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Non-Profit Associations as Legal Entities

Howard L. Oleck*

UNINCORPORATED ASSOCIATIONS long have been a problem to the law. They are analogous to partnerships, and yet not partnerships; analogous to corporations, and yet not corporations; analogous to joint tenancies, and yet not joint tenancies; analogous to mutual agency, and yet not mutual agency.¹ The most baffling of all are the non-profit unincorporated associations.

Piecemeal attempts to make legal order and sense of these organizations have not solved the basic question. Thus, statutes requiring the filing of certificates of doing business under an assumed name treat a symptom, not the problem itself.²

Modern studies of the subject express the same bafflement as did earlier studies, plus growing impatience with the slovenly law that permits such uncertainty to continue so long. Recently, for example, the application of constitutional rights to associations has involved the question of whether or not they are "persons" (*i.e.*, "legal entities") for purposes of the privilege against self-incrimination.³ Certainly the drafters of the Constitution could not foresee the modern proliferation of associations, both incorporated and unincorporated.

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¹ *Cousin v. Taylor*, 115 Ore. 472, 239 P. 96, 41 A.L.R. 750 (1925); *People v. Herbert*, 162 Misc. 817, 295 N. Y. S. 251 (1937); *Blair v. Southern Clay Mfg. Co.*, 173 Tenn. 571, 121 S. W. 2d 570 (1938); *Stone v. Guth*, 232 Mo. 217, 102 S. W. 2d 738 (1937); *Security-First Natl. Bank v. Cooper*, 62 Cal. App. 2d 653, 145 P. 2d 722 (1943); and see, *Wrightington, Unincorporated Assns. & Business Trusts* (1923); 3 C. J. S., Agency, Sec. 259; *Crane, Law of Partnership* 537 (1952).

² *Bacon v. Gardner*, 38 Wash. 2d 299, 229 P. 2d 523 (1951); *Notes*, 39 Yale L. J. 874 (1930); 18 Calif. L. R. 707 (1930); *Anno.*, L. R. A. 1915D, 982; L. R. A. 1916D, 335; 45 A. L. R. 198 (1926); 59 A. L. R. 55 (1929).

³ See, *Oleck, Non-Profit Corporations & Associations*, c. 3 (1956). (Note that a second edition of this book now is in preparation. It elaborates on the non-profit association more than the first edition did, but finds little more certainty about it now than existed years ago).

Confusion as to "entity" or "group of individuals" concepts was criticized recently in *Note, Constitutional Rights of Associations to Assert the Privilege Against Self-Incrimination*, 112 U. Pa. L. R. 394 (1964), citing *Hale v. Henkel*, 201 U. S. 43 (1906) that associations are not "persons," and recent Supreme Court difficulties in cases involving unincorporated associations. Under the decision in *United States v. White*, 322 U. S. 694, 700 (1944), associations again were denied the privilege available to "persons." *Hale v. Henkel's* artificial separation of associations from their agents still confuses decisions in self-incrimination cases, but seems consistent with the trend towards "entity."

The truth is that some influential non-profit associations long have vigorously fought attempts to give clear legal form and substance to unincorporated associations. They like "having it both ways." It is very convenient to be able to be sometimes a legal entity and sometimes not, sometimes a partnership and sometimes not—very convenient for the association (or its managers), not so convenient for creditors, regulatory agencies, injured members, or others affected by the will-o-the-wisp nature of the association.

Straightforward legislative attempts to force associations to settle into some specific form (e.g., corporate entity) have been futile. Thus a Colorado statute requiring labor unions to incorporate was held to be unconstitutional as an unlawful invasion of "freedom of speech" and of "freedom of assembly."⁴ This contrasts strangely with the common requirement that a national bank, for example, must be a "body corporate," as must other banks, insurance "companies," or public utilities.⁵

A very recent appellate decision in Ohio, not yet reported at the time of the writing of this note, has cast a beacon of light through the legal fog called "the non-profit unincorporated association." This was the case of *Miazga v. International Union of Operating Engineers, A.F.L.-C.I.O., Local 18*.⁶ Chief Justice Lee E. Skeel, who wrote the opinion, is the same jurist who settled the problem of advertised product liability with a razor sharp decision not long ago.⁷

In the *Miazga* case, the plaintiff and other members sued the union (a non-profit unincorporated association) for damages for defamation. The defense was the usual demurrer, based on the usual argument that a member of an unincorporated association is a co-principal in a joint enterprise, and thus in effect sues himself if he sues the association. The defense cited a long line of cases so holding.

Judge Skeel pointed out that, since 1955, Ohio's statutes

⁴ American Federation of Labor v. Reilly, 113 Colo. 90, 155 P. 2d 145, 160 A. L. R. 873 (1944).

