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UNINCORPORATED ASSOCIATIONS: LEGAL LIABILITIES OF AGENTS AND MEMBERS

A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person.¹

Since voluntary, unincorporated associations which are organized for social, scientific, political, or charitable purposes, either for the benefit of their members, or for the advantage of the public generally, as contrasted with those organizations where there exists a community of interest for business purposes, are not legal entities,² it follows that these organizations cannot, as groups, appoint agents to bind the society. They are not partnerships, and individual members cannot appoint agents to bind the group.³

The above conclusion does not, of course, preclude the members, acting as joint principals, from appointing an agent, and a person acting for such unincorporated group of persons may be an agent, either of all members of the association, or of some of them. Whether such person is the agent of the entire group, or only of certain members thereof, is dependent upon the interpretation of the manifestations of those who are alleged to be principals.⁴

To determine what members of an unincorporated association, other than a partnership, are principals and personally bound by the acts of one acting as agent for the unincorporated association, the facts must be examined to ascertain the members who conferred on the agent a prior authority or who subsequently ratified his acts.⁵

A member may, by previous assent, be bound by an act of the majority, as where consent to be so bound is a condition of membership,⁶ and he may likewise be bound if there is any subsequent act of ratification.⁷

A member who does not expressly or impliedly assent to, participate in, or ratify, the appointment and authorization of an agent should not be bound by the acts of that agent, and mere membership in such an organization is not, standing alone, sufficient to constitute assent.⁸ An interesting illustration of this proposition is found in the case of *Willcox v. Arnold*⁹ where printers of a college annual brought suit against the members of a college class. There was

¹Restatement of the Law of Agency, Section 20.

²*Maisch v. Order of Americus*, 223 Pa. 200 (1909).

³*Ash v. Guie*, 97 Pa. 493 (1881); *Franklin Paper Co. v. Gorman* 76 Pa. Super. Ct. (1921).

⁴Restatement of the Law of Agency, Section 20, Comment (e).

⁵Restatement of the Law of Agency, Section 20, Annotations.

⁶*Ash v. Guie*, 97 Pa. 493 (1881).

⁷*Ash v. Guie*, 97 Pa. 493 (1881); *Irwin v. McCullough*, 97 Pa. Super. Ct. 602 (1930).

⁸*Franklin Paper Company v. Gorman*, 76 Pa. Super. Ct. 276 (1921); *Irwin v. McCullough* 97 Pa. Super. Ct. 602 (1930).

⁹162 Mass. 577 (1895).

evidence tending to prove that all except one of the members of the class were present at a meeting where a business manager was elected and authorized to make arrangements for publishing the volume. Those who voted, or assented by presence and silence to the vote, were held responsible for the acts of the manager, as their agent, but the absent member was exonerated.

Between these two extremes of (1) assent, or participation, or ratification, and (2) absence from a meeting without subsequent participation or ratification lies a penumbra where factual situations, difficult of solution, arise daily in the unascertained number of associations organized for many and diverse purposes.

For example, if, in the above case, the absent member had been present, but had voted against the appointment of the particular person, or the delegation of authority to him, would it have been necessary for the objecting member to have registered a vigorous dissent against the proceedings; would it have been necessary for him to have withdrawn from the meeting; or would his negative vote alone have been sufficient to relieve him of legal liability for the acts of the business manager, assuming, of course, that there was no subsequent act of ratification?

In other words, does the thoroughly American theory of procedure in such matters, which is to afford equal opportunities to all to hear, and to be heard upon, a controversial subject, and then to expect cooperation in carrying out the expressed wishes of the majority of the members, carry with it the onus of imposing individual legal liabilities as a result of the will of that majority?

A Pennsylvania case which discusses the problem here presented is the early one of *Eichbaum v. Irons*¹⁰ where Chief Justice Gibson lays down a broad rule in the following language:

"Every member present assents beforehand to whatever the majority may do and becomes a party to acts done, it may be, directly against his will. If he would escape responsibility for them, he ought to protest, and throw up his membership on the spot . . ."

But this was said by way of dictum and seems like a harsh rule. It may, when occasion requires decision, be modified.

In this same case, in which the question was whether individual members of a committee appointed by a political meeting to provide a free dinner for the political party could be held responsible to the person who provided the food and service, it was said:

"Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be whether they had become personally liable by having exceeded their author-

¹⁰6 W. and S. 67 (1843).

ity, or whether they had not contracted on the credit of their constituents."

The strong implication from the above language is that if the individual members of such an organization had acted within the scope of their authority as agents, no personal liability would have attached.

The language of the above case is to be contrasted with the following, appearing in a recent case¹¹ dealing with the same general subject where the affidavit of defense filed by the defendants alleged that they were not liable because they acted as agents within the scope of their authority and that it was incumbent upon the plaintiff to look to the principals for his money:

"The rule that where the principal is disclosed, the agent is not liable if authorized, does not apply to the present situation. The defendants who signed the note, on the face of it, were acting for the unincorporated association They gave this obligation on behalf of the unincorporated association, and if any contributions are to be made, they must collect from their fellows."

