California Law Review

MEMBER NATIONAL AND WESTERN CONFERENCES OF LAW REVIEWS

Published Five Times Yearly by Students of the School of Law of the
University of California, Berkeley, California. Indexed in Index to Legal
Periodicals and Public Affairs Information Service.

Subscription Price, \$5.00

Current Single Copies, \$1.50

BOARD OF EDITORS

DEAN C. DUNLAVEY
Editor

GRAHAM B. MOODY, JR.
Assistant Editor

ROBERT S. DAGGETT
Managing Editor

FRANK F. MANKIEWICZ
Article Editor

Revising Editors

MERRILL K. ALBERT
GORDON E. DAVIS
JOHN K. MANGUM

WILLIAM D. MOORE
NORMAN G. RUDMAN

Associate Editors

HERBERT A. BLUER
DONALD L. EDGAR

EDWARD M. FORD JR.
J. CLIFFORD WALLACE

MARILYN MITCHELL
General Secretary

SHIRLEY S. BITTERMAN
ROBERT L. CHRISTENSEN
CHARLES W. FROELICH, JR.
H. HELMUT LORING
HERBERT P. MOORE, JR.

PAUL A. PETERSON
JERRY J. PHELAN
MARTIN J. ROSEN
PETER SIMMONS

Comment

LIABILITY OF MEMBERS AND OFFICERS OF NONPROFIT UNINCORPORATED ASSOCIATIONS FOR CONTRACTS AND TORTS

The State of California offers several methods of organization to individuals who wish to join together to carry on a social or other group activity for purposes other than profit.¹ The nonprofit corporation is in widespread use. However, sometimes through choice,² but often because of neglect or

¹ These organizations include clubs of various sorts, committees, lodges, churches, unions, societies, fraternities, political organizations, etc.

² There are no statutory requirements to comply with in order to form an unincorporated association. Most informal groups organized to accomplish any number of purposes will fall under the unincorporated association classification. See note 3 *infra*.

error,³ a second form is adopted—that of the unincorporated association. The form of internal organization may vary from an informal arrangement to a highly complex organization similar to that found in a corporation. This comment deals with the contract and tort liability of members and officers of such unincorporated associations to third persons, with special emphasis being placed upon California law.⁴

THE AGGREGATE AND ENTITY THEORIES AND THE IMPACT OF COMMON NAME STATUTES

The courts have for generations struggled to develop a consistent theory for fixing liability in contract and tort for the acts of persons who associate together under a common name in a common undertaking.⁵ According to common law dogma, a voluntary unincorporated association, of which the nonprofit association is one category, was regarded as merely an aggregate of individuals called for convenience by a common name.⁶ The association as such was not regarded as a legal unit with collective rights and obligations separate from the members; the rights and obligations of an association were merely the cumulative rights and obligations of the associates.⁷

³ Unincorporated association found: *Estate of Irwin*, 196 Cal. 366, 237 Pac. 1074 (1925) (no attempt to comply with the statutory requirements of incorporation); *Meyer v. Bishop*, 129 Cal. 204, 61 Pac. 919 (1900) (void corporation); *Law v. Crist*, 41 Cal.App.2d 862, 107 P.2d 953 (1940) (group organized to disseminate theosophy); *Case v. McConnell & Forrester*, 5 Cal. App.2d 688, 44 P.2d 414 (1935) (group operating under a trust arrangement); *Burks v. West*, 67 Cal.App. 745, 228 Pac. 541 (1924) (group operating under a forfeited corporate charter). See cases collected in WRIGHTINGTON, *THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* § 64 n.1 (2d ed. 1923).

⁴ As to tax liability and the distinct income tax definition given to an "association" see 26 U.S.C. § 3797(a)(3) (1952); *Hecht v. Malley*, 265 U.S. 144 (1924); *Keating-Snyder Trust v. Commissioner of Internal Rev.*, 126 F.2d 860 (5th Cir. 1942); *Snith, Associations Classified as Corporations Under the Internal Revenue Code*, 34 CALIF. L. REV. 461 (1946).

⁵ The most comprehensive study, dealing mainly with unincorporated business associations, is WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* (1929) *passim*; *Sperry Products v. Association of American R.R.*, 132 F.2d 408 (2d Cir. 1942), *cert. denied*, 319 U.S. 744 (1943).

⁶ *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 119, 62 Pac. 486, 487 (1900); see discussion by L. Hand, J. in *Sperry Products v. Association of American R.R.*, *supra* note 5 at 410.

⁷ WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 258, 549 (1929).

In California an unincorporated association is considered an entity for certain purposes. To illustrate:

(a) CAL. CORP. CODE § 21200 grants benevolent, fraternal and labor unincorporated associations the power to deal in real estate to further the purposes of the organization, and to take by will or deed and hold other real estate for a 10-year period. It seems such contracts as come within the scope of acquisition, use, management and disposition of such property can now be made. *Compare De Motte v. Arkell*, 77 Cal.App. 610, 247 Pac. 254 (1926) and *Powell v. Stivers*, 108 Cal.App.2d 72, 238 P.2d 34 (1951) (premises leased to association, all members becoming lessees), *with Estate of Winchester*, 133 Cal. 271, 65 Pac. 475 (1901) and *Estate of Irwin*, 196 Cal. 366, 237 Pac. 1074 (1925) (unincorporated associations may take charitable bequests. See CAL. PROB. CODE § 27).

(b) CAL. CIV. CODE § 3369 allows an association to sue in its common name to enjoin unfair fraternal competition. *Athens Lodge No. 70 v. Wilson*, 177 Cal. App.2d 322, 255 P.2d 482 (1953).

(c) CAL. INS. CODE § 11117 allows unincorporated fraternal benefit associations to make insurance contracts with members.

(d) There seems to be a trend in California at least at the procedural level to treat unincorporated labor unions no longer as fraternal orders but analogous to corporations. "It is obvious that such organizations [unions] are no longer comparable to voluntary fraternal

The procedural impact of this dogma was to prevent suits against the association unless all members were joined or unless the court treated the suit as a class action with all of its limitations. In the famous *United Mine Workers v. Coronado Coal Co.* case,⁸ although there was no specific statute which authorized suits against the members of a labor union under their common name, the United States Supreme Court found authority by implication from federal statutes relating to labor unions and permitted suit against the members of a labor union under the common name for damages arising from violation of the anti-trust laws. In affirming a judgment against the local of the international union, with execution to be issued against the collective funds of the local, the Court carefully pointed out that its decision merely established a rule of procedure and made no change in the substantive law as to nature of the liability of the associates. The Court found that by the provisions of the union constitution the members had given advance consent and authority to its officers and committees to take the actions which gave rise to the liability.

