

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

**Suit By or Against An Unincorporated
Association**

October 1966

CALIFORNIA LAW REVISION COMMISSION
30 Crothers Hall
Stanford University
Stanford, California

THE CALIFORNIA LAW REVISION COMMISSION

COMMISSION MEMBERS

RICHARD H. KEATINGE
Chairman

SHO SATO
Vice Chairman

JAMES A. COBEY
Member of the Senate

ALFRED H. SONG
Member of the Assembly

JOSEPH A. BALL
Member

JAMES R. EDWARDS
Member

JOHN R. McDONOUGH
Member

HERMAN F. SELVIN
Member

THOMAS E. STANTON, JR.
Member

GEORGE H. MURPHY
Ex Officio

COMMISSION STAFF

Legal

JOHN H. DEMOULLY
Executive Secretary

JOSEPH B. HARVEY
Assistant Executive Secretary

CLARENCE B. TAYLOR
Special Condemnation Counsel

Administrative-Secretarial

ANNE SCHMIDT-WEYLAND
Administrative Assistant

LINDA E. BERRY
Supervising Secretary

VIOLET S. HARJU
Secretary

NOTE

This pamphlet begins on page 901. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

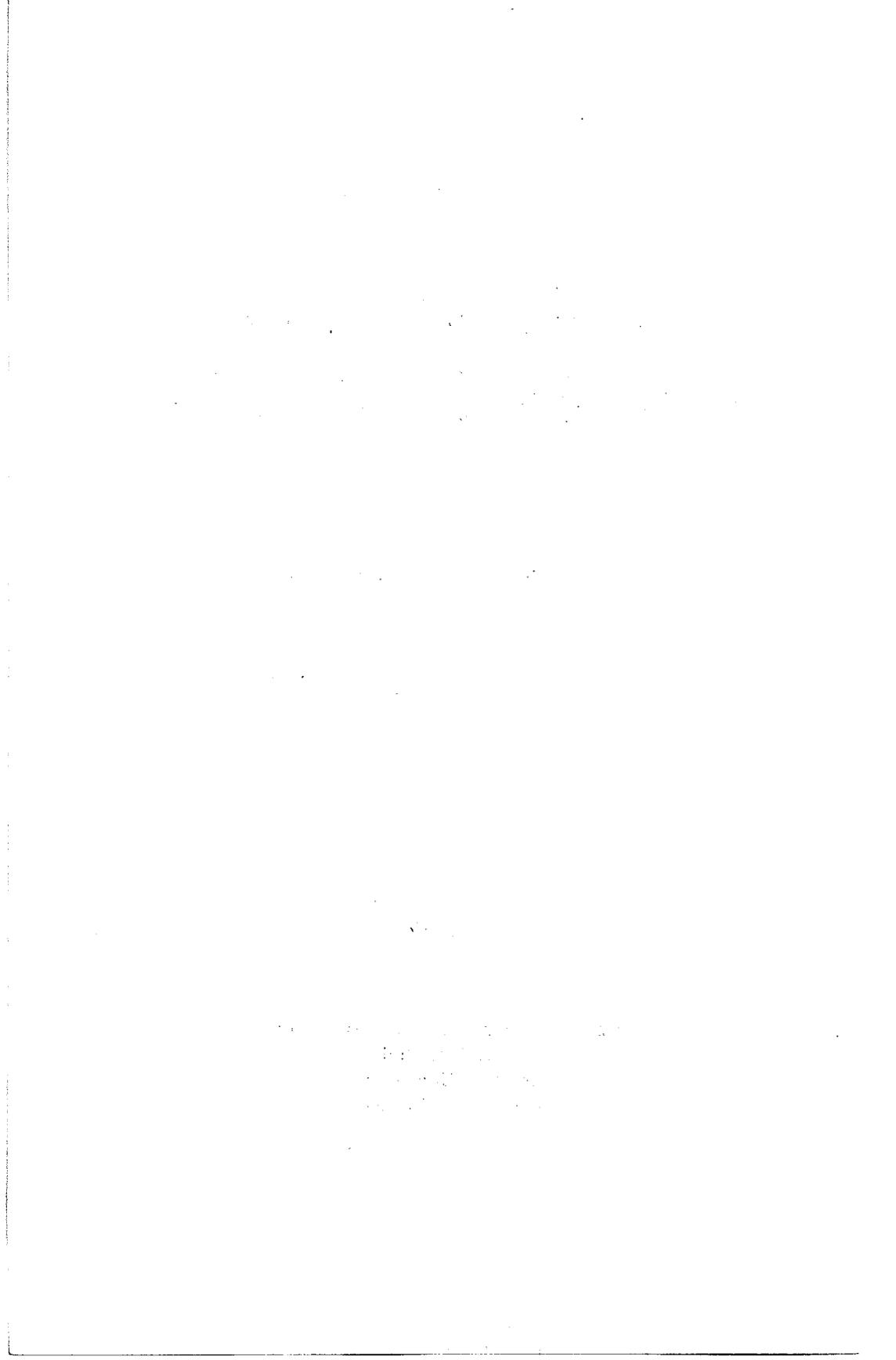
RECOMMENDATION AND STUDY

relating to

**Suit By or Against An Unincorporated
Association**

October 1966

CALIFORNIA LAW REVISION COMMISSION
30 Crothers Hall
Stanford University
Stanford, California



CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305



RICHARD H. KEATINGE
Chairman
SHO SATO
Vice Chairman
SENATOR JAMES A. COBEY
ASSEMBLYMAN ALFRED H. SONG
JOSEPH A. BALL
JAMES R. EDWARDS
JOHN T. MADONOUGH
HERMAN F. SELVIN
THOMAS E. STANTON, Jr.
GEORGE H. MURPHY
Ex Officio

October 4, 1966

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 9 of the Statutes of 1966 to make a study to determine whether the law relating to suit by and against partnerships and other unincorporated associations should be revised and whether the law relating to the liability of such associations and their members should be revised. The Commission submits herewith its recommendation relating to this topic.

The study that accompanies this recommendation was prepared by Mr. Joseph B. Harvey of the Commission's staff. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,

RICHARD H. KEATINGE
Chairman

THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
5800 S. DICKINSON DRIVE
CHICAGO, ILLINOIS 60637

RECEIVED
JAN 15 1964

TO THE DIRECTOR OF THE UNIVERSITY OF CHICAGO

FROM THE DIRECTOR OF THE UNIVERSITY OF CHICAGO

RE: [Illegible]

TABLE OF CONTENTS

	Page
RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION-----	907
BACKGROUND -----	907
RECOMMENDATIONS -----	908
PROPOSED LEGISLATION -----	911
Code of Civil Procedure	
Section 388 (amended)-----	911
Section 395.2 (added)-----	912
Section 410 (amended)-----	912
Section 411 (amended)-----	914
Corporations Code	
Section 24000 (added)-----	916
Section 24001 (added)-----	916
Section 24002 (added)-----	917
Section 24003 (added)-----	918
Section 24004 (added)-----	919
A STUDY RELATING TO SUIT BY OR AGAINST AN UNINCORPORATED ASSOCIATION-----	921

(A detailed Table of Contents for the study begins on page 921.)

THE UNIVERSITY OF CHICAGO

1. The first part of the paper is devoted to a general discussion of the problem of the structure of the universe. It is shown that the universe is not homogeneous and isotropic, but that it is in fact a collection of galaxies, each of which is itself a collection of stars. The galaxies are distributed in space in a way that is not uniform, but that is rather irregular. The stars within each galaxy are also distributed in a way that is not uniform, but that is rather irregular. The irregularity of the distribution of galaxies and stars is a result of the fact that the universe is not homogeneous and isotropic, but that it is in fact a collection of galaxies, each of which is itself a collection of stars.

2. The second part of the paper is devoted to a discussion of the problem of the origin of the universe. It is shown that the universe is not eternal, but that it had a beginning. The beginning of the universe is a point in time at which the universe was in a state of infinite density and temperature. This point is called the "big bang". The big bang is the origin of the universe, and it is the point at which the universe began to expand. The expansion of the universe is a result of the fact that the universe is not homogeneous and isotropic, but that it is in fact a collection of galaxies, each of which is itself a collection of stars.

3. The third part of the paper is devoted to a discussion of the problem of the future of the universe. It is shown that the universe is not eternal, but that it will have an end. The end of the universe is a point in time at which the universe will be in a state of infinite density and temperature. This point is called the "big crunch". The big crunch is the end of the universe, and it is the point at which the universe will cease to exist. The big crunch is a result of the fact that the universe is not homogeneous and isotropic, but that it is in fact a collection of galaxies, each of which is itself a collection of stars.

THE UNIVERSITY OF CHICAGO

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Suit By or Against An Unincorporated Association

BACKGROUND

At common law, an unincorporated association could neither sue nor be sued in the association's name. If the association incurred an obligation—except for a tort obligation¹—a party seeking to enforce the obligation had to proceed against all of the members of the association as parties defendant. If an unincorporated association desired to bring an action, all of the members of the association had to join as the parties plaintiff.

As the purposes for which unincorporated associations are organized have increased, and as the activities of unincorporated associations have expanded, these common law rules have been found to be increasingly burdensome. In modern times, unincorporated associations—such as partnerships, churches, lodges, clubs, labor unions, and business and professional societies—are organized for and carry on virtually every kind of commercial, charitable, and social activity. Because the common law rules that forbid an unincorporated association from appearing in court in its own name seriously impede the expeditious administration of litigation arising out of these activities, many states have enacted statutes that permit an unincorporated association to sue and be sued in its own name.

By statute, California provides that persons associated for the transaction of business may be sued in their common name. The California Supreme Court has held that one type of unincorporated association—a labor union—may sue in its own name. There is no general statute, however, that permits unincorporated associations in California to sue in their own names. Moreover, the California rules governing service of process and venue in actions against unincorporated associations are unnecessarily disadvantageous to such associations.

¹Tort obligations were regarded as the joint and several obligations of the association members; a plaintiff could thus sue one associate severally or all the associates jointly on such an obligation.

