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## The Legal Status of Joint Stock Associations

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## THE LEGAL STATUS OF JOINT STOCK ASSOCIATIONS

A joint stock company is a type of business organization which stands midway between the partnership, on the one hand, and the corporation, on the other hand. In many instances, however, it is to-day no easy matter to distinguish the unincorporated joint stock company from the corporation, since by statutory enactment many of the most characteristic capacities and attributes of corporations have been conferred upon joint stock associations.<sup>1</sup> So true is this that a learned judge said recently that "the idea that these companies occupy some undefined and undefinable ground midway between a partnership and a corporation has practically faded away."<sup>2</sup>

At common law, however, a joint stock association was a group of individuals organized for certain purposes into an association similar to a partnership, but, unlike a partnership, having a capital stock divided into shares transferable by the owner.<sup>3</sup> Partners, the courts held, might associate themselves in a joint stock company with transferable shares.<sup>4</sup> A joint stock association in the early days was really simply a large partnership possessing some of the characteristics and powers of the private corporation.<sup>5</sup> In fact, except to the extent that remedial legislation has altered the rule, joint stock associations are still subject to the principles of law relating to common law co-partnerships.<sup>6</sup>

<sup>1</sup>Clark on Corps. (3d Ed. by Wormser) pp. 22-25. As to the difference between the corporation and the partnership, see opinion of Cullen, Ch. J. in *Drucklieb v. Harris*, 209 N. Y. 211, 216.

<sup>2</sup>O'Brien, J., in *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

<sup>3</sup>*Attorney General v. Mercantile Marine Ins. Co.*, 121 Mass. 524; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96; *Hedge & Horn's Appeal*, 63 Pa. St. 273.

<sup>4</sup>*Lindley on Company Law*, (6th Ed.) p. 193.

<sup>5</sup>*People v. Rose*, 219 Ill. 46, 76 N. E. 42.

<sup>6</sup>*Hoadley v. Essex County Com'rs*, 105 Mass. 519; *Wells v. Gates*, 18 Barb. (N. Y.) 554.

The distinction between corporations and joint stock associations is not a mere academic one. The question is at times a momentous one to answer. For example, joint stock companies are not liable for taxes under a statute which imposes a tax upon "corporations".<sup>7</sup> In order to avoid this result, statutes are so phrased to-day as to embrace within their purview both corporations and joint stock associations.<sup>8</sup> The facility in doing business is substantially the same in both forms of organizations and it is this facility or advantage which it is the purpose of the taxing statute to assess.<sup>9</sup> Again, joint stock companies are exempt from the effect of a constitutional provision requiring corporations to be created only under general laws or requiring a two-thirds vote of the State legislature for the creation of corporations.<sup>10</sup>

Sometimes the legislature confers upon joint stock associations so many attributes of a corporation that judges have differed as to the legal status of the type of organization.<sup>11</sup> In a recent case,<sup>12</sup> Judge O'Brien of the Court of Appeals of New York regarded the Adams Express Company, which is a large joint stock association, as a "quasi corporation", saying: "A joint stock association, whatever else may be said about it, is certainly for most, if not for all practical purposes, a legal entity capable in law of acting and assuming legal obligations quite independent of the shareholders." And, in the same case, Judge Hiscock said: "A great association like the Adams Express Company is very unlike an ordinary co-partnership and it has assumed for ordinary practical purposes in its business and contractual relations, the features and characteristics of a corporate creation, whereby the joint aggregate entity has been made prominent, and the individual units composing it have been overshadowed and obscured." On the other hand, Judge E. T. Bartlett declared in the same case: "It is unnecessary to point out in detail the very great difference between the joint stock association and a corporation;" and Judge Werner said: "The company is concededly not a corporation although our statutes have invested it with certain corporate attributes." The Federal courts regard corporations as citizens

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<sup>7</sup>Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566.

<sup>8</sup>Eliot v. Freeman, 220 U. S. 178, interpreting The Federal Corp. Tax Law (Act Cong. Aug. 5, 1909, c. 6, sec. 38, 36 Stat. 112); Roberts v. Anderson, 226 Fed. 7, 141 C. C. A. 121.

<sup>9</sup>Eliot v. Freeman, *supra*.

<sup>10</sup>Thomas v. Dakin, 22 Wend. (N. Y.) 9; Warner v. Beers, 23 Wend. (N. Y.) 103.