The California courts have always adhered to this common law notion that, in the absence of statutory authority, an unincorporated association is not a legal entity with collective rights and liabilities separate from its members with capacity to become a party to an action.⁹ Thus at common law an association cannot sue¹⁰ or be sued¹¹ in its common name.¹² Section

orders or partnerships; that they are *sui generis*, and approximate corporations in their methods of operation and powers. This being so, whenever it can be done without violation of some rule of law, the ends of justice will be more properly served if courts apply to such organizations the rules applicable to corporations rather than the rules applicable to voluntary fraternal orders or partnerships, at least at the procedural level and in respect to the conduct of the business of a court and the enforcement of its lawful orders." *Oil Workers Int'l Union v. Superior Court*, 103 Cal. App.2d 512, 571, 230 P.2d 71, 106 (1951); *cf. Juneau Corp. v. Int'l Longshoremen*, 37 Cal.2d 760, 235 P.2d 607 (1951). See Labor Management Relations Act, 1947 (Taft-Hartley Act), 29 U.S.C. §§ 185(b), 187 (1952) which imposes certain liabilities on an unincorporated union as a legal entity.

(e) If the statutory provisions are fully complied with, an association apparently may maintain a mandamus proceeding under CAL. CODE CIV. PROC. § 1086. *Parker v. Bowron*, 40 Cal.2d 344, 254 P.2d 6 (1953).

(f) The California courts have been cautious in applying the entity theory to unincorporated associations even as to procedural matters unless commanded by statute. *Juneau Corp. v. Int'l Longshoremen*, 37 Cal.2d 760, 235 P.2d 607 (1951) (venue). In procedural matters the federal courts have gone much further in adopting the entity theory. See *Sperry Products v. Association of American R.R.*, 132 F.2d 408 (2d Cir. 1942), *cert. denied*, 319 U.S. 744 (1943).

⁸ 259 U.S. 344 (1922).

⁹ *Juneau Corp. v. Int'l Longshoremen Union*, 37 Cal.2d 760, 235 P.2d 607 (1951); *Case v. Kadota Fig Assn.*, 35 Cal.2d 596, 220 P.2d 912 (1950); Note, 39 CALIF. L. REV. 264 (1951).

However, if a third person recognizes the unincorporated association as an entity, he may later be estopped to deny it this right. *San Juan G. Co. v. San Juan R. etc. Assn.*, 34 Cal. App.2d 159, 93 P.2d 582 (1939). See cases collected, Note, 121 A.L.R. 632 (1939).

¹⁰ Associates may sue by their individual names whether as plaintiffs or cross-complainants. See note 9 *supra* and Notes, 39 CALIF. L. REV. 264 (1951), 35 CALIF. L. REV. 115 (1947). However, CAL. CODE CIV. PROC. § 382 allows a member of an association to bring a representative suit. *Florence v. Helms*, 136 Cal. 613, 69 Pac. 429 (1902); *Gieske v. Anderson*, 77 Cal. 247, 19 Pac. 421 (1888); *Keeler v. Schulte*, 119 Cal. App.2d 132, 259 P.2d 37 (1953); *cf. Parker v. Bowron*, 40 Cal.2d 344, 254 P.2d 6 (1953) (though a representative suit may be brought by a member all requirements must be fulfilled). For full discussion on representative suits, see Comment, 6 STAN. L. REV. 120 (1953); Note, 37 CALIF. L. REV. 525 (1949).

388 of the Code of Civil Procedure cuts across the common law rules in providing that:¹³

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, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, *in the same manner as if all had been named defendants and had been sued upon their joint liability.*

Although it might be assumed that Section 388 would be applicable only to partnerships and other forms of unincorporated business associations organized and conducted for the pecuniary profit of its members, the statute has not been given this restrictive interpretation. The statute applies equally to persons banding together in nonprofit associations, organized for charitable or other purposes, and who transact any business within the objects of the association, as a result of which the members become liable as associates. The associates may be sued in their common name in any action to enforce the liabilities so created.¹⁴

Section 388 is obviously a real advantage to association creditors in eliminating the necessity of naming the individuals as defendants.¹⁵ But

¹¹ *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931), appeal dismissed for want of a federal question, *per curiam*, 284 U.S. 592 (1932); *cf.* *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1921). See WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 542 *et seq.* (1929); Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977 (1929); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924).

¹² California fictitious name statute, CAL. CIV. CODE §§ 2466-2468, prohibits persons doing business under a fictitious name from *maintaining* an action without first complying with the requirements of this statute. It is clear that the fictitious name statute, though complied with, *does not* authorize such persons to institute and maintain an action as plaintiffs, under their business name. *Holden v. Mensinger*, 175 Cal. 300, 165 Pac. 950 (1917) (partnership); *Kadota Fig Assn. v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946).

With respect to suits *against* such persons conducting business in a fictitious name CAL. CODE CIV. PROC. § 388 allows suit in the common name. See text at note 13 *infra*; *Case v. Kadota Fig Assn.*, 35 Cal.2d 596, 220 P.2d 912 (1950); Note, 39 CALIF. L. REV. 264 (1951).

¹³ Emphasis Added.

¹⁴ *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931) (Los Angeles Stock Exchange); *Cannin v. Justice's Court*, 35 Cal. App. 293, 170 Pac. 409 (1917) (Good Roads Club); *Herald v. Glendale Lodge No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920); *cf.* *Warman Co. v. Redondo Beach C. of C.*, 34 Cal. App. 37, 166 Pac. 856 (1917) (held Chamber of Commerce not transacting "business"). This and other similar cases apparently were overruled by *Jardine*. If an association buys or sells property or enters into contracts, the associates transact business. A union is deemed to transact business for the purposes of CAL. CODE CIV. PROC. § 388. *Juneau Corp. v. Int'l Longshoremen*, 37 Cal.2d 760, 235 P.2d 607 (1951); *Armstrong v. Superior Court*, 173 Cal. 341, 159 Pac. 1176 (1916); see *Oil Workers Int'l Union v. Superior Court*, 103 Cal. App.2d 512, 230 P.2d 71 (1951).

For a discussion of CAL. CODE CIV. PROC. § 388 see Note, 39 CALIF. L. REV. 264 (1951), Comment, 33 CALIF. L. REV. 444 (1945). Compare FED. R. CIV. P. § 17(b) with CAL. CODE CIV. PROC. § 388.

¹⁵ The complaint must specifically name the association to recover under CAL. CODE CIV. PROC. § 388. *Potts v. Whitson*, 52 Cal. App.2d 199, 125 P.2d 947 (1942); *Burns v. Downs*, 42 Cal. App.2d 322, 108 P.2d 953 (1941).

"... [W]here reliance is had by a plaintiff upon Section 388 of the Code of Civil Procedure,

the question remains whether the statute is purely procedural or whether the effect is to alter the substantive liabilities of members of the association.

It is possible that the statute was intended to create a new substantive liability of the members of an unincorporated non-partnership association,¹⁶ whether or not organized for profit, at least with respect to the joint property of the associates.¹⁷ The association could be considered as a new kind of jural entity, possessing substantive rights and liabilities in so far as concerns the joint property. However, the California Supreme Court has professed to hold the view that this statutory enactment creates an entity only to the extent of allowing suit by the common name and does not affect the substantive liability of the members of the association.¹⁸ "In this it is similar to every other statute which provides a remedy for the enforcement of a right."¹⁹ The inquiry then remains, what are these rights and obligations of the associates?

