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SUIT BY OR AGAINST A PARTNERSHIP OR OTHER UNINCORPORATED ASSOCIATION IN ITS COMMON NAME*

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INTRODUCTION

A common name is one that is used by two or more persons for the conduct of their mutual affairs. Although there are some significant exceptions, the general rule in California is that a suit may not be brought by a partnership or other unincorporated association in its common name; all of the persons who conduct their mutual affairs under the common name must be named individually as parties. However, Code of Civil Procedure Section 388 permits such an association to be sued in its common name under certain circumstances.

This study is divided into three parts. The first part discusses what types of organizations are included within the term "unincorporated association" and includes a recommended definition of this term. The second part examines the problems that arise under existing law when an unincorporated association is sued in its common name. This part includes recommendations for changes in existing law to deal with some of these problems. The third part considers the advantages and disadvantages that would result from permitting an unincorporated association to sue in its common name and concludes that suit by such an association in its common name should be permitted. This part includes recommendations for statutory provisions designed to meet the problems that would arise if suit by such an association in its common name were permitted.

MEANING OF THE TERM "UNINCORPORATED ASSOCIATION"

It has been suggested that unincorporated associations can be classified into two types:

> (1) Those which are partnerships and to which the Uniform Partnership Act applies and controls. The requirements of CAL. CORP. CODE §§ 15006, 15007 must be fulfilled. The question whether parties have created a partnership is ordinarily one for determination by the trial court, from facts advanced and inferences to be drawn therefrom. Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138 (1935).
>
> (2) Those which are not treated as partnerships for any purposes and to which agency law applies in all respects. The nonprofit unincorporated association is a prime example, but this class would also include the common law joint stock company and the Massachusetts business trust, each of which are nonpartnership associations. See In Re Agriculturist Cattle Insurance Co., L.R. 5 Ch. App. Cas. 725 (1870)(common law joint stock company); State Street Trust Co. v. Hall, 311 Mass. 299, 41 N.E.2d 30, 156 A.L.R. 13 (1942)(Massachusetts trust).[1]

In California, Section 388 of the Code of Civil Procedure provides that 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." Although Section 388 might be construed to apply only to partnerships and other forms of unincorporated business associations engaged in activity for the pecuniary profit of its members, the section has not been given this restrictive interpretation. The section applies equally to persons associated together in a nonprofit association, organized for charitable or other purposes, who transact any business within the objects of the association.[2]

Section 388 does not use the term "unincorporated association" in describing the type of organizations that may be sued in common name. A few other states have statutes that are substantially the same as California.[3] The great majority of the common name statutes, however, apply by their terms to "unincorporated associations."[4]

A few of the common name statutes that apply to "unincorporated associations" specifically exclude partnerships from the coverage of the statute,[5] probably because a separate statute governs suits by and against partnerships.[6] However, the California statute applies to partnerships[7] and no reason is apparent why there should be two separate suit in common name statutes, one applying to unincorporated associations generally and the other applying only to partnerships.

A few of the common name statutes use the word "voluntary" in connection with the term "association."[8] A "voluntary organization" is one in which one may seek, or be accepted into, membership as a matter of choice.[9] This limitation on the scope of a common name statute is not recommended; the addition of "voluntary" might, for example, exclude a labor union having a "union shop" or "closed shop" contract from the coverage of the statute. Moreover, in view of the protection that can be afforded individual members of unincorporated associations from having to pay personally a liability of the association,[10] there is no necessity to limit the coverage of a common name statute to "voluntary" associations.

The common name statutes in the various states are not uniform. A substantial number use "unincorporated association" or a similar phrase without further definition to prescribe the scope of the coverage of the statute.[11] Some of the statutes contain a more detailed description of the types of organizations covered by the statute. The following are illustrative of the definitional type of statute:

> MINN. STAT. § 540.151 -- "two or more persons [who] associate or act, whether for profit or not, under the common name, including associating and acting as a labor organization or employer organization, whether such common name comprises the names of such persons or not."

NEB. REV. STAT. § 25-313 -- "any company or association of persons formed for the purpose of (1) carrying on any trade or business, (2) holding any species of property in this state, or (3) representing employees in collective bargaining with employers, and not incorporated."

PA. RULES CIV. PROC., Rule 2151 -- "any unincorporated association conducting any business or engaging in any activity of any nature whether for profit or otherwise under a common name," excluding "an incorporated association, general partnership, limited partnership, registered partnership, partnership association, joint stock company or similar association."

It is suggested that a definition of the term "unincorporated association" would be desirable. The definition would provide a clear indication of the types of organizations included within the scope of the common name statute and would eliminate unnecessary repetition in the various provisions of the statute. Such a definition would be available for use both in a statute providing for suit against an unincorporated association in its common name and in a statute providing for suit by such an association in its common name.

The definition should be broad enough to include all types of unincorporated organizations. If a particular provision of the common name statute should not apply to specific types of unincorporated organizations, limiting language can be inserted in that provision.

The following definition is recommended:

> "Unincorporated association" means any unincorporated organization engaging in any activity of any nature, whether for profit or not, under a common name, and includes, by way of illustration but not by way of limitation, a joint stock company, labor union, partnership, church, fraternal order, or club unless such organization is incorporated.

UNINCORPORATED ASSOCIATIONS AS DEFENDANTS

The Existing Statutory Scheme

At common law, suit against a partnership or other unincorporated association in its common name was not permitted; all of the individual members comprising the association had to be named as parties defendant.[1] This rule has been changed in California by Code of Civil Procedure Section 388 which permits an action to be brought against an unincorporated association in its common name.

Section 388, which was enacted as part of the 1872 Code of Civil Procedure, provides:

> 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 suit brought under Section 388 is one against the association and is not one brought against the associates in their individual capacities.[2] Thus, for example, an action against a partnership under Section 388 must be brought against the partnership itself in its firm name;[3] the firm must be specifically designated as a party defendant.[4] If the individual partners are named as parties defendant and only inferentially described as doing business under a designated firm name, the partnership itself is not a party defendant under the statute;[5] hence, a purported answer filed on behalf of the partnership in its firm name is improper since it is equivalent to a pleading entered by a stranger to the action.[6] By the same token, a judgment entered in such a case may not run against the firm itself.[7] Conversely,

when a suit is filed against the partnership itself in its firm name, the action is one against the firm only and not the members thereof individually. Accordingly, individual partners are precluded from interposing a defense to such an action in their own right because they are considered to be strangers to the action.[8] However, when an unincorporated association is sued in its common name under Section 388, nothing in the section precludes the joinder of individual members of the association as additional defendants.

Section 388 does not affect the rules of substantive liability;[8a] the plaintiff who sues an unincorporated association under Section 388 must establish the liability of the association under the applicable rules of substantive law.[9] While the law is not entirely clear, it appears that an unincorporated association is probably liable for its negligent or wrongful acts or omissions and for the negligent or wrongful acts or omissions of its officers, agents, or employees.[10]

If the plaintiff obtains a judgment against the unincorporated association, Section 388 provides that he can satisfy his judgment by execution against the joint assets of the association and the individual assets of the associates who were served in the action against the association. It has been held that Section 388 requires only that the associate be served in order that the judgment may be satisfied by execution against his individual assets; it does not require that he be made an additional defendant in the action against the association.[11] However, a 1959 amendment to Code of Civil Procedure Section 410 requires that when service is to be made against associates doing business in a common name, the copy of the summons must contain a notice stating that the associate is served on behalf of the association. If the associate also is being served as an individual, the notice must make clear that he is being served in both capacities. Thus, it is unclear whether mere service pursuant to Section 388 will suffice to bind the personal assets of the associate without making him a defendant to the action.[11a]

Analysis and Recommendations

Permitting suit in common name against unincorporated associations

Section 388 made a desirable change in the common law rule that did not permit suit to be brought against an unincorporated association in its common

name. The desirability of this change is so generally recognized that extended discussion is not necessary. The change eliminates need for an extended caption to name the individual members that constitute the association. Moreover, it permits the plaintiff to avoid the time and expense that would be required to determine each and every member of the association. Consider the injustice that would result if persons injured by a powerful unincorporated association were required to bring suit against 450,000 members as individuals.[12] To avoid this result, the common law rule has been changed not only in California[13] but also in the federal courts and in a substantial number of states.[14] Suit in common name also is permitted in England.[15]

The effect of Section 388 is to save the plaintiff a good deal of inconvenience, time, and expense without affecting the substantive rights of the members of the association. Although the enactment of Section 388 made a substantial improvement in the law, additional substantive and procedural changes in the law relating to suit against unincorporated associations in common name are needed. These are discussed below.

The "transacting business" requirement

Existing law. Section 388 is not an unqualified exception to the general common law rule that precludes suit against unincorporated associations, nor is there any statutory exception that is broader than Section 388. By its terms, Section 388 is limited to suit against "two or more persons, associated in any business, [who] transact such business under a common name whether it comprises the names of such persons or not." [Emphasis added.]

Obviously, if an unincorporated association is in business for the purpose of realizing a profit, it will be "transacting business" within the meaning of Section 388. However, the association need not be in business for profit; it may be merely philanthropic or charitable and still be subject to suit under Section 388.[16] "Transacting business" is construed so broadly that apparently all that is necessary is that the acts on which the plaintiff's claim of liability is based be acts intended to effectuate a specific object of the association.[17]

In Camm v. Justice's Court,[18] the "Sonoma County Good Roads Club,"--an association "engaged in instilling, promoting, furthering, and advancing the interests of the public of the state of California in repairing, maintaining, and improving the streets, roads, and byways of and in the County of Sonoma"--was held to be "transacting business" so as to be subject to suit under Section 388. The club defended on the ground that it was a "nontrading, unincorporated association". The district court of appeal said:

> [N]or is it important whether it was a voluntary association and not organized and conducted for pecuniary profit to its projectors or members. [Citation omitted.] By this we mean to say that section 388 has reference to an association of two or more persons who thus band together for the purpose of transacting as a single body any kind of business, whether for profit to themselves or for charitable or philanthropic purposes, and that, where persons so associated, to effectuate the specific objects of their association and for the benefit thereof, create liabilities against themselves as such associates, such persons, as such associates, may be proceeded against by their common name in any action to enforce the liabilities so created.[19]

In Herald v. Glendale Lodge,[20] it was held that an Elks Lodge could be sued in its common name under Section 388. The plaintiff was trying to enjoin the selling of liquor in the club in violation of a city ordinance. The court stated that it made no difference whether a service was being provided to the members of the club or to outsiders as far as determining

whether the club was "transacting business" for the purpose of Section 388. The district court of appeal stated by way of dictum:

> If the word "business" in this connection, means an actual commercial business, carried on for profit, the defendant here cannot qualify. As alleged in the complaint its purposes are purely social and benevolent. . . . It clearly is not a business concern, in any mercantile or commercial sense. On the other hand, if the word is used with the more general and very common meaning of any occupation, employment, or interest in which persons may engage, it would include this defendant. . . . We see no reason for restricting section 388 of the Code of Civil Procedure to associations formed for commercial business. . . . When a number of persons are associated under a common name in an undertaking in which the associates incur obligations for which they are legally liable, why should they not be sued in the common name which they have adopted, whether it is a money-making concern or otherwise? . . . Why should a different rule of liability exist because the associates happen to contract their liabilities in an enterprise in which they are catering to themselves? The word "business" in its broad sense, embraces everything about which one can be employed . . .[21]

The reasoning of these two cases was adopted by the California Supreme Court in Jardine v. Superior Court[22] which held the Los Angeles Stock Exchange to be "transacting business" so that it could be sued in its common name. Two recent California cases have upheld suit in common name against a labor union.[22a]

Recommendation: The "transacting business" requirement should be eliminated.

An analysis of the reasoning of the three cases discussed above indicates that any acts in furtherance of the objectives or purposes of an association probably will constitute "transacting business" so as to subject the association to suit in its common name for any liabilities arising out of such acts. Therefore, the requirement that an association be "transacting business" is no longer a significant limitation. However, to the extent that this requirement limits the right to bring an action against an

unincorporated association, it is an undesirable limitation. If the liability arises out of an associational activity, the plaintiff should have a right to bring his action against the association in its common name and a technical objection that the association is not "transacting business" should not be permitted to defeat the action. In this connection, it should be noted that the pertinent provision governing suits to enforce substantive federal rights against unincorporated associations has no "transacting business" requirement.[23] In addition, many of the common name statutes in other states have no "transacting business" requirement.[24]

The definition of "unincorporated association," previously recommended,[25] would include all unincorporated associations, not just those engaged in transacting business. Since the "transacting business" requirement is an undesirable limitation on the right to bring an action against an unincorporated association, the broad definition of "unincorporated association" should be used in the statute governing the right to bring suit in common name against an unincorporated association.

The following statutory language is recommended to effectuate this recommendation:

> An unincorporated association may [sue and] be sued in its common name.

The desirability of inserting the words in brackets is discussed in part 3 of this study.

Substantive liability of unincorporated associations

Existing law. An incorporated association is liable on its contracts and for its own negligent or wrongful acts or omissions and for the negligent or wrongful acts or omissions of its officers, agents, or employees committed while they are acting in the scope of their employment.[26] But an unincorporated association was not liable on this basis at common law since it was not recognized as a legal entity.[27] The assets of an unincorporated association are regarded as those of the membership in common, and under the common law rule could be reached only to satisfy a personal liability of all of the members of the association.[28]

Since the common law required that each member of an unincorporated association be personally liable before the plaintiff could reach the association's assets, the rules that determined the liability of members of various types of unincorporated associations were decisive in determining the liability of the association. The development of these rules has been described as follows:

> Because the actual wrongdoers often are without funds, persons injured have frequently sued some or all of the members. As late as one hundred years ago such actions had a fair chance of success since until then clubs and other unincorporated associations were treated very much like partnerships. Each member was considered a general agent of the others, and all were chargeable with harm caused by a member in the course of association business. By the end of the nineteenth century, however, many jurisdictions had drawn a sharp line between partnerships and nonprofit associations, and held association members liable only if they had actually authorized, ratified, or participated in the act. Moreover, authorization normally was not inferred from mere membership; a good measure of authority might have been drawn from the association's rules or its purposes, but, with some exceptions in early union cases, courts were very hesitant to bind members on that basis alone. . . . Practice was sometimes more liberal than theory, however, and as associations grew larger, made more contracts, and caused greater injury, the desire to find authority or ratification also increased.

