Unincorporated Business Organizations

I. Method of Legal Construction

1. The Old Antithesis

CLINGING to the inherited simple contrast between corporation and partnership, the literature for too long a time was lost in speculation over the nature of unincorporated organizations. The most significant dispute concerned the ordinary mercantile partnership which very clearly does not fit into the categories either of juristic persons or of mere contracts of societas. A deep cleavage among the European scholars was reflected in the split between the French doctrine, followed widely in Latin countries and influential in Louisiana,¹ which acknowledges mercantile collective societies as juristic persons, and the German theory accepted in many other countries, which denies that an

¹ Louisiana courts, more definitely than any others, have pronounced that a partnership is a civil person: Smith v. McMicken (1848) 3 La. Ann. 319, 322; Succession of Pilcher (1887) 39 La. Ann. 362, 1 So. 929; Newman v. Eldridge (1902) 107 La. 315, 31 So. 688; Stothart v. William T. Hardie & Co. (1903) 110 La. 696, 34 So. 740. Particularly informative with respect to the liability of commercial partnerships domiciled in Louisiana is Liverpool, Brazil & River Platte Navigation Co. v. Agar & Lelong (C. C. E. D. La. 1882) 14 Fed. 615. Of course there were limitations to this theory, see Drews v. Williams (1898) 50 La. Ann. 579, 23 So. 897. Although Louisiana did not adopt the Uniform Partnership Act, the old sweeping definitions appear to have vanished.

² The French doctrine distinguishes commercial (which are deemed to be recognized as juristic persons by C. C. art. 529) and civil societies (whose nature was in controversy) but the distinction has become of minor importance, since the courts have gradually recognized the legal personality also of the “civil” societies, and the Law of August 1, 1893, art. 68 has subjected civil societies clothed in the form of commercial companies to the commercial laws. See PLANIOL et RIPERT (et LEPARGNEUR), II Traité Pratique 248 § 989. These enlargements have not been followed in all countries adhering to the French type.
"offene Handelsgesellschaft" is a legal unit. An analogous debate divided American authors when the Uniform Partnership Act was drafted. On the one hand, the draft was attacked on the ground that it made concessions to the legal unit theory but did not acknowledge it completely, and, on the other hand, it was claimed that the draft, while purporting to adopt the aggregate theory, had in reality diluted it. As late as 1929, Warren even resented the language of the Uniform Act which spoke of the partnership as "it" and as having assets!

The Uniform Act, however, embodying the best practical solution conforming to universal business conceptions, has victoriously demonstrated that the dilemma was futile. The result of the act coincides with the conclusion reached in Germany, Switzerland, Scandinavia, Argentina, and other countries. The aggregate theory is the basis and certain features of a corporation are avoided, but there is a name or firm; assets, creditors, and debtors of the partnership exist in a marked sense; enforcement of claims and bankruptcy are assured; and in an increasing number of jurisdictions the partnership may be sued and even may sue, although methods and effects may slightly vary.


4 Warren, Corporate Advantages 29, 293. In my opinion, this unfortunate work of an eminent author has been properly censured by Magill, 30 Col. L. Rev. (1929) 144 and Whipple, 39 Yale L. J. (1930) 144, but it seems still to exercise some influence.

5 Warren, Corporate Advantages 295.

6 See 7 Uniform Laws Annotated, and Wrightington, The Law of Unincorporated Associations (1916) 144. The Act, in 1955, was in force in thirty-six states including the most industrial regions.

7 Austria: Allg. HGB. art. 111.
Germany: HGB. § 124 par. 1.
Liechtenstein: P. G. R. § 697.
Poland: C. Com. (1934) § 81.
Switzerland: C. Obl. art. 559.
In theoretical formulation of the common result, the partnership is regarded not as an independent person, but as a unit at every moment identical with the partners for the time being; the partners in their specific conjunction and not the general partners separately are the owners of the assets and, potentially, parties to lawsuits.\(^8\)

Similar controversies have involved joint stock corporations, limited partnerships, and business trusts, despite their high content of corporate elements.

2. Gradation of Corporate Character

The European literature at long last has perceived the multifarious gradations established by modern inventiveness between the extremes of a mere contract of associates and a complete legal person.\(^9\) Indeed, it is a statement of sober truth that a partnership is not a corporation. That the French société en nom collectif is generally termed a legal person, has been criticized by the author of the French standard work on juristic personality, because this type, too, is far from embodying all features of a regular corporation.\(^10\) But nothing is gained on the other hand by ignoring in juristic construction all those indicia of corporateness that make even ordinary partnerships appear legal bodies to businessmen. The dispute should find an end in Judge Learned Hand's suggestion that the entity of the firm should be constantly recognized and enforced in accordance with business usages and under-

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\(^8\) See Lewis, 29 Harv. L. Rev. (1915) 158, and the "constant view of the Reichsgericht," as expressed in 46 RGZ. 41; 65 id. 21, 229; 86 id. 70; Wieland, 1 Handelsr. 420 n. 61, 621-628; Staub-Pinner in 1 Staub § 105 n. 8. Muge1, Offene Handelsgesellschaft, in 5 Rechtsvergl. Handwörterbuch at 466 has correctly argued that there is no reason why the capacity of partnerships of being a party to a lawsuit should not be construed analogously to its other capacities.

\(^9\) Final clarification was due in the first place to Carl Wieland, 1 Handelsr. (1921) 396-434.

\(^10\) Michoud, 1 Personnalité Morale §§ 68 and 72, 2 id. 328 n. 1; see also Lehmann, 74 Z. Handelsr. (1913) 465.
standing; "like the concept of a corporation, it is for many purposes a device of the utmost value in clarifying ideas and in making easy the solution of legal relations."\textsuperscript{11}

In this country, as a matter of fact, judges and draftsmen perceived the truth earlier than in Europe. More than anything else the doctrine of \textit{de facto} corporations demonstrated that corporate functions can be exercised without a formally independent personality. The doctrine of "disregarding corporate nature" to obviate abuses was a complement thereto. The continuous necessity of comparing the different institutions of the states was educational in preventing overestimation of the corporation label. "It is difficult to find what peculiar powers or privileges can only be possessed by corporations or associations which must be regarded as incorporated or personified."\textsuperscript{12} Indeed, entirely separate capacity is the only essential attribute of a corporation. A common name, common funds or ownership of property, continuity of existence unaffected by changes in the membership, transferable shares, concentration of power in the management, limited liability of members, capacity to sue and be sued, capacity to be declared bankrupt—these and other features of an ordinary stock company may be more or less broadly combined in the structure of unincorporated bodies.

