

number of contract carriers and mitigate the pressure of the traffic on the highways of Texas.

Welcome as this decision is to the writer, meaning as it does that the states need no longer continue the trial and error method in the hope of getting a statute by the Supreme Court, it cannot be denied that this is a classic example of judicial rationalizing. It would better become the court frankly to assert the proposition that changing conditions in the transportation field have necessitated the abandonment of a concept of law which led only to chaos in the field. The fallacy of the court's theory is its ignoring the fact that most of the carriage which would have been done by the unregulated contract carrier will be done under an equalizing of competition, not by non-highway carriers but either by common carriers by motor vehicle or by private trucks which the shippers will purchase for their own use, both of which equally will wear the highway. This indicates an insularity of mind which ill becomes the supreme tribunal.

Aside from its "far fetched" reasoning, however, the *Binford* decision is auspicious and with ample economic justification. Coming as it does at a time when existing transportation facilities are greatly in excess of any effective demand possible in the immediate future, it gives the states something of a free hand in coordinating their transportation assets—to work the contract carrier into the comprehensive system of transportation in a manner which will provide for adequate public service, and yet will prevent tottering railroad valuations from further disaster. Future state legislation will, in all probability, adopt the opportunity of incorporating into itself such a recital as that which gave the court its cue for a change of heart in *Stephenson v. Binford*. "Oh highway preservation! What regulations shall be committed in thy name."

HARRY W. JONES, '34.

THE SUABILITY OF AN UNINCORPORATED ASSOCIATION IN MISSOURI

It appears to be a well settled rule of the common law that an unincorporated association cannot maintain an action in its own name,¹ but must sue or be sued in the names of the component members,² in the absence of a statute granting such powers.³

¹ *Francis v. Perry* (1913) 144 N. Y. S. 167; *Detroit Schuetzen Bund v. Detroit Agitation Verein* (1880) 44 Mich. 313, 6 N. W. 675.

² *Lewelling v. Woodworkers Underwriters* (1919) 140 Ark. 124, 128, 215 S. W. 258, 259; *Westbrook v. Griffin* (1906) 132 Iowa 185, 109 N. W. 608; *McMahon v. Rauhr* (1871) 47 N. Y. 67.

³ *Int'l Bro. Loc. Engineers v. Green* (1921) 206 Ala. 196, 89 So. 435;

The reason the courts have assigned for the rule is the unincorporated association's lack of an entity separate and distinct from its members.⁴ The Missouri courts have reiterated this doctrine.⁵

That the only method for a group to acquire the power to sue and be sued is through the aid of the corporate mechanism seems to be the consequence of this rule. But upon examination it would seem that the effect of this doctrine might be evaded in some instances. An unincorporated association wishing the "suability" attribute, which is generally considered as belonging solely to the corporation or the individual, may create an express trust in which the cestuis que trustent would be the members of the association. The codes of many states, including Missouri,⁶ authorize a trustee of an express trust to sue in his own name. Such provisions have been held to apply to a trustee for the benefit of the members of an unincorporated association.⁷

That the Missouri courts have indulged in the "suability dogma" is unquestionable,⁸ but have they confined themselves within the narrow limits the strict application of such a rule would necessitate?

In 1908 the case of *State v. Kansas City Live Stock Exchange*⁹ came before the Supreme Court of Missouri. It was a suit by the attorney general to enjoin the Live Stock Exchange, a voluntary association composed of both individuals and corporations, from practices which were alleged to be in restraint of trade. Judge Valliant said, "the association as such has no legal entity, and therefore can neither sue nor be sued, but in the case at bar the defendants are the individuals and corporations that compose the Exchange, and the name merely serves to distinguish those defendants in their associated capacity". There seems to be some subtle distinction between an association's suability and the right to sue the aggregate members, using the association's name to des-

Barbour v. Albany Lodge (1884) 73 Ga. 474; *Baskin v. United Mine Workers* (1921) 150 Ark. 398, 401, 234 S. W. 464; *Warton v. Warner* (1913) 75 Wash. 470, 135 Pac. 235; *Hanley v. Elm Grove Mut. Tel. Co.* (1911) 150 Iowa 198, 129 N. W. 807.

