rightly commenced more than one suit, and rightly incurred costs in both, may rightfully recover the same of the several parties originally liable for the debt and costs. Perhaps this should strictly be limited to costs accruing before satisfaction was received of other parties.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

United States Circuit Court, District of Indiana.

W. G. FARGO, PRESIDENT OF THE AMERICAN EXPRESS CO., v. LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY CO.

For purposes of Federal jurisdiction, a corporation is a citizen of the state creating it, and no averment of the individual citizenship of its members will be permitted.

A joint stock company, under the laws of New York, possessing the right to sue n the name of its president, who is individually a citizen of New York, and having various other essential qualities of a corporation, is a citizen of New York for the purposes of jurisdiction; and a suit by its president may be sustained in a federal court, although some of its members are citizens of the same state as the defendant.

It is only by comity that a corporation created by one state can sue in its own name in another, and the reasons for such comity apply equally to the case of a joint stock company.

BILL in equity brought by William G. Fargo, a citizen of the state of New York, individually and as president of the American Express Company, against the Louisville, New Albany and Chicago Railway Company for an injunction, and other relief.

The respondents moved to quash for want of jurisdiction.

Isaac Caldwell and *E. F. Trabue*, of Louisville, for the motion.—The American Express Company, not being a corporation, cannot sue as one in its corporate name, or by its president. *Louisville Railroad Co.* v. *Letson* 2 How. 497; *Marshall* v. *B. & O. Railroad Co.* 16 How. 314; *O. & M. Railroad Co.* v. *Wheeler*, 1 Black 286.

All shareholders must, therefore, be citizens of other states than Indiana: *Hope Ins. Co.* v. *Boardman*, 5 Cranch 57; *Bank of U. S.* v. *Deveaux*, 5 Id. 85; *Breithaupt* v. *Bank of Georgia*, 1 Pet. 238; *Bank of Cumberland* v. *Willis*, 3 Sumn. 472; *North River Co.* v. *Hoffman*, 5 Johns. Ch. 300; *Bank of Vicksburg* v. *Slocomb*, 14 Pet. 60; *Whitney* v. *Mayo*, 15 Ills. 254; *Baldwin* v. *Lawrence*, 2 Simon & Stuart 18; *Leigh* v. *Thomas*, 2 Vesey,

Sr. 312; *Strawbridge* v. *Curtiss*, 3 Cranch. 267; *Cameron* v. *McRoberts*, 3 Wheat. 591.

S. S. Rogers, of Buffalo, N. Y., and *A. W. Hendricks* for the complainant.—There is no want of jurisdiction unless the Indiana shareholders are indispensable parties: *West* v. *Randall*, 2 Mason 196: *Payne* v. *Hook*, 7 Wall. 431; *Hotel Co.* v. *Wade*, 7 Otto 13–21; Story's Eq. Pl., sects. 72–100; *Horn* v. *Lockhart*, 17 Wall. 570; *Shields* v. *Barrow*, 17 How. 130.

It would be a denial of justice to require all the shareholders to be made parties: *Hichens* v. *Congreve*, 4 Russell 562; *Wallworth* v. *Holt*, 4 Mylne & Craig 619; *Richardson* v. *Hastings*, 7 Beav. 323; 11 Id. 17.

As to the character of joint stock corporations: *Waterbury* v. *Merchants' Union Ex. Co.* 50 Barb. 158.

The American Express Company, nothwithstanding the residences of its shareholders, is, for the purpose of federal jurisdiction, a citizen of New York: *Fargo* v. *McVicker*, 55 Barb. 438–443.

GRESHAM, J.—The grounds of jurisdiction assigned in the bill are:

1. That the right of the American Express Company to sue and be sued in the name of its president is a franchise conferred upon it by the legislature of New York, which, by comity, follows it into states where it is permitted to do business; also, that the president is a natural person, and a citizen of the state of New York, and the defendant is a citizen of the state of Indiana.

2. That if it be held that the complainant, as such president, is not entitled to maintain the suit under the laws of New York, then he brings the suit not only in his own name and behalf individually, as a shareholder in the company, but also in behalf of such of the other numerous shareholders, not citizens of the state of Indiana, as shall come in and be made parties to the suit and share in the expense thereof.

The defendant's objections to the jurisdiction of the court are that the American Express Company is not a corporation, but a mere voluntary association, with no existence as an entity separate from the existence of its members; that, not being a citizen in the sense in which a corporation is, it can sue only with the names of

all its associates who, upon the face of the bill, must appear to be citizens of states other than the state of Indiana; that the New York statutes, which, it is claimed, authorized this suit to be brought in its present form, permit the president to sue only when all the stockholders can sue, and that all the stockholders of this company could not sue because they are all of the same class, and some of them are citizens of the same state as defendant; that the laws of New York, which confer upon this company certain corporate franchises, have no extra-territorial effect, and that the jurisdiction of this court is not of comity, but of constitutional right. The judicial power of the United States is extended by the constitution to "controversies between citizens of different states," and by the Judiciary Act jurisdiction is conferred upon the circuit courts of the United States when "the suit is between a citizen of the state where the suit is brought and a citizen of another state." It is now settled that for the purposes of federal jurisdiction corporations are regarded as citizens of the states where they are created, and no averment as to the citizenship of the members elsewhere will be permitted.