[See Lawlor v. Loewe, 235 U.S. 522 (1915); Security-First National Bank v. Cooper, 62 Cal. App. 2d 653, 145 P.2d 722 (Dist. Ct. App. 1943).] But this very growth in size made membership control unrealistic and membership liability seem unfair; courts expanding the liability of the members sometimes found themselves overruled by statute. [Compare 47 Stat. 71 (1932), as amended, 29 U.S.C. § 106 (1958), and CAL. CORP. CODE §§ 21100-03, with cases cited supra.][29]

Tort Liability

There is little California law on the liability of an unincorporated association for injuries resulting from its tort or the tort of its officer, agent, or employee. The general rule elsewhere now apparently is that such associations are liable to persons (other than members) to the same extent as legal entities:

> With respect to their torts, unincorporated associations or clubs are under the same duties and liabilities as any other group of individuals, whether corporate or noncorporate, and the general rule is that an unincorporated association is liable for a tort committed by its agents or servants in the course of their service or employment. Organizations called into being by the voluntary action of the individuals forming them for their own advantage, convenience, or pleasure, being but aggregations of natural persons associated together by their free consent for the better accomplishment of their purposes, are bound to the same care, in the use of their property and the conduct of their affairs, to avoid injury to others, as are natural persons, and a disregard of neglect of this duty involves a like liability. Under this rule, unincorporated associations and societies are responsible for injuries sustained by reason of their failure to use ordinary care in the erection or maintenance of buildings, structures, or premises fit for the purposes of their organization. A club, committee, or other organization, and the actively participating members, which organizes or promotes a free public entertainment or celebration, may be charged with liability for damages for personal injuries to spectators caused by negligence in conducting or managing such celebration or entertainment. . . . An unincorporated association may be held liable in an action for wrongful death, or may be liable for personal injury to the wife of one of its members.[30]

A distinction must be made between an action by a third person for injury caused by the activities of an unincorporated association and an action by a member against the association:

> The general rule deducible from the cases which have passed on the question is that the members of an unincorporated association are engaged in a joint enterprise, and the negligence or fault of each member in the prosecution of that enterprise is imputable to each and every other member, so that the member who has suffered damages to his person, property, or reputation through the tortious conduct of another member of the association may not recover from the association for such damage, although he may recover individually from the member actually guilty of the tort.[31]

Although no California decision has been found which imposes tort liability on an entity theory in a case where a third person brings an action against the association, California has been a leader in imposing liability on the common funds of an unincorporated association on an entity theory for an injury negligently or intentionally inflicted on a member of the association. In Marshall v. International Longshoremen's & Warehousemen's Union,[32] the California Supreme Court held that a labor union is to be treated as an entity for the purpose of determining liability. In this case, a member of the union sued the union for injuries resulting from negligent maintenance of the union parking lot. The court held "It is our conclusion that a member of a labor union is entitled to sue the union for negligent acts which he neither participated in nor authorized, and that any judgment he may recover against the union can be satisfied from the funds and property of the union alone."[33]

In Inglis v. Operating Engineers Local Union No. 12,[34] the California Supreme Court applied the same rule to intentional torts. The court held that a member of a labor union could recover against the union for an intentional tort committed on him by members and officers of the union during the course of a union meeting.

The California Supreme Court has not had occasion to determine whether the entity theory should be applied to actions brought by members of other types of unincorporated associations. In the Marshall case, the court said: "We limit our holding to labor unions only, leaving to future development the rules to be applied in the case of other types of unincorporated associations."[35] However, the reasoning in the Marshall case would seem to call for the application of the entity theory of liability in case of other unincorporated associations that are not partnerships. In Marshall, the court noted that the rules governing the liability of unincorporated nonprofit associations for injuries to members have been arrived at by applying the rules of law developed in the field of business partnerships and stated:

> Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all the other partners in the transaction of partnership business, and the agents of the partnership acting as agents for all of the partners. When these concepts are transferred bodily to other forms of voluntary associations such as fraternal organizations, clubs and labor unions, which act normally through elected officers and in which the individual members have little or no authority in the day-to-day operations of the association's affairs, reality is apt to be sacrificed to theoretical formalism. The courts, in recognition of this fact, have from case to case gradually evolved new theories in approaching the problems of such associations, and there is now a respectable body of judicial decision, especially in the field of labor-union law, with which we are here directly concerned, which recognizes the existence of unincorporated labor unions as separate entities for a variety of purposes, and which recognizes as well that the individual members of such unions are not in any true sense principals of the officers of the union or of its agents and employees so as to be bound personally by their acts under the strict application of the doctrine of respondeat superior.[36]

Various writers have suggested that the California Supreme Court should and probably will extend the rule of the Marshall case to other types of unincorporated associations, but probably not to partnerships. One writer states:

> Similarly, Marshall might be extended to apply to other unincorporated associations. The court indicated that, if an unincorporated association acts through elected officers, leaving no management control to its individual members, the application

> of partnership law to govern the relationship between them is apt to lack realism. These criteria might exclude some fraternal orders that break down into small, voluntary units in which each member does have some voice in the management of the organization's affairs. Nevertheless, Marshall does state that the other nonunion unincorporated associations may be accorded entity status--"leaving to future development the rules to be applied in the case of nonunion unincorporated associations." At the least, it seems that such organizations would be held liable for torts against their members. At the most, such associations might be treated as entities whenever partnership law would fail to yield an equitable result.
>
> It appears that the court in Marshall has reached an equitable result. It erased the vestige of common law that resulted in union immunity from tort suits by its members. It allowed the injured member to pursue his only effective remedy. It also pointed the way to the abrogation of similar immunity in other unincorporated associations. In doing so the court has met its responsibility of replacing the outmoded doctrine with its only fair alternative--one that recognizes and applies the characteristics of a modern labor union in establishing the relationship between the organization and its membership.[37]

The basic hurdle to be overcome in imposing liability on unincorporated nonprofit associations for tortious injuries to persons other than members is that the common law did not recognize such associations as separate entities and limited associational liability to cases where the liability of each and every member of the association was established. Although no California cases have used an entity theory to hold an unincorporated association liable for a tortious injury to a third person who is not a member of the association, it seems likely that the California Supreme Court would treat the association as a separate entity in such a case. In the Marshall case, the court showed a willingness to recognize an unincorporated association as a separate entity for tort liability purposes. Moreover, the California Supreme Court has shown no reluctance to change common law rules which provided immunity that could not be justified under modern conditions. For example, common law rules of sovereign immunity[38] and charitable immunity[39] have been changed. So, too, has the common law rule which prevented a married person from bringing

an action for personal injury against his spouse.[40] Hence, although no case in point has been found, it seems safe to predict that the rule in California will be that an unincorporated association is to be treated like a legal entity for the purposes of tort liability to persons other than members.

Contract Liability

With respect to contract liability, California appears to be in accord with the general rule in the United States[41] that an unincorporated association cannot make a contract unless by statute it is directly or indirectly authorized to do so or is made a legal entity for this purpose.[42] A contract entered into on behalf of the association without such authorization is merely the contract of the individual associates who authorized or ratified it.[43]

There are a number of California statutes which authorize unincorporated associations to make contracts. For example, fraternal benefit societies can enter into benefit contracts with their members which will be payable only out of the funds of the society.[44] Collective bargaining agreements are enforceable at law or equity.[45] Corporations Code Section 21200[46] grants certain powers respecting real estate and other property to unincorporated benevolent or fraternal organizations and labor unions which would seem necessarily to include the power to enter into contracts necessary to effectuate these powers. In addition, Sections 21100-21102 of the Corporations Code provide that a member of an unincorporated association is not liable on certain real estate obligations unless he has assumed the obligation in writing.[47] The necessary implication of this provision would be that the association can make such contracts and will be liable as an entity on them.

Recommendation: An unincorporated association should be treated as an entity not only for the purpose of bringing an action against it in its common name, but also for the purpose of determining the liability of the association. Specifically, the plaintiff should be able to obtain a judgment enforceable against the joint assets of the association merely by proving facts that would result in liability if the association were considered as a legal entity, i.e., by proving a negligent or wrongful act or omission of the association or of its officer, agent, or employee acting within the scope of his agency, office, or employment or by proving that a contract was entered into by the association which would have resulted in liability if the association were a legal entity.

The following statutory language is suggested to effectuate this recommendation:

> Section ____. An unincorporated association is liable for its negligent or wrongful act or omission, and for the negligent or wrongful act or omission of 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 legal entity. Nothing in this section affects the liability between partners or the liability between a partnership and the partners therein.
>
> Section ____. An unincorporated association is liable on any contract executed in the name of and on behalf of the association by a person authorized by the association to do so.

The proposed statutory provisions treat an unincorporated association as a kind of legal entity for the purpose of imposing liability based on contract or tort to the extent of the joint assets of the association. It is possible that when Section 388 was adopted it was intended to have this effect, but it has not been given this construction by the California courts.

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Until recently the common law rules denying associational liability retained considerable vitality, but a growing number of courts have altered

the common law rules to allow recovery from the association's funds by an injured person. The reasons have been stated as follows:

> The endurance of the common law rules seems due partly to judicial inertia but also to several difficulties inherent in change. First, there may be some feeling that a recasting of group liability is properly the task of the legislatures; this attitude held sway in association cases with respect to the related problem of procedural reform. Second, a conscientious judge is faced with analytic difficulties in attempting to create new theories which will adequately explain access to the common funds without personal liability of the members, embrace large and small associations, and suggest standards for imposing liability. Nevertheless, the proliferation of large private associations makes desirable a concept of group liability which is primarily limited to the common fund. The common law concept of personal liability or no liability at all has too often meant the latter, a result out of harmony with the accepted policies which sustain liability under respondeat superior: the policy of suppressing undesirable behavior by encouraging the selection of responsible officers and agents and the creation of other safeguards, and the policy of transferring the impact of the harm from the individual to the enterprise likely to bear it more easily as a cost of operations. Conversely, extension of recovery beyond the group funds by holding members personally liable is usually undesirable since the members often lack the knowledge and individual control which make justifiable the imposition of personal responsibility for the acts of others; nor will membership liability normally be necessary to compensate the harm.[48]

One writer has analyzed the effect of treating an unincorporated association like a legal entity as follows:

> The association is considered much like a corporation, with property, agents, and liability quite distinct from that of the membership. This approach has the immediate merit of conforming theory both to the actual behavior of many courts and to the usual conception of large associations. In addition, the corporate analogy provides a rich store of examples and criteria for determining substantive liability and procedural matters as well. However, some difficulties are posed by extension of the entity theory to other organizations. Particularly with smaller associations, which are unlikely to possess substantial assets of their own, personal liability of the individual members will continue to be desirable and sometimes proper. Courts will then face the task of coordinating two distinct systems of liability--one to reach group property and the other, with standards less conducive to recovery, to impose liability on the members.[48a]

The recommended statutory provisions merely make unincorporated associations legal entities for the purpose of tort and contract liability; they have no effect on the liability of the individual members of the association.[49]

The recommended statutory provisions will not make any great change in existing law. Labor unions already are treated as legal entities by the courts for tort liability purposes[50] and collective bargaining agreements are enforceable at law or equity.[51] Partnerships are now treated, in substance, as entities; a judgment enforceable against the joint assets of a partnership may be obtained merely upon proof of the negligent or wrongful act or omission of one partner acting within the scope of the partnership business.[52] Hence, the recommended statutory provisions merely extend to other unincorporated nonprofit associations the treatment already afforded partnerships and labor unions. The recognition of labor unions as legal entities in Daniels v. Sanitarium Ass'n, Inc.,[53] and in Marshall v. International Longshoremen's & Warehousemen's Union[54] and the reasoning in those cases appears to justify a prediction that the recommended statutory provisions --insofar as they relate to tort liability--merely state rules that will eventually be stated by the California Supreme Court if and when the appropriate cases are presented. So far as contract liability is concerned, it is apparent that to a considerable extent unincorporated associations now have express or implied authority to make many kinds of contracts;[55] thus, the recommended statutory provisions merely will make clear that all types of unincorporated associations--not just partnerships and labor unions--can make contracts and can be held liable for breaching them.

The recommended statutory provisions apply to all cases involving the liability of a partnership or other unincorporated association to a person who is not a member of the association. The provisions also apply to an action by a member of an unincorporated nonprofit association against the association. However, the provisions do not change the existing law relating to a suit by a partner against the partnership or to suits by one partner against another. One reason for leaving the development of the law in this area to the courts is that the relationship between partners is such that they each control the business and are co-principals. Hence, the doctrine of imputed contributory negligence may be justified in partnership cases. In fact, the California Supreme Court in the Marshall case stated:

> The concepts herein discussed [coprincipals and imputed contributory negligence] are proper enough when applied to business partnerships for which they were originally developed. 56

Permitting a plaintiff to recover from the joint assets of an unincorporated association on the basis of treating the association as a legal entity will tend to discourage plaintiffs from seeking to recover from the individual members of an association for injury or damage based on contract or tort. This will tend to distribute the financial risks involved in joining an association among the members. At the same time, the recommended provisions will make it easier for the plaintiff to reach the joint assets of the association to satisfy contractual or tort liability.

Since treating unincorporated associations as entities for liability purposes is fairer to plaintiffs and associates alike and is more in harmony with business realities than the rule requiring the plaintiff to establish the personal liability of each member of the association, there appears to be no reason why frank legislative recognition should not be given to the entity nature of unincorporated associations. The only obstacle to reform

in this area of the law is the common law concept that an unincorporated association is not a legal entity. The California Supreme Court in the Marshall case overcame this obstacle and held that a labor union is a legal entity for liability purposes, commenting:

> Justice Cardozo once remarked: "A fruitful parent of injustice is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic." [57]

Substantive liability of members of unincorporated associations

Existing law. A distinction must be made between the rules that determine the liability of partners and the rules that determine the liability of members of unincorporated nonprofit associations.