RECOMMENDATIONS

The Law Revision Commission has concluded that existing procedural rules applicable to actions brought by or against unincorporated associations are not in harmony with modern conditions. Accordingly, the Commission recommends:

1. An unincorporated association should be able to sue in its own name. An unincorporated association frequently incurs obligations or acquires rights in its association name, and there is no valid reason why it should be denied access to the courts as an association to define such obligations or to enforce such rights.

It is possible that legislation permitting an unincorporated association to sue in its own name will merely clarify rather than change existing California law. In *Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963), the Supreme Court held that a labor union could maintain an action in its own name. The courts may well apply the same rule to other types of unincorporated associations. But whether a particular type of unincorporated association can sue in its own name under the rule in the *Daniels* case may remain uncertain for many years since a case involving that type of association must be tried and processed through the appellate courts before the law can be determined with certainty. Legislation will obviate the need for repeated appeals to determine how far the principle of the *Daniels* case extends.

The present uncertainty as to the right of an unincorporated association to sue in its own name results in the institution of actions in the names of individuals who, apart from their association membership, are not really interested in the action. Joining all of the members of the association as plaintiffs imposes an extremely onerous procedural burden upon the plaintiff association—both in preparing the complaint and in substituting parties when there is a change in membership—without any corresponding benefit to the defendant. If the defendant wishes to know who the members are, he may obtain that information expeditiously through the use of ordinary discovery procedures. Usually, however, the interests and identity of the individual members is irrelevant. Permitting an unincorporated association to sue in the association name, therefore, will further the principle expressed in Code of Civil Procedure Section 367 that every action should be prosecuted in the name of the real party in interest.

2. The limitation now contained in Code of Civil Procedure Section 388 that an unincorporated association must be engaged in "business" before it can be sued in the association's name serves no useful purpose and should be repealed. Repeal of this limitation will make no great change in existing law, for the courts have held that practically any activity in which an unincorporated association engages constitutes the transaction of business within the meaning of this section. See *Herald v. Glendale Lodge No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920).

3. Legislation should be enacted providing that an unincorporated association is responsible, to the same extent as if it were a natural person, for an act or omission of its officer, agent, or employee acting within the scope of his office, agency, or employment. Here, again, it seems likely that such legislation will clarify rather than change existing California law. Recent cases have held that certain associations are liable for the torts of their officers and employees. *Inglis v. Operating Engineers Local Union No. 12*, 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962); *Marshall v. Int'l Longshoremen's & Warehousemen's Union*, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962). The recently enacted Commercial Code defines a "person" who may contract obligations thereunder to include unincorporated associations. COM. CODE § 1201(28), (29), (30). Other statutes authorize certain kinds of associations to incur obligations under particular types of contracts. See, e.g., CORP. CODE § 21200; LABOR CODE § 1126. Thus, the recommended legislation will remove any remaining uncertainty concerning the extent to which unincorporated associations are liable for actions taken on their behalf.

4. Under existing law, an unincorporated association may be sued in any county where any member of the association resides. *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*, 37 Cal. 2d 760, 235 P.2d 607 (1951). As a result, associations with large, widespread memberships are subject to suit in areas where they conduct no business and have incurred no obligations. Thus, a plaintiff who desires to sue an unincorporated association may frequently "shop" for a favorable forum. Individuals and corporations are not subject to this sort of forum shopping. To provide unincorporated associations with equivalent protection, legislation should be enacted permitting an unincorporated association to file a designation of its principal place of business with the Secretary of State so that such information may be readily ascertainable. After such a designation is filed, the unincorporated association should be subject to suit only in the designated county, in the county where a contract is made or is to be performed, or in the county where an obligation or liability arises or the breach occurs. Under this recommendation, an unincorporated association that had complied with the statute would be subject to the same venue rules as a corporation.

5. Under existing California law, service of process may be made upon an unincorporated association by serving any member thereof. CODE CIV. PROC. § 388. There is no requirement that a plaintiff notify any of the responsible officers of the association of the pendency of the litigation. A plaintiff can, therefore, under existing law, serve a member who has little interest in the association or whose interests are actually more closely identified with those of the plaintiff than they are with those of the association. If that member fails to notify the association of the pending litigation, a default judgment may be taken against the association despite the lack of any meaningful notice to the association.

To remedy this situation, legislation should be enacted permitting any unincorporated association to file with the Secretary of State a certificate designating an agent for service of process and stating the address at which such agent can be served. Service upon the association should be required to be made either by service upon a responsible officer of the association or by service upon the designated service agent. A party should be permitted to serve process upon an unincorporated association by service upon an individual member only if the officers of the association cannot be found in this state after diligent search and the agent for the service of process cannot be found at the address designated in the certificate filed with the Secretary of State. But even in this case, the party should be required to mail a copy of the summons to the last known mailing address of the association.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following legislation:

An act to amend Sections 388, 410, and 411 of, and to add Section 395.2 to, the Code of Civil Procedure, and to add Part 4 (commencing with Section 24000) to Title 3 of the Corporations Code, relating to unincorporated associations.

The people of the State of California do enact as follows:

CODE OF CIVIL PROCEDURE

Code of Civil Procedure Section 388 (amended)

SECTION 1. Section 388 of the Code of Civil Procedure is amended to read:

388. ~~When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, 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.~~

(a) *As used in this section:*

(1) *"Unincorporated association" means any unincorporated organization of two or more persons which engages in any activity of any nature, whether for profit or not, under a common name.*

(2) *"Person" includes a natural person, corporation, partnership or any other unincorporated organization, and a government or governmental subdivision or agency.*

(b) *An unincorporated association may sue and be sued in its common name.*

Comment. Under Section 388, any unincorporated association, whether engaged in business or not, may be sued in the association name. Under the prior law, only persons transacting *business* under a common name could be sued in that name. The term "business," however, was construed so broadly that it constituted little, if any, limitation on the right to sue an unincorporated association. See *Herald v. Glendale Lodge No. 1289*, 46 Cal. App. 325, 189 Pac. 329 (1920).

Section 388 also grants unincorporated associations the privilege of suing in the association name. The extent to which an unincorporated association could sue in its own name was unclear under prior law. Compare *Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963) (labor union could maintain action in

its own name), with *Kadota Fig Ass'n v. Case-Swayne Co.*, 73 Cal. App.2d 796, 167 P.2d 518 (1946) (unincorporated cooperative association could not sue in its own name).

The provisions formerly contained in Section 388 dealing with service of process are superseded by Code of Civil Procedure Sections 410 and 411(2.1), and the provisions formerly contained in Section 388 dealing with the enforcement of judgments are superseded by Corporations Code Section 24002.

Code of Civil Procedure Section 395.2 (added)

SEC. 2. Section 395.2 is added to the Code of Civil Procedure, to read:

395.2. If an unincorporated association has filed a statement with the Secretary of State pursuant to Section 24003 of the Corporations Code listing its principal office or place of business in this state, the proper county for the trial of an action against such unincorporated association is the same as it would be if the unincorporated association were a corporation and, for the purpose of determining such county, the principal place of business of the unincorporated association shall be deemed to be the principal office or place of business listed in the statement.

Comment. Under Section 16 of Article XII of the Constitution of California, both corporations and unincorporated associations may be sued "in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs." In addition, that section of the Constitution provides that a corporation (but not an association) may be sued in the county where its principal place of business is located. By statute, however, an unincorporated association may be sued in any county where the plaintiff can sue a member of the association. *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*, 37 Cal.2d 760, 235 P.2d 607 (1951) (construing Section 395 of the Code of Civil Procedure). Thus, large unincorporated associations may be subjected to a kind of "forum shopping" that is not possible where corporations or individuals are concerned.

Under Section 395.2, an unincorporated association, by filing a designation of its principal office or principal place of business with the Secretary of State, may avoid this sort of forum shopping and may secure the advantages of the venue provisions applicable to corporations under the state Constitution.

Code of Civil Procedure Section 410 (amended)

SEC. 3. Section 410 of the Code of Civil Procedure is amended to read:

410. The summons may be served by the sheriff, a constable, or marshal, of the county where the defendant is found, or any other person over the age of 18, not a party to the action. A copy of the complaint must be served, with the summons, upon each of the defendants. When the service is against

a corporation, or against *an unincorporated association in an action brought under associates conducting business under a common name*, in the manner authorized by Section 388, there shall appear on the copy of the summons that is served a notice stating in substance: "To the person served: You are hereby served in the within action (or proceeding) on behalf of (here state the name of the corporation or the *unincorporated association common name under which business is conducted by the associates*) as a person upon whom the summons and a copy of the complaint must be served to effect service against said party under the provisions of (here state appropriate provisions of Section 388 or 411) of *this the Code of Civil Procedure.*" When service is intended to be made upon said person as an individual as well as a person upon whom service must be made on behalf of said corporation or said *association associates*, said notice shall also indicate that service is had upon said person as an individual as well as on behalf of said corporation or said *association associates*. In a case in which the foregoing provisions of the section require that notice of the capacity in which a person is served must appear on the copy of the summons that is served, the certificate or affidavit of service must recite that such notice appeared on such copy of the summons, if, in fact, it did appear. When service is against a corporation, or against *an unincorporated association in an action brought under associates conducting a business under a common name*, in the manner authorized by Section 388, and notice of that fact does not appear on the copy of the summons or a recital of such notification does not appear on the certificate or affidavit of service of process as required by this section, no default may be taken against such corporation or such *association associates*. When service is made upon the person served as an individual as well as on behalf of the corporation or *association associates conducting a business under a common name*, and the notice of that fact does not appear on the copy of the summons or a recital of such notification does not appear in the certificate or affidavit of service of process as required by this section, no default may be taken against such person.

When the summons is served by the sheriff, a constable or marshal, it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to plaintiff if he is acting as his own attorney, otherwise to plaintiff's attorney. When it is served by any other person, it must be returned to the same place, with the affidavit of such person of its service, and of the service of a copy of the complaint.

If the summons is lost subsequent to service and before it is returned, an affidavit of the official or other person making service, showing the facts of service of the summons, may be returned in lieu of the summons and with the same effect as if the summons were itself returned.