⁴ *Grand Grove etc. v. Garibaldi Grove* (1900) 130 Cal. 16, 62 Pac. 486.

⁵ *Newton County Fruit Growers v. Southern Ry. Co.* (1930) 326 Mo. 617, 31 S. W. (2d) 803.

⁶ R. S. Mo. (1929) sec. 699.

⁷ *Colley v. Wilson* (1900) 86 Mo. App. 398; *Kuhl v. Meyer* (1889) 35 Mo. App. 206; *Kuhl v. Meyer* (1892) 50 Mo. App. 648. The equitable "representative suit" seems also to avoid the effect of the general rule. *McKenzie v. L'Amoureux* (N. Y. 1851) 11 Barb. 516; *Penny v. Central Coal Co.* (C. C. A. 8, 1905) 138 Fed. 769; *Guilfoil v. Arthur* (1895) 158 Ill. 600, 41 N. E. 1009; *Guske v. Anderson* (1888) 77 Cal. 247, 19 Pac. 421.

⁸ *Newton County Fruit Growers v. Southern R. Co.* (1930) 326 Mo. 617, 31 S. W. (2d) 803.

⁹ (1908) 211 Mo. 181, 109 S. W. 675.

ignates all members. However evasive that distinction may be, it is clear that the court wished to reaffirm the common law doctrine, but also allow suit against the association.

The case of *Weir v. Metropolitan Street Railway Co.*¹⁰ came before the Kansas City Court of Appeals. The plaintiff, in that case, as president of the Adams Express Company (a joint stock company) attempted to sue for damages sustained by the negligence of the defendant's servant in running down a truck of the Adams Express Company. In discussing the Company's ability to sue, the Court said that while a joint stock company differs in some respects from an ordinary business partnership and resembles in some respects a corporation, yet it lacked the important element of being a corporation, as it had not been made such by the state. The court emphatically held that the Adams Express Company could not maintain this suit in the name of the association, nor in the name of its officers as trustees. The same parties came before this court three years later.¹¹ This time the joint stock company was the defendant. The court, very consistently, held that the Adams Express Company had no capacity to sue or be sued. In the opinion the first case was reviewed, the court finding no reason to change its holding since the first decision had been rendered.

This same court, however, seven years later, allowed a suit against a joint stock company.¹² The court based its decision on two statutory provisions. One provided that a corporation shall have the power to sue and be sued in any court of law or equity.¹³ The other provided that the term "corporation," as used in the chapter of the statutes on corporations, shall include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships.¹⁴ Without pointing out what a "power or privilege" not possessed by individuals or partnerships might be, the court said this company was so endowed and could therefore sue or be sued in the company name. In rendering this decision the court did not pass over its opinion,

¹⁰ (1907) 126 Mo. App. 471, 103 S. W. 583.

¹¹ *Metropolitan St. Ry. Co. v. Adams Exp. Co.* (1910) 145 Mo. App. 371; 130 S. W. 101.

¹² *Williams v. United States Exp. Co.* (1917) 195 Mo. App. 362, 191 S. W. 1087.

¹³ R. S. Mo. (1909) sec. 2990—"Every corporation as such has power . . . to sue and be sued, complain and defend in any court of law or equity". This same provision may be found in R. S. Mo. (1929) Sec. 4555.

¹⁴ R. S. Mo. (1909) sec. 2963—"The term 'corporation' as used in this chapter shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships." This same provision may be found in R. S. Mo. (1929) sec. 4526. An identical provision is embodied in the Constitution of Missouri. Art. 12 Sec. 11.

as rendered in the *Metropolitan Street Railway Co. v. Adams Express Co.* without comment. It explained that in the earlier case (the *Adams Express Company* case) these two statutory provisions had not been considered.

