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# Class Suits under the Codes

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## INTRODUCTION

IN A VARIETY of legal problems today the individual finds himself a part of a group who have similar yet separate interests. The legal claims of the various members of the group arise from the same or a similar fact pattern. The employee who like other employees has a claim for compensation against their common employer, the defrauded investor who with other victims demands compensation, the consumer of power who with others is entitled to judicial relief against a public utility suggest the variety of group problems confronting modern courts. In such situations it may be asked to what extent do the courts recognize the individual's rights when he is bound to a group who are in a similar situation, and to what extent do the courts provide *all* the individual members of the group with a speedy device for the disposition of their claims. Have remedial devices been established which will recognize the interests of each member of the ascertained group in order that he may seek and obtain full relief?

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The procedural reforms of Anglo-American law which commenced in England with the Judicature Acts of 1875[1] and culminated in America with the Federal Rules of Civil Procedure[2] have introduced into the judicial process many new procedural devices which permit effective and comprehensive settlement of controversies. The modern interpleader statutes, the third party procedure, the modern rules governing parties, the extensive counterclaim provisions are but a few of the modern devices. The class suit doctrine is also a traditional device to dispose of multi-party situations. It is this doctrine that is the subject of special study here. What are its historical bases, its essential ingredients, its limits and defects, its ability or inability to dispose of multiple claims? How effective is this traditional remedy in modern society? Is there a need for a new remedy more effective to dispose of the interests of the individual when he is a member of a group having the same or similar interests? Has

[1] 38 & 39 Vict., c. 77.

[2] And of course the rules adopted in the various states which substantially duplicate the Federal Rules. See list of States, note 31, *infra.*

this doctrine met the test of all procedure — to secure a just, speedy and inexpensive determination of substantive rights?

This article proposes to discuss: 1) the extent to which the class suit has been authorized and permitted under code provisions, 2) the limitations of the class suit when separate and distinct rights of individual members of a group arise from the same or similar transactions or occurrences and 3) the logical and legal bases for any such limitations.

## HISTORICAL BACKGROUND

The fundamental philosophy underlying English equitable procedure with reference to parties was, simply, to do complete justice. As distinguished from the strictness of the common law, the motive of equity was to grant full relief to all concerned, to those who were interested in the subject of the action or in the object of the suit and, to that end, the primary object was to have all persons who were sufficiently interested before the court so that relief might be properly adjusted among the parties.[3] English equity, therefore, laid down the fundamental rule that all persons who were materially interested in the subject of the suit ought to be parties thereto, however numerous they may be, so that a complete decree might be made.[4] "All parties having an apparent right must be brought into Court before the Court will do anything, which may affect their right," said the Lord Chancellor in an early case.[5]

Many cases arose, however, where a strict adherence to these fundamental rules would violate complete justice. Where the parties interested in the subject or object of the suit were so numerous that justice would not be served, as in the case of continued abatements caused by the multi-

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[3] POMEROY, EQUITY JURISPRUDENCE 152 (5th ed. 1941). Pomeroy, in his treatise states the above in this manner: "The equitable doctrines with respect to parties and judgment are wholly unlike those which prevailed at the common law, different in their fundamental conceptions, in their practical operation, in their adaptability to circumstances, and in their results upon the rights and duties of litigants. . . . Its fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit. . . . The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree."

[4] REDESDALE, CHANCERY PLEADINGS, 144 (2d ed. 1789); Poore v. Clarke, 2 Atk. 515, 26 Eng. Rep. 710 (1742) indicated that "if you draw the jurisdiction out of a court of law you must have all persons parties before this court, who will be necessary to make the determination complete, and to quiet the question."

[5] Anon., 1 Ves. Jr. 29, 30 Eng. Rep. 215 (1789).

tude of parties involved, equity procedure was quick to develop the class device. The class suit was therefore a development of equitable procedure and was designed by the chancellors to fill a need, based upon convenience, to dispose of multiple party litigation. It was felt by the chancellors that if there were too many persons involved in a particular litigation it was not necessary to have them all present, if there were such a number that could stand in the shoes of those who were absent and could fairly represent the absent interests. Some could represent all, and the case could then proceed to a conclusion.[6] In the words of Lord Eldon in *Cockburn v. Thompson*,[7]

> The strict rule is that all persons materially interested in the subject of the suit, however numerous, ought to be parties: that there may be a complete decree between all parties having material interests: but that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases to which, consistently with practical convenience, it is incapable of application. The principle [of parties] being founded in convenience, a departure from it has been said to be justifiable where necessary; and in all these cases the court has not hesitated to depart from it, with the view by original and subsequent arrangement to do all that can be done for the purposes of justice; rather than hold that no justice shall subsist. . . .

Among the most common instances in which the class suit doctrine was applied were actions by or against voluntary unincorporated associations to enforce or defend an action which the association had against an adversary. One of the earliest was *Chancey v. May*.[8] There a bill was brought by the treasurer and manager of the Temple Mills brass works, on behalf of themselves and all other proprietors, against the former manager and treasurer, to account for misappropriations of funds of the partnership, amounting to some £50,000. The defendants demurred to the bill on the ground that there were some eight-hundred persons in the partnership who should be made parties in order to avoid a multiplicity of suits. The demurrer was overruled because

> . . . it was in behalf of themselves and others . . . so all the rest were in effect parties and . . . it would be impracticable to make them all parties by name and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties.[9]

So also, where a philanthropic institution sought an accounting of the sums received by the defendants and the defendants' plea alleged that a

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[6] Adair v. New River Co., 11 Ves. Jr. 429, 32 Eng. Rep. 1153 (1805); Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Eng. Rep. 1005 (1809); Meux v. Maltby, 2 Swans. 277, 36 Eng. Rep. 621 (1818); Small v. Attwood, Younge 406, 159 Eng. Rep. 1051 (1832).

[7] 16 Ves. Jr. 321, 33 Eng. Rep. 1005 (1809).

[8] Prec. Ch. 592, 24 Eng. Rep. 265 (1722).

[9] *Ibid.*

great number of persons were the proprietors of the institution, the motion that these persons be made parties to the litigation, was overruled. The court insisted that it would be impossible to bring in all of the persons interested; hence it must be instituted by some on behalf of all.[10]

Whether the rights of the group were being asserted, or were being defended of course made no practical difference. The same principles which applied to the assertion of association rights similarly applied to the case in which the association defended. In *City of London v. Richmond*[11] the City had leased certain water conduits to an individual who had agreed in the lease to pay a certain sum each year. The original lessee assigned the lease in trust for such persons as should buy shares. In an action by the city to recover the arrears the defendants objected that not all the owners of the shares of the lease had been made parties. But here, too, the court permitted the action to proceed by representation.

In these and other decisions[12] the right that is being asserted or defended can be viewed as a joint right. All the members of the association stand in the same capacity; they are in a sense united in interest. The right of one is the right of all, and the benefits which are sought and derived inure to the group as such (at least insofar as the litigation is concerned) and not to each individual. The interests of all are identical, but each individual is not entitled to separate relief. It is only insofar as he is a member of the group asserting or defending a joint right that he has an interest, and to require all members of the group to be made parties of record in such situations would be unnecessary and would, in the words of the chancellors, defeat justice.

But equity did not restrict the class doctrine to cases in which the group could be viewed as a unit. Where each individual had a separate and distinct interest or right, but the interest was the same as many others, the doctrine was also applied. The early cases involving separate and distinct rights were those dealing with remnants of feudalism in seventeenth century England.[13] Problems arose which required the settlement of controversies involving common lands, or the common mill, or tithes and other duties.[14] Each member of the community had, in the settle-

[10] Other cases of voluntary associations — Small v. Attwood, Younge 406, 159 Eng. Rep. 1051 (1832), Baldwin v. Lawrence, 2 Sim. & Stu. 17, 57 Eng. Rep. 251 (1824); Good v. Blewitt, 13 Ves. Jr. 397, 33 Eng. Rep. 343 (1807); Lloyd v. Loaring, 6 Ves. Jr. 774, 31 Eng. Rep. 1302 (1802); Cullen v. Duke of Queensberry, 1 Bro. Ch. 101, 28 Eng. Rep. 1011 (1781).

[11] 2 Vern. 421, 23 Eng. Rep. 870 (1701).

[12] Note 10, *supra*.

[13] See CHAFFEE, SOME PROBLEMS OF EQUITY 200 (1950).

[14] Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Eng. Rep. 1005 (1809); Chaytor v. Trinity College, 3 Anst. 841, 145 Eng. Rep. 1056 (1796); Brown v. Vermuden, 1 Ch. Cas. 271, 22 Eng. Rep. 796 (1676) (probably the earliest reported case).

ment of such disagreements between himself and the lord of the manor or the vicar, an interest which was common to all other members of the village or parish. In these cases there was no need to attempt to bring all the parties before the court, as one who stood in the same relation could try the right for all the rest. In these decisions equity gave recognition to multiple party action by "representation."

In *Brown v. Vermuden*[15] the Parson of Worselworth brought a bill against Vermuden to have performance of a decree that he had previously obtained against certain workers of lead mines declaring his right to tithes. Vermuden pleaded that he was not a party to the previous decree and insisted that he ought not be prosecuted by this bill. His plea, however, was overruled. While in *Chaytor v. Trinity College*[16] some owners and occupiers of lands within a certain district were permitted to sue for themselves and the other occupiers of lands to establish the right to pay money in lieu of tithes of hay and agistment in the township.

The interest of the individual in these and other cases was completely separate and distinct; yet each person was a member of a group in privity with the lord or the vicar, so that it may be said that there was a common interest among the numerous persons which was being asserted or defended. Implied as essential to the maintenance of the class suit, in these cases at least, was privity and a common or general right or defense against the adversary. The requirement of privity was later removed[17] but that of the common or general right has remained to this day.

Even though the interests of the members of the multitude were not joint or unitary, as in the association cases, and even though no privity existed, the class device was a convenient procedure to determine a common issue in situations involving separate and distinct interests. In *Attorney General v. Heelis*[18] certain persons, tenants and occupiers of houses in Great Bolton sued, on behalf of themselves and all others who were assessed, to avoid a payment of a rate that had been levied. Since the object of the bill was to avoid the payment of the assessment every individual assessed had in that respect one common interest which would

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[15] 1 Ch. Cas. 271, 22 Eng. Rep. 796 (1676).

[16] 3 Anst. 841, 145 Eng. Rep. 1056 (1796).

[17] Mayor of York v. Pilkington, 1 Atk. 282, 26 Eng. Rep. 180 (1737). Although technically a bill of peace, the court entertained the action on the ground of avoidance of multiplicity of suits since the determination of the right of fishery would affect many others. In this sense it can be said to apply to the class device. The court relied on *London v. Perkins,* III Brown 602, 1 Eng. Rep. 1524 (1734) where the city of London claimed to be entitled to levy duties upon all ships bringing cheese to London. The City filed a bill against certain individuals who refused to pay the duty.

[18] 2 Sim. & St. 67, 57 Eng. Rep. 270 (1824).

be beneficial to all. While each owner and occupier had owned a distinct parcel and had a distinct interest in the avoidance of the assessment that interest was sufficiently common that the class device was held a proper method to determine the validity of the assessment. The relief sought affected all, and the common determination disposed of the litigation.