<sup>11</sup>Clark on Corps. (3d Ed. by Wormser) pp. 24-25.

<sup>12</sup>Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108.

under Article III, sec. 2, of the Constitution of the United States, conferring jurisdiction upon the Federal courts over controversies between citizens of different States.<sup>13</sup> They refuse, however, to regard joint stock companies as citizens for purposes of federal jurisdiction.<sup>14</sup> Where the bill alleged that the Adams Express Company was a joint stock company duly organized and existing under the laws of the State of New York and a citizen of that State, and that the defendant was a citizen of the State of Missouri, the Federal Court in a recent case directed that the suit be dismissed for want of jurisdiction, saying: "The averment that the complainant is a joint stock company, is not equivalent to the statement that it is a corporation."<sup>15</sup>

If the legislature confers upon an association all the essential attributes of the corporate body, it thereby creates it a corporation and it would seem immaterial that the term "corporation" is not used.<sup>16</sup> If the legislature declares that the association shall not be a corporation, no matter how conclusive this may be in the domestic jurisdiction, it does not bind foreign jurisdictions or prevent their courts from inquiring into the true character of the association whenever that may come in issue.<sup>17</sup> Its attributes, as well as the intention of the domestic legislature, determine its status abroad.<sup>18</sup>

**Formation.**—Joint stock companies unlike corporations may be formed by a mere agreement of association among the members. A joint stock company with transferable shares is valid at common law, and will not be held illegal unless it can be shown to be of a dangerous character.<sup>19</sup> To-day, joint stock companies frequently derive from a statutory source further qualities or benefits not existing at common law. Such statutory authority is not at all essential, however, to the existence of the joint stock company, which is absolutely legal at common law. The statutory

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<sup>13</sup>Louisville R. Co. v. Letson, 2 How. (U. S.) 497; Marshall v. Baltimore R. Co., 16 How. (U. S.) 314; Doctor v. Harrington, 196 U. S. 579.

<sup>14</sup>Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449; Thomas v. Board of Trustees, 195 U. S. 207; Gregg v. Sanford, 65 Fed. 151, 12 C. C. A. 525; Rountree v. Adams Express Co., 165 Fed. 152, 91 C. C. A. 186.

<sup>15</sup>Rountree v. Adams Express Co., *supra*.

<sup>16</sup>Clark on Corporations, (3d. Ed. by Wormser) p. 15.

<sup>17</sup>Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566.

<sup>18</sup>Liverpool Ins. Co. v. Massachusetts, *supra*; Edwards v. Warren Lino-line & Gasoline Works, 168 Mass. 564, 47 N. E. 502; Tide Water Pipe Co. v. Assessors, 57 N. J. L. 576, 31 Atl. 220.

<sup>19</sup>Roberts v. Anderson, 226 Fed. 7, 141 C. C. A. 121. And see, Lindley on Company Law (6th Ed.) p. 193 *et seq.*

authority simply confers rights and privileges which no unincorporated association as such enjoys at common law.<sup>20</sup>

**Dissolution.**—A partnership may be dissolved at any time without the consent of the state and the same rule applies to joint stock companies except in so far as it may be modified by statute.<sup>21</sup> In this respect joint stock companies differ from corporations.

**Continuity of Existence.**—The element of *delectus personæ* is characteristic of a partnership, and the death of a partner or the transfer of his interest *ipso facto* dissolves the partnership. The precise opposite is true in the case of a corporation, which is unaffected by the death of a stockholder or the transfer of his shares. In this respect, the joint stock company resembles the corporation rather than the partnership, since the demise or withdrawal of an associate in a joint stock company does not dissolve it.<sup>22</sup> However, the right to transfer shares in a partnership business may by agreement be incorporated even into partnership articles.

**Common Name.**—Like corporations, joint stock companies are known by a common name. This does not make the body a corporation and, as is well known, partnerships are often commonly known by a trade name under which they carry on their business.<sup>23</sup>

**Agency.**—Each partner is an agent of the firm. On the other hand, a stockholder in a corporation is not an agent of the corporation, which acts through its duly constituted board of directors and officers. In this respect, again, a joint stock company resembles a corporation. Joint stock companies conduct their business through their boards of trustees or directors; their members as such, have no power to bind them. This circumstance of resemblance does not make a joint stock association a corporation.<sup>24</sup>

**Contracts.**—Each and every member of a joint stock company is liable upon the contracts entered into by it.<sup>25</sup> Under some statutes an action may even be brought in the first instance against

<sup>20</sup>Roberts v. Anderson, *supra*.