3. Purposes of Construction

It is a familiar and good method to analyze the corporate elements in a foreign type of association for the purpose of applying the corresponding domestic rules on corporations. Such associations may be assimilated to domestic business corporations from certain points of view and differentiated

\textsuperscript{11} \textit{In re} Samuels & Lesser (D. C. S. D. New York 1913) 207 Fed. 195, 198. An excellent comparison between corporation and partnership with respect to their changeable attributes is given in \textit{Fletcher}, 17 Cyc. Corp. § 20.

\textsuperscript{12} \textit{Ballantine}, Corporations 11 § 4; to exactly the same effect, \textit{Stevens}, Corporations § 5.
American courts are particularly well prepared to inquire into the composition of an organization without being influenced either by dogmatic preconceptions or mere names of institutions. For instance, in a famous American leading case, the Liverpool Insurance Company, an English joint stock corporation, was subjected to taxation in Massachusetts as a foreign corporation. The Supreme Court of the United States approved the constitutionality of this discrimination. It is a confusion, unfortunately still significant of a part of the literature, that the Liverpool case has been contrasted with such cases as Great Southern Fire Proof Hotel Co. v. Jones, in which a Pennsylvania limited partnership was declared not to be a corporation, although it is a well-known type of a near-corporation, definitely nearer to the full-fledged type than an English joint stock corporation.

The explanation is very simple and by no means a secret. The case dealt with access to the federal courts on the ground of diverse citizenship, and there is a strong tendency to limit this privilege as much as can be done consistently with the earlier admission of corporations.

How the courts employ this approach, may be exemplified by the treatment of common law trusts created under unequivocal laws and with ample corporate advantages in Massachusetts, New York, Oklahoma, and Wisconsin. Such trust "is neither in fact nor in law a corporation." Nevertheless, because of the many attributes of a corporation possessed by this organization, it has been brought under

18 WIELAND, 1 Handelsr. 430: "Only concepts of relations enable us to understand a total thing composed of parts."
14 (1870) 10 Wall. 566.
18 This mistake of WARREN, Corporate Advantages 519, 520, seems to be not yet eradicated.
18 See Note, 34 Col. L. Rev. (1934) 1555.
such statutes as Blue Sky laws, corporation tax laws, and bankruptcy statutes. It is quite consistent with the method of evaluating the impact of corporate features on a given problem, that the courts may doubt whether a statute requiring foreign corporations to obtain permission to do business, apply to such foreign business trusts as are validly constituted under their home laws. Filing has been declared unnecessary in Missouri, Montana, and New York, but is required in Kansas, Michigan, and Washington. The more liberal solution seems to be influenced by the idea that a common law trust is created by the mere volition of the organizers in the declaration of trust rather than as a creature of a statute. Of more persuasive force than this approach which stems from the time of the fiction theory, is the argument that, in the provisions on licensing, the New York legislature intentionally seems to have assimilated business trusts to partnerships rather than to corporations. The contrary solution, not merely intended for fiscal interests, may well be justified by the consideration that persons dealing in the state with the trustees of a foreign business enterprise are at least as much endangered as when dealing with foreign corporations.

19 See also Reilly v. Clyne, supra note 10.
20 See also Reilly v. Clyne, supra note 10.
21 See also Reilly v. Clyne, supra note 10.
22 See also Reilly v. Clyne, supra note 10.
23 See also Reilly v. Clyne, supra note 10.
24 Both arguments have been used by Shientag, J., in Burgoyne v. James, supra n. 22, at 13, 18.
It fits this situation well that the United States Supreme Court does not interfere with the freedom of states to treat a foreign trust either way. With its approval, a business trust of Massachusetts, whose trustees and shareholders were exempted from personal liability, after investigation of its structure, was declared clothed with the ordinary functions and attributes of a corporation and in Michigan subject to the laws relating to foreign corporations doing business in the state.\(^{25}\)

We shall meet more examples hereafter. Although conclusions reached may not always have been satisfactory, yet the method is clear and unimpeachable. Occasions for the courts to apply their method of putting the problem continue, since statutes and judge-made rules for the most part are still conceived as if corporations and partnerships were in contradictory opposition. The treatment of mixed types still depends on a delicate balancing in accordance with the intentions underlying every one of the different statutory or other rules. Also, the sparse texts directly referring to unincorporated organizations have presented some problems of construction. At any rate, the courts recognize that their task is to construe and adjust unspecified statutes that do not squarely regulate the foreign hybrid organizations.

In this connection, attention may be drawn to the Uniform Foreign Corporations Act, § 1, which has proposed a broad assimilation for the purpose of filing for doing business:

"'Corporations' includes a corporation and all associations, organizations, trusts, and joint stock companies having substantially the powers or privileges of corporations not possessed by individuals or partnerships, under whatever term or designation they may be elsewhere defined and known."

II. Personal Law

If, then, the courts have developed an assured method of analyzing the mixed nature of business trusts, joint stock corporations, partnerships of diverse kinds, labor unions, and clubs, for the purpose of Blue Sky laws, federal revenue, state taxation, and licensing statutes, is the same approach not proper for the purpose of ascertaining the applicable law?

It seems only logical to assume that all organizations enjoy a personal law at least to the extent that corporate attributes attach to them.

1. Civil Law Doctrine

Need for a personal law. This problem has not been exhaustively discussed in any country and not at all in this country. European writers have, however, perceived that a personal, ubiquitous law is as necessary to foreign unincorporated organizations, including partnerships, as to veritable corporations. The status of any association ought to be determined consistently and permanently. A careful Italian decision declares that “the need of a unitary regulation of commercial association (società) in their international relations requires respect for their original constitution.”