So, too, in cases involving creditors, the propriety of the class device was recognized. If, in an action against the representative of a deceased debtor for an account and application of assets to the payment of debts, it were necessary that all the creditors of the deceased debtor be made parties to the suit, the same practical objections that arose in other cases would exist. Hence, one or more creditors could sue for himself and all others for an account and application of the estate of the deceased debtor.[19] If one of the creditors having the same common interest (the application of the assets to the payment of the debts) sued, the other creditors were allowed to come in under the decree and present their claims.[20] The basic reason for this procedure was to relieve the estate of the burden of defending many actions.[21]

It was in the light of this history that Mr. Justice Story, the first influential American writer to examine the practice of English chancery, succinctly stated the conclusions of the English decisions.[22] In his COMMENTARIES ON EQUITY PLEADINGS, he arranged the English decisions into three categories:

1) Where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole.
2) Where the parties form a voluntary association for public or private purposes, and those who sue or defend, may fairly be presumed to represent the rights and interests of the whole.
3) Where the parties are very numerous, and though they have, or may have separate and distinct interests yet it is impracticable to bring them all before the court.[23]

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[19] Law v. Rigby, 4 Bro. C.C. 61, 29 Eng. Rep. 779 (1792); Leigh v. Thomas, 2 Ves. Sen. 312, 28 Eng. Rep. 201 (1751); Neve v. Weston, 3 Atk. 558, 26 Eng Rep. 1121 (1747).

[20] See Leigh v. Thomas, 2 Ves. Sr. 312, 28 Eng. Rep. 201 (1751). In *Neve v. Weston*, 3 Atk. 558, 26 Eng. Rep. 1121 (1747) the Chancellor stated that a creditor who attempted to bring a new bill against the executor of a deceased was not permitted to do so pending a suit by another creditor for all, as he was a quasi party to the pending suit.

[21] 1 DANIELL, CHANCERY PRAC. 174 (8th ed. 1914).

[22] STORY, COMMENTARIES ON EQUITY PLEADINGS 15 (2d ed. 1840).

[23] This classification although influential is not accurate. Class one — where the question is one of a common or general interest is implied and necessary for both classes two and three. If class three were taken literally such cases as *Jones v. Garcia Del Rio*, 1 Turn & R. 297, 37 Eng. Rep. 1113 (1823) would be wrong. This case is discussed later.

In his first class he limited his discussion to actions brought by seamen[24] and creditors and legatees.[25] And in his third class, where the only requirement appeared to be mere numbers, he limited his discussion to decisions involving feudal dues or rights. In this latter use of language he is not historically correct. The mere fact that there is a large group of persons having separate and distinct interests did not permit English chancery to take jurisdiction of a cause. The class device could only be used where the individual members of the group had separate and distinct rights and there was a common bond among the members — either in the subject matter, the object of the action or the relationship of the parties. Where the interests of the individual members of the group were separate, distinct and purely personal and not tied to the crowd, and the object of the action was to compensate an individual right, the mere fact that the parties were numerous would not sustain the class device. This was recognized for the first time by Calvert[26] when he stated:

> The propriety of making a person a party may depend on something personal to himself; for instance upon his participation in a fraud, or his possession of certain information . . . [then] it is manifest, that the person must be actually before the court.

*Jones v. Garcia Del Ria*[27] was the first case to promulgate this rule. There, a bill was filed by three persons on behalf of themselves and all the other holders of shares of a Peruvian loan, against an impostor who represented himself to be a lawful agent of the Peruvian government. The impostor, presumably empowered to contract for a loan for the use of his government, issued a prospectus and proceeded to sell shares to numerous purchasers. Alleging fraud and misrepresentation, the plaintiffs prayed that an account be taken of the monies which they had advanced and that they be declared entitled to have returned what had been paid. Lord Eldon denied relief in this form since each person had a demand at law. It would appear that this decision stands solely for the proposition that the class device is not applicable where numerous persons have been defrauded by a single act of the defendant and each victim is entitled to compensation. But other considerations were involved. Although Lord Eldon denied the right of the plaintiffs to bring the action in a representative form on "that ground alone," the decision injected extraneous issues which cannot be ignored. Peru had had a revolution,

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[24] Good v. Blewitt, 13 Ves. Jun. 396, 33 Eng. Rep. 343 (1807).

[25] A discussion concerning the doctrine of "virtual representation" involving heirs or legatees is beyond the scope of this paper. See 3 SIMES, FUTURE INTERESTS § 672 (1936).

[26] CALVERT, PARTIES TO SUITS IN EQUITY 22 (2d ed. 1847).

[27] 1 Turn & R. 296, 37 Eng. Rep. 1113 (1823).

and the de facto government which had been set up was not recognized by the King of England. Commenting on this, Lord Eldon stated,

> If individuals in this country choose to advance their money for the purpose of assisting a colony opposed to its parent state, that parent state being at peace with this country, will the Courts of Justice here assist them to recover their money?

In summary, equity was cognizant of the problems arising from multiple party fact situations and quickly adapted its procedure to meet the need and created the doctrine of the class action. The requirements, therefore, laid down by equity seem to be only two:

1) There must be such a number of persons involved making it impracticable completely to settle the controversy.

2) There must be either a joint interest [as in the association cases] or a community of interest among the numerous persons having separate and distinct interests in the object of the suit or the subject matter involved.

## THE CODE PROVISIONS

The general outlines and principles of the class suit doctrine laid down by the English chancellors and Story's interpretation of them had great influence upon codification of that doctrine. This escape from the normal equitable principles had become so ingrained in the procedural processes that no codifier could ignore them. Yet it is surprising that the first report by the Field Commission to the Legislature of New York did not contain any reference to that equitable doctrine.[28] Nor was there such a code provision when the Code of Procedure became the law of New York in 1848.[29] Not until the amendment of 1849 was there codification of the equitable principles, and this was attached to the provision relating to compulsory joinder.[30] This New York codification was copied into practically all of the codes of procedure throughout the United States.

While there is some variation in the language of the various state provisions, the usual provision finds expression in the principle:

> 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 numer-

[28] FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS § 99 (1848).

[29] N.Y. LAWS, c. 379 (1848).

[30] N.Y. CODE § 119 (1849). "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants . . . and when the question is one of a common or general interest of many persons, or when the 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 the whole." Notice the similarity of the language to that of Mr. Justice Story, note 23, *supra.*

ous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.[31]

## NATURE AND PURPOSE OF SUIT UNDER CODE PROVISION

The above codification of the procedural device, commonly referred to as the "class action" or "representative action"[32] is simply a recognition and codification of the equitable doctrines. The nature of the suit, as interpreted by the decisions under code provisions is such that certain parties may be omitted where their interests are represented by those individuals who are parties of record. Where the individuals in the group concerned are so numerous that it would be highly impracticable or inconvenient to bring them all into the litigation, one or a few persons whose interests are the same, and who would fairly insure the representation of the interests of those who are omitted, are permitted to represent all the rest to enforce or defend the interest being asserted or defended.[33]

Various reasons have been advanced by the state courts to justify this remedial device. Some courts reason that the purpose of such actions is to avoid a multiplicity of suits,[34] or to prevent a failure of justice,[35] or that constant and continued abatement by death or removal from the juris-

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[31] ALASKA COMP. LAWS ANN. § 55:3-16 (1949); ARK. STAT. ANN § 27-809 (1947); CAL. CODE CIV. PROC. Pt. 2, tit. 3 § 382 (1953); FLA. Eg. Rule 14; IDAHO CODE ANN. § 5-316 (1948); IND. STAT. ANN. § 2-220 (Burns 1933); KAN. GEN. STAT. ANN. § 60-413 (1949); MINN. STAT. ANN. § 540. 02 (1947); MONT. REV. CODES ANN. § 93-2821 (1947); REV. STAT. NEB. § 25-319 (1943); NEV. COMP. LAWS ANN. § 8558 (1929); N.M. STAT. ANN. § 19-601 (1941); N.Y. CIV. PRAC. ACT. § 195 (1942); N.C. GEN. STAT. § 1-70 (1953); N.D. REV. CODE § 28-1208 (1943); OHIO REV. CODE § 2307.21 (1954); OKLA. STAT. ANN. § 233 (1941); ORE. COMP. LAWS ANN. § 9.106 (1940); S.C. CODE § 10-205 (1952); S.D. CODE § 33-0410 (1939); WASH. REV. CODE § 4.08.070 (1951); WIS. STAT. § 260.12 (1951); WYO. COMP. STAT. ANN. § 3-616 (1945).

[32] See the various uses of the term "representative" in McLaughlin, *The Mystery of the Representative Suit*, 26 GEO. L. J. 878 (1938).

[33] The general nature of the class action under the code provision is stated in *Newberry Library v. Bd. of Education*, 387 Ill. 85, 55 N.E.2d 147 (1944). "The class suit is recognized as an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject matter of the litigation is so great that it is impracticable to join them as parties. In such cases where the interests of those not joined are the same as the interests of those who are, and those joined as parties fairly represent those not joined in the litigation of issues in which all have a common interest, the court will proceed to a decree." This language is substantially the same as in Hansberry v. Lee, 311 U.S. 32, 41, 61 Sup. Ct. 115, 118 (1940). RESTATEMENT, JUDGMENTS § 86 (1954).

[34] Whaley v. Comm., 110 Ky. 154, 61 S.W. 35 (1901); Guffanti v. National Surety Co., 196 N.Y. 452, 90 N.E. 174 (1909).

[35] Campbell v. Webb, 258 S.W.2d 595 (Mo. 1953); Bouton v. City of Brooklyn, 15 Barb. 375, 7 How. Pr. 198 (N.Y. 1853); State v. Board of County Comm., 188 Okla. 184, 107 P.2d 542 (1940).

diction would prevent the suit from being completed.[36] The more basic reason however, as indicated by the prior equitable decisions, is that the device is a mere matter of convenience. Where parties are too numerous to be brought before the court, the courts, for the sake of convenience, and in order to adjust the differences that affect the numerous parties, permit one who has a common interest to stand for all.[37] While it is true that the class doctrine is a device based on convenience it should be noted that the term "convenience" is not intended to mean that the class device is a proper method to settle all legal controversies involving multiple parties. The term should be used in a restrictive sense under the decided cases; it is "convenient" to omit certain individuals from the record of the proceedings since their interests are before the court as quasi-parties.

Any one or all of the above reasons are justifications for the doctrine. While the decisions may not be in agreement as to the exclusive or proper justification, they have uniformly interpreted the code provisions as mere statutory enactments of the principles formerly applied in equity.[38] Statements can be found to the effect that the provisions relate both to legal and to equitable claims.[39] But the qualification must be made that they apply only where the rights of the parties are in common with each other so that the benefit of the judgment inures to the whole class and not to individual members thereof.

An examination of the cases in which the problem has been raised indicates that the doctrine is applied in legal actions in at least two situations. First, in actions for the recovery of land[40] and second, in suits where the parties actually on the record are members of a class, and the benefit of a judgment inures to the whole class. Thus, in *Platt v. Colvin*[41] the plaintiff as representative of some one thousand persons owning

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[36] Platt v. Colvin, 50 Ohio St. 703, 36 N.E. 735 (1893).

[37] POMEROY, CODE REMEDIES 439 (5th ed. 1929).

[38] Brenner v. Title Guarantee & Trust Co., 276 N.Y. 230, 11 N.E.2d 890; George v. Benjamin, 100 Wis. 622, 76 N.W. 619 (1898); POMEROY, CODE REMEDIES 440 (5th ed. 1929); CLARK, CODE PLEADING 396 (1947).

[39] Colt v. Hicks, 97 Ind. App. 177, 179 N.E. 335 (1933); Kirk v. Young, 2 Abb. Pr. 453 (N.Y. 1856); Platt v. Colvin, 50 Ohio St. 703, 36 N.E. 735 (1893); POMEROY, CODE REMEDIES 441 (5th ed. 1929). *Cf.* Niehaus v. Jos. Greenspon's Son Pipe Corp., 237 Mo. App. 112, 164 S.W.2d 180, 185 (1942): ". . . the rule which permits a few persons to sue for themselves and others similarly situated is one of equitable cognizance and in this state is not to be extended in its application to cases wholly lacking in equitable features. . . ."

[40] Stearns Coal & Lumber Co. v. Van Winkle, 221 Fed. 590 (6th Cir. 1915); Thomas v. Jones, 97 N.C. 121, 1 S.E. 692 (1887); Whitaker v. Manson, 84 S.C. 29, 65 S.E. 953 (1909).