<sup>21</sup>Mann v. Butler, 2 Barb. Ch. (N. Y.) 362.

<sup>22</sup>Gleason v. McKay, 134 Mass. 419; Hibbs v. Brown, *supra*.

<sup>23</sup>Warner v. Beers, 23 Wend. (N. Y.) 103.

<sup>24</sup>Warner v. Beers, *supra*.

<sup>25</sup>Tappan v. Bailey, 4 Metc. (Mass.) 529; Kingsland v. Braisted, 2 Lans. (N. Y.) 17.

the individual members of the association.<sup>26</sup> It is more generally provided, however, that an action cannot be brought against the individual members of the joint stock association until after judgment and execution unsatisfied against the association.<sup>27</sup> In this regard, a joint stock association is more similar to a partnership than to a corporation, since the contracts of a corporation are the contracts of the legal entity, and of it alone, and are not in any sense, the contracts of the individual members of the corporation.<sup>28</sup>

**Acquisition and Transfer of Property.**—Except as modified by statute, a joint stock company, unlike a corporation, cannot acquire and convey property by its common name. Title must be taken and conveyed by the members as individuals. Property may also be taken and conveyed by an officer in trust for the members.<sup>29</sup> It is not necessary that an unincorporated association should have statutory authorization to have its real estate held by its president (or other officer) as a trustee for its members.<sup>30</sup> Indeed, in a case decided recently by the Supreme Court of the United States, the property of an unincorporated joint stock company was held by trustees, and it was conceded by the court that its right in this regard was not derived from any statute.<sup>31</sup>

**Actions.**—In the case of the joint stock company, the rule at common law is that it cannot sue or be sued in the name of the association or of its officers, but must sue or be sued in the name of all of the members composing it, however numerous they may be. All are necessary parties at the common law.<sup>32</sup> The hardship and inconvenience of making all the members of large unincorporated associations parties to actions soon led to important remedial legislation both in England and in this country.<sup>33</sup> This legislation

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<sup>26</sup>See opinion of Hiscock, *J.*, in *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

<sup>27</sup>*Hibbs v. Brown*, *supra*.

<sup>28</sup>*Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, at p. 587; *Erickson v. Revere Elevator Co.*, 110 Minn. 443, 126 N. W. 130.

<sup>29</sup>*Pratt v. California Min. Co.*, 24 Fed. 869; *Byam v. Bickford*, 140 Mass. 31.

<sup>30</sup>*Roberts v. Anderson*, 225 Fed. 7, 141 C. C. A. 121.

<sup>31</sup>*Eliot v. Freeman*, 220 U. S. 178.

<sup>32</sup>*Roberts v. Anderson*, *supra*; *Van Aernam v. Bleistein*, 102 N. Y. 355; *Hybart v. Parker*, 4 C. B. (N. S.) 209.

<sup>33</sup>See, *Roberts v. Anderson*, *supra*. In New York, the Act of 1849 authorized joint stock companies to sue and be sued in the name of the president or treasurer. This was followed by similar legislation. The provisions are still in force, being included in the Joint Stock Association Law (Consol. Law. c. 29). See, also, Constitution of New York, Article VIII, sec. 3.



provides that such associations may sue and be sued in the name of a designated officer, as, for example, the president or treasurer of the company. This officer, for the purposes of suit, is regarded substantially as the company, as distinct from the individuals composing it. Such statutes, however, do not make joint stock associations, corporations.<sup>34</sup> On the other hand, if all other corporate attributes are conferred upon the association, the mere fact that it sues and is sued in the name of an officer rather than in its artificial name should not be held to prevent the courts from treating the company as a corporation. The result is, in effect, the same, for process would have to be served on some officer even if the suit were brought in the artificial name.<sup>35</sup> It must be noted that suits may never be brought by or against a joint stock company in its artificial name unless this is expressly authorized by statute.<sup>36</sup>

**Actions by Members Against Joint Stock Associations.**—A corporation may sue its stockholders or be sued by them, and under some statutes it is held that a joint stock company is so similar to a corporation that an action may be brought by a member against the officer designated by statute as the representative of the association, and vice versa.<sup>37</sup> The Constitution of New York (Article VIII, sec. 3.) expressly provides that the term "corporation" shall include joint stock companies and, accordingly, joint stock companies have the right to sue, and are subject to be sued, in all cases just like corporations. Under provisions of this nature it is plain that joint stock companies for most practical purposes are constituted corporations.<sup>38</sup> There is a clear recognition of the joint stock association as an entity recognized by the law as something quite distinct and separate from its individual members.