Each partner is the agent for all the other partners when he transacts business on behalf of the partnership in the manner in which such business usually is transacted, and his acts bind all the partners.[58] Thus, each partner is individually liable to the injured person for the tortious act of a partner in carrying out the partnership business. And each partner is liable for debts contracted in the name of the partnership by other partners.[59] If an unincorporated association is organized for profit, the cases seem to support the proposition that the members will be treated as partners for liability purposes.[60]

The liability of members of an unincorporated nonprofit association is determined by agency law rather than partnership law.[61] As a result, the acts of one associate do not bind the other associates. To establish the liability of an associate, it is necessary to prove that he participated in the act in question, authorized it, or subsequently ratified it. The member's authorization or subsequent ratification may be either express or implied. Affirmatively voting for an action or merely accepting the benefits

of the action may be enough to enable the court or jury to find the requisite consent or ratification.[62]

There is apparently only one California case dealing with the liability of the members of an unincorporated nonprofit association. In Security-First National Bank v. Cooper,[63] a bank was attempting to recover moneys owing to it from the Santa Monica Elks Lodge, an unincorporated association which had become incorporated during the course of the transactions involved in the suit. The obligation arose from the lease of a building to be used as a lodge building by the defendant Elks Lodge. Suit was brought against the lodge and 1188 members thereof. The questions raised on appeal did not concern the liability of the association but were limited to determining the individual liabilities of certain members of the lodge.

The defendant members raised the objection that they were not bound by by the actions of the officers of the association. The court rejected this contention. Quoting from Corpus Juris Secundum, the court said: "If, however, a member, as such, directly incurs a debt, or expressly or impliedly authorizes or ratifies the transaction in which it is incurred, he is liable as a principal. So a member is liable for any debt that is necessarily contracted to carry out the objects of the association."[64] (The court recited language from an earlier California case, Leake v. City of Venice,[65] in support of this proposition. However, in that case the court treated the association as if it were a partnership; thus, the case does not seem to support the proposition for which it was cited.)

The court pointed out that the officers had been authorized to execute the lease by a vote of the lodge at a regular meeting. However, the plaintiff was unable to show that any of the individual defendants had attended this meeting; apparently the defendants had voted neither for nor against the execution of the lease. Nevertheless, the court held that the defendants who were members of the lodge at the time of the execution of the lease were liable on the lease since they had signed the lodge's by-laws which authorized the lodge to obtain and maintain a club or home for the members. The court held that this act was sufficient to make these members ones who "impliedly consented" or "constructively assent[ed] to" the execution of the lease. Alternatively, the court held that, since the establishment and maintenance of a club was an object of the association and the lease was executed as an appropriate means of achieving this end, the members of the association were liable thereon simply through joining and belonging to the association.

Thereafter, in response to this decision, Corporations Code Sections 21100-21102[66] were enacted. These sections provide (1) that members of nonprofit unincorporated associations are not liable on real estate contracts entered into on behalf of the association unless they have assented thereto in writing, and (2) that the consent of a member of an association to an act of the association cannot be presumed or inferred merely from his joining or belonging to the organization or signing its by-laws.

The California Supreme Court, like the California Legislature which enacted Corporations Code Sections 21100-21102 mentioned above, has shown concern that the cost of liability arising out of activities of unincorporated nonprofit associations be paid from the funds and property of the association, rather than from the assets of individual members. This concern is reflected

in the holding in the Marshall case[67] that a member of a labor union is entitled to sue the union for injuries caused by negligence but that any judgment he may recover against the union can be satisfied only from the funds and property of the union.

Recommendations: No change should be made in the rules governing the liability of members of partnerships. Members of unincorporated nonprofit associations should be liable for tortious conduct only if they participated in the conduct, authorized it, or subsequently ratified it and should be liable on contracts entered into on behalf of the association only if they have assented to such liability in writing.

The following statutory language is suggested to effectuate these recommendations:

> A member of a nonprofit association is not individually or personally liable on any contract entered into in the name of and on behalf of the association unless such member assumes such liability by contract and the contract or some note or memorandum thereof, specifically identifying the contract which is assumed, is in writing and signed by the party to be charged or his agent.
>
> A member of a nonprofit association is not liable for the negligent or wrongful act or omission of an officer, agent, or employee of the association acting within the scope of his office, agency, or employment unless such member participated in, authorized, or subsequently ratified the negligent or wrongful act or omission. Authorization or ratification of a negligent or wrongful act or omission may not be inferred merely from the fact of joining or being a member of the association or signing its by-laws.

The first provision, relating to contract liability, would extend the limited immunity from liability provided by Corporations Code Sections 21100 and 21102 for debts incurred in acquiring realty[68] to all contracts made by an unincorporated nonprofit association. The recommended provisions would be included in Chapter 2 (commencing with Section 21100) of Part 1 of Title 3 of the Corporations Code. Hence the definition of "nonprofit

association" in Section 21000[68a] would be applicable.

The second provision, relating to tort liability, would codify what probably is existing California law.

Since, in many instances, an unincorporated association's treasury will be the largest and most certain source of funds, the practical effect of these recommendations will be to encourage the plaintiff to sue the association in its common name and to collect from its joint assets. Consequently, these recommendations will tend to accomplish the desirable objective of reducing the number of instances in which a plaintiff will satisfy an associational liability out of the individual assets of the members of an unincorporated association. Of course, an associate's contribution to the joint assets of the association will be subject to execution even though he effectively withholds his consent to the transaction on which the liability is based. But no reasonable objection can be made to this because the associate's contribution to the joint fund could have been used to pay the obligation voluntarily despite his objections. In addition, an associate has no right to withdraw his contributions from the joint fund when he withdraws from the association.[69] In effect, an associate will be in a somewhat similar position to that of a limited partner whose liability for the debts of the partnership is limited to the amount of his contribution to the partnership if he does not participate in the control of the partnership's business.[69a] Any additional burden that these recommendations might impose on a plaintiff seeking to recover from an individual member of a nonprofit unincorporated association on an associational liability will be offset by the recommendations made previously which will make it possible for the plaintiff to recover a judgment that may be enforced against the joint assets of the association. If it appears that a particular association does not have sufficient assets to meet its contractual obligations, the person negotiating the contract with the association can require that additional security be provided to insure payment.

Enforcement of Judgment

Existing law: Section 388 of the Code of Civil Procedure provides that a judgment against an unincorporated association sued in its common name binds the joint assets of all the associates and the personal assets of any "party" who has been served with process in the action. It has been held that a partner who was served with process in an action against the partnership was bound by the judgment even though he was not made a party to the action.[70] This procedure is designed to avoid multiplicity of suits.[71] The constitutionality of permitting an individual's personal assets to be bound by a judgment rendered in an action in which he was served but not made a party has been raised but has not been decided in California.[72]

Although Section 388 is not entirely clear, it could be argued that a judgment binding the individual assets of an associate could be obtained only if the associate were made a party to the action against the association. Section 388 provides in part that "the judgment in the action shall bind the joint property of the party or parties served with process." (Emphasis added.) Giving "party" its technical legal meaning would result in a construction of Section 388 that would achieve the desirable result of giving the associate a right to participate in the defense of the action.

A 1959 amendment to Code of Civil Procedure Section 410[72a] established the procedure for serving an associate in an action against an association in its common name. Section 410 now provides that the summons in such an action must make clear the capacity in which an associate is being served: Where service is made on an associate in order to effect service against the unincorporated association, there must be a notice in the copy of the summons served that the person is being served on behalf of the business firm; if the person also is served as an individual, the notice must state both

capacities in which he is served. The certificate or affidavit of service must contain a recital that the required notice was included in the summons. If the notice is omitted from the summons, or if the recital of the notice is omitted from the certificate or affidavit of service, no default judgment may be taken against an association or individual with respect to whom service was improper. However, if service on an associate is proper in respect to either the association or the associate individually, a default judgment may be entered against such party even though the attempted service was improper in respect to the other party.

It would seem to be a useless formality to require an associate to be notified that he is being served both in his individual and representative capacities if his personal assets would be liable for satisfaction of a valid default judgment against the association even though a valid default judgment could not be taken against him personally because of improper service. Thus, when the 1959 amendment to Section 410 was enacted, it must have been assumed either that "party" as used in Section 388 was to be given its technical legal meaning or that the amendment would indirectly accomplish the same result. Since no case has discussed the interrelationship between Sections 388 and 410, the law in this area remains unclear.

Recommendation. A judgment against an unincorporated association should bind only the funds and property of the association. A plaintiff should be permitted to join members of such association in the action against the association but if the plaintiff obtains a judgment against the association he should not be permitted to satisfy the judgment obtained against a member of the association for the same injury or damage until the judgment against the association is returned wholly or partially unsatisfied.

The following statutory language is suggested to effectuate this recommendation:

> Section ____. A judgment against an unincorporated association binds only the property of the association and does not bind the individual property of a member of the association.
>
> Section ____. (a) Any person who it is alleged is liable for the injury or damages, including a member of the association, may be

joined as a defendant in any action against an unincorporated association to recover for such injury or damage.

(b) If a judgment is rendered against the association and also against a member of the association for the same injury or damage, execution shall not issue against the individual property of the member unless and until execution against the property of the association has been returned wholly or partially unsatisfied.

The recommended legislation is consistent with the other recommendations treating an unincorporated association as a legal entity for liability purposes. It also is consistent with Marshall v. International Longshoremen's & Warehousemen's Union,[73] where the California Supreme Court held that a member of a labor union was entitled to sue the union for its negligence, but that "any judgment he may recover from the union can be satisfied from the funds and property of the union alone."[74] The court stated: "We limit our holding to labor unions only, leaving to future development the rules to be applied in the case of other types of unincorporated associations."[75]

The recommended legislation will have no effect on the liability of the individual members of an unincorporated association. (For a discussion of the rules governing individual liability see the text supra at pages 20-25.) Nor will the recommended legislation prevent the plaintiff from proceeding against one or more of the associates in a separate action. Sections 414 and 989-994 of the Code of Civil Procedure provide a procedure for suing one or more persons on their joint obligations. Hence, the plaintiff may still proceed against partners under the procedure provided by those sections. However, when he chooses to proceed under the suit in common name statute against the association as an entity, the plaintiff is required to first exhaust the assets of the association before he may resort to the individual assets of its members who have been adjudged to be personally liable for the same injury or damage.

The most important effect of the recommended rules is that they will guarantee that a member will be personally afforded an opportunity to litigate

the question of his personal liability before he can be required to pay for an injury or damage arising out of the association's activities. Under existing law, it is not clear whether a member of an association can be required to pay a judgment when he had no opportunity to defend the action which resulted in his liability.[76] Under the recommended rules, the action against the association will no longer bind the individual assets of a member of the association unless he is made a party to the action and a personal judgment is rendered against him or a separate action is brought against him.

There is ample precedent in other jurisdictions to justify the recommended rules. A number of jurisdictions provide that in the first instance the judgment against the association will bind only the property of the association or property owned jointly or in common by the associates.[77] However, these statutes provide that if the judgment against the association is returned unsatisfied, usually either wholly or in part, the judgment will not preclude a second action either in law or equity to enforce the personal liability of one or more of the associates. It appears from the wording of these sections that a second action is contemplated against an associate rather than merely delaying execution on an individual judgment obtained against him in the action against the association; New York and Rhode Island clearly prohibit an action against the associates until the return of an unsatisfied execution against the association.[78]

Provisions in Alabama,[79] Connecticut,[79a] and Texas[79b] permit the joinder of actions against associations and their members in certain situations. The proposed statute adopts this latter approach and provides for the joinder of actions against the association and its members individually but permits execution on the judgments against the individuals only after execution against the joint property of the association has been returned unsatisfied. This rule seems to be preferable to having two separate actions since it avoids multiplicity of suit and protects the associates at the same time.

Service of Process

Existing law. Section 388 designates who may be served with summons when two or more persons are sued in their common name; service may be made on "one or more of the associates." Section 410 of the Code of Civil Procedure[79c] provides that when an associate is served in a representative capacity as provided by Section 388, the summons must contain a notice naming the association and stating that the associate is served on its behalf. If the associate also is served as an individual, the notice must indicate that he is served in both capacities. The certificate or affidavit of service must contain a recital that the copy of the summons which was served included the required notice. Service in this manner gives the court jurisdiction over the association so that any resulting judgment will bind the joint assets of all the associates. If the notice is omitted in the summons or the recital is omitted from the certificate, no default judgment may be entered against the association (or the individual associate).

In the case of a partnership, the existing law creates no serious problems[80] since the acts of one partner bind all the other partners. In addition, the relationship that normally exists between partners is such that one partner who is served will notify the other partners of the action that is pending against the partnership. Hence, it is extremely unlikely that a default judgment will result in such a case.

However, in the case of an unincorporated nonprofit association (which may have thousands of members), serious problems may arise under the existing law. The likelihood that a default judgment will be entered against such an association is much greater than in the case of a partnership. Under Section 388, for example, service of process on a single member of an unincorporated nonprofit association is sufficient to acquire jurisdiction over the entire association. Particularly where the association is a large one, the member served often may have neither the authority nor the inclination to defend the action on behalf of the association. Code of Civil Procedure Section 410 makes the capacity in which the associate is served clear but it does not supply any additional incentive for the associate to notify his association of the suit against it. If the associate is not made a defendant, the only possibility of his being personally liable is derivatively through the association. However, under the recommendations previously made concerning unincorporated nonprofit associations, a default judgment against the association would not bind the individual assets of the member served. Hence, he might disregard the service and not notify anyone of the action pending against the association.

Recommendation: Service of process on an unincorporated association should be made on the agent of such association designated for the purpose of service of process if a statement designating the agent of such association for the purpose of service of process has been filed with the Secretary of State prior to the commencement of the action. If no agent has been so designated, service should be sufficient if made by serving any one or more of the members of the association and by mailing a copy to the last known mailing address, if any, of the principal office or place of business of the association.

