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court in this case deemed the insured's will a "reasonable effort" to change the beneficiary.[26]

Nevertheless, there is question as to whether this case is a good precedent for permitting a change of beneficiary by will. The defendant did not claim as a designated beneficiary, but rather as the person entitled to take the policy proceeds in the absence of a designated beneficiary. Thus an important factor was that the will did not truly change the beneficiary, but rather that it designated one for the first time. Also, the decision of the case was almost immediately rejected by another court.[27]

Many federal decisions recognize that the manifested intent of the insured is the determining consideration. Besides being one of the basic legal arguments to permit change of beneficiary by will, it also is a moral factor which the court must consider. One often quoted Arkansas decision declares that ". . . *this being the insured's last expression on the subject, it ought to control.*"[28] In answer, it was said that where no steps are taken to comply with the policy provisions, the expressed purpose is an unexecuted intention and accomplishes nothing.[29] Nevertheless, the insured keeps the policy in force and pays the premiums, and his last wish should be respected.[30] Furthermore, an expression of intention documented in a will is much more convincing than any informal writing would be.[31]

These arguments between strict construction on the one hand and the insured's intention on the other are still highly controverted. Whether the courts are finally learning to support the intention is something to be determined at a future date.

[26] Sears v. Austin, 180 F. Supp. 485 (N.D. Cal. 1960).

[27] See Breckline v. Metropolitan Life Ins. Co., 40 Pa. 573, 178 A. 2d 748 (1962). (Held: The policy provisions were statutory and could not be waived). Note that if subsequent decisions show that the rules applicable to Federal Employee's Life Insurance, as with National Life Insurance, are not applicable to private commercial insurance, the precedent of the Sears case will be valid only within this narrow sphere of insurance created by federal statute, if at all.

[28] Pedron v. Olds, 193 Ark. 1026, 1030, 105 S.W. 2d 70, 72 (1937) (Emphasis added).

[29] Parks' Ex'rs. v. Parks, 288 Ky. 435, 156 S.W. 2d 480 (1941).

[30] Stone v. Stephens, 155 Ohio St. 595, 99 N.E. 2d 766 (1951), (dissenting opinion, Zimmerman, J.).

[31] *Ibid.* (dissenting opinion, Stewart, J.).

LABOR–EXTENSION OF THE ENTITY CONCEPT TO ALLOW RECOVERY TO UNION MEMBERS IN TORT ACTIONS AGAINST UNION

The defendant union, an unincorporated association, maintained a parking lot adjacent to its meeting hall as an accommodation for its members.

Marshall, a member of the union, was injured as the result of a fall over a concrete obstruction in the lot and brought an action against the union for injuries sustained in his fall. A motion for a summary judgment was filed by the union which contended that Marshall's membership in the union precluded recovery in a negligence action. Defendant's motion was granted and the plaintiff appealed. The question which the court had to determine was whether a member of an unincorporated association may maintain an action against the union for personal injuries allegedly caused by negligent maintenance of the property. On appeal, the Supreme Court held that the member could maintain such an action. *Marshall v. International Longshoremen's Union,* 22 Cal. Rptr. 211, 371 P. 2d 987 (1962).

This question had not been previously litigated in California, but it has been the subject of litigation in other courts. In *Hromek v. Gemeinde,*[1] the plaintiff, a union member, tripped over a platform negligently placed in the union meeting hall by the union officers and was injured. The Wisconsin Supreme Court ruled that the plaintiff had no cause of action for the union had neither an entity nor existence apart from that of its members. The Court considered the union members as co-principals and would not permit a suit allowing a co-principal to sue a co-principal.[2] This line of reasoning holds that a voluntary association such as a labor union is not a legal entity and cannot be sued as such in the absence of a statute.[3] Although it is permissible in some jurisdictions to sue a group comprising a union in the name of the association; this has been held to be a procedural provision and does not in any way change the status of the group.[4]

The union in the noted case relied on the general rule that members of an unincorporated association are engaged in a joint enterprise, and the negligence of each member in the prosecution of that enterprise is imputable to each and every member.[5] Consequently, the member who has

[1] 238 Wis. 204, 298 N.W. 587 (1941).