An alternative solution would be to allow each court to determine under its domestic law the legal effects of a foreign association. Sometimes writers and courts have been inclined to apply the famous “characterization according to the lex fori,” to determine whether a foreign association should be regarded as a legal person. But this is not a tenable proposition. As the Restatement well states in its conflicts rule

on corporations.\textsuperscript{28} "Whether an association has been incorporated is determined by the law of the state in which an attempt to incorporate has been made." This implies that an association, considered a corporation in the state of charter, is considered just that everywhere. Furthermore: "The effects of an unsuccessful attempt to incorporate are governed by the law of the state in which the attempt was made." This\textsuperscript{29} implies that a \textit{de facto} corporation resulting from a defect in the process of incorporation in the state of the charter, is so recognized.\textsuperscript{30} Is it possible in consistency to treat other unincorporated associations by a conflicting criterion? If it is understood, after all discussions, that the difference separating corporations, joint stock companies, and partnerships is only gradual, how can the recognition of foreign-created associations stop with corporations? A third solution has been advocated by a few writers who persist in the error of not distinguishing the problems of personal law and nationality, especially enemy nationality;\textsuperscript{31} they would determine the personal law of an association according to the citizenship of its members, a senseless and often impractical approach.

\textbf{Laws and treaties.} The general European doctrine attributes to associations and partnerships, irrespective of legal personality, a personal law, determined by the same criterion as in the case of corporations, i.e., in England, the place of creation, and on the Continent, the "seat" or central office.\textsuperscript{32}

\textsuperscript{28} Restatement § 155.
\textsuperscript{29} Or subsec. 3 of § 155 and special note to § 155 drawing the same conclusion.
\textsuperscript{30} United States: See Annotation, 73 A. L. R. 1202; 23 Am. Jur. 67 § 56.
\textsuperscript{31} Belgium: App. Gent (April 21, 1876) Clunet 1876, 305.
\textsuperscript{32} France: ARMINJON, Revue 1908, 772, 825.
\textsuperscript{33} Italy: App. Roma (March 8, 1932) supra n. 27.
\textsuperscript{34} FEDOZZI, Gli enti collettivi nel diritto internazionale privato (1897) 243; CAVAGLIERI, Dir. Int. Com. 270. A similar old decision of the Swiss Fed. Trib. (Nov. 11, 1893) Clunet 1893, 640 is obsolete.
This rule is expressed in recent enactments such as the Polish statute on international private law, which extends its scope to "juristic persons as well as all societies and associations," the Code of Liechtenstein, and the Código Bustamante and the new draft of the Montevideo Treaties. Of particular significance are the provisions of international draft proposals and bilateral treaties, such as the following:

"The expression ‘companies of the High Contracting Parties’ shall, for the purposes of this Treaty, be interpreted in

Austria: Walker 149.

Belgium: Poulet § 209, 3ème règle: foreign associations put by their national law in an intermediate status between the total absence of any juristic individuality and the civil personification in proper sense will enjoy in Belgium the particular status assigned them by their national legislation.

Germany: ROHG. (February 17, 1871) 2 ROHGE. 36; Lewald §§ 53, 65; and see the commentaries to Handelsgesetzbuch § 106.

Italy: Busca 173 (though not very clear).

The Netherlands: See 1 Van Hassett 315ff. including in "handelsvereeniging" the "non-juristic persons."

Switzerland: von Steiger, Die Handelsgesellschaften im internationalem Privatrecht, 67 ZBJV. (1931) at 312; contra BG. (March 5, 1957) 83 BGE. II 41 at 47 (party autonomy).

88 Poland: Int. Priv. Law, art 1 No. 3.

89 Liechtenstein: P. G. R. arts. 676, 677.

90 Código Bustamante, art. 249.

91 Treaty on Civil Law, art. 4 par. 4 (sociedades civiles); on Commercial Law, art. 8 (sociedades mercantiles). The actual text of 1889 limits itself to juristic persons, which concept in Argentina and Paraguay excludes partnerships, cf. Argaña, Report on the Commercial Draft of 1940, in República Argentina, Segundo Congreso Sudamericano 225.


Ambiguous: Draft of the Geneva Sub-committee on the treatment of foreigners, Revue 1930, 236, 242, art. 16 § 1: "Les sociétés par actions et autres sociétés commerciales, y compris les sociétés industrielles, les sociétés financières, les compagnies assurant les communications et les compagnies de transport, ayant leur siège . . . " The draftsmen may have believed a partnership or a joint stock company necessarily to be a juristic person.

On the other hand, the treaties of the United States, e.g., with Poland (June 15, 1931) art. 11, U. S. Treaty Series No. 862, 139 L. of N. Treaty Series (1933) 397 at 407, mentioning "limited liability and other corporations and associations," seem to refer exclusively to juristic persons, as also the original German version of art. 12, Treaty U. S.-Germany (Dec. 8, 1923) U. S. Treaty Series No. 725, 52 L. of N. Treaty Series (1926) 133 at 141 understands the analogous passage.
the case of either High Contracting Party as relating to the limited liability and other companies and associations (partnerships) formed for the purpose of commerce, finance, industry, transport or any other business, and carrying on business in the territories of that Party, provided that they have been truly constituted in accordance with the laws in force therein, etc.” Treaty between Great Britain and Turkey, of March 1, 1930, article 2.

“Limited liability and other companies, partnerships and associations formed for the purpose of commerce, insurance, finance, industry, transport or any other business and established in the territories of either Party shall, provided that they have been duly constituted in accordance with the laws in force in such territories, be entitled, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.” Treaty between Great Britain and Germany, of Dec. 2, 1924, article 16, paragraph 1.

Evidently to the same effect the formula included in article 10, paragraph 1, of the Treaty between Egypt and Turkey, of April 7, 1937, enumerates: joint stock companies, including industrial, insurance, and transport companies which have their headquarters (siège) in the territory, et cetera.