In the absence of statute an association is not a legal unit capable of contracting or holding assets,²⁰ yet there is nothing to prevent members of an association from using a fictitious name for the purpose of holding the joint property of the members.²¹ Thus, assets may be accumulated in the name of the association; however, these are owned by all of the members jointly.²² No actual individual interest is maintained. Any agreement between the associates will control the disposition which may be made of such property.²³

good practice requires him to allege and prove the existence of an association of two or more persons transacting business under a common name." *Nicholls v. Anders*, 13 Cal. App.2d 440, 443, 56 P.2d 1289, 1291 (1936); cf. *Burrell v. Capt. H. A. Crow* Post No. 884, 102 Cal. App. 716, 283 Pac. 370 (1929).

See collection of varied statutes which enable suit by or against unincorporated association, WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 542 *et seq.* (1929); Notes, 39 CALIF. L. REV. 264, 266 ns. 18, 19, 20 (1951), 33 CALIF. L. REV. 444, 446 ns. 7, 8 (1945).

¹⁶ No problem arises as to any change in the substantive rights of partners because of the power of each partner to impose firm and individual liability on copartners. See *infra* at note 31.

¹⁷ See *Moore v. El Paso Chamber of Commerce*, 220 S.W.2d 327 (Tex. Civ. App. 1949) (nonprofit unincorporated association treated as an entity for procedural and substantive law purposes apparently under the Texas "common name" statute). For a discussion of this statute see WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 547 *et seq.* (1929). In general see Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 1000 (1929).

¹⁸ *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931).

"... [I]t is after all in essence and principle merely a procedural matter. As a matter of substantive law, all the members ... engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether ... they may not be sued as ... [a] body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purposes." *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 390 (1922).

¹⁹ *Jardine v. Superior Court*, 213 Cal. 301, 321, 2 P.2d 756, 764 (1931).

²⁰ *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 62 Pac. 486 (1900). The associates and not the association are the lessees on a lease, *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944); *De Motte v. Arkell*, 77 Cal. App. 610, 247 Pac. 254 (1926).

²¹ See discussion, Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383, 390 *et seq.* (1924).

²² See note 23 *infra*.

²³ *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 62 Pac. 486 (1900) (articles of agreement, constitution and bylaws constitute a contract and must be complied with to divest members of property rights). *Accord*: *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d

At common law the substantive liability of members of an unincorporated association is vastly different from that of a partnership. In the partnership, each member of the firm is an agent of the partnership for the purpose of its business, and the act of every partner for apparently carrying on in the usual way the business of the partnership binds the partnership, except as to persons having knowledge of lack of authority.²⁴ In this area an "association responsibility," *e.g.*, liability existing against all of the associates, is easily established. Correspondingly, in this situation, under the substantive law, judgment may be easily obtained against *all* of the associates, which judgment will also bind joint property.

On the other hand, in the case of the unincorporated non-partnership association, whether or not organized for profit, liability is determined by the law of agency.²⁵ No agency of one member for the "association" or the other members is implied. Accountability is restricted to those members who are the actors and to those who, expressly or impliedly, authorize, ratify or consent to the action taken.²⁶ In order to recover a judgment enforcing a contractual liability, which will bind the joint property of the associates, in the absence of any statute, it is generally held that the plaintiff must have been able to maintain the action against all of the associates by reason of their joint liability therefor.²⁷ Thus, the establishment of liability of an individual member will hinge upon a finding of individual participation, of one sort or another. But to establish an "association responsibility," all of the associates must have participated in or authorized the action.²⁸ It is

139, 187 P.2d 769 (1947), cert. denied, 333 U.S. 876 (1948) (reasonable construction of constitution and bylaws by governing board is binding on members); *Supreme Lodge etc. v. L.A. Lodge No. 386*, 177 Cal. 132, 169 Pac. 1040 (1917) (due process of law must be observed); *Keeler v. Schulte*, 119 Cal.App.2d 132, 259 P.2d 37 (1953).

²⁴ See Cal. Corp. Code § 15009. Partners are jointly and severally liable for everything chargeable to the partnership under CAL. CORP. CODE §§ 15013, 15014; while partners are jointly liable for all other partnership debts and obligations. CAL. CORP. CODE § 15015. See *Leake v. City of Venice*, 50 Cal. App. 462, 195 Pac. 440 (1920).

An association organized for pecuniary purposes may be treated as a partnership and individual liability will correspondingly arise although members do not expect to reap personal profit out of the enterprise. *Burks v. Weast*, 67 Cal. App. 745, 228 Pac. 541 (1924). Other jurisdictions have held that one must participate to be held as a partner. See *Harris v. Aslidown Potato Curing Assn.*, 171 Ark. 399, 284 S.W. 755 (1926).

²⁵ *Pacific Lines v. Valley Motor Lines*, 72 Cal. App.2d 505, 164 P.2d 901 (1946); *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944). See cases collected, Notes, 7 A.L.R. 222 (1920), 41 A.L.R. 754 (1926).

Members may be bound contractually though not named but merely described by use of trade or association name. *Bakers & Confect. Workers v. Hall Baking Co.*, 320 Mass. 286, 69 N.E.2d 111 (1946).

In a few jurisdictions members of an unincorporated nonprofit association have been held liable as partners. This result may be accomplished through case law or statute. See cases collected, Notes, 7 A.L.R. 222, 232 (1920), 41 A.L.R. 754 (1926).

²⁶ *Ibid.*

²⁷ *McCabe v. Goodfellow*, 133 N.Y. 89, 30 N.E. 728 (1892); see *Sturges, Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924).

²⁸ Of course, a statute may establish liability against an association as an entity. Here suit may be brought under CAL. CODE CIV. PROC. § 388 and the liability be imposed under the substantive statute. *Juneau Spruce Corp. v. Int'l Longshoremen Union*, 119 Cal. App.2d 144, 259 P.2d 23 (1953) (suit to enforce judgment on Taft-Hartley Act violation of 29 U.S.C. §§ 185(b), 187 (1952)).

obvious that it may be difficult to establish an "association responsibility."²⁹ If only some of the associates are responsible to the plaintiff, he can proceed solely against these individual members.³⁰ Unless Section 388 of the Code of Civil Procedure is deemed to create new substantive rights and liabilities, the statute must be regarded as being a mere procedural convenience in suits against unincorporated associations.³¹

The liability of an associate, normally, is either joint or several. In either case individual liability for the full amount of the debt may be imposed.³² Contract liability is generally joint.³³ Procedurally, at common law

It has been held that individual members may sue their association under CAL. CODE CIV. PROC. § 388. However the substantive law must allow recovery. But see *Deeney v. Hotel etc. Local 283*, 57 Cal. App.2d 1923, 134 P.2d 328 (1943).

²⁹ "If this is the purpose and effect of the suit against the common name and such is the proof requirement for plaintiff's cause of action, it seems obvious that no change is made in proof of plaintiff's cause of action facilitating his establishing an 'association responsibility' at any sacrifice of protection to the associates." *Sturges, Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383, 402, 403 (1924).