Comment. The amendments to Section 410 merely conform the section to the amended versions of Sections 388 and 411.

Code of Civil Procedure Section 411 (amended)

SEC. 4. Section 411 of the Code of Civil Procedure is amended to read:

411. The summons must be served by delivering a copy thereof as follows:

1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president, a secretary, and assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. If such corporation is a bank, to any of the foregoing officers or agents thereof, or to a cashier or an assistant cashier thereof. If no such officer or agent of the corporation can be found within the state after diligent search, then to the Secretary of State as provided in Sections 3301 to 3304, inclusive, of the Corporations Code, unless the corporation be of a class expressly excepted from the operation of those sections.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business in this state: in the manner provided by Sections 6500 to 6504, inclusive, of the Corporations Code.

2.1. If the suit is against an unincorporated association (not including a "public agency" as defined in subdivision 5): to the president or other head of the association, a vice president, a secretary, an assistant secretary, general manager, general partner, or a person designated as agent for service of process as provided in Section 24003 of the Corporations Code. If no president or other head of the association, vice president, secretary, assistant secretary, general manager, or general partner can be found within the state after diligent search, and if the person designated as agent for service of process cannot be found at his address as specified in the statement designating him as the agent of the association for the service of process, then to any one or more of the association's members and by mailing a copy thereof to the last known mailing address, if any, of the principal office or place of business of the association.

3. If against a minor, under the age of 14 years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person residing within this state and for whom a guardian or conservator has been appointed: to such person, and also to his guardian or conservator.

5. Except as otherwise specifically provided by statute, in an action or proceeding against a local or state public agency,

to the clerk, secretary, president, presiding officer or other head thereof or of the governing body of such public agency. "Public agency" includes (1) every city, county, and city and county; (2) every public agency, authority, board, bureau, commission, corporation, district and every other political subdivision; and (3) every department and division of the state.

6. In all cases where a corporation has forfeited its charter or right to do business in this state, or has dissolved, by delivering a copy thereof to one of the persons who have become the trustees of the corporation and of its stockholders or members; or, in a proper case, as provided in Sections 3305 and 3306 of the Corporations Code.

7. If the suit is one brought against a candidate for public office and arises out of or in connection with any matter concerning his candidacy or the election laws and said candidate cannot be found within the state after diligent search, then as provided for in Section 54 of the Elections Code.

8. In all other cases to the defendant personally.

Comment. Subdivision 2.1 has been added to Section 411 to permit service upon an unincorporated association in much the same manner that service may be made upon a corporation. The revised form of the section provides assurance that the responsible officers of an unincorporated association will become aware of any actions that are brought against the association. Prior law did not provide such assurance, for service could be made under the prior law upon any member of the association.

CORPORATIONS CODE

Sec. 5. Part 4 (commencing with Section 24000) is added to Title 3 of the Corporations Code, to read:

PART 4. LIABILITY; LEVIES AGAINST PROPERTY; DESIGNATION OF AGENT FOR SERVICE AND OF PRINCIPAL OFFICE OR PLACE OF BUSINESS

Corporations Code Section 24000 (added)

24000. (a) As used in this part, "unincorporated association" means any unincorporated organization of two or more persons which engages in any activity of any nature, whether for profit or not, under a common name but does not include a government or governmental subdivision or agency.

(b) As used in this section, "person" includes a natural person, corporation, partnership or any other unincorporated organization, and a government or governmental subdivision or agency.

Comment. Section 24000 provides a definition that includes all private unincorporated associations of any kind and excludes all governmental entities, authorities, boards, bureaus, commissions, departments, and associations of any kind.

Although subdivision (a) provides that a governmental entity or agency is not an unincorporated association under this part, subdivision (b) provides that an unincorporated association is subject to this part even though its membership may include governmental entities or agencies.

Corporations Code Section 24001 (added)

24001. Except as otherwise provided by statute, an unincorporated association is liable for its act or omission, and for the act or omission if its officer, agent, or employee acting within the scope of his office, agency, or employment, to the same extent as if the association were a natural person. Nothing in this section affects the liability between members of an association or the liability between an association and the members thereof.

Comment. Section 24001 provides that unincorporated associations are liable for acts or omissions done by or under the authority of the association to the same extent that natural persons are liable. The exception at the beginning of the section is intended to avoid the repeal of any statutory limitations on association liability, such as that found in Section 21400 of the Corporations Code (relating to death benefits payable by unincorporated fraternal societies).

Section 24001 is probably declarative of the prior California law insofar as the tort liability of unincorporated associations is concerned.

See *Inglis v. Operating Engineers Local Union No. 12*, 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962); *Marshall v. Int'l Longshoremen's & Warehousemen's Union*, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

Whether Section 24001 is declarative of the prior California law relating to the contractual liability of unincorporated associations is uncertain. In the absence of statute, a contract of an unincorporated association was regarded as the contract of the individual members of the association who authorized or ratified the contract. *Pacific Freight Lines v. Valley Motor Lines, Inc.*, 72 Cal. App.2d 505, 164 P.2d 901 (1946); *Security-First Nat'l Bank v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944); *Leake v. City of Venice*, 50 Cal. App. 462, 195 Pac. 440 (1920). By statute, however, unincorporated associations have been authorized to enter into a wide variety of transactions and thus incur liability on behalf of the association. See, e.g., COM. CODE § 1201 (28), (29), (30); CORP. CODE § 21200; LABOR CODE § 1126. Section 24001 eliminates whatever gaps may have remained in the previous statutory provisions making unincorporated associations responsible for their contractual obligations.

Corporations Code Section 24002 (added)

24002. Only the property of an unincorporated association may be levied upon under a writ of execution issued to enforce a judgment against the association.

Comment. Section 24002 permits the plaintiff to resort only to the assets of an unincorporated association to satisfy a judgment against the association. Of course, nothing in the section precludes the plaintiff from also resorting to the individual property of a member of the association to satisfy a judgment against the member in a case where the member was also a party defendant. The procedure provided by Code of Civil Procedure Sections 414 and 989-994 may also be available in a case where the members of the association are jointly liable with the association on a contract and are named as joint defendants.

Insofar as Section 24002 provides that the assets of the association may be levied upon to satisfy a judgment against the association, it restates the law formerly stated in Code of Civil Procedure Section 388. The former version of Section 388 also authorized satisfaction of the judgment against the association from the individual assets of a member who had been served with process in the action against the association. However, a 1959 amendment to Code of Civil Procedure Section 410 precluded this unless the summons served on the member indicated that service was being made upon him in his individual capacity. Under Section 24002, it is necessary not only to serve an individual member in his individual capacity but also to name him as a defendant before a judgment can be obtained that may be satisfied from his individual assets.

Corporations Code Section 24003 (added)

24003. (a) An unincorporated association may file with the Secretary of State on a form prescribed by him a statement containing either or both of the following:

(1) A statement designating the location and complete address of the association's principal office in this state or principal place of business in this state. Only one such place may be designated.

(2) A statement designating as agent of the association for service of process any natural person residing in this state or any corporation which has complied with Section 3301.5 or Section 6403.5 and whose capacity to act as such agent has not terminated.

(b) If a natural person is designated as agent for service of process, the statement shall set forth his complete business or residence address. If a corporate agent is designated, the statement shall set forth the state or place under the laws of which such agent was incorporated and the name of the city, town, or village wherein it has the office at which the association designating it as such agent may be served, as set forth in the certificate filed by such corporate agent pursuant to Section 3301.5, 3301.6, 6403.5, or 6403.6.

(c) An unincorporated association may at any time file with the Secretary of State a revocation of a statement filed by the association under this section. A statement designating either a new principal office or place of business or a new agent for the service of process, or both, is a revocation of any prior statement filed by the association under this section.

(d) A revocation becomes effective 30 days after it is received by the Secretary of State, except that:

(1) A revocation of a designation of a principal office or place of business is effective upon receipt of the revocation by the Secretary of State if the revocation is a statement that designates a new principal office or place of business.

(2) A revocation of a designation of an agent for the service of process is effective upon receipt of the revocation by the Secretary of State if the revocation is a statement that designates a new agent for the service of process.

(e) Delivery by hand of a copy of any process against the unincorporated association (1) to any natural person designated by it as agent, or (2) if the association has designated a corporate agent, at the office of such corporate agent, in the city, town, or village named in the statement filed by the association under this section to any person at such office named in the certificate of such corporate agent filed pursuant to Section 3301.5 or 6403.5 if such certificate has not been superseded, or otherwise to any person at such office named in the last certificate filed pursuant to Section 3301.6 or 6403.6, constitutes valid service on the association.

(f) For filing a statement as provided in this section, the Secretary of State shall charge and collect the fee prescribed

in Government Code Section 12185 for filing a designation of agent.

(g) The Secretary of State may destroy or otherwise dispose of any statement filed under this section:

(1) At any time one year after such statement has been revoked; or

(2) In the case of a statement that only designates an agent for the service of process, at any time one year after such designation has been revoked or such agent has resigned as provided in Section 24004.