Conflict with domestic classification. The principle is obvious in the case where a partnership is considered an entity short of legal personality in the countries both of creation and of recognition. An American partnership is in fact recog-

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Great Britain-Germany (Dec. 2, 1924) art. 16 par. 1, 43 L. of N. Treaty Series (1926) 89 to 98, 119 British and Foreign State Papers (1924) 369 at 374, RGBl. 1925 II 777. Similarly, the German treaty with South Africa (Sept. 1, 1928) art. 15, 95 L. of N. Treaty Series (1929) 289 at 297, 128 British and Foreign State Papers (1928) Part I, 473 at 478; Finland, RGBl. 1926 II 557; Italy, RGBl. 1929 II 15; etc.

90 191 L. of N. Treaty Series (1938) 95.
nized in Germany with exactly the same degree of personality and the same extent of personal liability of the partners as in the state of creation. 41

The personal law applies likewise to a foreign partnership that is not a legal person under its original law, also when a similar domestic partnership is construed as a corporation. For example, a partnership of the United States is to be treated in Mexico as of the same nature it has in the United States, different from Mexican partnerships which are corporations. A German partnership or association without legal personality, an American partnership, or a *de facto* corporation should enjoy abroad its personal law, neither more nor less than at home, particularly with respect to standing in court. In the French courts, this thesis has been accepted 42 against opposition erroneously characterizing as procedural the French rule that only legal persons may appear in court. 43 Exactly the same problem exists in this country and will be discussed shortly.

The converse case of a partnership with the status of a corporation in the state of its creation is covered by the conflicts rule on corporations. The personal law prevails over a different local characterization, although eager followers of the *lex fori* theory have opposed this result. 44 Thus, if a French "société en nom collectif" claims in a German

41 Germany: RG. (Nov. 25, 1895) 36 RGZ. 393 (English partnership); OLG. Kiel (March 21, 1901) 12 Z.int.R. 469 (Swedish cooperative); OLG. Hamburg (June 6, 1904) 14 Z.int.R. 163 (American partnership), 166, aff'd, RG. (Oct. 7, 1904) 15 id. 293; OLG. Kassel (July 30, 1909) Leipzig Z. 1909, 954 (Swiss partnership); OLG. Augsburg (Nov. 6, 1917) 36 ROLG. 105 (Swiss limited partnership).


43 See Michoud, 2 Personnalité Morale 328 n. 1, 345 n. 1; 2 Arminjon (ed. 2) 538; as against 2 Lyon-Caen et Renault § 1126.

44 RIGOAUD, io Répert. 229 Nos. 19, 21, 22 and in some respects Melchior 138; Sauser-Hall, 50 Bull. Soc. Législ. Comp. (1921) 247. Nussbaum, D. IPR. 190, deciding according to the usual theory of characterization under the *lex fori*. Also Betzke, Jur. Personen 62, 117 advocates the law of the forum, with wrong reference to the decision of the German Supreme Finance Court, IPRspr. 1931, Nos. 15 and 16, actually confirming the conflicts rule.
court the rights of a legal person as enjoyed in France, it is immaterial that common German opinion denies legal personality to an "offene Handelsgesellschaft"; the legal entity is recognized in conformity with French law. A partnership constituted by two British subjects in Czarist Russia was a legal person under the local law; therefore the liability of the partners to a German creditor was declared dependent on the Russian law by the Anglo-German Mixed Arbitral Tribunal. Likewise, the Belgian law of October 25, 1919 (article 8) allows foreign scientific associations to "exercise in Belgium ... the rights resulting from their national law." The Swiss authorities recognized German private limited companies (Gesellschaften mit beschränkter Haftung) at a time when Switzerland had not yet introduced this type, and now grant full acknowledgement to English stock companies, corporations sole and business trusts, all unknown to Swiss internal law.

The following case of the Italian Supreme Court gives another confirmation:

*Illustration: Nizard v. Finanza.* Two brothers Nizard, intending to form a partnership, established a firm in France but omitted the prescribed publications. The resulting irregular or *de facto* partnership is considered a merely contractual relationship in France, while it would be an effective corporation in Italy. After the death of one of the brothers, taxes were levied on certain assets situated in Italy and

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47 Anglo-German Mixed Arb. Trib., Voith Maschinenfabrik und Gießerei v. Thornton & Geiler, 8 Recueil trib. arb. mixtes 300.
48 Swiss Dept. of Justice (Nov. 25, 1898); Decision of the Federal Council (June 16, 1902) BBl. 1902 IV 42.
50 Austria: OGH. (Feb. 26, 1952) 25 SZ. (1952) No. 48, Clunet 1953, 172 (a Liechtenstein trust can be entered into an Austrian commercial register).
51 Italy: Cass. (April 29, 1933) Foro Ital. 1933 I 1160.
brought into the société. The legality of such taxation was
dependent, in the opinion of the courts, on the question
whether the assets were owned by the brothers in joint
tenancy or by the firm. The courts correctly resorted to the
personal law of the association and found it to be that of the
central office and principal place of business in France rather
than the law of the situs or the national law of the partners.

A learned French commentator on this case reveals his
perplexity, that the association has not been characterized
according to the lex fori as required in conflicts problems, but
consoles himself with thinking that the decision of the court
could be supported by reference to the law of aliens rather
than conflicts law. Yet, the ascertainment of the personal
law of foreign organizations is by no means a problem of
“condition des étrangers” but a part of regular conflicts law.

In a case where in the name of an intended stock corpo­
ration, during the period of preparation for its incorporation,
contracts were concluded with third parties, the German
Reichsgericht has applied the personal law of the future
corporation, since the main office was to be established in
Germany. Under this law, namely, the German law, the
promoters were considered to be an unincorporated associa­
tion, and the agents were personally liable. It would have
been more correct to ascribe to the promoting syndicate its
own personal law, with probably the same result. The princi­
ple ought to be the same as where a limited company was
intended, with the central office being established in Bombay,
India, but because not registered there, considered a partner­
ship according to Anglo-Indian law.

