Representative Suits Involving Numerous Litigants

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REPRESENTATIVE SUITS INVOLVING NUMEROUS LITIGANTS

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The purpose of this study is to present the statutory law of the United States and England in relation to representative suits in which the number of persons involved plays a part; to state the non-statutory law interpreting such statutory law; to give the writer's construction of the present enactments; and to suggest the type of law that should be enacted.

THE EXISTING STATE OF THE LAW

The Statutory Law

The usual statute reads as follows: "When the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." 1

Slight variations of this statute are:

"If the question involves a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all." 2

"... and when the question is one of a common or joint interest of many persons, or when the parties are numerous and it may be impracticable to bring them all into court, one or more may sue or defend for the benefit of the whole." 3

"... and when the question is one of a common or general inter-

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2 KY. CIV. PRAC. CODE (Caitoll, 1932) §25.
3 ALASKA COMP. LAWS (1913) §871.
est of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and the court may make an order that the action be so prosecuted or defended."

Another type of statutes provides for but one situation in which there may be representative suits. This appears to attempt a combination of the two classes mentioned in the statutes heretofore quoted. Examples of this kind of legislation are now set forth:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

"When the question raised in a suit is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more of the class may sue or defend for the whole class."

"When the persons who might be made parties shall be very numerous, so that it would be impracticable or unreasonably expensive to make them all parties, one or more may sue or be sued or may be authorized by the court to defend for the benefit of all."

"Members of a numerous class may be represented by a few of the class in litigation which affects the interest of all."

(This applies only to equitable proceedings.)

"When the subject-matter of the controversy is one of common or general interest to many persons, and the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the court or a Judge to defend in such cause or matter on behalf or for the benefit of all persons so interested."

"Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are

5 Fed. Eq. Rule 38; Fla. Comp. Laws (1927) §4918 (7) relating to equity cases.
10 Rules of Sup. Ct. Eng. Order XVI, Rule 9 (1883). Wood v. McCarthy (1893) 1 Q.B. 775, is interpreted by the annotator of the 1933 edition of "The Annual Practice" to make "may be authorized" in ORDER 16, RULE 9, to mean "shall be directed."
not parties to the proceedings, but there are other persons in the same interest before the Court, and assenting to the compromise, the Court or a Judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts."

The Non-Statutory Law

Source and Purposes of Statutes

The doctrine relating to representative parties which we are examining appears to have been suggested in an equity case at least as early as 1701. As a result, we should not be surprised to find the courts saying, as they do, that the source of the statutes mentioned is equity. Since their origin is equity, their purposes are naturally said to be the aims of equity. Thus, some tribunals and authors have stated that the reason for allowing representative actions is to avoid a multiplicity of suits. Others say it is to prevent a failure of justice. The question of whether a plaintiff or defendant who is sued in a representative capacity shall be bound by the judgment is governed by the court's discretion, and the court may order that the plaintiff or defendant shall be bound in accordance with the nature of the cause and the order. The power to order such a binding of the absent party is inherent in the Court, and it may be exercised by the court or judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts."

11Rules of Sup. Ct. Eng. Order XVI, Rule 9 (a) (1893). In connection with Order XVI, Rule 9, one should read Order III, Rule 4, "If plaintiff sues, or defendant or any of the defendants is sued, in a representative capacity, the indorsement shall show, in manner appearing by such of the Forms in Appendix A, Part II, s. VII, as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued."


of justice.\textsuperscript{15} It is also claimed that convenience is the ground for permitting them.\textsuperscript{16} Again, combinations of reasons for the existence of statutes providing for such actions are given. It has been suggested that their presence is justified to prevent a practical failure of justice in extreme cases and to avoid a multiplicity of suits;\textsuperscript{17} to prevent delay and a multiplicity of suits;\textsuperscript{18} to advance convenience and to overcome the difficulty of bringing all names of those interested upon the record;\textsuperscript{19} to advance convenience and to prevent injustice.\textsuperscript{20}

\textit{When Statutes are Applicable}

It is usually said that the statutes apply to both legal and equitable causes since the language is broad enough to cover both types of proceedings and neither is expressly excluded.\textsuperscript{21} But there are

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\begin{itemize}
  \item Bouton v. City of Brooklyn, 15 Barb. 375, 7 How. Pr. 198 (N. Y. 1853);
  \item Reid v. The Evergreens, 21 How. Pr. 319 (N. Y. 1861);
  \item Stevens v. Brooks, 22 Wis. 695 (1866);
  \item Taff Vale Railway v. Amalgamated Society of Railway Servants, (1901) A. C. 426;
  \item Meux v. Maltby, 2 Swan. Ch. 277, 36 Eng. Rep. 621 (1818);
  \item Milligan v. Mitchell, 3 Myl. & C. 72, 40 Eng. Rep. 852 (1837);
  \item CLARK, CODE PLEADING (1928) 277; STORY, EQUITY PLEADING (10th ed. 1892) §§96, 100, 120; Note (1922) 36 HARV. L. REV. 89.
  \item March v. Eastern Railroad Co., 40 N. H. 548, (1860);
  \item Good v. Blewitt, 13 Ves. Jr. 397, 33 Eng. Rep. 343 (1807);
  \item Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Eng. Rep. 1105 (1809);
  \item Harvey v. Harvey, 4 Beav. 215, 49 Eng. Rep. 321 (1841);
  \item Powell v. Wright, 7 Beav. 444, 49 Eng. Rep. 1147 (1844);
  \item Bunnett v. Foster, 7 Beav. 540, 49 Eng. Rep. 1175 (1844);
  \item Blain v. Agar, 1 Sim. 37, 57 Eng. Rep. 492;
  \item Harrison v. The Marquis of Abergavenny and others, 3 Times L.R. 324 (1887);
  \item The Duke of Bedford v. Ellis et al., (1901) A. C. 1;
  \item BLISS, CODE PLEADING (3rd ed. 1894) §79; 30 CYC. 132;
  \item DANIELS, CHANCERY PLEADING AND PRACTICE (6th Am. ed. 1894) 230;
  \item KOCHER AND TRIER, NEW JERSEY CHANCERY PRACTICE AND PRECEDENTS (1924) §52; PHILLIPS, CODE PLEADING (2nd ed. 1932) §254;
  \item POMEROY, CODE REMEDIES (5th ed. 1929) §287; STORY, EQUITY PLEADING, §107.
  \item 30 Cyc. 133.
  \item Bryant v. Russell, 23 Pick. 508 (Mass. 1839).
  \item Hill v. Kensington Com'ts, 1 Pars. Eq. Cas. 501 (Pa. 1850).
  \item Duke of Bedford v. Ellis et al., supra note 16.
  \item Colt et al. v. Hicks, 179 N. E. 335 (Ind. 1932); Kirk v. Young, 2 Abb. Pr. 453 (N. Y. 1856); Platt v. Colvin, 50 Ohio St. 703, 36 N. E. 735 (1893); Walker et al. v. Village of Dillonvale, 82 Ohio St. 137, 92 N. E. 220 (1910); BATES, NEW PLEADING, PRACTICE, PARTIES, AND FORMS UNDER THE CODE (4th ed. 1932) §784; 30 Cyc. 134; DEEMER, IOWA PLEADING AND PRACTICE (2nd ed. 1927) §60; KINNEALD, LAW OF PLEADING IN CIVIL ACTIONS AND DEFENSES UNDER THE CODE (2nd ed. 1898) §15; PHILLIPS, CODE PLEADING (2nd ed. 1932) §254; POMEROY, CODE REMEDIES (5th ed. 1929) §290.
\end{itemize}
PLURAL LITIGANTS IN CLASS SUITS

statements that, without the aid of legislation, there cannot be representative actions in suits at law.22 The question arises as to whether or not a representative action at law is permissible in the federal courts. 28 U. S. C. § 724 provides that in law cases in federal district courts the practice, pleadings, and forms and modes of proceeding in civil causes shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing in like causes in courts of record of the state within which such district courts are held. From early to late times it has been decided that this statute covers the matter of parties.2a There is a strong intimation in a decision by Chief Justice Taft2b that the Supreme Court of the United States favors allowing suits by representative parties in suits at law. In that case, which was one at law, and in which the members of a union consisting of thousands of persons were allowed to be sued in the union's name, he says, "More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued." Stearns Coal & Lumber Co. v. Van Winkle2c was an action in ejectment tried before the court, the jury having been waived. A few stockholders sued on behalf of themselves and all other stockholders. The court said that since it was apparently impracticable to bring them all before the court, since the questions involved were common to all the stockholders, and since their rights rested upon the same foundation, the suit was authorized by the express provisions of the state statute, which, apparently, the court felt it should follow. It must be noticed that the case was tried without a jury, but, since the action, as the court expressly states, is one in ejectment, it is one at law. The fact that the judge, who usually tried equity actions, heard the case does not change it from an action at law to a suit in equity. This decision, therefore, seems to support the jurisdiction of federal courts in representative proceedings at law. A dictum in a late decision of a federal district court2d is also pertinent to the discussion and clearly states that federal courts should follow the state law as to allowing the bringing of representative

22Lilly v. Tobbein, 103 Mo. 477, 15 S. W. 618 (1890); Coffman v. Sangston, 21 Gratt. Va. 263 (1871); (1923) 87 Justice of the Peace 542.
2c221 Fed. 590 (C.C.A. 6th, 1915).
actions at law. The court said: "The action is for fraud and deceit and to redress the wrong done bondholders as individuals.

'The plaintiffs have attempted to bring the action as a representative action, and, as the action is at law, the Act of Conformity (title 28, section 724, U. S. Code, 28 U. S. C. A. par. 724) applies, and the statutory procedure of the state governs.

'This is found in section 195 of the Civil Practice Act of the State of New York, which reads as follows: 'Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.'

'Conforming, as we must, as near as may be, to the practice and procedure of the courts of the state, the construction of the state law by its courts is binding upon the courts of the United States. Atlantic & Pacific Railroad Company v. Hopkins, 94 U. S. 11, 13, 24 L. Ed. 48.