[41] 50 Ohio St. 703, 36 N.E. 735 (1893).

shares in a joint stock association brought an action to recover money which the defendants had conspired to and did carry away from its offices. The defendants demurred on the ground that the other members of the joint stock association were not parties to the suit. The court permitted the action in the representative form, reversing the lower court. While this was an action at law, the recovery was for the benefit of all the members of the class in their group and not their individual capacity. When, therefore, it is stated that the code action applies to legal as well as equitable causes, the parties must have a unity of interest in the recovery, and not an individual and separate legal right of recovery.

CONDITIONS FOR APPLICATION OF STATUTE

Although the code provision is stated in the disjunctive, the courts indicate that both requirements of a common or general interest and numerous parties must be satisfied. The mere fact that the parties are numerous does not satisfy the statute unless there is further a "common or general interest."[42] While some courts have indicated that a "common question" is sufficient although the parties are not numerous[43] no court has permitted an action based on mere numbers of parties where there is no community of interest.[44]

There must be such a number of parties involved that it would be impracticable to bring them all before the court. If the first clause of the code section is applied, however, it would seem that "many" persons having a question in common satisfies the statute. Although decisions have indicated that as few as three have constituted "many"[45] the important thing to consider is that the code provision was intended to apply to cases in which the parties were so numerous that it would be impracticable to bring them all before the court. This consideration is recognized in the second clause of the statute which requires "very numerous" persons. The wording of the two clauses is unfortunate, for history shows that the class device was used only when the parties were so numerous that they could not all be made parties of record. The result of the wording has been to cause confusion. What number is sufficient to permit the application of the code provision varies with the judge's

[42] Garfien v. Stiglitz, 260 Ky. 430, 86 S.W.2d 155 (1935); Lile v. KeFauver, 244 Ky. 486, 51 S.W.2d 473 (1932).

[43] McKenzie v. L'Amoureaux, 11 Barb. 516 (N.Y. 1851); Hilton Bridge v. Foster, 26 Misc. 338, 57 N.Y. Supp. 140 (1899).

[44] POMEROY, CODE REMEDIES 437 (5th ed. 1929) indicates that the language of the code does not in terms require any question of common or general interest in the second clause of the provision, but it is stated that it would be 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 before the court — unless the question to be determined was one of common or general interest.

[45] McKenzie v. L'Amoureaux, 11 Barb. 516 (N.Y. 1851).

fancy, and no accurate determination can be made. Each case must stand on its own facts.[46] As few as three,[47] or four[48] has been sufficient under the first clause of the code, and fifty[49] has been held to be "numerous."

The representative or representatives of the class must fairly represent all those for whom they act. As stated in *Spear v. H. V. Greene Co.*:[50]

> Class bills may be maintained where a few individuals are fairly representative of the legal and equitable rights of a large number who cannot be readily joined as parties. The persons suing as representatives of a class must show by the allegations of their bill that all persons whom they profess to represent have a common interest. . . .

The representative is also required to show by the allegations in the complaint that his interest is in harmony with those who are represented.[51] Not only must the representative fairly insure the representation of the absent members, but there must also be a sufficient number of representatives to insure a fair trial.[52] The representatives must be a member of the class which they purport to represent.

There must be an ascertained class. That is, there must be a group of individuals who are bound together by some *common* interests. The class, of course, may be large. In *Parker v. University of Delaware*[53] the class consisted of all Negro persons in the State of Delaware who would have the privilege of attending the University if the plaintiff were successful. The court stated:

> Here there is a class and it is well-defined. Those Delaware Negroes who are legally interested in obtaining a college education, and legally interested in a determination of their constitutional right with respect to admission to the University constitute a definite class within the meaning of the rule of court governing class actions.

There must be a "common or general interest" among the members of the class before the class device under the code provision may be main-

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[46] For a more detailed discussion of the code cases involving numbers, see Wheaton, *Representative Suits Involving Numerous Litigants,* 19 CORNELL L. Q. 399, 412 (1934).

[47] Note 45, *supra.*

[48] Climax Speciality Co. v. Seneca Button Co., 54 Misc. 152, 103 N.Y. Supp. 822 (1907).

[49] Libby v. Norris, 142 Mass. 246, 7 N.E. 919 (1886).

[50] 246 Mass. 259, 140 N.E. 795 (1923).

[51] McClelland v. Rose, 247 Fed. 721 (5th Cir. 1918); City of Lakeland v. Chase National Co., 159 Fla. 783, So.2d 833 (1947); Sparks v. Robinson, 115 Ky. 453, 74 S.W. 176 (1903); Castle v. City of Madison, 113 Wis. 346, 89 N.W. 156 (1902); POMEROY, CODE REMEDIES 438 (5th ed. 1929).

[52] Adelbert College of Western Reserve Univ. v. Toledo W. & W. Ry. Co., 3 Ohio N.P. 15 (1894).

[53] 31 Del. Ch. 381, 75 A.2d 225 (1950).

tained. This phrase has caused considerable confusion. While the whole population may be said to be bound together by common interest, the common interest involved in class litigations must of necessity be a narrow and limited interest which will prove beneficial or adverse to the holders. While it is universally recognized that there must be community of interest among the members of the class, nowhere is that phrase defined or clarified. The statutory provision requires that the question be one of a "common or general interest" to the persons who are many or too numerous to be brought before the court. These words, either standing alone or in context in the clause have been most perplexing. Does this requirement mean that the parties must be "united in interest" before it is proper to bring the action in a representative form? Does the "question" mean a question of fact or law? Does the code require that there must be a "common" interest in the subject matter of the litigation or a "common interest" in the object of the suit, or in the relief to be obtained? Must the interests of the various parties be joint or common or may they be separate and distinct interests, each person having a separate right of action or defense, but tied together by a common bond of fact or law? Must the interests of the individuals depend upon the same basic factors, or arise from a common source, or may their interests arise from separate and independent sources before the code provision will be applied? If the persons are permitted to join in the suit, may a representative suit serve the same purpose? These questions as such have never been considered by the courts, and the result has been confusion in determining the boundaries and meaning of "question" and "common interest."

These questions, of course, are crucial. An answer to them determines the limits and effectiveness of the action under the code.[54] The decisions usually state the requirement in general language. A person who undertakes to sue or defend as a representative of a class must have such a right or interest in common with the persons represented.[55] Only if there

[54] In *City of Lakeland v. Chase National Co.*, 159 Fla. 783, 32 So.2d 833 (1947) the court recognizes these problems — and apparently is the only court to do so. The court stated: "The statute authorized class representation when 'the question' is one of common or general interest. A 'question' related to what? Question of fact or law? A question related to the 'subject matter' of the suit, or to the 'object' of the suit? A 'question' related to a common right — to several rights? or — to joint rights? If the 'interest' be 'common or general' may the rights be separate and distinct? Also must they depend on the same basic factors? Is the rule a matter of indulgence when joinder would otherwise be required? Or is it a matter of convenienve for the benefit of the parties and the court?"

[55] Lile v. Kefauver, 244 Ky. 486, 51 S.W.2d 473 (1932); Spear v. H. V. Greene Co., 246 Mass. 259, 140 N.E. 795 (1923); Brenner v. Title Guarantee & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937); Linden Land Co. v. Milwaukee Elec. Ry. & Light Co., 107 Wis. 493, 83 N.W. 851 (1900).

is a community of interest is the suit maintainable in the representative form.

## CLASSIFICATION OF THE DECISIONS CONSTRUING THE CODE PROVISION

Before attempting to determine the nature of the "community of interest" required under the code provision and in order fully to understand the limitations of the class device, it might be profitable to make a classification of the decisions construing the code provision. The decisions under the code and the equitable decisions prior to the code appear to fall into four more or less separate classes:[56]

1) Those cases in which the parties are very numerous so that it would be impracticable to bring them all before the court and the members of the class have interests which are united or joint.[57]

2) Those cases in which the parties are very numerous and all the individual members of the class have "common" or identical interests in the determination of the litigation.[58]

3) Those cases in which the parties are very numerous and the individual members of the class have separate and distinct rights or interests, but all the members of the class are interested in the identical relief sought or in the identical subject matter involved.[59]

4) Those cases in which the parties are very numerous, and the individual members of the class have separate and distinct interests, and

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[56] See a similar scheme of classification in McLaughlin, *The Mystery of the Representative Suit,* 26 GEO. L. J. 878 (1938).

[57] Platt v. Colvin, 50 Ohio St. 703, 36 N.E. 735 (1893); Small v. Attwood, Younge 406, 159 Eng. Rep. 1051 (1832).

[58] Smith v. Swormstedt, 57 U.S. 288 (1853); Penny v. Central Coal & Coke Co., 138 Fed. 769 (8th Cir. 1905); Wheelock v. First Presb. Church, 119 Cal. 477, 51 Pac. 841 (1897); Bates v. Houston, 66 Ga. 198 (1880); Colt v. Hicks, 97 Ind. App. 177, 179 N.E. 335 (1932); *In re* Taylor, 265 App. Div. 858, 37 N.Y.S.2d 675 (1942); Hodges v. Nalty, 104 Wis. 464 (1899).

[59] Birmingham v. Fairview Home Owners Ass'n., 66 So.2d 775 (Ala. 1953); Coachella Val. County Water Dist. v. Stevens, 275 Pac. 538 (Cal. 1928); Jones v. Newlon, 81 Colo. 25, 253 Pac. 386 (1927); Parker v. Univ. of Del., 31 Del. Ch. 381, 75 A.2d 225 (1950); Tenney v. Miami Beach, 152 Fla. 126, 11 So.2d 188 (1942); Sweeney v. Louisville, 309 Ky. 465, 218 S.W.2d 30 (1949); Peoples Store v. McKibbin, 379 Ill. 148, 39 N.E.2d 995 (1942); Lockwood v. Lawrence, 77 Me. 297 (1885); Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938); Haggerty v. Squire, 137 Ohio St. 207, 28 N.E.2d 554 (1940); Crane v. Pa. Liquor Control Bd., 50 Dauph. 401 (Pa. Com. Pl. 1941); Kelly v. Tiner, 91 S.C. 41, 74 S.E. 30 (1912); Perkins & Co. v. Diking Dist., 162 Wash. 227, 298 Pac. 462 (1931); Trade Press Pub. Co. v. Milwaukee Typo. Union, 180 Wis. 449, 193 N.W. 507 (1923). *Cf.* Dinkes v. Glen Oaks, 206 Misc. 143, 132 N.Y.S.2d 138 (1954).

each individual is entitled to separate and distinct relief from every other member of the group. This is the situation which primarily concerns us.[60]

These cases can be further classified into those involving separate and distinct rights arising from a common source or transaction, and those arising from separate and distinct sources or transactions.

Classification (1) above can be illustrated by the situation wherein a joint stock company or partnership consists of many members, and the association seeks to enforce or defend a claim. All the members of the association are united in interest, since the right which they are seeking to enforce would inure to their united benefit. In this situation it is certainly unnecessary for all to be made parties, the action can be brought by a few for the benefit of the rest and the adversary can be released from liability once and for all. This category is the typical "representative" action.