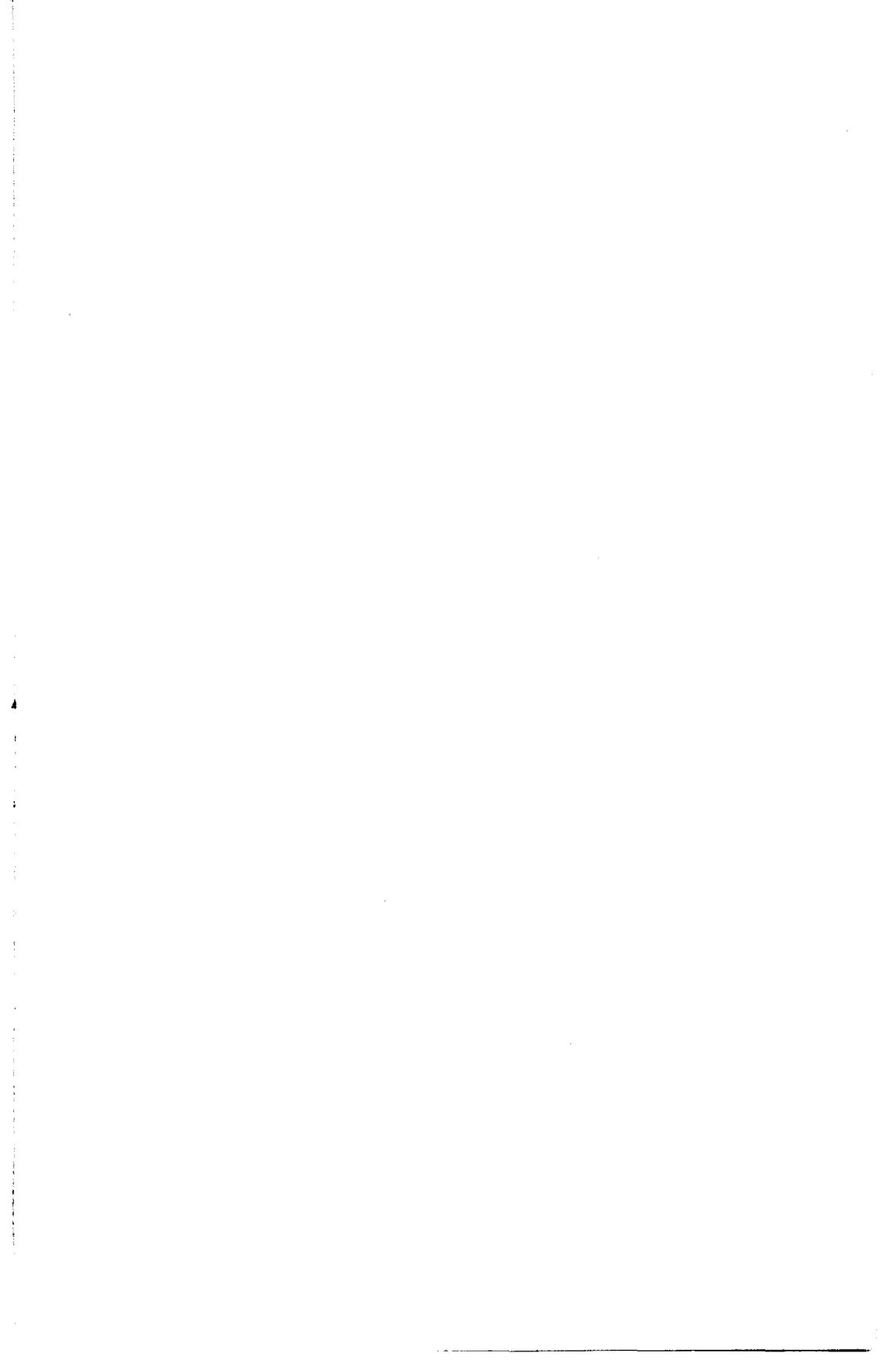
Comment. Section 24003 provides a procedure whereby an unincorporated association may designate a principal office or place of business for venue purposes (Code of Civil Procedure Section 395.2) and an agent upon whom service of process may be made (subdivision 2.1 of Section 411 of the Code of Civil Procedure). See the Comments to Code of Civil Procedure Sections 395.2 and 411.

Section 24003 is based largely upon Corporations Code Section 3301 except that designation of an agent is permissive rather than mandatory.

Corporations Code Section 24004 (added)

24004. An agent designated by an unincorporated association for the service of process may file with the Secretary of State a written statement of resignation as such agent which shall be signed and execution thereof shall be duly acknowledged by the agent. Thereupon the authority of the agent to act in such capacity shall cease and the Secretary of State forthwith shall give written notice of the filing of the statement by mail to the unincorporated association addressed to its last known principal office or principal place of business in this state.

Comment. Section 24004 permits an agent designated to receive service of process to resign. The section is based on Corporations Code Sections 3301.7 and 6405.



A STUDY RELATING TO SUIT BY OR AGAINST AN UNINCORPORATED ASSOCIATION

TABLE OF CONTENTS

	<i>Page</i>
INTRODUCTION	923
THE COMMON LAW	924
The Common Law Concept of an Unincorporated Association	924
Substantive Aspects of the Common Law Concept.....	925
Acquisition and transfer of property.....	925
Nature of members' interests in property.....	926
Contractual rights and liabilities.....	926
Tort liability.....	927
Procedural Aspects of the Common Law Concept.....	927
RIGHTS AND LIABILITIES OF UNINCORPORATED ASSOCIATIONS UNDER CALIFORNIA LAW	929
Contractual Rights and Liabilities.....	929
Acquisition and Transfer of Property.....	930
Tort Liability.....	930
Summary	931
UNINCORPORATED ASSOCIATIONS AS LITIGANTS.....	932
The Unincorporated Association as Defendant.....	932
Naming the association as defendant.....	932
Individual members as parties to the action.....	934
Service of process.....	936
Venue	936
The Unincorporated Association as Plaintiff.....	937
SUMMARY AND RECOMMENDATIONS.....	940



INTRODUCTION

Section 388 of the California Code of Civil Procedure provides that two or more persons associated for the transaction of business under a common name may be sued in that common name. There is no similar California statute authorizing an unincorporated association to bring an action in the name of the association. Thus, so far as the statutory law is concerned, some unincorporated associations—those engaged in “business”—may appear in litigation as defendants, but there is no authority for any unincorporated association to appear as a plaintiff.

The limited scope of the statutory authority for an unincorporated association to appear as a party to litigation is significant because of the underlying common law rule that an unincorporated association cannot sue or be sued.¹ Because of this rule, it has been the law in California that an unincorporated association cannot appear in litigation except to the extent provided by Section 388 of the Code of Civil Procedure.² Recently, however, the California courts have partially abandoned their adherence to the common law rule, and Section 388 no longer describes the full extent to which an unincorporated association may appear as a party in California litigation.³

The purpose of this study is to determine the present state of the California law relating to the right of an unincorporated association to appear as a party to litigation and to determine whether it is necessary or desirable to revise that law. The study will also consider the substantive rights and liabilities of unincorporated associations, for improving the procedural techniques for conducting litigation on behalf of or against such associations is meaningful only to the extent that such associations have substantive rights and duties to be determined through litigation.

¹ 6 AM. JUR.2d *Associations and Clubs* § 51 (1963).

² 5 CAL. JUR.2d *Associations and Clubs* § 34 (1952).

³ *Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963) (labor union may bring action in its own name as a plaintiff).

THE COMMON LAW

The Common Law Concept of an Unincorporated Association

At common law, an unincorporated association is regarded as merely an aggregation of individuals who are joined together for a common purpose and called, for convenience, by a common name.⁴ As stated by Dicey:⁵

But a firm is not, in the courts of common law, recognized as in any way distinct from the persons who compose it. Hence, the firm of M. & Co., being nothing more than the individuals A., B., and C., of whom it consists, any change amongst its members destroys its identity, and the so-called property, debts, and liabilities of the firm are, in truth, merely the property, debts, and liabilities of A., B., and C., who compose the firm.

The individuals comprising an unincorporated association are bound together by their agreement to associate.⁶ Although a formal, written agreement is usual, it is not required.⁷ The agreement of association defines the rights and obligations of the members as among themselves and determines the nature of the association.⁸ The ordinary partnership agreement provides that the associates are to carry on as coproprietors a business for profit,⁹ and each partner is an agent for the partnership.¹⁰ Other unincorporated associations, however, confer power to bind the members of the association upon only the managing agent or upon a governing board.¹¹ But whatever form of unincorporated association is created by the agreement, the common law regards the association merely as a convenient name for referring to all of the individual members.

If an association as such has no independent existence and consists merely of its members, it follows that any change in the membership results in the formation of a different association because the association name is then being used to describe a different group of associates. An association consisting of A, B, and C is not the same as an association consisting of A, B, and D even though both associations have used the same name.¹²

⁴ DICEY, PARTIES TO ACTIONS 169 (2d Am. ed. 1886). See *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 119, 62 Pac. 486, 487 (1900).

⁵ DICEY, PARTIES TO ACTIONS 169 (2d Am. ed. 1886).

⁶ See, e.g., *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763 (1897); *Hogan v. Pacific Endowment League*, 99 Cal. 248, 33 Pac. 924 (1893).

⁷ See *Burks v. Weast*, 67 Cal. App. 745, 228 Pac. 541 (1924).

⁸ *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 62 Pac. 486 (1900); *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763 (1897).

⁹ CAL. CORP. CODE § 15006.

¹⁰ CAL. CORP. CODE § 15009. See generally 1 ROWLEY, PARTNERSHIP § 6.1 (2d ed. 1960).

¹¹ See, e.g., *McConnell v. Denver*, 35 Cal. 365 (1868). 7 C.J.S. *Associations* § § 19, 28 (1937).

¹² As stated by Dicey, "[T]he firm of M. & Co., being nothing more than the individuals A., B., and C., of whom it consists, any change amongst its members destroys its identity . . ." DICEY, PARTIES TO ACTIONS 169 (2d Am. ed. 1886).

Apparently, the refusal of the English courts to recognize an unincorporated association stemmed from the view that group existence was a privilege to be obtained only by grant from the crown.¹³ Corporate existence was created by the king's franchise, and to assume such existence without his permission was to usurp his prerogative.¹⁴

Because the common law courts would not recognize the existence of unincorporated associations, the rules used to resolve problems involving associations are the rules developed with respect to relations between individuals—rules of joint or common ownership, joint liability, agency, and trusts.¹⁵

The common law concept, thus, has important substantive and procedural consequences relating to the rights and duties of unincorporated associations and the remedies that may be used to enforce those rights and duties.

Substantive Aspects of the Common Law Concept

Although an association has no independent existence at common law, the members of an association can acquire rights and incur obligations as individuals, and by acting in concert they can acquire joint rights and incur joint obligations.