In the case of *Weichtuechter v. Miller*,¹⁶ the plaintiff Wiech-tuechter sued in his representative capacity as secretary of the American International Musical and Theatrical Union, a voluntary association, against defendants for an alleged slander. Upon a demurrer to the plaintiff's petition the question of plaintiff's legal capacity to sue was raised. In disposing of the case the Supreme Court held that such a suit as this could be maintained in the name of the association under the reasoning found in the *United States Express Company* case. Since the suit could be maintained in the name of the association, the petition was bad on demurrer because the suit was not brought in the name of the real party in interest. Although this was a negative decision as to the association's suability, still it is most interesting to find the Supreme Court sanctioning suit in tort by this unincorporated group.

In 1922 the St. Louis Court of Appeals considered the case of *Bruns v. Milk Wagon Drivers Union*.¹⁷ The father of a deceased member of the union sued the union, an unincorporated association, for the sum of \$500 as provided by the by-laws of the organization. The union presented its unincorporated status as a defense to the suit, but the defense proved ineffective. The decision was based upon section 1186, Revised Statutes Missouri (1919)¹⁸ which provided in express terms that unincorporated associations might be sued in their common name and validly served by merely serving the president or other officer of the association. "Such an organization as this," said the court, "is a legal entity and entitled to sue and be sued the same as a corporation." The Kansas City Court of Appeals followed the *Bruns* case without a discussion of the question when it considered the case of *Mc-*

¹⁵ See note 11, supra.

¹⁶ (1918) 270 Mo. 322, 208 S. W. 39.

¹⁷ (1922) 242 S. W. 419.

¹⁸ The opinion was based upon subdivision seven in that section. This provision originated in Laws 1915 p. 225. It is now R. S. Mo. (1929) sec. 728. Subdivision seven is as follows: "where any action shall be commenced against any voluntary or unincorporated association or organization it may be sued in the name it has selected or by which it is known or uses and summons may be served on it by delivering a copy of the writ and petition to the president or other officer . . . , and when had (service) in conformity herewith shall be deemed personal service against such voluntary or unincorporated association or organization and authorize the rendition of a general judgment against it".

Intyre v. Live Stock Shipping Association.¹⁹ In overruling the defendant association's contention that all its members must be made parties to the suit, the court merely said that *Bruns v. Driver's Union and Williams v. Express Co.* controlled the case under review.

With section 1186²⁰ to be found in the statutes it would seem there should no longer be any question of the right to sue a voluntary association in its own name. The language clearly provides such a suit may be had.²¹

However, the Supreme Court of Missouri subsequently ruled that this section could not be given its full literal effect, because of the restrictions in the Missouri Constitution that the title of every statute must reveal its contents.²² The title of this act merely stated that it was an act to amend a named section of the revised statutes of 1909. This former section was solely concerned with declaring how service might be made upon individuals and corporations which were already suable entities. The court held that it was improper to add wholly new and unrelated provisions to a statute by way of amendment to it. Therefore, the statute could not constitutionally be allowed to create new suable entities, although it was upheld in so far as it merely regulated how already existing suable entities might be served.

Two years after the unconstitutionality of this statute had been determined, the St. Louis Court of Appeals had occasion to pass upon the suability of an unincorporated labor union.²³ It was a suit upon a contract of insurance made by the union. The court recognized that section 1186 Revised Statutes Missouri (1919) had been declared unconstitutional in so far as it made voluntary associations suable entities. But, reasoned the court, this union had powers and privileges not possessed by individuals or partnerships and was therefore a suable entity without the aid of the unconstitutional statute. It may be noted that the court did not enumerate any powers or privileges, nor did it give a hint as to what specific ones it had considered.

The Supreme Court reviewed the case of *Newton County Fruit Growers v. Southern Railway Co.*²⁴ in 1930 and denied the Growers' Association the right to sue in its own name. The petition alleged the association was not a corporation, but that it possessed powers and privileges not possessed by individuals or partnerships and hence was capable of suing as a corporation. The

¹⁹ (1928) 222 Mo. App. 935, 11 S. W. (2d) 77.