Since the specific problem suggested in the case of *Eichbaum v. Irons*¹² was before the Court in the case of *Irwin v. McCullough*,¹³ the language of the latter would seem to represent the modern law on the subject and to be more in harmony with the legal concepts generally applicable to associations.

That agents who exceed their authority when purporting to represent an association are personally liable seems indisputable and does not need to be discussed here.

It has been a familiar principle of the law of agency in most jurisdictions that one who professes to act as agent, unless he binds his principal, is ordinarily held to bind himself. Since a contract is unenforceable against the association, one who assumes to act for that association must be held directly responsible, either as principal upon the ground that the purported principal has no legal existence,¹⁴ or as an individual for the breach of his implied warranty that he did have authority. The tendency of the courts seems to be to adopt the latter theory, when applicable.¹⁵ Usually the fact that there is no legally responsible principal will be equally within the knowledge of both parties, and, in that event, there will be no occasion for resorting to an implied warranty of authority.¹⁶

¹¹*Irwin v. McCullough*, 97 Pa. Super. Ct. 602 (1930).

¹²6 W. and S. 67 (1843).

¹³97 Pa. Super. Ct. 602 (1930).

¹⁴*Cousin v. Taylor*, 239 P. 96, 115 Or. 472 (1925); *Fennell v. Hauser*, 14 P. (2d) 998, 141 Or. 71 (1932).

¹⁵Restatement of the Law of Agency, Section 329 and Annotations.

¹⁶1 *Mechem on Agency* (2nd. Ed.) Section 1389.

Furthermore, upon the general principle that the greater includes the less, no good reason is perceived why the member who has capacity to vote to appoint an agent, but who is himself subsequently appointed, is not directly responsible as the principal of himself as agent, for he is actually acting in a dual capacity. The instances where the parties making the arrangements are not members of the association are rare, if not non-existent, and, while an effort was made by the defendants in *Irwin v. McCullough*¹⁷ to escape liability on the ground that they were not members of the association, the court held that the whole transaction bore out a conclusion that they were part of the association.

It is not to be assumed that the foregoing is the universal rule, for some very respectable courts take an opposite position. New York, in a case decided as recently as 1935,¹⁸ announced in clear and unequivocal language an intention to apply a contrary rule previously adopted. The Supreme Court of Florida said in *Hunt v. Adams*:¹⁹

"Agents of charitable, religious, or eleemosynary and kindred unincorporated societies are, as a rule, not personally responsible on written contracts made with third parties when executed by them solely in the name of, and in behalf of, the unincorporated charitable, religious, or eleemosynary society for which they purport to act, where the nature of the written contract entered into, and the particular manner of its execution, is on its face such as to clearly impute no intention on the part of those who sign on behalf of the unincorporated society, to bind themselves or their associate representatives personally.

"This is true notwithstanding the admittedly universal rule to the effect that one professing to act as agent, unless he binds his principal, is ordinarily held to bind himself, and that the agent assuming to contract for a principal must make a contract binding upon some principal, or else he himself will be held liable."

In *Fuller v. Reed*²⁰ it was held that an officer of a voluntary non-profit association, who had expressly stipulated that he was not to be individually liable upon a contract made for it, was not bound by the contract, and it is submitted that Pennsylvania would probably adopt this view because the Court said, in *Irwin v. McCullough*:²¹

¹⁷97 Pa. Super. Ct. 602 (1930).

¹⁸Empire City Job Print v. Harbord, 277 N.Y.S. 795, 244 App. Div. 6, reversing Empire City Job Printing Co. v. Falk, 272 N.Y.S. 202, 151 Misc. 688, which reversed (City Ct.) Empire City Job Print v. Harbord, 265 N.Y.S. 450, 148 Misc. 23.

¹⁹149 So. 24, 111 Fla. 164 (1933).

²⁰215 NW. 147, 55 N.D. 707 (1927); 1 Williston on Contracts, Section 282.

²¹97 Pa. Super. Ct. 602 (1930).

"If it had been disclosed to the plaintiff on his receiving the note that they (the defendants) were not members, it may well be argued that they would not be liable as the party receiving the note would have known the exact condition of affairs and would be compelled to look for recovery to the members of the State Committee."

Since it has been developed that the general rule is that an agent cannot, when purporting to act for an association, escape liability upon the ground that he acted within the scope of his authority, unless such liability is expressly negated, let us examine more minutely the rule as to the necessity for the withdrawal of members from membership in associations in order to avoid legal liability. This is suggested because, in spite of the fact that "when the committee of a political party . . . goes to a merchant and orders goods to be delivered at the party headquarters, the merchant is not required, in order to recover the value of his goods, to bring suit against all the members of the party, nor even against all the members of the committee,"²² yet, sooner or later, the situation will arise where the members of an appointed committee, and the persons who can be proved to have authorized, or ratified, their acts will be insufficiently financially responsible to satisfy the claim of the plaintiff, or the persons who are compelled to pay will seek contribution from other members, or the plaintiff will join in the action members who voted against the proposition, or the agent will have been successful in proving a declaration to the effect that he was to be under no personal obligation. If the plaintiff is to be paid that which admittedly may be due him, it will be necessary that pecuniary liability be fastened upon someone, and the determination of that party or parties will not be without difficulty.