The various states which permit suit in common name provide for a number of different methods of serving process in such suits. A number of states have provisions similar to California and permit service to be made on any member of the association.[81] Another group of states permits service only on an officer, agent or other person in a position of management in an association.[82] Two states, Alabama[83] and Georgia,[84] provide for service on any officer or member of an association unless the association files with the Secretary of State a designation of a particular officer or agent to receive service in which case service may be made only on such officer or agent.[85]

The proposed rule adopts the approach taken by Alabama and Georgia. The designation of an agent would remove the danger of a default judgment that exists under the present rule. Even if no agent were designated, the mailing of a copy of the process to the association's last known mailing address would tend to greatly reduce the danger of default judgments. The recommendation also appears to be superior to providing for service on the officers or representatives of the association for three reasons. First, one rule will apply to all unincorporated associations. The recommended rule would be appropriate for partnerships which normally do not have officers or representatives as well as for associations which often do. Second, under this approach, the plaintiff automatically will know whom to serve and will not have to resort to discovery techniques to learn the identity of the association's officers or representatives so that he may serve them.[86] Third, the recommended rule would cover those situations where an unincorporated association does not have any officers or official representatives.

Designation of an agent for service of process on an association should be permissive rather than mandatory. This would afford an opportunity to all associations to protect themselves against default judgments. At the same time, if an association does not wish to subject itself to the additional expense and inconvenience of designating an agent, it will be in no worse position than it now is. Government Code Section 12185 fixes the fee for filing a statement designating an agent for service of process at five dollars.

To effectuate this suggestion the existing service provisions in Section 388 should be repealed, a new provision should be enacted to permit the designation of an agent to receive service, a new section should be added to Code of Civil Procedure Section 411 governing the manner of serving a summons, and Section 410 of the Code of Civil Procedure should be amended to conform to the new sections.

The following provision is recommended to permit an association to designate an agent to receive service of process:

> Section ____. (a) Any unincorporated association may file with the Secretary of State on a form prescribed by him a statement designating, as the agent of such unincorporated association for the purpose of service of process, any natural person residing in this state, setting forth his complete business or residence address. The association may at any time file a new statement which designates a different agent for the service of process and such filing shall be deemed to revoke the prior designation.
>
> (b) Any unincorporated association may file with the Secretary of State on a form prescribed by him a certificate listing the location and mailing address of the association's principal office or place of business in this state. The association may at any time file a new certificate showing a new location or mailing address of its principal office or place of business in this state.
>
> (c) The Secretary of State shall prescribe a form that will permit the statement referred to in subdivision (a) and the certificate referred to in subdivision (b) to be combined in one document.

(d) For filing the statement referred to in subdivision (a) or the certificate referred to in subdivision (b) or the combined document referred to in subdivision (c), the Secretary of State shall charge and collect the fee prescribed in the Government Code for designation of an agent for the purpose of service of process.

The certificate listing the principal office or place of business of the unincorporated association in this state is discussed infra in connection with venue.

Section 411 of the Code of Civil Procedure should be 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, an 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 nonresident 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: except as provided in subsection 2, to the agent designated for the purpose of receiving service as provided in Section ____. [set out above] If no such agent has been designated prior to the commencement of the action, or if such agent cannot be found within the state after diligent search, 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.

Section 410 of the Code of Civil Procedure should be amended to provide:

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 Section ~~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 code." 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 Section ~~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.

Venue

Existing law. At least some aspects of venue in actions against unincorporated associations are governed by Article XII, Section 16, of the California Constitution which provides that "a corporation or association" may be sued in the county in which a contract is made or is to be performed or where the obligation or liability arises or the breach occurs; it concludes by providing that venue may lie "in the county where the principal place of business of such corporation is situated" (emphasis added). It is clear that the designation of the first four places for trial of an action applies equally to a corporation or to an unincorporated association However, it appears that the word "association" was deliberately omitted from the last clause, and, since an unincorporated association--unlike a corporation--

is not required to designate and maintain a principal place of business, Juneau Spruce Corp. v. Int'l Longshoremen[87] held that the last clause is inapplicable to an unincorporated association. As a result, when a large association such as a labor union is sued alone in its common name, venue is proper in any county in which any member of the defendant association resides.[88]

Recommendation: An unincorporated association should be treated as if it were a corporation for venue purposes if the association has filed a certificate with the Secretary of State listing its principal office or place of business in this state.

This recommendation will accomplish two desirable objectives. First, it will authorize the plaintiff to bring the action against the association in the county in which the principal office or place of business of the association is located. Second, it will prevent the plaintiff from bringing an action against the association in a particular county merely because a member of the association resides in that county.

The recommendation will change the rule in Juneau Spruce Corp. v. Int'l Longshoremen,[89] and replace it with a rule which some federal courts have applied to determine venue in suits against unincorporated associations.[90]

Although the primary policy consideration underlying venue is convenience to the defendant, the rule developed in the Juneau Spruce case works a substantial hardship on many unincorporated associations. Since many unincorporated associations maintain a principal office or place of business, they should not be compelled to defend an action in an outlying county which some plaintiff deems to be a favorable county merely because one or more of the association's members reside there.[91] The court in the Juneau Spruce case[92] recognized the persuasive reasons that justify this change:

> In Sperry Products v. Association of American R.R., 132 F.2d 408, 411 [145 A.L.R. 694], the court said: "Thus, for most purposes the law still looks at such associations as mere aggregations of individuals. Since, however, for the purpose of suit it has come to regard them as jural entities, we can see

> no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity. . . ." The discussion in the Sperry case, as argued by the I.L.W.U. is persuasive, but persuasive only for legislative or constitutional change. Contrary to the existing law in California, the Federal Rules of Civil Procedure permit a partnership or unincorporated association to sue as well as be sued in its common name (rule 17b), and process may be served in the same manner as upon a corporation (rule 4d, 3). Under section 388 of the Code of Civil Procedure process in an action against an association sued in its common name must be served on "one or more of the associates." The different procedures in the two jurisdictions are too great to regard the Sperry case as being other than a rational argument for a change in the existing law embodied in our statutes and Constitution.[93]

Adoption of the recommended provision on service of process, combined with the following language, would effectuate this recommendation:

> If an unincorporated association has filed a certificate with the Secretary of State listing its principal office or place of business in this state, the unincorporated association shall be treated as if it were a corporation for venue purposes.

These two recommendations adopt the substance of the proposal made in a Stanford Law Review comment concerning the problem of venue in suits against unincorporated associations.[94]

This recommendation would limit to some extent the plaintiff's present right to "forum shop." However, the rules governing venue in suits against corporations often will permit suit to be brought in one of several counties;[95] therefore, a plaintiff would still have a reasonable opportunity to choose among counties in which to bring his suit. In addition, the recommendation is consistent with the recommendations previously made that an unincorporated association be treated as an entity for the purpose of suit and liability.

The objection that the plaintiff will be unable to learn what county constitutes an association's principal office or place of business is obviated by the recommended provision which permits an unincorporated association to file a certificate with the Secretary of State designating its principal office or

place of business.[96] Only those associations which file such a certificate would be treated as if they were corporations for venue purposes. Such a permissive filing requirement would permit those associations which feel they would be benefitted by the new rule to comply with the requirement without imposing any additional expense or inconvenience on other unincorporated associations.

No case has been found indicating whether this recommendation can be effectuated by statute or only by constitutional amendment. It has been said of Article XII, Section 16, of the California Constitution that:

> This section is in the nature of a code provision in regard to procedure, and is obviously self-executing, and differs from a statutory code provision only in that it cannot be repealed, nor can its scope and operation be limited by statute. So far as it conflicts with a statute, the statute must give way.[97]

However, providing an additional place for venue in actions against unincorporated associations would not seem to be limiting the scope and operation of the constitutional provision. Instead, it would seem to be expanding the scope of the provision; hence, providing an additional place for venue would not conflict with the constitutional provision. The constitutionally provided places for laying venue would still be available and the only effect of the new provision would be to supply another alternative. Therefore, it appears that this recommendation can be effectuated by statute rather than a constitutional amendment.

UNINCORPORATED ASSOCIATIONS AS PLAINTIFFS

The Present California Law

At common law, a partnership or other unincorporated association was not permitted to appear formally as a party plaintiff in its common name. To appear as a litigant is an incident of legal personality which, in the absence of specific statutory authority, courts have been reluctant to attribute to anyone other than a natural person or corporation.[1] Each of the individual members of such an association must be named as a party plaintiff;[2] nonjoinder is a cause for abatement.[3]

California follows the common law rule.[4] However, several judicial qualifications and exceptions have evolved to avoid the gross inequities that would result from a strict adherence to the common law rule.

A significant qualification of the common law rule is found in the cases that hold that the legal inability of an unincorporated association to sue in its common name is regarded by the courts as only a procedural defect that casts upon the defendant the burden to raise an objection in a timely and technically correct manner.[5] For example, if a pleading discloses on its face facts sufficient to show that the named plaintiff has no capacity to sue in its own name, a special demurrer is required to preserve the defendant's right to complain regarding the plaintiff's incapacity to sue in its own name.[6] A general demurrer is insufficient,[7] and the failure to demur specially constitutes a waiver of the defect.[8] As a practical matter, therefore, suits are in fact instituted in the common names of such quasi-artificial entities and they may be prosecuted to judgment in the absence of timely objection regarding noncapacity to sue.

Another instance of judicial refinement in mitigation of the common law rule is illustrated by Case v. Kadota Fig Ass'n,[9] a case that presented the question whether an unincorporated association sued as a defendant under Section 388 of the Code of Civil Procedure could assert a cross-demand in its common name against the plaintiff. Taking the position that the pleading was a cross-complaint, so that the defendant association was for the purposes of the cross-demand to be treated in all respects the same as a plaintiff, the district court of appeal was of the opinion that the cross-demand could not be brought in the name of the association alone; that, instead, it should have been brought in the names of the individual members of the association so that the cross-defendant would have available their individual liability for costs or for restitution in case the judgment was paid and later reversed.[10] The supreme court disagreed and affirmed the judgment of the superior court for the association.[11] The court held that the cross-demand could be asserted in the common name in which the defendant was sued because the pleading was in fact a counterclaim arising out of the same transaction or contract sued on in the complaint. By thus characterizing the pleading as a counterclaim, the defendant association remained a defendant within the terms of Code of Civil Procedure Section 388 and never rose to the status of a cross-plaintiff so as to bring itself within the proscription of the common law rule precluding such an association from appearing as a party plaintiff in its common name. Deciding the case on this ground, the court ignored the opportunity it had to reexamine the bases of the common law rule. Instead, the opinion cites and discusses with approval several earlier decisions holding that an original complaint by an unincorporated association must be in the names of the individual members and that a cross-complaint must be so captioned because it is a distinct cause of action.[12]

A relatively minor exception to the strict common law rule was declared in Athens Lodge No. 70 v. Wilson.[13] Here, the court held that since the

legislative enumeration of persons in Civil Code Section 3369[14] included associations, no room was left for argument or doubt as to the capacity of an unincorporated association to bring an action in its common name to enjoin unfair competition. This limited exception to the general rule precluding suit in common name is based upon Section 3369, however, and has not been expanded by the courts to cover other situations.

Recently, the California Supreme Court had occasion to reexamine the basis of the common law rule and concluded as to the situation immediately before it "that the role of the [labor] union in the present economy, and the statutory sanction of the union under certain circumstances as a bargaining representative of employees, requires a procedural accommodation to the union's ability to litigate."[15] In Daniels v. Sanitarium Ass'n, Inc.,[16] the vice president of a local union instituted a libel action "in a representative capacity for and on behalf of . . . an unincorporated association representing approximately 7,000 members."[17] Speaking to the obvious dilemma faced by the association in seeking to litigate its rights, Mr. Justice Tobriner for a unanimous court lists a series of decisions which treat a labor union as an entity and concludes that:

> The reluctance of the courts to traverse the full route in procedural recognition of the changed nature of trade unions leads to obscurantism in the enforcement of union rights. The latent unfairness and patent difficulties find their reflection in the instant case.
>
> In the absence of a remedy for the union as an entity, plaintiff Daniels sought to bring suit on behalf of the union in a representative capacity. Defendants assert that such a representative suit is not available. The complaint, according to defendants, alleges a libel of the union as an entity. The complaint does not identify or name any ascertainable persons who were libeled, and therefore states no cause of action as to any of the numerous individual members of the union. Since the complaint alleges a libel of the union as an entity, rather than of the specific members, plaintiffs fail to meet the statutory requirement of numerous parties. (Code Civ. Proc., § 382.) [Emphasis in original.]
>
> The union is thereby presented with a fleeting image of the entity. If it seeks to sue as an entity, it meets the legal response that it cannot do so because it is merely a collection of individuals. If, however, it seeks to bring a class action on behalf of its members, it is told that it cannot sue in that capacity because it

has complained that the union suffered the libel and because the union therefore cannot be conceived to be simply an association of individuals. The resultant anomaly deprives the union of any effective procedure of litigation.

* * * * *

We must recognize that the society of today rests upon the foundation of group structures of all types, such as the corporation, the cooperative society, the public utility. Such groups must, of course, operate successfully within the society; one of the prerequisites to that functioning is, generally, liability to suit and opportunity for suit. To frustrate that viability by the imposition of outmoded concepts would be to impair the institutions as well as to impede the judicial process. [Emphasis added.]

We would be particularly remiss if we withheld the legal process from the labor union either as to suability or the right to sue. . . . The judicial process which confers such power should surely exact liability of such an organization to suit; the process must, by the same token, grant the right to sue.

Hence the better and simplest form of procedure would be the suit in the name of the union as such. Since the matter is procedural only, however, we have considered, and sustained, the instant complaint as one brought by the union as an entity.