⁵ See, 1 Oleck, Modern Corporation Law, sec. 26 (1958), citing typical statutes and cases.

⁶ 196 N. E. 2d 324 (Ohio Ct. of Appeals, 8th Dist., #26670, Opinion Feb. 14, 1964); Skeel writing the opinion; Silbert & Corrigan concurring.

⁷ Rogers v. Toni Home Permanent Co., decided by Ohio Ct. Appeals, 8th Dist., and aff'd. in 167 Ohio St. 244, 147 N. E. 2d 612 (1958); see, Skeel, Product Warranty Liability, 6 Clev-Mar. L. R. 94 (1957); Holdridge, Advertised Product Liability, 8 Clev-Mar. L. R. 14, 40 (1959).

have provided that an unincorporated association may contract or sue or be sued "as an entity" under its own name.⁸ Such provisions now are found in many states.⁹

Ohio's statute seemingly permits execution only against the assets of the association but has been interpreted otherwise,¹⁰ while some statutes expressly permit execution also against assets of members in some situations.¹¹

Judge Skeel then referred to the common law origin of the theory of non-liability in the law of partnership.¹² He said that, while this may be reasonable for small unincorporated associations, it is "completely outmoded" for a labor union consisting of thousands of members.¹³

He then ruled that "such an association . . . should be like any other corporate entity, held legally responsible as an association in a proper case for injuries inflicted by its wrongful acts not only to members of the public but to its members as well." He pointed out that the use of the legal fiction of legal entity of an organization has been, and still is, determined by the courts rather than by legislative action, and that there is no statutory provision to this effect even as to corporations in Ohio or in most states.¹⁴ Judicial control of the actions of private associations fills what otherwise would be a vacuum in the law.¹⁵

So we have, at long last, in the *Miazga* decision, a clear and direct judicial statement that a non-profit unincorporated asso-

⁸ Ohio Rev. Code, Sec. 1745.01; Calif. Code Civ. Prac., Sec. 388; and see Oleck, Non-Profit Corps. & Assns., sec. 20 (1956).

⁹ See, N. J. Stat. Anno., tit. 2A, c. 64; N. Y. C. P. L. & R., Sec. 1025; Okla. Stat. Anno., tit. 12, Sec. 182.

¹⁰ Ohio Rev. Code, Sec. 1745.02 speaks only of execution against association assets, but a recent case held that the statutory right to sue the "entity" is one in addition to the right to hold the members of an unincorporated association (American Legion Post) personally liable: *Lyons v. American Legion Post No. 650 Realty Co.*, 175 N. E. 2d 733 (Ohio 1961).

¹¹ See statutes cited *supra*, n. 9. As to the federal view, that an association is an entity for suit (venue, jurisdiction) purposes, but that tort liability applies only to members generally, see, *Sperry Products v. Assn. of Amer. RR.*, 132 F. 2d 408 (2d Cir. 1942), cert. den. 63 S. Ct. 1031 (1942).

¹² See, *DeVillars v. Hessler*, 363 Pa. 498, 70 A. 2d 333, 14 A. L. R. 2d 470 (1950); Anno., 14 A. L. R. 2d 473 (1950).

¹³ See, *Crane, Liability of Unincorporated Association for Tortious Injury to a Member*, 16 Vand. L. R. 319 (1963), citing *Marshall v. International Longshoremen's & W. Union*, 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P. 2d 987 (1962); and see *Inglis v. Operating Engrs. Local Union No. 12*, 18 Cal. Rptr. 187 (1962); affd. 23 Cal. Rptr. 403, 373 P. 2d 467 (1963).

¹⁴ Citing, 1 Oleck, *Modern Corporation Law*, c. 1, 2 (1958).

¹⁵ See, Note, *Development in the Law: Judicial Control of Actions of Private Associations*, 76 Harv. L. R. 983 (1963).

ciation is a legal entity, at least in the case of a fairly large organization.