²⁰ R. S. Mo. (1919).

²¹ See note 18, *supra*, for express language referred to.

²² *Mayes v. United Garment Workers of America* (1928) 320 Mo. 10, 6 S. W. (2d) 333.

²³ *Syz v. Milk Wagon Drivers Union* (1930) 24 S. W. (2d) 1080.

²⁴ (1930) 326 Mo. 617, 31 S. W. (2d) 803.

court reasoned that it was not enough merely to allege that there are exceptional powers and privileges which an association possesses; the statute which grants these must be set forth. At common law such an association did not have power to sue. Unless there is a statute which grants it privileges not possessed by individuals or partnerships, suit in the association's name is impossible.

In the case of *Clark v. Grand Lodge*,²⁵ the Supreme Court considered the suability question again and, in its opinion, gave a full discussion and review of many of the leading Missouri cases on the question. The suit, in this instance, was on a contract of insurance made by the defendant unincorporated labor organization. The defendant's defense that it could not be sued proved ineffective. The court found that Missouri statutes, regulating and governing the insurance business, recognized that such business could be carried on by voluntary associations as well as by corporations and individuals.²⁶ "Contracts are not contracts unless they are enforceable. To say that an association like the defendant can make contracts necessarily means valid contracts—contracts that are binding on the parties and enforceable against them. It is an absurdity to say that defendant can make contracts of insurance, but cannot be sued thereon. If it is a legal entity when making such contracts, it retains such legal entity when sued thereon". This was the basis of the decision, but it was also suggested that the doctrine of estoppel might well be applied to such a situation. It was pointed out that this association was composed of over a hundred thousand members and had the appearance and employed the method of doing business of a corporation. It chose a name and did a business under that name as a legal entity. It made contracts in that name and when sued on those contracts in the name it used in making them, "it ought not be allowed to say that it is a mere myth—an intangible non-entity incapable of being sued."

While the court in *Clark v. Grand Lodge* holds that this association was a suable entity so long as the suit is on a contract made in the association name, it nevertheless is careful to point out that it does not intend to go as far as the Supreme Court of United States did in *United Mine Workers v. Coronado Coal Co.*²⁷ and hold that

²⁵ (1931) 328 Mo. 1084, 43 S. W. (2d) 404.

²⁶ R. S. Mo. (1929) sec. 5670, 5990, 5994, 5997, 6002, 6021.

²⁷ (1922) 259 U. S. 344. In this case, with no statute expressly authorizing suit against unincorporated labor unions, the Supreme Court allowed suit against the United Mine Workers, finding that state and federal statutes had from time to time been enacted touching labor unions in various respects and that these statutory provisions were "affirmative legal recognition of their existence". Since, the court reasoned, their "existence" had been "recognized", they were suable in their association name.

an unincorporated association is suable in actions sounding in tort.

Clark v. Grand Lodge was decided in 1931. One year later the suability question was again presented to the Supreme Court in the case of *Ruggles v. International Association of Iron Workers*.²⁸ In the plaintiff's petition it was alleged that the defendant was a voluntary association, having powers and privileges not possessed by individuals or partnerships, but as in the *Newton County Fruit Growers* case, the petition failed to show the source of any such powers. The allegations were held to be mere conclusions, and the plaintiff's right to sue was denied. The court did not overrule the decision of *Clark v. Grand Lodge*, but attempted to distinguish the two. In the *Clark* case the suit was on a contract of insurance, but in the *Ruggles* case the plaintiff was asking damages for being wrongfully deprived of the privileges of membership in the organization.

There are other cases, involving the suability question in some degree, which have not been mentioned in this discussion. They may be grouped in two classes. (1) Those cases in which suability is allowed without mention or discussion of the fact;²⁹ (2) Those cases in which the suability question is discussed in dicta.³⁰ These cases are, no doubt, pertinent to some degree, but none of them have been considered by the courts in arriving at a conclusion upon the suability of a particular association when the question has been presented. It may be well, therefore, to make no further mention of them.