Acquisition and transfer of property. At common law, property said to be owned by an association is regarded as the joint property of the individual members.¹ Apparently, despite the refusal of the common law courts to recognize the independent existence of an association, it is usually held that the members can hold personal property in the association name as a convenient means of designating the joint owners.² Most cases, however, hold that real property may not be acquired or transferred in the association name.³

The reason that associations cannot acquire interests in real property in the group name appears to be that the actual owners (the members of the association) remain unidentified and uncertain.⁴ If title is conveyed to the members by their collective name only, it cannot be determined from the title documents who the actual owners are and whose signatures are necessary to convey a good title to the property. Where any members of the association are mentioned in the association name, a conveyance to the association has been held to vest title in the named members subject to a trust in favor of the association.⁵

The problem of the property rights of unincorporated associations is frequently avoided by the designation of a trustee to hold the associ-

¹³ FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS xix (1959); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383, 394 (1924).

¹⁴ *Blundell v. Winsor*, 8 Sim. 601, 613, 59 Eng. Rep. 238, 243 (1837).

¹⁵ WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 3 at 5 (2d ed. 1923).

¹ *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 119, 62 Pac. 486, 487 (1900).

² FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS 9-11 (1959); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383, 390 *et seq.* (1924); Comment, 42 CAL. L. REV. 812, 816 (1954).

³ FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS 3-8 (1959); SHUMAKER, *THE LAW OF PARTNERSHIP* 124 (2d ed. 1905).

⁴ Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383, 396 (1924); FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS 3-8 (1959).

⁵ *Woodward v. McAdam*, 101 Cal. 438, 35 Pac. 1016 (1894); *Winter v. Stock*, 29 Cal. 407 (1866).

ation's property in trust for the purposes of the association.⁶ This avoids the uncertainty of legal ownership that has sometimes resulted in decisions holding that deeds to unincorporated associations are void.

Nature of members' interests in property. The nature of the members' interests in the association's property depends on the nature of the organization. If the association is organized for purposes of profit, each member is deemed to have an interest in the common assets which can be used for the satisfaction of his separate debts.⁷ On the other hand, a member has no severable interest which his individual creditors can reach in the assets of a nonprofit association.⁸ In the absence of an express provision to the contrary, the member cannot sell or transfer his interest in the common property.⁹ Upon termination of his membership, whether voluntarily or by expulsion, his interest in the common property is extinguished.¹⁰

Contractual rights and liabilities. Although an unincorporated association, being nonexistent, cannot contract on its own behalf, the name of the association can be used as a convenient means of designating the members who are the actual parties to the contract.¹¹ When the members thus contract, they incur a joint obligation; and, inasmuch as each change in membership creates a different association, a contractual obligation of an unincorporated association is the joint obligation of those persons who were members at the time the contract was entered into.¹² An incoming partner or member is not personally liable for obligations previously contracted, but he takes his interest in the association subject to them.¹³

In some states and in England, the doctrine has developed that members of nonprofit associations are not personally liable for obligations contracted in the name of the association unless they authorized or ratified the particular contract in question.¹⁴ Authorization is not to be implied merely from membership.¹⁵

Just as a contract of a partnership creates a joint obligation of the members of the partnership, the contractual rights of a partnership are the joint rights of the persons who were members at the time the contract was executed.¹⁶ The contract rights of a nonpartnership association also appear to be the joint rights of either the persons who were members at the time the contract was executed or their assignees or successors.¹⁷

⁶ WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 60 at 337 (2d ed. 1923).

⁷ SHUMAKER, THE LAW OF PARTNERSHIP 137 (2d ed. 1905).

⁸ Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383, 386 (1924).

⁹ *Ibid.*

¹⁰ See *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 130, 187 P.2d 769 (1947); *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763 (1897); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383, 386 (1924).

¹¹ See SHUMAKER, THE LAW OF PARTNERSHIP 99 (2d ed. 1905).

¹² DICEY, PARTIES TO ACTIONS 285-286 (2d Am. ed. 1886).

¹³ WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 24 at 140-141 (2d ed. 1923).

¹⁴ *Id.* § 63 at 382.

¹⁵ *Ibid.*

¹⁶ WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 22 (1929).

¹⁷ *Lucas v. Beale*, 10 C.B. 739 (1851).

Tort liability. Although the common law regards a partnership's contract liabilities as the joint liabilities of its members, its tort liabilities are joint and several.¹⁸ The tort liability of members of nonprofit associations is also joint and several, but many cases hold that an individual member cannot be held personally liable for a tort committed in the scope of the association's employment unless the member actually authorized or ratified the act resulting in the tort.¹⁹

Procedural Aspects of the Common Law Concept

Under traditional rules of common law pleading, a joint obligee may not sue alone to enforce an obligation owing to several joint obligees. Whether the obligation is in contract or in tort, all of the obligees are required to join as plaintiffs in the action.¹ Similarly, joint obligors upon a contract must be sued jointly by a party seeking to enforce the obligation.² Although joint tortfeasors, as a general rule, may be sued either jointly or severally, joinder of all of the joint tortfeasors is required if the injury complained of arises from the condition of land and the tortfeasors' liability is based on their joint ownership of the land.³

Because an unincorporated association is, at common law, nonexistent, it can neither sue nor be sued,⁴ and actions must be brought by and against the members under the rules applicable to persons with joint rights or obligations. Thus, all of the members of an orchestra were required to join as plaintiffs in action upon a contract that had been entered into by one of its members on behalf of the orchestra.⁵ And all of the partners must join in an action to enforce contracts with the partnership and must be joined as defendants in an action to enforce contracts against the partnership.⁶ Failure to join all of the members of an association may be pleaded in abatement, but if the defect in parties is not raised, it is waived.⁷

With the development of large unincorporated associations, the courts have been forced to develop rules to overcome the inconveniences caused by application of the common law concept of an unincorporated association. In equity, the so-called representative action was developed in which a few members of an association could sue or be sued as the representatives of the entire membership.⁸ Representative suits are now permitted in actions at law as well as in suits in equity.⁹

¹⁸ WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 22 (1929); SHUMAKER, *THE LAW OF PARTNERSHIP* 249 (1905).

¹⁹ 6 AM. JUR.2d *Associations and Clubs* § 48 (1963).

¹ "RULE 13.—All the persons with whom a contract is made must join in an action for the breach of it." DICEY, *PARTIES TO ACTIONS* 119 (2d Am. ed. 1886). "RULE 80. . . . 3. Persons who have a joint interest must sue jointly for an injury to it." *Id.* at 401.

² "RULE 49.—Where several persons are jointly liable on a contract, they must all be sued in an action for the breach thereof, i.e., joint contractors must be sued jointly." *Id.* at 247.

³ "RULE 98.—One, or any, or all of several joint wrong-doers may be sued. . . ." *Id.* at 448. "Exception.—Persons sued as joint owners of land." *Id.* at 456.

⁴ See *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 119, 62 Pac. 486, 487 (1900).

⁵ *Lucas v. Beale*, 10 C.B. 739 (1851).

⁶ SHUMAKER, *THE LAW OF PARTNERSHIP* 241-250 (1905).

⁷ See *Sturges, Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383, 384 (1924).

⁸ *Id.* at 387.

⁹ 6 AM. JUR.2d *Associations and Clubs* § 55 (1963).

This device—the representative suit—has been helpful, but it does not solve all of the procedural problems. Some courts have objected to the idea of subjecting a member of an association to a judgment for damages in an action where he was not served. And, since the assets of an association are regarded as the personal assets of the members for the time being, the assets cannot be subject to liability for judgments that are not binding on the owners. Similar reasoning has sometimes resulted in denial of injunctions in representative actions because a person not personally before the court cannot be bound.¹⁰

Other courts, however, have permitted the representative or class action to be used to obtain a judgment binding on the common fund even though some owners of the fund were not personally served. Moreover, some courts have permitted such actions to be maintained even though there was a change in membership of the association since the obligation was incurred.¹¹ In the landmark case of *United Mine Workers v. Coronado Coal Co.*,¹² the United States Supreme Court held that an unincorporated labor union could be sued in its own name under the Sherman Anti-Trust Act.

Some courts have attacked the problem by holding that association contractual liabilities are the joint and several liabilities of the members as are the tort liabilities.¹³ Thus, an individual member may be sued without joining the other members. However, this device is not helpful if the notion is retained that the association's property belongs to its members jointly and, therefore, cannot be utilized to satisfy the several debt of one of the members; for in this view the association's assets remain immune so long as all of the members are not made parties to the action.

In some courts, the common law concept of an association has resulted in decisions that the association property cannot be used to satisfy either a contract or a tort liability unless all of the members (to whom the property actually belongs) are found to be liable.¹⁴ Where it is held that an individual member is not personally liable unless he actually authorized the particular contract or the particular act resulting in the tort, application of this theory virtually immunizes the association property from liability for debts incurred on its behalf.

¹⁰ See FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS 93-112 (1959).

¹¹ *Ibid.*

¹² 259 U.S. 344 (1921).

¹³ See 6 AM. JUR.2d *Associations and Clubs* § 46 (1963).

¹⁴ *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, 384-387 (1924).

RIGHTS AND LIABILITIES OF UNINCORPORATED ASSOCIATIONS UNDER CALIFORNIA LAW

For the most part, the California courts have followed the common law relating to unincorporated associations except insofar as that common law has been modified by statute. Thus, unless a statute otherwise provides, an unincorporated association is regarded as an aggregation of individuals.¹

Contractual Rights and Liabilities

The California courts, however, have not been among those that have held that such associations cannot make contracts. On the contrary, they have recognized and enforced contracts with unincorporated associations on the theory that the members have jointly entered into the contract.²

There is also extensive statutory authority for unincorporated associations to enter into contracts. Perhaps the most far-reaching statute is the recently enacted Uniform Commercial Code. Section 1201 of the Uniform Commercial Code as enacted in California defines a "person" to include an "organization." The same section defines an "organization" to include a "partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity." Because an unincorporated association is defined as a person, such an association can enter into any of the commercial transactions that are governed by the various provisions of the Commercial Code. It can be a buyer or seller of goods,³ a party to negotiable paper,⁴ a party to the issuance or transfer of warehouse receipts,⁵ and a party to the issuance or transfer of investment securities.⁶ In addition, Labor Code Section 1126 authorizes unincorporated labor organizations to enter into collective bargaining agreements, and Corporations Code Sections 21200-21202 authorize certain specified nonprofit associations to contract in regard to real property.

