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PROCEDURAL PROBLEMS OF CLASS SUITS*

Joseph J. Simeone†

THE complexity of contemporary society constantly creates new stresses on judicial administration. Ingenuity is called for to produce new methods¹ (or to modify and streamline old methods) in order to alleviate congested dockets,² avoid lengthy jury trials,³ and in general to liberalize traditional rules of procedure and evidence with the object of furthering the quick and efficient disposition of disputes. Instances of progress toward achieving these ends include the introduction of workable rules for discovery, pre-trial conferences and summary and declaratory judgments, the abolition of technical and dilatory tactics in pleading, and the liberalization of such remedies as interpleader and intervention.

But modernization of the so-called "class" or "representative" suit as a procedural device has not kept pace to meet the needs of contemporary society. The present study is proffered to demonstrate the fact of that lag, to trace its causes, and to support the conclusion that legislation in the form of a model or uniform law is now needed to make the representative suit a more useful member of the modern family of remedies.

In the past several decades the courts have been called upon to resolve controversies in which numerous persons may have acquired separate and distinct rights against a common adversary because of a single fact-event.⁴ Obvious examples include monopolistic practices damaging numerous potential competitors or cus-

* This article is a part of a dissertation submitted to the Faculty of The University of Michigan Law School in partial fulfillment of the requirements of the S.J.D. degree.—Ed.

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¹ Judge Yankwich in *"Short Cuts" in Long Cases*, 13 F.R.D. 41 (1953), has commented at 42: "As societies become more complex and law becomes more formalized, the legal conflicts which arise take on the complexity of the materials out of which they arise. The determination of these conflicts calls not only for greater social control, but also, for procedural schemes that will enable judicial bodies to handle the complex problems and do so efficiently."

² See the series of articles in Symposium, *Lagging Justice*, 328 Annals 7-163 (March 1960).

³ Palmer, *On Trial: The Jury Trial*, 20 F.R.D. 65 (1958).

⁴ Since the adoption of the federal rules there have been approximately 225 reported decisions in the federal courts and some 200 reported cases in the state courts. Contrast this with only sixteen cases in the American Digest before 1900.

tomers,⁵ overcharges by a public utility upon the citizenry of a whole city,⁶ and fraudulent activities injuring numerous victims.⁷

The unique virtue of the representative suit, once made available, is that it enables a court, once and for all in a single action, to dispose of the issues in such cases which are the same as to each of many persons too numerous for all to be joined. A dramatic example would be the commission of a mass tort. Hundreds, perhaps thousands, might be personally injured by an explosion of combustible material, by a fire at a crowded place, or by emissions of an atomic reactor gone awry. It would be naive to expect comparable problems not to become more usual, even more acute. Recently, for example, the United States was sued, after it had conducted a series of nuclear tests, for damages for the loss of sheep suffering lesions which might have been explainable as side effects of nuclear radiation.⁸ While the court found no causal connection between the injury and the nuclear tests in this instance, the occurrence of such claims will undoubtedly increase. In common situations if multiple, separate but identical claims continue to have to be tried entirely separately, prohibitive burdens well may be placed upon already overburdened judicial systems which might give cause for the establishment of additional administrative or quasi-judicial machinery to dispose of them, further ousting courts from their proper adjudicatory sphere. Yet each claim, whether separately or collectively determined, may present the same issues and require the same evidence from many of the same witnesses. Practically, under existing codes and rules, solutions are necessarily *ad hoc*.⁹

One of the remedies traditionally available when one side in a particular case is comprised of multiple parties has been the equitable "class" or "representative" suit, in which one or more

⁵ *Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942); *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D. Ill. 1959); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D. Cal. 1957).

⁶ *Kovarsky v. Brooklyn Union Gas Co.*, 279 N.Y. 304, 18 N.E.2d 287 (1938); *Davies v. Gas & Elec. Co.*, 151 Ohio St. 417, 86 N.E.2d 603 (1949), *reversing* 79 N.E.2d 327 (Ohio Ct. App. 1948).

⁷ *Society Million 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).

⁸ *Bulloch v. United States*, 145 F. Supp. 824 (D. Utah 1956).

⁹ *Cf. Dalehite v. United States*, 346 U.S. 15 (1953); *Pennsylvania R.R. v. United States*, 111 F. Supp. 80 (D.N.J. 1953); Note, 63 YALE L.J. 493 (1954); Note, 60 YALE L.J. 1417 (1951).

members of a "class" may sue or defend for the benefit of the whole group. The class suit remedy as it exists today, however, is so limited that it does not fill the need for representative proceedings outlined above. Born as a device of convenience to dispose only of a situation in which a true community or class interest existed, its original concepts have become categorized and crystalized, so that the limitations imposed by history and embodied in the present rules curtail modification of the remedy to serve expanding needs. The traditional remedy requires that the interested persons comprise a definite group, but that the group be so large that it is impractical to bring all of its members before the court; more important, a positive showing must be made that the interests of the parties of record are identical with those of the absentees so that adequate and effective representation of the latter interests will be insured. And in this context special procedural problems arise in pleading, service of process, discovery, amount in controversy, control of litigation, and intervention which take on more than the usual importance.

The true and hybrid class actions, to be defined later, have been used in many situations to fill a variety of societal demands: to protect the civil rights of individuals,¹⁰ to test the constitutionality of legislation,¹¹ to secure the rights of employees in a mechanized society,¹² to enable suits by or against an unincorporated association.¹³ By adopting this method of disposing of multi-party interests, the judiciary avoids multiplicity of actions, saves expense and time, and obviates relitigation of issues which are common to all members of the class.

The situations already discussed involving separate but identical rights similarly demand a procedure that is quick, effective, and competent to dispose of common problems and thus avoid unnecessary litigation. The so-called "spurious" suit, however, has

¹⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955); Comment, *Class Action, A Study of Group-Interest Litigation*, 1 RACE REL. L. REV. 991 (1956).

¹¹ *Ashwander v. TVA*, 297 U.S. 288 (1936).

¹² *Shipley v. Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947).

¹³ *Tunstall v. Brotherhood of Locomotive Firemen*, 148 F.2d 403 (4th Cir. 1945); *Oster v. Brotherhood of Locomotive Firemen*, 271 Pa. 419, 114 Atl. 377 (1921); Brunson, *Some Problems Presented by Unincorporated Associations in Civil Procedure*, 7 S.C.L.Q. 394 (1955); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948); Note, 46 COLUM. L. REV. 818 (1946); Note, 7 OKLA. L. REV. 472 (1954).

not been expanded to meet modern needs. It has failed to develop into a remedy which, on the one hand, guarantees every person his "day in court" and, on the other hand, avoids unnecessary, repetitive litigation.

The purpose of this article is to discuss numerous aspects of the class device, to discuss the many procedural problems confronting court and counsel, to determine the effectiveness of one type of class suit—the spurious—and in the conclusion, to propose legislation for a new rule independent of the rules regarding class actions, a remedy which would more effectively permit the dispatch of numerous claims arising from similar fact patterns.

I. PROGRESSION TO THE PRESENT RULES

Developed in equity to circumvent the stringency of joinder requirements,¹⁴ the class suit doctrine was a necessary development in its time if justice was to be done. The fundamental rule in equity was, and 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 . . . ."¹⁵

In order to escape somewhat from the limitations of this strict rule a necessary exception was engrafted,¹⁶ so that justice could be

¹⁴ See REDESDALE, *CHANCERY PLEADINGS* 144 (2d ed. 1789); *Poore v. Clark*, 2 Atk. 515, 26 Eng. Rep. 710 (Ch. 1742).

¹⁵ *Cockburn v. Thompson*, 16 Ves. Jr. 321, 325, 33 Eng. Rep. 1005, 1007 (Ch. 1809) (Lord Eldon).

¹⁶ See CLARK, *CODE PLEADING* § 63, at 397 (1947); 1 DANIELLS, *CHANCERY PLEADING AND PRACTICE* 190 (6th ed. 1894); STORY, *COMMENTARIES ON EQUITY PLEADINGS* 87 (8th ed. 1870); *Hansberry v. Lee*, 311 U.S. 32, 41 (1940); see also *Newberry Library v. Board of Educ.*, 387 Ill. 85, 55 N.E.2d 147 (1944). Lord Eldon in *Cockburn v. Thompson*, 16 Ves. Jr. 321, 325, 33 Eng. Rep. 1005, 1007 (1809) said: "But that [the principle that all persons materially interested ought to be made parties], 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."

In *Hansberry v. Lee*, 311 U.S. 32, 41 (1940), Mr. Justice Stone said: "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interest of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree."

accomplished in cases where the substance, if not the strict letter, of *res judicata* could be satisfied without complete joinder. If the parties of record had interests identical to those of absent persons to whom they were consensually related, the parties present might represent the absentees and assert their interests.

The English developments were summarized in this country by Story in his *Commentaries*.¹⁷ After examining the English decisions, Story arranged the principles relative to class actions into three categories:

"1. [W]here the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole;

"2. [W]here 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. [W]here the parties are very numerous, and although they have, or may have separate, distinct interests; yet it is impracticable to bring them all before the court."¹⁸

Story's language was adopted in the codes,¹⁹ first in New York,²⁰ and then in other states.²¹ Decisions interpreting the code provision have applied the principles originally developed in equity and summarized by Story. Under the codes, class suits have been authorized in several situations: (1) where the interests of the members of the class are joint,²² or common;²³ (2) where the interests of the

¹⁷ STORY, *op. cit. supra* note 16, ch. V.

¹⁸ *Id.* at 105.

¹⁹ The usual statute provides: Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

²⁰ N. Y. Code of 1849, § 119; N.Y. CIV. PROC. ACT § 195.

²¹ The following states have statutes identical or similar to the code provisions (note 19 *supra*): ALASKA COMP. LAWS ANN. § 55-3-16 (1949); ARK. STAT. ANN. § 27-809 (1947); CAL. CODE CIV. PROC. § 382; CONN. GEN. STAT. REV. § 52-105 (1958); FLA. RULES CIV. PROC. § 3.6 (1961); GA. CODE ANN. § 37.1002 (1936); IND. ANN. STAT. § 2-220 (BURNS 1933); KAN. GEN. STAT. ANN. § 60-413 (1949); NEB. REV. STAT. § 25-319 (1956); N.Y. CIV. PROC. ACT § 195; N.C. GEN. STAT. § 1-70 (1953); OHIO REV. CODE § 2307.21 (Baldwin 1958); OKLA. CODE CIV. PROC. tit. 12, § 233 (1960); ORE. REV. STAT. § 13.170 (1961); PA. RULES CIV. PROC. rule 2230 (1951); S.C. CODE § 10-205 (1952); S.D. CODE § 33.0410 (1939); WASH. REV. CODE § 4.08.070 (1956); WIS. STAT. ANN. § 260.12 (1957).

²² *Platt v. Colvin*, 50 Ohio St. 703, 36 N.E. 735 (1893).

²³ *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853); *Penny v. Central Coal & Coke Co.*, 138 Fed. 769 (8th Cir. 1905); *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51

members of the class are several, but each is interested in a fund or property involved in the action;²⁴ (3) where the interests of the members of the class are several, but each is interested in the same relief.²⁵

A few years before the adoption of the code provision in New York, Federal Equity Rule 48 had formally authorized class suits in the federal system,²⁶ although the remedy was well known prior to the adoption of the formal rule.²⁷ The rule itself caused some speculation²⁸ because of its language that "the decree shall be without prejudice to the rights and claims of all the absent parties." If this portion of the rule were taken literally, no absent party would be bound by the suit, and there would be an inconsistency between the rule and former decisions. If taken literally the efficiency of the class device would be seriously hampered. But when the class suit was used subsequent to the rule, that portion was disregarded.²⁹ In 1912 when Federal Equity Rule 38,³⁰ which followed the code provision,³¹ was passed, that portion of rule 48 was omitted.

When the present federal rules were being considered over a score of years ago, Professor Moore argued that, "A real service would be rendered the profession if a rule were promulgated

Pac. 841 (1897); *Bates v. Houston*, 66 Ga. 198 (1880); *Colt v. Hicks*, 97 Ind. App. 177, 179 N.E. 335 (1932).

²⁴ *Guffanti v. National Sur. Co.*, 133 App. Div. 610, 118 N.Y. Supp. 207, *aff'd*, 196 N.Y. 452, 90 N.E. 174 (1909); *Gibson v. American Loan & Trust Co.*, 12 N.Y. Supp. 444 (Sup. Ct. 1890).

²⁵ *Climax Specialty Co. v. Seneca Button Co.*, 54 Misc. 152, 103 N.Y. Supp. 822 (1907); *Hawarden v. Youghiogheny & Lehigh Coal Co.*, 111 Wis. 545, 87 N.W. 472 (1901).

²⁶ 42 U.S. (1 How.) 1vi (1843). "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."

²⁷ *Mandeville v. Riggs*, 27 U.S. (2 Pet.) 482 (1829); *West v. Randall*, 29 Fed. Cas. 718, 722 (No. 17424) (C.C.R.I. 1820).

²⁸ 1 STREET, *FEDERAL EQUITY PRACTICE* 344 (1909).

²⁹ *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853).

³⁰ 226 U.S. appendix 11 (1912).

³¹ When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. For a history of federal rules 38 and 48, see 6 *CYCLOPEDIA OF FEDERAL PROCEDURE* § 23.01, at 661 (1951); Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34 (1937); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928 (1958).

which was really informative.”³² This history of the class device, the confusion existing in the decisions rendered under the code provisions, and the uncertainty of the prior federal rules were influential in the attempt to draft a modern rule. Nevertheless, in the Preliminary Draft there was not even a separate rule on the subject until Moore suggested one which substantially conforms to present rule 23. Moore’s proposal relating to the effect of judgment³³ was modified, however, because the committee believed that it was beyond its function to deal with the question of the effect of judgment since this was a matter of substantive law.³⁴ Rule 23, therefore, emerged in its present form,³⁵ and has been subsequently adopted by several states.³⁶

II. FEATURES OF CLASS SUITS

The unique feature of the class suit is its adjudication of the interests of absent parties so as to preclude additional litigation. This is undoubtedly its most worthwhile attribute. Evolving as it

³² Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937).

³³ Moore & Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 555 (1937-38).

³⁴ See the comment of the committee in 3 MOORE, *FEDERAL PRACTICE* ¶ 23.11, at 3456 (2d ed. 1948) [hereinafter cited as MOORE].

³⁵ FED. R. CIV. P. 23: “(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

“(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

“(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

“(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought. . . .

“(c) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.”

³⁶ The following states have statutes or rules based on rule 23 of the Federal Rules of Civil Procedure: ALA. R. CIV. P. 31 (equity) (1960); ARIZ. R. CIV. P. 23 (1956); COLO. R. CIV. P. 23 (1953); DEL. R. CT. CHAN. 23 (1952); IDAHO R. CIV. P. 23 (1957); IOWA R. CIV. P. 42 (1951); KY. R. CIV. P. 23 (1953); MINN. R. CIV. P. 23 (1952); MO. REV. STAT. § 507.070 (1959); MONT. REV. CODE § 93-2704-7 (1962); N.M.R. CIV. P. § 21-1-1(23) (1953); N.D.R. CIV. P. 23 (1960); TEX. R. CIV. P. 42 (1955); UTAH R. CIV. P. 23 (1953); WYO. R. CIV. P. 23 (1957).

did, necessarily the general principles of *res judicata* have been, almost without exception, applied to the traditional types of class actions so that the represented absentees, whether they desire it or not, whether the action is known to them or not, are bound by the results of a class adjudication. In the traditional type action (not the so-called "spurious") that is as it should be and, for proper judicial administration, as perhaps it must be.

But in order that this overriding principle be applied, other considerations become incidentally enmeshed in the remedy. The factors inherent in such suits have been succinctly set forth by the court of appeals for the Seventh Circuit in *Kainz v. Anheuser-Busch, Inc.*:³⁷ "1), the parties must be so numerous as to make it impractical to bring them all before the court; 2), the plaintiffs must adequately represent the class; and 3), there must be some community of interest."³⁸

The requirement that the members of the class must be so "numerous" as to make it impractical to bring all the parties before the court has not been a particularly troublesome question. While no formula has been devised for determining "impracticability," involvement of a large number of individuals naturally makes it highly impractical because of the difficulties of service and fluctuations by deaths, etc., to name all the members of the class as parties. The size of the group has therefore been decisive.³⁹

More troublesome is the requisite that the parties representing the class must "fairly insure the adequate representation of all."⁴⁰ The rules do not and could not set forth all the details that must be observed to satisfy the requirement of adequate representa-

³⁷ 194 F.2d 737 (7th Cir. 1952).

³⁸ *Id.* at 740. Other articles and decisions which discuss the various requirements of class suits: *Knowles v. War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948); *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64 (D. Conn. 1958); *Wheaton, Representative Suits Involving Numerous Litigants*, 19 CORNELL L.Q. 399, 402-18 (1934); *Comment*, 6 STAN. L. REV. 120, 141 (1953); *Comment*, 11 SW. L.J. 210 (1957).