'The most common application of section 195 of the Civil Practice Act, supra, is to suits in equity, but it may also apply to suits at law, Kirk v. Young, 2 Abb. Pract. (N. Y.) 453; Atkins v. Trowbridge, 162 App. Div. 629, 148 N. Y. S. 181; but a class action is not proper for fraud or deceit, Dykman v. Keeney, 154 N. Y. 483, 48 N. E. 894; Marsh v. Kaye, 168 N. Y. 196, 61 N. E. 177; Brown v. Werblin, 138 Misc. 29, 244 N. Y. S. 209, 212; Cavanagh v. Hutcheson, 140 Misc. 178, 250 N. Y. S. 127; and neither do Kirk v. Young, supra, nor Atkins v. Trowbridge, supra, furnish authority for the bringing of a class action for fraud or deceit.

'The situation of the plaintiff in the action at bar cannot be better described than in the words used by Mr. Justice Walsh, in Brown v. Werblin, supra, wherein he said: 'Nor do the provisions of section 195, Civil Practice Act, permit the bringing of this action. A representative action cannot be maintained unless it appears from the allegations of the complaint that the plaintiff not only has a cause of action but that he is representative of a common or general interest of others. Bouton v. Van Buren, 229 N. Y. 17, 227 N. E. 477. Here there is neither community of right or interest in the subject-matter of the action nor in the questions of law or fact involved. Each plaintiff has a several right to recover, in an action at law, the damage, if any, sustained by reason of defendants' fraud. Each plaintiff's action is necessarily predicated upon the facts which induced him to act. The right of each individual is not derivative. It must stand on allegations and proof peculiar to itself and
disassociated from others. None has an interest in the cause of action or the damage recoverable by another. In such a case a class action may not be maintained.”

The result of these opinions definitely indicates that the federal courts, as far as they have spoken on the matter, believe that the state law as to representative suits should be applied in those courts in actions at law. Suggestions are found that tort cases are not covered by the statutes we are discussing. However, a very large number of cases deciding the other way is discovered, which fact will be disclosed hereafter. We find at least one direct statement that representation is not permitted where the purpose of the action is to impose personal liability or to require some positive act. The clear result is that defendants may be sued by representation, for the statutes do not distinguish between plaintiffs and defendants. But it does not authorize new causes of action, or enlarge the courts’ jurisdiction. The statutes have been held to apply not only to the usual cases before courts, but to proceedings before commissions. The representative statute applies though another

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\text{Cavanagh v. Hutcheson, 140 Misc. 178 250 N. Y. Supp. 127 (1931); Tem-}
\text{perton v. Russel, 1. Q. B. 435 (1893); Mercantile Marine Service Ass'n v. Toms}
\text{et al.,(1916) 2 K. B. 243.}
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\text{McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES}
\text{(1929) §242.}
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\text{United States v. Coal Dealers' Ass'n of California et al., 85 Fed. 252 (N. D.}
\text{Cal. 1898); State v. Webb, 97 Ala. 111, 12 So. 377 (1893); Baskins v. United}
\text{Mine Workers of America, 150 Ark. 398, 234 S. W. 464 (1921); Wheelock v.}
\text{First Presbyterian Church, 119 Cal. 477, 51 Pac. 841 (1897); Herald v. Glendale}
\text{Lodge No. 1289 B. P. O. E., 46 Cal. App. 325, 189 Pac. 329 (1920); Adams v.}
\text{Clark, 36 Colo. 55, 85 Pac. 642, 10 Ann. Cas. 774 (1906); Pearson v. Anderburg,}
\text{28 Utah 495, 80 Pac. 307 (1905); Van Brunt v. Wisconsin Consistory Home Ass’n,}
\text{163 Wis. 540, 158 N. W. 295 (1916); Wood v. McCarthy, 1 Q. B. 775 (1893);}
\text{Taff Vale Railway v. Amalgamated Society of Railway Servants, (1901) A. C. 426;}
\text{STORY, EQUITY PLEADING (10th ed. 1892) §116. This is also true under case}
\text{law. Chicago Typographical Union No. 16 v. A. R. Barnes & Co. et al., 134 Ill.}
\text{App. 11 (1907); Maisch v. Order of Americus, 223 Pa. 199, 72 Atl. 528 (1909);}
\text{Wolfe et al. v. Limestone Council No. 373, etc., 233 Pa. 357, 82 Atl. 499 (1912);}
\text{Oster v. Brotherhood of Locomotive Firemen and Enginemen et al., 271 Pa.}
\text{419, 114 Atl. 377 (1921); Dewey v. St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224}
\text{(1888); Brown v. Vermuden, 1 Chan. Cas. 272, 22 Eng. Rep. 796 (1676); Long}
\text{v. Yonge, 2 Sim. 369, 57 Eng. Rep. 827 (1830).}
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\text{Asplund v. Hannett, 249 Pac. 1074 (N. M. 1926); POMEROY, CODE REMEDIES}
\text{(5th ed. 1929) §827.}
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\text{Asplund v. Hannett, supra note 26.}
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\text{Southern Hardware Jobbers' Ass'n et al. v. Federal Trade Commission, 290}
\text{Fed. 733 (C. C. A. 5th, 1923); Chamber of Commerce of Minneapolis v. Federal}
\text{Trade Commission, 13 F. (2d) 673 (C. C. A. 8th, 1926); (1926) 25 MICH. L. REV.}
\text{184.}
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statute provides for suit by the president or treasurer of the organization on behalf of whose members an action is brought.29

Are the Statutes Mandatory?

Although the words "may sue or defend" are ordinarily used in the statutes and rules of court now under consideration, it is usually said that where representation of parties is possible it is necessary.30 Story suggests that this is true because the court is solicitous to attain the purposes of substantial justice.31 We find this mandatory doctrine applied to actions by creditors against stockholders to enforce the latter's liability for corporation debts;32 by creditors to enforce the statutory liability of incorporators to creditors;33 by shareholders to restrain an illegal act by the corporation;34 by partners in relation to a partnership matter;35 by creditors to carry into effect an assignment for the benefit of creditors;36 by creditors to set aside a transfer in fraud of creditors;37 by creditors to prevent and redress any maladministration or fraud against creditors, con-

31Story, Equity Pleading (10th ed. 1892) §96.
32Pollard v. Bailey, 87 U. S. 520 (1874); Terry v. Little, 101 U. S. 216, 1 Sup. Ct. 432 (1886); Patterson v. Lynde, 106 U. S. 519, 1 Sup. Ct. 432 (1883); Handley v. Stutz, 137 U. S. 366, 11 Sup. Ct. 530 (1890); New Orleans Pacific Railway Co. et al. v. Parker et al., 143 U. S. 42, 12 Sup. Ct. 364 (1892); Geo. W. Signor Tie Co. v. Monett & S. W. Const. Co. et al., 198 Fed. 412 (E. D. Mo. 1912); John A. Roebling's Sons Co. v. Kinnicutt, 248 Fed. 596 (S. D. N. Y. 1917); Crease et al. v. Babcock et al., 10 Metc. 532 (Mass. 1846); Wright v. McCormack 17 Ohio St. 86 (1866); Umsted v. Buskirk, 17 Ohio St. 113 (1866). It has been said that the reason for this result is that the stockholder's liability is to pay his proportion of the corporation's debts, and it is essential that the action be brought in such a form that each stockholder should pay a sum into a fund to be paid to all the creditors. Handley v. Stutz and George W. Signor Tie Co. v. Monett & S. W. Const. Co. et al., supra this note.
33Hessler et al. v. Cleveland Punch & Shear Works Co. et al., 61 Ohio St. 621, 56 N. E. 469 (1900).
35Baldwin v. Lawrence, 2 Sim. & S. 18 (1824); Macbride v. Lindsay, 9 Hare 574 (1825).
36Bryant v. Russell, supra note 18. Wakeman v. Grover, 4 Paige 23 (N. Y. 1832); Story, Equity Pleading, (10th ed. 1892) §99. Here Story says the reason for the result is that the debtor's representative might otherwise be compelled to account de novo with all the other creditors in other bills.
templated or executed, where there is a voluntary liquidation of a national bank;\(^4^8\) by creditors to marshal assets of a deceased and to obtain their administration;\(^4^9\) by creditors against one who is liable for obligations of a debtor up to a certain amount;\(^4^0\) and by a crew to obtain an accounting of prize money.\(^4^1\) There are a few cases holding that the statutes and rules of court now being examined are not mandatory.\(^4^2\) Again, some courts have decided that the bringing of a class suit is, or is not, permitted within the court's discretion.\(^4^3\) It has been said that one suing as a representative sues for himself and claims nothing in behalf of those represented unless they choose to come in and make their claims.\(^4^4\)

"A Question of Common or General Interest of Many Persons"

One of the most baffling problems of code pleading is what is meant by a question of common or general interest of many persons. Let us first examine the ideas of legal writers as to the import of "common or general interest". Some courts say that those similarly situated\(^4^5\) may be represented. We find this expression in an action by property owners to enjoin the collection of taxes;\(^4^6\) in a suit

\(^{48}\)Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788 (1887).

\(^{49}\)Stephenson v. Taverners, 9 Gratt. 398 (Va. 1852); Worraker v. Pryer, 2 Ch. D. 109 (1876); DANIELL, CHANCERY PLEADING AND PRACTICE (6th Am. ed. 1894) 231.

\(^{40}\)Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086 (1898).

\(^{41}\)Leigh v. Thomas, 2 Ves. Sr. 312 (1751). Of course, it must be noticed that in this case, and a few others mentioned, the result was based on case law of the same, or very nearly similar, wording as is found in legislation and rules of court.

\(^{42}\)Adams v. Clark, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774 (1906); Thornton et al. v. Hightower, 17 Ga. 1 (1859); Way v. Bragaw et al., 16 N. J. Eq. 213 (1863); Terry v. Calnan, 4 S. C. 508 (1873).