[2] United Mine Workers of America v. Bourland, 169 Ark. 796, 277 S.W. 546 (1925); Diamond Block Local Co. v. United Mine Workers of America, 188 Ky. 477, 222 S.W. 1079 (1920).

[3] DeVillars v. Hessler, 363 Pa. 498, 70 A. 2d 333 (1950). An association member who, while operating a steam bath, sustained injuries through the negligence of other association members was not able to recover from the association.

[4] Revised Code of Montana, 93-2827 (1947). When two or more persons, associated in any business, transact such business, under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name. The summons in such case being served on one or more of the associates, and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had named defendants, and had been sued upon their joint liability.

[5] Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941); Clark v. Grand Lodge of Brhd. of R.R. Trainmen, 328 Mo. 1084, 43 S.W. 2d 404 (1931).

suffered damages through the tortious conduct of the association may not recover from the association. The basic rationale of the rule is that an association has no legal entity or existence apart from that of its members.[6] When the members are joined in the prosecution of a joint enterprise, there is created a mutual relationship of agency among them with the result that the negligence of any one of them is imputed to each and all.[7] In legal effect, each member becomes both a principal and an agent as to all members for the actions of the group itself. A principal may sue an agent for dereliction of a duty but he may not sue his co-principals for the dereliction of a duty by their common agent.[8]

Basically, this rule has been arrived at by applying to other forms of voluntary unincorporated associations the rules of law developed in partnerships.[9] Probably the most accepted definition of a partnership is the one given by Chancellor Kent:

> A contract of two or more competent persons to place their money, efforts, labor, and skill on some or all of them in lawful commerce or business and to divide the profit and bear the loss in certain proportions.[10]

The term "association" does not have in law the fixed meaning accorded to partnerships or corporations,[11] but is used to indicate a collection of persons who have united or joined together for some special purpose or business.[12] It is commonly used to indicate a body of persons acting together without a charter but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.[13]

The courts in recognition of the difference have gradually evolved new theories in approaching the problems of such associations. Labor unions

[6] Roschmann v. Sanborn, 315 Pa. 188, 172 A. 657 (1934). Members of an unincorporated fraternal association participated in a social excursion in a bus owned and operated by the organization. Plaintiff was injured and brought suit but was denied recovery because the negligence of the driver was imputed to him the same as to all other members of the organization. Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933).

[7] DeVillars v. Hessler, 363 Pa. 498, 70 A. 2d 333 (1950); Roschmann v. Sanborn, 315 Pa. 188, 172 Atl. 657 (1934); Koogler v. Koogler, 127 Ohio St. 57, 186 N.E. 725 (1933).

[8] Hromek v. Gemeinde, 234 Wis. 204, 298 N.W. 587 (1941).

[9] Pettis v. Atkins, 60 Ill. 454 (1871).

[10] KENT'S COMMENTARIES ON AMERICAN LAW. Kent, J. (1763–1847), an American jurist whose four volume commentaries won for him a distinguished place amongst jurists. His judgments as chancellor have formed much of the basis of American equity jurisprudence.

[11] W. R. Roach & Co. v. Harding, 348 Ill. 454, 181 N.E. 331 (1932).

[12] Chicago Grain Trimmers Ass'n v. Murphy, 389 Ill. 102, 58 N.E. 2d 906(1945); Clark v. Grand Lodge of Brhd. of R.R. Trainmen, 328 Mo. 1084, 43 S.W. 2d 404 (1931); People v. Brander, 244 Ill. 26, 91 N.E. 59 (1910).