³⁹ It has been held that it is not impractical to join seven, *Jackman v. Union Pac. R.R.*, 4 F.R.D. 172 (W.D. Mo. 1944), or eleven, *Statler v. Mock*, 12 F.R.D. 409 (W.D. Pa. 1952). It has been held not impractical to join forty persons, *Atwood v. National Bank*, 115 F.2d 861 (6th Cir. 1940). When the number reaches hundreds, *Rank v. Krug*, 90 F. Supp. 773 (S.D. Cal. 1950); *Carter v. School Bd.*, 182 F.2d 531 (4th Cir. 1950) (by implication), or thousands, *Molina v. Sovereign Camp, W.O.W.*, 6 F.R.D., 385 (D. Neb. 1947); *Lopez v. Seccombe*, 71 F. Supp. 769 (S.D. Cal. 1944), courts uniformly are satisfied that joinder is impractical.

⁴⁰ FED. R. CIV. P. 23(a).

tion. As one decision said, "any attempt to do so would be foredoomed."⁴¹ Courts⁴² often repeat Professor Moore's formula:

"... In determining the question the court must consider (1) whether the interest of the named party is coextensive with the other members of the class; (2) whether his interests are antagonistic in any way to the interests of those whom he represents; (3) the proportion of those made parties as compared to the total membership of the class; (4) any other factors bearing on the ability of the named party to speak for the rest of the class; and (5) the type of class action involved."⁴³

One essential ingredient of adequacy of representation is that the representatives be actual members of the class which they purport to represent. In *Pelelas v. Caterpillar Tractor Co.*,⁴⁴ plaintiff instituted an action for an accounting for surplus funds accumulated under a group insurance policy. His petition alleged that he brought the action not only for himself, but for the benefit of all former and present employees of the defendant. The court held that in this instance the plaintiff could not fairly and adequately represent the other employees since he had not been an employee for some time and was not presently insured under the group policy.

Another ingredient is that the interests of the representatives must not be antagonistic to those of other members of the class. The mere fact that there are divergent views among the members would not, in every instance, preclude the maintenance of the action.⁴⁵ But when the divergence becomes a material consideration, so that the interests of the representatives and the represented clash, there is not adequate representation. In *Kentucky Home Mut. Life Ins. Co. v. Duling*,⁴⁶ plaintiff sued for himself and for the members of the Postal Employees Society alleging a breach of contract of insurance by the change from a uniform premium rate to a step-rate and praying for cancellation of the policies. The

⁴¹ *Sheets v. Thomann*, 336 S.W.2d 701, 711 (Mo. Ct. App. 1960).

⁴² *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 76 (D. Conn. 1958).

⁴³ MOORE ¶ 23.07, at 3425.

⁴⁴ 30 F. Supp. 173 (S.D. Ill. 1939).

⁴⁵ *Redmond v. Commerce Trust Co.*, 144 F.2d 140, 152 (8th Cir. 1944). See also, *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 77 (D. Conn. 1958) and Note, 24 N.Y.U.L.Q. 191, 194 (1949).

⁴⁶ 190 F.2d 797 (6th Cir. 1951).

court denied the use of the class device on the ground that the requirement of adequacy of representation was not satisfied for the reason that the members of the society did not, in all probability, have the same interests as the "representative." Some members might have preferred to continue their policies at whatever rates might be determined, rather than have their policies canceled and be forced to "seek insurance in other companies, possibly with less or different benefits or with higher rates."⁴⁷

The mere fact that numbers of persons are being dealt with will probably insure some differences of opinions and desires. Yet, in the absence of a specific showing of antagonistic interests, either by inference from the facts or from affirmative evidence, the courts do not permit this obstacle to preclude the use of the remedy. A leading decision illustrating the possibility of inferring antagonistic interests is *Hansberry v. Lee*.⁴⁸ The question confronting the Court was whether certain defendants were bound by a ruling in previous litigation. Plaintiffs sought to enjoin the defendants from violating a covenant restricting the use of certain land in Chicago to members of the Caucasian race. The bill alleged that the covenant was not to become effective unless ninety-five percent of the owners signed; plaintiffs claimed the necessary percentage had signed; defendants, however, denied this and contended that the agreement had never become effective. Plaintiffs then contended that defendants were precluded from raising this issue because of certain prior litigation in which this issue had been stipulated between the parties. The Supreme Court of Illinois⁴⁹ held that the defendants were precluded from raising the issue, but the Supreme Court of the United States reversed on the ground that such a foreclosure would violate due process. Holding that the group which sought to enforce the covenant was not of the same class as those who sought to resist it, the Court said:

"It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest in the litigation, is either to assert a common right or to challenge an asserted obligation. . . . It is quite

⁴⁷ *Id.* at 802.

⁴⁸ 311 U.S. 32 (1940), 21 B.U.L. REV. 132 (1941), 26 CORNELL L.Q. 317 (1941), 29 GEO. L.J. 922 (1941), 39 MICH. L. REV. 829 (1941), 89 U. PA. L. REV. 525 (1941), 27 VA. L. REV. 396 (1941), 26 WASH. U.L.Q. 422 (1941).

⁴⁹ 372 Ill. 369, 24 N.E.2d 37 (1939).

another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."⁵⁰

Representation obviously cannot be adequate in a case where the representatives attempting to enforce the covenant seek to represent those who desire to resist it.

One further remark may be made concerning the requisites of the class remedy. Although federal rule 23, as well as decisions construing other rules, requires that "common relief"⁵¹ be sought, modern decisions have expanded the meaning to the point where "common relief" means the same kind or type of relief, rather than the same relief.⁵² Both in federal and state courts prior to rule 23-type language the representatives and the represented had to seek the same relief, *e.g.*, an injunction or similar remedy. With the introduction of the spurious device this stringent meaning has now been necessarily liberalized. Where, therefore, each member of the group is entitled to separate relief, such as damages or other monies, "common relief" is sought.

In order to orient the reader to the manifold procedural problems confronting court and counsel in class actions, a reference must be made to the various categories of such actions. As is well known, courts, especially in the federal system, have often characterized class suits as "true," "hybrid," and "spurious."⁵³ In *Shipley*

⁵⁰ 311 U.S. at 44-45.

⁵¹ This requirement is discussed in 3 MOORE ¶ 23.10, at 3455; Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518 (1947); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 931 (1958).

⁵² *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *McGrath v. Abo*, 186 F.2d 766 (9th Cir. 1951); *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944); *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88 (7th Cir. 1941); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510, 512 (N.D. Ill. 1959). *Contra*, *Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942).

⁵³ 3 MOORE ¶ 23.08, at 3434; *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945); *Hurd v. Illinois Bell Tel. Co.*, 136 F. Supp. 125, 135 (N.D. Ill. 1955); *Knowles v. War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948); *Shipley v. Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947).

*v. Pittsburgh & L.E.R.R.*⁵⁴ a true class action was described as an action in which a decree will affect the interests of persons too numerous to be made parties; a hybrid as one in which individuals having separate rights nevertheless have a common interest in a fund or piece of property; and a spurious as a permissive joinder device in which the persons have an interest in a common question of law or fact requiring adjudication.⁵⁵ The classification is, therefore, dependent upon the jural relations of the members of the class, and important results flow from the placing of a class suit in any one category. Jurisdictional requirements, the binding effect of a judgment, the running of the statute of limitations, the remedy of intervention—all vary with the “type of suit” deemed to be involved.

A. True Class Actions

The traditional type of class suit is the “true” class action. It has been described as “one wherein but for the class device, the joinder of all interested persons would be essential.”⁵⁶ Typical examples are suits by or against joint stock associations, partnerships consisting of many members, or unincorporated associations,⁵⁷ stockholders’ derivative suits⁵⁸ and taxpayer actions.⁵⁹ Cases such as *Smith v. Swormstedt*⁶⁰ involving church organizations also fall within this category.⁶¹ In this leading decision, the Supreme Court overruled an objection asserting that the class device was not proper where a small number of plaintiffs who asserted common rather than individual interests sought to repre-

⁵⁴ 70 F. Supp. 870 (W.D. Pa. 1947).

⁵⁵ Moore seems to say that in a true class suit the joinder of all interested persons is essential. 3 MOORE ¶ 23.08, at 3435. The courts, however, have not seen fit to require this stringent a test for the true class suit. Compare the language in *Pentland v. Dravo Corp.*, 152 F.2d 851, 852 (3d Cir. 1945); *Shipley v. Pittsburgh & L.E.R.R.*, 70 F. Supp. 870, 874 (W.D. Pa. 1947).

⁵⁶ 3 MOORE ¶ 23.08, at 3435.

⁵⁷ *Tunstall v. Brotherhood of Locomotive Firemen*, 148 F.2d 403 (4th Cir. 1945); *Platt v. Colvin*, 50 Ohio St. 703, 36 N.E. 735 (1893); *Oster v. Brotherhood of Locomotive Firemen*, 271 Pa. 419, 114 Atl. 377 (1921). For a comprehensive collection of cases, see Brunson, *Some Problems Presented by Unincorporated Associations in Civil Procedure*, 7 S.C.L.Q. 394, 396-97 (1955).

⁵⁸ BALLANTINE, CORPORATIONS § 193, at 334 (1946); 3 MOORE ¶ 23.08, at 3436. See the distinctions between derivative suits and representative suits in Note, 42 IOWA L. REV. 568 (1957).

⁵⁹ Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 43 (1937).

⁶⁰ 57 U.S. (16 How.) 288 (1853).

⁶¹ *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853); *Bates v. Houston*, 66 Ga. 198 (1880); *Hodges v. Nalty*, 104 Wis. 464, 80 N.W. 726 (1899).

sent some fifteen hundred ministers to enforce rights in a common fund.

In all these situations the fundamental cause of action or defense that exists for each member of the group is common to all others; the characters of the rights sought to be enforced or defended are identical, and the few who maintain or defend the action "stand in the shoes" of the others so that their interests are clearly affected. In maintaining or defending such a suit, supposedly, vigorous action can be expected not merely for the parties of record but for all the others as well. Hence, in these situations the class device performs the important function of disposing of the dispute involving the essential interests of the members of the group.

It is not, of course, always possible to place class suits in nice, neat niches, and many courts properly either ignore the classification of suits or deprecate the use of such odd terms.⁶² Because of the inherent difficulty of classification, the nomenclature is essentially useless.⁶³ Many decisions, considering other relevant factors such as the "character of the right sought to be enforced, the jural relations of the members, the effect of the judgment, the kind of liability sought to be imposed, the concept of due process, . . . and most importantly, judicial convenience,"⁶⁴ come to a conclusion

⁶² Judge Goodrich in *Pentland v. Dravo Corp.*, 152 F.2d 851, 852 (3d Cir. 1945), said: "It may be admitted that the terminology shocks the aesthetic sense and the succession of adjectives before the noun shows the poverty of imagination in choice of terms characteristic of the legal profession."

Professor Chafee once remarked: "It is not uncommon, when a case goes through several courts, for one court to call it spurious and another hybrid, and sometimes the judges throw up their hands in despair and frankly say they do not know what it is." CHAFEE, *SOME PROBLEMS OF EQUITY* 249 (1950). The difficulty of classification is shown by history of *Deckert v. Independence Shares Corp.*, 27 F. Supp. 763 (E.D. Pa.), *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *opinion on remand*, 39 F. Supp. 592 (E.D. Pa.), *rev'd*, 123 F.2d 979 (3d Cir. 1941). The district court denominated the bill "a class bill"; on appeal, the Third Circuit termed the action "spurious"; the Supreme Court did not characterize the action; when remanded, the district court said it was "hybrid" and on appeal to the Third Circuit for the second time, that court said, "Names are not important." 123 F.2d at 983.

⁶³ CHAFEE, *op. cit. supra* note 62, at 249: "Therefore, Rule 23 (a) would be greatly improved, in my opinion, if all the provisions establishing the tripartite division of class suits were dropped out, making this part of the rule read as follows: '(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.'" Such a rule would then be similar to old Equity Rules 38 and 48 and the code provisions. See also Kalven & Rosenfield, *supra* note 13, at 703, 707; Keefe, Levy & Donovan, *supra* note 13, at 333; Note, 46 COLUM. L. REV. 818, 823 (1946); Note, 2 How. L.J. 111, 116 (1956).

⁶⁴ Note, 2 How. L.J. 111, 116 n.32 (1956).

without any attempt at classification. In recent civil rights cases in the federal tribunals, for example, the courts have reached the conclusion that recognition of civil rights is for the benefit of all the members of the class, without bothering to denominate the enforcement suit as one type or another of class action. In *Lucy v. Adams*⁶⁵ an action was instituted by certain Negro students against the dean of admissions of the University of Alabama for a declaratory judgment and injunction to obtain admission to that university. In the course of its opinion the court held that the action was properly brought under federal rule 23(a), without plaintiffs or the court specifying the particular section and without denominating the type of class suit. Nor need this have been done. The identical jural relations of the members of the Negro race, the assertion of interests of the members of the group to affect the whole group, the convenience of deciding the question once instead of innumerable times, all were factors which would lead to the application of the "true" label, but which were considered by the court without the risk of becoming entangled in the web of explicit classification.

B. *Hybrid Class Actions*

In the "hybrid" action numerous persons have individual rights; each has a separate and distinct interest which could be asserted or defended individually; each would be entitled to separate relief, yet each person has an interest in a specific "common" fund or property which is to be distributed to all the members of the class.⁶⁶ An example is *Redmond v. Commerce Trust Co.*⁶⁷ in which two holders of trust investment certificates brought an action for the benefit of all holders to establish for the beneficiaries an equitable lien upon a surplus in a trust fund over and above the surrender value of the certificates. The court held that juris-

⁶⁵ 134 F. Supp. 235 (N.D. Ala. 1955). See the excellent discussion of the civil rights cases in Comment, *Class Actions, A Study of Group-Interest Litigation*, 1 RACE REL. L. REP. 991 (1956).

⁶⁶ 3 MOORE ¶ 23.09(2), at 3439.

⁶⁷ 144 F.2d 140 (8th Cir. 1944). In *Boesenberg v. Chicago Title & Trust Co.*, 128 F.2d 245 (7th Cir. 1942), action was brought on behalf of all beneficiaries of a trust estate against the trust company seeking to have restored to the trust estate certain funds allegedly wrongfully diverted. The trial court dismissed the complaint, but on appeal this holding was reversed. While the issue before the court was whether the several amounts could be aggregated to satisfy the jurisdictional requirement of amount in controversy, the court held that the class suit was properly brought. This type of class suit has also been recognized under code provisions. *Guffanti v. National Sur. Co.*, 133 App. Div. 610, 118 N.Y. Supp. 207 (1909), *aff'd*, 196 N.Y. 452, 90 N.E. 174 (1909).

dictional facts for a proper class suit were alleged on the grounds that the rights were common to all certificate holders. While the court did not specify that the action was authorized under federal rule 23(a)(2), that portion of the rule properly was applicable inasmuch as the rights of the certificate holders were several and each holder was interested in a common fund—the surplus.⁶⁸

C. *Spurious*⁶⁹ Class Actions

The term “spurious” was probably adopted from Street’s *Federal Equity Practice*.⁷⁰ Street distinguished between only two kinds of suits—the “true” and the “spurious.” The “true” was one affecting a fund or property while the “spurious” was concerned with personal liability. Injunction suits were given by him as examples. In such cases the rights of the members are several; one can sue alone; joinder might be permitted; or one could sue for all, seeking a relief which would abate the injury for all. The *object* sought, therefore, was common to all. To Street, “spurious” thus had a more restricted meaning than under present usage.

Under the present-day concept the action envisages two situations: (1) where the interests of the members of the group are several and each member is entitled to, or is seeking, the *same* relief (such as an injunction), and (2) where the interests of the members of the group are several and each member is seeking separate but similar relief.⁷¹ Thus the “spurious” action today is a device to permit numerous parties to band together to dispose of their multiple interests when they have no affiliation with each other save the fact that they are fortuitously interested in common questions of law or fact and they seek or are entitled to the same general type of relief. Each member of such a group is given a choice to maintain an action or intervene in one which another has initiated. In the latter case those persons who begin the action and all those who intervene then become actual parties and will gain or lose by any judgment. But absent parties are not affected

⁶⁸ See also *Henn v. City of Clinton*, 131 F.2d 978 (10th Cir. 1942).

⁶⁹ For discussions of this type of suit, see 3 MOORE ¶ 23.10(3); Comment, 35 CALIF. L. REV. 443 (1947); Notes, 46 COLUM. L. REV. 818 (1946), 2 HOW. L.J. 111 (1956), 53 NW. U.L. REV. 627 (1958), 7 OKLA. L. REV. 472 (1954).

⁷⁰ 1 STREET, FEDERAL EQUITY PRACTICE 342 (1909).