\(^{43}\)Sparks v. Robinson, 115 Ky. 453, 74 S. W. 176 (1903); Pencille v. State Farmers' Hall Ins. Co., 74 Minn. 67, 76 N. W. 1026 (1898); Faber v. Faber, 76 S. C. 156, 56 S. E. 677 (1907). Contra: 30 Cyc. 133-134. Under Order 16, rule 9 of the English Rules of Court it has been declared that there may be a class suit as to plaintiffs, but not as to defendants, without an order of court. Fairfield Shipbuilding and Engineering Co. Ltd. v. London and East Coast etc. Co. Ltd., (1895) W. N. 64; Walker v. Sur et al., (1914) 2 K. B. 930; (1923) 87 Justice Peace 543. Contra as to defendants: Graham v. Cadogen etc., (1906) W. N. 12.

\(^{44}\)Fish v. Howland, 1 Paige 20 (N. Y. 1828).


\(^{46}\)Risley et al. v. City of Utica et al., 173 Fed. 502 (N. D. N. Y. 1909); Everglades Drainage League et al. v. Napoleon B. Broward Drainage Dist. et al., 253 Fed. 246 (S. D. Fla. 1918); Matheny et al. v. Golden, 5 Ohio St. 361 (1856); Trustees of Jackson Township et al. v. Thoman et al., 51 Ohio St. 285, 37 N. E. 523 (1894). A dictum in this last case says the result is contra in an action to recover back taxes illegally and involuntarily paid.
by a city and traffic associations representing their citizens and clients to enjoin the enforcement of freight rates;\textsuperscript{47} in a case by stockholders to have the defendants restore corporate property improperly taken;\textsuperscript{48} in an injunction proceeding by property owners against a nuisance;\textsuperscript{49} and in a case by manufacturers and sellers of fertilizers to be relieved from carrying out an order of a Commissioner of Agriculture to attach tags to packages of fertilizer.\textsuperscript{50} Other expressions of like import which are used are \textit{similar interests}\textsuperscript{51} and \textit{same interests}\textsuperscript{52}.

It has been stated that there must be a \textit{common interest} in the \textit{matter involved},\textsuperscript{53} but that such common interest need not be \textit{similar},\textsuperscript{54} or \textit{identical}.\textsuperscript{55} We also find the term \textit{community of interest} employed.\textsuperscript{56} Again, a \textit{common}\textsuperscript{57} or general (homogeneous)\textsuperscript{58} right has been held necessary.

Up to this point the terminology used has not been definite enough to be of much value in explaining the phrase with which we are dealing, except as we apply it to the facts concerning which it is used. Now, however, we turn to something more definite. Thus, we find it said that to permit a representative suit, "there must be community of interest, as well as a right of recovery, by reason of the same essential facts."\textsuperscript{59} Again, it is claimed that it is sufficient

\textsuperscript{47} Merchants' & Manufacturers' Traffic Ass'n etc. v. United States \textit{et al.}, 231 Fed. 292 (N. D. Cal. 1915).
\textsuperscript{48} Atlanta Real Estate Co. v. Atlanta National Bank, 75 Ga. 40 (1885).
\textsuperscript{50} Blanton v. Southern Fertilizing Co., 77 Va. 335 (1883).
\textsuperscript{51} Blain v. Agar, 1 Sim. 37, 57 Eng. Rep. 492 (1826).
\textsuperscript{52} Powell v. Wright, 7 Beav. 444, 49 Eng. Rep. 1137 (1844).
\textsuperscript{54} Crease et al. v. Babcock et al., 10 Metc. 525 (Mass. 1846); State v. Dist. Ct. \textit{et al.}, 300 Pac. 544 (Mont. 1931). In speaking of cases relating to members of voluntary associations as defendants, Story in his \textit{Equity Pleading} (10th ed. 1892) \S116, says the interests of those representing and represented must be of a common character and responsibility.
\textsuperscript{58} Stevenson v. Austin, 3 Metc. 474 (Mass. 1842).
if there is a common interest in the question of law involved, which probably refers to the legal question just mentioned, but there are cases contrary to this. Some courts declare that, to permit a representation, all involved need only have a common interest in the facts and law, or in the same facts and issues, which probably means the same thing. Professor Blume is decidedly of this opinion. Professor McIntosh more vaguely says there must be some community of interest in the question presented. Still others have decided that there must be relief sought which is beneficial to all, or that there must be an object common to all. Then there are those who declare that certain combinations involving the things just mentioned constitute the "question" involved. We discover them saying there must be a common interest in the question involved and in the relief requested, in the legal question and relief sought, in the same cause or matter and relief sought, in the questions of law and fact and in the subject matter. We are also in-
formed that a community of interest in the questions of law and fact or in the relief demanded suffices, 73 but there is an opposing opinion saying that it is necessary that those represented must have "a common interest in the subject matter of the suit and a right and interest to ask for the same relief," and that such an interest in the questions of law and fact or in the relief demanded will not suffice. 74

It has been claimed that the common interest involved in a representative suit should be in the defendant's misdeed, 76 or in the cause of complaint. 78

We now come to a very important list of authorities who hold that there can be a representation of plaintiffs only when those suing and those represented could sue jointly. 77 The only reason that seems to be given for this result is that, in effect, the action is brought by all the parties. 78 A very able article has been written by Professor Blume opposing this view. 79 His argument is that, in determining whether or not those involved in representative suits must be able to join, one should look only to the statutory provisions dealing with such suits, and nothing stated in them makes it necessary that those representing and represented have to be able to join.

A court believing that there can be no representative action in tort cases has claimed that all those involved in such a proceeding must have claims arising out of the same contract and that there must be a limited fund out of which all are to recover. 80


76 U. S. Smelting Co. v. Hofkin et al., 245 Fed. 896 (B. D. Pa. 1917). 77 Certia v. University of Notre Dame, 82 Ind. App. 542, 141 N. E. 318 (1923); Holland Oil & Gas Co. et al. v. Holland, 114 Kan. 863, 220 Pac. 1044 (1923); Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152, 103 N. Y. Supp. 822 (1907); Habicht v. Pemberton, 4 Sandf. 657 (N. Y. 1851); Glidden et al. v. Cincinnati, 4 S. and C. P. D. 428, 30 Weekly Cin. L. B. 213 (1896); Bates, New Pleading, Practice, Parties and Forms Under the Code (4th ed. 1932) §81a; Bliss, Code Pleading (3rd ed. 1894) §79; Miller, Pleading and Practice in Courts of Iowa (5th ed. 1888); Phillips, Code Pleading (2nd ed. 1932) §254; Watson's Works' Indiana Pleading, Practice, Procedure and Forms (4th ed. 1918-1922) §247. Pomeroy, Code Remedies (5th ed. 1929) §287 says a representative suit cannot be sustained unless it could have been maintained if all the "many" persons had been joined as co-parties, or unless it could have been maintained by each of them suing separately for himself.


Finally, we discover many opinions in which it is stated that the "common or general interest" with which this article deals must be in the subject matter of the suit. This brings up the whole question as to the meaning of "subject matter." That phrase is probably synonymous with "subject of the action." For a detailed discussion of the meaning of that term one may see a recent article by the author. The United States Supreme court has further explained the first sentence of this paragraph as meaning it is essential that there be a community of interest growing out of the nature and condition of the right in dispute. The Supreme Court of Colorado has said the "subject matter" mentioned is the legal right of the persons interested in the representative suit. There are some instances in which it is said that there must be a proprietary interest involved. This may be meant to be a limited application of the "subject matter" rule. One comparatively late case says there must be the common interest in the subject matter and in the relief requested.

It is very clearly pointed out by a few writers that the interest with which the representative statutes deal is a common, as opposed to a united, interest. The late Professor Hepburn said this was so because another type of statute said that those united in interest must be joined. One author calls to our attention the fact that more than one class may be represented if the question is one of common interest to several classes.

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82Wheaton, Statutory Use of the Term "Subject of Action" (1932) 18 CORNELL LAW QUARTERLY 35-50. 83Scott v. Donald, supra note 81.

84Speyer v. School Dist. No. 1, City and County of Denver, supra note 81.


87Day v. Buckingham, 87 Wis. 215, 58 N. W. 254 (1894); George v. Benjamin, 100 Wis. 622, 76 N. W. 619 (1898). 8830 CYC. 134.

89KINKEAD, LAW OF PLEADING IN CIVIL ACTIONS AND DEFENCES UNDER THE CODE (2d ed. 1898) §15.
Properly, or improperly, many have said that the usual statutes which we are examining are to be divided into two parts. The first division, they remark, deals with instances when the question is one of a common or general interest of many persons, while the other one permits representation when the parties are numerous and it is impracticable to bring them all before the court. The result has been that such courts have made a distinction between many and numerous persons.

We must, therefore, see what numbers have, and have not, been held "many" and "numerous". There is much confusion in the result. As few as three or four persons have been said to be "many". On the other hand, four have been held not to be sufficient under the first division. As the aggregate of those involved increases the uncertainty disappears. Thus, one hundred thirty-eight have been said to be "many". It has been stated that "many", when used in connection with "common or general interest", means a limited number, and that the character of the interest of the persons involved, rather than their number, controls. It is asserted that under the common interest clause those interested in representing and being represented need not be numerous, and it need not be impracticable to bring them all before the court.

Now, when are persons "numerous", so that there may be a representative suit of the alleged second class of actions where some sue for themselves and others? Where there are a hundred or more interested, the courts have no difficulty in saying they are "numerous". Nor do they hesitate to say three or five.
are not "numerous". But in between these figures there is no unanimity. Thus, twenty,^{99} twenty-five,^{100} twenty-eight,^{101} thirty-five,^{102} thirty-seven,^{103} about fifty,^{104} about sixty,^{105} and over seventy-five^{106} have been said to be "numerous". On the other hand, twenty,^{107} thirty-one,^{108} thirty-five,^{109} thirty-five to forty,^{110} and more than forty^{111} have been held not to be "numerous".