By statute, a partner has authority to enter into contracts on behalf of the partnership.⁷ All of the partners are jointly liable on such contracts.⁸ Members of nonpartnership associations, however, have no general authority to contract on behalf of the association.⁹ Such associations usually act through officers and agents whose authority is granted and defined by the agreement creating the association—the articles of association or bylaws.¹⁰

¹ *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 62 Pac. 486 (1900).

² See, e.g., *Meyer v. Kohn*, 29 Cal. 278 (1865); *Leake v. City of Venice*, 50 Cal. App. 462, 195 Pac. 440 (1920); *Security-First Nat'l Bank v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944).

³ CAL. COM. CODE § 2013.

⁴ CAL. COM. CODE §§ 1201(5), (20), 3101 *et seq.*

⁵ CAL. COM. CODE § 7102.

⁶ CAL. COM. CODE § 8201 *et seq.*

⁷ CAL. CORP. CODE § 15009.

⁸ CAL. CORP. CODE § 15015(b).

⁹ 5 CAL. JUR.2d *Associations and Clubs* § 31 (1952).

¹⁰ *Ibid.*

The California cases have given lip service to the rule developed in some jurisdictions that a member of a nonprofit association is not liable for a contract made on behalf of the association unless he authorized or ratified the particular contract.¹¹ But in applying the rule, the courts have held that the members of an association "impliedly authorize" or "constructively assent to" a contract executed by an officer to carry out one of the objects of the association. Hence, if the contract was executed by the appropriate officer pursuant to proper authority, all of the persons who are members at the time the contract is executed are liable even though they may not have appeared or voted at the particular meeting authorizing the contract.¹² By virtue of Corporations Code Sections 21100-21103, however, members of nonprofit associations organized for certain specified religious or benevolent purposes are not personally liable for the debts of the association arising out of contracts for the acquisition, leasing, or furnishing of real property.

Acquisition and Transfer of Property

In the absence of statute, the California courts regard personal property owned by an association as the joint property of the members.¹³ Where a partnership or profitmaking organization is involved, the members' interests in the association can be severed and applied to their separate debts.¹⁴ The members of a nonprofit association, however, usually have no severable interest in the property held in the association name.¹⁵

Real property may be acquired by a partnership in the partnership name by virtue of the provisions of the Uniform Partnership Act.¹⁶ Certain specified nonprofit associations are also authorized to take title to real property in the association name.¹⁷ But there is no general statutory or case authority for unincorporated associations to take title to real property in the association name.

Tort Liability

The courts have recognized that an unincorporated association may recover for tortiously inflicted injuries.¹⁸ By statute, some associations are authorized to secure injunctions against the use of their names or insignia by unauthorized persons.¹⁹

Partnerships are liable for wrongful acts or omissions committed in the ordinary course of the business of the partnership.²⁰ Labor organizations have also been held liable for torts.²¹ However, there is no statu-

¹¹ See *Security-First Nat'l Bank v. Cooper*, 62 Cal. App.2d 653, 667, 145 P.2d 722, 729-730 (1944).

¹² *Security-First Nat'l Bank v. Cooper*, 62 Cal. App.2d 653, 145 P.2d 722 (1944). See FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS 58-59 (1959).

¹³ *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 62 Pac. 486 (1900).

¹⁴ CAL. CORP. CODE § 15028.

¹⁵ See, e.g., *DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 187 P.2d 769 (1947).

¹⁶ CAL. CORP. CODE § 15008.

¹⁷ CAL. CORP. CODE §§ 21200-21202.

¹⁸ *Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963).

¹⁹ CAL. CORP. CODE § 21308; *Most Worshipful Hiram of Tyre Grand Lodge v. Sons of Light Grand Lodge*, 94 Cal. App.2d 25, 210 P.2d 34 (1949).

²⁰ CAL. CORP. CODE § 15013.

²¹ *Marshall v. Int'l Longshoremen's & Warehousemen's Union*, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

tory or case authority for the tort liability of nonprofit associations generally.

The members of a partnership are jointly and severally liable for the torts committed within the scope of the business of the partnership.²² The extent of a member's personal liability for a tort committed in the course and scope of the activities of a nonprofit association has not been decided in California. In *Marshall v. Int'l Longshoremen's & Warehousemen's Union*,²³ the Supreme Court noted with apparent approval several decisions from other jurisdictions holding that the liability of individual members of a labor union must rest, if at all, upon their personal participation in, or authorization of, the acts causing the injury. However, that case involved a plaintiff who was a member of the union, and the language was intended to meet the argument that the union could not be liable to the plaintiff because he himself was liable as a principal for the injury to himself. Whether the court intended to immunize union members from personal liability in all cases cannot be determined.

Summary

Thus, existing statutory and decisional law has recognized that unincorporated associations may acquire virtually all recognized rights and incur virtually all recognized forms of liability. There are, however, some uncertainties that remain. Before proposals for revision can be considered, however, it is necessary to determine whether the law still regards these rights and obligations as the joint rights and obligations of the members or whether the law recognizes them as rights and obligations of the association as an entity. And this involves a consideration of the present law relating to suits by and against unincorporated associations.

²² CAL. CORP. CODE § 15015(a).

²³ 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

UNINCORPORATED ASSOCIATIONS AS LITIGANTS

The enforcement of contracts made in the name of an unincorporated association, the recognition of ownership of property held in the association name, and the enforcement of tort liabilities incurred in association activities are not necessarily inconsistent with the common law concept that the association name is merely a convenient designation for the individual members. The major problems created by the common law theory, however, are those that arise when these rights and liabilities are sought to be enforced through litigation. The common law pleading rules relating to joint interests and joint parties are not geared to the conduct of litigation involving large associations with many thousands of members.¹ As a result, these rules have been modified to a substantial degree by both statutes and decisional law.

The Unincorporated Association as Defendant

Naming the association as defendant. The California Legislature's first effort to facilitate the enforcement of an association's obligations was made in 1851. Inasmuch as the common law regarded the contractual obligations of an unincorporated association as the joint obligations of its members, this first statute was designed to facilitate suit against joint debtors. It provided that an action against joint debtors could proceed to judgment even though all of the joint debtors were not personally served; however, the judgment in the action could be satisfied only from the joint property of the debtors and the separate property of those defendants who were actually served.² In 1870, the provision authorizing execution upon the joint property was held unconstitutional.³ Said the Supreme Court:⁴

[W]e are utterly unable to see how a judgment that is to be enforced against the interest in such property of a person who has not been served with process, and has not appeared in the action, can be maintained. It is a cardinal principle of jurisprudence that a judgment shall not bind or conclude a man, either in respect to his person or property, unless he has had his day in Court.

When the Code of Civil Procedure was enacted in 1872, this statute was codified as Section 414 without, however, the inclusion of the offending provision authorizing execution upon the jointly owned property. Under existing law, therefore, if joint debtors are sued and the plaintiff cannot serve them all, he may proceed against those served and secure a judgment that is binding only on those who were served.⁵ After recovery of judgment, the plaintiff may summon the remaining defendants to appear and show cause why they should not be bound by the original judgment.⁶ If the plaintiff can then demonstrate that

¹ See Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383 (1924).

² Cal. Stats. 1851, Ch. 5, § 32, p. 56.

³ Tay, Brooks & Backus v. Hawley, 39 Cal. 93 (1870).

⁴ 39 Cal. at 96.

⁵ CAL. CODE CIV. PROC. § 414.

⁶ CAL. CODE CIV. PROC. § 989.

the remaining defendants are in fact jointly obligated, they will be held liable to the plaintiff in the amount remaining unpaid on the original judgment.⁷ Under this procedure, however, it is clear that the plaintiff cannot levy execution upon the joint assets of the debtors unless he is able to serve all of the joint debtors.

In 1854, the Legislature enacted another statute designed to deal only with the problem of suing unincorporated associations. As originally enacted, it provided:⁸

When two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such case being served on one or more of the associates, but the judgment in such case shall bind only the joint property of the associates.

In 1872, this section was codified as Section 388 of the Code of Civil Procedure, but the final clause was recast in the following form:

. . . and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability.

In 1907, the last clause was amended by the addition of the italicized words as follows:⁹

. . . 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.

Under common law theory, this statute seems as objectionable as the one held unconstitutional in *Tay, Brooks & Backus v. Hawley*.¹⁰ It authorizes the taking of property for the satisfaction of the debt of the owner despite the fact that the owner has not been served and has not appeared in the action. Nevertheless, in *Jardine v. Superior Court*,¹¹ the California Supreme Court held the statute constitutional. The court said that an unincorporated association is, for purposes of the statute, an entity distinct from its members. Thus, its property can be taken to satisfy a judgment in an action where it is represented even though all of the individual members are not parties.

Section 388 authorizes suit against associations engaged in "business" only. This limitation is, however, more apparent than real. Some of the early cases attached some significance to the term and held, for example, that a chamber of commerce¹² and a stock exchange¹³ were not subject to suit under Section 388 because they were not engaged in some commercial enterprise for the purpose of profit. But these deci-

⁷ CAL. CODE CIV. PROC. §§ 989-994.

⁸ Cal. Stats. 1854, Ch. 54, § 68, p. 72.

⁹ Cal. Stats. 1907, Ch. 371, § 2, p. 704.

¹⁰ 39 Cal. 93 (1870).

¹¹ 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291 (1931).

¹² *Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce*, 34 Cal. App. 37, 166 Pac. 856 (1917).

¹³ *Swift v. San Francisco Stock & Exch. Bd.*, 67 Cal. 567, 8 Pac. 94 (1885).

sions were repudiated by the Supreme Court in its 1931 decision in *Jardine v. Superior Court*.¹⁴ In *Jardine*, the court held that the Los Angeles Stock Exchange was subject to suit under Section 388. In explanation, the court pointed out that the word "business" in its broadest sense embraces everything about which one is employed and stated that the evident purpose underlying Section 388 required that it be liberally construed. Hence, the court said that the section would permit suit against an unincorporated association even where it was not organized to carry on commercial activity for gain.