⁷¹ Although FED. R. CIV. P. 23(a)(3) uses the term “common relief,” the courts have interpreted this to mean the same kind of relief.

in any way.⁷² The spurious suit is therefore merely an invitation to join and not a "command performance."⁷³

While the spurious suit has found favor in the federal courts and some state courts,⁷⁴ there has been a good deal of doubt as to the real nature and function of the device. Unlike the class suit it is not based on traditional equitable principles, and historically this type of suit was never permitted. Many state courts, in construing their code provisions, refuse to go beyond traditional situations, and do not permit the spurious class action.⁷⁵ Decisions have denied the class remedy in cases involving consumer overcharges,⁷⁶ fraud,⁷⁷ actions to recover refunds,⁷⁸ and in other situations.⁷⁹

Various reasons have been given for the courts' refusal to extend the class device to the area where there is no ready existing class. Since all the persons who have claims to assert have distinct, separate interests, one person cannot "stand in the shoes" of an-

⁷² Shipley v. Pittsburgh & L.E.R.R., 7 F.R.D. 744 (W.D. Pa. 1948); 3 MOORE ¶ 23.11, at 3465.

⁷³ 3 MOORE ¶ 23.10, at 3443.

⁷⁴ California Apparel Creators v. Wieder of Cal., Inc., 162 F.2d 893 (2d Cir. 1947); Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945); Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952); Fischman v. Raytheon Mfg. Co., 9 F.R.D. 707 (S.D.N.Y. 1949); McNichols v. Lennox Furance Co., 7 F.R.D. 40 (N.D.N.Y. 1947); McReynolds v. Louisville Taxicab & Transfer Co., 5 F.R.D. 61 (W.D. Ky. 1942); Fanucchi v. Coberly-West Co., 311 P.2d 33 (Cal. Dist. Ct. App. 1957); Harrison Sheet Steel Co. v. Lyons, 15 Ill. 2d 532, 155 N.E.2d 595 (1959); Cohon v. Oscar L. Paris Co., 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

⁷⁵ Weaver v. Pasadena Tournament of Roses Ass'n, 190 P.2d 626 (Cal. App.), *aff'd*, 32 Cal. 2d 833, 198 P.2d 514 (1948); City of Lakeland v. Chase Nat'l Co., 159 Fla. 783, 32 So. 2d 833 (1947); Newberry Library v. Board of Educ., 387 Ill. 85, 55 N.E.2d 147 (1944); Kimes v. City of Gary, 224 Ind. 294, 66 N.E.2d 888 (1946); Garfein 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 Neb. 344, 23 N.W.2d 323 (1946), *rev'd on other grounds*, 25 N.W.2d 908 (Neb. 1947); Society Milion Athena v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939); State *ex rel.* Gerspacher v. Coffinberry, 157 Ohio St. 32, 104 N.E.2d 1 (1952); Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N.E. 1058 (1905); Covert v. Nashville, C. & St. L.R.R., 208 S.W.2d 1008 (Tenn. 1948); Matthews v. Landowners Oil Ass'n, 204 S.W.2d 647 (Tex. Civ. App. 1947).

⁷⁶ Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938).

⁷⁷ 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).

⁷⁸ Thorn v. Hormel & Co., 206 Minn. 589, 289 N.W. 516 (1940), 24 MINN. L. REV. 703 (1940).

⁷⁹ *E.g.*, actions by employees to recover overtime compensation, Archer v. Musick, 147 Neb. 344, 23 N.W.2d 323 (1946), *rev'd on other grounds*, 25 N.W.2d 908 (Neb. 1947); Niehaus v. Jos. Greenspon's Son Pipe Corp., 237 Mo. App. 112, 164 S.W.2d 180 (1942); and actions to recover statutory penalties, Weaver v. Pasadena Tournament of Roses Ass'n, 190 P.2d 626 (Cal. App. 1948), *aff'd*, 32 Cal. 2d 833, 198 P.2d 514 (1948).

other in the assertion of his individual claim or defense. It is argued that one person should never have it in his power to litigate another's interest so that the other would be bound in the event of an unfavorable determination. To extend the generalization of the worth of the class action in traditional type suits to the "spurious" class situation would, it is said, violate fundamental notions of due process. Not being before the court personally, and not having himself appointed a representative, the non-appearing person cannot be bound by any adverse decision.

The federal courts, spurred by Professor Moore's analysis and treatise, have gone beyond the traditional principles in recognizing spurious class actions,⁸⁰ although the committee referred to rule 23 as "a substantial restatement of equity rule 38"⁸¹ and writers referred to the rule as "introducing no change of principle in respect to class suits."⁸² State courts too, construing rule 23-type language, have sometimes recognized this type of suit.⁸³ In doing so, the courts have attempted to extend the traditional rules of class actions to solve a multiple party problem involving the several rights of individuals where each is entitled to separate relief. Federal rule 23(a) provides:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is . . .

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

⁸⁰ *California Apparel Creators v. Wieder of Cal., Inc.*, 162 F.2d 893 (2d Cir. 1947); *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945); *Oppenheimer v. F.J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944); *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941).

⁸¹ Original committee 1937 note to rule 23, 3 MOORE ¶ 23.01, at 3404; ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT 58 (1937).

⁸² CLARK, WASHINGTON INSTITUTE ON FEDERAL RULES PROCEEDINGS 66 (1938); Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 16 (1938); Comment, 6 STAN. L. REV. 120, 137 (1953). Professor Sunderland said at 16: "The new rule introduces no change of principle in respect to class suits, but merely expresses in a simple, intelligible way the operating principles by which the courts have been guided in dealing with class suits. What the committee tried to do was to specify in this rule all the types of cases in which class suits had in fact been authorized, and to state the conditions which the courts appeared to consider necessary for instituting class suits."

⁸³ *Fanucchi v. Coberly-West Co.*, 311 P.2d 33 (Cal. Dist. Ct. App. 1957); *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958); *Salt Lake City v. Utah Lake Farmers Ass'n*, 4 Utah 2d 14, 286 P.2d 773 (1955).

Under the rule the spurious class suit is a remedy which permits certain individuals who claim individual relief to initiate proceedings for and on behalf of others who are then permitted to circumvent federal jurisdictional requirements and enter the pending litigation to assert their individual claims for relief. The only tie that all the individuals need have is a common question of law or fact.

In the federal system, most decisions have denominated this type suit a permissive joinder device,⁸⁴ a mere invitation to intervene. Intervention must be made at an early stage and is rarely permitted after judgment. The orthodox view is expressed in *Hess v. Anderson, Clayton & Co.*,⁸⁵ an action brought by certain cotton growers on behalf of themselves and all others similarly situated to recover damages for violation of the antitrust laws. The court, in denying the plaintiffs' action brought in the class form, held that the spurious action is nothing more than a permissive joinder device and that counsel's contention that an interlocutory judgment could be entered and then additional parties allowed to come in finds no justification in any principle of law.

Although each party is free to assert and defend all issues relative to the situation as to absentees, any absentee seeking relief after judgment must instigate a new and independent action and is thus forced to plead, prove and bear the brunt of the whole case again; the opposite party, even if he had prevailed before, must fully defend anew. In short, an adverse judgment does not foreclose those "represented," however numerous, from litigating the same issues separately and repetitively. This falls far short of solving modern-day problems. The spurious class suit under present federal-rule practice presents something of an enigma. If the device is merely a permissive joinder remedy which operates to enlarge the field of federal jurisdiction there would seem to be no need to be concerned with the requirements laid down in the rule as to representation and numbers of persons. Furthermore, if the only function is to avoid effects of federal jurisdictional limitations, what justification can there be for enactment in state rules of a provision patterned after federal rule 23? It would seem that

⁸⁴ 3 MOORE ¶ 23.10(3), at 3442; *California Apparel Creators v. Weider of Cal., Inc.*, 162 F.2d 893 (2d Cir. 1947); *Hunter v. Southern Indem. Underwriters*, 47 F. Supp. 242 (E.D. Ky. 1942).

⁸⁵ 20 F.R.D. 466 (S.D. Cal. 1957).

the spurious class suit is neither a class suit nor a mere permissive joinder device. Rather, it is an attempt to provide a remedy to dispose of a multiple party problem as efficiently as can be done under present rules.

It has been urged by several courts⁸⁶ and writers⁸⁷ that the action should be interpreted as more than a mere permissive joinder device—as a new and potentially useful, effective procedure to suit modern conditions. Emphasis placed on the “class” nature of the proceedings would facilitate a clean disposition of a whole situation in a single action. Kalven and Rosenfield,⁸⁸ for example, have suggested that any decree in the suit should be held open to permit claimants to participate in the benefits of a favorable decision. Such a suggestion, besides presupposing a decree favorable to the class side, would still entail the following additional steps: (1) the entry of an interlocutory order by the court, in favor of the parties plaintiff and those who intervene; (2) a reference to a master to administer the details; (3) the preparation and submission of proof of claims and a hearing on any objections thereto; and (4) the entry of a final decree.⁸⁹ This general approach of allowing intervention after the issues had been closed favorably on liability was approved recently in *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*⁹⁰ Twenty retail grocers and two wholesale grocers in Chicago brought an action against a national grocery company for injunctive relief and treble damages under the Clayton Act for certain discriminatory practices. Two and one-half years after the proofs had been closed on the issue of liability the plaintiffs sought to bring into the action those retail and wholesale grocers who would accept an invitation to join. The court permitted the plaintiffs to do so and said: “I think the procedures utilized in the instant cases demonstrate most effectively the proper employment of the Rules and the tools available to a trial court.”⁹¹

This decision is a cogent example of what can be accomplished

⁸⁶ *Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942); *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Hunter v. Southern Indem. Underwriters*, 47 F. Supp. 242 (E.D. Ky. 1942).

⁸⁷ Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948); Note, 46 COLUM. L. REV. 818 (1946).

⁸⁸ Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

⁸⁹ *Id.* at 693-94.

⁹⁰ 24 F.R.D. 510 (N.D. Ill. 1959).

⁹¹ *Id.* at 513.

through the use of the existing rules to ease overburdened dockets. The class device was invented not only as a matter of necessity but also as a matter of convenience and utility. This decision holds that the rules do possess to some extent that "quality of utility." The original trial tested the legality of the conduct of the defendant and found against it—conduct which incontestably was common in its effects upon all persons injured and the fact that intervention of the absent persons might take place some time after trial did not interpose insuperable obstacles.

Other proposals have been advanced to make the rule 23(a) spurious suit a more effective device by simply foreclosing relitigation of common questions of law or fact by any member of the class.⁹² As to these common issues, *e.g.*, an affirmative finding of the liability of the defendant, there would be one trial which would be binding upon the defendant which would allow others to take advantage of the favorable determination and present their claims in subsequent proceedings. This approach was taken in *Montgomery Ward & Co. v. Langer*,⁹³ a libel action instituted against several defendants as representatives of two labor unions. In the course of the concurring opinion, it was stated:

"I am satisfied that it legally would be possible to adjudicate, on the basis of class representation, whether the publications complained of were in fact union acts; whether they were libellous in the circumstances; and, if so, what pecuniary damage had been occasioned to appellant by them. . . . Such an adjudication could probably also be made to serve as a foreclosure of all questions against the members of the union as a group, leaving open only the question in favor of each individual, who might subsequently be sued and served with summons as a basis for a personal judgment, whether he had participated in, authorized or ratified such wrongful acts as the union was found to have committed."⁹⁴

From these various viewpoints it can be seen that courts and writers have not yet reached agreement as to a true and proper function for the spurious class suit. Nor is agreement likely to be reached while the spurious suit remains tied in concept to the

⁹² Note, 7 OKLA. L. REV. 472, 475 (1954).

⁹³ 168 F.2d 182 (8th Cir. 1948).

⁹⁴ *Id.* at 189-90. See discussion in Note, 7 OKLA. L. REV. 472 (1954); see also *Pascale v. Emery*, 95 F. Supp. 147, 149 (D. Mass. 1951).

traditional class suit. Until it is removed from that category, progress is not likely to be made.

The doctrines of limitations on the class suit are so ingrained in judicial concepts that no amount of interstitial revision of the rules would solve the problem of disposing of cases in all the situations. What is needed is a new legislative rule which will directly authorize solution of these problems and free the new remedy from all of the historical limitations of the "class" suit. Under this new remedy some individuals who have interests must be permitted to initiate a proceeding for and on behalf of all others who are similarly situated in order to try, once and for all, the common issues of fact and law. After the litigation has been begun, notification could be given to all known, and by publication to all unknown, interested persons to invite them to appear, join, consent to, or intervene in the pending suit. If the common issues were adjudicated favorably to the representative side, the court would have the power to appoint a referee or master to determine the individual claims of the various persons and the amount of relief to which each personally might be entitled, if any. The adversary, before the referee or master, would have the right to assert any peculiar defense it might have against the individual claimant, but would not be able to relitigate the common issues already adjudicated. The claimant would be allowed to present his claim to the officer appointed or to the court even after judgment. As to those individuals who took advantage of the opportunity to present their claims, a pro rata share of the recovery, if any, would be allocated to their attorneys' fees and expenses. The one litigation would then be *res judicata* to all those claimants who were original parties or who had intervened or submitted claims and to the defendants on all the common issues involved. By this type of procedure eliminating the "class" concepts, it is believed that the courts would not then be faced with the same objections that now are faced under the language of the present rules and equitable principles.

III. SPECIAL PROCEDURAL PROBLEMS

A. *Pleading and Proof*

Court and counsel are presented with unique and often perplexing procedural problems in the maintenance of a class action.

At the outset the pleading must indicate that the suit is a class action; otherwise it is maintainable only in one's individual capacity.⁹⁵ The suit is not properly in representative form unless it is alleged to be brought on behalf of all others similarly situated. Such allegation by itself, however, does not determine that the character of the suit is substantively a representative one.⁹⁶ The petition should allege that the class is so large as to make it impractical to bring all the members before the court,⁹⁷ but at the same time it should describe the class with some certainty, whether the class be plaintiffs or defendants.⁹⁸ The complaint should state facts sufficient to establish the petitioner as representative within the prevailing rules,⁹⁹ in order to establish *prima facie* that the petitioners will fairly and adequately represent the class.¹⁰⁰

The data to be considered relative to adequacy of representation should include "any matter which would prove or reasonably indicate the lack such an adversary interest on the part of those named and served."¹⁰¹ A petition seeking to enjoin the trustees of a subdivision from enforcing certain restrictions sufficiently satisfied the requirement of adequacy where the petition alleged that a meeting of the lot owners was held, that a discussion occurred as to what action the group was to take, that the parties were owners of lots in the subdivision, and that their presence insured the fair and adequate representation of all the owners.¹⁰²

Of course, where the petition shows on its face an absence of the elements that must be present the petition will not be upheld.¹⁰³ The usual form of objection offered to test sufficiency of

⁹⁵ *Spanner v. Brandt*, 1 F.R.D. 555 (S.D.N.Y. 1941).

⁹⁶ *Pacific Fire Ins. Co. v. Reiner*, 45 F. Supp. 703 (E.D. La. 1942); *City of Lakeland v. Chase Nat'l Co.*, 159 Fla. 783, 32 So. 2d 833 (1947).

⁹⁷ *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *RFC v. Teter*, 117 F.2d 716 (7th Cir. 1941).

⁹⁸ *City of Lakeland v. Chase Nat'l Co.*, 159 Fla. 783, 32 So. 2d 833 (1947); *Matthews v. Landowners Oil Ass'n*, 204 S.W.2d 647 (Tex. Civ. App. 1947).

⁹⁹ *Parker v. Bowron*, 40 Cal. 2d 344, 254 P.2d 6 (1953).

¹⁰⁰ *Oppenheimer v. F. J. Young & Co.*, 3 F.R.D. 220 (S.D.N.Y. 1943); *Milton Const. & Supply Co. v. Metropolitan St. Louis Sewer Dist.*, 308 S.W.2d 769 (Mo. Ct. App. 1958). Although the federal rules authorize "notice pleading" it has been held that in class suits more facts should be alleged than in ordinary cases. *Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108 (S.D.N.Y. 1956).

¹⁰¹ *Sheets v. Thomann*, 336 S.W.2d 701, 711 (Mo. Ct. App. 1960).

¹⁰² *Ibid.*

¹⁰³ *Gray v. Reuther*, 99 F. Supp. 992 (E.D. Mich. 1951).

the petition as a class action is the motion to dismiss,¹⁰⁴ although this is not listed as one of the grounds in rule 12 of the federal rules. But both a motion for judgment on the pleadings¹⁰⁵ and a motion to strike¹⁰⁶ also have been used successfully to test the pleadings.

Not only must the pleadings be sufficient to satisfy the requirements for a class suit, but the proofs likewise must be so. In *Weeks v. Bareco Oil Co.*¹⁰⁷ a civil action by jobbers of gasoline to recover damages under the antitrust laws, the court, discussing the quantum of proof necessary to establish satisfaction of the representative requirements, suggested that this requirement might have been met if further facts had been adduced. If plaintiffs had shown that the recoverable damages would have been the same under all the various contracts, that damages were suffered as a result of the defendant's price increase, that others in the class desired this suit (or at least that they knew of few or no instances where members of the class were opposed to the suit), and that notice by letter or newspaper could have been given to the represented jobbers,¹⁰⁸ then the requirement of representation would have been satisfied.