* * * * *

In summary, we have cited the decisions that have noted a growing social responsibility of labor unions and that have recognized that inherent in such responsibility is suability. If, however, we hold that these organizations are thus subject to suit but that they cannot sue, we create a gross anomaly. We cannot arbitrarily split so obvious an equation. [Footnote omitted.][18]

The court's language indicates an awareness of the inequities that result from strict adherence to the common law rule regarding the legal incapacity to sue in a common name. The specific reference to "the cooperative society" tends to suggest some doubt as to the continued vitality of the Kadota Fig case[19] as an example of an association not permitted to sue in its common name. Although the court in Daniels is particularly careful to restrict its decision to labor unions, the way is clearly left open to a full-scale reexamination of the common law rule as

applied to other unincorporated associations. "[W]e limit our holding to labor unions, leaving to future development the rule to be applied to other types of unincorporated associations."[20] Thus, although the court has indicated the future judicial qualifications of the strict common law rule are not unlikely, these future developments will take place only if and when appropriate cases are presented to the California appellate courts.

Analysis and Recommendations

Permitting Suits by Unincorporated Associations

As previously noted, California follows the general common law rule which precludes an unincorporated association from appearing as a party plaintiff in its own name. However, this proscription is treated as a procedural defect that is waived if it is not raised by answer or demurrer. Hence, associations frequently appear as parties plaintiff and there is a considerable body of case law on the subject. Until recently, there has been little analysis of the soundness of the primary reason given in justification for the common law rule, i.e., that unincorporated associations are not legal entities. However, the fact that partnerships and other unincorporated associations are treated as legal entities for a variety of purposes, including suits against such groups, suggests that the justification given for the common law rule is unsound. Accordingly, it is appropriate to inquire as to the advantages to be gained from permitting suit to be brought in common name and as to the problems that such a rule would create.

A rule permitting unincorporated associations to sue in their common names would contribute significantly to the simplification of procedure and the realization of justice. Under the present rule, a complaint to enforce

a legal obligation running to the benefit of an unincorporated association requires a greatly extended caption to name the individual members who constitute the association. In the case of small partnerships and associations, this is only a minor inconvenience that could be overlooked. However, large partnerships and unincorporated associations may be effectively deterred from enforcing valid rights because of the inconvenience and expense which results from the necessity of suing in the individual names of the members. Any such pleading is onerous to prepare and, except for identifying the individual members of the association, serves no useful purpose. Accordingly, a great deal of work and expense would be eliminated if such associations were permitted to sue in their common names; valid rights which are now too expensive to enforce would become enforceable.

A collateral advantage of permitting an unincorporated association to sue in its common name would be that cases involving such plaintiffs would be indexed and cited in the common name by which the association is known instead of the name of the member who happened to be listed first in the caption of the complaint. Moreover, the defendant who is sued by such an association would no longer be perplexed by the problem of determining what relationship exists between the individually named plaintiffs and the association with which he had been dealing.

The clearest example of the substantive inequities that flow from the present rule, however, is the situation presented in Daniels v. Sanitarium Ass'n, Inc.[21] As seen by the court, the libel was against the union as an entity and neither the members individually nor as a class had standing to sue for the alleged libel. As thus viewed by the court, the only means of litigating the question on the merits was to permit the union to sue in its

own name, which the court did. Other situations similar to that presented in the Daniels case will arise in which the injury or damage will be to the associational entity rather than to its individual members; furthermore, unincorporated associations other than labor unions will have to contend with those situations. The Daniels decision is a significant reversal of existing law and can be considered as a preview of judicial action in related cases.[22] One writer said:

> The court did not feel that the decision represented a substantial change in the California law, saying that for years courts have found various excuses for calling a union an entity to achieve a desired result and that they were merely reaching the desired result without resorting to subterfuge. Yet the court articulated the policies involved in granting organizations of the size, wealth, influence and perpetual existence of the modern union the status of an entity, and decided the case without resort to fictions or other devices to preserve the role of stare decisis. In spite of the language of the court to the contrary, it would thus seem that the decision represents a complete reversal of established precedent. . . . It seemed that sooner or later the California courts would have to recognize unions as entities for all purposes. The Daniels court was extremely careful to note that they only decided the question as to unions, leaving to another day the question of the status of all other unincorporated associations. Granting the proposition that any language to the effect that other types of associations would be included within the holding would be dicta, inquiry should be made for any valid reasons for denying them a procedure of litigation. . . . No dire consequences have resulted from this statute [Code of Civil Procedure Section 388] nor from the Federal rule permitting such actions, so it would seem reasonable to predict that the liberal decision in Daniels will be followed by similar decisions involving unincorporated associations other than unions, particularly fraternal organizations and other associations involving a large and influential membership.[23]

There is ample precedent for permitting unincorporated associations to sue in their common names. Many other states permit such associations to sue in their common names.[24] In the federal courts suit may be brought by a partnership or unincorporated association in its common name if a federal

question is presented; if no federal question is presented, the right of such a group to sue in its common name is governed by the law of the state in which the federal court is located.[25] In addition, Great Britain permits persons claiming as copartners to sue in their common name.[26]

However, objections have been made to permitting suit to be brought in common name. First, it has been suggested that the defendant will not know exactly who his adversary is and, hence, may be in doubt upon such questions as the person or persons against whom cross-demands may be made or upon whom service of pleadings and notices ought to be made, and upon related questions involving the taking of depositions and the posting of undertakings. Another argument against permitting unincorporated associations to sue in their common names is suggested by the opinion of the district court of appeal in Case v. Kadota Fig Ass'n:[27] If a defendant sued by such an association obtains a judgment for costs, or if he pays a judgment to the plaintiff association that is later reversed, he may not know from whom to collect.

These objections to permitting suit in common name are discussed in detail later. For the present it is sufficient to note:

(1) To the extent that the defendant's adversary is considered to be the association itself, the caption of the plaintiff association's complaint will adequately identify the adversary. The defendant could obtain the names of the members of the association by resorting to discovery techniques.[28] (For a more detailed discussion, see infra at 51-52.)

(2) Once the defendant's adversaries were identified, he would have no problem in asserting a cross-demand against one or more of them. Even if

the defendant failed to learn the identities of the members of the plaintiff association, he could assert his cross-demand against the plaintiff association in its common name and against the members as "Doe defendants," filling in the names of the individual parties when he learns their identities.[29]

(3) Having learned the identity of his adversaries, the defendant could serve pleadings and notices on them according to existing statutes governing such service.[30]

(4) A defendant's right to obtain restitution of a judgment which he has paid but which is subsequently reversed does not appear to be a serious problem and is adequately provided for by existing law. In the event that the defendant obtains a judgment against the association for costs, his opportunity to collect such judgment could be protected by providing that the association party plaintiff on demand must post an undertaking for costs as a condition to maintaining an action in its common name. (For a more detailed discussion, see infra at 49-52.)

Recommendation: An unincorporated association should be permitted to bring suit in its common name.

The following statutory language is suggested to effectuate this recommendation.

> An unincorporated association may sue and be sued in its common name.

Many jurisdictions, including a majority of jurisdictions which permit unincorporated associations to be sued in their common names, have statutory provisions permitting unincorporated associations to sue in their common names.[31] The District of Columbia[32] and South Carolina,[33] which do not have statutes permitting unincorporated associations to sue in their common names, have granted such authority to associations by judicial decision.

Some jurisdictions which do not permit an unincorporated association to sue in its common name per se accomplish the same result by permitting an officer or member of the association to sue on its behalf.[34] This approach is somewhat analogous to a class action but would differ from a class action in that the plaintiff apparently may sue as a matter of right without satisfying requirements such as multiplicity of parties and adequate representation of members. Louisiana appears to combine both of these approaches by providing that an unincorporated association has the procedural capacity to sue in its common name but that it must appear through and be represented by its president or some other officer.[35] Pennsylvania has justified its requirement that an unincorporated association sue by means of a trustee ad litem on the ground that it makes available a source from which the defendant may collect any judgment for costs rendered against the association.[36]

The recommendation proposes a broad rule that will encompass both original suits and cross-actions.[37] Permitting unincorporated associations to sue in their common names is consistent with the entity treatment generally afforded such associations by the other recommendations in this study. The logical counterpart of permitting an unincorporated association to be sued in its common name is to permit it to sue in such name. The court commented on this problem in Daniels v. Sanitarium Ass'n, Inc.,[38] saying:

> [W]e have cited the decisions that have noted a growing social responsibility of labor unions and that have recognized that inherent in such responsibility is suability. If, however, we hold that these organizations are thus subject to suit but that they cannot sue, we create a gross anomaly. We cannot arbitrarily split so obvious an equation.[39]

This proposal, by granting to all unincorporated associations the privileges and advantages which have already been granted to labor unions, would extend important procedural advantages to unincorporated associations generally and would enable them to better protect their substantive rights. Particularly when a fraternal organization or other association with a large and influential membership is involved, there does not seem to be any ground on which to distinguish it from a labor union. When a smaller association is involved, there may be less necessity for extending the right to sue in common name to such an association; however, there also is less likelihood that serious problems will be created by granting such authority.

Finally, by extending the right to sue in common name legislatively rather than waiting for it to be extended judicially, a great deal of time will be saved and it will be possible to evaluate and to attempt to solve all the potential problems at the same time rather than leaving them to the courts to solve on an ad hoc basis. These problems are discussed below.

Identifying the Adversaries

The courts ordinarily deny an unincorporated association the right to sue in its common name on the ground that the association is not a jural entity. Seldom is any other reason given. It has been suggested, however, that when a defendant is sued by an unincorporated association using its common name, he might be unable to determine who his adversaries are and, hence, might be in doubt as to the persons against whom he might assert a cross-demand.

Such an objection appears to be illusory.[40] In the first place, if the cross-complaint or counterclaim is to be made against the plaintiff association per se, the defendant need only proceed against the association in its common name which would be made clear by the caption of the association's complaint. If the cross-complaint is to be made against a third person who is neither a party to the action nor a member of the plaintiff association, the defendant's ability to assert his cross-complaint will not be affected by the association's suing in its common name rather than by naming all of its members. The defendant asserting the cross-complaint will be in exactly the same position as any plaintiff who wishes to institute a law suit; there is no reason for affording him special consideration. (This problem cannot arise in connection with a counterclaim since it can be asserted, if at all, only against the party plaintiff in the action; a counterclaim cannot be used to bring a new party into the action.[41])

The only instance in which permitting the plaintiff association to sue in common name would affect the position of the defendant would be when the defendant wished to assert a cross-complaint against a member of the plaintiff association. Under existing practice, all of the members of the plaintiff

association must be named in the caption of the complaint; if the association could sue in its common name, the identity of the members would not be made clear by the complaint. This is not, however, a serious problem since the defendant can resort to discovery to learn the names of the members of the association. If the defendant does not want to wait until after the discovery process to file his cross-complaint, he could proceed against the members by naming them as "Doe defendants," filling in their names when he later learned them.[42]

If it is felt that the existing procedures are inadequate, California could adopt additional procedures modeled after the provisions in Great Britain. Order 48a, Rule 1 of the Rules of the Supreme Court of Great Britain provides that when an action is instituted by or against partners in their firm name, any party to the action may apply by summons to the judge for a statement of the names and addresses of the persons who were the partners in the firm at the time the cause of action accrued.[43] The adoption of such a procedure, however, appears to be unnecessary and undesirable in light of existing discovery practice.

A related objection that sometimes is raised is that the defendant will not know on whom to serve pleadings or notices or in what manner to serve them. When the defendant has identified his adversary, he has learned on whom to make his service. Existing procedures adequately provide for the manner of serving cross-complaints,[44] other pleadings subsequent to the complaint,[45] notices of motions[46] and discovery proceedings,[47] and other notices and papers generally.[48] Thus, there is no merit to this objection.

Collecting Costs and Obtaining Restitution of Judgments

It was suggested in Case v. Kadota Fig Ass'n[49] that if an association were permitted to sue in its common name, the defendant to the action might not know from whom to collect his costs or from whom to collect the restitution of a judgment which he had paid but which subsequently was reversed. An obvious source from which to collect these items would be the assets and property of the plaintiff association. Another, or additional, source from which to collect these items would be the personal assets of the association's members. A third possibility would be to require the plaintiff association to post an undertaking to cover any judgment for costs or restitution that might be rendered against it.

Restitution. The problem of obtaining restitution of a judgment which has been paid but which has subsequently been reversed on appeal is relatively insignificant. Existing law appears to be adequate to solve the problem.

When a defendant appeals from a judgment, he may file an appeal bond which will stay all further execution by the plaintiff pending the determination of the appeal.[50] As a practical matter, a bond is almost always filed. Furthermore, a defendant rarely is faced with a situation in which he must file his bond immediately in order to preclude the plaintiff from executing on his judgment. When such a situation does exist, the defendant may protect himself by asking the trial court to stay execution pursuant to Code of Civil Procedure Section 681(a)[51] in order that he may perfect his appeal.

Since a defendant has available a procedure by which he can prevent a plaintiff from executing on his judgment pending appeal, it is not

unreasonable to make the defendant bear whatever burden may result from his permitting the plaintiff to proceed with execution. However, a defendant who is unable to obtain an appeal bond may need protection. The usual instance in which the defendant would be unable to obtain a bond would be where he did not have sufficient funds to cover the amount of the judgment. If this were the case, the defendant would be at least partially "judgment proof" and the danger of his being seriously harmed by the plaintiff's execution would be minimized. If the defendant were unable to obtain a bond for some other reason than insufficient funds, he could protect himself by paying the amount of the judgment into court; this would stay execution of the judgment by the plaintiff in the same manner as would an appeal bond.[52]

Even in the event that the plaintiff is partially or wholly successful in his attempt to execute on his judgment, the defendant is protected if the judgment is subsequently reversed. A trial court whose judgment has been reversed has inherent power to order the restitution of what the defendant has lost;[53] the appellate courts have been given the same authority by statute.[54] Therefore, in light of the relative infrequence of the problem, the appellant's ability to protect himself, and the protection provided by the courts, it does not appear to be necessary to make special provision for the restitution of judgments which have been paid and subsequently have been reversed in actions brought by unincorporated associations in their common names.

Costs. The Code of Civil Procedure prescribes the general rules for determining when a plaintiff or defendant is entitled to costs in an action.[55] Assuming that the defendant is entitled to collect costs from the plaintiff association, the problem is to make clear from whom he may collect his costs.