³⁰ Problems may here arise in the use of a "common name" statute. For example, members of an association fluctuate. What will the liability be for members who join and deposit funds in the common assets after the liability has been established? Conversely, what to do with the members who drop out after the debt has been incurred? Once a liability is imposed it cannot be disposed of by a withdrawal from the organization. Also, as members withdraw, their interests pass to those remaining in the organization. *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763 (1897); *Most Worshipful Lodge v. Sons etc. Lodge*, 118 Cal. App.2d 78, 257 P.2d 464 (1953). (Contrast the property rights of a partner as set forth in CAL. CORP. CODE § 15024 *et seq.*) Thus, the joint interest and individual assets of such a withdrawing member will remain subject to recovery on a judgment. However, to hold the assets of the member who joins after the debt is outstanding; it must be expressly found that the debt has been assumed by him.

³¹ It would seem that associations may be classified into two types:

(1) Those which are partnerships and to which the Uniform Partnership Act applies and controls. The requirements of CAL. CORP. CODE §§ 15006, 15007 must be fulfilled. The question whether parties have created a partnership is ordinarily one for determination by the trial court, from facts advanced and inferences to be drawn therefrom. *Spier v. Lang*, 4 Cal.2d 711, 53 P.2d 138 (1935).

(2) Those which are not treated as partnerships for any purposes and to which agency law applies in all respects. The nonprofit unincorporated association is a prime example, but this class would also include the common law joint stock company and the Massachusetts business trust, each of which are nonpartnership associations. See *In re Agriculturist Cattle Insurance Co.*, L.R. 5 Ch. App. Cas. 725 (1870) (common law joint stock company); *State Street Trust Co. v. Hall*, 311 Mass. 299, 41 N.E.2d 30, 156 A.L.R. 13 (1942) (Massachusetts trust).

The effect of California Code of Civil Procedure Section 388 as to class one above is to enable recovery on joint assets whenever the necessary partnership act has been consummated. However, the effect of this statutory provision on the nonpartnership association would appear negligible, unless it is possible to reserve or segregate out the shares of those members not liable and hold the remaining assets (and the individual assets of the members served) to satisfy a judgment against the members found liable.

If the situation arises where all of the members are execution proof and yet funds in the association are plentiful, unless some sort of segregation is allowed to members not liable and the remaining assets are held to satisfy the judgment, no recovery can normally be obtained. It seems this possibility has not been developed by courts.

In this situation it would appear that recovery should be allowed; however, if the common law rules apply and the joint funds are held inseparable, major difficulties are encountered. If only a few members out of a large group are not liable should this be enough to deny recovery? It can be argued that where interests in the joint assets are separable, pro rata recovery should be allowed.

³² "While, as between the members of an unincorporated association, each is bound to pay only his numerical proportion of indebtedness . . . , yet as against creditors, each member is

in an action on a joint liability, all of the associates who are liable must be joined.³⁴ The price of omitting one member was to be disqualified for suit. However, a failure on the defendant's part to raise this objection would constitute a waiver of the defense.³⁵ Equity, recognizing the hardship of a joinder requirement where large groups were involved, allowed a representative suit against a few to adjudicate the liability of all.³⁶ The California legislature also took a hand in this matter and provided that though individuals are jointly liable on a *contract*, those served must defend themselves as if they were the only defendants.³⁷

The liability imposed on the association members for torts is usually several, although in case of "joint" torts, all tortfeasors may be joined.³⁸ In this situation, a member defendant is under certain definite procedural as well as substantive disadvantages. He has no right to request joinder, although other parties are in *pari delicto* and may be joined on plaintiff's request;³⁹ and a judgment is fully recoverable against such member's personal assets.⁴⁰ Furthermore, when liability has been adjudicated, normally no right of contribution may be claimed.⁴¹

A member may under some circumstances also become individually liable for the full amount of a contractual claim against the association. Neither the entire membership need be named as defendants nor may liability even exist against all.⁴² However, unlike torts where the liability is

individually liable for the entire debt. . . ." *Webster v. San Joaquin Fruit etc. Assn.*, 32 Cal. App. 264, 265, 162 Pac. 654, 655 (1916) (quote applied to profit association). The same liability apparently would be applied to members of a nonprofit unincorporated association. However, the liability may arise differently. See *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944) and discussion *infra*. Members of an unincorporated church organization are correspondingly liable. *Hawthorne v. Austin Organ Co.*, 71 F.2d 945 (4th Cir. 1934).

See CAL. CORP. CODE § 9610 which sets out the liability imposed on members of a nonprofit corporation. Some jurisdictions have varied the common law liability and hold members of an unincorporated nonprofit association individually liable only after joint assets have been depleted by creditors. See cases collected in 7 A.L.R. 222, 233 (1920), 41 A.L.R. 754 (1926). See also WRIGHTINGTON, *THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* 387, 388 (2d ed. 1923).

³³ *McCabe v. Goodfellow*, 133 N.Y. 89, 30 N.E. 728 (1892). Compare CAL. CIV. CODE § 1431 with CAL. CIV. CODE § 1659. See CAL. CORP. CODE § 15015 which sets out the liability of a partner.

³⁴ See the discussion in *Sturges, Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383, 384 (1924).

³⁵ *First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944); *Herald v. Glendale Lodge No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920). See also CAL. CODE CIV. PROC. § 434.

³⁶ See *Gorman v. Russell*, 14 Cal. 531 (1860).

³⁷ CAL. CODE CIV. PROC. § 414. Also, "When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in Section 414 of this code, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons." CAL. CODE CIV. PROC. § 989.

³⁸ *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N.Y.S. 373 (1902). See *Sperry Products v. Association of American R.R.*, 132 F.2d 408, 410 (2d Cir. 1942); PROSSER, *JOINT TORTS AND SEVERAL LIABILITY* 413 (1937). CAL. CORP. CODE § 15015 sets out the liability of a partner.

³⁹ See PROSSER, *TORTS* 1096 *et seq.* (1941).

⁴⁰ *Id.* at 1102 *et seq.*

⁴¹ *Id.* at 1111 *et seq.*

⁴² See *First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944).

several, a member who is individually liable on a joint obligation and who satisfies more than his share of the claim, in California, may require a proportionate contribution from all parties joined with him.⁴³ The imposition of such liabilities may come as a shock to unsuspecting members of these organizations, but such results arise from the amorphous character of the unincorporated association. Code of Civil Procedure Section 388 has not abrogated individual liability. On the contrary, where the nature of the liability is joint the enactment expressly provides for action against individual members concurrently with suit against the association, and for recovery against the individual property of members served with process.⁴⁴ Thus, the substantive liability of members must be determined, whether or not the action is commenced under the California "common name" statute.

The liability of members and officers of nonprofit unincorporated associations in California will now be considered.

SUBSTANTIVE LIABILITY

Contract Liability

At the outset it should be mentioned that California, by statute, has modified, to some extent, the common-law liability of members of nonprofit unincorporated associations with respect to contracts. However, there is a scarcity of authorities defining the scope of the statutory provisions and apparently they are of limited application. They must be considered, therefore, against the background of the common law which, aside from those members who as agents represent the associates in making the contract, restricts liability to those members who, expressly or impliedly, with full knowledge of the facts, authorize or ratify the contract.⁴⁵

Members. An unincorporated nonprofit association is defined in the California Corporation Code as a group of "natural persons [organized] for religious, scientific, social, literary, educational, recreational, benevolent or other purposes, not that of pecuniary profit."⁴⁶ At common law the pitfall of contract liability is ever present for the members of such groups

⁴³ E.g., CAL. CIV. CODE § 1432; CAL. CODE CIV. PROC. § 709. See *Richter v. Henningsan*, 110 Cal. 530, 536, 42 Pac. 1077, 1078 (1895).