Classification (2) above is so closely related to class (1) that it is difficult to separate the two. But in doing so, analysis of the problem is aided. This class of cases can be best illustrated by voluntary organizations, which do not particularly have a unity of interest, but in which the members of the organization are tied together by a common interest in the association. Decisions involving church organizations are illustrative. In *Bates v. Houston*[61] the trustees of a church, on behalf of themselves and other members of the religious body, sought to restrain unlawful and unchristian behavior on the part of the defendants and were successful in so doing. And in *Hodges v. Nalty*[62] several members of St. Victor's church, an unincorporated religious society, sued to recover an unpaid subscription that the defendant had signed in order to defray

[60] Cherry v. Howell, 4 F. Supp. 597 (E.D. N.Y. 1931); Bickford's v. Federal Reserve Bank of N.Y., 5 F. Supp. 875 (S.D. N.Y. 1933); Michelsen v. Penney, 10 F. Supp. 537 (S.D. N.Y. 1934); Ry. Express Agency v. Jones, 106 F.2d 341 (7th Cir. 1939); Weaver v. Pasadena Tournament of Roses Assn., 190 P.2d 626 (Cal. 1948), *aff'd*, 198 P.2d 514 (1948); City of Lakeland v. Chase Nat. Co., 159 Fla. 783, 32 So.2d 833 (1947); O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. (1938); Kimes v. City of Gary, 224 Ind. 294, 66 N.E.2d 888 (1946); Codell Const. Co. v. Miller, 304 Ky. 708, 202 S.W.2d 394 (1947); Locke v. City of Detroit, 335 Mich. 29, 55 N.W.2d 161 (1952); Thorn v. Hormel & Co., 206 Minn. 589, 289 N.W. 516 (1940); Neihaus v. Jos. Greenspon's Son Pipe Corp., 237 Mo. App. 112, 164 S.W.2d 180 (1942); Archer v. Musick, 147 Nebr. 344, 23 N.W.2d 323 (1946), REV'D, 25 N.W.2d 908 (1947); Society Milion Athena v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939); Sutton Carpet Cleaners v. Firemen's Ins. Co., 68 N.Y.S.2d 218 (1947); State *ex rel.* Gerspacher v. Coffinberry, 157 Ohio St. 32, 104 N.E.2d 1 (1952); Matthews v. Landowners Oil Assn., 204 S.W.2d 647 (TEX. 1947); McMichen v. Amos, 25 Va. 134 (1826); Hawarden v. The Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 87 N.W. 472 (1901).

[61] 66 Ga. 198 (1880).

[62] 104 Wis. 464, 80 N.W. 726 (1899).

the cost of building a new church. In these and other situations the congregation, or the members, have a community of interest in restraining the unlawful behavior or in recovering the unpaid subscription. It cannot be said that each individual member has a separate and distinct right of action against the wrongdoer. Each member of the congregation could not sue alone if he so desired — for his interests are interwoven with those of the other members of the congregation, and in that sense it can be said that he has a "common interest" with all the members of the class. Illustrative also of this group of cases are the modern suits involving labor unions, where statutory authorization is not granted to sue in the name of the union.[63]

These situations are not difficult. If the aggregate is looked upon as a unit, composed of several members, then there can be no difficulty in permitting one of the unit to represent the group to enforce or defend a right which exists for the unit.

The more difficult problems confronting the court arise in classes (3) and (4) where the interests of the group are not regarded as unitary, but rather are separate and distinct, and each individual member of the aggregation has an important personal interest in seeking recovery against the adversary. In these cases, the "common question" principle becomes important, and here there is great disagreement as to the meaning of the term. In what situations, therefore, can it be said that the code provision applies the term "common or general interest" to cases involving individuals who have a separate and distinct claim against the adversary?

### Separate and Distinct Rights and A Common Question in A Fund or Subject Matter

Many decisions indicate that where the parties are numerous, but each has a right or interest which is separate and distinct, one or more may represent the group if all the members have a community of interest and are interested in a particular fund or subject matter involved in the litigation. The community of interest — the "common or general interest" — lies in the fund or property involved.[64] The separate interest that each person has must be an interest in a trust fund, an insolvent estate, a mortgage or some other tangible interest.

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[63] Oster v. Bro. of Locomotive Fireman, 271 Pa. 419, 114 Atl. 377 (1921); Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906). Modern enactments and decisions permit the entity to be sued or to sue: U.M.W. v. Coronado Coal Co., 259 U.S. 344 (1922); see 29 U.S.C. § 185(b) (Labor Management Relations Act, 1947).

[64] Bickford's v. Fed. Res. Bank of N.Y., 5 F. Supp. 875 (S.D. N.Y. 1933); N.Y. Cloak & Suit House v. Coston, 64 Cal. App. 94, 270 Pac. 695 (1928); Mitchell v. Hart, 107 Ind. App. 548, 25 N.E.2d 665 (1939); Lile v. Kefauver, 244 Ky. 486, 51 S.W.2d 473 (1932); Kahlmeyer v. Green-Wood Cemetery, 175 Misc. 187, 23 N.Y.S.2d 17 (1940).

*Gulffanti v. National Surety Co.*[65] presents a typical case. There, one Zanolini was depositary of sums deposited by 150 persons for transmission to Italy. Zanolini converted the money to his own use and, after being declared a bankrupt, absconded. More than one hundred and fifty depositors now had claims against him, and the plaintiff brought an action in equity on behalf of himself and other creditors against the defendant bonding company which had insured the various deposits. The court permitted the action to stand in representative form, expressly stating that the statute requiring bonds was to deter irresponsible parties from engaging in such business and to provide a fund to indemnify creditors. "Such fund," the court stated, "I think, is not for one creditor but for all, and should be equitably distributed among all according to their respective claims." Each creditor's claim here was distinct, and each creditor's claim accrued as soon as the default occurred; the creditors had equal rights to the fund and they should therefore be satisfied from the proceeds of that fund.[66]

Where each individual bondholder or certificate holder has a distinct interest in his bond, apart from others, one of the bondholders has been allowed to enforce the lien or foreclose the mortgage securing the issue.[67] In *Gibson v. American Loan and Trust Co.*[68] an action was brought by owners of 85 out of 150 bonds secured by a mortgage upon the property of a water company. The mortgage was executed and delivered to the defendant in trust for all bondholders. The owners of the eighty-five bonds representing themselves and all others sought to remove the trustee for improper action in subordinating their mortgage to expenditures alleged to have been made for improvements and to foreclose the mortgage. The court, in indicating that this was proper procedure, stated:

> Neither can the action be defeated for the reason that all the owners of bonds secured by the mortgage are not made parties to it; for it has been brought by the plaintiffs, as the owners of eighty-five of the bonds forming more than a majority of those secured by the mortgage, and they are prosecuting it under the authority of . . . the code. . . .

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[65] 133 App. Div. 610, 118 N.Y. Supp. 207 (1909), *aff'd*, 196 N.Y. 452, 90 N.E. 174 (1909).

[66] Not only was this a permissive representative suit, but the court indicated that the creditor who sues, although his claim is distinct from all others, must sue for the benefit of all.

[67] Carter v. Rodewald, 108 Ill. 351 (1884); Gibson v. American Loan Co., 12 N.Y. Supp. 444 (1890); Clay v. Selah Vallery Irr. Co., 14 Wash. 543, 45 Pac. 141 (1896); Adelbert College of Western Reserve Univ. v. Toledo Wabash & Western Ry. Co., 3 Ohio N.P. 15 (1894); Atkins v. Trowbridge, 162 App. Div. 629, 148 N.Y. Supp. 181 (1914); Hilton Bridge Co. v. Foster, 26 Misc. 338, 57 N.Y. Supp. 140 (1899); *In re* 1030 No. Dearborn Bldg. Corp., 7 F. Supp. 896 (E.D. Ill. 1934).

[68] 12 N.Y. Supp. 444 (1890).

In all of the above decisions, the court either expressly, or impliedly indicated that the "common interest" which existed between all members of the class existed in the fund, in the trust, or in the tangible property. Conversely, if individuals have separate and distinct interests which do not inhere in an ascertained physical subject, many cases hold that no relief by means of the class remedy can be obtained. This view is expressly shown by two recent decisions.

In the first,[69] the question presented to the court was whether three creditors of an insolvent bank could maintain an action against the bank directors to enforce a statutory liability for declaring dividends when the corporation was insolvent. The three representatives were depositors of the bank, and they sought to represent more than 1500 other depositors whose deposits amounted to more than $400,000. The chancellor sustained the motion of the defendants to require plaintiffs to elect whose cause of action they would prosecute and in whose name the same would be prosecuted. The court of appeals sustained the trial chancellor on the ground that the claim of each of the creditors of the bank was distinct and individual and there was "no common security or fund in which they have a collective or community of interest." Each person was only a creditor of the bank and had a separate right of action. Although it was recognized that the claims of the depositors arose under the same statute and involved the same questions of law and fact, their claims were entirely separate and distinct and one could not sue for all. The language of the court was:

> And as pointed out in notes and cases cited under section 25 [the class section] of the Civil Code of Practice, it is not sufficient that the rights of the various creditors may be determined upon the same law and facts, or that the common or general interest be in questions of law raised by the pleadings, but there must be a common and general interest in the subject matter of the action to authorize one or more to maintain an action for all.

The court was undoubtedly hesitant to grant the type of relief requested here, fearing that such a decision would amount to a precedent that all the creditors of a common debtor would be able to sue the common debtor in a representative type action. But the court completely overlooked the fact that the whole controversy could have been completely disposed of by the simple device of the representative suit.

In the second decision[70] a class suit to impress a trust upon the proceeds of certain checks collected by the defendant was refused. After reviewing familiar instances in which class suits were permitted,[71] the court

[69] Lile v. Kefauver, 244 Ky. 486, 51 S.W.2d 473 (1932).

[70] Bickford's v. Federal Reserve Bank of N.Y., 5 F. Supp. 875 (S.D. N.Y. 1933).

[71] Stewart v. Dunham, 115 U.S. 61, 5 Sup. Ct. 1163 (1885) (suit by judgment creditor in behalf of all such creditors to reach equitable assets of debtor); Carnahan

recognized that if a court has jurisdiction of the subject matter, it can declare the rights of the absent persons whose interest in the subject matter is identical with that of the parties before the court. But where the interests are separate and distinct and are merely separate claims existing against the adversary, although involving common questions of law or fact, the court does not have the power to permit a class suit.

These decisions indicate that the "common or general interest" requirement is satisfied when there is a res before the court and the individual claimants have the same interest in the subject of litigation. Although the interests of the various members of the group are separate and distinct, when their interest is connected by the common bond of the tangible property, there is a "question" involving a "common or general interest." This meaning of "common or general interest" satisfies the code requirement.

SEPARATE AND DISTINCT RIGHTS AND COMMON RELIEF

Suppose that an upper riparian owner is depositing refuse into a stream which flows into the lands of several lower owners, making it impossible for the lower owners to use the water for domestic and other purposes. Or suppose that an individual in the community is committing a nuisance by permitting noxious fumes to escape from his premises, thus interfering with the enjoyment of many persons nearby. Is such a situation, where each individual would have a separate and distinct right of action against the upper owner or the individual committing the nuisance, a proper one for the class device? It has been thought by at least one court[72] that such actions are not representative suits. But many decisions permit such actions to be brought in a "representative" form where each of the individuals affected has a separate right of action against the adversary, and each member of the group could have sued alone or where they could have joined together in the action. It may be stated, therefore, that the decisions recognize a "representative action" when the "representative" seeks the same or identical relief to which all would be entitled and which would benefit all in the same way.[73]

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v. Peabody, 31 F.2d 311 (S.D. N.Y. 1929) (suit by heirs on behalf of all); Guffanti v. National Surety Co., 196 N.Y. 452, 90 N.E. 174 (1909) (suit by creditor on behalf of many to get payment from fund).

[72] Linden Land Co. v. Milwaukee Electric Ry. & Lighting Co., 107 Wis. 493, 83 N.W. 851 (1900).

[73] Coachella Valley Cty. Water Dist. v. Stevens, 274 Pac. 538 (Cal. 1929); Jones v. Newlon, 81 Col. 25, 253 Pac. 386 (1927); Lockwood v. Lawrence, 77 Me. 297 (1885); Berle, Chamberlain v. Dawkins, 150 Misc. 911, 271 N.Y. Supp. 579 (1934); Kelly v. Tiner, 91 S.C. 41, 74 S.E. 30 (1912); Perkins & Co. v. Diking Dist., 162 Wash. 227, 298 Pac. 462 (1931); Trade Press Pub. Co. v. Moore, 180 Wis. 449, 193 N.W. 507 (1923); *contra,* Certia v. Notre Dame, 82 Ind. App. 542, 141 N.E. 318 (1923).