Although the procedural rules contain no explicit variations for the three types of class suits relative to pleading and proof of the fact of "adequate representation,"¹⁰⁹ the standard in the spurious-suit case must in this respect be less stringent and exacting than in those cases where the group might enjoy some bond of association or community of interest. By definition in the spurious suit there will be no persons "similarly situated" in the same sense as in the other type cases. "Representatives" will not represent in the same sense, as each interest will be separate, although against the common adversary. One cannot adequately represent another

¹⁰⁴ *Rank v. Krug*, 90 F. Supp. 773 (S.D. Cal. 1950); *Coxhead v. Winsted Hardware Mfg. Co.*, 4 F.R.D. 448 (D. Conn. 1945); *Oppenheimer v. F. J. Young & Co.*, 3 F.R.D. 220 (S.D.N.Y. 1943); *Hunter v. Southern Indem. Underwriters*, 47 F. Supp. 242 (E.D. Ky. 1942).

¹⁰⁵ *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945).

¹⁰⁶ *Saxton v. W. S. Askew Co.*, 35 F. Supp. 519 (N.D. Ga. 1940).

¹⁰⁷ 125 F.2d 84 (7th Cir. 1941).

¹⁰⁸ *Id.* at 94. See also discussion in *Molina v. Sovereign Camp, W.O.W.*, 6 F.R.D. 385, 394 (D. Neb. 1947).

¹⁰⁹ FED. R. CIV. P. 23(a) provides: "If persons constituting a class are so numerous ... such of them ... as will fairly insure the adequate representation of all may ...." (Emphasis added.)

in the assertion or defense of details of his individual claim. *A*, injured in a disaster, cannot under traditional standards "adequately represent" *B*, who may have sustained personal injuries in the same disaster, as to any issues, and *A*'s action for damages is not made binding by the rule as to any other injured person who does not become a party in *A*'s proceeding. All that can be shown and all that can be required in such suits if they are to be authorized is that the "representatives" are similarly situated because of identity of issues. Recognizing the realities of the situation, the court in *Oppenheimer v. F. J. Young & Co.*¹¹⁰ placed less stringent requirements of adequacy of representation on the spurious action because the judgment would not be binding on those who were "represented."¹¹¹ Because of these considerations, the meaning of allegations of adequate representation is that there is a basis for a court finding of the propriety of the representative procedure, under assurance of a fair and adequate presentation of the common issues in the proceeding.

B. *Discovery*

In class suits, pre-trial conferences, special interrogatories, and demands for documents and admissions could be effectively utilized in order both to simplify the issues and to determine the propriety of representation by reference to the number of persons involved and the differences in views, if any, within the alleged class. But, as suggested by the materials in the appendix, they seem not to have been extensively employed. In one case, for example, general depositions were used to establish the nature of the defendant's business, but were limited to that issue.¹¹²

The pre-trial conference under modern rules¹¹³ has sometimes been used effectively in large representative suits.¹¹⁴ *Clark v. United States*¹¹⁵ strikingly illustrates what can be accomplished through pre-trial conferences. In 1948 the Columbia River broke through an embankment on ground owned by the United States and flooded the city of Vanport, Oregon, causing widespread dam-

¹¹⁰ 144 F.2d 387 (2d Cir. 1944).

¹¹¹ *Id.* at 390.

¹¹² *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945).

¹¹³ FED. R. CIV. P. 16.

¹¹⁴ *Clark v. United States*, 13 F.R.D. 342 (D. Ore. 1952); *Womack v. Consolidated Timber Co.*, 43 F. Supp. 625 (D. Ore. 1941). See discussion of the *Clark* case in *Seminar on Protracted Cases*, 23 F.R.D. 319, 385 (1959).

¹¹⁵ 13 F.R.D. 342 (D. Ore. 1952).

age. Out of three thousand claims filed against the United States under the Federal Tort Claims Act twenty cases were selected for initial trial. Extremely complicated issues of law were involved, especially as to liability, and multitudes of fact details would require proof, especially as to damages. In pre-trial conferences ordered by the court, attorneys reached agreement on various issues, resulting in a pre-trial order which occupied sixty-one pages in the report. The order consisted of first, a statement of facts, second, a statement of the contentions of the parties as to the facts and law, third, a statement of the issues of fact and law as agreed upon by the attorneys, and fourth, a list of all the documents which either party might introduce. Thus the issues were sharply drawn, much trial time was saved, and undoubtedly the trial was simplified.

It is in just such cases as this that the remedy proposed herein would operate. One action instead of three thousand could be used to determine the liability issues common to all plaintiffs against the defendant; subsequently, if the defendant was held liable a master could be appointed to determine outside of court amounts of individual damages, thus relieving the court of the undue burden of such details. In fact, in this whole process the ancillary proceedings could be supervised by special masters appointed for the purpose of taking testimony relative to the individual claims and making initial findings and recommendations respecting any special defenses asserted by the defendant.¹¹⁶ Jury trial, if demanded, would be held once on the common issues, but not repetitively for the individual claims. Judgment would determine liability once and for all, thus making unnecessary constant re-uttering of evidence and parading of witnesses. Parties affected could be notified and allowed to present their claims before the master within a reasonable time specified by the court.

C. *Service of Process and Jurisdiction*¹¹⁷

When an action is brought against a class, the general principle is that service of process upon representatives of the class is suffi-

¹¹⁶ Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 465-69 (1958); Marsh, *Pre-Trial Discovery in an Anti-Trust Case*, 8 RECORD OF N.C.B.A. 401 (1953); Weinstein, *Standing Masters To Supervise Discovery*, 23 F.R.D. 36 (1959).

¹¹⁷ Brunson, *Some Problems Presented by Unincorporated Associations in Civil Procedure*, 7 S.C.L.Q. 394, 411 (1955); Kaplan, *Suits Against Unincorporated Associations Under the Federal Rules of Civil Procedure*, 53 MICH. L. REV. 945, 948 (1955).

cient to give the court in personam jurisdiction over the class. As has been said elsewhere, "the criterion as to the sufficiency of service in a class suit is whether or not the service of process in question constitutes adequate notice to the class sued to come in and defend."¹¹⁸

A decision often cited is *Tunstall v. Brotherhood of Locomotive Firemen*,¹¹⁹ in which the question of the sufficiency of service on the chairman of a subordinate lodge was raised. The court, relying on the relationship involved, held that the brotherhood was given reasonable notice by service on the representative.

More unique questions were presented in *White v. Quisenberry*.¹²⁰ Plaintiff sought damages for assault and battery from certain defendants, both individually and as representatives of a local union, alleging that the assault was committed by the individual defendants while acting within the scope of their employment for the union. The defendants moved to dismiss in so far as the complaint attempted to assert a claim against the union, on the ground that the union, being an unincorporated association, was not subject to suit in the state courts. The motion was overruled and service on the representative individuals was held to be effective service on the members of the union as a class. It would appear, however, that any judgment for damages obtained might under existing precedents well prove uncollectible from union funds if the union itself was not a party. Could judgment against the defendant class bind personally for damages the individual members represented but not personally served? It has been suggested that no such service could be an effective basis for adjudging personal liability of those represented:

"No one has ever previously believed . . . that a federal court was entitled, on the basis of class representation alone, to enter a personal judgment of pecuniary liability against an individual who was in no other manner being brought into court."¹²¹

¹¹⁸ *Malarney v. Upholsterers' Union*, 7 F.R.D. 403, 405 (E.D. Pa. 1947). See *Underwood v. Maloney*, 14 F.R.D. 222 (E.D. Pa. 1953); *Allain v. National R.R. Adjustment Bd.*, 120 F. Supp. 453 (N.D. Ill. 1953).

¹¹⁹ 148 F.2d 403 (4th Cir. 1945), cited with approval in *Graham v. Brotherhood of Firemen*, 338 U.S. 232 (1949).

¹²⁰ 14 F.R.D. 348 (W.D. Mo. 1953), 7 OKLA. L. REV. 232 (1954).

¹²¹ Judge Johnsen in *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 189 (8th Cir. 1948).

The facts of this case present well the problem of acquiring jurisdiction in personam over the absent individuals even of a "true" class in their personal capacity. Although the federal rule presumably allows service of process on representative defendants in any type of class suit, it is difficult to believe that service on representative defendants in a spurious suit could be held effective to impose a personal judgment for damages upon the absent "represented" persons under traditional notions of due process.

Where defendant service has been held effective in the traditional class suit in the absence of a common name statute,¹²² suit has been required to be alleged to be brought against the served individuals as representatives of the association.¹²³ Service should be made upon the person designated by statute,¹²⁴ if any, and otherwise upon such person or persons as will prima facie insure the adequate representation of the members of the group and adequately give notice to the class and afford it an opportunity to defend. If care is taken to serve the process upon persons fairly representative of the members of the group, service will be effective for some purposes at least.¹²⁵

D. *Standing To Sue*

Questions sometimes arise whether an association has a standing to sue as a real party in interest. If the association itself has no direct interest in the litigation then it is clear that it cannot maintain the action, since it is not the real party in interest. In *California Apparel Creators v. Wieder*,¹²⁶ an unincorporated trade association and seventy-five of its members sought to enjoin the defendants from using the name "California" in relation to its wearing apparel and to recover damages for unfair competition. The organization, it was held, did not have a standing to sue, since

¹²² At common law and in the absence of statute the unincorporated association could not be sued in its common name. *Communications Workers v. Brown*, 252 S.W.2d 103 (Mo. Ct. App. 1952); *Bloom v. National Fed'n*, 35 T.L.R. 50 (Ct. App. 1918); *Brunson*, *supra* note 117.

¹²³ If, however, the unincorporated association is sued to enforce a substantive right existing under the Constitution or laws of the United States then it may be sued in the common name under rule 17(b). *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922) which authorized suit against the entity was the subject of some debate in an attempt to limit the decision to the Sherman Act. See discussion in *Kaplan*, *supra* note 117, at 946-48.

¹²⁴ Various statutes are collected in *Brunson*, *supra* note 117, at 416.

¹²⁵ *Canuel v. Oskoian*, 23 F.R.D. 307 (D.R.I. 1959).

¹²⁶ 162 F.2d 893 (2d Cir. 1947).

it had no direct interest in enjoining such practices. So also in *Air Line Dispatchers Ass'n v. California Eastern Airways, Inc.*,¹²⁷ two former employees of the defendant airline and a voluntary unincorporated labor organization brought an action alleging that by discharging certain dispatchers defendant had breached a collective bargaining agreement. The court held that the union would have to be dismissed because it did not seek any relief for itself.

Where, however, the association has a pecuniary interest in preventing a diversion of trade from its members,¹²⁸ or where a labor organization itself is seeking recovery for the breach of a collective bargaining agreement, it has the proper standing to maintain the action.¹²⁹

E. Venue—Federal

In actions based on other than federal rights the general venue statute is applicable,¹³⁰ and accords no special treatment to the class action. In diversity cases, therefore, the action should be brought in the district of the named plaintiffs or the district of the named defendants. The general principle is recognized in *Carolina Cas. Ins. Co. v. Local 612*,¹³¹ an action against a local union and eight individuals who were officers and members of the local. The defendants were sued "as the representatives of a class composed of the International Union . . . and its members . . . as parties defendant." One of the defendants moved to dismiss the action against him on the ground of nonresidency, accompanying the motion with an affidavit attesting to his nonresidence in the district. The court granted his motion just as it would have had to in a non-class action, stating, "None of the venue statutes accord different treatment to a class action than is accorded to non-class actions."¹³²

¹²⁷ 127 F. Supp. 521 (N.D. Cal. 1954).

¹²⁸ *Gibbs v. Buck*, 307 U.S. 66 (1939); *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155 (S.D.N.Y. 1959).

¹²⁹ *UAW v. Wilson Athletic Goods Mfg. Co.*, 119 F. Supp. 948 (N.D. Ill. 1950).

¹³⁰ 3 MOORE ¶ 23.14, at 3486; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 933 (1958). 28 U.S.C. § 1391(a) (1958) provides: "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." As to stockholders' actions, see discussion in 3 MOORE ¶ 23.21[3], at 3534-44; Note, 39 VA. L. REV. 512 (1953).

¹³¹ 136 F. Supp. 941 (N.D. Ala. 1956).

¹³² *Id.* at 943.

In actions based on federal rights the proper venue is either the principal place of business of the association or the place where the federal right was violated if the association has a regular place of business there. *Sperry Prods. v. Association of American Railroads*¹³³ involved an action for patent infringement against an unincorporated association. Under the venue statute,¹³⁴ which provided that the proper venue was "in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have an established place of business," the court held that the association might be sued in either place, as it might in a non-class suit.

F. Control of Suit

In the absence of a specific rule otherwise, the original parties who bring the action have absolute control of the suit so that they may dismiss or settle without permission of the court.¹³⁵

"One who brings a suit . . . holds and retains absolute dominion over it unless the court orders otherwise upon findings made after hearing that it is not being prosecuted in good faith, with vigor and reasonable capacity. There can be but one master of litigation for the plaintiffs. The original plaintiffs assumed the burden of prosecuting the cause to a conclusion and the liability to costs if defeated. It would be impracticable to permit litigation in these circumstances to be conducted by the independent action of several plaintiffs acting without harmony and according to divergent ideas as to the establishment of the liability of the defendant. This is the general rule supported by many authorities."¹³⁶

Exceptions are carved out of the plaintiff's freedom where a contrary court order or decree has been entered,¹³⁷ or where persons have been allowed to intervene.¹³⁸ The intervenor, however,

¹³³ 132 F.2d 408 (2d Cir. 1942), discussed in 3 MOORE ¶ 17.25, at 1415.

¹³⁴ 36 Stat. 1100, § 48 (1911). Today 28 U.S.C. § 1400(b) (1958) applies and provides: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

¹³⁵ *Schatte v. International Alliance*, 183 F.2d 685 (9th Cir. 1950); *Wheaton, Representative Suits Involving Numerous Litigants*, 19 CORNELL L.Q. 399, 423 (1934); Note, 34 COLUM. L. REV. 118, 123 (1934); Note, 5 WYO. L.J. 126 (1951); Annot., 91 A.L.R. 587 (1934).

¹³⁶ *Hallett v. Moore*, 282 Mass. 380, 388, 185 N.E. 474, 478 (1933).

¹³⁷ *Catron v. Bostic*, 123 Va. 355, 96 S.E. 845 (1918).

¹³⁸ *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 336 (C.C.W.D. Pa. 1891).

cannot introduce foreign, antagonistic or extrinsic issues into the litigation and must take the case as he finds it.¹³⁹ A recent federal decision indicates that these principles are based on orderly procedure in the conduct of litigation. In *Schatte v. International Alliance*¹⁴⁰ action was brought by certain individuals on behalf of themselves and two thousand others for damages arising out of loss of employment. One of the twenty-six named plaintiffs had filed a petition for rehearing. The other twenty-five, represented by another attorney, considered it not in their best interests to file such a petition. The case arose on a motion to substitute another attorney for the one plaintiff. In denying the motion, the court relied on the general principle that under orderly procedure the original party representing others "retains control over the action as opposed to other members of the class who may later seek to intervene."¹⁴¹

The federal rules, and the state rules based thereon, have now placed additional restrictions on control of the class suit. Federal rule 23(c) provides that no action shall be dismissed without court approval and keys notice thereof to rule 23(a).¹⁴² If the action is a true class action, notice of dismissal or compromise must be given to the members of the class. In the other types of so-called class suits notice shall be given only if the court requires it. The rule, however, applies only to voluntary, not to involuntary, dismissals.¹⁴³

There can be no doubt that the general principle permitting control of the litigation by those who initiate action is necessary. It is usually the only practical choice. But the present restrictions relative to notice before dismissal now prevent a class suit from being dismissed without notice to the absentees; such a restriction is essential and practical where binding effect is intended on absentees. It is doubtful, however, that the same reason for excep-

¹³⁹ *Hallett v. Moore*, 282 Mass. 380, 185 N.E. 474 (1933).

¹⁴⁰ 183 F.2d 685 (9th Cir. 1950).

¹⁴¹ *Id.* at 687.

¹⁴² "A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it."

¹⁴³ *Pelelas v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940); *Cross v. Oneida Paper Prods. Co.*, 117 F. Supp. 919 (D.N.J. 1954).

tion applies to the spurious suit if the action is not a "class" action, in the sense that absentees are not bound, and if the action is a mere permissive joinder device.