⁴⁴ See text at note 13 *supra*.

⁴⁵ See note 25 *supra*.

⁴⁶ CAL. CORP. CODE § 21000 (Enacted 1947. Based on former CAL. CIV. CODE § 2523, as added by Cal. Stats. 1945, c. 144, § 1, p. 630). Other statutory provisions which declare certain nonprofit purposes may aid in determining the characteristics of the nonprofit unincorporated association. CAL. CORP. CODE § 2900 *et seq.*, and § 10200 list examples of nonprofit corporation purposes to be religious, charitable, eleemosynary, social, educational, cemetery and the rendering of certain services such as a health service. Also the prevention of cruelty to children or animals is set out as a nonprofit purpose in CAL. CORP. CODE § 10400.

By statute certain nonprofit groups can engage in business and distribute the profits among the members. CAL. CORP. CODE § 12201 *et seq.* It would seem that carrying on a business at a profit merely as an incident to the main nonprofit purposes would not be forbidden to the nonprofit association in view of CAL. CORP. CODE § 9200 which applies this rule to nonprofit corporations. See *First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 667, 145 P.2d 722, 729 (1944). Such conduct would, however, result in the availability of CAL. CODE CIV. PROC. § 388 upon suit against the association. *Herald v. Glendale Lodge No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920).

since express authorization, ratification or consent may be found or may be rather easily inferred.⁴⁷ It is clear that active participation, by vote or volunteered services, in the project that incurs expense will be considered an express consent.⁴⁸ However, liability can also arise based upon agency principles.⁴⁹ Officers normally have certain specific powers necessary to carry out the objectives of the group. The articles of association and bylaws generally determine the limits of their capacity.⁵⁰ In addition, the members may confer special grants of power upon officers or other agents to act on behalf of the association.⁵¹ An officer or agent acting under such specific authority will bind all members to contracts entered into on behalf of the association. Consent is founded upon the grant of power by the members.⁵²

Moreover, authority may be implied from the purposes and objects of the association or the manner in which the activities of the association are conducted.⁵³ Whether or not an agent or officer has bound association members is ordinarily a question of fact.⁵⁴

Even where no authority is found,⁵⁵ individual members who subsequently ratify the contract will be liable.⁵⁶ The necessary ratification may be express or implied.⁵⁷ No problem arises in determining express ratifica-

⁴⁷ See *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944).

⁴⁸ *Id.* at 667, 145 P.2d at 729, 730.

⁴⁹ *Ibid.* BALLANTINE, CORPORATIONS 9 (Rev. ed. 1946); Notes, 7 A.L.R. 222 (1920), 41 A.L.R. 754 (1926).

⁵⁰ *Hogan v. Pac. Endowment League*, 99 Cal. 248, 33 Pac. 924 (1893). See also cases cited *supra* note 23.

⁵¹ Statutes may also confer certain authority on officers to bind the association. For example, see CAL. CORP. CODE § 21201 (authority in president and secretary to execute real estate conveyances).

⁵² *Russell v. Intl. Theatrical Employes*, 66 Cal. App.2d 691, 152 P.2d 737 (1944). Adequate authority in officers to bind members on contracts not found: *Pacific etc. Lines v. Valley Motor Lines*, 72 Cal. App.2d 505, 164 P.2d 901 (1946); *Johnson v. California I.M.T. Assn.*, 24 Cal. App.2d 322, 74 P.2d 1073 (1938) (ratification established as to some members of the nonprofit association, thus holding them liable, but not as against others).

Cf. nonprofit corporations: *Colburn Biological Institute v. Shaffer*, 12 Cal.2d 168, 82 P.2d 938 (1938); *City of Los Angeles v. Stone*, 12 Cal.2d 170, 82 P.2d 939 (1938); *Red Jacket Tribe v. Gibson*, 70 Cal. 128, 12 Pac. 127 (1886).

⁵³ See *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722, 729, 730 (1944). Of course the authority may be express, implied or ostensible. CAL. CIV. CODE §§ 2316, 2317; MECHEM, AGENCY §§ 707 *et seq.*, 720 *et seq.* (2d ed. 1914); MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 31 *et seq.*, 51 *et seq.*, 84 *et seq.* (4th ed. 1952).

⁵⁴ See *Brisacher v. Baier*, 67 Cal. App. 96, 226 Pac. 830 (1924). It seems that for the purposes of dissolution the trial court must expressly determine whether, in fact, associates are bound together as an unincorporated association or as a partnership. Thus, the dissolution of a partnership would be controlled by CAL. CORP. CODE § 15038 while a voluntary unincorporated association would not fall under this section. *Tompkins v. Taylor*, 51 Cal. App.2d 372, 124 P.2d 856 (1942).

⁵⁵ *Pacific etc. Lines v. Valley Motor Lines*, 72 Cal. App.2d 505, 164 P.2d 901 (1946); *Johnson v. California I.M.T. Assn.*, 24 Cal. App.2d 322, 74 P.2d 1073 (1938) (president had no authority to bind the association. However, ratification established as to some members of the nonprofit association, but not as against others).

⁵⁶ See note 55 *supra*; CAL. CIV. CODE § 2307, *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948) (subsequent ratification is the equivalent to prior authorization).

⁵⁷ See note 55 *supra*; MECHEM, AGENCY § 418 *et seq.* (2d ed. 1941); MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 195 *et seq.* and 217 *et seq.* (4th ed. 1952).

tion. However, implied ratification may be found from the mere act of acknowledging the benefits of an unauthorized contract or even passively doing nothing since both recognize the action taken as being valid.⁵⁸

In addition, liability will be imposed by members who are found to have impliedly consented to a future course of action, which in fact leads to indebtedness. In the past, a member's liability has been supported by mere joining of a nonprofit association, where the possibility of incurring expenses could have been reasonably expected;⁵⁹ by mere membership in an association when obligations arise which are within the objects of the association;⁶⁰ or by signing association bylaws which sanction general association action.⁶¹

Often some form of majority control is established to run the association. A minority member who recognizes the majority action as valid, by not objecting forcefully after knowledge of it, may be held to have assented to it.⁶² Of course, majority action which exceeds the granted authority or which is beyond the purposes of the association can only bind those who participate or ratify. Mere inaction in this situation should not be a ratification.