It should be carefully noticed that part of the ordinary statute which we are now studying states that there may be a representative suit when "the parties are numerous, and it is impracticable to bring them all before the court." Because of this wording, many say that parties are "numerous" only when there are so many of them that it would be impracticable to join them individually.^{112} There are many decisions that, by inference, hold, rather, that those interested must be "numerous" and it must be impracticable to bring them all before the court. Moreover, there is at least one


Hilton Bridge Const. Co. v. Foster, supra note 69; Bear v. American Rapid Tel. Co., 36 Hun (N. Y.) 400 (1885).


Stimson et al. v. Lewis et al., 36 Vt. 91 (1863).

McCaleb v. Crichfield, 52 Tenn. 288 (1871).


Hendrix, etc. v. Money etc., 64 Ky. 306 (1866).


Hodges v. Nalty, 104 Wis. 464, 80 N. W. 726 (1899).


George v. Benjamin, 100 Wis. 622, 76 N. W. 619 (1899).

Kirk v. Young, 2 Abb. Pr. 453 (N. Y. 1856).


Bacon et al. v. Robertson et al., 18 How. (U. S.) 480 (1856); Commodores Point Terminal et al. v. Hudnall et al., 283 Fed. 150 (1922); Conroy v. Cover et al., 80 Colo. 434, 252 Pac. 883 (1937); Whitney v. Mayo, 15 Ill. 251 (1853); Liggett v. Ladd, 17 Ore. 89, 21 Pac. 133 (1888); Whitaker v. Manson, 84 S. C. 29, 65 S. E. 953 (1909); Dewey v. St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224 (1888); Perkins et al. v. Seigfried's Admr., 97 Va. 444, 34 S. E. 64 (1899); Board of Supervisors
instance in which it is said that, where it is practicable to unite a large number, a representative suit will not lie.\textsuperscript{113}

This logically leads to the question as to the meaning of "impracticable" when that word is used in connection with these types of holdings. The United States Supreme Court has said, in effect, that such impracticability exists when the parties concerned are so great in number that "their rights and liabilities are so subject to change and fluctuation by death, or otherwise, that it would not be possible without very great inconvenience to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing."\textsuperscript{114} This general idea has been applied in several decisions. The notion seems to be that it is unfair to demand the actual joinder by name of a large number of persons as parties since it would be difficult to ascertain all their names and residences,\textsuperscript{115} to add to the record the names of representatives of the original parties who might die during the proceeding,\textsuperscript{116} or to replace those who were, in the first instance, named as parties with the vendees of their interests which were sold after the commencement of the action.\textsuperscript{117}

We find it stated that the court will not assume that it is impracticable to bring in parties because they are numerous. On the other hand, there may be a representative suit no matter how many persons are concerned.\textsuperscript{118}

Under the \textit{Rules of the Supreme Court of England}, which provide for only one class of representative suits in which the number of persons interested is important, it has been declared that five persons are not numerous enough to permit a representative action, \textit{unless}


\textsuperscript{113}Tobin v. Portland Flouring Mills Co., 41 Ore. 269, 68 Pac. 743 (1902). (There were 101 persons involved, but they were all readily available).

\textsuperscript{114}Smith \textit{et al.} v. Swormstedt \textit{et al.}, 16 How. (U. S.) 288 (1853).

\textsuperscript{115}Prentice v. Kimball, 19 Ill. 319 (1857); Coffman v. Sangston, 21 Gratt. 263 (Va. 1871).


\textsuperscript{117}Bates, \textit{id}.

\textsuperscript{118}Castle \textit{et al.} v. City of Madison \textit{et al.}, 113 Wis. 346, 89 N. W. 156 (1902). (There were 256 involved here).
the amount in question is very small, or unless the court is satisfied that all the other parties wished the question to be determined in the presence of the one.\textsuperscript{119}

The statutes under investigation, which appear to provide for two classes of cases, do not directly say that under the impracticable clause the parties representing and represented must have any common interest. It is very important to know whether or not they need to have it. A few authorities say none has to exist.\textsuperscript{120} But the great majority of opinions is the other way.\textsuperscript{121} Under \textit{Federal Equity Rule 38}, which only provides for one type of class suit, there must be a question common to so many that it would be impracticable to bring them all before the court.\textsuperscript{122} There is very little reasoning used in reaching this result, the courts being satisfied to state their conclusions. The late Dean Hepburn, however, was not satisfied with just giving an unreasoned decision, but stated further, "... the same facts of the cases which recognize and apply the exception all show some interest in common among the parties represented. The established doctrine in equity recognized it as essential that there should be at least 'a common interest, or a common right ... or a general claim or privilege'; and the fundamental tenets of sound procedure require it."\textsuperscript{123} Pomeroy says, "The language does not in terms require any question of common, or general interest to this great number, but it is difficult to conceive of an action in which a very large number of persons should be capable of joining as plaintiffs—so large that it would be impracticable to bring them all actually before the court—unless the question to be determined was one of common or general interest to them all."\textsuperscript{124}


\textsuperscript{120}McKenzie v. L'Amoureux, 11 Barb. 516 (N. Y. 1851) (perhaps, by dictum); George v. Benjamin, 100 Wis. 622, 76 N. W. 619 (1898) (dictum); I Deemer, \textit{Iowa Pleading and Practice} (2nd ed. 1927) §60; \textit{Kineead, Law of Pleading in Civil Actions and Defenses under the Code} (2nd ed. 1898) §15.


Those courts which demand the presence of a common interest under the impracticable clause of the rule are as much at sea as to what such common interest amounts to as they are when considering the purport of that term when used in the other clause of the rule. Thus we have many cases which make no attempt at definition. Others define it as an interest in the facts and law, in the object of the action and in the results to be accomplished, in the grievance and relief, in the subject of the controversy. There are some suggestions that there is the proper common interest only if all interested could join.

A Fair Representation

We now turn our attention to other fields. The opinion of all who have spoken of the matter is definite that persons actually suing in class proceedings must fairly represent all those for whom they act. Some writers have gone further than merely to make this general statement. It has been said that those appearing of record must be shown to have an interest in the suit in harmony with those represented.

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126Fleming v. Mershon, 36 Iowa 413 (1873).
131Sparks v. Robinson, 115 Ky. 453, 74 S. W. 176 (1903); Overton v. Overton, 123 Ky. 311, 96 S. W. 469 (1906); Russell v. Kentucky Utilities Co., 231 Ky. 820, 22 S. W. (2d) 289 (1920); Bardstown & Louisville R. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199 (1862); Hubbell v. Warren, 8 Allen 173 (Mass. 1864); Wakeman v. Grover, 4 Paige 23 (N. Y. 1832); Yarborough v. North Caroline Park Com-
must appear of record in a class proceeding. The rule is that a sufficient number of persons must be of record to insure a fair representation of the class and to obtain a fair trial.\footnote{1} A few specific examples may be of interest. One creditor was allowed to sue for numerous (number not given) creditors to foreclose mortgages and secure all the claims of the defendant's creditors.\footnote{2} One heir was permitted to sue on behalf of twenty-eight heirs to have a trust fund properly distributed.\footnote{3} Two shareholders, it was held, could sue on behalf of all shareholders (number not given) to enjoin the issue of stock.\footnote{4} Two citizens of a town properly represented all such citizens (number not given) in a suit to force a railroad company to build its line within a certain distance of the town.\footnote{5} Two of those holding about $100,000 worth of county bonds were sufficient representatives of all the bondholders in an action on a bond given for their benefit in a proceeding to enjoin the payments due thereunder, the injunction suit having been finally dismissed.\footnote{6} It has been decided that three policemen could sue for about twenty-five policemen to recover sums due for making arrests.\footnote{7} But three out of two hundred subscribers to a fund to whom a circular concerning it had been sent before they subscribed were said not properly to represent all of them for the facts as to the subscriptions of those represented might not be similar to those made to the persons suing.\footnote{8}

\begin{footnotes}
\footnotetext{2}{Carpenter v. Canal Co., 35 Ohio St. 307 (1880).}
\footnotetext{3}{Smith v. Williams, 116 Mass. 510 (1882).}
\footnotetext{4}{Lawson et al. v. Financial News Ltd. et al., 34 L. T. 52 (1917).}
\footnotetext{5}{Macon & B. R. R. Co. et al. v. Stamps et al., 85 Ga. 1, 11 S. E. 442 (1890).}
\footnotetext{6}{Alexander v. Gish, 88 Ky. 13, 9 S. W. 801 (1888).}
\footnotetext{7}{Duke v. Boyd County, 225 Ky. 112, 7 S. W. (2d) 839 (1928).}
\footnotetext{8}{Churchill v. Whetnall, 87 Law J. Ch. 524 (1918).}
\end{footnotes}
The proceeding, in order to be a class suit, must be on behalf of the class. It is not sufficient that the plaintiffs bring an action merely for their benefit. Nor can the proceeding represent any other than the party named if such person is treated as a corporation. Where a suit is brought on behalf on an unincorporated society, the parties should be its individual members.

Citizenship and Amount Involved

Let us next examine two problems which, though not peculiar to federal courts, are most often considered in their printed reports.

It is almost always decided in representative suits that only the citizenships of the parties to the record are considered in determining whether or not there is a diversity of citizenship. One should notice, however, that it has been held that a representative suit, the bill in which failed to set forth the names and residences of the persons represented, violated Federal Equity Rule 25, which provides that it shall be sufficient that a bill in equity shall contain the full name, when known, of each party, and the citizenship and residence thereof. The court gave judgment for the defendant on the ground that the court had no jurisdiction of the suit.

There are opposing theories as to whether or not, in a class action, the value of the interests of those suing and represented can be aggregated to make up a jurisdictional amount. Cowell v. City Water Supply Co. et al. very definitely claims, "Where a suit is brought by

116 Castle et al. v. City of Madison et al., 113 Wis. 346, 89 N. W. 156 (1902); Moxley v. Alston, 1 Phil. 790 (1847); Markt & Co. Ltd. v. Knight S. S. Co. Ltd., (1910) 2 K. B. 1021; Story, Equity Pleading (10th ed. 1892) §126; 1 Whittaker, Equity Practice (1915) §59.