[13] Hecht v. Malley, 265 U.S. 144 (1924).

are treated as separate entities in the entering and performance of their contracts, and in suits against members for dues, strike penalties, and fines.[14] Conversely, it has been held that a member can sue his union for a welfare fund payment due him or to recover an overpayment of dues, for wrongful expulsion, or for breaches of the membership contract.[15]

The first major breakthrough in considering unions liable for their torts is found in the decision of the United States Supreme Court in *United Mine Workers of America v. Coronado Coal Company*.[16] In this instance the striking mine workers destroyed company property and injured bystanders. The Court reached the conclusion, although there was no statute expressly so providing, that an unincorporated labor union was responsible for its torts and could be sued as an entity in the federal courts. In a later case, the United States Supreme Court ruled that members of unions are not subject to either criminal or civil liability for the acts of the union or its officers unless it is shown that they personally authorized or participated in the particular acts.[17]

Thus, the main basis of the defendant union's contention in the instant case was 1) that the union is not a legal entity, and 2) that each member of the union is liable as a principal for the acts of union officers, agents, and employees under the doctrine of *respondeat superior*, is not sustained by the reasoning of the Supreme Court. The extension of the entity concept of unions in federal courts and the removal of the member's personal liability for the acts of the union has swept away the two main bases of the rule prohibiting suits against large unincorporated voluntary associations.

The Supreme Court of Wisconsin changed from its position in the *Hromek*[18] case in the later case of *Fray v. Amalgamated Meat Cutters*.[19] This is apparently the first case expressly allowing a member of an unincorporated association to sue the association as an entity for negligence. Fray was discharged by his employer and immediately thereafter gave notice of his discharge to the union. The union was under a duty to register a formal grievance but did not and Fray subsequently brought suit against the union. The Wisconsin Supreme Court extended the entity concept to include recovery from union funds for negligent representation and suggested that if an association has the attributes of an entity, it should be so considered for purposes of tort liability. However, the Court

[14] Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631, 101 N.W. 2d 782 (1960).

[15] *Ibid.*

[16] 259 U.S. 344 (1922).

[17] U.S. v. White, 322 U.S. 694 (1944).

[18] Hromek v. Gemeinde, 234 Wis. 204, 298 N.W. 587 (1941).

[19] 9 Wis. 2d 631, 101 N.W. 2d 782 (1960). The Wisconsin Supreme Court held that the *Hromek* case does not exclude all possibility of an action by an injured union member against the union.

limited the union entity concept for tort actions to a violation of those duties growing out of the union-member relationship, leaving open the question of recognition of union entity for a violation of a duty owed to the members in common, such as negligent maintenance of a union parking lot.

The California Court in the *Marshall* case extended the entity concept to include all union torts. Consequently two states, California and in certain factual situations Wisconsin, allow recovery in suits by union members against the unincorporated union. All the other states, including Illinois, uphold the concept that voluntary unincorporated associations may not be sued by their members.

The minority view seems to be the better reasoned holdings. Labor unions are developing institutions and with their tremendous growth in importance and power they have come to be more akin to large corporations than fraternal orders or partnerships.[20] These organizations, no longer being comparable to voluntary fraternal orders or partnerships, are *sui generis* and approximate corporations in their methods of operation and power.[21] Since labor unions have more of the characteristics of corporate entities than of partnerships, it appears far more logical to treat them as legal entities for purposes of tort liability than to apply rules of partnerships.

[20] Oil Workers International Union v. Superior Court, 103 Cal. App. 2d 512, 230 P. 2d 71 (1951).

[21] *Ibid.*

OBSCENITY—ADMISSIBILITY OF EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS

Two booksellers were convicted of violating the obscenity statute of New York State.[1] A New York detective, representing himself as a prospective customer, entered a bookstore managed by one of the defendants. He observed two particular books on display, purchased said books, and thereupon arrested the defendant for selling pornographic material. Later in the same day the detective entered the store of the other defendant and repeated the procedure, arresting this defendant also. At the trial, the court applied the *Roth* test[2] to determine whether or not the

[1] See NEW YORK, PENAL LAW, § 1141 subd. 1, the relevant part of which provides; "a person who sells .... or has in his possession with intent to sell .... any obscene .... book .... is guilty of a misdemeanor."

[2] The test for obscenity was officially laid down to be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957).