A distinction may be drawn between membership liability imposed on an ordinary contract and that which may be incurred on a lease. Where property is leased to an unincorporated association it has been held that all members become tenants.⁶³ The tenancy may arise by contract or by privity of estate.⁶⁴ The tenancy of a member who becomes such after the association has made a lease must end when he ceases to be a member or

⁵⁸ See discussion and cases collected Note, 42 DICK. L. REV. 154 (1938). However, members must have full knowledge of the unauthorized acts of their agents to effect a ratification. CAL. CIV. CODE § 2310, *Johnson v. California I.M.T. Assn.*, 24 Cal. App.2d 322, 74 P.2d 1073 (1938); see *Flagg v. Nichols*, 202 Misc. 1096, 115 N.Y.S.2d 7 (Sup. Ct. 1952) (by implication).

⁵⁹ *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 667, 145 P.2d 722, 730 (1944) ("Persons who organize as a campaign committee on the eve of an election may perhaps be supposed to know that their associates, in the name of the committee, will incur certain obvious expenses in giving notice of political meetings, and to sanction such outlay by the very fact of their organization."). *Richmond v. Judy*, 6 Mo. App. 465 (1879); cf. *Pacific etc. Lines v. Valley Motor Lines*, 72 Cal. App.2d 505, 507, 164 P.2d 901, 902 (1946) (no mention of CAL. CIV. CODE § 2524 subsequently codified as CAL. CORP. CODE § 21102).

⁶⁰ "[A]ll who were members of the lodge at the time the lease was executed by the lodge were liable thereon as principals, even though they did not expressly authorize it by appearing at the meeting and voting for the resolution directing its execution." The lease was held to have been executed to carry out the purposes of the lodge. *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 668, 145 P.2d 722, 730 (1944).

⁶¹ *Ibid.* CAL. CIV. CODE § 2524 subsequently codified as CAL. CORP. CODE § 21102 clearly was enacted to prevent such results.

⁶² See discussion and cases collected in Note, 42 DICK. L. REV. 154 (1938). Apparently little law is directly on point in California. Nevertheless, analogies may be drawn to bear out the instant proposition. To illustrate, see cases cited note 52 *supra* (elected officers may bind the association members); *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 668, 145 P.2d 722, 730 (1944) (constitution and bylaws binding on members and those who sign impliedly assent to the governing regulations and the manner in which they are to be carried out). For a proper statement of the law see *MECHEM, AOENCY* § 188 (2d ed. 1914).

⁶³ *De Motte v. Arkell*, 77 Cal. App. 610, 247 Pac. 254 (1926).

⁶⁴ *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944). In view of the present California statutory enactments it is not clear whether contract liability could today arise from mere privity of estate.

when the association ceases to occupy the property.⁶⁵ Thus, his liability for lease obligations also then ceases. However, those who are members at the time the lease is executed and who are found to have "participated" in its procurement may be bound to the lease on contract principles though individual privity of estate may have ceased.⁶⁶

By statute, California has modified the common law contract liability on nonprofit unincorporated association members in two important respects. First, the members are no longer liable on association real estate contracts⁶⁷ although the debt may be assumed by *written* consent.⁶⁸ Second, for other types of contracts, no longer does a presumption or inference of consent arise merely from a member's joining or belonging to a group or signing its bylaws.⁶⁹ Strangely, no case can be found which refers to these code provisions or to their predecessors. As it seems improbable that the sections could have been overlooked, the more likely explanation is that litigation has been discouraged by a literal reading of the statutes. Nevertheless, the provisions do not codify the whole sphere of membership liability. Furthermore, the Code Commission has raised a question of constitutionality about segments of this statutory enactment.⁷⁰ The exact area of coverage of the code provisions is therefore uncertain. A constitutional severability clause increases the quandary.⁷¹ On the other hand, the common law will continue to prevail in cases not specifically covered by these

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ CAL. CORP. CODE § 21100 (Enacted 1947. Based on former CAL. CIV. CODE § 2524, 1st sentence, as added by Cal. Stats. 1945, c. 144, § 1, p. 630): "Members of a nonprofit association are not individually or personally liable for debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, construction, repair, or furnishing of buildings or other structures, to be used for the purposes of the association."

⁶⁸ CAL. CORP. CODE § 21101 (Enacted 1947. Based on former CAL. CIV. CODE § 2524, 2d sentence, as added by Cal. Stats. 1945, c. 144, § 1, p. 630): "Any contract by which a member of a nonprofit association assumes any such debt or liability is invalid unless the contract or some note or memorandum thereof, specifically identifying the contract which is assumed, is in writing and signed by the party to be charged or by his agent."

⁶⁹ CAL. CORP. CODE § 21102 (Enacted 1947. Based on former CAL. CIV. CODE § 2525, as added by Cal. Stats. 1945, c. 144, § 1, p. 630): "No presumption or inference existed prior to September 15, 1945, or exists after that date, that a member of a nonprofit association has consented or agreed to the incurring of any obligation by the association, from the fact of joining or being a member of the association, or signing its bylaws."

⁷⁰ Code Commissioners Notes: "There is some doubt as to whether C.C. § 2524, codified as § 21100, may be unconstitutional as special legislation, since it makes a distinction between debts incurred in connection with real property and other debts, and so discriminates among creditors in respect to the recourse they may have for satisfaction of the debts due to them. It is also uncertain whether C.C. § 2525, codified as § 21102, will be sustained in respect to the law prior to September 15, 1945, or whether it might be deemed to impair the obligation of contracts entered into before that date. Retention of this section appears desirable in view of that doubt and uncertainty, even though § 19 provides a separability clause applicable to the entire code."

⁷¹ CAL. CORP. CODE § 21103 (Enacted 1947. Based on Cal. Stats. 1945, c. 144, § 2, p. 630): "Notwithstanding any other evidence of legislative intent, it is the controlling legislative intent that if any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter and the application of such provision to persons and circumstances other than those as to which it is held invalid, shall not be affected thereby."

statutes. Thus, ratification and consent will continue to impose contract liability on members of the association.⁷² However, until the constitutional questions are settled, a signed written instrument assuming the debt will be necessary to impose liability on members for certain types of contracts. And, though an inference or presumption of consent can no longer arise from mere membership or signing of association bylaws, consent in fact may be inferred from conduct of the members.

Of course, members who authorize or ratify are liable whether or not they so intended or understood the law.⁷³ If a contract was entered into before an individual became a member, the determination of liability may hinge upon subsequent ratification or assumption of the contract.⁷⁴ Naturally, no consent or ratification can normally be found if the contract was made after a member retired from the association. However, once liability is incurred, it cannot be terminated by withdrawal from the association.⁷⁵ Regardless of actual ratification or consent, individuals who actually enjoy the benefits of a contract may be liable to make restitution.⁷⁶ Nevertheless, a creditor may expressly agree to look only to a certain fund⁷⁷ and not to the members individually.⁷⁸

Officers. The liability of officers or agents acting on behalf of any unincorporated association is determined entirely by the law of agency.⁷⁹ There

⁷² See discussion *supra*. However, mere receipt by association of money and crediting the third person's account should not be a ratification of the agent's acts in securing the money. See *Imperial-Yuma Credit Assn. v. Shields*, 99 Cal. App.2d 546, 222 P.2d 148 (1950) (a corporation).

⁷³ E.g., *Lawler v. Murphy*, 58 Conn. 294, 20 Atl. 457 (1889) (benefit association); *Fetner v. American National Bank*, 15 Ga. App. 736, 84 S.E. 185 (1915).