117 Cooper, Equity Pleading (1809) 40; Edwards, Parties in Chancery (1832) 40. In Irish Free State v. Guaranty Safe Deposit Co., 126 Misc. 269, 212 N. Y. Supp. 421 (1925), it was said that the plaintiff could not sue as a state for the benefit of persons who subscribed to the cause represented by it.

118 Pomeroy, Code Remedies (5th ed. 1929) § 290.


one of a class on behalf of himself and all others similarly situated who may join in the proceeding, the sum or value of the matter in dispute is the amount or aggregate value of the interests of those who have joined in the suit. It is not the amount or value of the interest of the entire class." This seems to represent the majority law, yet one should notice that a few decisions oppose this view.\footnote{146} The court in \textit{Local No. 7 etc. v. Bowen et al.}\footnote{147} very confidently said, without argument, "... it is clear that complainants' suit is a class or representative suit, and it is well settled that in such suits the aggregate interests of the whole class, and not the several interests of each individual, constitute the matter in dispute." Of the two citations given to support this view one of them is not a case of this type.\footnote{148} The other one\footnote{149} is in accord and gives, as authority to sustain its view, a quotation from a non-judicial writer.\footnote{150} Professor Blume believes that the joinder of amounts should be allowed, as that is the fair result, for all members of the class represented "must be in the same situation and alike interested in having the questions involved in the case decided a particular way."\footnote{151}

\textbf{Allegations}

At this point can best be discussed the allegations which have a bearing on our problem and which must be made in the plaintiff's original pleading. The best general statement concerning this matter which the writer has discovered is found in \textit{McClelland v. Rose}.\footnote{152} The court in that case says, "In order for a judgment or decree in a suit to be binding upon others than those who are brought before the court, it should be made to appear \textit{from the record} in the case that such a result is contemplated; that there are persons not before the court having an interest in common with those who sue or defend, and why such others are not brought in; and, further, the relation to the subject-matter of the suit of those who sue or defend for others as well as themselves should be disclosed as to present for the determina-

\footnote{146}{Carpenter \textit{et al.} v. Knollwood Cemetery \textit{et al.}, 198 Fed. 297 (Mass. 1912); \textit{Local No 7 etc. v. Bowen et al.}, 278 Fed. 271 (S. D. Tex. 1922); \textit{Union Light, Heat & Power Co. v. Milligan}, 177 Ky. 662, 197 S. W. 1081 (1917); \textit{Batman v. Louisville Gas & Electric Co.}, 187 Ky. 659, 220 S. W. 318 (1920). (The last two cases deal with state statutes and contain mere dicta on this point.)}

\footnote{147}{Supra note 146.}

\footnote{148}{Herbert v. Rainey, 54 Fed. 248 (W. D. Pa. 1892).}

\footnote{149}{Carpenter \textit{et al.} v. Knollwood Cemetery \textit{et al.}, \textit{supra} note 146.}

\footnote{150}{I \textit{Foster}, \textit{FEDERAL PRACTICE} (4th ed. 1909) p. 107.}

\footnote{151}{\textit{Blume}, \textit{Jurisdictional Amount in Representative Suits} (1931) 15 \textit{MINN. L. REV.} 502-524.}

\footnote{152}{247 Fed. 721, Ann. Cas. 1918 C, 341 (C. C. A. 5th, 1918).}
tion of the court the question whether they do or do not properly represent, not only themselves, but others not before the court, who are similarly concerned in the issues they raise or contest. Where it is fairly made to appear by the allegations of a bill that such an adjudication is sought as will be effective, not only against those who are brought before the court as defendants, but against others similarly related to the subject of dispute, it is not necessary to aver in terms that those who are made defendants are sued as representatives of the class of which they are shown to be members, especially when it is disclosed that those who defend contest the plaintiff’s claim by setting up the claim that the subject of the suit belongs in common to an entire class which they admit does or may include others besides themselves.

In the various authorities dealing with this point, as is true with those considering other propositions relating to our subject, very little reasoning is employed. However, one judge says this is true so that the defendant may not be charged with a double defense, and another sustains the idea so that those represented may all come in under the decree. An action may, it is usually said, be treated as a representative suit if the statement of the case and relief contemplated and prayed for make it such in substance though there is no formal allegation that it is brought for, or against, a class. Nevertheless, it should be

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14Fish v. Howland, supra note 44.


remembered that designating oneself as suing on behalf of others having a common interest with him does not make one to be so suing, for the proper interest may not exist. 157 An allegation by the plaintiff that he does not know how many others are situated similarly to him, but that, on information and belief, he states there are many such, has been held not sufficiently to set forth the existence of a large enough class to permit a representative suit. 158 It has been declared that that portion of a complaint which attempted to show that a representative suit was being brought was defective where the plaintiff said he sued on behalf of other creditors but failed to allege that there were other creditors. 159 It has even been held that when one sues on behalf of himself and all others who shall join in the prosecution of the suit and contribute to the expenses thereof, he does not sue under the representative statute, for the unnamed members of the class interested are not parties to the suit, unless they elect to come in, bear their portion of the expenses, and claim as such. 160 If one goes through the cases, he will find that the courts, almost without exception, allow representative actions based upon such an allegation without saying anything one way or the other about it. Another holding is to the effect that where one alleges that he sues for himself and others of his class who intervene, he does not bring a class suit, for parties who intervene can look after their own interests. 161

There is some authority that it should appear both in the title and statement of claim that the action is brought on behalf of others than those named, if that is the case; 162 but the contrary result has also been reached. 163

Amendments are freely allowed to make a representative suit of what originally appears to be an action on behalf of an individual. Thus such amendments have been allowed at the hearing, 164 and even after decree. 165

157Oswald et al. v. Morris, 92 Ky. 52, 17 S. W. 167 (1891).
159Elwell and Post et al. v. Johnson, 3 Hun 558 (N. Y. 1875).
162Tottenham v. Tottenham, (1896) 1 Ch. 628, (1923) 87 Just. P. 543-44.
Although those represented in a class action are not technically parties thereto, only those appearing by name holding that position, they have been said to be before the court. They have also been described as parties interested, quasi-parties, informal parties, inchoate parties, and as persons having an inchoate right in the suit. Their assent to the prosecution of the representative suit is presumed, unless they show their disapprobation. They may, by the clear weight of authority, become parties to the class action at any time after it is begun. Nevertheless, it has been decided they can only come in under the decree, since, before that, they could bring their own suits. The usual practice is to require one wishing to become a party of record to a representative proceeding to obtain

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17 Gieske v. Anderson, 77 Cal. 247, 19 Pac. 421 (1888); Stevens v. Brooks, 22 Wis. 695 (1866); Story, Equity Pleading (10th ed. 1892) §99; Phillips, Code Pleading (2nd ed. 1932) §254.


170 Bilmyer v. Sherman, supra note 166.

173 Woodgate v. Field, 2 Hare 211 (1842).


176 Mattison v. Demarest, supra note 13.
PLURAL LITIGANTS IN CLASS SUITS

a court order permitting him to do so, though the reports do not often say it.

In actions such as are being described it is unimportant that some of the named parties die or are infants or married women, for they may be disregarded as unnecessary parties.

Statute of Limitations

Since those represented in a class suit have an interest in it, it is treated as a request for relief for them, as well as for the parties of record, and the statute of limitations ceases to run against their claims, and those of the named litigants, from the time the action is begun. It has also been held that the statute of limitations does not run against represented plaintiffs during the continuance of a representative action which is dismissed before decree, for it would be attended with mischievous consequences to estates if every creditor was bound to sue.

Control of Suit

Those who commence a representative action are ordinarily held to have control of it until others have joined in the proceeding or a decree has been rendered therein. This has been said to be true because they act on their own motion and at their own expense.

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180Sterndale v. Hankinson, supra note 179; Clark, Code Pleading (1928) p. 279.
182Handford v. Storie, 2 Sim. & S. 196 (1825).
Thus, they may discontinue or settle the suit without the consent of those represented. It has even been said that a defendant may tender satisfaction due the representatives and compel them to accept it, for, as far as power over the proceeding is concerned, it is treated as an action between the parties named. In fact, this idea has been carried so far that it has been decided, in an action by one judgment creditor on behalf of all such creditors to set aside a transfer by the common debtor as fraudulent, in case of the death of such plaintiff, even after interlocutory decree, if before any other creditor had proved his claim, the action could be continued only in the name of the legal representative of the deceased. This, however, is but one side of the picture. After judgment, the sole dominion over the action by those named as parties is lost. One reason given for the distinction between the situation before and after judgment is that prior thereto no other persons of the class than the plaintiffs of record are bound to rely upon the diligence of those who instituted the suit. Those represented may file their own suits, but after decree no second action is permitted. Another court has said that after judgment, the decree being for the benefit of all members of the class, those representing the class lose absolute dominion of the proceeding. Even rendition of interlocutory decrees has been said to result in a division of control over the class proceeding among all involved. It has been so decided where a legatee filed a bill for the benefit of all legatees and a decree was made establishing the right of the plaintiff to recover; where the order in a creditor's suit against stockholders declared the rights and liabilities of the various parties; and where the intermediate decision in a creditors' bill against a debtor ordered

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185 McDougald et al. v. Dougherty, 11 Ga. 570 (1852).


188 Handford v. Storie, supra note 183.

189 Brinckerhoff v. Bostwick, supra note 183.

190 Collins v. Executors of Taylor et al., 4 N. J. Eq. 163 (1842).

an accounting. In the last situation the reason given for the result was that, after the decree, the fund in issue was in the court's control. The same result has been reached in a statutory proceeding to restrain the officers and agents of an insolvent bank from interfering with its affairs and for the appointment of receivers. The receivers having, apparently, been named and qualified, it was said that the situation was similar to proceedings under a commission of bankruptcy and that the original plaintiff could no longer discontinue the action at his sole desire. A dictum also suggests that, when a receiver has been appointed in a representative suit by a creditor for an accounting by a debtor and the payment of his obligation, the suit could not be dismissed without the consent of all the creditors.