Is the American Express Company, which is a joint stock company, organized under the laws of New York, a citizen in the same sense and for the same purpose? In chapter 258 of the laws of 1849, of the state of New York, and in subsequent amendatory acts, joint stock companies may sue and be sued in the name of the president and treasurer, when the nature of the action is such that the suit might be maintained by or against all the shareholders. Such companies are endowed with perpetual succession, dissolution not resulting from change in membership produced by death or otherwise. A pending suit by or against the president or treasurer of the company is not abated by the death, resignation, or removal of such officers; and a judgment against the president or treasurer, as such, is not a lien upon their individual property, but execution is levied upon the property of the company only, the shareholders being liable individually after an ineffectual effort to thus collect the debt from the company. These are privileges that are not enjoyed by natural persons or partnerships. While these companies have no common seal, it is difficult, in other respects, to distinguish them from corporations. They are organized under general laws, very much as corporations are now generally organized. Their stock is divided up into shares and sold on the stock

boards, just as the stock of corporations is divided up and sold. Corporations are artificial persons, ideal creatures of the state; and so are New York joint stock companies. It is of no consequence that in the statutes under which these companies are organized they are called "unincorporated associations." In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint stock company, it is none the less a corporation for being called something else. Section 3, article 8, of the constitution of New York declares that "the term 'corporation,' as used in this article, shall be construed to include associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue, and shall be subject to being sued, in all courts, in like cases as natural persons."

It is urged, however, by counsel for the defendant, that the statute which confers the right upon these companies to sue and be sued in the name of the president or treasurer, relates to the remedy only, and that it can have no extra-territorial effect. Experience demonstrated the usefulness of these institutions in carrying on trade and business, and convenience required that they should be allowed to sue and be subject to suit, in the name of an individual who should represent the companies, as distinct from the individuals composing them. The right of such companies to sue and of others, including their own shareholders, to sue them, could not be acquired by agreement between the associates. In England, by an Act of Parliament, a public officer is designated to represent the individuals composing joint stock companies in the courts, both as plaintiff and defendant, and a judgment taken against him, in his representative capacity, binds only the property of the company. In New York, where the same necessity was felt for a representative of joint stock companies in litigation, both by and with them, the legislature provided that suits might be brought by and against such companies in the name of the president or treasurer. Aside from considerations of convenience, it would be a practical denial of justice to hold that such organizations, representing as they do large interests, with numerous and ever-changing shareholders, can sue and be sued only in the names of all their associates, as in the case of partnerships.

It is only by comity that a corporation which has been created by one state, is permitted to carry on its business in other states, and there sue in its corporate name; and it is not easy to assign a reason why the same rule of comity could not apply in favor of joint stock companies, which, in character, are not unlike corporations. In 1855 the legislature of Indiana passed an act (1 Davis 466), relating to express companies. At that time, and ever since, the express business in this state has been done by foreign companies, organized as this company was. By this act it is declared, that all such companies, and clearly foreign companies are contemplated, before entering on business in any county in this state, shall file in the clerk's office of that county a statement of their membership, the amount of capital invested in their business, and an agreement that service of process upon any agent of the company shall be deemed good service on the company. Here was a recognition by the state, of the existence of express companies like the American, with all the privileges which those enjoyed here organized, one of which was the right to sue in the representative or common name.

The legislature of Massachusetts passed a statute which imposed upon each fire, marine and fire and marine insurance company, incorporated or associated under the laws of any government or state, other than one of the United States, a tax of 4 per cent. upon the premiums charged or received on contracts made in that state, for insurance of property With this statute in force, the state of Massachusetts filed a bill in its Supreme Judicial Court against the Liverpool and London Life and Fire Insurance Company, to collect a tax of 4 per cent. on its premiums upon contracts made in Massachusetts, and to restrain the company from doing further business until the tax was paid. Payment of the tax was resisted on the ground, that the defendant was an association of natural persons under certain deeds of settlement and especial acts of Parliament, and not a corporation. In these acts of Parliament conferring privileges on the company, it was declared not to be the intention to make a corporation. The Supreme Court of Massachusetts gave a decree against the company. In affirming the case on appeal, the Supreme Court of the United States held (*Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566), that, as the law of corporations is understood in this country, the Liverpool and London Life and Fire Insurance Company was exercising a cor-

porate franchise in Massachusetts, and that it was liable as a corporation to pay the tax under the statute of that state.