The question of whether or not there was active participation by the defendant is the one to which the court will be compelled to produce an answer, and it is recognized that a rule found to be applicable to one factual situation may be totally useless for another specific situation dealing with the same general question.

The court may say, as did the court in *Eichbaum v. Irons*,²³ that (1) those members who failed to protest and resign are liable, or it may say that (2) the disapproving members displayed a sufficient unwillingness to be a part of the proceedings when they cast their negative votes, or it may say that (3) there should have been some additional manifestation of dissent, but less drastic than resignation from the organization.

It would seem, on principle, that the first possibility will be rejected because so to hold would either shortly cause a dissolution of the association because

²²Franklin Paper Co. v. Gorman, 76 Pa. Super. Ct. 276 (1921).

²³6 W. and S. 67 (1843).

of a lack of the necessary membership, or frequent resignations, followed by re-enrollments, would be required. This would be a needless procedure, serving no useful purpose, and it is not the policy of the law, or of the courts, to insist upon useless and unnecessary acts.

The second possibility could be justifiably adopted on the generally prevailing legal theory that liabilities are not to be thrust upon defendants who have not contracted and who are without fault. The court may properly and reasonably decide that the members who have cast their dissenting votes have manifested sufficient disapproval of the proceedings to be relieved of any and all responsibilities for subsequent acts done on the basis of the decision reached by the majority. The court may say that since dissenting members are generally free to manifest a change of mind in conformity to the expressed will of the majority, and to cooperate in making the proposed venture a complete success, and, since there has been no such manifestation, the negative vote is to be regarded as a continuing expression of dissent, cognizance of which must be taken by agents who are invariably appointed to carry out the wishes of the majority, and by those who contract with those agents. This view would derive some support from the case of *Merriwether v. Atkin*²⁴ in which it was held that where a defendant, the presiding officer of a voluntary association, who had been approached by the plaintiff to arrange for a leasing of lodge quarters, promised to call the matter up in the lodge, and appoint a committee to confer with the plaintiff in relation thereto, and did so, but was not present when the lodge afterwards met, received the report of the committee, and authorized the committee to accept plaintiff's proposal for a lease, the defendant was not liable for a breach of the contract entered into, as he did not authorize the association or the committee to contract. In this case it was contended by the plaintiff that, when the lodge met and approved the minutes of the latter meeting, the defendant being present, he ratified the action of the lodge which authorized the committee to enter into a contract for a lease. But the court held that the defendant's presence did not operate as a ratification by him of the action taken at the former meeting, since the approval of the correctness of the minutes of a meeting is not a ratification of what was done, but merely an assent that a proper record was kept of what occurred. This case would seem to be authority for the proposition that express assent must have been expressed by the defendant in order that he be held liable.

On the other hand it can reasonably be argued that the second possibility should be rejected because it is necessary that all meetings proceed along established, orderly lines, because the wishes of the membership must in some way be ascertained, and because the principal, if not the sole, purpose of a vote is to determine whether the proposition has, in the minds of the members, any merit.

²⁴119 S.W. 36, 137 Mo. App. 32 (1909).

It can be contended that there is no justification for permitting a member both to express disapproval and to negative legal liability simply by voting with the minority. The casting of a vote may be regarded merely as the exercise of a privilege incident to membership, and it may be decided that, to permit associations to accomplish anything constructive, it is required that each member be regarded as giving conditional consent to be bound by the will of the majority the moment he exercises that privilege.

As to the third possibility, it is submitted that it is not unreasonable to assume that everyone within whose presence an act is done, and for whose benefit the majority feels the act is being done, should, in fairness to that majority, in fairness to the agents who are almost invariably appointed in their presence, and in fairness to those who contract with those agents, indicate that he is not only not in favor of the proposal but that he is also not willing to be bound by any action taken in pursuance of the vote. The manifestation of dissent might be merely an unequivocal declaration of dissatisfaction and refusal to be bound by future action in relation to the particular matter, or it might be this, and, in addition, withdrawal from the particular meeting, but the latter would seem to be wholly unnecessary.

In factual situations where this general question is involved, an effort must be made to protect dissenting members, concurring members, the agents, and the persons dealing with those agents.

Dissenting members can protect themselves by such way as shall be decided to be proper, i. e. by one of the three ways indicated previously, or by some other way prescribed by a court. Concurring members, less than the total number, against whom an action is brought, can compel subsequent contribution from those not joined in the action, or bring them on the record as additional defendants in the principal action:²⁵ agents can be protected by assurance that they are acting in justified reliance upon the express or implied assent of all of those who fail to deny the agency, or who subsequently ratify it: and persons who deal with the agents can be protected by continuing to give them a right of action against the agents with whom they contract, by continuing to give them a right of action against all members who actually assent by their vote or by ratification, and by giving them, in addition, a right of action against all members who are estopped to deny the agency, having failed to manifest dissent in a proper way.

J. Murray Buterbaugh.

²⁵Act of April 10, 1929, P.L. 479, as amended.