**Transfer of Shares.**—The capital of a joint stock company unlike that of a partnership, but like that of a corporation, is divided into shares which are apportioned among the members in proportion to the respective amounts which they have dedicated to

<sup>34</sup>People v. Coleman, 133 Mass. 279, 31 N. E. 96; Van Aernam v. Bleistein, 102 N. Y. 355.

<sup>35</sup>Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566.

<sup>36</sup>Van Aernam v. Bleistein, *supra*.

<sup>37</sup>Hibbs v. Brown, *supra*, opinion of Hiscock, J., citing Code Civ. Proc. secs. 1919-1924.

<sup>38</sup>Hibbs v. Brown, *supra*.

the common enterprise. These shares are assignable by their owners like shares of corporate stock. The right to transfer shares in a partnership business may by agreement be inserted into articles of co-partnership, however, and it follows that this attribute of transferability of shares does not make a joint stock association, a corporation.<sup>39</sup> In the case of certain types of joint stock companies, *e. g.*, the Pennsylvania "partnership association," the transferee will not become an associate unless the consent of the other members is given, either antecedently in the articles of association, or at the time of the transfer, or subsequently.<sup>40</sup>

**Individual Liability of Members.**—Unless it is provided to the contrary by statute, or by a provision in the articles of association which has been brought to the attention of creditors, the associates in a joint stock company are personally liable for its debts.<sup>41</sup> The stockholders in a corporation are not liable for the debts of the corporation; the debts are regarded as those of the corporate entity and of it alone. On the other hand, partners are liable for the debts of a partnership. Joint stock companies have nevertheless sometimes been regarded as corporations for all practical purposes even though their members do not possess the important corporate attribute of limited liability.<sup>42</sup> Even corporations may exist, under charter or statutory provision, where the members do not enjoy a restricted liability, without making the association any the less a corporation. It was recently held that under the constitution and laws of the State of New York, the United States Express Company, a joint stock association, was "for all practical purposes a corporation," even though its individual associates were liable for the debts of the company.<sup>43</sup> The statutes and constitution endowed joint stock associations with so many corporate characteristics, and with so many capacities and attributes not in possession of a partnership at common law, that the decision was quite correct. On the other hand, the common law liability on the part of members of joint stock associations may be removed by statute, or by provision brought home to the notice

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<sup>39</sup>*Gleason v. McKay*, 134 Mass. 419; *Warner v. Beers*, 23 Wend. (N. Y.) 103.

<sup>40</sup>*Edwards v. Warren Linoline & Gasoline Works*, 168 Mass. 564, 47 N. E. 502; *Sheble v. Strong*, 128 Pa. St. 315; *Eliot v. Himrod*, 108 Pa. St. 569.

<sup>41</sup>*Pettis v. Atkins*, 60 Ill. 454; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Kingsland v. Braisted*, 2 Lans. (N. Y.) 17; *Frost v. Walker*, 60 Me. 468.

<sup>42</sup>*Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

<sup>43</sup>*Hibbs v. Brown*, *supra*, opinions of Hiscock, J., and O'Brien, J.

of creditors, without thereby creating the association a corporation.<sup>44</sup>

The distinction between corporations and joint stock companies with regard to individual liability would seem to be that stockholders in a corporation are not liable for its debts unless they are expressly made liable by statute; whereas, on the other hand, the associates in a joint stock association are individually liable for its debts unless this liability is expressly removed by statutory enactment or by agreement brought home to the notice of creditors. The creation of a corporation, so to speak, drowns out the individual liability of the members, whereas the creation of a joint stock association has not this inherent effect unless so provided by express affirmative enactment or stipulation.<sup>45</sup> Individual liability for debts is, however, not a positive criterion whereby to distinguish corporations from joint stock associations since, as has been seen, the principle of stockholders' personal liability is not at all inconsistent with the fact of corporate existence.<sup>46</sup>

**Merger of Associates Into Artificial Personality.**—We have seen that a joint stock company is not a corporation simply because it is authorized by the state, or because its shares are transferable, or because it has an artificial name, or even because its associates may not be personally liable for its debts. It has been suggested that the distinguishing mark between a joint stock company and a corporation is whether the association exists as a legal entity distinct and separate from the associates as individual persons; if there is such separate entity and artificial personality, then the body is a corporation, otherwise it is a joint stock company.<sup>47</sup> The difficulty with this is that it is begging the question to assert that the body is a corporation if it be a legal entity, since in order to determine whether the body is a legal entity, it is first necessary to consider the legislative intent and the attributes conferred upon the body.