In the case of *Westcott* v. *Fargo*, 61 N. Y. 542, it was held, that under sect. 3, art. 8, of the constitution of New York, and under the legislation of that state already alluded to, the president of the American Express Company was to be deemed a corporation solely for the purpose of suing and being sued in the courts of that state. The reasons which induced the Supreme Court to hold, that for the purpose of federal jurisdiction, corporations are to be regarded as citizens of the states whose creatures they are, call with equal force for a similar ruling in favor of joint stock companies which are organized under the laws of New York. It is no less convenient for the public than it is for these companies, that they should be allowed to sue and be sued in the name of the president or treasurer. If they are not allowed the privilege of suing, they cannot be thus sued. The American Express Company has a capital stock of $18,000,000, with more than three thousand shareholders. Its right to sue and its liability to suit in the name of its president or treasurer, is a franchise conferred upon it by the laws of New York, which, by comity, should and does follow it into other states; and William G. Fargo, who brings the suit as president, is a citizen of New York; and the defendant is an Indiana corporation, and a citizen of that state. For these reasons, I think the suit is properly brought, and without deciding other questions which were argued by counsel, the motion to dismiss for want of jurisdiction is overruled.

Unincorporated joint stock companies, as they exist in the United States, are, with the exception perhaps of those organized under the statutes of New York, merely co-partnerships, and, as a general thing, subject to all the rules governing that branch of the law. *Vigers* v. *Sainet*, 13 La. 300; *Tenney* v. *N. E. Protective Union*, 37 Vt. 64; *Manning* v. *Gasharie*, 27 Ind. 399; *Hedge's Appeal*, 63 Penn. St. 274; *Tappan* v. *Bailey*, 4 Met. 535; *Robbins v. Butler*, 24 Ill., 387; *Babb* v. *Reed*, 5 Rawle 151; *Lafond* v. *Deems*, 52 How. Pr. 41; s. c., 1 Abb. N. C. 318; *Wells* v. *Gates*, 18 Barb. 554; *Dennis* v. *Kennedy*, 19 Id. 517; *Townsend* v. *Goewey*, 19 Wend. 428; *Cross* v. *Jackson*, 5 Hill 478; *Williams* v. *Bank of Mich.*, 7 Wend. 539; *In re Fry*, *Treas.*, 4 Phila. 129; *Kramer* v. *Arthurs*, 7 Penn. St. 165.

The principal difference between unincorporated joint stock associations and partnerships, relates to the effect of a transfer of a member's interest in the association. In the case of a partnership such a transfer, in the absence of an agreement to the contrary, works a dissolution, as does likewise the death of a partner. In the case of a joint stock association there is usually no *delectus personæ*, and a transfer by a member, of his shares, or the death of a member does

not dissolve the association; *Tyrrell* v. *Washburn*, 6 Allen 466; *Tenney* v. *N. E. Prot. Union*, 37 Vt. 64. See *Troy Iron and Nail Factory* v. *Corning*, 45 Barb. 231; also, *Taylor* v. *Castle*, 42 Cal. 367, and *Jones* v. *Clark*, Id. 180, relating to California mining partnerships, in which there is usually no *delectus personæ*.

As respects joint stock companies organized under the New York statute of 1849 and the acts amendatory thereof, as was the American Express Co. in the principal case, the later and more authoritative and well-considered cases in that state regard them substantially as corporations, not having, however, any common seal, and in which the members are personably liable: *Waterbury* v. *Merchants' Union Express Co.*, 50 Barb. 157; s. c., 3 Abb. Pr. N. S. 163; *Westcott* v. *Fargo*, 61 N. Y. 542; *Sandford* v. *Supervisors of New York*, 15 How. Pr. 172.

As to what is the status of such companies in other states, there is some diversity of opinion. In Massachusetts it is held that the statutes under which such joint stock companies are organized are local in their operation, as regards remedies for debt against the company; that in Massachusetts such a company is a mere partnership, and that its members may be sued there in the first instance as partners for such a debt; notwithstanding the provisions of the New York statute, that no suit shall be maintained in the demand against the individual members, till judgment has been rendered against the company, in the name of the president or treasurer, and execution thereon returned unsatisfied: *Taft* v. *Ward*, 106 Mass. 518; s. c., 111 Id. 518; *Gott* v. *Dinsmore*, 111 Id. 45. See, however, *Cutler* v. *Thomas*, 25 Vt. 73, where it was said that the liability of individual members of an unincorporated joint stock company formed in Canada, growing out of the association, must be judged of by the laws of Canada, where the association was formed, and where their place of business was, though a bill of exchange drawn by them might be governed by the laws of the place where it is made payable.

The points decided in the principal case, and in the Massachusetts cases, are not identical, and possibly the cases may stand together, but there has as yet been so little litigation upon the questions involved in said cases that the law upon these subjects can hardly be said to be settled. The reason of the principal case, however, seems satisfactory, and such as ought to prevail in future cases.

MARSHALL D. EWELL.

Chicago, June 1881.

Supreme Court of Indiana.

ARCHIBALD LOVE, ET AL. *v.* E. G. CULVER PAYNE.

One partner has no authority to make a contract with a third party, to admit the latter as a member of the firm.

A third person cannot, by buying the interest of one partner, become a member of the firm unless all the partners consent.

In a firm consisting of fourteen members owning equal shares, one of the members, A., acted as president by election of the other members, and had general management of the firm business. He contracted with a third party, that if such party would purchase B.'s, one of the fourteen members' interest, and pay a certain sum