As soon as a represented plaintiff becomes a party of record, or, it appears, has even made a proper motion to become such, the exclusive control of the action is lost to the original demandants, who may, however, thereafter dismiss the suit as to themselves.

Furthermore, we find some courts going to the extent of saying that in certain cases of class actions those named never have complete dominion over the proceedings. It has been declared that where a creditor of a corporation sues on behalf of all creditors in an action to enforce the liability of stockholders, the plaintiff cannot dismiss the suit to the prejudice of the other creditors. The action was said to deal with a situation unlike the ordinary representative suit, the fund arising being for the benefit of all the creditors. There was a dissent.

We are also advised that Order XVI, Rule 9 of the English Rules of Court will not permit a representative plaintiff to compromise the rights of those whom he represents. Hence, still less, can he elect on their behalf to take less than is admittedly due them.

At least one court has definitely said that those suing in a representative capacity must so conduct the litigation that the interests

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194 Belmont Nail Co. v. Columbia Iron & Steel Co., supra note 175.
197 Piedmont and Arlington Life Ins. Co. v. Maury et al., supra note 175.
198 Johnson et al. v. Carpenter, Receiver, etc., 11 Ohio C. D. 457, 21 Ohio C. C. 168 (1901).
199 In re Calgary and Medicine Hat Land Co., Ltd., (1908) 2 Ch. 652.
of all are protected and that neither by collusion nor inattention may there be a failure to offer such preservation from loss.\textsuperscript{203}

\textit{Rights of Persons Represented to Sue}

The usual conclusion is that persons represented in a class proceeding may bring similar suits\textsuperscript{204} prior to a decree therein, in which they can receive as much relief as in any other action.\textsuperscript{205} Grounds given for this result have been that before the decree the plaintiff may discontinue his action\textsuperscript{206} and that those represented are not bound to rely on the diligence of the demandant.\textsuperscript{207} As one might expect, there are directly contrary holdings containing the ordinary paucity of reasoning.\textsuperscript{208} One can also discover decisions taking a middle course. Therefore, there is at least one court which says that those represented may prosecute their own suits, if there is a lack of diligence on the part of the plaintiff of record;\textsuperscript{209} and another one gives similar permission unless the interested persons not named as plaintiffs had notice of the suit and an opportunity to become parties.\textsuperscript{210} Though this right to sue exists before such a judgment, thereafter it is ordinarily said to cease,\textsuperscript{211} and actions commenced prior thereto are suspended.\textsuperscript{212} It has also been determined that those repre-

\textsuperscript{203}Farmers Loan and Trust Co. v. Lake St. El. R. Co., 68 Ill. App. 666 (1896).

\textsuperscript{204}Innes v. Lansing, supra note 183.

\textsuperscript{205}Coan v. Atlanta Cotton Factory Co., 14 Fed. 4(C. C. N. D. Ga. 1882); Innes v. Lansing, supra note 183; Mattison v. Demarest, supra note 13; O’Brien v. Browning, supra note 184; Brinckerhoff v. Bostwick, supra note 179; Hirshfeld v. Fitzgerald, supra note 175; MacArdell v. Olcott et al., supra note 183; Yost v. Cowden, supra note 183; Piedmont and Arlington Life Ins. Co. v. Maury et al., supra note 175; Woodgate v. Field, supra note 181; Handford v. Storie, supra note 182; Clark, Code Pleading (1928) p. 279.

\textsuperscript{206}Woodgate v. Field, supra note 181.

\textsuperscript{207}Handford v. Storie, supra note 182.

\textsuperscript{208}Duffy v. Duncan, 32 Barb. 587 (N. Y. 1860); Towner v. Tooley, 38 Barb. 598 (N. Y. 1860); Johnson et al. v. Carpenter, Receiver, etc., supra note 198; In re Chickering, supra note 179; Shepherd v. Towgood, 1 Turn. & R. 379, 37 Eng. Rep. 1147.

\textsuperscript{209}Kent’s Adm’t r v. Cloyd’s Adm’t r, 30 Gratt. 555 (Va. 1878).

\textsuperscript{210}O’Brien v. Browning, supra note 184.


\textsuperscript{212}Mattison v. Demarest, supra note 13; O’Brien v. Browning, supra note 184; Brinckerhoff v. Bostwick, supra note 179; Hirshfeld v. Fitzgerald, supra note 175; MacArdell v. Olcott, supra note 183; Stephenson v. Taverners, 9 Gratt. 398.
PLURAL LITIGANTS IN CLASS SUITS

sentenced cannot intervene to oppose and nullify the representative proceeding,\textsuperscript{210} for the plaintiffs suing by name have a right to prosecute it for themselves.\textsuperscript{211} On the other hand, those who do not come in under such suit may settle out of court their part of the claim involved therein.\textsuperscript{212} Indirectly connected with the points now being discussed is a holding that when a creditors' suit against stockholders is begun, no creditor can acquire a priority.\textsuperscript{213}

The Decree

Prior to the granting of a judgment, "When the allegation of a general or common interest in many persons is denied, the duty devolves on the court to determine whether the common or general interest exists . . ."\textsuperscript{214}

A very definite majority holding is that decrees in representative suits bind all who are represented,\textsuperscript{215} this being true of both plaintiffs and defendants.\textsuperscript{216} Reasons given for the result are that it must be so

(\textsuperscript{Va. 1852}; Kent's Adm'r v. Cloyd's Adm'r, \textit{supra} note 206; Paxton v. Rich, \textit{supra} note 179.\textsuperscript{217})


\textsuperscript{211}Flint v. Spurr, \textit{supra} note 173.


\textsuperscript{213}Wright v. McCormack, 17 Ohio St. 86 (1866).


\textsuperscript{216}Commissioners of Sewers of London v. Gallatly, \textit{supra} note 112.
or the parties of record do not represent all and that the rights of those represented rise no higher than those of their representatives. Sometimes it is stated by inference, or directly, that those of a class not named as parties, in a proceeding of the type with which this paper deals, are not bound by judgments therein unless they choose to be made parties thereto. One case is found which says the general rule as stated above does not apply to an action brought on behalf of those suing and of those others of the class involved who join and contribute to the costs of the proceedings, since this is really not a representative suit. This is apparently thought by the court to be true, since it is not brought, in so many words, for the benefit of all of the class, but only for those thereof who join therein and pay their share of the costs. This surely is not the idea of the great majority of courts, for in most representative actions the parties are so described and all members represented are ordinarily held to be bound by the decisions therein. Further, it has been declared that members of a class who were not named parties in a representative action would not be bound by a judgment, if they were, prior to the decision without knowledge of the pendency of the case. Attention should be called to a holding in which the court declared that a final judgment in a representative suit upon a bond, wherein all claimants were ordered by published notice to present their claims to the referee, was binding upon all of those represented only when it provided that no others than those appearing were entitled to recover. If this statement were not a part of the decree, the others of the class interested could sue, notwithstanding the existence of the decision in the representative proceeding. Nor should one fail to mention Dean Clark's statement that, if there are proper safeguards present in cases involving contingent interests of represented defendants, the result of the suit as to such rights is conclusive against collateral attack.


Fish v. Howland, supra note 44; Phillips, Code Pleading (2nd ed. 1932) §554.

Pomeroy, Code Remedies (5th ed. 1929) §297. This author also said that those represented would be bound by a decree in a class suit, if they failed to unite in the proceedings, they knowing of their pendency, and having an opportunity to join therein.

Adelbert College of Western Reserve Univ. v. Toledo etc. Ry. Co., supra note 160.

Holderman v. Hood, 70 Kan. 267, 78 Pac. 838 (1904).


Clark, Code Pleading (1928) p. 282.
decree in a class suit renders *res adjudicata* all questions within the issues of the case whether formally litigated or not.\(^\text{225}\)

Having considered the binding effect of decrees in class proceedings, let us look at another aspect of them. The customary statement is that the plaintiffs represented, as well as those named, in a representative action may take advantage of a judgment therein.\(^\text{226}\) However, at least one decision is found in which this is held to be true only when the proceeding is what the court calls a derivative action. Examples of such suits are those by a stockholder in the right of a corporation, or of a creditor in the right of a receiver, the object of such actions being to realize a fund to be paid to the person in whose right the plaintiff sues, thence to be distributed among those entitled to share in it.\(^\text{227}\)

In order that a represented plaintiff may take advantage of a decree for the benefit of a class, it is usually said that he must ask the court to allow him that privilege,\(^\text{228}\) though Pomeroy, without giving any examples, suggests that there may be cases of such a type that the benefits necessarily inure to the advantage of all who may be situated in the same position as the plaintiffs of record.\(^\text{229}\) We also learn that where some creditors sue for all thereof for an accounting of a trust fund, the trustees have no active duty to prove the claims of the creditors represented.\(^\text{230}\) Moreover, if those represented neglect to come in under the judgment in a class proceeding, after reasonable notice given to them for that purpose, the customary holding is that


\(^{228}\)Kvello v. City of Lisbon, 38 N. D. 71, 164 N. W. 305 (1917); Stevens v. Brooks, 22 Wis. 695 (1866); POMEROY, *Code Remedies* (5th ed. 1929) § 295.