In *Climax Specialty Co. v. Seneca Button Co.*[74] the plaintiff, who sued for himself and "for the benefit of all others who are similarly situated," owned certain mills and water rights on the Seneca River. The defendant had raised an upstream dam to such an extent that approximately one-half of the water was diverted into another race. The plaintiff demanded judgment that the defendant be required to restore the dam to its former condition and be enjoined from interfering with the flow of water to which the plaintiff and others were entitled. The defendant challenged the right of the plaintiff to maintain a "representative" suit, arguing that there is no common question among the owners in severalty of water rights in the sense which the "common question" principle was used in the code. The court, however, rejected the defendant's contention in these words:

> . . . it would seem to be clear that that interest in the subject matter of this action and in the relief sought is of a kind which would authorize them all to join as plantiffs, if that method were chosen, or each proprietor could sue alone, and one can sue for all.

Here the court recognized the convenience of the class device[75] for in granting the relief to the plaintiff, the other members of the affected class would thereby benefit. The court here tied the class device to permissive joinder of parties. If joinder is permitted under the pertinent code provisions, then it would seem that one could sue for all, for each is entitled to the identical relief.

In *Greer v. Smith*[76] the court permitted a "representative" suit where many persons who owned residences in a certain area in New York City were injured in the use of their property by the acts of the defendant in emptying refuse into a pond and thereby polluting a brook which passed the property of the various owners. The court found it unnecessary for each of the 100 owners to come into court with his own complaint and concluded that this was a situation which was included in the "common or general interest" clause.

It is to be noted in the above decisions that the relief sought by one would have the effect of discontinuing the wrong-doing which would affect all the members of the group. In the case of enjoining the pollution of a stream, if one of the plaintiffs had sued alone and not in a "representative" capacity, the injunction would have stopped the nuisance and all persons similarly situated would have been benefited. It may be

[74] 54 Misc. 152, 103 N.Y. Supp. 822 (1907).

[75] These cases should not be thought of as "representative" suits in the sense that one stands for another as in the decisions involving voluntary organizations, but rather the term "class suit" should be used to identify the litigation as a convenient device to clear up a multi-party controversy.

[76] 155 App. Div. 420, 140 N.Y. Supp. 43 (1913).

said then that it does not add anything to bring the suit "for all others similarly situated." But in other decisions the identical relief sought would not have affected all, and still the class device has been approved.

In *Hawarden v. Youghiogheny & Lehigh Coal Co.*[77] the plaintiff, a retail coal dealer alleged two causes of action 1) for damages by reason of the defendant's malicious acts in destroying his business and 2) for an injunction to restrain the conspiracy which affected plaintiff's business and the others who were similarly situated. The defendants, wholesalers of coal, allegedly had conspired to sell coal only to certain retailers, thus driving the plaintiff and some other retailers out of business. The court enjoined the defendants from continuing the conspiracy and permitted the action to be brought in the representative form. The common question was found in the legality of the conspiracy. "The question as to the legality of this conspiracy is certainly one of common and general interest to all persons against whom it was directed and is being enforced," stated the court. The same acts of conspiracy affected numerous retailers and although the injunction, if plaintiff had sued for himself only, would not have been effective to restrain the acts of conspiracy as they affected the other retailers, the court permitted the class device.

In *Trade Press Publishing Co. v. Milwaukee Typographical Union*[78] ten plaintiffs, all engaged in the printing business in Milwaukee and representing all the employing printers of the city, sued to enjoin a conspiracy by the defendant union which attempted to force the plaintiffs to enter into closed shop contracts. The court permitted the plaintiffs to sue not only for themselves but for all other employing printers of the city. Convinced that this conspiracy was aimed at a class of persons the court said that this was a "situation where one or more of a class may sue for their own benefit and for the benefit of others having a similar interest in obtaining the relief demanded."[79]

The common interest that exists in these cases consists not merely in the subject matter involved but in the relief demanded which is identical to each member of the class and in the "common question" presented.

It has been questioned whether these are truly representative suits.[80] In the sense that one of the members of the group "represents" and stands in the place of another to enforce his claim, they are not representative suits. These actions are certainly not "representative" in the same sense as suits involving an association which seeks to enforce a joint right of

[77] 111 Wis. 545, 87 N.W. 472 (1901).

[78] 180 Wis. 449, 193 N.W. 507 (1923).

[79] *Id.* at 452, 193 N.W. at 510.

[80] See discussion in Blume, *The Common Questions Principle in the Code Provision* 30 MICH. L. REV. 878, 897 (1932). See the various meanings of "representative" in McLaughlin, *The Mystery of the Representative Suit,* 26 GEO. L. J. 878 (1938).

action against the defendant, or actions whereby one member of a church organization enforces a right for the members of the congregation. The *Hawarden* and *Trade Press* cases are substitutes for permissive joinder of parties, and the court for purposes of convenience in avoiding a multiplicity of actions permits one to sue for all who find themselves in the situation. Although the Wisconsin court in *Linden Land Co. v. Milwaukee Electric R.R. & L. Co.*[81] criticized the statement that these situations were representative suits, they are in form representative and a convenient device for the settlement of a litigious controversy.

## SEPARATE AND DISTINCT RIGHTS AND A COMMON QUESTION OF LAW OR FACT

Many statements have been made to the effect that:

> Mere community of interest in the questions of law or fact at issue in a controversy or in the kind of relief to be afforded does not go far enough to warrant a class suit.[82]

Yet the fact remains that in many cases the only question of common or general interest consisted of an identity of questions of law or fact. In all of the cases discussed in the preceding section there was presented a "question" of law or fact affecting the various members of the group. Have the defendants by their action of polluting the stream injured the various plaintiffs?[83] Have the defendants by their act of diverting water from a dam injured the various plaintiffs?[84] Have the defendants by their act of conspiracy deprived the plaintiffs of their right to a livelihood?[85] These questions are common to all the members of the group. And where the relief sought by one member of the group affects each member in precisely the same way, the courts have permitted the action to be maintained in the representative form and have construed the common question to include a common question of law or fact.

The problem whether a class action may be maintained where there is a community of questions of law or fact is complicated by the fact that it is identified with another problem. This is the problem of whether equity has jurisdiction to prevent a multiplicity of suits arising from com-

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[81] 107 Wis. 493, 83 N.W. 851 (1900).

[82] Spear v. H. V. Greene Co., 246 Mass. 259, 140 N.E. 795 (1923). See also Jones v. Healey, 56 N.Y.S.2d 349 (1945).

[83] Greer v. Smith, 155 App. Div. 420, 140 N.Y. Supp. 43 (1913).

[84] Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152, 103 N.Y. Supp. 822 (1907).

[85] Trade Press Publishing Co. v. Milwaukee Typographical Union, 180 Wis. 449, 193 N.W. 507 (1923).

mon questions of law or fact.[86]. Whether equity has jurisdiction to handle legal claims which arise from a common question of law or fact is distinct from the question whether the code in administering both law and equity, can be construed in such a manner so as to apply to a question of law or fact which is of "common or general interest" of many persons. The code provision has thus been construed and rightly so. The only community of interest in the nuisance and riparian owner cases discussed above were questions of fact. Each member of the group had a distinct and separate right arising from one act of the defendant which required a determination of the common fact question.

In *Skinner v. Mitchell*[87] one taxpayer sought on behalf of 874 similarly situated taxpayers to compel the county treasurer to issue tax receipts for money paid by the various taxpayers to the county through a bank which was a county depository. One of the grounds for the motion to quash the alternative writ of mandamus was that there was a misjoinder of parties because the plaintiff had no right to maintain the action on behalf of the other taxpayers since in each instance there was a separate transaction. The court, relying on Pomeroy's text dealing with the prevention of a multiplicity of suits stated:

> In the present case the community of interest lies in the legal questions involved, the similarity of the situation of the several taxpayers, and in the fact that the character of relief sought would be applicable to all. The case is one falling within the code provision and there was no misjoinder.

Not only, therefore, may the "question" refer to a common question of fact, but to a common proposition of law.[88]

## THE MEANING OF COMMUNITY OF INTEREST

The code requires that the point in litigation or the "question" must be one of common or general interest of numerous persons. This community of interest which is necessary to satisfy the code provision must be one of three types:

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[86] For a complete discussion see POMEROY, EQUITY JURISPRUDENCE § 255-281 (5th ed. 1941).

[87] 108 Kan. 861, 197 Pac. 569 (1921). This was an action in mandamus, a legal remedy, yet the court discusses whether there is equitable jurisdiction to prevent a multiplicity of actions.

[88] Of course, many persons who are interested in a *general* question of law would not be permitted to join together or to maintain a class suit. A distinction must be made between a case like *Skinner v. Mitchell* where the rights of numerous persons arise from a common source of law and a case where a negligent defendant injures numerous persons in successive independent occurrences; although all the persons injured are interested in the question of law (negligence) it is not a *common* question of law since the rights are not derived from a common source.

1) A community of interest in a voluntary or unincorporated association, where the members of the group do not stand out as individuals but are anonymous in the crowd. The group as a whole will be benefited and not the individual as such, or

2) A community of interest in a res which is the subject matter of the litigation. Although the interests of the various members of the group are separate and distinct, the community of interest lies in the subject matter of litigation, or

3) A community of interest in the facts of the case or the legal problem presented and in the identical relief sought, although the members of the group have separate and distinct interests, and their claims for relief arise from the same occurrence or series of occurrences.

This is the extent to which the term "community of interest" has been used under the decisions construing the code provision. Does the court have the power to go further and extend the meaning of community of interest to cases involving a class, having separate and distinct interests, where each member of the class is entitled to *separate* relief, when their legal claims arise from the same transaction or occurrence (or series thereof) and involve the same or similar questions of law or fact?

## THE PROBLEM CONFRONTING THE COURTS TODAY

The courts in the past score of years have with increasing frequency been called upon to determine the question whether a class suit may be maintained where numerous persons acquire separate and distinct interests from the same act or similar acts of the adversary. This problem may be exemplified by examining the factual situation in a recent case. In *Burke v. Illinois Bell Telephone Co.*[89] the Illinois Commerce Commission issued an order requiring telephone companies to revise, print and distribute directories at least semi-annually.[90] The Illinois Bell Company neglected to revise its directories for subscribers of telephones in Chicago and the suburban area. The plaintiff brought action on behalf of himself and all other subscribers who were similarly affected for damages which the court called a "request for refund" under the provisions of the Public Utilities Act. Here is a situation in which hundreds of persons have claims against the telephone company which is by law required to perform a particular act and has failed to do so. Each of the subscribers has a claim for reparation which could be determined in *one* action by means of the class device. The question at issue is: may this multi-party controversy be determined and disposed of by means of the class device under the code provision?

[89] 348 Ill. App. 529, 109 N.E.2d 358 (1952).

[90] If the exchange served more than 1000 subscribers.