One approach that might be taken would be to make a judgment for costs binding only on the property of the plaintiff association. Since an association which is sued in its common name is the party to the action rather than the members of the association,[56] by analogy, the same rule should apply when the association sues in its common name. Limiting the liability for costs to the assets of the association would, therefore, be consistent with treating an unincorporated association as an entity. However, this proposal is undesirable since it would permit an association to prosecute an action when it had insufficient funds to pay costs in the event the defendant were awarded his costs.

The opposite approach would be to make all of the members of an association liable for the costs of an action brought by the association in its common name. Massachusetts[57] and Wyoming[58] make every member of an unincorporated association or union liable for costs in an action brought to restrain another's use of an imitation or a counterfeit of an association's trademark or label. However, in these actions the association does not sue in its common name; instead, an officer or member of the association prosecutes the action on behalf of the association.

Making all the members of an association liable for a judgment for costs would be consistent with looking behind the named parties to see who were the real parties in interest. However, it appears that the court might have to decide in each and every case which of the complainant members had authorized or ratified the bringing of the action. It has been said that:

> It is true that the court may always look beyond the record to ascertain who are the real parties in the action, and will often regard one who does not appear on the record as a party as really occupying that position. But . . . no person, whatever his interest, can be held to be a party unless he has voluntarily undertaken the prosecution or defense or held himself out to the adverse party as so doing.[59]

Determining the liability of the individual members would be a cumbersome process and should be avoided. This determination would be particularly difficult to make since, unlike the situation in which the members' liability for the plaintiff's injury or damage is being determined, the association's members are not parties to the action. Furthermore, a recommendation was proposed earlier in this study to make it unnecessary to determine the individual liability of the association's members in establishing the association's liability for injury or damage to a plaintiff. Thus, it would be inconsistent to abolish the need to prove the individual liability of the association's members in one instance and to require such proof in another instance.

Pennsylvania provides that the person suing on behalf of the association as a trustee ad litem is liable for costs even though he is not personally liable for a regular judgment rendered against the association.[60] This provision creates a definite source from which a defendant may collect his judgment for costs. However, this approach would not be appropriate for the proposed statute which does not provide that an association must sue through a trustee ad litem.

Recommendation: Any time after the filing of the complaint in an action brought by an unincorporated association in its common name, any defendant in the action should be permitted to require the association to post security for the costs and charges which might be awarded to that defendant in the action.

There are two alternative methods of effectuating this recommendation. First, Code of Civil Procedure Section 1030 could be amended to read as follows:

1030. When the plaintiff in an action or special proceeding resides out of the State, or is a foreign corporation, or is an unincorporated association wherever situated which is bringing the action or proceeding in its common name, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceedings must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, or with the judge if there be no clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars ($300). A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed. Any stay of proceedings granted under the provisions of this section shall extend to a period 10 days after service upon the defendant of written notice of the filing of the required undertaking.

After the lapse of 30 days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge, may order the action or special proceeding to be dismissed.

The second approach to effectuating this recommendation is to draft a new section which would be located in the same place in the code as the other provisions relating to suit by unincorporated associations in common name:

At any time after the filing of the complaint in an action brought by an unincorporated association in its common name, the defendant may file and serve a demand for a written undertaking on the part of an unincorporated association as security for the allowable costs which may be awarded against such association. The undertaking shall be in the amount of $200 or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. A new or an additional undertaking may be ordered by the court upon proof that the original undertaking is insufficient security. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, his action shall be dismissed. This section does not apply to an action commenced in small claims court.

Under this recommendation, a judgment for costs would be treated in the same manner as any other judgment against the association. If the

recommendations relating to judgments which were proposed earlier were adopted, only the property of the association would be liable to satisfy the judgment for costs in the first instance; however, if execution against the association were returned unsatisfied, the defendant would have a cause of action to recover his costs from the members of the plaintiff association who participated in the action, authorized it, or subsequently ratified it. Where the defendant required the association to provide an undertaking for costs, the defendant would, of course, proceed to collect under the undertaking before resorting to other means for collection of his judgment for costs.

Several other code provisions in California have similar provisions governing the posting of security for costs: Code of Civil Procedure Section 1030 applies whenever the plaintiff in an action or special proceeding resides out of the State or is a foreign corporation; Section 947 of the Government Code applies when suit is brought against a public entity; Section 393 of the Military and Veterans Code applies when an active member of the militia of the State is sued for an act or omission committed in his official capacity in the discharge of his duty. This recommendation, placing the burden on the defendant to require the posting of security, makes it unnecessary for the association to file security for costs in every action and, thus, eliminates a certain amount of expense and inconvenience.

The recommended provision is similar to that adopted by Nebraska which provides that a company which wishes to sue in its partnership name must give security for costs, either by writ endorsed by a responsible surety or otherwise.[61] Filing security for costs has been held to be an essential prerequisite to maintenance of an action in the partnership name.[62]

FOOTNOTES

MEANING OF TERM "UNINCORPORATED ASSOCIATION"--footnotes

1. Comment, 42 CAL. L. REV. 812, 818 n.31 (1954). But on the treatment of joint stock companies and Massachusetts business trusts as partnerships, see Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930); Old River Farms Co. v. Roscoe Haegelin Co., 98 Cal. App. 331, 276 Pac. 1047 (1929).

2. See the text, infra at 7-10.

3. E.g., IDAHO CODE ANN. § 5-323; MONT. REV. CODE ANN. § 93-2827. See also UTAH RULES CIV. PROC., Rule 17(d); OKLA. STAT. ANN. Tit. 12, § 182.

4. See note 11 infra. A few states apparently apply their common name statute only to partnerships. E.g., ILL. STAT. ANN., Ch. 110, § 27.1; IOWA RULES CIV. PROC., Rule 2; N.M. STAT. ANN. § 21-6-5; OHIO REV. CODE ANN., Tit. 23, § 2307.04. See also FLA. STAT. § 47.15 (partnership), § 447.11 (labor organizations).

5. E.g., PA. RULES CIV. PROC., Rule 2151.

6. E.g., PA. RULES CIV. PROC., Rules 2127, 2128, 2129.

7. CAL. CODE CIV. PROC. § 388.

8. E.g., CONN. GEN. STAT. ANN. § 52-76; MICH. STAT. ANN. § 27A.2051.

9. 6 AM. JUR.2d Associations and Clubs § 1 (1963).

10. See the recommendations set out in the text, infra at 24.

11. E.g., ALA. CODE, Tit. 7, §§ 142-145 ("unincorporated organization or association"); COLO. REV. STAT. § 76-1-6 ("partnership or other unincorporated association"); CONN. GEN. STAT. ANN. § 52-76 ("voluntary association, not having corporate powers, but known by some distinguishing name"); DEL. CODE ANN., Tit. 10, § 3904 ("unincorporated association of

persons using a common name, ordinary partnerships excepted, [which transacts business]"); GA. CODE ANN. §§ 3-117 to 3-121 ("unincorporated organization or association"); LA. CODE CIV. PROC. ANN., Arts. 687, 738 ("unincorporated association"); MAINE REV. STAT. ANN., Tit. 14, § 2 ("organized unincorporated society or association"); MD. ANN. CODE, Art. 23, § 138 ("unincorporated association or joint stock company"); MICH. STAT. ANN. § 27A.2051 ("partnership, partnership association, or any unincorporated voluntary association having a distinguishing name"); NEV. REV. STAT. § 12.110(?); N.J. STAT. ANN. § 2A:64-1 ("unincorporated organization or association, consisting of 7 or more persons and having a recognized name"); N.Y. GEN. ASS'NS LAW §§ 12, 13 ("unincorporated association"); N.C. GEN. STAT. § 1-69-1 ("all unincorporated associations, organizations or societies, foreign or domestic, whether organized for profit or not" excluding "partnerships or co-partnerships which are organized to engage in any business, trade or profession"); PA. RULES CIV. PROC., Rule 2151 ("any unincorporated association conducting any business or engaging in any activity of any nature whether for profit or otherwise under a common name," excluding "an incorporated association, general partnership, limited partnership, registered partnership, partnership association, joint stock company or similar association"); R.I. GEN. LAWS § 9-2-10 ("any unincorporated organization of persons, except a copartnership"); S.C. CODE ANN. § 10-215 ("all unincorporated associations"); TEXAS RULES CIV. PROC., Rule 28 ("partnership or other unincorporated association"); TEXAS REV. CIVIL STAT. ANN., Art. 6133 ("any unincorporated joint stock company or association"); VT. STAT. ANN., Tit. 12, § 814 ("partnership or an

unincorporated association or joint stock company"); VA. CODE ANN. § 8-66 ("an unincorporated association or order"); WIS. STAT. § 262.06(7)("unincorporated association"). See also FLA. STAT. § 447.11 ("labor organization").

FOOTNOTES

UNINCORPORATED ASSOCIATIONS AS DEFENDANTS -- footnotes

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

2. Ibid.

3. Artana v. San Jose Scavenger Co., 181 Cal. 627, 185 Pac. 850 (1919); Potts v. Whitson, 52 Cal. App.2d 199, 125 P.2d 947 (1942).

4. Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195 (1910).

5. Davidson v. Knox, 67 Cal. 143, 7 Pac. 413 (1885). See 1 CHADBOURN, GROSSMAN & VAN ALSTYNE, CALIFORNIA PLEADING § 692 (1961).

6. Potts v. Whitson, 52 Cal. App.2d 199, 125 P.2d 947 (1942).

7. Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195 (1910); Poswa v. Jones, 21 Cal. App. 664, 132 Pac. 629 (1913).

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

9. Compare Comment, 42 CAL. L. REV. 812, 817 (1954) with Note, 50 CAL. L. REV. 909 (1962), Note, 37 SO. CAL. L. REV. 130 (1964), Comment, 36 SO. CAL. L. REV. 445 (1963). See also Sturges, Unincorporated Associations as Parties to Actions, 33 YALE L.J. 383, 401 (1924).

10. Inglis v. Operating Engineers Local Union No. 12, 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962); Marshall v. International Longshoremen's & Warehousemen's Union, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962). See discussion in the text, infra at 11-21.

11. Calimpco, Inc. v. Warden, 100 Cal. App.2d 429, 444, 224 P.2d 421, 432 (1950).

12. See United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922).

13. FED. RULES CIV. PROC. Rule 17(b).

14. ALA. CODE, Tit. 7, §§ 141-145; ARIZ. RULES OF CIV. PROC., Rule 4(d)(6) (by implication); COLO. REV. STAT. § 76-1-6; CONN. GEN. STAT. ANN. § 52-76; DEL. CODE ANN., Tit. 10, § 3904; FLA. STAT. § 47.15 (partnership), § 447.11 (labor organization); IDAHO CODE ANN. § 5-323; ILL. STAT. ANN., Ch. 110, § 27.1; IOWA RULES CIV. PROC., Rule 4 (see Tuttle v. Nichols Poultry & Egg Co., 240 Iowa 208, 35 N.W.2d 875 (1949)); LA. CODE CIV. PROC. ANN., Arts. 688, 689, 737, 738; MAINE REV. STAT. ANN., Tit. 14, § 2; MD. ANN. CODE, Art. 23 §§ 138, 356(g); MICH. STAT. ANN. § 27A.2051(a); MINN. STAT. ANN. § 540.151; MONT. REV. CODE ANN. § 93-2827; NEB. REV. STAT. § 25-313; NEV. REV. STAT. § 12.110; N.J. REV. STAT. § 2A:64-1 to 64-6; N.M. STAT. ANN., § 21-6-5; N.Y. CIV. PROC. LAW & RULES § 1025; see also N.Y. GEN. ASS'NS LAW §§ 12-17; N.C. GEN. STAT. § 1-69.1; OHIO REV. CODE ANN., Tit. 23, § 2307.24; OKLA. STAT. ANN., Tit. 12, § 182; PA. RULES CIV. PROC., Rule 2153(a); R.I. GEN. LAWS § 9-2-10; S.C. CODE ANN. § 10-215; TEXAS RULES CIV. PROC., Rule 28 (see also TEXAS REV. CIVIL STAT. ANN., Arts. 6133-6138); UTAH RULES CIV. PROC., Rule 17(d); VT. STAT. ANN., Tit. 12, § 814 (Supp. 1965); VA. CODE ANN. § 8-66; WIS. STAT. § 262.06(7).

15. Rules of the Supreme Court [of Great Britain], Order 48a, Rule 1.

16. Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756 (1931)(dicta). See also Daniels v. Sanitarium Ass'n, Inc., 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963); Inglis v. Operating Engineers Local Union No. 12, 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962); Marshall v. International Longshoremen's & Warehousemen's Union, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

17. Ibid.

18. 35 Cal. App. 293, 170 Pac. 409 (1917).

19. Id. at 299, 170 Pac. at 411. (Emphasis added.)

20. 46 Cal. App. 325, 189 Pac. 329 (1920).

21. Id. at 328-330, 189 Pac. at 330-331.

22. 213 Cal. 301, 2 P.2d 756 (1931).

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

23. FED. RULES CIV. PROC., Rule 17(b).

24. E.g., ALA. CODE, Tit. 7, § 142; COLO. REV. STAT. § 76-1-6; CONN. GEN. STAT. ANN. § 52-76; GA. CODE ANN. §§ 3-117 to 3-118; LA. CODE CIV. PROC. ANN., Art. 689; MAINE REV. STAT. ANN., Tit. 14, § 2; MD. ANN. CODE, Art. 23, §§ 138, 356(g); MICH. STAT. ANN. § 27A.2051(a); MINN. STAT. ANN. § 540.151 (Supp. 1965); NEB. REV. STAT. § 25-313 ("doing business" is one alternative under this section); N.J. REV. STAT. § 2A:64-1; N.Y. GEN. ASS'NS LAW § 13; N.C. GEN. STAT. § 1-69.1 ("doing business" is one alternative under this section); PA. RULES CIV. PROC., Rules 2151, 2153(a); R.I. GEN. LAWS § 9-2-10; S.C. CODE ANN. § 10-215; VT. STAT. ANN., Tit. 12, § 814 (Supp. 1965); VA. CODE ANN. § 8-66 ("doing business" is one alternative under this section).