An exception made by the Belgian Supreme Court was
not a happy one. The court really did not doubt that the

52 MAURY, Note in 3 Giur. Comp. DIP. 23.
53 RG. (October 29, 1938) JW. 1939, 110.
54 OLG. Hamburg (Jan. 21, 1932) Hans.GZ. 1932, B 266 No. 73, IPRspr. 1932
No. 14.
capacity of the Société des Droits d'Auteurs et Compositeurs de Musique (SACEM) of Paris was subject to French law but thought that article 1832 of the Civil Code, common to France and Belgium, should receive the Belgian interpretation rather than the French so as to deny legal personality to a société civile. A strange view. The law presiding over the creation of an association should be exactly applied without interference of the municipal law, whether it grants more or less autonomy. The mistake is instructive. Also common law courts have not hesitated at times to apply their own special construction to an association organized in another state under common law; we shall encounter immediately such a decision.

2. American Law

(a) Quasi corporations. Apart from general partnerships, it seems to me that, although no unequivocal commitment to a formulated rule can be ascertained, practically the law under which a limited partnership, a business trust, or a joint stock corporation has been organized, clearly forms the law determining the extent of its corporate advantages. The above-mentioned examinations of business trust relations have led to the clear conclusion that New York courts have "fully recognized the status of a business trust" as reflected in the decisions of the Massachusetts courts. A Michigan limited partnership association was thoroughly analyzed by the Supreme Court of California, which found that under the Michigan statute, the association had so many corporate powers that it should be deemed a foreign corporation at least for the purpose of the power to hold and convey real

property in the firm name, a power which was denied to partnerships by California law. Where a limited partnership was organized in Cuba under Spanish law to the effect that a special partner was not personally liable with his separate assets for firm debts, the New York Court of Appeals applied Spanish law, although the contract sued upon was made in New York on behalf of the firm. This decision has been incidentally approved in the Restatement and has several parallels. It was not even mentioned that the Cuban organization, which must have been a comandita simple, would be construed as a legal person in Cuba itself. The case, therefore, has a broad scope. In a later case, a New York unincorporated stock company was found to be a legal entity “for most, if not all practical purposes, capable in law of acting and assuming legal obligations quite independent of the shareholders,” a “quasi-corporate entity,” very unlike an ordinary copartnership. As a result, capacity for issuing negotiable bonds was recognized. In Kansas, it has been held that a common law trust domiciled in Oklahoma has legal capacity to acquire a royalty interest in lands located in the state, in assimilation to corporations endowed with this power under the state constitution. The status of an organization called “The Farmers Association of North Mississippi” was analyzed according to the law of the state of Mississippi where the members resided, and held not to constitute a partnership.

57 Hill-Davis Co., Ltd. v. Atwell (1932) 215 Cal. 444, 10 Pac. (2d) 463.
59 Restatement § 343 comment c.
60 Barrows v. Downs (1870) 9 R. I. 446, 11 Am. Rep. 283; in a contract “considered as made in New York” by the general partner of a Havana partnership, his authority to bind special partners is “regulated by the law of Cuba”; Lawrence v. Batcheller (1881) 131 Mass. 504, 509: “all persons doing business with limited partnerships are presumed to take notice of the laws of the State in which they are formed.” See moreover cases infra ns. 82-86.
63 Price v. Independent Oil Co. (1933) 168 Miss. 292, 150 So. 521.
It is true that some decisions seem to indicate opposite tendencies. But they belong to two classes of special considerations.

One class seems to be represented by only one case. An attempt had been made to form a business trust in Texas, the members contracting that no stockholder should be personally liable. By the law of Texas, the stipulation was invalid, and a partnership resulted with personal liability of the members. The plaintiff brought an action in Iowa on a note issued by the "trustees" of the association, against an Iowa resident who had bought stock in the organization. The Iowa Supreme Court surprisingly dismissed the action on the ground that public policy required the application of Iowa law under which the organization is considered an unincorporated joint stock association. The decision has been criticized on several grounds. It commits inversely the mistake made in the California provisions which held a shareholder personally liable under California law, contrary to the law of the charter. These applications of the lex fori vary the personal law without any possible justification.

As this case seems to suggest, the controversies about the nature of a common law trust have somewhat confused the issue. In contrast to the courts of Massachusetts, other jurisdictions such as Kansas and Texas have considered that corporate advantages such as limited liability of stockholders or the concentration of the power of management should not be attributed to an organization otherwise than by statute or by a distinct agreement in the individual contracts made by the trustees with third persons. Writers once correctly relied on the conflicting considerations for the support of their own respective opinions, so long as the law was fluid. But when a

64 Farmers' & Merchants' Nat'l Bank v. Anderson (1933) 216 Iowa 988, 250 N. W. 214.
65 Note, 47 Harv. L. Rev. (1934) 526.
66 Supra p. 82.
doctrine has become stabilized by the court practice or statute, it is a part of the general law of the state. Massachusetts law on the one hand, Texas law on the other, ought to be recognized exactly as they are. There is no occasion for Iowa or California to supply its own theory. That the established judge-made law of Massachusetts, for instance, should not have been able to work out a trust susceptible of being recognized in Kansas, whereas its subsequently enacted statute should be given effect, is one of those apparently immortal dogmas loved by some writers and too unreasonable to be really adopted by any court.

Of another character, however, are cases in which it was stressed that the association had acted under the color of a corporation. A limited partnership of Pennsylvania filed an application for doing business in New York, referring to its "corporate seal" and indicating an agent for service of process. The New York court, without entering into an examination as to what was the true status of the party under the law of creation, upheld the service upon the New York agent authorized by the application mentioned. The plaintiff otherwise "would have been misled." This is an interesting exception to be connected with territorial protection of third persons.

A similar idea has been expressed in a California case. An organization, having vainly attempted to incorporate elsewhere, conducted business in the state "in garb of a corporation inducing the transaction involved in the instant litigation." It was considered estopped to deny the legality of its organization, and treated as a de facto corporation under the

67 Also in the field of the Full Faith and Credit Clause, primarily not in question here, the traditional doctrine that judicial decisions are not a part of the public acts protected by the clause seems to vanish; see Morgan, "Choice of Law Governing Proof," 58 Harv. L. Rev. (1944) 153, 167 and n. 31.
69 Charles Ehrlich & Co. v. J. Ellis Slater Co. (1920) 183 Cal. 709, 192 Pac. 526.
laws of California. On the other hand, the Iowa Supreme Court permitted an Illinois de facto corporation to sue on the ground that a domestic de facto corporation could do so, instead of inquiring into the law of Illinois, the state of creation, as is normally, although not always, done.