G. Diversity of Citizenship

Questions often arise in class suits in the federal system because of the diversity of citizenship limitation. The question is whether the citizenship of each of the members of the class is to be taken into consideration so that, if some are citizens of the same state as the adversary, the rule of *Strawbridge v. Curtis*¹⁴⁴ would apply. If diversity as to all members of the class and the adversary were required, federal courts would cease to be a forum on grounds of diversity for many class actions. Accordingly, so far as diversity is concerned, the absent members of the class are disregarded, and if diversity exists between named parties, the jurisdictional requirement is satisfied.¹⁴⁵

The leading decision applying the general principle is *Supreme Tribe of Ben-Hur v. Cauble*.¹⁴⁶ There the Court, recognizing the impracticability of bringing together many thousands of persons who resided in many different states, allowed the use of the class-suit device when there "was the requisite diversity of citizenship to justify the bringing of a class suit."¹⁴⁷ Where there is no diversity, however, between the parties of record, the federal court lacks jurisdiction.¹⁴⁸

¹⁴⁴ 7 U.S. (3 Cranch) 267 (1806).

¹⁴⁵ *Fitzgerald v. Dillon*, 92 F. Supp. 681, 682 (E.D.N.Y. 1950). See also *Zelley v. Muehleck*, 10 F.R.D. 62, 63 (E.D. Pa. 1950); *Malarney v. Upholsterers' Union*, 7 F.R.D. 403, 405 (E.D. Pa. 1947); *Moreschi v. Mosteller*, 28 F. Supp. 613, 617 (W.D. Pa. 1939); 3 MOORE ¶ 23.13, at 3485; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 933 (1958). In jurisdictions which forbid class suits against unincorporated associations, federal rule 17(b) has been held to be determinative so that citizenship of all the members of the class determines diversity. In *Underwood v. Maloney*, 256 F.2d 334 (3d Cir. 1958), the plaintiff, a resident of Pennsylvania brought action against the president of an international, a resident of Illinois, seeking injunctive relief to prevent the enforcement of an order removing him as president of a local. The court held that it did not have jurisdiction since capacity to be sued is determined by state law. Since some of the members of the class were citizens of the same state as the plaintiff, no jurisdiction existed. Such a decision precludes federal jurisdiction but is sought to be justified in Note, 107 U. PA. L. REV. 559 (1959).

¹⁴⁶ 225 U.S. 356 (1920).

¹⁴⁷ *Id.* at 364.

¹⁴⁸ *Steele v. Guaranty Trust Co.*, 164 F.2d 337 (2d Cir. 1947).

H. *Amount in Controversy*

The amount in controversy, while rarely an issue in state courts,¹⁴⁹ is often determinative of jurisdiction in the federal tribunals.¹⁵⁰ Long before the classification of class actions the aggregation problem in class suits was considered.¹⁵¹ The general principle, observed as long ago as 1891 in *Clay v. Field*,¹⁵² is dependent upon the separability of interests. If the interests of several persons are distinct and joined merely for the sake of convenience, the rights or liabilities "cannot be aggregated together"¹⁵³ for the purpose of giving the court jurisdiction. But if their interests are undivided, though separable among themselves, the amount of their joint claim will be the test of jurisdiction. Thus, where the character of the right sought is one in common among all the members of the class, the determinative jurisdictional amount is the total amount sought. In *Boesenberg v. Chicago Title and Trust Co.*,¹⁵⁴ suit was brought by one person as representative of all beneficiaries of a trust estate against the trustee, seeking to have certain trust funds, alleged to have been diverted, restored to the trust estate. The court of appeals held that since the action sought sums in excess of the jurisdictional amount, the subject of the controversy was not the recovery of the plaintiff's interest (which was less than the jurisdictional amount) but the "protection, preservation and administration of a trust estate worth far more than \$3,000."¹⁵⁵

In true class actions, therefore, the claims of all members of the class may be aggregated for the purpose of obtaining the requi-

¹⁴⁹ *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal. 2d 833, 198 P.2d 514 (1948).

¹⁵⁰ See 3 MOORE ¶ 23.13; Note, 39 ILL. L. REV. 178 (1944); 35 VA. L. REV. 510 (1949); Annots., 141 A.L.R. 569 (1942); 81 L. Ed. 189 (1936).

¹⁵¹ Blume, *Jurisdictional Amount in Representative Suits*, 15 MINN. L. REV. 501 (1931).

¹⁵² 138 U.S. 464 (1891).

¹⁵³ *Id.* at 480. "While the cited case was concerned with the jurisdictional amount on appeal to the Supreme Court, the principle applies with full effect to . . . the trial courts." *Giesecke v. Denver Tramway Corp.*, 81 F. Supp. 957, 960 (D. Del. 1949).

¹⁵⁴ 128 F.2d 245 (7th Cir. 1942).

¹⁵⁵ *Id.* at 246. In *Grand Rapids Furniture Co. v. Grand Rapids Furniture Co.*, 127 F.2d 245 (7th Cir. 1942) the plaintiffs sought to enjoin the use of that name by the defendants. Since the plaintiffs had a common cause of action, though separable among themselves, the amount of the joint claim was held to be the test of jurisdiction. Examples of "true" suits where the amount involved is the character of the right sought to be enforced are *Gibbs v. Buck*, 307 U.S. 66 (1939); *Buck v. Gallagher*, 307 U.S. 95 (1939); see Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 47 (1937). In hybrid class suits it is said that the amounts cannot be aggregated. Note, 39 ILL. L. REV. 178, 179 (1944).

site jurisdictional amount, while in the hybrid or spurious class suit, the claims may not be aggregated—each claim must be of the jurisdictional amount in order for the federal court to take jurisdiction.¹⁵⁶ This rule for spurious suits dates back to *Pinel v. Pinel*,¹⁵⁷ which forbade aggregation since the demands were “separate and distinct.”¹⁵⁸ The rule has been upheld in spurious actions to recover damages for breach of sales contracts,¹⁵⁹ to recover vacation pay of discharged employees,¹⁶⁰ to enforce rights under a pension plan,¹⁶¹ to recover damages for fraud,¹⁶² and to recover damages for wrongful discharge.¹⁶³ Two decisions arising out of the termination of the War Damage Corporation are often cited. In *Knowles v. War Damage Corp.*,¹⁶⁴ a husband and wife sought an accounting of funds collected as premiums to insure against property damage by enemy action. The interests of the plaintiffs amounted to only 18 dollars but some 300,000,000 dollars had been collected from various policy holders, and the question was which amount involved was properly in controversy. The court held the interests of the plaintiff and of “represented” persons were several so that they could not be aggregated to attain the “jurisdictional threshold.”¹⁶⁵ Although in *Matlaw Corp. v. War Damage Corp.*¹⁶⁶ the plaintiffs sought to impress a trust upon the funds, this action fared no better because the rights of the parties still were several and distinct as to amount in controversy.

¹⁵⁶ *Giesecke v. Denver Tramway Corp.*, *supra* note 154, at 960: “It is well settled that in a ‘true’ class action in the federal courts, whether jurisdiction is based upon diversity of citizenship or upon a federal question arising under the Constitution or laws of the United States, the claims of all the members of the class may be aggregated for the purpose of obtaining the requisite jurisdictional amount. On the other hand, if the action is either a ‘hybrid’ class suit under Rule 23(a)(2) or a ‘spurious’ class suit under Rule 23(a)(3), then the claims of the several members of the class may not be aggregated to determine the jurisdictional amount, but rather the claim of each party-plaintiff must at least equal the requisite jurisdictional amount specified in the statute in order for the court to have jurisdiction as to him.”

¹⁵⁷ 240 U.S. 594 (1916).

¹⁵⁸ *Id.* at 596.

¹⁵⁹ *Coxhead v. Winsted Hardware Mfg. Co.*, 4 F.R.D. 448 (D. Conn. 1945).

¹⁶⁰ *Long v. Dravo Corp.*, 6 F.R.D. 226 (W.D. Pa. 1946).

¹⁶¹ *Hughes v. Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir. 1952).

¹⁶² *Miller v. National City Bank*, 166 F.2d 723 (2d Cir. 1948).

¹⁶³ *Air Line Dispatchers Ass'n v. California E. Airways, Inc.*, 127 F. Supp. 521 (N.D. Cal. 1954).

¹⁶⁴ 171 F.2d 15 (D.C. Cir. 1948).

¹⁶⁵ *Id.* at 19. It could be argued that this is a hybrid suit since the rights were several and there is specific property involved, but the court said that it would not matter that the action might be designated a class action under rule 23(a)(2) or (3).

¹⁶⁶ 7 F.R.D. 349 (S.D. Ind. 1947).

These results curtail the efficiency of the spurious suit. To carry federal rule 23 into effective operation so that the purpose of the rule would be accomplished, either the rule should be amended to provide for aggregation in all types of class actions or the spurious class suit should be omitted from rule 23 and special provisions be made to govern it. In neither *Knowles* nor *Matlaw* was a decision obtained on the merits. It is submitted that the result is unsatisfactory, however technically justifiable.

I. *Statute of Limitations*¹⁶⁷

Since in the traditional, as distinguished from the "spurious," class suit persons represented are bound by the decision, the statute of limitations is tolled as to all the members of the class at the time of the commencement of the action.¹⁶⁸ The first judicial pronouncement to this effect was *Richmond v. Irons*.¹⁶⁹ There a bill was filed by a judgment creditor of an insolvent national bank praying that a receiver be appointed and that the proceeds be applied to the payment of the plaintiff's debt. A question arose as to whether relief should be limited to those persons who became parties prior to the expiration of the statute of limitations. The Court refused to exclude any person merely because of late filing, stating, "if he proves himself to be a creditor with a valid claim against the bank, he becomes a complainant by relation to the time of the filing of the bill."¹⁷⁰

Justification can be made for tolling the statute of limitations in the "true" and "hybrid" type suits inasmuch as the absentees are virtually represented in the action either as to the subject matter or as to the fund or property involved. But whether the statute of limitations is tolled upon the commencement of a spurious class suit is uncertain. Language in some decisions¹⁷¹ indicates

¹⁶⁷ Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 339 (1948); Wheaton, *supra* note 135, at 423; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 942 (1958); Note, 34 COLUM. L. REV. 118, 127 (1934).

¹⁶⁸ 3 MOORE ¶ 23.12, at 3476.

¹⁶⁹ 121 U.S. 27 (1887).

¹⁷⁰ *Id.* at 52. The same rule applied not only to creditors: cases collected in Note, 34 COLUM. L. REV. 118, 130 (1934); but also to stockholders: *Brinckerhoff v. Bostwick*, 99 N.Y. 185, 1 N.E. 663 (1885); and taxpayers suits: *Coyne v. City of Yonkers*, 57 Misc. 366, 109 N.Y. Supp. 625 (Sup. Ct. 1908).

¹⁷¹ *York v. Guaranty Trust Co.*, 143 F.2d 503, 528-29 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945); *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155, 162 (S.D.N.Y. 1959). Judge Frank in the *York* case at 529 said: "As to suits under (3), no less than those under (1) or (2), the Rule unequivocally tells all persons

that one of the uses of this device is the tolling of the statute to permit other members of the group to intervene after the statute has run. However, in the recent decision of *Athas v. Day*¹⁷² this view was not followed. Action for damages for violations in selling securities without proper registration was filed by five plaintiffs, for themselves and all others similarly situated. An amended complaint added three additional parties after the statute of limitations had run. The court held that they could not be added since the action was a spurious class suit which "involves separate causes of action, and is a matter of efficiency to avoid multiplicity of actions. Consequently, each plaintiff must be able to avoid the bar of the statute of limitations without reference to the other causes of action."¹⁷³

This decision is consistent with the present concepts of the spurious action, although the rules relating to class actions themselves make no such distinction. Of course, this limitation further curtails the effectiveness of the spurious-type suit. The principle applied in *Athas* must be right so long as a person who did not take advantage of the "invitation to join" the original litigation would not be foreclosed by it.

J. Intervention

Intervention is intertwined with the principles of res judicata, control of the litigation, and jurisdictional requirements; hence these principles play an important part in the effectiveness of the class remedy.

Unknown under the organic common law,¹⁷⁴ the device of

having claims of the type therein described that one or more of them may begin such a class action 'on behalf of all' when the 'class' is 'so numerous as to make it impracticable to bring them all before the court.' Any non-accepting noteholders, relying on that assurance, were justified in believing that plaintiff's suit was begun on their behalf although they were not before the court. To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule into a trap. Since, in a class suit under clause (3), a judgment will not be res judicata for or against those of the class who do not intervene, we suggest that if, after trial, the court finds against the defendant, appropriate steps be taken to notify all such noteholders to intervene . . . judgment to be entered in favor only of those who do so within a reasonable time."

¹⁷² 161 F. Supp 916 (D. Colo. 1958).

¹⁷³ *Id.* at 919.

¹⁷⁴ 2 CHITTY, GENERAL PRACTICE 493-94 (1835). Intervention is the product of the continental system, and to some extent equity. See discussion in 4 MOORE ¶ 24.03.

intervention was relatively recently adopted in both the state¹⁷⁵ and federal courts.¹⁷⁶ Rule 24 of the federal rules governs intervention in the federal courts.¹⁷⁷

The proper procedure for intervening is set forth in federal rule 24(c). The applicant is required to serve upon all the other parties his petition or motion to intervene, accompanied by a pleading setting forth the claim or defense upon which intervention is sought. *Atlantic Refining Co. v. Port Lobos Petroleum Corp.*¹⁷⁸ contains the most explicit discussion of the proper procedure: leave of the court should be obtained to file the petition,¹⁷⁹ but:

"The mere filing of the petition pursuant to leave does not make the petitioner a party to the cause. The original parties are entitled to be heard on the question of his admission, and, upon filing his petition, he should obtain an order of notice to them and have the petition set down for a hearing . . . . The hearing upon the petition should be followed by an order denying or granting leave to the petitioner to intervene and become a party . . . . After a petitioner becomes a party, he stands to all intents and purposes as if he had been an original party to the suit."¹⁸⁰

The federal rules provide for two types of intervention—intervention as of right and permissive intervention. Permissive inter-

¹⁷⁵ CLARK, CODE PLEADING § 65, 420-23 (1947).

¹⁷⁶ Prior equity rule 37, 226 U.S. Appendix 11 (1912), provided: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

¹⁷⁷ "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in the action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

"(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

¹⁷⁸ 280 Fed. 934 (D. Del. 1922).

¹⁷⁹ This is no longer a requirement under rule 24, although some courts require a notice. *Cowan v. Tipton*, 1 F.R.D. 694 (E.D. Tenn. 1941); *In re Finger Lakes Land Co.*, 29 F. Supp. 50 (W.D.N.Y. 1939).

¹⁸⁰ 280 Fed. 934, 937 (D. Del. 1922).

vention is a matter largely in the discretion of the court. It is possible only when the applicant's claim or defense and the main action have a question of law or fact in common; factors of delay, complication of issues, and prejudice to the original parties may bear upon the court's exercise of its discretion.¹⁸¹

In the cases of intervention as of right, the discretion on the part of the court is extremely limited. If the various conditions set forth in rule 24 are satisfied the court will be bound to permit intervention. This type of intervention "serves a protective function for the applicant who may be injured unless heard in the action. Out of fairness to the applicant, considerations of procedural efficiency and of inconvenience to the original parties are prohibited from influencing the decisions as to intervention of right."¹⁸² These requirements under rule 24(a), so far as they pertain to class actions, were judicially stated in *Farmland Irrigation Co. v. Dopplmaier*.¹⁸³

"Essential to an absolute right of intervention in accordance with Rule 24(a) is a showing by the applicant for intervention of the existence of both conditions stated by the Rule, i.e., inadequate representation by existing parties and a judgment that is or may be binding in the action. A showing that an applicant for intervention will be bound by a judgment in the action is not in itself sufficient to confer upon such applicant a right to intervene; it must also be shown that representation of the applicant's interest by existing parties is or may be inadequate."¹⁸⁴

The above requirement of "inadequacy" of representation before intervention is allowed under rule 24 does not quite square with the provisions of rule 23. Under rule 23 adequacy of representation must be shown before the class suit may be maintained. "If it is a proper class action under rule 23, he is by definition adequately represented."¹⁸⁵ It is possible however, that the in-

¹⁸¹ *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141 (1944); *First Congregational Church v. Evangelical & Reformed Church*, 21 F.R.D. 325 (S.D.N.Y. 1958); *Kind v. Markham*, 7 F.R.D. 265 (S.D.N.Y. 1945); *Crosby Steam Gauge & Valve Co. v. Manning*, 51 F. Supp. 972, 973 (D. Mass. 1943).

¹⁸² Note, 63 YALE L.J. 408, 409 (1954).

¹⁸³ 220 F.2d 247 (9th Cir. 1955).

¹⁸⁴ *Id.* at 248.

¹⁸⁵ *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 941 (1958).

tended intervenor may be able to add facts which were not brought forth originally, and that he may therefore be able to show that there is inadequacy of representation. Two decisions have discussed the problem. In *Bisanz Bros. v. Chicago-M. St. P. & P. R.R.*,¹⁸⁶ and *Farmland Irrigation Co. v. Dopplmaier*,¹⁸⁷ it was held that inadequacy of representation can be established "if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or fails because of non-feasance in his duty of representation."¹⁸⁸ In such instances rule 24 would be satisfied and intervention presumably allowed.