25. See the text, supra at 4.

26. E.g., Wukaloff v. Malibu Lake Mt. Club, 96 Cal. App.2d 147, 214 P.2d 832 (1950)(incorporated club).

27. Comment, 42 CAL. L. REV. 812, 813 (1954).

28. Comment, 76 HARV. L. REV. 983, 1089 (1963).

29. Id. at 1088. (Some footnotes omitted.)

30. 6 AM. JUR.2d Associations and Clubs § 47.

31. Id. at § 31.

32. 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

33. Id. at 787, 22 Cal. Rptr. at 215, 371 P.2d at 991 (1962).

34. 58 Cal.2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962).

35. Marshall v. International Longshoremen's & Warehousemen's Union, 57 Cal.2d 781, 787 n.1, 22 Cal. Rptr. 211, 215 n.1, 371 P.2d 987, 991 n.1 (1962).

36. Id. at 783-784, 22 Cal. Rptr. at 213, 371 P.2d at 989.

37. Note, 50 CAL. L. REV. 909, 914 (1962).

38. Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

39. Silva v. Providence Hospital, 14 Cal.2d 762, 97 P.2d 798 (1939); Malloy v. Fong, 37 Cal.2d 356, 232 P.2d 241 (1951).

40. Self v. Self, 58 Cal.2d 683, 26 Cal. Rptr. 97, 376 P.2d 65 (1962); Klein v. Klein, 58 Cal.2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962). It also has been held in California, contrary to the common law rule, that a child may sue his parent for an intentional tort. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955).

41. 6 AM. JUR.2d Associations and Clubs § 44.

42. Most Worshipful Lodge v. Sons of Light, 118 Cal. App.2d 78, 257 P.2d 464 (1953); Comment, 42 CAL. L. REV. 812 (1954).

43. Comment, 42 CAL. L. REV. 812, 816 (1954).

44. CAL. INS. CODE §§ 11040-11041.

45. CAL. LABOR CODE § 1126.

46. CAL. CORP. CODE § 21200 provides:

> 21200. Any unincorporated benevolent or fraternal society or association, and every lodge or branch of any such society or association, and any labor organization, may, without incorporation, purchase, receive, own, hold, lease, mortgage, pledge, or encumber, by deed of trust or otherwise, manage, and sell all such real estate and other property as may be necessary for the business purposes and objects of the society, association, lodge, branch or labor organization, subject to the laws and regulations of the society, association, lodge, or branch and of the grand lodge thereof, or labor organization; and also may take and receive by will or deed all property not so necessary, and hold it until disposed of within a period of ten years from the acquisition thereof.

47. CAL. CORP. CODE §§ 21100-21102 provide:

> 21100. Members of a nonprofit association are not individually or personally liable for debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, construction, repair, or furnishing of buildings or other structures, to be used for the purposes of the association.
>
> 21101. Any contract by which a member of a nonprofit association assumes any such debt or liability is invalid unless the contract or some note or memorandum thereof, specifically identifying the contract which is assumed, is in writing and signed by the party to be charged or by his agent.
>
> 21102. No presumption or inference existed prior to September 15, 1945, or exists after that date, that a member of a nonprofit association has consented or agreed to the incurring of any obligation by the association, from the fact of joining or being a member of the association, or signing its by-laws.

47a. Comment, 42 CAL. L. REV. 812, 816 (1954).

47b. Jardine v. Superior Court, 213 Cal. 301, 321, 2 P.2d 756, 764 (1931).

48. Comment, 76 HARV. L. REV. 983, 1090 (1963). (Footnotes omitted.)

48a. Id. at 1092. (Footnote omitted.)

49. See the text, infra at 21-25 for discussion of the standards for liability of individual members of unincorporated associations.

50. See the text, supra at 13-16.

51. CAL. LABOR CODE § 1126.

52. CAL. CORP. CODE § 15009(1).

53. 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963).

54. 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

55. See the text, supra at 16.

56. Marshall v. International Longshoremen's & Warehousemen's Union, 57 Cal.2d 781, 787, 22 Cal. Rptr. 211, 215, 371 P.2d 987, 991 (1962).

57. Ibid.

58. CAL. CORP. CODE § 15009(1).

59. Goodlett v. St. Elmo Inv. Co., 94 Cal. 297, 29 Pac. 505 (1892).

60. Burks v. Weast, 67 Cal. App. 745, 751, 228 Pac. 541, 543 (1924); Webster v. San Joaquin Fruit Etc. Ass'n, 32 Cal. App. 264, 162 Pac. 654 (1916).

61. Security-First Nat'l Bank v. Cooper, 62 Cal. App.2d 653, 145 P.2d 722 (1944).

62. Comment, 42 CAL. L. REV. 812, 822 (1954).

63. 62 Cal. App.2d 653, 145 P.2d 722 (1944).

64. Id. at 667, 145 P.2d at 730.

65. 50 Cal. App. 462, 195 Pac. 440 (1920).

66. See note 47, supra for text of statutes.

67. 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

68. This amendment would seem to remove any constitutional problem that now exists in the sections. See Code Commission Notes in CAL. CORP. CODE § 21103 (West 1955).

68a. Section 21000 of the Corporations Code provides:

> 21000. A nonprofit association is an unincorporated association of natural persons for religious, scientific, social, literary, educational, recreational, benevolent, or other purpose not that of pecuniary profit.

69. Most Worshipful Lodge v. Sons of Light, 118 Cal. App.2d 78, 257 P.2d 464 (1953).

69a. CAL. CORP. CODE § 15507.

70. Calimpco, Inc. v. Warden, 100 Cal. App.2d 429, 444, 224 P.2d 421, 432 (1950)(partnership).

71. The Code Commission's Note to Section 388 states: "The words 'and the individual property of the party or parties served with process' have been added [by the 1907 amendment to Section 388], thus avoiding multiplicity of suits."

72. The question has been raised at least twice but the court has not decided the question on either occasion. Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756 (1931); The John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 P.2d 690 (1911)(rehearing denied, 16 Cal. App. at 593, 122 Pac. 835).

72a. The pertinent portion of Code of Civil Procedure Section 410 provides:

> When the service is against . . . 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 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 . . .) of this code." 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 associates, said notice shall also indicate that service is had upon said person as an individual as well as on behalf of . . . said 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 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 associates. When service is made upon the person served as an individual as well as on behalf of the . . . 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.

72b. See 34 CAL. S.B.J. 630, 631 (1959).

73. 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 987 (1962).

74. Id. at 787, 22 Cal. Rptr. at 215, 371 P.2d at 991.

75. Id. at 787 n.1, 22 Cal. Rptr. at 215 n.1, 371 P.2d at 991 n.1.

76. See discussion supra at

77. Typical statutes are:

ILL. STAT. ANN. Ch. 77, § 1 and Ch. 110, § 27.1, which provide:

> 1b. A judgment rendered against a partnership in its firm name shall support execution only against property of the partnership and shall not constitute a lien upon real estate other than that held in the firm name.
>
> 27.1. (1) A partnership may be sued in the names of the partners as individuals doing business as the partnership, or in the firm name, or both.
>
> (2) An unsatisfied judgment against a partnership in its firm name does not bar an action to enforce the individual liability of any partner.

NEB. REV. STAT. §§ 25-314 and 25-316, which provide in part:

> 25-314. . . . Executions issued on any judgments rendered in such proceedings [against an unincorporated association] shall be levied only on the property of the company, firm, partnership, or unincorporated association.
>
> 25-316. If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons comprising such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them as may appear to have been members of such company, association, or firm.

N.Y. GEN. ASS'NS LAW §§ 15 and 16, which provide:

> 15. In such an action [against an unincorporated association] the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize an execution to be issued against his property, or his person; nor does the docketing thereof bind his real property, or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal or real property belonging to the association, or owned jointly or in common, by all the members thereof.
>
> 16. Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as described in this article, another action, for the same cause, shall not be brought against the

members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff, or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum, collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision first of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein. Section eleven of this chapter applies to an action brought, as prescribed in this section against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept.

R.I. GEN. LAWS §§ 9-2-14 and 9-2-15, which provide:

9-2-14. In such action or proceeding [against an unincorporated association] the officers or members against whom it is brought shall not be arrested; and a judgment against them shall not authorize an execution to be issued against their property or person. When such judgment is for a sum of money, an execution issued thereon must require the officer serving the same to satisfy such execution out of any personal or real property belonging to the association or owned jointly or in common by all members thereof.

9-2-15. When any action or proceeding at law is brought to recover any property, or upon any cause of action for or upon which the plaintiff may maintain such an action or proceeding at law against all the associates by reason of their interest or ownership or claim of ownership therein as heretofore provided in §§ 9-2-10 to 9-2-14, inclusive, no action or other proceeding at law for the same cause of action shall be brought to recover a personal judgment against the members of such association or any of them until

after final judgment in such first action or proceeding, and the return of any execution issued thereon wholly or partially unsatisfied.

See also, CONN. GEN. STAT. ANN. § 52-76 ("Civil actions may be brought, both in contract and tort, against such associations and its members, but no such action, except on contract, shall be brought against such members without joining such association as a party thereto, if such association is located or has property subject to attachment in this state."); GA. CODE ANN. § 3-121 ("No such judgment [against an unincorporated association] shall be enforced against the individual property of any member of an unincorporate association unless such member has personally participated in the transaction for which said action was instituted."); MINN. STAT. ANN. § 540.151 (1965 Supp.)("Any money judgment against a labor organization or employer organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."); MD. ANN. CODE, Art. 23, § 138 (Supp. 1965)("Any money judgment against such association or joint stock company shall be enforceable only against such association or joint stock company as an entity and against its assets, and shall not be enforceable against any individual member or his assets.").

78. See the text of these sections, supra note 77.

79. ALA. CODE ANN., Tit. 7, § 141 provides:

> 141. Two or more persons associated together as partners in any business or pursuit, who transact business under a common name, whether it comprise the names of such persons or not, may be sued by their common name, and the summons in such case being served on one or more of the associates, the judgment in the action binds the joint property of all the associates in the same manner as if all had been named defendants, had been sued upon their joint liability, and served with process; any one or more of the associates, or his legal representative, may also be sued for the obligation of all.

79a. CONN. GEN. STAT. ANN. § 52-292 provides:

> 52-292. The property of a voluntary association, whether held by it or by trustees for its benefit, may be attached and held to respond to any judgment that may be recovered against it; but the individual property of its members shall not be liable to attachment or levy of execution in actions against such association to which such members are not parties. Any judgment obtained in a joint action against such association and its members shall be satisfied first from the personal property of such association, if the same is sufficient, and thereafter the property of any member of such association against whom judgment was rendered jointly with such association may be taken upon execution to satisfy the unpaid portion of such judgment. The attachment lien on the personal property of any member of such voluntary association against whom judgment is rendered in an action so brought shall not expire until two months from the completion of the levy issued upon the personal property of such association; and if real estate of any member has been attached in such action and judgment therein is rendered, the attachment lien thereon shall not expire until four months from the completion of the levy of the execution against the personal property of such association. Nothing herein contained shall be construed as prohibiting the plaintiff in any action of tort from satisfying such judgment out of the real estate of such association.

See also, the portion of CONN. GEN. STAT. ANN. § 52-76 quoted in note 77, supra.

79b. TEX. REV. STAT. ANN., Arts. 6136-6137 provide:

> 6136. Where suit shall be brought against such company or association, and the only service had shall be upon the president, secretary, treasurer or general agent of such company or association, and judgment shall be rendered against the defendant company, such judgment shall be binding on the joint property of all the stockholders or members thereof, and may be enforced by execution against the joint property; but such judgment shall not be binding on the individual property of the stockholders or members, nor authorize execution against it.
>
> 6137. In a suit against such company or association, in addition to service on the president, secretary, treasurer or general agent of such companies or association, service of citation may also be had on any and all of the stockholders or members of such companies or associations; and in the event judgment shall be against such unincorporated company or association, it shall be equally binding upon the individual property of the stockholders or members so served, and executions may issue against the propety of the individual stockholders or members, as well as against the joint property; but executions shall not issue against the individual property of the stockholders or members until execution against the joint property has been returned without satisfaction.

79c. For the pertinent portion of the text of this section, see note 72a.

79d. CAL. CODE CIV. PROC. § 442

79e. CAL. CODE CIV. PROC §§ 1010-1020.

79f. CAL. CODE CIV. PROC. § 1005.

79g. CAL CODE CIV. PROC § 465.

79h. Wood v. Johnston, 8 Cal. App. 258, 260, 96 Pac. 508 (1908).

79i. WITKIN, CALIFORNIA PROCEDURE, PLEADING § 8.

80. CAL. CORP. CODE § 15009(1).

81. See, e.g., ALA. CODE ANN., Tit. 7, § 141; IDAHO CODE ANN. § 5-323; MONT. REV. CODE ANN. § 93-2827; NEV. COMP. LAWS ANN. § 12.110; N.M. STAT. ANN. § 21-6-5; OKLA. STAT. ANN., Tit. 12, § 182; S.D. CODE ANN. § 33.0408; VT. STAT. ANN., Tit. 12, § 814 (Supp. 1965).

82. See, e.g., NEB. REV. STAT. ANN. § 25-314; N.J. REV. STAT. ANN. § 2A:64-2; N.M. STAT. ANN. § 21-1-1(4); S.C. CODE ANN. § 10-429; UTAH RULES CIV. PROC. ANN., Rule 4(e)(4); VT. STAT. ANN., Tit. 12,§ 814 (Supp. 1965); VA. CODE ANN. § 8-66.1 (Supp. 1964).

83. ALA. CODE ANN., Tit. 7, § 144 provides:

> 144. Service of process in such action against such organization or association shall be had by service upon any officer or official member of such organization or association or upon any officer or official member of any branch or local of such organization or association, provided that any such organization or association may file with the secretary of state a designated officer or agent upon whom service shall be had and his residence within the state, and if such designation is so made and filed, service of process shall be had only on the officer or agent so designated if he can be found within the state.