Such cases remind us of the reverse side of recognition. Reciprocal application of the personal law may cause some concern where misrepresentation is to be feared. But this is a general consideration needing separate and comprehensive discussion in the future.

(b) Partnerships. The question is considerably more difficult with respect to partnerships, because the approach implicitly accepted in the Restatement seems generally to be in the mind of lawyers. It is this: partnership means the partners; whenever a contract is made on their behalf, the ordinary rules of agency apply and, since the power of an agent to make his principal liable is said to depend on the law of the place where the contract with the third party is made, it is this law which governs the external situation of a partnership. In a few old decisions, the law of the place where a partner contracts with a third party, clearly has been extended to the problem of liability of other partners. Some authors, in fact, take it for granted that a partnership is devoid of a personal law. Can it be, however, that one partner A, contracting in some jurisdiction on behalf of the partnership or

70 First Title & Securities Co. v. U. S. Gypsum Co. (1931) 211 Iowa 1019, 233 N. W. 137.
72 Thus in Illinois: Hudson v. Green Hill Seminary (1885) 113 Ill. 618 (Indiana de facto corporation); Concord Apartment House Co. v. Alaska Refrigerator Co. (1898) 78 Ill. App. 682.
73 See Restatement New York Annotations § 155.
even of partners A, B, C, may make partner C liable beyond the rules under which the partnership has been organized, without any cause other than the local law regulating domestic organizations? The confusion wrought is evident. The extent of a power of attorney, under certain conditions (to be discussed in the next volume), is governed by the law of the place where the agent acts. This rule may affect an obligation of the partnership. But what effect such an obligation has on the liability of the various persons, inherent in the partnership, with their own assets is determinable by another law, governing in reality the structure of the organization.

Indeed, it has been said that the liability of partners is determined by the state of the domicil or origin of the partnership. The cases speak of the place of origin, the place where the partners are domiciled, or where they carry on their business. None of these cases, it is true, clearly recognizes a constitutive law of the partnership. They rather argue, more or less distinctly, on the basis of the conflicts rules concerning contracts. Likewise, the Restatement calls for the law of the place where the partnership agreement is made to determine the liability of a special limited partner.

Yet we have mentioned before a case involving Cuban special partners, decided in New York under Cuban limited partnership law. Also, this choice of law allegedly rested on the fact that the partnership agreement was made and performable in Cuba. Nevertheless, the court compared the prob-

80 § 343 comment c; 2 Beale 1194 § 345.1.
problem with the formation of a marriage relation and the acquisition of property in a foreign country. The difference from an ordinary obligation contract was obviously felt.

All the analogies above discussed make the conclusion inevitable that partnerships also may have a personal law.

3. Contacts

(a) Law of the seat. In civil law countries referring to the law of the state of the "seat" as applicable to corporations, it is the dominant opinion that the seat principle governs also all other private associations. Commercial partnerships are included, since they have necessarily a head office, at which they have to register. Noncommercial societies are included if they have a seat.

The nationality and domicile of the partners, therefore, are immaterial. A partnership domiciled abroad is foreign, even though all partners be subjects of the forum, and is domestic, even though all be foreigners.

(b) American quasi corporations. In American cases, equally, it is not rare to find applied the law of the state where an associated body has been organized. The cases speak of "a common law trust domiciled in Oklahoma," or "determined by the law of Massachusetts where it is located," "created in Massachusetts," "a limited partnership organized under the Act of Pennsylvania," et cetera. It


82 GEILER in I Düringer-Hachenburg 49 contends that, even if they have no seat, the law under which the organization is made would apply.

86 Great Southern Fire Proof Hotel Co. v. Jones (1900) 177 U. S. 449.
seems that the places of organizing and of domicil are not distinguished in determining the applicable law; this would be analogous to the treatment of incorporated bodies, where the domicil is legally deemed to be in the state of incorporation.

(c) American general partnerships. The question is of more serious significance with respect to partnerships. Since these have not yet been recognized in the United States as bearers of personal law, the courts have been uneasy in defining the law governing their structure.87 Almost never has the problem been squarely posited. The cases generally suppose a partnership carried on in the same state as that in which is was constituted.88 One case only is known in which a partnership was formed in one state, Pennsylvania, and carried on in another, New York; the Supreme Court of Pennsylvania regarded the partnership as governed by the law of New York.89 And this was on the ground that New York was the place of performance.90

This situation calls for clarification. Partnerships may have to be construed under foreign laws. Within the United States, many states have adopted the Uniform Partnership Act and many have not. What organizations are those made “under the Act?”91 In this case, any pretension that only statutory law can bestow corporate attributes would be beside the point; there is a statute.

87 See supra p. 112.
90 2 Beale 1192 observes that the result would have been the same under the lex loci contractus.
91 Cf. In re Hoyne (1922) 277 Fed. 668; whether a partnership was validly made was determined under the Illinois Act, since the contract was executed and the business conducted in Chicago.
What is in issue is the question, which contact should prevail in case of divided local attachments: the place where the contract of partnership is “consummated” or “launched,” or the place where the carrying on of business is centered, the domiciliary seat. The Continental doctrine leans on the latter contact, and it may be said in its favor in the absence of registration that third persons have a much better opportunity to know the location of the actual headquarters than the place where a contract was once made. Common law habits, contented with mere incorporation and not ascribing importance to the principal management, are not concerned with unincorporated organizations. On the other hand, difficulties in ascertaining the main business place may occur in some rare cases or irregular companies, but not frequently in any group of organizations. That a partnership cannot have a domicil, is an empty assertion. Of course, ordinary partnerships in this country, as contrasted with limited partnerships, need not necessarily have any fixed business place and have no duty of registration, which was one of the chief reasons for excluding their construction as legal persons. But in practice there will be found few partnerships showing no central office in their letterheads, and a great many of considerable, if not gigantic, proportions whose business is comparable to that of big corporations.