The courts that have been confronted with the request to permit one person, whose right arises from a transaction or occurrence which similarly affects numerous other persons, to maintain an action in a representative form for himself and all others affected have consistently denied relief. In view of what has been said, this is not illogical. To say that one person who has a distinct claim for his own personal damage can "represent" another who is not before the court in the prosecution of his claim against the same adversary would be stretching the principle of "representation" far beyond the contemplation of the codifiers. No one individual can "represent" another in his claim. Each person who has a distinct legal interest, whether arising from a common source or not, is master of his own claim. No one person can recover a judgment for an aggregate sum and be permitted to hold the sum for the benefit of all members of the group. There is, and should be, a tendency on the part of courts not to permit one to claim money for another person even though the effect of permitting the class suit would be to avoid multiplicity of litigation. That is the reason why the state courts in construing the code provision consistently deny the propriety of the class suit device where one or more seek to represent a group of persons who have separate and distinct claims, and each one is entitled to distinct relief.[91]

The reasons given for denying the propriety of the class device in this type of case are many. Relief has been denied on the ground that there is "no common interest in the question involved,"[92] that such suits do not apply to actions at law,[93] that there is no fund or subject matter

[91] Cherry v. Howell, 4 F. Supp. 597 (E.D. N.Y. 1931); Bickford's v. Federal Reserve Bank of N.Y., 5 F. Supp. 875 (S.D. N.Y. 1933); Michelsen v. Penney, 10 F. Supp. 537 (S.D. N.Y. 1934); Weaver v. Pasadena Tournament of Roses Assn., 32 Cal.2d 833, 190 P.2d 626 (1948), *aff'd*, 198 P.2d 514 (1948); City of Lakeland v. Chase Nat. Co., 159 Fla. 783, 32 So.2d 833 (1947); Newberry Library v. Bd. or Education, 387 Ill. 85, 55 N.E.2d 147 (1944); Kimes v. City of Gary, 224 Ind. 294, 66 N.E.2d 888 (1946); Garfien v. Stiglitz, 260 Ky. 430, 86 S.W.2d 155 (1935); Thorn v. Hormel & Co., 206 Minn. 589, 289 N.W. 516 (1940); Niehaus v. Jos. Greenspon's Son Pipe Corp., 237 Mo. App. 112, 164 S.W.2d 180 (1942); Archer v. Musick, 147 Nebr. 344, 23 N.W.2d 323 (1946), *rev'd on other grounds*, 25 N.W.2d 908 (1947); Society Milion Athena v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939); Stevens v. Cincinnati Times Star Co., 72 Ohio St. 112, 73 N.E. 1058 (1905); State *ex rel.* Gerspacher v. Coffinberry, 157 Ohio St. 32, 104 N.E.2d 1 (1952); Covert v. Nashville C. & St. L. RR. Co., 208 S.W.2d 1008 (Tenn. 1948); Matthews v. Landowners Oil Assn., 204 S.W.2d 647 (Tex. 1947).

[92] Watson v. Santa Carmelita Mut. Water Co., 58 Cal. App.2d 709, 137 P.2d 757 (1943); Burke v. Ill. Bell Telephone Co., 438 Ill. App. 529, 109 N.E.2d 358 (1952); Kimes v. City of Gary, 224 Ind. 294, 66 N.E.2d 888 (1946); Union Light Heat & Power Co. v. Mulligan, 177 Ky. 662, 197 S.W. 1081 (1917); Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937); Davies v. Columbia Gas & Elec. Co., 151 Ohio St. 417, 86 N.E.2d 603 (1949).

[93] Arthur Rubloff & Co. v. Leaf, 347 Ill. App. 191, 106 N.E.2d 735 (1952); Nie-

involved,[94] that the individuals in the group are not united in interest,[95] or that the court lacks jurisdiction of small claims and that the case was not within the jurisdiction of the trial court.[96] Many courts have denied relief because a determination of the action would not be binding upon those persons who are not personally before the court.[97] The theory of these courts is that a class suit is only operative when the determination made would be binding upon all members of the class, and where one person has a distinct claim against an opponent no other person can prejudice his rights without his consent. A fair test of a class suit according to many courts is "whether or not the judgment is conclusive for or against the members of the class represented . . . a result which could not be extended to entirely separate claims of the respective members."[98]

### Cases Involving Public Utility Consumers

There have been, in recent years a number of decisions in which numerous consumers of public utility services have been entitled to refunds of overcharges as a result of a single act on the part of the utility. Although it would seem highly desirable to settle in one action the various claims of the innumerable parties, the courts have not permitted the use of the class device for recovering such overcharges or demands.[99] The struggle of the court on the one hand to obviate a multiplicity of suits and to provide an expeditious remedy to all individuals involved, and on the other to comply with the requirements of the code provisions can be best illustrated by *Davies v. Gas & Electric Co.*[100] A consumer of

haus v. Jos. Greenspon's Son Pipe Corp., 237 Mo. App. 112, 164 S.W.2d 180 (1942).

[94] Cherry v. Howell, 4 F. Supp. 597 (E.D. N.Y. 1931); Watson v. Santa Carmelita Mutual Water Co., 58 Cal. App.2d 709, 137 P.2d 757 (1943); Peoples Store of Roseland v. McKibbin, 379 Ill. 148, 39 N.E.2d 995 (1942); Garfien v. Stiglitz, 260 Ky. 430, 86 S.W.2d 155 (1935); Thorn v. Hormel & Co., 206 Minn. 589, 289 N.W. 516 (1940); Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938).

[95] Hart v. E.P. Dutton & Co., 93 N.Y.S.2d 871 (1949); Weaver v. Pasadena Tournament of Roses Assn., 190 P.2d 626 (Cal. 1948), *aff'd*, 198 P.2d 514 (1948).

[96] Davies v. Columbia Gas and Elec. Co., 151 Ohio St. 417, 86 N.E.2d 603 (1949); Union Light Heat & Power Co. v. Mulligan, 177 Ky. 662, 197 S.W. 1081 (1917).

[97] Acton v. Johnson, 240 S.W.2d 541 (Ky. 1951); Weaver v. Pasadena Tournament of Roses Assn., 190 P.2d 626 (Cal. 1948), *aff'd*, 198 P.2d 514 (1948); City of Lakeland v. Chase Nat. Co., 159 Ala. 783, 32 So.2d 833 (1947); Brenner v. Title Guarantee & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937).

[98] Briggs v. Technocracy Inc., 85 N.Y.S.2d 735 (1948).

[99] Davies v. Columbia Gas & Elec. Co., 151 Ohio St. 417, 86 N.E.2d 603 (1949), *reversing*, 79 N.E.2d 327 (Ohio App. 1948); Union Light Heat & Power Co. v. Mulligan, 177 Ky. 662, 197 S.W. 1081 (1917); Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938).

[100] 151 Ohio St. 417, 86 N.E.2d 603 (1949), *reversing*, 79 N.E.2d 327 (Ohio App. 1948).

natural gas sued the utility on behalf of himself and other consumers who had purchased gas during the previous ten year period. He alleged that the defendant was engaged in a conspiracy to dilute the natural gas distributed to consumers, by injecting into the mains inert flue gas in order to defraud all consumers. About 700,000 consumers had been overcharged because of this dilution. Plaintiff's prayer was for injunctive relief, an accounting and damages. The Ohio court of appeals in a convincing opinion held that this was a proper occasion for the class device.[101] The court noted that no distinction is made between law and equity and that the code provision is to be applied if there is a common question of law or fact. Since the rights of action arose from a common source and represented a like interest the matter should be litigated in one suit.

Upon appeal, however, the supreme court reversed stating:

> Here, the primary object of the action is the recovery of money in the form of damages for all those who are allegedly defrauded by the claimed deceitful practices of the defendants during a specified number of years. . . . Such amounts would depend upon the peculiar facts surrounding the particular person . . . [and] because of the diverse conditions and circumstances referred to, it cannot be said that there is a community of interest plus a right of recovery based on the same essential facts between plaintiff and those he assumes to represent. . . .[102]

The court further noted that some of the individuals who might be entitled to recovery might not wish to sue or might wish to sue for breach of contract or restitution and not damages.

In *Union Light Heat and Power Co. v. Mulligan*,[103] the company supplied gas under a franchise which permitted it to charge a certain amount per thousand cubic feet of gas consumed. For some time the company had been demanding advance payments to secure payment of gas consumed contrary to their franchise, and the plaintiff demanded that the company return the money so paid. Thirty-three plaintiffs joined asserting claims that aggregated only a small sum. The court made a futile attempt to determine the precise nature of the "common interest" required under the code provision, and refused to permit the plaintiffs to sue for other consumers.

Where consumers of public utilities seek to restrain illegal charges or to determine rights by way of declaratory judgment the obstacles of the preceding decisions do not interfere with the propriety of the class device. In *Kovarsky v. Brooklyn Union Gas Co.*[104] the plaintiff sought an

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[101] 79 N.E.2d 327 (Ohio App. 1948).

[102] 151 Ohio St. 417, 86 N.E.2d 603 (1949).

[103] 177 Ky. 662, 197 S.W. 1081 (1917).

[104] 279 N.Y. 304, 18 N.E.2d 287 (1938).

injunction, a declaration of rights and an accounting against the gas company for charging services for reconnections in violation of the Public Service Law. The court said:

> It is proper here to allow the representative action for the injunction and the declaratory judgment, but not for the accounting. To maintain a representative action the plaintiff must show that he has a cause of action and that he is representative of a common or general interest.

### CASES INVOLVING FRAUD

Many attempts have been made to use the class device to dispose of the claims of numerous persons who have been defrauded by misrepresentations pursuant to a common design or conspiracy. Although the misrepresentations are the same or similar in their nature, no court has as yet permitted the victims to present their claims via the class device. However laudable it may be for the courts to provide a remedy whereby all victims may have an inexpensive and expeditious settlement of their claims, the courts have consistently refused to permit the claims to be prosecuted under the code section dealing with class suits.[105]

The two most enlightening cases in this regard are *Society Milion Athena v. National Bank of Greece*[106] and *Brenner v. Title Guarantee & Trust Co.*[107] In the former an action was brought by two depositors for themselves and all others to compel the return of money deposited by them and others in a bank which was not authorized to receive deposits under the limited license issued to it by the New York Superintendent of Banks. The Court of Appeals of New York reasoned that while it is laudable to avoid a multiplicity of actions no class action could be maintained. Each person wronged may determine for himself the remedy which he will seek for the wrong to him and "separate wrongs to separate persons, though committed by similar means and even pursuant to a single plan, do not alone create a common or general interest in those who are wronged."[108] There were in this case upwards of 5000 persons.[109]

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[105] Society Milion Athena v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939); Brenner v. Title Guarantee & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937); Fetherston v. National Republic Bancorp, 280 Ill. App. 151 (1935); Cherry v. Howell, 4 F. Supp. 597 (E.D. N.Y. 1931); Note, 114 A.L.R. 1015.

[106] 281 N.Y. 232, 22 N.E.2d 374 (1939).

[107] 276 N.Y. 230, 11 N.E.2d 890 (1937).

[108] 281 N.Y. 282, 292, 22 N.E.2d 374, 377 (1939).

[109] It is surprising to note that in this case the plaintiffs could have properly joined as plaintiff. The court would have permitted joinder. But to fulfill the requirements of permissive joinder under the N.Y. Civil Practice act it is necessary that the claims of the several plaintiffs must arise from the same transaction or series of transactions, a requirement that would not seem to be fulfilled if there are completely "separate wrongs" to "separate persons."

In the *Brenner* Case, plaintiffs alleged that they purchased certain certificates secured by a mortgage on property in New York. They further alleged that they and many others were induced to purchase such certificates relying upon the fraudulent misrepresentations of the defendant. In denying the propriety of the action the court pointed out that each buyer of a certificate acquired an individual right, based upon the wrong to the *individual* buyer and that the purpose of a "representative" action is to permit an adjudication of a question in which others are interested only where the decree is conclusive for or against those members who are "represented."

In these cases there may be a single design or scheme to defraud innocent victims which scheme results in one act of fraud upon which many persons rely,[110] or there may be a series of actions which are similar. The rights of the various victims arise from a common source, and in such a situation there is certainly a "common question" of law or fact involved. By permitting joinder the courts recognize the fact that there are common questions of law or fact arising from the series of transactions. Therefore, the denial of class suits in the misrepresentation cases must be based on other grounds. The subjective nature of the tort, the separate acts of fraud, or the individual circumstances that may exist in order to impose liability—such as reliance and damage—all combine to cast doubt on the propriety of the class device. While it cannot be denied that each individual has a right of action against the wrongdoer, the individual circumstances and defenses that may arise, the individual privilege that each person has to prosecute his claim or not and the various remedies that he may assert such as rescission, restitution, or damages all militate toward the frustration of the class suit device.

Even in those cases where the relief sought by all is identical, such as rescission, the courts hold the class suit is not the proper procedural remedy. In *Acton v. Johnson*[111] the plaintiff, on behalf of himself and all others, sought rescission of certain contracts under which the defendants had sold certain lots in a newly formed subdivision to the plaintiff and one hundred and ninety-eight others. These contracts, it was alleged, had been entered into relying upon certain fraudulent statements made to each *obligor.* The court dismissed the plaintiff's petition on the ground that the representative suit could not be binding on the others, and hence did not come within the code provision.[112]

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[110] *E.g.,* Akely v. Kinnicut, 238 N.Y. 466, 144 N.E. 682 (1924) (misleading prospectus).