84. GA. CODE ANN. § 3-119. This section is the same in substance as the Alabama statute set out in note 83. See also, MINN. RULES CIV. PROC., Rule 4.03(b)

85. See also, LA. REV. STAT. ANN., Art. 1264, which provides:

> Service on an unincorporated association is made by personal service on the agent appointed, if any, or in his absence, upon a managing official, at any place where the business of the association is regularly conducted. In the absence of all officials from the place where the business of the association is regularly conducted, service of citation or other process may be made by personal service upon any member of the association.

86. It may not be possible to use California discovery procedures to discover this information. See LOUISELL, MODERN CALIFORNIA DISCOVERY § 9.06 (1963).

87. 37 Cal.2d 760, 235 P.2d 607 (1951).

88. Ibid.

89. 37 Cal.2d 760, 235 P.2d 607 (1951).

90. Some courts have applied the test of 28 U.S.C. § 1391(c) used to determine the residence of corporations to determine venue in actions involving unincorporated associations. For discussion, see 1 MOORE'S FEDERAL PRACTICE ¶ 0.142 [5.-4](1964) and the cases cited therin. Cf. Sperry Products, Inc. v. Association of American Railroads, 132 F.2d 408 (1942). A recent decision of the Supreme Court holding that unincorporated associations are not to be treated as corporations for the purpose of determining their citizenship for diversity jurisdiction casts doubt on the propriety of drawing such an analogy for determining residence for venue purposes. See, United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145 (1965). The Bouligny decision did, however, realize the desirability of treating an unincorporated association as if it were a corporation but felt that any change should be made by Congress.

91. See generally Comment, 4 STAN. L. REV. 160 (1951).

92. 37 Cal.2d 760, 235 P.2d 607 (1951).

93. Id. at 764, 235 P.2d at 609.

94. Comment, 4 STAN. L. REV. 160, 162 (1951).

95. See CAL. CONST., Art. XII, § 16; cf., PA. RULES CIV. PROC. Rule 2156, which provides:

> Rule 2156. (a) Except as otherwise provided by subdivision (b) of this rule, an action against an association may be brought in and only in a county where the association regularly conducts business or any association activity, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose.
>
> (b) Subdivision (a) of this rule shall not restrict or affect the venue of an action against an association commenced by or for the attachment, seizure, garnishment, sequestration or condemnation of real or personal property or an action for the recovery of the possession of or the determination of the title to real or personal property.

See also, TEXAS CIVIL STAT. ANN., Art. 1995(23) which provides in part:

> 23. Corporations and associations.--Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county.

96. See the text, supra at

97. Miller & Lux v. Kern County Land Co., 134 Cal. 586, 587, 66 Pac. 856, 857 (1901). (Emphasis added.)

UNINCORPORATED ASSOCIATIONS AS PLAINTIFFS

The Present California Law

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

2. Ginsberg Tile Co. v. Faraone, 99 Cal. App. 381, 278 Pac. 866 (1929).

3. Herald v. Glendale Lodge No. 1289, 46 Cal. App. 325, 189 Pac. 329 (1920).

4. It has been suggested that Section 388 of the Code of Civil Procedure altered the common law rule with respect to suits by partnerships and other unincorporated associations as well as to suits against them. See, e.g., Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 513 (1946). Similarly, it has been contended that the fictitious name statute--Civil Code Sections 2466-2471--constitutes an affirmative authority to sue in the business name. Ibid. See also Note, 35 CAL. L. REV. 115 (1947). Nevertheless, subject to the exceptions noted in the text, the appellate courts in California follow the common law rule, usually without examining the reasons for its longevity or its effect in modern society.

5. The following cases are illustrative:

A.M. Gilman & Co. v. Cosgrove, 22 Cal. 356 (1863). The complaint in an action for goods sold was entitled "A.M. Gilman & Co. v. James N. Cosgrove" and contained no other description or designation of the party plaintiff. At the trial, defendant objected to the introduction of evidence of the sale on the ground that the complaint did not sufficiently designate the party plaintiff. The objection was overruled and judgment for plaintiff affirmed. The court said:

> The complaint should have set forth the names of the individuals composing the firm of A.M. Gilman & Co., as the plaintiffs, if the action was intended to be in behalf

> of individuals composing a firm. . . . The objection to this defect has, however, not been taken in a way to be available . . . [T]he defendant should have demurred to the complaint for a defect of parties. . . . The objection not having been taken in a proper mode, there was no error committed on this point. [22 Cal. at 357-358.]

Holden v. Mensinger, 175 Cal. 300, 165 Pac. 950 (1917). A lien claim was filed in the common name of a partnership. The complaint to foreclose the claim was in the names of the partners. This was held not to be a fatal variance because there is no requirement that lien claims be filed in the names of the partners.

Kadota Fig Ass'n v. Case-Swayne Co., 73 Cal. App.2d 796, 167 P.2d 518 (1946). Plaintiff was named as "Kadota Fig Association of Producers (a Growers Cooperative Association)." It was held that the complaint was subject to demurrer for want of capacity apparent on the face thereof to sue in a common name but that it was error to dismiss the complaint without giving plaintiff an opportunity to amend. To the same effect, see Ginsberg Tile Co. v. Faraone, 99 Cal. App. 381, 278 Pac. 866 (1929).

6. Andrews v. Mokelumne Hill Co., 7 Cal. 330 (1857).

7. Swamp & Overflowed Land Dist. No. 110 v. Feck, 60 Cal. 403 (1882); see also Florence v. Helms, 136 Cal. 613, 69 Pac. 429 (1902).

8. Tennant v. Pfister, 51 Cal. 511 (1876). See also 37 CAL. JUR.2d Parties § 70 and cases therein cited in note 13. See generally 1 CHADBOURN, GROSSMAN & VAN ALSTYNE, CALIFORNIA PLEADING § 692 (1961).

9. 35 Cal.2d 596, 220 P.2d 912 (1950).

10. Case v. Kadota Fig Ass'n, 207 P.2d 86 (1949).

11. Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 220 P.2d 912 (1950).

12. The earlier stages of the Kadota litigation are noted in 35 CAL. L. REV. 115 (1947). The final decision is noted with approval in 39 CAL. L. REV. 264 (1950), with suggestions for amendment of Code of Civil Procedure Section 388. The overlapping of cross-complaint and counterclaim in California law is discussed in Note, Counterclaims, Cross-Complaints, and Confusion, 3 STAN. L. REV. 99 (1950).

13. 117 Cal. App.2d 322, 255 P.2d 482 (1953).

14. Subdivision 4 of Civil Code Section 3369 provides: "As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

15. Daniels v. Sanitarium Ass'n, Inc., 59 Cal.2d 602, 603, 30 Cal. Rptr. 828, 829, 381 P.2d 652, 653 (1963).

16. 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963).

17. Id. at 603, 30 Cal. Rptr. at 829, 381 P.2d at 653.

18. Id. at 606-610, 30 Cal. Rptr. at 831-834, 381 P.2d at 655-658.

19. Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 220 P.2d 912 (1950).

20. Daniels v. Sanitarium Ass'n, Inc., 59 Cal.2d 602, 610 n.9, 30 Cal. Rptr. 828, 834 n.9, 381 P.2d 652, 658 n.9 (1963).

21. Ibid.

22. Indeed, the court specifically noted the possible application of the Daniels rationale to other situations and noted that it was "leaving to future development the rule to be applied to other types of unincorporated associations." Id. at 610 n.9, 30 Cal. Rptr. at 834 n.9, 381 P.2d at 658 n.9.

23. Note, Unincorporated Associations as Plaintiffs, 37 SO. CAL. L. REV. 130, 131-133 (1964).

24. See the statutes and cases cited in notes 31-33, infra at

25. FED. RULES CIV. PROC., Rule 17(b).

26. Rules of the Supreme Court [of Great Britain], Order 48a, Rule 1.

27. 207 P.2d 86 (1949).

28. CAL. CODE CIV. PROC. §§ 2016-2036.

29. See CAL. CODE CIV. PROC. § 474.

30. See CAL. CODE CIV. PROC. §§ 442, 465, 1005, 1010-1020 and 2016-2036.

31. 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 (Supp. 1965); MICH. STAT. ANN. § 27A:2051; MINN. STAT. ANN. § 540.151 (Supp. 1965); NEB. REV. STAT. ANN. §§ 25-313 to 25-316; N.J. REV. 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 (Supp. 1965); OHIO REV. CODE ANN., Tit. 23, § 2307.24; OKLA. STAT. ANN., Tit. 78, §§ 32, 54; TEXAS RULES CIV. PROC. ANN., Rule 28 (see also TEXAS REV. CIVIL STAT. ANN., Arts. 6133-6138); VT. STAT. ANN., Tit. 12, § 814 (Supp. 1965); VA. CODE ANN. § 8-66 (Supp. 1964); WYO. RULES CIV. PROC. ANN., Rule 17(b). See also ARIZ. CODE ANN. § 23-1324 (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. GEN. 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). See also notes 34, 35, and 36, infra.

32. Busby v. Electric Utilities Employees Union, 79 App. D.C. 336, 147 F.2d 865 (1945). The holding apparently is limited to labor unions.

33. Bouchette v. International Ladies Garment Union, Local No. 371, 245 S.C. 586, 141 S.E.2d 834 (1965). The court held that the right of an unincorporated association to sue in its common name arose by necessary implication from the state's statutes, including a statute permitting an unincorporated association to be sued in its common name.

34. ARIZ. CODE ANN. §§ 10-801 to 10-802 (fraternal and benevolent society); MAINE REV. STAT. ANN., Tit. 14, § 2; MASS. LAWS ANN., Ch. 110, § 10 (restrain use of counterfeit of registered label); MO. STAT. ANN. § 417.070 (trademarks); N.Y. GEN. ASS'NS LAW ANN. §§ 12-17; PA. RULES CIV. PROC. ANN., Rule 2152; R.I. GEN. LAWS ANN. § 9-2-11; W. VA. CODE ANN. § 4550 (enjoin use of counterfeit trademark or label). See also LA. CODE CIV. PROC. ANN., Arts. 688, 689; WIS. STAT. ANN. § 188.02 (fraternal organizations); WYO. COMP. STAT. ANN. § 17-162.

35. LA. REV. STAT. ANN., Art. 689.

36. The note to Rule 2152 of the Pennsylvania Rules of Civil Procedure 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."

See also note 37, infra.

37. Although Pennsylvania normally permits an unincorporated association to bring suit only through a trustee ad litem, it does permit an unincorporated association that is sued in its common name to prosecute any set-off, counterclaim, or cross-action in its common name. The adoption of such a limited provision in California would at least overrule the distinction between counterclaims and cross-complaints made by the California Supreme

Court in Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 220 P.2d 912 (1950). The Kadota Fig case held that a counterclaim could be brought in the defendant's common name but that a cross-complaint could be brought only by naming all the members of the cross-complainant association in the complaint.

38. 59 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d 652 (1963).

39. Id. at 609-610, 30 Cal. Rptr. at 833-834, 381 P.2d at 657-658.

40. One writer commenting on this objection pointed out that if any problem exists it is when the unincorporated association is a party defendant because in such a case the court might be unable to determine if all the parties in interest had been served. He said:

> One possibly valid reason sometimes advanced [for denying an unincorporated association the right to sue in its common name] is confusion in the identification of the parties plaintiff or defendant. This seems at first glance to make some sense, because surely a court must be able to determine that all parties in interest have been served. This problem would appear to be crucial only in the case of associated defendants, because the plaintiff in stating a cause of action would necessarily establish the identity of the parties in interest. California has, however, provided by statute that the association can be a party defendant in the association name, thus abrogating the rule in the only place where it might make some sense. [Note, Unincorporated Associations as Plaintiffs, 37 SO. CAL. L. REV. 130, 133 (1964).

41. Comment, Counterclaims and Cross-Complaints in California, 10 SO. CAL. L. REV. 415, 425 (1937).

42. CAL. CODE CIV. PROC. § 474.

43. Order 48a, Rule 1 of the Rules of the Supreme Court [of Great Britain] provides:

> Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the

accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner and verified on oath or otherwise as the judge may direct. And when the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named as the plaintiff in the writ. But all the proceedings shall, nevertheless, continue in the name of the firm.

44. CAL. CODE CIV. PROC. § 442.

45. CAL. CODE CIV. PROC. § 465.

46. CAL. CODE CIV. PROC. § 1005.

47. CAL. CODE CIV. PROC. §§ 1016-1036.

48. CAL. CODE CIV. PROC. §§ 1010-1020.

49. 207 P.2d 86 (1949).

50. See generally, CAL. CODE CIV. PROC. §§ 942-949.

51. CAL. CODE CIV. PROC. § 681a provides:

> 681a. The court, or the judge thereof, may stay the execution of any judgment or order; provided, that no court shall have power, without the consent of the adverse party, to stay the execution of any judgment or order, the execution whereof would be stayed on appeal only by the execution of a stay bond, for a longer period than 10 days in justice courts, nor for a longer period than 30 days in other courts. If a motion for a new trial or for judgment notwithstanding the verdict is pending, execution may be stayed until 10 days after the determination thereof.

52. CAL. CODE CIV. PROC. § 948.

53. Schubert v. Bates, 30 Cal.2d 785, 185 P.2d 793 (1947).

54. CAL. CODE CIV. PROC. §§ 957, 988f.

55. See CAL. CODE CIV. PROC. §§ 1021-1035.

56. See note 44, supra.

57. MASS. LAW ANN., Ch. 110, § 10.

58. WYO. COMP. STAT. ANN. § 40-3.

59. Sealand Investment Corp. v. Shirley, 190 Cal. App.2d 323, 326, 12 Cal. Rptr. 164, (1961).

60. PA. RULES CIV. PROC. ANN., Rule 2155.

61. NEB. REV. STAT. ANN. § 25-315.

62. Burlington & M. R. R. Co. v. Dick, 7 Neb. 242 (1878).