III. Scope of Personal Law

1. General Aspects

It is not difficult to define the domain of the personal law of quasi-corporations, whose distinctive elements are so prevalent in most de facto corporations, in the limited partner-

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92 Navarrini, Note, Foro Ital. 1927 I 485.
93 This assertion of the Restatement § 41 comment d has been challenged by Restatement New York Annotations 23.
94 Lewis, 29 Harv. L. Rev. (1915) 158 at 167.
ships of Pennsylvania or Michigan, and in the common law trusts of Massachusetts or New York. The border line runs exactly where the contractual features replace the corporate. The question, for instance, whether a special partner in a limited partnership, as an ordinary creditor, may request satisfaction out of the partnership funds for loans or goods sold, in competition with strangers, is closely connected with the structure of the organization, and hence, it ought to be covered by the law governing such organization. But if an unincorporated joint stock company is constituted in such a way that it discontinues in case an associate dies or is adjudged a bankrupt, and company debts are incurred after the death of an associate, the legal problems arising should be referred to the ordinary law of contracts; whether an associate paying the debt has recourse for reimbursement from the executor, may be determined by the law governing the preliminary agreement or the contract of association, not by that of the place of the company domicil.

The subject seems not to have found any attention thus far and would deserve a special study.

2. Partnership

The Continental doctrine extends its principle to all incidents of organization of mercantile partnerships. The law of the place where a partnership has its head office, therefore determines in particular the constitution of the partnership, so as to render defects in its creation under the personal law open to attack everywhere; the distinction between property of the partnership and separate property of the partners; powers of the partnership including its capacity for being

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95 Cf. Warren, Corporate Advantages 319, 323.
96 Diena, I Dir. Com. Int. 287.
97 App. Roma (March 8, 1932) supra p. 101 n. 27.
98 RGZ. 354; OLG. Kassel, Leipz. Z. 1911, 616 n. 2; Kohler, 74 Z. Handelsr. 459.
a party to a law suit; transfer and seizure of the rights of partners; the authority of partners to obligate the partnership; the liability of partners to third parties and whether such liability is limited, joint, or joint and several.

The last application, concerning the conditions of the partners' liability, is consistently followed by the courts of France, Germany, the Netherlands, and other countries and has been clearly adopted also in the English leading case of General Steam Navigation Co. v. Guillou. The court in this case, however, distinguished two questions: (1) one substantive, whether French law governing the partnership imposed upon the defendant joint liability or no liability, to which question the court was ready to apply the French answer; and (2) one procedural, whether in the French courts the defendant would have to be sued jointly with the other shareholders of the company, which mode of procedure was declared to be inapplicable in an English court. This distinction was applied to objectionable use in this and particularly in a later case. In the latter, the court declared bad
the plea of the defendant partner of a firm domiciled in Scotland that the firm was distinct from the members and that a judgment against the firm was a condition precedent to individual liability. But the character of a Scotch partnership as a distinct person was notorious and since has been confirmed by the Partnership Act of 1890. This should have been recognized in England with all its attendant effects on marshalling the liabilities of company and members. The privilege of being sued only after the principal debtor has been sued and his assets exhausted (beneficium excussionis) is an incident to liability of partners, as German courts confirm, notwithstanding the opposed English view.

The law of the seat has been said also to include the reciprocal rights of the partners, with the proviso that this may be changed by the intention of the parties. But the Reichsgericht in a case of two German-domiciled partners carrying on business in Portugal, had no hesitation in assuming that application of German law was intended by the parties. On the other hand, by a distinct mistake in a draft of the Institute of International Law, all incidents, including conditions of constitution, relations among associates and toward third parties, dissolution and liquidation, have been lumped together and subjected to the law of the seat by presumptive intention of the parties. It should be contended, instead,
that the personal law is independent of intentions of the parties but does not cover the internal relations of associates in any kind of partnership, because they are not characterized by corporate features. They are entirely subjected to contractual conflicts rules, and it is only casually that the applicable law often coincides with that of the center of the business, or, for that matter, the place where the business started.

The American partnership cases, due to their general attitude, cannot offer a direct contribution to this problem.

3. The Right to Be a Party

Following the principle of the personal law and at the same time conceiving the right to be a plaintiff or defendant as substantive, the Continental doctrine states that the law of the principal business place determines this right. The prevailing theoretical approach is the same as in construing rights and duties of partnerships in general; the members in their particular joint relationship are the parties. Accordingly, the members of an English partnership may sue under the name of their firm on the Continent, because they may do so according to English procedure, although in the English conception the proceeding is more closely connected with the individuals than on the Continent. By the same token, a New York partnership has been held in Germany incapable of being a party.

111 To this effect, probably Anglo-German Mixed Arb. Trib., Samson v. Heilbrun (June 27, 1929) 9 Recueil trib. arb. mixtes 36: a partnership consisting of an English and a German national, dissolved by art. 299 (a) of the Treaty of Versailles, is subjected to Scottish Law with respect to the relations between the partners resulting from a dissolution not followed by agreement or winding up procedure.

112 See WIELAND, 1 Handelsr. 420 and n. 61.


Germany: RG. (November 25, 1895) 36 RGZ. 393.


114 OLG. Hamburg (June 14, 1904) 9 ROLG. 25.
In the United States, however, the problem presents peculiar difficulties. The reasons are various, including the doctrines that, at common law as contrasted with statute, only legal entities may sue and be sued; that statutory authorizations to associations lacking personality are of procedural character; and that common law courts refuse representative actions in such situations.\(^{115}\)

These arguments imply that the state of creation has not elevated these types to the rank of corporations in the meaning of the forum, although they are perfectly capable of suing at home. The courts embark on a thorough analysis of the status of the unincorporated associations according to the law of the state where they have been organized, but the decision finally depends on whether the specific mixture of corporate and noncorporate elements justifies classifying the association as a corporation in the sense of the forum.