⁷⁴ E.g., *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 670, 145 P.2d 722, 731 (1944). The liability of a new member on a prior lease should be contrasted. See *supra* note 63 *et seq.*

⁷⁵ Incorporation of unincorporated nonprofit association (permitted under CAL. CORP. CODE § 9202) does not terminate or alter the then existing liability of members. Where a statute authorizes an unincorporated association subsequently to incorporate, all members at the time of joining impliedly assent to a later incorporation. *Security-First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944).

A liability imposed on members arising out of a lease should be contrasted. See note 63 *supra*.

⁷⁶ For a full discussion of quasi-contractual principles and recovery see 1 CORBIN, CONTRACTS § 19 *et seq.* (1950); 5 WILLISTON, CONTRACTS § 1479 *et seq.* (Rev. ed. 1937); Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533 (1912). Compare CAL. CIV. CODE §§ 1589, 3521 with the above discussions.

⁷⁷ *Johnson v. California I.M.T. Assn.*, 24 Cal. App.2d 322, 74 P.2d 1073 (1938) (retained lawyers agreed to look to specific fund).

⁷⁸ "No personal liability" placed on contract by signer is not enough to relieve members of personal liability. *Old River Farms Co. v. Roscoe Haegelin Co.*, 98 Cal. App. 331, 276 Pac. 1047 (1929).

⁷⁹ See MECHEM, AGENCY § 1389 (2d ed. 1914); MECHEM, OUTLINES OF THE LAW OF AGENCY § 328 (4th ed. 1952); WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 68 (2d ed. 1923). See also *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951) (discussion and citations to New York procedural and substantive law concerning the liability of officers and members for contracts and torts at common law and as modified by N.Y. GEN. ASSOC. LAW § 13).

Officers and agents acting in good faith are not liable to members for their acts or losses incurred through their acts. However, if they commit wrongful acts against members they are liable. *Florence v. Helms*, 136 Cal. 613, 69 Pac. 429 (1902). *Accord*: *Malone v. Superior Court*, 40 Cal.2d 546, 254 P.2d 517 (1953) (accounting allowed).

is a strong inference that where an agent purports to act for a non-existent principal, the parties intend that the agent shall be individually liable on the contract.⁸⁰ Since an unincorporated association is not a legal entity, in California or elsewhere, an agent purporting to act for the association will generally incur individual liability on a contract made on behalf of the association.⁸¹ It is immaterial that the agent misunderstood the law or did not intend to bind himself.⁸² However, if the creditor agrees to look only to the members of the association and if the officer or agent is treated only as a representative, the agent will not be liable.⁸³ The question of fact seems to be "to whom was the credit extended"?⁸⁴ Nevertheless, since officers and agents are often members, membership liability can easily arise from active or implied participation in the pursuits from which the liability arose.⁸⁵ Of course, officers and agents who are liable only in their representative capacity, should be able to secure contribution from the association members.⁸⁶

Liability of members of a "committee" is based upon the same principles as heretofore considered.⁸⁷ A committee itself may be an unincorporated association and liability of each member may correspondingly arise.⁸⁸ Also, a committee as a group may well be an agent of the whole organization and incur an agent's liability.⁸⁹

Tort Liability

Members. It is impossible to do more than deal in general terms with the liability of members of nonprofit, unincorporated associations for torts arising from "associational activity." Third persons may seek to impose liability upon members for the torts of officers, agents or employees on the basis of vicarious liability.⁹⁰ Employees may also assert claims on some

⁸⁰ RESTATEMENT, CONTRACTS § 326 (1932); *Leake v. City of Venice*, 50 Cal. App. 462, 465, 195 Pac. 440 (1920).

⁸¹ See note 73 *supra*; *Cousin v. Taylor*, 115 Ore. 472, 239 Pac. 96 (1925); MECHEM, OUTLINES OF THE LAW OF AGENCY § 328 (4th ed. 1952). However, jurisdictions differ in imposing liability on agents acting in behalf of an unincorporated nonprofit association. See discussion and cases cited in Note, 42 DICK. L. REV. 154 (1938).

⁸² See note 73 *supra*; MECHEM, OUTLINES OF THE LAW OF AGENCY § 328 (4th ed. 1952).

⁸³ See MECHEM, AGENCY § 1389 (2d ed. 1914); *Johnson v. California I.M.T. Assn.*, 24 Cal. App.2d 322, 74 P.2d 1073 (1938) (by implication).

⁸⁴ MECHEM, AGENCY § 1389 (2d ed. 1914).

⁸⁵ See cases collected, WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 68 n.5 (2d ed. 1923).

⁸⁶ Normal quasi-contract principles would appear to apply. See note 76 *supra*.

⁸⁷ *E.g.*, *Burrell v. Capt. H. A. Crow* Post No. 884, 102 Cal. App. 716, 283 Pac. 370 (1929). See discussion and cases collected in Note, 61 A.L.R. 241 (1929) (dealing with the personal liability of a committee or board who contract in name of unincorporated religious society incapable of contracting); WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 418 (2d ed. 1923).

⁸⁸ *E.g.*, *Fennell v. Hauser*, 145 Ore. 351, 27 P.2d 685 (1933).

⁸⁹ See discussion and cases collected, MECHEM, AGENCY § 1390 (2d ed. 1914); WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS §§ 418, 419 (2d ed. 1923).

⁹⁰ *Feldman v. North British & Mercantile Ins. Co.*, 137 F.2d 266 (4th Cir. 1943); *Johnson v. Miller et al*, 63 Iowa 529, 17 N.W. 34 (1884); *Sweetman v. Barrows*, 263 Mass. 349, 161 N.E. 272 (1928). *Accord*: *Mallow v. Carroll*, 287 Mass. 376, 191 N.E. 661 (1934); WRIGHTINGTON,

theory of breach of duty arising from the employment relation.⁹¹ Liability may also arise from the ownership or occupation of property by the "association."⁹²

When any such liability is asserted, the question will turn upon a decision as to who was the "employer" or "principal" of the "servant" or "agent"⁹³ or who was the "occupier" of the premises. Since the "association" is not regarded as an entity, responsibility will be placed upon the "management," i.e., the committee or board to whom was delegated the active management of the "association" affairs, on the ground that they were the employer or principal.⁹⁴ In some situations the members may also be deemed to be the principal or employer if, under the circumstances, it can be established that they participated in the action or authorized or approved it after knowledge of all the facts.⁹⁵ Participation or approval of such action may be express or implied from conduct.⁹⁶ However, liability will not be inferred from mere membership.⁹⁷

In the same fashion, when an "association" owns or occupies land, it would seem that there is "joint" ownership or occupation by the active members.⁹⁸ What little authority there is in California seems to so indicate.⁹⁹ If this be so, members of the association may be severally liable for

THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS §§ 389, 390 (2d ed. 1923); Note, 11 U. OF PITTS. L. REV. 308 (1950).

Compare the recovery allowed a member from an unincorporated association for injuries inflicted by tort of a fellow member. See discussion and cases collected. Note, 14 A.L.R.2d 473 (1950).