Prior efforts to solve the problem have employed various devices to fasten liability on unincorporated associations, such as the concept of conspiracy.¹⁶ Some courts have held a union to be not liable for injury done by a member,¹⁷ while others have held it to be liable.¹⁸ Under federal labor law, unions are considered to be legal entities; under bankruptcy law a non-profit association may go into voluntary bankruptcy as an entity.¹⁹

Many states have applied to non-profit associations the *co-principal doctrine*, which treats them as partnerships, imputing negligence from one member to another, including the injured member himself.²⁰ There is some logical basis for this only in the case of a small organization, not in the case of a large one.²¹ A large group (Temple of the Mystic Shrine) was held to be liable for an injury to a member not long ago.²² In labor union cases the doctrine has been invoked frequently in recent years.²³

As to unions, the tendency has been to hold them liable for intentional acts.²⁴ So, too, if a union owes a duty of representa-

¹⁶ Wallick v. International Union of Elec., R. & M. W., 90 Ohio L. Abs. 584; 36 Ohio Bar (17) 584 (1963). Compare, Meriwether v. Atkin, 137 Mo. App. 32, 119 S. W. 36 (1909) which held an association not to be bound though its members who acted might be; American Art Works v. Republican State Committee, 177 Okla. 420, 60 P. 2d 786 (1936) political committee members not liable; Magness v. Chicora Chapter, 193 So. Car. 205, 8 S. E. 2d 344 (1940) members held liable; Mitterhausen v. South Wisconsin Conference Assn., 245 Wis. 353, 14 N. W. 2d 19 (1944) trustee-members held liable; Note, Liability of Members and Officers of Non-Profit Associations for Contracts and Torts, 42 Calif. L. R. 812 (1954).

¹⁷ Benoit v. Amalgamated Local 229 U. E. R. M. W., 188 A. 2d 499 (Conn. 1963).

¹⁸ United Brotherhood of Carpenters & J. of Amer. v. Humphreys, 127 S. E. 2d 98 (Va. 1962).

¹⁹ See, Oleck, Non-Profit Corps. & Assns., sec. 20 (1956). Associations can be taxed as corporations: see, Sarner, article, 20 N. Y. U. Inst. Fed. Tax. 609 (1962). And see, *supra*, n. 3, 9, 11.

²⁰ Anno., 14 A. L. R. 2d 473 (1950); DeVillars v. Hessler, 363 Pa. 498, 70 A. 2d 333 (1950).

²¹ Crane, article, *supra*, n. 13. But in a small group (e.g., a 3 or 5 man partnership) the individual members deny association (partnership) status too, when that is inconvenient; as in refusal of workmen's compensation coverage to an injured employee of a partnership of farmers, in, Campos v. Jomoi, 122 N. W. 2d 473 (Neb. 1963).

²² Thomas v. Dunne, 131 Colo. 20, 279 P. 2d 427 (1955).

²³ Crane, article, *supra*, n. 13; Marchitto v. Central R. Co. of N. J., 9 N. J. 456, 88 A. 2d 851 (1952).

²⁴ International Assn. of Machinists v. Gonzales, 78 S. Ct. 923, 256 U. S. 617, 2 L. Ed. 2d 1018 (1958); Morton v. Local 20, Teamsters, Chauffeurs, & Helpers Union, 200 F. Supp. 653 (D. C. Ohio, 1962) awarded punitive damages.

tion to a member;²⁵ but not if a matter of business judgment is involved.²⁶

All this backing and filling has been of small help to anyone but the professional managers of unincorporated non-profit associations. Beyond question, labor unions have been the chief beneficiaries of this legal uncertainty—more specifically, professional labor union managers. In essence, they have claimed the benefits of unincorporated (partnership) form while operating organizations larger than most corporations, and denied the liabilities appropriate to large organizations which are more truly “management controlled” than are most large corporations.

The writer of this note does not view a “professionally operated” organization as entitled to the same tolerance that one gives to small groups of amateurs who try to carry on charitable or social or educational work *pro bono publico*.

Such views are not anti-labor. The same views would apply to abuse by business corporation management or any other holders of power. Power is respectable only if combined with responsibility.

The *Miazga* case, and its conclusion that at least the larger unincorporated non-profit associations shall be treated as legal entities, is wise and sound. This view will require clarification of the status of officers, trustees and members, *vis-a-vis* each other and *vis-a-vis* third persons. The constitutional problem of privilege of an association against self-incrimination is a good example of the problems involved even as to incorporated associations.²⁷ It is now to be settled whether or not corporate norms or some other standards shall be applied to internal and external relations of unincorporated non-profit associations. But at least the deliberate abuse, by powerful organizations and their managers, of a legal concept meant only for small, amateur-operated clubs now should be ended.

²⁵ *Fray v. Amalgamated Meat Cutters, etc.*, 9 Wis. 2d 631, 101 N. W. 2d 782 (1960). But no duty was required in *Marshall v. International Longshoremen's & W. Union, Local 6*, 57 Cal. 2d 781, 22 Cal. Rptr. 211, 371 P. 2d 987 (1962).

²⁶ *Finnegan v. Penna. R. Co.*, 76 N. J. Super. 71, 183 A. 2d 779 (1962); but see (no special duty involved) *Marshall* case, *supra*, n. 25.

²⁷ See comments, *supra*, n. 3.