In a well known New York case,<sup>48</sup> Judge Finch suggested that the distinction is "that the creation of the corporation merges in

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<sup>44</sup>Warner v. Beers, 23 Wend. (N. Y.) 103. See, also, Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293. The authority of the last cited case is shaken, if in fact the decision is not overruled, in Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449.

<sup>45</sup>People v. Coleman, 133 N. Y. 279, 31 N. E. 96.

<sup>46</sup>And, see, Clark on Corporations (3d Ed. by Wormser) pp. 20, 24.

<sup>47</sup>Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293, opinion per Lurton, J.

<sup>48</sup>People v. Coleman, 133 N. Y. 279, 31 N. E. 96.

the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint stock company leaves the individual rights and liabilities unimpaired and in full force." This suggestion is not satisfactory, for associations have frequently been held by the courts to be corporations even though the members are by charter made individually liable for the debts of the body. The principle of stockholders' personal liability is not necessarily inconsistent with the fact of corporate existence,<sup>49</sup> and as said by Mr. Justice Miller, speaking for the Supreme Court of the United States, "it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain."<sup>50</sup> The Court of Appeals of this State, however, has never altogether abandoned its position that the distinguishing feature of the joint stock association, as contrasted with the corporation, is the personal liability of its members; and, indeed, this feature of personal liability has been regarded by some members of the court as so co-existent with the life of the joint stock association that it cannot be abrogated by the contract of the parties in interest.<sup>51</sup>

**Conclusion.**—The truth is, in fine, that the modern joint stock association, as the result of statute, is so frequently endowed with most of the familiar attributes of the private corporation that to-day it is a matter of the greatest difficulty in many instances to determine precisely where the legal domain occupied by joint stock associations begins and ends. The so-called "partnership association" of the State of Pennsylvania is recognized in that State as a body quite distinct from a corporation,<sup>52</sup> and it is so treated in some of the States, for example, in Massachusetts.<sup>53</sup> On the other hand, other States regard it as a corporation, insisting that the essential attributes of the body are those of a corporate entity and that, therefore, it is a corporation.<sup>54</sup> These latter States insist that the true test is not so much what the legislature intended

<sup>49</sup>See note 46, *supra*.

<sup>50</sup>*Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566.

<sup>51</sup>*Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108, opinions of Cullen, Ch. J., Edward T. Bartlett, J. and Werner J.

<sup>52</sup>*Sheble v. Strong*, 128 Pa. St. 315; *Eliot v. Himrod*, 108 Pa. St. 569.

<sup>53</sup>*Edwards v. Warren Linoline & Gasoline Works*, 168 Mass. 564, 47 N. E. 502.

<sup>54</sup>*Tide Water Pipe Co. v. Assessors*, 57 N. J. L. 516, 31 Atl. 220; *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940.

to do as what the legislature has really done, and that a legislature actually can create a corporation although not intending to do so.<sup>55</sup>

The difficulty is that oftentimes the legislature has not clearly in mind exactly what it intends to do, with the result that the courts are burdened with questions of statutory interpretation and construction which are as tantalizing as they are unnecessary. The problem should be squarely confronted. The statutes of the different States, particularly New York and Pennsylvania, on the subject of joint stock associations should be redrafted so as to define more precisely the legal status of the bodies created thereunder. This course would at least do away with the absurdity of the present situation, when no two judges of the self-same court are even agreed upon what a joint stock association is in the eye of the law.<sup>56</sup> The only alternative to this suggested legislative drafting of a scientific statute is to do away entirely hereafter with the joint stock association as a type of business organization, and to confine trading groups to the partnership and the corporation. This would have the positive merit of drawing a horizontal line across the list of trading groups, confining corporations to its lower side and partnerships to its upper side, and thereby eliminating the illogical and confusing twilight zone which the writer has sought to outline in this paper.

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<sup>55</sup>See, Clark on Corps. (3d Ed. by Wormser) p. 14 *et seq.*

<sup>56</sup>Hibbs *v.* Brown, 190 N. Y. 167, 82 N. E. 1108.