The second portion of the requirement in rule 24(a)(2), that the intervenor may be bound by a judgment, has received varied treatment by the courts.¹⁸⁹ A number of decisions have strictly equated "being bound" with being foreclosed under the doctrine of *res judicata*.¹⁹⁰ A less stringent interpretation of "being bound," however, is shown in the recent decision of *Clark v. Sandusky*,¹⁹¹ in which certain Negro citizens in Illinois sought damages and an injunction restraining the defendants from interfering with their right of occupancy in an apartment in Cicero, Illinois. Mrs. DeRose sought to intervene in the action, alleging that she was the landlord of the apartment house and that she had an interest in the furniture that was sought to be moved into the apartment. She sought damages against the plaintiffs and defendants because her building had been damaged and her furniture destroyed. The trial court denied her petition for intervention; but the appellate court, permitting her to intervene as of right, held that while a judgment would not be *res judicata* as to her, "she will be . . . unduly prejudiced by that judgment."¹⁹² Just how Mrs. DeRose would have been prejudiced, inasmuch as no obstacles prevented

¹⁸⁶ 20 F.R.D. 353 (D. Minn. 1957).

¹⁸⁷ 220 F.2d 247 (9th Cir. 1955).

¹⁸⁸ *Bisanz Bros. v. Chicago M. St. P. & Pac. R.R.*, 20 F.R.D. 353, 354 (D. Minn. 1957). In *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), intervention was allowed because of inadequate representation.

¹⁸⁹ See Note, 63 YALE L.J. 408 (1954).

¹⁹⁰ *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), 50 CALIF. L. REV. 89 (1962) (critical); *Sutphen Estates v. United States*, 342 U.S. 19 (1951); *Durkin v. Pet Milk Co.*, 14 F.R.D. 374 (W.D. Ark. 1953); *Owen v. Paramount Prods., Inc.*, 41 F. Supp. 557 (S.D. Cal. 1941).

¹⁹¹ 205 F.2d 915 (7th Cir. 1953).

¹⁹² *Id.* at 918.

her from maintaining an independent action against the parties, was not explained. If such a liberal interpretation of being bound is uniformly given, the trial courts may come to be required to allow the interjection into pending litigation of some issues which might be more expeditiously and justly handled in separate proceedings.

When an applicant seeks to intervene in the federal courts, the question arises whether the intervenor must have independent jurisdictional grounds. The leading decision holding that the intervenor need not satisfy jurisdictional requirements is *Stewart v. Dunham*.¹⁹³ A creditors' bill was filed in a state court; after removal to the federal tribunal, the court permitted certain other persons to intervene as parties. It was contended that there was no federal jurisdiction because the controversy did not then appear to be wholly between citizens of different states. The Supreme Court rejected this contention:

"This, of course, could have furnished no objection to removal of the cause from the State court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties."¹⁹⁴

In the true and hybrid class suits, intervention will be allowed even when the applicant does not satisfy the jurisdictional requirements. In the spurious-type suit, however, Professor Moore's thesis that "other persons similarly situated [are able] to intervene without regard to jurisdictional limitations applicable to original parties,"¹⁹⁵ while approved in a number of cases,¹⁹⁶ has not been consistently followed.¹⁹⁷ *Wagner v. Kemper*¹⁹⁸ did not permit in-

¹⁹³ 115 U.S. 61 (1885).

¹⁹⁴ *Id.* at 64. See also *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921); *Boesenberg v. Chicago Title & Trust Co.*, 128 F.2d 245 (7th Cir. 1942); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 941 (1958).

¹⁹⁵ 3 MOORE ¶ 23.10, at 3444.

¹⁹⁶ *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155 (S.D.N.Y. 1959); *Zelley v. Muehleck*, 10 F.R.D. 62 (E.D. Pa. 1950); *Shipley v. Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947).

¹⁹⁷ *Wagner v. Kemper*, 13 F.R.D. 128 (W.D. Mo. 1952). The court relied on *Knowles v. War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948), where the original parties did not have the jurisdictional amount. Except for the class device there must be independent grounds of jurisdiction by the intervenor. *Hunter v. Southern Indem. Underwriters*, 47 F. Supp. 242 (E.D. Ky. 1942).

¹⁹⁸ 13 F.R.D. 128 (W.D. Mo. 1952).

tervention by a number of persons in the absence of an independent showing of satisfaction of jurisdictional requirements of diversity and amount. There was sufficient confusion in the rule to suggest to the *Wagner* court that, contrary to some other decisions and contrary to the results in true and hybrid class suit cases, intervention may not be allowed in the spurious-type suit if the intervenors fail to satisfy these jurisdictional requirements.

While both sections (a) and (b) of federal rule 24 provide that the filing of the application for intervention must be timely,¹⁹⁹ and while the application usually is made at an early stage of the proceedings,²⁰⁰ a special effectiveness of the spurious class suit device lies in the fact that intervention can be allowed here even after a judgment favorable to the class.²⁰¹ Liberality in permitting intervention after judgment has been urged²⁰² and was effected in *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*,²⁰³ in which intervention was permitted two and one-half years after proofs had been closed on the issue of liability. By permitting intervention at such a late stage the greatest utility of the "spurious" device is achieved to avoid duplicative suits, to dispose of multiple claims based on identical facts and law which are similar but not identical. Since this decision is not uniformly followed, however, a rule explicitly providing for intervention at a late stage of the proceeding—or even after judgment—is needed.

K. *Res Judicata*²⁰⁴

While there is a need for a modern effective remedy to dispose of multi-party litigations, the procedural device of the class suit—any class suit—conflicts with the deep-rooted principle of Anglo-

¹⁹⁹ *Distini v. Cunningham*, 272 F.2d 528 (D.C. Cir. 1959); 4 MOORE ¶ 24.13.

²⁰⁰ *Tatem v. Southern Transp. Co.*, 8 FED. RULES SERV. 24c.32, Case 1 (E.D. Pa. Jan. 31, 1945).

²⁰¹ *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942 (7th Cir. 1956).

²⁰² Note, 53 NW. U.L. REV. 627, 632 (1958).

²⁰³ 24 F.R.D. 510 (N.D. Ill. 1959).

²⁰⁴ CHAFEE, SOME PROBLEMS OF EQUITY 250 (1950); 3 MOORE ¶ 23.11; Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948); Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555 (1938); Comment, 35 CALIF. L. REV. 443 (1947); Note, 37 CALIF. L. REV. 525, 528 (1949); Note, 34 COLUM. L. REV. 118, 132-39 (1934); Note, 46 COLUM. L. REV. 818, 824 (1946); Note, 67 HARV. L. REV. 1059 (1954); Note, 39 IOWA L. REV. 365 (1954); Note, 13 U. KAN. CITY L. REV. 163 (1945); Note, 7 OKLA. L. REV. 472 (1954); Comment, *Denial of Due Process Through Use of the Class Action*, 25 TEXAS L. REV. 64, 65 (1946).

American jurisprudence that no one shall be bound by a judgment without having had an opportunity to litigate his own claim in his own way.

Nevertheless, because of the obvious need in a representative suit, a judgment was recognized in some cases as being binding on those individuals who, although not made actual parties, could be identified with the suit as "virtual" parties.²⁰⁵ Thus the development of the class suit in equity procedure. Deletion in subsequent rules of the last sentence of the old Federal Equity Rule 48—"the decree shall be without prejudice to the rights and claims of all the absent parties"—implied that the drafters, while still recognizing the traditional principles, did consider a representative-suit judgment binding in the exceptional cases. And despite the absence of any specific rule on the subject, modern decisions have in similar cases applied the evolved doctrine of *res judicata*.²⁰⁶

The general principles concerning the binding effect of a judgment in class actions are simple enough. In a true class action all the members of the class are bound by the judgment;²⁰⁷ a hybrid class action is conclusive as to all members of the class insofar as the fund or property is involved,²⁰⁸ and a spurious class action is conclusive only on those who are participating parties or who somehow intervene in the action.²⁰⁹ Ineptitudes of categorization, however, have led some courts to ignore the classifications and to decide on the basis of other factors as heretofore suggested. "The nature of the class, procedural safeguards, and judicial administration in granting relief"²¹⁰ have determined that the judgment is binding upon absent persons when it appears from the record that there are individuals who have an interest in common

²⁰⁵ *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853); *Richardson v. Kelly*, 191 S.W.2d 857 (Tex. 1945).

²⁰⁶ Professor Moore recommended, in *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937), that the federal rules contain a provision keying *res judicata* to the type of class suit, but the committee rejected the proposal as being a matter of substance. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT 60 (1937).

²⁰⁷ 3 MOORE ¶ 23.11, at 3460-61; Judge Goodrich in *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945); *Shipley v. Pittsburgh & L.E.R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947); RESTATEMENT, JUDGMENTS, § 86, comment *b* (1942).

²⁰⁸ 3 MOORE ¶ 23.11, at 3468.

²⁰⁹ 3 MOORE ¶ 23.11, at 3465.

²¹⁰ *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 936 (1958).

with those who sue or defend, whose interests are tied by some bond of association. A judgment is held to be *res judicata* upon absent persons in actions involving unincorporated associations,²¹¹ in stockholders' suits,²¹² in taxpayers' actions,²¹³ and in creditors' bills.²¹⁴

In *Supreme Tribe of Ben-Hur v. Cauble*,²¹⁵ certain citizens, none of whom resided in Indiana, brought action in the federal district court of Indiana against the Supreme Tribe, an assurance society, to enjoin what was claimed to be an unlawful use of trust funds by the defendant. The suit was brought for the benefit of all members holding class A certificates (some 70,000) to contest the Tribe's reclassification of certificates. A final decree was entered dismissing the bill, and later certain Indiana residents filed suit in the state court of Indiana which would have relitigated the questions settled by the judgment of the federal court. The Tribe then sought an injunction against the Indiana residents to restrain them from prosecuting the action. The United States Supreme Court held that the Indiana citizens were members of the class; that their rights were duly represented by those parties before the federal court, and therefore the previous decree was binding upon them.

The decision, standing alone, is a strong holding supporting the rule stated above of the binding effect on a "true class suit" judgment upon absent but represented members of a true class.

Comparison of *Hansberry v. Lee*,²¹⁶ discussed earlier, is clearly appropriate here. There the question arose as to the effectiveness of a restrictive covenant which was to become effective when

²¹¹ *Armstrong v. Superior Court*, 173 Cal. 341, 159 Pac. 1176 (1916); *People ex rel. Stearns v. Marr*, 181 N.Y. 463, 74 N.E. 431 (1905).

²¹² *Dana v. Morgan*, 232 Fed. 85 (2d Cir. 1916); *Kaufmann v. Annuity Realty Co.*, 301 Mo. 638, 256 S.W. 792 (1923); *Moore & Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 559 (1938); Note, 34 COLUM. L. REV. 118, 136 (1934).

²¹³ *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N.E. 161 (1887); *Ashton v. City of Rochester*, 133 N.Y. 187, 30 N.E. 965, 14 N.Y. Supp. 855 (1892); Note, 34 COLUM. L. REV. 118, 138 (1934).

²¹⁴ *Towel v. Donnell*, 49 F.2d 49 (6th Cir. 1931); *Throckmorton v. Hickman*, 279 Fed. 196 (3d Cir. 1922).

²¹⁵ 255 U.S. 356 (1921).

²¹⁶ 311 U.S. 32 (1940). Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 337 (1948) say: "It seems unlikely, however, that the *Ben Hur* case, were it to come up for the first time today, would reach the same result, for its doctrine as to *res judicata* seems irreconcilable with the position of the Supreme Court in the case of *Hansberry v. Lee*...."

"signed by the owners . . . of ninety-five per cent of the frontage."²¹⁷ After one action to enforce the covenant was successful, subsequent litigation sought to strike down the covenant. The Supreme Court of Illinois²¹⁸ held that the first action was a class suit and that the present parties were bound by that previous decision, but the United States Supreme Court reversed,²¹⁹ holding that due process was violated since the interests of the represented parties might well be antagonistic—one sub-class of the group seeking to uphold the covenant, another sub-class wishing to defeat it. Hence the class suit did not afford "that protection to absent parties which due process requires."²²⁰ The language used by the Court suggests that a possible ground for the decision was that no notice had been given to any member of the class and therefore the absentees were not bound.²²¹ But the clear sense of the opinion is that the class, if any, of persons who were earlier represented and wanted the covenant enforced did not include those who might elect to reject the covenant.²²² The rule to be found in *Hansberry* is not that all persons represented in a class suit must agree with the purposes of the acting plaintiff in order for them to be bound by the judgment, nor is it that due process cannot exist for purposes of applying res judicata unless all represented persons are members of some lodge or comparable voluntary association. The rule is simply and clearly, as stated, that there exists no class for such purposes "where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it."

Cases²²³ subsequent to *Hansberry* have continued to apply the doctrine of res judicata in class suits, recognizing the fact that *Hansberry* has not eliminated this principle in such actions.

²¹⁷ *Burke v. Kleiman*, 277 Ill. App. 519, 524 (1934).

²¹⁸ 372 Ill. 369, 24 N.E.2d 37 (1939).

²¹⁹ 311 U.S. 32 (1940).

²²⁰ *Id.* at 45.

²²¹ *Id.* at 42.

²²² Comment, 25 TEXAS L. REV. 64, 74 (1946); see also Note, 67 HARV. L. REV. 1059, 1062 (1954); Note, 49 YALE L.J. 1125, 1127 (1940).

²²³ *Waybright v. Columbia Mut. Life Ins. Co.*, 122 F.2d 245 (6th Cir. 1941); *International Allied Printing Trades Ass'n v. Master Printers Union*, 34 F. Supp. 178 (D.N.J. 1940). The language of Judge Goodrich in *Pentland v. Dravo Corp.*, 152 F.2d 851, 852 (3d Cir. 1945) is: "The learned district judge was in error when he said, in his opinion in this case it was 'too astonishing to be accepted' that one unwilling to appear in a suit might be bound by the judgment therein. That is just what does happen in case of a true class action."

In the case of the spurious class suit, whether the members of the class are entitled to the same or to separate relief, courts have held that a previous adjudication is not binding upon the absent parties.²²⁴ Here, it is said, the judgment binds only those persons who are before the court, including those who intervene and were made parties.²²⁵ Various proposals have been made to apply the doctrine of *res judicata* to the spurious class action. Keeffe, Levy, and Donovan²²⁶ suggest that, since the Supreme Court in *Hansberry* did not foreclose the possibility that *res judicata* would apply to a spurious class suit,²²⁷ notice should be given to the members of the class to provide them with an opportunity to participate in the litigation or be bound by the decision. And one writer²²⁸ argues that due process would be satisfied if timely notice were given and an opportunity to participate provided.²²⁹ Another view suggests that only the common issues be held to be *res judicata*.²³⁰

Possibility of non-legislative extension, however, was rejected in the recent federal district court case of *Pennsylvania R.R. v. United States*.²³¹ Ammunition stored at Perth Amboy exploded, causing widespread damage to persons and property, resulting in the filing of over 30 death actions, 110 injury actions and 8,000 suits for property damage. Pennsylvania Railroad, one of the possible tort-feasors, brought a "spurious type" class action against representative claimants for a declaratory judgment to determine its legal responsibility, and it urged the court to apply the principle of *res judicata* to all known and unknown claimants. The court rejected this proposal and refused to permit its decision to be binding on any claimant who had not become a party. The court recognized the difficulties inherent in disposing of this mass of claims but concluded:

²²⁴ *Schatte v. International Alliance*, 183 F.2d 685 (9th Cir. 1950); *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945); *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2d Cir. 1944) (dictum); *Albrecht v. Bauman*, 130 F.2d 452 (D.C. Cir. 1942); *Hurd v. Illinois Bell Tel. Co.*, 136 F. Supp. 125 (N.D. Ill. 1955); *Walton v. Poplos*, 32 Del. Ch. 292, 85 A.2d 75 (1951).

²²⁵ *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944).

²²⁶ Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 342 (1948).

²²⁷ *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

²²⁸ Note, 46 COLUM. L. REV. 818, 833 (1946).

²²⁹ See the proposals summarized in Note, 7 OKLA. L. REV. 472 (1954), and the discussion concerning notice in Note, 67 HARV. L. REV. 1059, 1062-65 (1954).

²³⁰ *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 189-90 (8th Cir. 1948); *Pascale v. Emery*, 95 F. Supp. 147 (D. Mass. 1951); Note, 50 YALE L.J. 90, 95 (1940).

²³¹ 111 F. Supp. 80 (D.N.J. 1953), discussed in Note, 63 YALE L.J. 493, 511 (1954).