Since *Jardine* was decided, no case has been found holding that an unincorporated association is not subject to suit because it is not engaged in business. Nevertheless, the expressed condition remains as an invitation to litigation over its meaning.

Other states, too, have substantially modified their rules relating to actions against unincorporated associations. Many have statutes permitting actions to be brought against associations in the name of the association. Many of such statutes limit the organizations that are subject to suit in the organization name, but there is little consistency in the nature of the limitations. Some states, like California, permit an action against an association engaged in business only.¹⁵ Other states permit only partnerships to be sued in the association name.¹⁶ Many states, however, place no limitations on the kinds of organizations that can be sued in the association name. For example, the Colorado statute¹⁷ authorizes suit against a "partnership or other unincorporated association." The Connecticut statute authorizes suit against any "voluntary association" that is "known by some distinguishing name."¹⁸ In North Carolina, suit is permitted against "all unincorporated associations, organizations or societies, foreign or domestic, whether organized for profit or not."¹⁹ The South Carolina statute provides simply that, "All unincorporated associations may be sued . . ."²⁰

No reason has been suggested for any limitation. Permitting an association to be sued confers no privilege upon the association; it merely facilitates the enforcement of the association's obligations by its creditors.

Individual members as parties to the action. In the form in which Section 388 was originally enacted, it was clear that those unincorporated associations that were engaged in "business" could be sued and that the action was against the association as an entity. A judgment that was personally binding on the members of the association could not be obtained unless the members were named as codefendants and were found liable. The 1907 amendment to Section 388—authorizing a personal judgment against the associate served with process—represents a partial retreat to more orthodox theories of the nature of unincorporated associations. Under the amendment, the designation of an associ-

¹⁴ 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291 (1931).

¹⁵ *E.g.*, DEL. CODE ANN., Tit. 10, § 3904; IDAHO CODE ANN. § 5-323; MONT. REV. CODE ANN. § 93-2827; NEB. REV. STAT. § 25-313; OHIO REV. CODE ANN. § 2307.24.

¹⁶ *E.g.*, ILL. CIV. PRAC. ACT § 27.1; IOWA RULES CIV. PROC., Rule 4.

¹⁷ COLO. REV. STAT. § 76-1-6.

¹⁸ CONN. GEN. STAT. ANN. § 52-76.

¹⁹ N. C. GEN. STAT. § 1-69.1.

²⁰ S. C. CODE ANN. § 10-215.

ation as a defendant serves two functions: it names the association as the defendant, and it names the individual members of the association as individual defendants "in the same manner as if all had been named defendants and had been sued upon their joint liability."¹ Hence, a judgment against an associate personally may be obtained even though he is not named except by the collective designation of all of the associates. Presumably, the plaintiff after securing judgment against the association may make that judgment binding on the associates who were not originally served with process by complying with the procedure for summoning joint debtors,² but no case has been found in which this procedure has been used.

The Code Commissioners who recommended the 1907 amendment explained that the words "and the individual property of the party or parties served with process" were added to avoid multiplicity of suits.³ The amendment is not necessary for this purpose, however, because the plaintiff may obtain a judgment binding personally on the individual associates by joining them as named defendants in the original action.⁴ Apparently, if the debt is contractual, the plaintiff must name all of the associates as defendants if he chooses to name any inasmuch as the members' obligation is joint, not several.⁵

Although Section 388 provides that a judgment against an association binds the individual property of the member who is served with process, this provision has apparently been qualified by an amendment to Code of Civil Procedure Section 410. The latter section now provides that the summons served on the member must contain a notice stating whether the member is being served as an individual. If no such notice is contained in the summons, no default can be taken against the member. Thus, an individual is not bound personally by the service of summons upon him unless the summons so states.

Code of Civil Procedure Section 410 at least serves the purpose of providing notice to an individual member of an association when his personal responsibility for the association's indebtedness is being asserted. But the procedure authorized by Section 388 can be prejudicial to the individual member nevertheless. Although the member's personal assets may be subject to the judgment against the association, the action is still an action against the association only.⁶ Hence, the individual member apparently has no right to plead or otherwise control the defense of the action.⁷

Although some of the statutes in other states authorizing actions to be brought against unincorporated associations contain a provision making the judgment binding on the individual associate who was

¹ CAL. CODE CIV. PROC. § 388.

² CAL. CODE CIV. PROC. §§ 989-994.

³ Code Commissioners' Notes in CAL. CODE CIV. PROC. § 388 (West 1954).

⁴ As was done in *Harbor City Canning Co. v. Dant*, 201 Cal. 79, 255 Pac. 795 (1927).

⁵ See discussion of *Redwood City Salt Co. v. Whitney*, 153 Cal. 421, 95 Pac. 885 (1908), in *Harbor City Canning Co. v. Dant*, 201 Cal. 79, 86, 255 Pac. 795, 798 (1927).

⁶ *Artana v. San Jose Scavenger Co.*, 181 Cal. 627, 185 Pac. 850 (1919).

⁷ *Ibid.*

served,⁸ most statutes provide that the judgment binds only the property held in the association name.⁹

Service of process. Code of Civil Procedure Section 388 provides that service upon an unincorporated association may be made by serving any member. The legislative assumption seems to be that each associate is actively interested in the organization's welfare and will transmit the papers with which he has been served to the appropriate officers. This may be the case where the defendant entity is a partnership; however, if it is a social club, a large labor organization, or even a church, there is no real assurance that the member served will notify the association's officers. Under the statute, a plaintiff can enhance the possibility of default by carefully arranging to serve a member who is disinterested or even hostile to the association.

Code of Civil Procedure Section 410 provides that, when a member of an association is served in a representative capacity under Section 388, the summons must contain a notice naming the association and stating that the individual is being served on its behalf. Unless the summons also states that the member is being sued as an individual, a default cannot be taken against him. Therefore, where a member is served only in a representative capacity, the only risk the action creates to the member served is that of an indirect loss through levy on commonly owned property together with the risk of an assessment by the organization to make up a deficit.

Under Corporations Code Section 3301, a corporation may file with the Secretary of State a designation of an agent for the service of process. Code of Civil Procedure Section 411 provides that service upon the corporation may be made by serving certain designated officers or the agent for the service of process. This procedure is advantageous to both the corporation and a creditor who wishes to bring suit against the corporation. The corporation is assured that process will be served on a responsible officer or agent, and the suing creditor is assured that a person who can be served can be readily found. This procedure could be adapted for use by unincorporated associations. Such associations, too, could be authorized to file a designation of an agent for service of process with the Secretary of State. Because service could then be readily made upon a responsible representative of the association, service upon any member should be permitted only if the designation is not made or the agent cannot be found.

Venue. Article XII, Section 16 of the California Constitution provides:

A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases.

⁸ *E.g.*, ARIZ. REV. STAT. § 29-104, GA. CODE ANN. § 75-312.

⁹ COLO. REV. STAT. § 76-1-6 (individual member is bound only if named as a defendant and served); IDAHO CODE ANN. § 5-323; ILL. STAT. ANN., Ch. 77, § 1b; MD. ANN. CODE, Art. 23, § 138; MINN. STAT. ANN. § 540.15.

The first portion of this section refers to "a corporation or association"; the second portion refers only to "such corporation." In *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*,¹⁰ the Supreme Court held that the omission of a reference to "association" was deliberate. Hence, an unincorporated association is not entitled to be sued at its principal place of business. The court held that, for venue purposes, the action against the association is regarded as an action against the individual members; hence, venue is proper in any county where one of the members resides.

In reaching this decision, the court pointed out that a corporation is required to have a principal place of business specified in its articles of incorporation, but an unincorporated association is subject to no similar requirement.

In the particular case, the provisions of the first clause of the constitutional provision—providing venue in a county where some acts connected with the liability occurred—were inapplicable because the liability arose outside the state. However, the language of the opinion indicates that, even had they been applicable, the constitutional list of places for suit against an association is not exclusive. Hence, a statute could (and did) make the association subject to suit in any county where a member of the association resides.

Thus, when a plaintiff sues an unincorporated association he may frequently engage in "forum shopping" to an extent that the law does not permit where any other kind of defendant is involved. Where large associations such as labor unions are defendants, members may be found in most of the counties in the state, and a plaintiff may elect to sue in any of them regardless of whether the particular county chosen has any connection with the litigants or the litigation.

In no other state does a statute that fixes venue in actions against unincorporated associations give a plaintiff such a broad power to select the forum. Such statutes usually permit such associations to be sued in a county in which the association is doing business or has an office, representative, or subordinate lodge.¹¹

The general policy of California has been to require a defendant to be sued in the county where he resides.¹² In the case of a corporation, this policy is reflected in the provision that it may be sued in the county of its principal place of business. This policy could also be applied to unincorporated associations if there were a convenient means for determining the principal place of business of such an association. If an association were permitted to file a designation of its principal place of business with the Secretary of State, this location would be a matter of public record, and there would no longer be a reason for denying an association the venue rights that all other defendants now enjoy.

The Unincorporated Association as Plaintiff

Most of the jurisdictions that have enacted statutes permitting unincorporated associations to be sued have included in those statutes provisions authorizing an unincorporated association to sue in the associ-

¹⁰ 37 Cal.2d 760, 235 P.2d 607 (1951).

¹¹ See, e.g., ALA. CODE, Tit. 7, § 57; PA. RULES CIV. PROC., Rule 2156; TEXAS CIV. STAT. ANN., Art. 1995 (23).

¹² CAL. CODE CIV. PROC. § 395.

ation name.¹³ A few states, including California, have authorized suits against—but not by—unincorporated associations.¹⁴

In the absence of a statute authorizing unincorporated associations to appear as plaintiffs, the California courts have generally followed the common law rule that an unincorporated association cannot bring an action in its own name.¹⁵ Recently, however, the California Supreme Court held that an unincorporated labor union could bring an action in its own name despite the lack of statutory authorization.¹⁶ Although the court limited its decision to labor unions, the language of the opinion suggests that the court may extend its ruling to other associations under similar circumstances.¹⁷

Although an unincorporated association cannot appear as a plaintiff under California law, a defendant who is sued by such an association must object to the designation of an association as plaintiff at the earliest opportunity or the error in the designation of the plaintiff is waived.¹⁸ Moreover, if the defendant does make a timely objection, the plaintiff is entitled to amend the complaint in order to designate the individual plaintiffs correctly.¹⁹ Thus, in California practice the rule that an unincorporated association cannot appear as a plaintiff constitutes no more than a ground for delaying the proceedings while an amended complaint is prepared.