\(^{229}\)Ibid.

they are barred from the benefits of the decree, unless there was fraud in the proceedings,221 though they are bound by it.222

**Costs**

Though, according to the orthodox view, judgment for costs in a representative suit can only be obtained against the parties of record,223 those represented who share the benefits of such an action are indebted to those representing them for their share of the expenses accruing therein.224 When, by a representative action, there is a fund preserved for the benefit of a class, these expenses are deducted therefrom prior to its division among the successful litigants,225 "not simply and alone because services have been rendered which have been beneficial to the common interest, but upon the ground that they were rendered by authority of those having the common interest exercised by the representative, the compensation for which was to be chargeable to the fund protected or recovered."225

**Proceedings After Decree**

Though there is little authority as to the effect of proceedings in upper courts in the case of class actions, we do learn that, where a defendant appeals from a judgment in favor of plaintiffs who have sued by representation, there is an appeal as to the whole class.227 We are also informed that, if a represented plaintiff is dissatisfied with an order of the trial court, which ruling is in favor of the plaintiff of record, the proper action for the dissatisfied per-

221O'Brien v. Browning, supra note 184.
PLURAL LITIGANTS IN CLASS SUITS

son to take is not to appeal from the order, but to apply to the trial court to be added as a defendant and then to ask, as such defendant, to get rid of the order, or to take the conduct of the suit out of the hands of the alleged representative plaintiff, if it can be shown he does not really represent the wishes of the members of the class. To hold otherwise, the court continues, would enable every person in a representative suit to destroy its representative character and to take up the matter for himself. Further, we learn that only parties of record can appeal a class proceeding, but a represented plaintiff may come in under the decree, not having previously been a party of record, and show that the judgment is erroneous or entitle himself to a rehearing.

THE AUTHOR’S INTERPRETATION OF THE STATUTES

Their Origin and Purpose

Our perusal of the authorities has been completed. Next let us proceed to give a personal view of what the law should be under the terms of the ordinary existing statute. To interpret any law properly one must know its purpose; to understand that he must be familiar with the law's history. In this case there can be no doubt that the origin of the law of representative suits is equitable. The general aim of equity was to make a nearer approach to just results than could be done by the application of the more formal rules of the law courts. Thus, some of the objects of equity practice were to prevent a multiplicity of suits, to promote the convenience of persons interested in litigation, and to avert delay in proceedings. This must all be kept clearly in mind when one attempts to construe the legislation now under consideration.

When the Statute is Applicable

The usual statutes providing for representative parties make no distinctions between law and equity or tort and contract cases. Therefore, they apply to all such suits.

To the writer, it seems clear that the doctrine of representative suits should apply in cases at law in federal district courts. The conformity statute clearly covers the matter of parties and there is no reason to make any exception in this type of case. Rather, the tendency of the national courts has been to take a broad view

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238 Watson v. Cave (No. 1), 17 Ch. D. 19 (1881).
240 Campbell et al. v. Railroad Co. et al., supra note 169.
of that law, except where it deprived them of jurisdiction. To
extend that legislation relating to conformity to this situation
would have the opposite effect. It may be suggested that except
in a very few cases at law, such as actions in ejectment, a law court
cannot effectively give the necessary remedy, and that when state
courts grant such a remedy in other cases they are really proceeding
partly at law and partly in equity, and, therefore, neither side
of the federal court would have jurisdiction of such a representa-
tive proceeding. Such an action would be one for money damages
due those representing and those represented. As will be noticed
in another portion of this paper, some state courts allow such a
proceeding and others do not, the latter thinking a law court cannot
make an effective judgment in favor of the represented parties
in such a case. However, it should be noticed that the courts all
treat such cases as actions at law, and any mechanical device used
to enforce the money judgment for the benefit of those represented
is a matter of execution and does not change a typical action at law
into something else. This the writer believes is the correct view to
take. At this point the only question dealt with is as to whether
or not the federal courts should take cognizance of representative
actions at law, presuming they are permitted in state courts. Thus,
the problem dealing with the ability of a court of law to enforce
a money judgment in a representative suit is dealt with elsewhere,
for it is not peculiar to the law of representative suits in federal
courts, but would have to be answered whether the action were
brought in a state or national court.

Neither are plaintiffs singled out as the only parties in relation
to whom some may act for all of a class. Thus defendants, as well
as plaintiffs, may be represented. These statutes do not deal with
the creation or reduction of causes of action, for they are purely
remedial. They should be applicable to proceedings other than
the ordinary cases before a court, since they are easily employed
therein. Moreover, they are a part of the less formal procedure
that is growing up and it is fitting that they should be used in hear-
ings before commissions and similar bodies which are provided as
a means for escaping the formalism of the usual trial. One should
be allowed to make use of a representative statute where the mem-
bers of an unincorporated organization are parties, though a dif-
f erent legislative enactment provides that such members may sue,
or be sued, by an officer of such body, unless such other statute is
mandatory, for if it is permissive in its terms a choice of methods
of procedure is offered.
PLURAL LITIGANTS IN CLASS SUITS

Are the Statutes Mandatory?

Though the form of the legislation now being considered is permissive, it should also be remembered that its purpose is more nearly to approach justice than one could if it did not exist. There should, therefore, be no set rule as to whether or not a representative suit, where possible, should be brought. The court, or other body taking its place, should determine this question. It should be allowed to require a preliminary hearing on this matter. No appreciable delay in the case would be necessary in most instances if the court decided that a proceeding which had not been brought as a class action should proceed as such, since usually the parties already in the suit would properly represent the class. If this were not true, a reasonable time should be allowed to add such parties. If a representative action had been brought and the court thought that such procedure was improper, it could order the form of the proceeding changed and there need be no further delay. It may be suggested that the choice of bringing, or not bringing, a class action lies only with the plaintiff. The answer is that the statute does not say so.

"A Question of Common or General Interest of Many Persons"

This phase of the law has caused more trouble than any other portion thereof and has led to all conceivable results. One cannot find any outstanding weight of authority as to its proper interpretation. The writer believes it should be given the broadest possible meaning. It is not difficult to decide what a "common or general interest" means. It deals with an interest that is of universal concern within the limits of the reference, that is, in this case, a concern of all who represent and are represented. The suggestion that "common or general" means "united" is incorrect, for there are statutes making joinder mandatory where interests are united, whereas this legislation is not mandatory. However, those having a united interest should be permitted the use of a representative action, for in such a proceeding there whole class is involved. The difficulties come in deciding what is meant by "question" and "many". In what kind of "question" must the necessary interest exist? There is nothing in the applicable legislation that definitely answers the question. However, in the statutes relating to joinder of parties and actions and to counterclaims the term "subject of the action" is used, while in those dealing with representative suits it is not employed. This indicates that the "question" does not refer to the subject of the action. This being true,
it is not essential that plaintiffs to a representative suit must be persons who can be joined under the ordinary joinder statute, for such people must have an interest in the "subject of the action". Because of this and the further facts that there are no other statutes, in addition to the one under investigation, which bear on the matter, that this one says nothing definite in relation to our problem, that there is no compellingly large number of authorities giving a single construction to the words involved, and that the purpose of the statute is to aid in our search for fair results, the writer believes that the question in which the common interest must exist consists of the basic facts and law of the case. This permits an extensive joinder of parties and, at the same time, if those involved in a suit are interested in the underlying facts and law therein the proceeding will be kept within a reasonable sphere of inquiry. If the common concernment were essential only in questions of law, the courts would be compelled to consider unwieldy mixtures of fact situations.

In reaching a conclusion as to the meaning of "many" as found in this division of the law, one must look at the statute in its entirety. It will be recalled that in form the statute is generally separated into two parts. The first division of the usual enactment allows a representative suit when the question is one of a common or general interest of many persons, and the second portion permits a class action where the parties are numerous and it is impracticable to bring them all before the court. If one considers merely the form of the law, a class proceeding may be commenced if there is a question of common interest to "many", but if there is no such interest it is essential that the parties to a representative action be numerous, and that it be impracticable to bring them all before the court. As has been shown, many authorities have tried to interpret the statute in this way and have attempted to tell when there were "many", and when there were "numerous", persons involved. It is maintained that this cannot properly be done. No matter how many members there are in a class, a representative suit should not be allowed under the law being considered unless there is a proper question in which they all have a common interest. To conclude otherwise would result in permitting innumerable unconnected questions of law and facts to be dealt with in a single suit. Though numerous courts have, in words, said this could be done, in fact they have not permitted it. The practical, and proper, result of almost every decision has been to treat the statute being interpreted as consisting of a single part to the extent of demanding that every one representing and represented should have a common interest
in some question. Then, improperly, a large number of courts, not realizing, apparently, that they have done it, have proceeded to distinguish between many persons and parties so numerous that it would be impracticable to bring them all before the court. The right way to translate this enactment is to say that there can be a representative suit only where there is a class of persons having a common interest in certain questions of law and facts, which individuals are so numerous that, under the peculiar circumstances, it would result, on the whole, in injustice not to allow such a proceeding. Whether or not such a situation exists should be left to the court before whom the case comes.

A Fair Representation

Of course there must be enough parties of record who are concerned with the same questions of law and facts as are those whom they represent so that all involved will have their interests properly cared for. Just when that situation does, or does not, exist should be for the court to decide, for it alone could act in an unbiased manner. The action should be on behalf of the class, for otherwise its members are not represented.

Citizenship and Amount Involved

In those suits in which, to give a court jurisdiction, there must be a peculiar type of citizenship, the writer believes the tribunal should have authority to determine the cause, if the parties of record have the necessary citizenship. He thinks this because such a view will eliminate lawsuits and will, at times, make possible a remedy which might otherwise not exist. If a different decision were reached, persons might effectively manage their citizenship so that there never could be a suit upon a just claim, and one should again recall that the purpose of the law in question is to help in approaching legal justice.

One should be permitted to aggregate the amounts due members of a class in case of a representative suit in which a certain sum has to be in issue to give the court jurisdiction. By allowing this practice, a reduction in the number of court actions results. Such reduction is one of the ideals of equity procedure and of the present trend in adjective law, of which the rule allowing representative suits is a part. It should not, moreover, be forgotten that the parties plaintiff to a class action must have a common interest in the questions involved, even though their concern in the matters touched upon in the suit need not be united. Thus, one is not, in allowing this
aggregation of amounts claimed, permitting such joinder of sums by persons with unrelated interests.