"The Federal Rules of Civil Procedure and existing legislation do not provide a satisfactory solution of the problems presented by the legal controversies arising out of accidents such as the South Amboy explosion. They are controversies in which the common questions of law and fact should be tried in one action in which every individual and corporation accused of liability and the United States could be joined, in which all claimants could be represented and in which all the evidence could be presented. Such a result, however, cannot be achieved unless Congress modifies, in this unusual type of situation, the requirements of complete diversity of citizenship, allows service of summons outside of the district wherein the court hearing the case sits, and permits a federal court to enjoin all other suits arising out of the same occurrence."²³²

It seems hard indeed to foreclose anyone's personal claim without permitting him to present his own facts by an attorney of his choice, with the chance to exercise for himself the available trial strategies. Would such a foreclosure be buying judicial efficiency at too high a price? Would new legislation attempting this for the sake of expediting multiple-claim situations violate inviolable principles? The Supreme Court of the United States, in *Hansberry v. Lee*, strongly hints that it would not—if there can be insured a "protection of the interests of absent parties" and a "full and fair consideration of the common issues."²³³ Accordingly, in the conclusion of this paper it will be urged that model or uniform legislation be adopted along these lines.

Even under the present procedures, the common opponent who has lost in the representative action may be prevented from relitigating issues common to the claimants in each separate new proceeding. It has been suggested²³⁴ that the common issues would once and for all be foreclosed, so that the defendant would not be permitted to continue to relitigate the question. "There seems to be no good reason why the defendant should be permitted continual relitigation of a factual problem already judicially determined."²³⁵ A technical justification for the defendant to relitigate common issues is the fact that the defendant may be entitled to a jury trial. But in an analogous situation—a case involving permis-

²³² 111 F. Supp. at 91.

²³³ 311 U.S. 32, 42 (1940).

²³⁴ Note, 7 OKLA. L. REV. 472, 474 (1954).

²³⁵ Note, *Civil Liability Under the Federal Securities Act*, 50 YALE L.J. 90, 95 (1940).

sive joinder of plaintiffs—*Akely v. Kinnicut*,²³⁶ in which the defendants contended that they should be entitled to a jury trial as to each plaintiff, the court rejected the contention and held that the defendants did not have a right to a separate trial by jury on each claim. As long as the “substance of the right of trial by jury is preserved,” the right is not violated.²³⁷

L. *Attorneys' Fees*²³⁸

It has been traditional in true,²³⁹ hybrid,²⁴⁰ and spurious²⁴¹ type suits to award a reasonable attorneys' fee reimbursement to a party who has by his expense and effort in a representative suit created or captured the fund or property in which others may share.²⁴² The basic principles are that represented persons who are entitled to share benefits should also share the expenses,²⁴³ and that “property which has been secured by the services of an attorney should bear the cost thereof.”²⁴⁴ These principles are implicit in the theory that “the plaintiff is the representative of the whole class

²³⁶ 238 N.Y. 466, 144 N.E. 682 (1924).

²³⁷ *Id.* at 475, 144 N.E. at 685.

²³⁸ See the excellent article by Hornstein, *Legal Therapeutics: The “Salvage” Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956). His other writings dealing with stockholders' suits are: Note, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939); *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1 (1947).

²³⁹ *Harris v. Chicago G.W. Ry.*, 197 F.2d 829 (7th Cir. 1952); *Confederated Bands of Ute Indians v. United States*, 120 Ct. Cl. 609 (1951).

²⁴⁰ *Nolte v. Hudson Nav. Co.*, 47 F.2d 166 (2d Cir. 1931); *Central Trust Co. v. United States Light & Heating Co.*, 233 Fed. 420 (2d Cir. 1916); *Helm v. Smith-Fee Co.*, 79 Minn. 297, 299, 82 N.W. 639, 640 (1900); *White v. University Land Co.*, 49 Mo. App. 450 (1892).

²⁴¹ *Illinois Bell Tel. Co. v. Slattery*, 102 F.2d 58, 66 (7th Cir. 1939); *Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 356 (S.D.N.Y. 1950).

²⁴² *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Hobbs v. McLean*, 117 U.S. 567 (1886); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1881); *St. Louis Union Trust Co. v. Fitch*, 354 Mo. 638, 190 S.W.2d 215 (1945); *Aetna Ins. Co. v. O'Malley*, 124 S.W.2d 1164 (Mo. 1938) (award governed by legislative appropriation); *White v. University Land Co.*, 49 Mo. App. 450 (1892). See Annots., 49 A.L.R. 1149 (1927); 107 A.L.R. 749 (1937). The principle had its origin in the English courts of chancery—see historical discussion by Mr. Justice Frankfurter in *Sprague v. Ticonic Nat'l Bank*, *supra* at 164.

²⁴³ “The rule is established that where one goes into a court of equity and takes the risks of litigation upon himself, and successfully creates, protects, or preserves the fund, to share in which others are entitled, those others will not be allowed to lie back and share the results of the successful labors, without contributing their due share. And a court of equity . . . requires payment out of the fund before distribution, of reasonable costs and expenses, including reasonable counsel fees of the complainant whose diligence has created or preserved the fund . . .” Annot., 49 A.L.R. 1149, 1153 (1927).

²⁴⁴ Hornstein, *supra* note 238, 69 HARV. L. REV. 658 (1956). See also Note, 33 NOTRE DAME LAW. 651 (1958).

and is authorized to contract for all with respect to the expenses of the litigation," and in the fairness theory of quasi-contract.²⁴⁵ In one of the leading decisions, *Trustees v. Greenough*,²⁴⁶ a holder of railroad bonds sued on behalf of himself and other bondholders to set aside certain conveyances and to appoint a receiver to care for the property which was being sold at nominal prices. The litigation on behalf of the plaintiff was successful, the fund was saved, and a considerable amount of money was realized for all the holders of the bonds. The plaintiff bore the burden of the litigation, advanced money for expenses, and employed attorneys to realize this result. A question arose as to allowance of expenses and attorneys' fees. The Supreme Court of the United States allowed the attorney fees and expenses, stating:

"[I]n a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; . . . and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings, . . . he may be said to have saved the fund for the *cestuis que trust*. . . . It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage."²⁴⁷

That attorneys' fees are awarded in spurious suits can be seen from the case of *Paris v. Metropolitan Life Ins. Co.*,²⁴⁸ in which attorneys applied for an additional allowance of fees after they were successful in recovering retroactive compensation due to certain life insurance agents employed by the insurance company. The court awarded an additional fee of 225,000 dollars for services rendered, taking into consideration the novel and complicated problems involved in the litigation. It is apparent also that when the attorneys representing the initial parties are successful in the spurious suit, so that others may intervene to assert their demands, the original attorneys should be entitled to a proportion of the recovery of the

²⁴⁵ Note, 33 NOTRE DAME LAW. 651, 652 (1958).

²⁴⁶ 105 U.S. 527 (1881).

²⁴⁷ *Id.* at 532.

²⁴⁸ 94 F. Supp. 356 (S.D.N.Y. 1950).

intervenor. Otherwise grave inequities could result. Absentees could await the outcome of the initial litigation, and then through their own attorneys take advantage of a judgment without being responsible to the successful attorneys whose efforts aided in creating the interests for the absentees.²⁴⁹

To entitle attorneys to a fee collectible in part from persons merely "represented," *i.e.*, from the members of a spurious class, the efforts compensated must have resulted in the creation or increase of a fund in which such represented persons may share.²⁵⁰ When that is established the court in its sound discretion²⁵¹ will take into consideration in determining the amount of fees: the nature, character and extent of the service rendered; the time devoted to the matter by the attorneys; the professional standing of the attorneys and their degrees of professional skill and experience; the value of the fund; and the favorable result and benefits obtained.

Although some special difficulties in determining the proper and fair amount of attorneys' fees should be expected to be encountered in the spurious type suit, that suit should not therefore be treated differently in this respect from other types. The theory of the spurious suit device—that the rights are separate, that each person would be entitled to seek separate relief—would seem consistent with requiring that no represented person may gain unless he submit to bear his own proportion of fees. One barrier may be canon 28 of the Canons of Professional Ethics. That provides: "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit. . . . It is disreputable to . . . breed litigation by seeking out those having claims for personal injuries or those having any other ground of action in order to secure them as clients . . . ." However, it has been suggested that in such wide-ranging affairs as representative suits the attorney should be allowed reasonable latitude in soliciting intervenors as long as this is done under the auspices of the court.²⁵² If the spurious suit is to be successful some reason-

²⁴⁹ Note, 53 NW. U.L. REV. 627, 636 (1958). See also Comment, *Suit by Class Representation in Ohio*, 20 U. CINC. L. REV. 85, 114 (1951).

²⁵⁰ *Thomas v. Peyser*, 118 F.2d 369 (D.C. Cir. 1941); *Matter of Attorney Gen. v. North Am. Life Ins. Co.*, 91 N.Y. 57 (1883); Note, 33 NOTRE DAME LAW. 651, 652 (1958). Even where the litigation has become moot, it has been held that attorneys are entitled to a fee, *Lafferty v. Humphrey*, 248 F.2d 82 (D.C. Cir. 1957).

²⁵¹ *Central Trust Co. v. United States Light & Heating Co.*, 233 Fed. 420 (2d Cir. 1916).

²⁵² Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL. L. REV. 518, 532 (1947).

able notification should be permitted, and if this is supervised by the court there should be no violation of the canon.

IV. CONCLUSION AND RECOMMENDATION

It has been shown that there are two kinds of situations wherein under existing rules the representative suit remedy is readily and consistently made available for single-litigation disposal of multiple-party claims: first, where numerous absent parties and those representing them are already tied together in some consensual or status relationship constituting a "true class" under traditional equity standards; and second where the relief sought is the validation or division of some specific collectively-claimed fund or asset subject to the court's jurisdiction. In these situations, by and large, the results show that the remedy functions well—although problems of pleadings, evidence, and internal procedures in the suit generally are complicated by the exigencies of the due representation of absent parties, foreclosing their rights.

But it is seen also that there is a further area of potential usefulness of the representative suit in which the present rules have not served at all well—that is, where there has existed neither a "true class" nor a community of claim to a specific common relief or common fund. The hard question is whether in this increasingly important area the representative suit can and ought to be made functional; and it has been said in many cases that the doctrine of *res judicata* cannot constitutionally and fairly be applied to bar the rights of absent "represented" persons.

The Supreme Court of the United States broadly hints otherwise, however, in its opinion in *Hansberry v. Lee*,²⁵³ saying:

"There is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; . . . nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, . . . this Court is

²⁵³ 311 U.S. 32 (1940).

justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."²⁵⁴

It is the conception of the recommendations herein that a procedure "fairly insuring the protection of the interests of absent parties" can be effected by legislation imposing upon the court directly the duty of judicially determining and finding as a condition of final judgment (a) that there has existed throughout all the proceedings an adequate and diligent representation and protection of the rights of absent represented persons, and (b) that the judgment is intended to be binding upon those persons. That a judgment may be binding upon those persons who are not parties of record in the so-called "spurious type" class suit, when an adequate procedure for notification is adopted, finds favor in the language of the Supreme Court in *Hansberry*:

"Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue"²⁵⁵

If adequate personal notice were given to known absent claimants ensuring assertion of their claims within the time specified by the court, the procedure thereby adopted would, in view of recent developments in the field of acquisition of in personam jurisdiction, seem to be consistent with due process. State barriers have ceased to place limitations upon the courts in any particular forum; the trend in the past decade or two has been to expand the permissible scope of jurisdiction. Keeffe, Levy, and Donovan²⁵⁶ have argued that it is a proper problem of public concern to adjudicate

²⁵⁴ *Id.* at 42. It is submitted arguendo that in the context of this quotation, as elsewhere, and in federal rule 23, the Court uses the terms "class" and "class suit" to include the so-called "spurious" class suit.

²⁵⁵ *Id.* at 43.

²⁵⁶ Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 347 (1948).

issues as to all members of the class without multiple actions, and that the issues in common should be foreclosed as to all members of the class. Since the publication of the Keeffe article, judicial recognition of the transformation of our national economy has made fair and reasonable notice, rather than territorial power, the important consideration.²⁵⁷ It would now seem to be a logical step in the progression to provide a procedure whereby the absentees, upon adequate notice, would be foreclosed from re-trying their individual claims.

Under such a rule or statute there could be one determination made which would dispose of all the numerous claims of the members of a group dependent upon the same fact pattern. If the decision were favorable to the group, absentee members would be able to assert their claims and have them determined by supplementary proceedings. If, on the other hand, the decision were adverse to the group, *res judicata* would be applicable only to all members personally notified. If personal notification had been given to all members of the class, they would thus all be foreclosed from relitigating. This procedure, under the language of *Hansberry*, should not be unconstitutional. And such a procedure, foreclosing the interests of members of the group when the defendant is successful, would not only assure the defendant that he would not be burdened with innumerable additional litigations after using every effort to defend the initial suit, but would achieve judicial efficiency in disposing of numerous claims in one action.

It must be admitted that persons who neither appeared nor were personally served could not be foreclosed, and could maintain their separate actions. The difficulty in making the issues *res judicata* as to all members of the group (notified or not) when the decision is favorable to the defendant is that it is hard to propose that individual rights should be foreclosed without notice in an action brought by a total stranger, whose only relationship would be the fortuitous circumstance giving rise to common questions of law and fact. Nevertheless, these multiple-party similar-fact situations cry for a procedure that will dispose of the multiple claims fairly as to all concerned. The proposal herein, it is submitted, balances these conflicting values and is consonant with due process.

²⁵⁷ Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

Although the issues could still in some instances be re-tried by unnotified "represented" persons, this difficulty may be more apparent than real. In many instances, all the members of the group would be known and personal notice could be achieved. Publication could be made, inviting unknown members of the group to participate and assert their claims. If any should do so their interests would, of course, be foreclosed in the event of a decision favorable to the defendant. Furthermore, if the defendant is successful, the individual claims may be such as not to justify separate actions upon issues once lost. And the defendant would be, under the suggested statute, safe at least against the claims of those members who had been served with adequate notice in the first action. The alternative—to foreclose the rights of persons who neither appeared nor had been accorded opportunity to appear—would be undesirable, even if to do so, for the sake of judicial and public convenience, might be constitutional under the broad implications of *Hansberry*.

The difficulties presented by use of the representative suit are varied and complex. Traditional conservatism, unfortunate and artificial classifications, failure of existing rules to provide explicit guidance in certain instances—all these combine to make the device something less than the modern, effective judicial remedy it could become. If this device is ever to fulfill its potential in modern procedure, the wording of the rules and statutes relating to representative actions should be improved to state the intention to cover the situation where there are numerous parties and their claims have only questions of law or fact in common. This approach would make it possible to divorce the historical principles evolved in "class" actions, with their technicalities and limitations, from the modern remedy. In this new device, where the questions of fact or law are common to numerous persons, the common issues²⁵⁸ relating to liability appropriately may be tried first, and if those be adjudicated favorably to the represented group then other persons, after notification, can be permitted to present their claims before a master or trustee appointed by the court. Thus, the common issues will be litigated only once, and the individual issues will be determined by an officer so that the court will not be bur-

²⁵⁸ *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 189-90 (8th Cir. 1948); *Pascale v. Emery*, 95 F. Supp. 147, 149 (D.C. Mass. 1951).

dened with time-consuming testimony on individual claims. Those persons who do not appear to present their claims or who are not parties of record will have to be bound, subject to appeal, under the principles of *res judicata* if the court has obtained jurisdiction over them by adequate notification; they will be free to litigate their own claims if it has not. Notice can be given to permit individual claimants to present their demands, even after judgment, and such notice should, subject to sufficiency of the grounds for representative suit procedure, be made binding upon those who do not present their claims.²⁵⁹ Liberal intervention should be allowed to permit the claimants to present their claims even after judgment.²⁶⁰ Those persons who would have a tendency to lie back and await a favorable verdict would, of course, be responsible for their proportionate share of costs and attorneys' fees in accordance with the traditional principles concerning attorneys' fees in class actions.

It is proposed, therefore, that federal rule 23(a)(3) and the state rules based thereon be repealed, and the rules amended to provide for a new rule along the following lines:

If there are numerous persons having separate rights and it is or may be impracticable for each of them to maintain suit individually, and there is a common question of law or fact affecting the several rights of the parties, and a common relief is sought, one or more of such persons may maintain action for himself and all others similarly situated. Aggregation of the amounts in controversy shall be allowed.

Intervention may be permitted by the court at any time, even after judgment, without regard to diversity of citizenship or amount²⁶¹ so as to permit a claimant to present and prove his claim. The court shall have the power to appoint a master or other officer or officers to hear and determine the claims, and such officers may take such evidence and proof as are deemed to be necessary. Evidence with regard to personal defenses which may bar the right of the individual claimant to recover may be taken. Personal or other adequate notice shall be given to known potential claimants as directed by the court to provide opportunity to present their claims.

²⁵⁹ Keefe, Levy & Donovan, *supra* note 256; Note, 46 COLUM. L. REV. 818, 833 (1946).

²⁶⁰ Two and one-half years had elapsed since proofs had been closed on issue of liability in *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D. Ill. 1959).

²⁶¹ This part of the rule would be omitted in the state rules.