The reason that California has prevented associations from suing in the association name is clear: the common law bars the judicial recognition of an association as an entity that can appear before the court, and the common law has not been changed. Modern justifications for the rule are difficult to find. A district court of appeal in California once attempted to justify the rule on the ground that the defendant might not know from whom to collect his costs or from whom to collect restitution if judgment in the action were reversed after it had been paid.²⁰ Similar reasoning seems to underlie the requirement in Pennsyl-

¹³ FED. RULES CIV. PROC., Rule 17 (b); ALA. CODE ANN., Tit. 7, §§ 142-145; COLO. REV. STAT. ANN. § 76-1-6; CONN. GEN. STAT. ANN. § 52-76; GA. CODE ANN. §§ 3-117 to 3-121; IOWA RULES CIV. PROC., Rule 4; LA. CODE CIV. PROC. ANN., Arts. 688, 689, 737, 738; MD. ANN. CODE, Art. 23, § 138; MICH. STAT. ANN. § 27A.2051; MINN. STAT. ANN. § 540.151; NEB. REV. STAT. ANN. §§ 25-313 to 25-316; N.J. STAT. ANN. §§ 2A:64-1 to 2A:64-6; N.M. STAT. ANN. § 21-6-5 (partnership), §§ 51-18-5 to 51-18-5.1 (unincorporated association); N.Y. CIV. PROC. LAW & RULES ANN. § 1025; N.C. GEN. STAT. ANN. § 1-69.1; OHIO REV. CODE ANN. § 2307.24; OKLA. STAT. ANN., Tit. 78, §§ 32, 54; TEXAS RULES CIV. PROC. ANN., Rule 23 (see also TEXAS REV. CIV. STAT. ANN., Arts. 6133-6138); VT. STAT. ANN., Tit. 12, § 814; VA. CODE ANN. § 8-66; WYO. RULES CIV. PROC. ANN., Rule 17(b). See also ARIZ. REV. STAT. § 23-1323 (labor organization to enjoin illegal picketing); FLA. STAT. ANN. § 447.11 (labor organization); IDAHO CODE ANN. § 44-605 (association or union to enjoin use of counterfeit label); KAN. STAT. ANN. § 44-811 (labor organization); N.H. REV. STAT. ANN. §§ 292.12, 292.14 (fraternal organization); N.D. CODE ANN. § 34-09-08 (labor union to enforce collective bargaining); R.I. GEN. LAWS ANN. § 28-8-1 (labor union to enforce collective bargaining agreement).

¹⁴ See, e.g., CAL. CODE CIV. PROC. § 388; DEL. CODE ANN. § 3904; IDAHO CODE ANN. § 5-323; MONT. REV. CODE ANN. § 93-2827.

¹⁵ *Ginsberg Tile Co. v. Faraone*, 99 Cal. App. 381, 14 P.2d 777 (1929).

¹⁶ *Daniels v. Sanitarium Ass'n, Inc.*, 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963).

¹⁷ The court said, "[W]e limit our holding to labor unions, leaving to future development the rule to be applied to other types of unincorporated associations." 59 Cal.2d at 610, n.9, 30 Cal. Rptr. at 834, n.9, 381 P.2d at 658, n.9.

¹⁸ *Gilman & Co. v. Cosgrove*, 22 Cal. 356 (1863); *Agricultural Extension Club v. Hirsch & Son*, 39 Cal. App. 433, 179 Pac. 450 (1919).

¹⁹ *Ginsberg Tile Co. v. Faraone*, 99 Cal. App. 381, 14 P.2d 777 (1929).

²⁰ *Case v. Kadota Fig Ass'n*, 207 P.2d 86 (Cal. Dist. Ct. App. 1949).

vania that unincorporated associations must sue through a trustee ad litem who is made responsible for any costs incurred in the action.²¹

These objections are unsound, however. The information that a defendant receives when the complaint is amended to designate the individual members of the association can be readily obtained through discovery procedures. The defendant is not provided with any information that is not otherwise readily available to him concerning the persons who will be responsible for costs or restitution. Moreover, where the association is so large that it would be impractical to name all of the members as plaintiffs, Code of Civil Procedure Section 382 authorizes a representative to sue on behalf of all of the members of the association. Thus, if the complaint is amended to designate a representative of the association, the defendant will have no more information concerning the membership of the association than he had when the action began.

²¹ The note to Rule 2152 states in part: "The requirement that suit be brought in such representative form has the advantage of placing upon the record persons who may be held responsible for costs." [PA. RULES CIV. PROC., Rule 2152 (Purdon 1951).]

SUMMARY AND RECOMMENDATIONS

California has recognized by statute and judicial decision that contracts can be made in the name of an unincorporated association, that property can be held in the name of an unincorporated association, that tort liabilities can be incurred by an unincorporated association, and that an unincorporated association can suffer a tortious injury for which it is entitled to compensation. Although these rights and liabilities were originally considered to be the joint rights and liabilities of the members, the courts are increasingly recognizing that these are the rights and liabilities of the association itself.

To eliminate any vestiges of uncertainty, a statute should be enacted providing that an unincorporated association is liable for the act or omission of its officer, agent, or employee to the same extent that it would be liable if the association were a natural person. This would not alter the manner in which such associations may incur liabilities. Under partnership law, every partner is an agent and, therefore, may bind the partnership by his acts. And under the law applicable to other unincorporated associations, only designated managers or officers are authorized agents. However, such a statute would make it clear that unincorporated associations do incur liabilities to the same extent that persons and corporations incur liabilities. Associations should enjoy no common law immunity that stems from the refusal of the common law to recognize them as jural entities.

Although California has recognized that unincorporated associations may incur obligations and acquire substantive rights, its procedures for determining those obligations and rights through litigation are seriously defective. Although there is statutory authorization for unincorporated associations to be sued if they are engaged in business, there is no general statutory authority for associations to sue. The courts have thus far authorized labor unions to sue and have intimated that other associations may be permitted to do so too. There should be no limitation on the kinds of associations that may sue and be sued. The "business" limitation contained in Code of Civil Procedure Section 388 serves no ascertainable purpose, nor can any purpose be perceived in imposing any other limitation. Removal of the remaining restrictions on suits by and against unincorporated associations should be accomplished by statute. No reason can be perceived for waiting for the Supreme Court to determine on a case by case basis how far it intends to extend the right to sue in the absence of statute. To accomplish this end, the following statutory language is suggested:

Any unincorporated association may sue or be sued in the name which it has assumed or by which it is known.

Many of the statutes authorizing suits by and against unincorporated associations use additional descriptive words to indicate that the reference to unincorporated associations includes partnerships, nonprofit associations, and other forms of unincorporated associations. Any such words of extension are unnecessary, for the foregoing authorization

is as comprehensive as it can possibly be. The addition of other terms might cast doubt on the generality of the words that are recommended.

Under existing California law, the designation of an association as a defendant is regarded as a collective designation of all of the members of the association. Thus, a judgment against the association binds the personal assets of any member who is served or appears. Of course, the summons must indicate that the member is being served as an individual; but the procedure that is authorized impairs the right of an individual who will be bound by the judgment to assert defenses that are personal to him and to conduct his defense as he desires. Therefore, a statute should be enacted to provide that an action by or against an unincorporated association determines only the rights and liabilities of the association, not the rights and liabilities of any individual members who were not made parties. The association's name should not be regarded merely as a convenient means for referring to all of the members, and only the association's property should be subject to execution on a judgment against the association.

Under existing law, service upon an unincorporated association can be accomplished by serving any member. The venue of an action against an association can be laid in any county where a member resides. The law relating to service provides an association with little assurance that a responsible officer will learn of the pending litigation before a default judgment has been entered. The law relating to venue deprives an association of the right to be sued in the county where its principal place of business is located.

Both of these deficiencies in the law may be corrected by authorizing an unincorporated association to file with the Secretary of State a statement designating its principal office in this state and the name of an agent for the service of process. If such a statement is filed, the principal office would be a matter of public record as would the name and address of a person on whom service may be made. It would then be feasible to apply to unincorporated associations the same service and venue rules that are applicable to corporations. Just as a corporation may be served by serving a responsible officer or a designated agent for service of process, an unincorporated association should be entitled to service upon a responsible officer or a designated agent for service of process. Just as a corporation is subject to suit only in a county connected with the asserted liability or in the county of its principal place of business, an unincorporated association should also be subject to suit only in a county connected with the asserted liability or in the county of its principal office.

No recommendation is made herein to modify the law relating to the personal liability of the members of an association for debts incurred by the association during his membership. Until recent years, the courts had generally held that the members were liable for such debts upon principles of agency. But both the Legislature and the courts have given recent indications of a desire to shield members from personal liability. This writer does not share this desire. If a member is sued personally on an association's contract liability, he can readily join the association as a cross-defendant and thus provide himself with assurance that ultimate responsibility for the debt will rest with the association. If a member is sued personally upon a tort liability, he can join not only the

association but also the tortfeasor primarily liable for the injury. If the association and the tortfeasor are not adequately insured, and if the association does not have sufficient assets to meet the deficiency, it seems unjust to place the remaining loss upon the injured plaintiff instead of spreading it ratably among the association's membership on whose behalf the acts that resulted in the liability were done.

It is unnecessary to deal with the matter of the members' personal liability in order to remedy the deficiencies in the law relating to suits by and against unincorporated associations. In order to make clear, however, that the law relating to the personal liability of association members has been left unchanged, a statute designed to effectuate the foregoing recommendations should also include a provision that nothing in the statute affects the liability of members of an association.

o

printed in CALIFORNIA OFFICE OF STATE PRINTING