Such reasoning evidently is grounded in traditional conceptions. It should be noticed, however, that the application of these conceptions to foreign associations obscures their legal structure and causes a great deal of unnecessary delay and difficulty,\(^{116}\) even though in some cases careful lawyers may avoid these problems by adjusting matters to special devices of the local procedure. The entire argument amounts to a requirement that other states should not equip organizations in a manner different from the forum. The very investigation into attributes other than the right to sue, in order to ascertain the right to sue, shows how inadequately the problem is handled. Joint stock companies established under the statutes of New York, Pennsylvania, or Michigan are “difficult to distinguish” from corporations.\(^{117}\)

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\(^{115}\) STURGES, “Unincorporated Associations as Parties to Actions,” 33 Yale L. J. (1924) 383-405.

\(^{116}\) See STURGES (supra n. 115) at 404.

\(^{117}\) BALLANTINE 15.
they be distinguished at any cost, for the purpose of denying them the very right to sue that they have in their home state?

Of course, the real theoretical trouble lies in the dogma that the right to be a party is procedural. As in many other respects, the development of American law requires a definite departure from the overextended scope of procedural law. In the meantime, we may draw some comfort from a recent concurring vote of Mr. Justice Frankfurter. The Federal Rules of Civil Procedure have expressly dealt with unincorporated associations, but they did it under a congressional authority confined to procedural matters. Therefore, it is the official view of the United States Supreme Court that, as Mr. Justice Frankfurter declares, suability of trade unions is "in essence and principle a procedural matter." The federal rule allows a trade union to be sued in its common name if the local law allows this, a question possibly resolved by the local procedural law. "But if such a procedural matter may be cast in the form of a substantive issue for the determination of status, it would at least in this case, be a question of the substantive law of the District [the local law of the case at bar] and not raise any substantive issue of federal law." In other words, the law of a state may treat the problem as substantive, an incident of the personal law; this will be enough for the federal court to recognize suability on its allegedly procedural level.

It seems to follow that American courts, irrespective of their own characterization, ought to apply the personal law of foreign countries, including suability as an incident, and consistency requires that this liberalism should extend to the laws of sister states, endowing associations or partnerships with the substantive right to sue or be sued.

118 Busby v. Electric Utilities Employees Union (1944) 65 S. Ct. 143.
Occasionally, it has been noted that New York courts may be liberal in entertaining suits against unincorporated associations, because they have a special procedure provided by their statutes. It should be replied that any procedure good for citing a corporation is good to use against any nonincorporated group which has articles of organization implying its suability under the applicable law.

Finally, if an action at law can be instituted against a corporation, there is no reason other than the mere weight of a tradition cancelled by economic necessity, to prevent a similar action against any organization endowed with the capacity of being sued by its personal law.

IV. QUASI NATIONALITY OF PARTNERSHIPS

How to apply the various rules affecting foreigners to unincorporated associations, particularly partnerships, again depends on the infinitely differentiated purposes of these rules. Neither can partnerships be simply assimilated in all respects to corporations, although they enjoy many benefits of the latter and are now often included in the treaties protecting business organizations, nor are they entirely incapable of being treated as entities.

There is no fixed rule including all matters such as security for costs, jurisdiction, taxation, and the like, valid for all countries.

On the other hand, nationality of partnerships in the

119 Note, 34 Col. L. Rev. (1934) 1555, 1556.
120 French Cass. (civ.) (July 25, 1933) Gaz. Pal. 1933.2.502 states that although a partnership is invested with the attributes of a legal unit in France, such concept cannot be transferred without qualification to the domain of public law, and in particular a partnership composed of foreigners may not claim compensation for war damage according to the principles of private law. Other decisions had decided the particular issue to the contrary, especially Cass. (req.) (July 17, 1930) Revue 1931, 128.
121 For instance, Austria: Law on Jurisdiction (Jurisdicteionsnorm) § 75 (administrative seat), cf. Walker 149.
meaning of the peace treaties of 1919 dealing with the clearing of prewar debts should not have been denied. The Anglo-German Mixed Arbitral Tribunal held for dogmatic reasons that an English or German partnership was not an English or German national in the meaning of the Treaty provisions concerning prewar debts. Hence, the nationality of the single partners was decisive for their participation in claims and debts, upon the application of the clearing and valorization rules. This theory was wrongly deduced from the overestimated fact that partnerships are not legal persons in every and all respects, in disregard of the essential corporate attributes they undoubtedly have and of the various purposes for which they have always been considered connected with the several countries. In fact, the view of the Tribunal was entirely impractical.

Belgium: Cass. (Nov. 5, 1906) Clunet 1907, 808 (center of operation, for tax purposes).


Germany: Nationality has been ascribed to partnerships for the purposes of restricting the provisions of the HGB. to domestic partnerships, RG. (Feb. II., 1896) 36 RGZ. 172, 177; RG. in Leipz. Z. 1911, 616; the duty of advancing security for the costs of a lawsuit, OLG. Hamburg, DJZ. 1900, 444; Stein-Jonas, 1 ZPO. (ed. 5, 1934) § 110 I 1 1 c. (36 RGZ. 393, 396 is obsolete), cf. Staub-Pinner in I Staub 647 § 105 n. 45; for general jurisdiction (13 OLG. 73). Cf. Wieland, I Handelsr. 419 n. 57, 617-19 § 18. On the other hand, a Venezuelan partnership is recognized as a juristic person, but the German partners are treated for tax purposes as the members of a German partnership. Reichsfinanzhof (Feb. 12, 1930) 27 Entsch. (of this court) 73, and JW. 1931, 160 with critical note by Rheinstrom.

Italy: Cass. (April 29, 1933) Foro Ital. Mass. 1933 IV 319; a French “irregular company” treated for taxation as not being a unity according to French law.

Switzerland: Schnitzer, Handelsr. 159.

The Netherlands: Rb. Rotterdam (June 24, 1914) W. 1915, 9719, 3 (a unit for jurisdiction); Rb. Amsterdam (Dec. 19, 1924) W. 11346 (a French partnership of an English and a French national has to give security for costs in respect to the English partner only, although it is held to be a legal unit in the French doctrine).