[111] 240 S.W.2d 541 (Ky. 1951).

[112] In other cases only that part of the petition that relates to the suit on behalf of others is dismissed and the plaintiff is permitted to amend. Bickford's v. Federal Reserve Bank of N.Y., 5 F. Supp. 875 (S.D. N.Y. 1933).

### ACTIONS FOR REFUNDS

Several cases have arisen in which many persons have made payments which were thought to be obligatory at the time, but were later found to be unenforceable, entitling these persons to a refund.[113] Although the person or firm holding the payments is not entitled thereto, and although each person making the payment has a lawful right to the refund, the recovery thereof cannot be had by means of the class suit. In *Thorn v. Hormel & Co.*[114] it was held that plaintiffs could not recover money paid to defendant packing house as a result of the defendant's shifting to the producer of hogs, the processing tax required under the Agricultural Adjustment Act. After the Act was held invalid, the defendant withheld the tax and the plaintiffs, on behalf of themselves and others similarly situated, sought to recover the tax so retained. On appeal from an order sustaining a demurrer the court refused to allow a class action because there were separate transactions between each plaintiff and defendant for which each had an adequate remedy at law.[115] The net effect of the decision is that the defendant either must be subjected to numerous suits in order for each of the producers to collect their money, or the defendant may be unjustly enriched in retaining the processing tax collected.

### CASES INVOLVING DEPOSITORS

If numerous general creditors of a banking association seek to recover deposits to which they are entitled as a result of wrongful acts on the part of the debtor, they are required to do so by means other than the class suit.[116] In *Lile v. Kefauver*[117] three persons, for themselves and all other depositors of a state bank, filed a bill in equity against the directors of the bank alleging that the directors contrary to law, had declared and paid a dividend on the capital stock at a time when the bank was insolvent. There were more than 1500 depositors and creditors whose aggregate deposits amounted to more than $400,000. The court determined

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[113] Thorn v. Hormel & Co., 206 Minn. 589, 289 N.W. 516 (1940); Peoples Store of Roseland v. McKibbin, 379 Ill. 148, 39 N.E.2d 995 (1942); State *ex rel.* Gerspacher v. Coffinberry, 157 Ohio St. 32, 104 N.E.2d 1 (1952).

[114] 206 Minn. 589, 289 N.W. 516 (1940); 24 MINN. L. REV. 703 (1940).

[115] Note here the court speaks of separate and distinct transactions; yet the rights of the parties involve a common question of law which should satisfy the code provision. *Accord,* Smith v. Sparks Milling Co., 219 Ind. 576, 39 N.E.2d 125 (1942).

[116] Lile v. Kefauver, 244 Ky. 486, 51 S.W.2d 473 (1932); Bickford's v. Federal Reserve Bank, 5 F. Supp. 875 (S.D. N.Y. 1933); Michelsen v. Penney, 10 F. Supp. 537 (S.D. N.Y. 1934); Fetherston v. National Republic Bancorp., 280 Ill. App. 151 (1935).

[117] 244 Ky. 486, 51 S.W.2d 473 (1932).

that mere numbers will not authorize joinder nor permit some of the group to sue for others. Before some could sue for all, there must be a tangible something such as a trust fund, an insolvent estate, or liens on the same property in which many persons have the necessary or common interest. Separate and distinct claims against the same person, the court indicated, have never been sufficient.[118]

The courts in these cases look upon the claims of the several depositors as separate and distinct contracts and refuse to become enveloped in a doctrine which would permit all creditors of a debtor to bring suit in one action merely because the debtor is common to all. No court or system of procedure would permit all claims by all parties to be brought in one action merely to avoid a multiplicity of actions, but where the claims of the several parties arise from a common source, or from a series of contracts which tie the separate and distinct claims together, there seems to be some ground for a relaxation of the rule denying the right to bring an action either by way of joinder of parties or the class device.

### Actions by Employees

A few cases have arisen in the state courts under the Fair Labor Standards Act[119] in which employees seek to recover compensation for overtime work. Where the state courts have been presented with the problem, they have followed the line of decisions in other class suit cases and have refused to permit one or a few employees to sue and recover for all.[120] In *Archer v. Musick*[121] the plaintiff, on behalf of himself and as assignee of thirty-nine other employees, sought to recover overtime pay and attorney fees claimed to be due on account of service performed in excess of forty hours per week. Denying the right of the plaintiff to sue for all even though he held assignments from the other employees, the court stated:

> We do not think that this is a class action. . . . An action may not be maintained as a class action by a plaintiff in behalf of himself and others unless he has the power as a member of the class to satisfy a judgment in behalf of all members of the class. No one would contend here that plaintiff could satisfy judgments obtained on the 39 causes of action on any class action theory.

And in *Niehaus v. Jos. Greenspon's Son Pipe Corp.*[122] the Missouri court said:

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[118] But compare the injunction cases discussed above.

[119] 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-209 (1952).

[120] Archer v. Musick, 147 Nebr. 344, 23 N.W.2d 323 (1946), *rev'd*, 25 N.W.2d 908 (1947); Niehaus v. Jos. Greenspon's Son Pipe Corp., 237 Mo. App. 112, 164 S.W.2d 180 (1942) (obiter); Lonsford v. Burton, 267 P.2d 208 (Ore. 1954).

[121] 147 Neb. 344, 23 N.W.2d 323 (1946); *rev'd*, 25 N.W.2d 908 (1947).

[122] 237 Mo. App. 112, 164 S.W.2d 180 (1942).

> The case at bar incidentally does not purport to be a class suit and we may therefore pass that question by, save only to say that the rule which permits a few persons to sue for themselves and others similarly situated is one of equitable cognizance and in this state is not to be extended in its application to cases wholly lacking in equitable features and triable only as actions at law.[123]

It is interesting to compare these decisions with *Masetta v. National Bronze & Aluminum Foundry Co.*[124] where plaintiff, as representative of many employees, sought under terms of a collective bargaining agreement to reinstate the employees to their rightful jobs and to recover wages due to each of the employees. The court permitted the action to be brought as a class suit and distinguished this case from other suits on the ground that the rights of the employees grew out of the same agreement and the contract was entered into for the benefit of the plaintiff and other employees. Though each of the members of the union was entitled to different amounts of relief, the court said:

> It does not seem that the fact that in the instant case, a court of equity may be required to adjudicate the separate and individual claims of a number of members of a union and that the claims with respect to compensation may differ in amount should be reason to prevent maintenance of a class suit under the code where all of the rights sought to be enforced arise from a common source, to wit the same contract.

Where the interests of the members of the union arise from a common source, the collective bargaining contract, the court did not hesitate to grant relief to the employees.[125] Problems may arise in giving each employee his compensation. But where the interests of the employees arise from the statute giving the claims for relief, although there are common questions of law or fact, no class suit is permitted.

## GAMING CASES

The same principle of precluding the class device has been applied to a number of cases involving gaming or betting where many hundreds of persons are induced to pay money to participate in a contest or other betting transaction.[126]

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[123] The court seems to overlook the fact that the code provides for an amalgamation of law and equity and that the code provision should apply to both legal and equitable claims.

[124] 107 N.E.2d 243 (Ohio App. 1952). On the appeal the court of appeals was reversed, 159 Ohio St. 306, 112 N.E.2d 15 (1953).

[125] *But cf.* Ass'n of Westinghouse Sal. Emps. v. Westinghouse Elec. Corp., 75 Sup. Ct. 488 (1955).

[126] Stevens v. Cincinnati Times Star Co., 72 Ohio St. 112, 73 N.E. 1058 (1905); Ballin v. Los Angeles County Fair, 43 Cal. App.2d 884, 111 P.2d 753 (1941). *Contra,* Kimbrough v. Parker, 344 Ill. App. 483, 101 N.E.2d 617 (1951).

A novel scheme to sell newspapers was promoted by the Cincinnati Times Star. In order to encourage subscriptions the paper decided upon a plan whereby individuals would be induced to pay fifty cents to the company. Part of the payment was applied to the price of a subscription, the remainder was to be awarded to those who made the most nearly correct predictions of the total vote which would be cast for a state official at the next election. After $200,000 had been collected by such means, but before prizes were awarded, the plaintiff brought suit on behalf of himself and all other contestants to recover the money. The court refused plaintiff the privilege of representing all the contestants. Since the contest had not as yet been completed the court pointed out that the other contestants may not have repented their decisions to enter the contest and may not have wanted their contracts rescinded; hence there was no community of interest among the class.[127]

In *Ballin v. Los Angeles County Fair*,[128] the plaintiff, who had wagered on horses, sought to recover money allegedly due to him and all other wagerers because the defendant had erroneously calculated "breakage" from the winnings. He sought to recover some $200,000 for all racing enthusiasts although his claim was only for $3.60. Relying on the fraud and consumer cases discussed above, the court curtly denied the plaintiff's right to maintain the suit in the representative form.

But in *Kimbrough v. Parker*[129] the Puritan Church, under the auspices of one of its chancellors, undertook the promotion of a contest to build a Puritan meeting house, the contest being advertised in several newspapers. The contest was a fraud, the solution did not require normal intelligence, and there was apparently no intention of awarding any prizes. Some $230,000 was collected and the five plaintiffs sought to recover the money from the holder. Contrary to the *Cincinnati Times Star* case, the court decided that this suit was properly maintained as a class suit. Relying on the facts that there was here a common fund collected, that the inducements were substantially the same for all contestants, and that the plaintiffs were fairly representative, the court sustained the chancellor. It would seem that this case cannot be distinguished from the *Times Star* case since in both cases there was a fund collected and in both there were

[127] The court gives a hint as to the basic reason for denying the action in the representative form when it says: "In passing we should take note of the fact that there would have followed as a necessity from the sustaining of plaintiff's contention, the ascertainment by the court through its receivers, of the names and addresses of the 400,000 contributors and the distribution to each of his half dollar, it must be apparent that the magnitude and difficulties of the task would be immeasurably greater than any good which the painful working out of the remedy would bring about."

[128] 43 Cal. App.2d 884, 111 P.2d 753 (1941).

[129] 344 Ill. App. 483, 101 N.E.2d 617 (1951).

substantially the same inducements. Yet the Illinois Court in the *Kimbrough* case, apparently seeing an opportunity to clean up in one sweep this multiple litigation, permitted the action to be brought as a class suit.

### MISCELLANEOUS DECISIONS

Many decisions in this field do not fit neatly into any classification. In *Weaver v. Pasadena Tournament of Roses Assn.*,[130] the California court determined that four persons could not sue for all who were wrongfully denied admission to the Rose Bowl game, since each individual denied admission was not interested in the claim of the others. The question as to each individual plaintiff is whether

> he "as a person over twenty-one years" presented himself and demanded admittance to the game, whether *he* tendered the price of the ticket, and whether, as to *him* the refusal of admission was wrongful under section 53 of the Civil Code, entitling him "to recover . . . his actual damages, and one hundred dollars in addition thereto."

Since a decision favorable or adverse to any one of the plaintiffs could not determine the rights of any of the unnamed parties, the court was forced to conclude that plaintiffs' complaint can be regarded

> as one more than an invitation to such persons as may be interested to join with them in this action in seeking relief "arising out of the same transaction or series of transactions" but such situation furnishes no ground for the maintenance of a representative proceeding. . . .