By way of summary a few conclusions may be drawn from the cases discussed. Generalizations are impossible, but it may well be said that the common law rule is a general principle which may be invoked from time to time. If an unincorporated association possesses "powers" or "privileges" not possessed by individuals or partnerships, the association may sue or be sued. That seems

²⁸ (1932) 52 S. W. (2d) 860.

²⁹ *Missouri Bottlers' Ass'n v. Tinnerty* (1889) 81 Mo. App. 525. This case involved a suit by an unincorporated association against an expelled member of the organization, on an account admitted to be owing. A defense was set up that the association was a partnership and could only sue in equity in suit for an accounting. The court held that the association was not a partnership and that equity was not the proper place for this suit. Without further discussion the court found the defendant owed the organization the money and allowed the unincorporated association to recover. See also: *O'Neal v. Grand Lodge* (1924) 216 Mo. App. 212, 261 S. W. 128.

³⁰ *Lilly v. Tobbein* (1891) 103 Mo. 477, 15 S. W. 618; *Miller Lumber Co. v. Oliver* (1896) 65 Mo. App. 435; *Moore v. Stemmons* (1906) 119 Mo. App. 162, 95 S. W. 313; *State ex rel. Great Am. Home Sav. Inst. v. Lee* (1921) 288 Mo. 679, 233 S. W. 20.

For effect of conveyance (of land) to a partnership and unincorporated associations see *Arthur v. Westan and Stroda* (1856) 22 Mo. 378; *Douthitt v. Stimson* (1876) 63 Mo. 268.

to be good law and might certainly be a helpful rule if there were any evidence in the cases as to what the nature of these powers must be. From the opinions in *Newton County Fruit Growers Association v. Southern Railway* and *Ruggles v. Iron Workers Association* it appears that these powers must be derived from the statutes and that the statutes must be pleaded before the suability attribute will attach. With *Clark v. Grand Lodge* as a precedent it can be said that an association which has made a contract of insurance is a suable entity in so far as the association may be sued upon that contract. Whether a suit or an ordinary contract would be allowed seems doubtful in view of the decision in *Ruggles v. Iron Workers Association*. The opinion in the case of *Clark v. Grand Lodge* shows a reluctance to recognize an unincorporated association as a suable entity for purpose of a suit in nature of a tort. However, it is submitted that allowing such a suit would not be without precedent.³¹

To-day there are many unincorporated associations, such as the labor unions. They have thousands of members, are efficiently organized, hold valuable property and large sums of money, and conduct business in furtherance of the ends of the organization. The need for a practical method of suing these groups as entities is self-evident. The Missouri Courts have met this situation only partially, but effectively in some instances.

LESTER E. BARRETT '33.

ENLARGEMENT OF LIFE ESTATES TO FEES SIMPLE BY THE ANNEXATION OF A POWER

There seems to be a great deal of learned argument on the part of the courts and the authorities in the State of Missouri as to the status of executory limitations. It has been suggested by Mr. McCune Gill¹ that there is a "remarkable body of law" on the subject in this state. "An analysis of these elements in these forty-nine cases shows that it is quite impossible to deduce a rule from the decisions. The limitations seem to have been upheld or disregarded and the supposed intention of the testator or grantor

³¹ Consider the case of *State v. Kansas City Stock Exchange* note 9, supra. See also *Wiechtuechter v. Miller* note 16 supra.

Professor Sturgis suggests in an article found in 33 *Yale Law Journal* 383 (1924) that the power to sue or be sued in their association name is denied the unincorporated groups not because they have no legal entity separate and distinct from their members, but because the courts feel the power is usurped from the corporate franchise, which must lie in grant from the sovereign.

¹ *A Limitation After a Fee Simple* (1927) pamphlet written by McCune Gill and published by the Title Insurance Corporation of St. Louis.