⁹¹ See *Campbell v. Thompson*, [1953] 1 Q.B. 445.

⁹² See discussion and English cases cited, Note, 16 MOD. L. REV. 359 (1953). The authority in California is negligible. However, certain language may be found in support of this proposition. See *First Nat. Bk. v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944) (by implication); *Powell v. Stivers*, 108 Cal. App.2d 72, 238 P.2d 34 (1951); *De Motte v. Arkell*, 77 Cal. App. 610, 247 Pac. 254 (1926). Both latter cases deal with suits by injured members (lessees) against the landlord. Normal landlord-tenant tort liability controls. However, whether tenant members may be liable to third persons for injuries occurring on the premises appears to be an open question.

⁹³ E.g., *Pandolfo v. Bank of Benson*, 273 Fed. 48 (9th Cir. 1921). *Accord*: *Moore v. El Paso Chamber of Commerce*, 220 S.W.2d 327 (Tex. Civ. App. 1949) (nonprofit unincorporated association treated as an entity for procedural and substantive law purposes).

⁹⁴ See discussion, Note, 16 MOD. L. REV. 359 (1953); e.g., *Pease v. Gardner*, 113 Me. 264, 93 Atl. 550 (1915).

⁹⁵ *Feldman v. North British & Mercantile Ins. Co.*, 137 F.2d 266 (4th Cir. 1943) (members who initiate an act are participating and thus are liable in tort for the results); *Sweetman v. Barrows*, 263 Mass. 349, 161 N.E. 272 (1928); *Weston v. Barnicoat*, 175 Mass. 454, 56 N.E. 619 (1900).

⁹⁶ *Pandolfo v. Bank of Benson*, 273 Fed. 48 (9th Cir. 1921). However, to proceed against members of the association a cause of action must exist. See *Bango v. Ward*, 21 N.J. Super. 500, 91 A.2d 427 (1952), *aff'd*, 12 N.J. 415, 97 A.2d 147 (1953) (judgment in former action against unincorporated association was *res judicata* in subsequent action against a member of the association). Further, before tort liability can be imposed, a duty of care must be owed from the defendant to the plaintiff. *De Motte v. Arkell*, 77 Cal. App. 610, 247 Pac. 254 (1926). *Accord*: *Bango v. Carteret Lions Club*, 12 N.J. Super. 52, 79 A.2d 57 (1951), *certification denied*, 7 N.J. 347, 81 A.2d 522 (1951).

⁹⁷ See *Sweetman v. Barrows*, 263 Mass. 349, 161 N.E. 272 (1928) (by implication).

⁹⁸ *Supra* note 23.

⁹⁹ *Ibid.*

injuries to third persons solely on the basis of joint occupation of the property.¹⁰⁰

It is not at all clear that Section 388 of the Code of Civil Procedure was intended to extend to "associational torts" since the liabilities of the members are several rather than joint.¹⁰¹ If Section 388 should be construed to permit tort actions against a nonprofit association in its common name, to recover from joint assets of the associates, it would seem that substantive liability must be established against each and every associate unless it be held that Section 388 has the effect of changing the substantive tort liability of the associates.¹⁰² The full implications of the problem seem never to have received the considered attention of the California courts.¹⁰³

Officers. Officers are individually liable for torts or crimes perpetrated by them in connection with "associational activities."¹⁰⁴ Whether or not the officer so understood the law is immaterial.¹⁰⁵ The liability that here arises is that imposed on an agent who has committed a tort. The servant or officer, as the actual tortfeasor or criminal, must pay the penalty. If the officer himself is not an actual participant in the crime or tort, he can be held liable only when he individually, expressly or impliedly, authorized or ratified the act as a member.¹⁰⁶ The question of what constitutes participation would seem to turn on whether or not the officer had a duty¹⁰⁷ to prevent the crime or protect the third person from injury. If such a duty is found the officer should be liable as a participant.

CONCLUSION

There are perils of which one must be aware in the use of the unincorporated nonprofit association. The ease with which such an association is

¹⁰⁰ See cases cited *supra* note 92.

¹⁰¹ This aspect does not seem to have been considered by the California courts. *Cf.* *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931) (apparently action to enforce a constructive trust based upon allegations of fraud); *Armstrong v. Superior Court*, 173 Cal. 341, 159 Pac. 1176 (1916) (action to enjoin labor union from picketing).

¹⁰² See discussion text at note 18 *supra*. *Cf.* *Moore v. El Paso Chamber of Commerce*, 220 S.W.2d 327 (Tex. Civ. App. 1949) (nonprofit unincorporated association treated as entity in the establishment of substantive liability).

¹⁰³ See, e.g., *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931); *Deeney v. Hotel etc. Local 283*, 57 Cal. App.2d 1023, 134 P.2d 328 (1943); *Cf.* *Juneau Spruce Corp. v. Int'l Longshoremen Union*, 119 Cal. App.2d 144, 259 P.2d 23 (1953) (debt claim; substantive liability existed against union under Taft-Hartley Act).

¹⁰⁴ *MECHEM, OUTLINES OF THE LAW OF AGENCY* § 343 *et seq.* (4th ed. 1952).

¹⁰⁵ See note 73 *supra*.

¹⁰⁶ The normal rules of agency should apply. *E.g.*, *Pease v. Gardner*, 113 Me. 264, 93 Atl. 550 (1915) (members of committee liable for acts of subagent).

Statutes may specifically state the liability to be imposed. To illustrate: "No officer or member of any association or organization, and no association participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106 (1952), *Brotherhood of Carpenters v. U.S.*, 330 U.S. 395 (1947). Compare the above with 29 U.S.C. § 185(b) and (e) (1952).

See *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951) (discussion and citations of New York procedural and substantive law concerning the liability of officers and members for contracts and torts at common law and as modified by N.Y. GEN. ASSOC. LAW § 13).

¹⁰⁷ In general, see *PROSSER, TORTS* §§ 31, 32 (1941).

formed and the layman's unfamiliarity with his obligation for ensuing liabilities often may snare the unwary. It is true that in the ordinary circumstance liabilities are slight enough so that funds are obtained by harmless assessment of the members. Nevertheless, one should be conscious of the inherent danger the unincorporated association presents to members and officers. The possibility of individual liability in considerable amount, though remote, is ever-present. The organizers should be especially cognizant of the risks others are being asked to take.

If an organization is expected to engage employees, own or lease property or incur debt, it may be wise to seek the protection of the corporate veil. A determination of whether to incorporate will hinge upon a weighing of the corporate advantages of limited liability and perpetual life as opposed to the cost and detailed regulation which are necessarily a part of corporate existence.

Often membership liability will have been incurred long before legal advice is procured. Thus, the attorney is perennially locking the barn door after the horse has long since been led astray. It will be difficult to advise clients adequately of the hazards the nonprofit unincorporated association entails. However, the attorney by occupation is frequently called upon to join or serve such organizations. Such opportunities to educate should not be overlooked; nor should the attorney neglect to enlighten whenever the proper occasion presents itself.

*Eugene Garfinkle**

* Member, California Bar; LL.B. University of California, Berkeley, June, 1954.