The same result has been reached where the defendant exacted usurious payments from many persons and one sought to recover such payments on behalf of all;[131] where recovery was sought for overcharges of license plates;[132] where separate libelous statements were made in one book concerning numerous individuals[133] and where a railroad had overcharged numerous persons.[134]

### CASES PERMITTING CLASS ACTION

In view of the consistent refusal to apply the class suit device to cases where each person is entitled to individual relief, it is surprising to discover a limited number of decisions which, using fine distinctions, permit the class action. Where there is a community of interest, although

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[130] 32 Cal. 2d 833, 198 P.2d 514 (1948), *affirming*, 190 P.2d 626 (1948); noted in 37 CALIF. L. REV. 525 (1949) and 23 SO. CALIF. L. REV. 285 (1950).

[131] Thomas v. Kentucky Trust Co., 156 Ky. 260, 160 S.W. 1037 (1913).

[132] Garfien v. Stiglitz, 260 Ky. 430, 86 S.W.2d 155 (1935).

[133] Hart v. E. P. Dutton & Co., 93 N.Y.S.2d 871 (1949).

[134] Covert v. Nashville, Chattanooga & St. Louis Ry., 208 S.W.2d 1008 (Tenn. 1948).

each member of an ascertained group is entitled to relief different in amount, some courts have granted relief.[135] At one time it appeared that code provisions would be liberally construed to include the cases under discussion since the codes provided a convenient device for disposing of multiple party claims insofar as there was a common interest among the members. In 1901, a series of decisions came forth from the state of Kentucky which appeared to break with the orthodox decisions.

Two cases involved taxpayers' suits to recover illegal tax levies imposed by the county.[136] In *Whaley v. Commonwealth*[137] a county had adopted a tax rate of thirty-four cents for county purposes during the year 1897 and later in the same year imposed an additional levy of twenty-five cents for road construction. The constitution imposed a limitation of fifty cents in any one year, and when a decision was rendered adjudging the excess void, plaintiff on behalf of himself and all other taxpayers of the county instituted an action against the sheriff and his sureties to recover the tax illegally collected. Relying on equitable principles (to prevent a multiplicity of actions) and the class action section of the code, the court stated that at one time it was thought that the code provision did not embrace actions by a taxpayer to restrain the collection of, or to *recover* illegal taxes imposed because there was no common title or identity of interests, but that the modern tendency has been to extend the rule codified in the language of section 25 so as to include the class of cases to which this belongs.[137]

In *McCann v. City of Louisville*[138] the city of Louisville brought suit to prohibit two justices of the peace from proceeding to try a large number of actions. Prior to this action, certain individuals filed an action in equity for themselves and others alleging that they had paid certain sums of money to contractors upon apportionment warrants for the cost of construction of cisterns, wells, fire hydrants, etc. The petition further alleged that such payments were made under a mistake of law since the city had no authority to order the construction of the improvements at the expense of the abutting property owners or to issue apportionment warrants against them, and plaintiffs sought to recover from the city the

[135] Wiggins v. Scott, 112 Ky. 252, 65 S.W. 596 (1901); Masetta v. Nat. Bronze & Alum. Foundry Co., 107 N.E.2d 243 (Ohio App. 1952), *rev'd*, 159 Ohio St. 306, 112 N.E.2d 15 (1953); Kimbrough v. Parker, 344 Ill. App. 483, 101 N.E.2d 617 (1951); Locke v. City of Detroit, 335 Mich. 29, 55 N.W.2d 161 (1952); O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. 564 (1938); Whaley v. Comm., 110 Ky. 154, 61 S.W. 35 (1901).

[136] Whaley v. Comm., 110 Ky. 154, 61 S.W. 35 (1901); Wiggins v. Scott, 112 Ky. 252, 65 S.W. 596 (1901).

[137] 110 Ky. 154, 61 S.W. 35 (1901).

[138] 23 Ky. L. Rep. 558, 63 S.W. 446 (1901).

money so paid by them. After this representative suit was filed some 1250 suits were filed in the justices' courts to recover from the city the various sums, whereupon the city sought this prohibition. Noting that the city would be burdened with the cost of litigation far beyond the amount of money really involved, the court relied on the code provision, stating that the question of the right of the property owners who paid the warrants to recover their money involved a common interest. "The question involved," said the court, "Was the liability of the city to refund this money." The taxpayers of the city were interested in a speedy settlement at as little cost as possible and the code seemed intended to cover such a case as this. Since the code provision is designed to avoid a multiplicity of suits and settle the rights of all parties having a common interest, the court granted the writ and denied the jurisdiction of the justices.

These decisions may be explained on the ground that there was no practical difficulty in determining the other members of the class and in apportioning the relief to which each was entitled and on the additional ground that to allow a situation where innumerable claims may be made would be a burden on the taxpayers, depleting funds of a municipal corporation. But, insofar as the cases present a determination of separate rights and separate relief, involving a common question, they cannot be distinguished from the cases denying the propriety of the class device.

Several decisions recognizing the convenience of the class device have permitted employees to bring action for themselves and all others similarly interested where their separate rights are derived from a common statute, contract or arbitration agreement.[139] In *Gorley v. City of Louisville,*[140] ten policemen sued for themselves and other members of the police force (some 200 in number) to recover compensation allegedly due as a result of a void order of the board of public safety which relieved policemen of their duties four days in each month. Demurring to the petition, the defendants contended that the case did not come within the provisions of the code. But the court, relying on the *McCann* decision, permitted the plaintiffs to maintain the action in the class form.[141]

When confronted with the *Gorley* decision in the later case of *Union*

[139] Duke v. Boyd County, 225 Ky. 112, 7 S.W.2d 839 (1928); Barnett v. Barnett, 64 S.W. 844 (Ky. 1901); Locke v. City of Detroit, 335 Mich. 29, 55 N.W.2d 161 (1952).

[140] 64 S.W. 844 (Ky. 1901).

[141] Apart from the fact that this involved an association of a particular group — policemen — there is no reason to believe that the court was not intending to expand the doctrine of the code to permit actions to be brought by numerous persons where their rights depended upon a common source — here, the void order — although each was entitled to separate relief. Also there is no indication that this is not a law action.

*Heat Light and Power Co. v. Mulligan*[142] the court of appeals distinguished the *Gorley* case on the ground that the revenue of the city was involved, and public interest required that the suits be settled in as speedy a manner as possible and without a waste of public funds which would be incurred if each plaintiff were required to sue separately. A number of years later in *Duke v. Boyd County*[143] where policemen were entitled to statutory fees upon conviction of a criminal who had been arrested by the respective officers, the court, relying upon the *Gorley* decision permitted one policeman to sue for all who were entitled to recover the statutory fees since their respective rights hinged upon the constitutionality of the statute.[144]

### Effect and Rationale of Decisions

The net effect of the decisions taking a restrictive view of the code provision is that each member of a group, although their rights and interests are derived from one common source and involve similar questions of law or fact, must sue alone in order to protect his interest or must join with others and be present before the court. In such a situation, there would be innumerable actions filed which would unnecessarily burden the courts. If each member of the group desired to assert his claim the cost of so doing would be out of proportion to the return which he could hope to receive. In such decisions as the public utility consumer cases, each *one* is required to prosecute his own claim for it would hardly be possible for all the individuals affected to join in one action.

The decisions indicate that there is no uniform reason why, in a concrete factual situation, the courts deny relief in these cases. While some decisions have stated that a unity of interest is essential to the maintenance of the class suit, and others that a fund or property is essential to the maintenance, these conditions have been absent in many cases where the class suit was permitted. The fact is that class actions have been allowed when the rights of the numerous parties are wholly separate and distinct and each could sue alone if he so desired. The effect of the code provision has been to allow class suits only in those cases in which the members of the group are united by a common bond of property or identity of the relief sought. The decisions which deny the propriety of the class device are not based on the fact that the parties are not united in interest, or that there is no common or general interest among the members of the class (for where the rights of the parties arise from a common

[142] 177 Ky. 662, 197 S.W. 1081 (1917).

[143] 255 Ky. 112, 7 S.W.2d 839 (1928).

[144] Here there seems to be no practical barriers involved since the policmen were all ascertained and amounts could easily be determined.

source, there is at least a community of interest in questions of law or fact) but rather on the following grounds:

1) The class device under the codes is based upon the decisions decided under prior equitable principles. The historical background plays an important part in determining the extent of the class device as a convenient method of omitting certain persons from the record.

2) A restricted interpretation of the term "community of interest" requires that the decisions be decided in a restrained manner. Since each individual seeking to be compensated for his claim is not "interested" in the question whether another individual is to be compensated for his claim, there is no community of interest in the question involved and no class suit.

3) The class device as construed under the code provision is intimately tied to permissive joinder of parties. A restrictive interpretation of permissive joinder of parties, permitting joinder only where the individuals have an interest in the subject matter and in the relief demanded has an influence upon a restricted interpretation of permitting the separate rights — separate relief class suit. Even though the claims of the parties arise from the same source, many decisions do not permit permissive joinder and this seems to influence the courts to refuse to permit one to sue for all.

4) The courts have not seen fit to divorce the principle of res judicata from the class suit device. The courts reason that where one individual purports to represent a class he does not have it in his power, in the event that a judgment be adverse to the representative, to bind the other members of the class, since in these cases that have been discussed the absent members have not really been represented in court. There is no difficulty in applying the principle of res judicata to cases where there is true representation as in the voluntary organizations and joint interests cases. In these decisions, since each member of the class stands in the same position as the other members, his interest is being enforced and protected or defended when a true representative sues or defends. But in situations where each person has a distinct and separate claim for relief, it is difficult to say that his claim would be barred by an action brought by another who has a similar claim arising from the same fact pattern. Not being before the court and not having appointed the plaintiff as his representative to prosecute his claim, the absent party's interest has been jealously guarded by the courts and they have refused to permit one to sue for another when the action could not bar the absent persons. This, of course, is as it should be.

5) To permit the class device in the cases discussed would require

a determination of such a diversity of circumstances that the class device would not be feasible. In order to recover for example in the cases involving similar frauds, the conditions precedent to recovery and the defenses would be different as to each member of the class. Since one member of the class does not and cannot stand in the same position as all other members of the class, the courts must of necessity state that there is no common interest among the several members and must therefore deny the class suit.

6) Since the practical effects of permitting the class device would be highly burdensome the courts have seen fit to deny these actions in the representative form. If the class device were to be used insofar as there are common questions of law or fact, each person entitled to relief would have to step forward and present the peculiar facts which entitle him to compensation. New testimony would have to be taken as to each member of the class and a determination would have to be made as to each person. This would involve the court in such administrative detail that it is far easier to deny the form of the suit altogether.

There is, however, no legal objection to the maintenance of the separate rights-separate relief class suit. The class action was designed to be a remedy of convenience to avoid a multiplicity of litigation, but the interpretations of the state courts do not adhere to this doctrine. Insofar as the separate rights of individual persons arise from a common source and are based upon a common transaction or occurrence (or series thereof) there is a "community of interest," and a liberal interpretation of the code would seem to authorize a class suit. Although it has been said that "separate wrongs to separate persons . . . do not alone create a common or general interest in those who are wronged"[145] yet where separate rights arise from a common source (either one act or a series of similar acts) it cannot be denied that the various members of the class have a community of interest in the common issue. The situation may be thought of in terms of a simile: Where the rights of individual persons, like spokes of a wheel emanate from the hub (the transaction or occurrence) the class device may be legally allowed; but where the separate and distinct rights of the parties, arise from various wheels (various separate transactions) then the class device may not even be legally allowed. Note for example the case of *Thomas v. Kentucky Trust & Security Co.*[146] Plaintiff sought to recover usury paid to the defendants by many persons. The court denied the class suit. Each loan and each payment of usury involved a separate and independent contract (the spokes did not arise from the

[145] Society Milion Athena v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939).

[146] 156 Ky. 260, 160 S.W. 1037 (1913).

same hub) and since there were separate contracts, separate loans, separate wrongs to many persons, there were no common questions involved.

## CONCLUSION

The state courts, therefore, have not utilized the convenient class device to the fullest extent to dispose of multi-party litigation. Although there may often be satisfactory reasons for this self-denial, there is manifestly a need for a remedy which can satisfactorily dispose of a mass of complex modern problems. In many instances that remedy can and should be the class suit.