**Allegations**

The best way for the plaintiff to draft his original pleading in a representative suit is to indicate in its title and in its body that he is commencing such an action and to set forth in the first part of the statement of the case all of the facts essential to the bringing of such a suit. He should show that there are so many persons, plaintiff, defendant, or both, having a common interest in certain facts and law that it would be unfair to demand that they all become actively engaged in the proceedings, or that they should each be served with a process. It should likewise be made to appear that the class involved is fairly represented by those who are parties of record. It must be made clear that such parties have an interest in common with those represented. There should be no uncertainty as to any of these matters, but the spirit of the statute in question demands that it should suffice if these elements of a representative suit are substantially set forth. The request for relief should be for the benefit of all members of the class. A failure to show in the title that a class suit is being brought should not be fatal, for that is merely a formal error. Of course, the ordinary amendment statutes apply to pleadings in cases of the nature under discussion, for they are general enactments. It is, properly, insufficient to say one sues on behalf of others, where no others are shown to exist, for there is no allegation that there is a class for whom an action can be brought. Also, to allege that one sues on behalf of himself and others who shall join in the prosecution of the suit is incorrect, for a representative action is brought on behalf of, or against, all of the class, whether they are, or are not, active in the conduct of the proceeding.

The reasons that one should draft his pleading as suggested are that this type of proceeding is a special one, and in such cases one must affirmatively show in his pleading that he has a right to bring it. Then, too, if one did not indicate that he was bringing a representative suit, judgment could not be rendered for, or against, those of the class who were not parties of record.

**Parties to a Representative Suit**

Though technically only parties of record in a class action are the parties thereto at any particular time, those represented are really suing or being sued. Therefore, properly by court order,
they may become parties thereto at any time after the representative suit is begun, and it is incorrect to say that they can become parties only after decree. It should be clear that the death of a member of the class involved or any disability of one in such a group, including residence or citizenship, which makes him unavailable as a party, does not abate, or destroy the efficacy of a representative proceeding. This is true because one of the reasons for permitting such an action is that frequent deaths, changes of residence or domicile, and other disabilities of members of the class would unduly delay the obtaining of justice, or, perhaps, entirely thwart those interested from suing successfully, if this method of procedure were not available.

Statute of Limitations

Bringing of a representative suit properly stops the running of the statute of limitations against the claims of those represented as well as against the rights of those who are parties of record. This must be so, for otherwise one could not truly say that the action was brought on behalf of the entire class concerned. If such a suit is dismissed, the running of the statute should be treated as in abeyance during its pendency. If this were not done, an unscrupulous person could easily create a bar against the bringing of actions by other members of a class.

Control of Suit

It is right, in general, there being no statutory law to the contrary, that those suing as representatives in a class action should have control of the proceedings until some of those represented are made parties of record, or until judgment, for they, up to that point, are the active parties to the proceeding. As soon, however, as new persons become named parties, they should share in the direction of the method of continuing the proceeding. On the other hand, they should not keep those who commenced the action from withdrawing therefrom and settling any individual claims, if by so doing the interests of others were not injured, since one should have control over matters between himself and another in relation to which no third person is involved.

Throughout the proceeding, however, it is fair, in order to protect the parties represented, that the court should, where necessary, direct proceedings so that this protection may be effected.

Those suing should, as long as they continue the action, act fairly for the benefit of the whole class which they represent.
If there are several who are representing a class, all of which representatives do not agree as to the proper way in which to conduct their part of the representative suit, the local law as to the control of a proceeding in which there are several parties, defendant or plaintiff, who are not in accord as to the proper steps to take, should apply, it being remembered that the action must be in good faith as far as it relates to those represented. The court should be permitted to interfere and order that different action be taken, if it learns that such good faith is not being exercised.

Rights of Persons Represented to Sue

Since one of the purposes of a representative suit should be to avoid a multiplicity of actions, those represented should not be permitted to bring separate proceedings to enforce their rights involved in the class action. This is not unfair to them, as they may become parties to the representative action and help manage it. The elimination of court proceedings is more important than that each person concerned should have the sole control of the action involving his claim. If he has not had notice of the bringing of the class action and has proceeded to trial in his individual case, there being no judgment rendered in the representative suit, it may be that the best interests of all concerned would be served by continuing his proceeding to judgment. Whether or not that is true should be left to the discretion of the court before whom the question arises. If the interests of the others of a class will not be injured by one or more of its members settling their claims outside of court, they should be permitted to do so.

The Decree

A decree in a class proceeding should be so worded as to cover all of the members thereof and should bind each one of them, unless some unusual situation should arise which makes such a result unfair. A condition of that nature would be unusual and the judge granting the decree should be the one to decide whether or not it exists. The reason for the general rule is that, if the decree did not affect all concerned, the suit would not really be a representative proceeding. Though it is better formally to bring a representative action for the benefit of all of a class, if it happens to be commenced "for those who join and contribute to the costs of the suit," the decree should, nevertheless, bind all members of such class. This is true, since any representative suit should be treated as being brought for the benefit of the whole class, because the law should provide that all
members of the class are to be treated as parties and should be forced
to contribute to the expense of the proceeding, unless they settle
separately and properly before judgment. Thus, whether in so many
words, one brings a representative suit for all members of a class,
or for those thereof who join and contribute to its costs, he practically
does the same thing. He commences it for everyone involved and
each one of them must pay part of the costs thereof. Knowledge
of the pendency of the suit, or lack thereof, on the part of those
represented should make no difference in the effect of the judgment,
for their interests are being dealt with whether they know of it or
not, which interests it is the duty of the parties of record, and of
the court, to protect.

Since the decree should bind all members of the class involved
in a representative suit, each one of them must have a right to his
proper share in the relief recovered thereby, for otherwise he would
have to bear the burden of obligations without having the benefit
of the correlative rights. This would clearly be unjust. Reasonable
notice of the rendition of the judgment should be given to all mem-
ers of the class, and they should be given ample opportunity to
present their claims whenever there is any uncertainty as to what
those rights are. If it is clear just what is due under the decree to
those who have been represented, the court can provide for their
obtaining that which is justly theirs, even though their whereabouts
is not known at the time of the rendition of the judgment. But
what can be done when there is a set sum to be divided equally
among all those who are members of the class interested and the num-
ber of those who are to receive a portion of the fund is not known? The fairest procedure seems to be to order a published notice of the
rendering of the decree, in which the facts involved should be set
forth fully enough so that one having a claim to the fund can recog-
nize, by the reading of the notice, that he has an interest in the decree.
All concerned should be given a reasonable time, to be set by the
court, for them to establish their claims. If, after judgment, but
prior to the division of the fund mentioned, the existence of definite
members of the represented plaintiffs becomes known for the first
time to any party to the class suit, or to the judge hearing it, personal
notice of the decree should be given the newly discovered person.
Any loss occasioned by failure to give such a notice should be borne
by the party or judge through whose fault the loss was occasioned.
After that period has elapsed, a division among those of the class
whose existence has come to the court's attention should be proper.
Prior to that time, a partial distribution might, under peculiar cir-
cumstances, be permissible, but the court should be very careful before taking such a step. An apportionment made after due notice should be final. One could argue that even thereafter those who received the fund should be proportionately liable to newly discovered members of the class for what they would have received if they had applied for a share of the proceeds of the suit before the division thereof. That would be unjust unless a fair and definite time were set by statutory law or order of court within which a claim could be made, for one should, otherwise, reasonably think that he can dispose of his share of the fund which he has received without having to give a portion of it back to someone else.

Costs

To the writer, it seems clear that those members of a class who do not appear as parties to a representative action, but who obtain the benefits thereof, should be liable for their proportionate share of its expenses to the named parties, for one should not receive the benefits of a judgment without bearing some of the burdens of the proceeding resulting in the decree. Moreover, since this is a representative action, those represented should be liable to their opponents for costs assessed in favor of the latter. This is true because the parties of record should be treated as proceeding on behalf of all members of the class concerned. If a fund is obtained for the class, the reasonable expenses of procuring it are properly deducted therefrom before its distribution, since it would be unjust to demand that those who had made the expenditure initially should have to depend on the promise of each member of the class in order to be recompensed for their outlay.

Proceedings After Decree

Any steps taken after judgment by, or against, those representing a class should bind all members thereof. Those who have previously been represented, but who have not become parties of record until after a decree, should, subsequently, have a share in the control of any proceeding occurring later.

A Proper Statute

Ordinarily, the writer would not care to suggest a statutory form to cover a legal situation, for he does not like to see the law put in a straight-jacket. However, the condition of the enactments and other authorities relating to class suits of the type dealt with in this paper is very unsatisfactory. It is, therefore, permissible to make any sug-
gestions that may result in the improvement thereof. It is thought that this betterment can, under the circumstances, be effected only by means of a definite statute or rule of court. He, therefore, suggests the following enactment to cover the matter of class suits in which the number of persons involved plays a part. If possible, it should be in the form of a rule of court, so that any defects in it could be readily remedied. The suggested wording is as follows: When among a class of persons so numerous that to make them all parties of record would be impracticable, there is a common interest in the facts and law which are the basis of a cause of action or defense, the court, in its discretion, may permit one or more of such a class of persons to sue or be sued as representatives of such class. This enactment shall apply to all types of proceedings. When the jurisdiction of a court is dependent upon the citizenship of the parties to a class action, only the citizenship of the original parties of record thereto shall be considered. Where jurisdiction of a court is dependent on the fact that a certain sum is involved, the amounts due the members of a class may be aggregated. The bringing of a representative action shall stop the running of any statute of limitations applicable to the claim sued upon in favor of all members of the class, and if the suit should be dismissed without decree, the statute shall be in abeyance between the times when the action was begun and dismissed. The parties of record shall have control of a class suit, subject, however, to the supervision of the court. After a representative action is commenced, no other proceeding relating to the same cause of action shall be permitted during its continuance. All decisions of trial and appellate courts in such proceedings shall bind each member of the class concerned, unless such decisions are made to apply only to particular persons. Each member of a class shall be liable to pay his share of the costs of a representative proceeding in proportion to the amount of his recovery or liability.

Though the suggested enactment is comparatively long, it is believed that its length is justified if its adoption would mean the elimination of useless and expensive litigation.