Matters of fact and law in common shall be conclusive upon the defendants and upon those claimants who within the time authorized by the court present and prove their claims. And if there be a finding upon sufficient record and evidence that all the rights of persons represented who did not appear were adequately and fairly represented as to the common issues of law and fact, all persons who were personally or otherwise adequately notified²⁶² and who did not appear to present their claims within the time authorized by the court shall be foreclosed from further litigating their claims. Persons not so notified, however, shall not be foreclosed.

If such a rule or model statute were adopted, many controversies in the state courts which involve numerous parties would be decided and disposed of instead of being dismissed as is presently the case under the code provisions. Under the present state rules, the result is that either the claimants have no effective remedy because of the time and expense in seeking recovery for small sums, or that the courts are needlessly over-burdened because each person must maintain a separate action.

²⁶² Notice, "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," under somewhat analogous state legislation was passed upon by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Legislation adopted in New York empowered trust companies to establish common trust funds and invest as one mingled fund the assets of small estates. Notification to beneficiaries for the judicial settlement of the trustee's account was to be by publication—"a notice or citation addressed generally without naming [the beneficiaries]." Central Hanover Bank, following the legislative directive, petitioned for settlement and informed the beneficiaries as prescribed by law. Mullane, who had been appointed special guardian for the beneficiaries, objected to the form of notice. Unsuccessful in the state courts, Mullane appealed to the Supreme Court of the United States. That Court held that the notice by publication required by the banking law of New York was incompatible with the fourteenth amendment when it sought to foreclose the personal rights of *known* beneficiaries. A clear implication of the decision is that if due and adequate notification had been given to those known beneficiaries, due process requirements would then have been satisfied. Such implication accords with the hypothesis submitted in the text that upon adequate notification to those known absentee members of a class, foreclosure of personal rights should not offend due process. And, analogously, if the judicial settlement had been undertaken by employing the representative-suit technique, similar adequate notice to absent "represented" beneficiaries likewise should satisfy requirements of due process.

The decision and its possible broad implications are discussed in Perry, *The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements*, CURRENT TRENDS IN STATE LEGISLATION 33 (University of Mich. Legislative Research Center 1952); Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951); Note, 50 MICH. L. REV. 124 (1951).

And in the federal courts such a rule would expand the concept of the spurious suit from a mere permissive joinder device to one which permits disposition of the numerous claims of many persons. By allowing absentees to intervene after judgment if their side is successful on the common issues and have their claims determined by an officer of the court without the necessity of proving again the facts and law common to the members of the group, and foreclosing those who have been adequately notified but have not intervened, an efficient judicial remedy would be provided. While some decisions in the federal system recognize the utility of the spurious action, uniform treatment has not been achieved, nor will it be as long as the "class suit" doctrines govern the remedy for the disposition of such group interests. The above proposal would retain the elements of judicial procedure and at the same time adequately permit disposition of complex problems which today confront the courts and tomorrow may create chaos.

APPENDIX

Field Study

In an effort to determine the practical procedural problems confronting court and counsel in class suits and to assess the effectiveness of the spurious suit in particular, a field study was undertaken. Eighteen cases considered to be fairly typical were chosen for examination.¹ Various types of cases were selected: actions under the Fair Labor Standards Act, cases involving price discriminations, suits by creditors to set aside fraudulent transfers, libel suits, and others. An inquiry was addressed to both trial counsel² and trial judges.³ Numerous questions were asked and comments were invited. Among the questions asked were the following:

¹ *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945); *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D. Ill. 1959); *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155 (S.D.N.Y. 1959); *Canuel v. Oskoian*, 23 F.R.D. 307 (D.R.I. 1959); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); *Zelley v. Muehleck*, 10 F.R.D. 62 (E.D. Pa. 1950); *Rosenberg v. Globe Aircraft Co.*, 80 F. Supp. 123 (E.D. Pa. 1948); *Shipley v. Pittsburgh & L.E. R.R.*, 70 F. Supp. 870 (W.D. Pa. 1947); *Schempf v. Armour & Co.*, 5 F.R.D. 294 (D. Minn. 1946); *Smith v. Stark Trucking Co.*, 53 F. Supp. 826 (N.D. Ohio 1943); *McReynolds v. Louisville Taxicab & Transfer Co.*, 5 F.R.D. 61 (W.D. Ky. 1942); *Heffernan v. Bennett & Armour Co.*, 243 P.2d 846 (Cal. App. 1952); *Harrison Sheet Steel Co. v. Lyons*, 15 Ill. 2d 532, 155 N.E.2d 595 (1959); *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958); *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); *Salt Lake City v. Utah Lake Farmers Ass'n*, 4 Utah 2d 14, 286 P.2d 773 (1955).

² Inquiry usually by letter: "In the case of . . . which involved a 'class suit' under modern rules of civil procedure, your firm represented one of the litigants in the cause. The reported decision indicates that the class suit was proper under the circumstances.

"Inasmuch as I am doing research on Procedural Problems of Class Suits . . . I would appreciate your help in determining the events that occurred after the reported decision. I am particularly interested in those procedural and trial problems that confronted you after the appellate court determined that the class action was proper, and the solution of those problems. I would also appreciate your comments concerning the aftermath of the reported decision in order that a comparison can be made with the numerous other cases throughout the country so that a single article will condense the various problems for the guidance of other attorneys who may be faced with similar cases.

"In particular, I am interested in obtaining information as to the procedural methods used in proving the claim of each member of the class and of disposing of the funds of the class.

"I have prepared a questionnaire which I enclose to give you some indication of the scope of the problems as I see them. I am sure, however, that other matters will come to your mind, and I welcome any comments you may have."

³ Inquiry usually in letter form: "In the past several years there have been a great number of reported decisions dealing with class suits. The courts, I feel, are struggling to find some uniformly effecting method to dispose of multiparty claims when the

What specific allegations did the petition contain to satisfy the requirement of adequacy of representation?

How many members of the class were there? What were the considerations in choosing the ones to represent the class?

What benefits did you consider appropriate that prompted the class device?

Was any notification given to the members of the class before or after the filing of the suit to the effect that suit was contemplated or pending or filed?

Were persons not joined in the original action allowed to intervene?

At what stage of the proceedings were intervenors allowed? Before judgment? After judgment?

How were intervenors notified to participate?

How were the intervenors' claims handled?

Was a master appointed to hear the various claims?

Were claims other than intervenors' approved and paid for?

Was a jury trial held? If so, did the jury hear the various claims of the members of the class?

What proof was made to satisfy the requirement of adequacy of representation at trial?

What procedural method was used to hear and determine amounts due each member of the class?

How were attorneys' fees handled in this case? Was the fee taken out of the class funds? Did the intervenors contribute to the fee?

Were discovery procedures used to determine the persons in the class?

Were instructions given in the case? If so, may I have copies?

Were there any particular evidentiary problems involved regarding the class suit aspect of the case?

Were any objections made by the adversary as to any individual claims? If so, how were they handled?

How were costs handled? Did the members of the class contribute?

parties are so numerous that it is highly impractical to bring all having common questions of fact or law before the court.

"I am presently engaged in a research project dealing with the Procedural Problems of the Class Suit in order to determine the feasibility of the class suit device to handle multiple party claims where many persons have matters in common. . . . As a part of that project I am seeking comments concerning the worth of the spurious class device. Since you are in a position to have knowledge of the multitude of problems involved, having recently had occasion to hear the case of . . . , I would deeply appreciate such comments as you may have concerning the class suit . . . ."

If a master or receiver was appointed how were his fees taken care of?

Several observations can be made concerning the results of the survey:

1. The expense and consumption of time in class actions seem to be so great that at least 50% of the cases were settled or dismissed. One case⁴ became so expensive and time-consuming that original counsel withdrew, substitute counsel was employed and fared no better, and the case was finally dismissed.⁵ Other cases were settled perhaps short of indicated value.⁶

2. No notice of any kind was given to any member of the class prior to or during trial in any of the cases surveyed, although in two⁷ cases notification was given after judgment to permit claimants to participate in the judgment.

3. Discovery and pre-trial procedures were not utilized to any great extent. In one case,⁸ pre-trial would have been very helpful. In another case⁹ involving the Fair Labor Standards Act interrogatories were sent to the employer only to determine the amounts due.

4. While intervention seems to have been allowable,¹⁰ intervention did not often occur.¹¹

5. Attorneys' fees were, in a number of instances, paid out of the fund recovered or were paid by the losing defendant.¹²

6. To determine the claims of the several members, the court has at times referred the matter to a master¹³ or trustee,¹⁴ and has sometimes used the technique of mathematical computation.¹⁵ The judgment in two

⁴ *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952).

⁵ Letter from Hirsch E. Soble, Esq., August 1, 1960. Mr. Soble states: "In a case such as this where the financial resources of the parties were so far apart, the full utilization of the discovery procedures can often result in injustice. I have witnessed this more than once. But that is the price we pay for civilization."

⁶ *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); *Rosenberg v. Globe Aircraft Co.*, 80 F. Supp. 123 (E.D. Pa. 1948); *Smith v. Stark Trucking Co.*, 53 F. Supp. 826 (N.D. Ohio 1943).

⁷ *Heffernan v. Bennett & Armour Co.*, 243 P.2d 846 (Cal. App. 1952); *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

⁸ *Heffernan v. Bennett & Armour Co.*, *supra* note 7. The case was tried before California adopted the pre-trial practice. Counsel indicated that "obviously, a pre-trial conference would have been advantageous because a lot of these issues, so laboriously argued in the appellate court, could have been raised and determined at such a conference."

⁹ *Smith v. Stark Trucking Co.*, 53 F. Supp. 826 (N.D. Ohio 1943) (FLSA).

¹⁰ *Ibid.* *Heffernan v. Bennett & Armour Co.*, 243 P.2d 846 (Cal. App. 1952); *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

¹¹ *Smith v. Stark Trucking Co.*, *supra* note 9. *Heffernan v. Bennett & Armour Co.*, *supra* note 10.

¹² *Smith v. Stark Trucking Co.*, *supra* note 9; *Heffernan v. Bennett & Armour Co.*, *supra* note 10; *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

¹³ *Heffernan v. Bennett & Armour Co.*, *supra* note 10.

¹⁴ *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

¹⁵ *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945).

cases provided for the order and procedure by which the claims should be proved.¹⁶

7. The petitions filed in the cases were predominantly in the general form, alleging that the claimants were too numerous to be joined and that the action was brought by the named plaintiffs for and in behalf of themselves and all others similarly situated.¹⁷

8. Counsel uniformly indicated that there were benefits to be derived from maintaining an action in the class form.¹⁸

One of the most detailed replies was that of Branko M. Steiner, Esq., counsel in *Cohon v. Oscar L. Paris Co.*,¹⁹ a case which well illustrates the effective use of a class action. In that case "hundreds of persons," including the plaintiff, purchased wall-to-wall carpeting and installations from the defendant, Paris Co., and were charged a certain selling price, plus a Retailers' Occupation Tax. Before the institution of the present action the Paris company had brought an action to declare the collection of such taxes illegal and its cause was sustained by the Supreme Court of Illinois.²⁰ Thereafter, the present suit was brought by the plaintiff "in his own behalf and in behalf of others similarly situated" to compel the defendant to repay all funds theretofore collected as the illegal taxes to the respective customers of the defendant. The petition filed was most carefully drafted. It recited, in part:

"5. The customers of this defendant for whom this action is prosecuted, are all similarly situated, having since 1949 purchased wall to wall carpeting from said defendant, and each having paid to it, a tax as a separate item, in addition to the charge made by defendant to each customer for the carpeting and padding, and the installation thereof. The taxes in question known as the Retailers' Occupation Tax, were separately passed on to, and paid by such customers to the defendant. The sums representing said charge for tax so paid by plaintiff and other customers to the defendant, represented a common fund, and in reality belonged to the defendant's customers who paid or deposited such taxes from which said fund was accumulated and was held by the defendant in trust. Such customers for and on behalf

¹⁶ *Heffernan v. Bennett & Armour Co.*, 243 P.2d 846 (Cal. App. 1952); *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

¹⁷ *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945); *Schempf v. Armour & Co.*, 5 F.R.D. 294 (D. Minn. 1946); *Smith v. Stark Trucking Co.*, 53 F. Supp. 826 (N.D. Ohio 1943); *Heffernan v. Bennett & Armour Co.*, *supra* note 16; *Cohon v. Oscar L. Paris Co.*, *supra* note 16.

¹⁸ One counsel replied: "I firmly believe a class action is effective in handling a multi-party problem where the members of the class are numerous. If one could not file a class action in such instances, it might well effectively preclude the prosecution of a meritorious claim." Letter from J. Benton Tulley, Esq., August 2, 1960.

¹⁹ 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

²⁰ *Oscar L. Paris Co. v. Lyons*, 8 Ill. 2d 590, 134 N.E.2d 755 (1956).

of whom the plaintiff prosecutes the instant cause of action, constitute a class, and since there are hundreds of them they are at this time unknown to plaintiff and too numerous, it becomes highly impractical to bring them all before the court. This action will prevent and avoid a multiplicity of suits. Plaintiff can and will prosecute this action by able counsel and all members of the class will be adequately and fully represented, whereas individually the tax as to any one individual would not be large enough to warrant any such litigation to recover it. One decision can and will determine the rights of all members of the class since the same issue is common to all such customers. The same common relief is sought by and for all said class of customers. . . .

"10. Plaintiff files this suit in his own behalf and in behalf of others similarly situated who may care to join herein and pay their proportionate share of the costs, fees and expenses entailed in the prosecution of this suit."

A trustee was finally appointed by the court and in the decree the trustee was ordered to have published a notice to all the represented customers. The "Notice to Customers of Oscar L. Paris Company" was in the following form:

"If you purchased carpeting and the installation thereof from Oscar L. Paris Company during the period from January 1, 1949 to and including September 30, 1955, you may be entitled to a refund in full of the Illinois Retailers' Occupation Tax applicable to such sale. Bring or send your paid invoice, cancelled check or similar evidence of such purchase to the office of [trustee]. This should be done before the 30th day of September, 1960, or the liability of Oscar L. Paris Company to make such refunds shall terminate."

The trustee was ordered to furnish to the defendant a list of answering claimants within ten days after the limitation period set by the court and published in the above notice and the defendant was ordered to furnish to the trustee the amounts necessary to pay all such answering claimants. The trustee was further ordered to file a report with the court detailing the number of claims filed, amounts claimed and paid, amounts claimed but unpaid, and the amount of the reimbursement fund remaining in the possession of the defendant. Upon receipt of the report the court would then enter an order for the costs and expenses of obtaining the recovery, including attorneys' fees and expenses.

The somewhat summary trustee proceedings seem justified since the "amounts due each of the individual members of the class were so comparatively insignificant that it would have been impossible, from a practical viewpoint, for each member of the class to file a separate suit for the amount due."²¹ The tax-refunds sum already in the hands of the defendant

²¹ Letter from Branko M. Steiner, Esq., counsel for plaintiffs in customers' refund suit, *Cohon v. Oscar L. Paris Co.*, 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958).

makes this a hybrid-type representative suit case, and the judgment therefore is *res judicata*. But what if there had been no fund? Without a fund, what would be the technical legal effect under due process doctrines if the published notice cancelled defendant's whole liability as to any absentee parties who failed to make their claims in the pending suit against defendant by September 30, 1960? In other words, could the personal rights of the individual "represented" claimants to sue separately similarly be terminated by the court if the situation were of the "spurious" type? It could be done and the spurious type class suit made a more useful device if there existed state legislation authorizing the trial court to make such an order upon its finding of "due representation" and "adequate protection" of rights of represented potential claimants, assuming that such legislation would be valid, and that judgments entered upon notice under it could satisfy constitutional due process requirements.

Case	Type	Letters To	Disposition	Petition	Number In Class	Benefits	Drawbacks
1. Smith v. Stark Trucking Co., 53 F. Supp. 826 (N.D. Ohio 1943)	FLSA	Attorneys	Case settled after preliminary motion	That the claimants were too numerous to join all of them by name, as parties plaintiff, and that the action was brought by the named plaintiffs for and on behalf of themselves and other employees similarly situated as provided by § 16(b) of Fair La- bor Standards Act	50	Eliminate ne- cessity of con- sulting with all members of the class	Work of pro- curing consent of each party plaintiff as re- quired by § 16(b)
2. Kainz v. Anheuser- Busch, Inc., 194 F.2d 737 (7th Cir. 1952)	Price discrimi- nation	Attorneys, judge	Defendants pro- pounded "several hundred" interroga- tories to be answered by each of the 75 plaintiffs; plaintiffs could not defray cost of litigation; original attorney withdrew; substitute counsel was hired who fared no better; case dismissed		75		
3. Rosenberg v. Globe Aircraft Co., 80 F. Supp. 123 (E.D. Pa. 1948)	Fraud under § 10(b) of SEA	Attorneys	Case settled and dis- tribution made to stockholders who joined in suit				
4. Heffernan v. Ben- nett & Armour, 243 P.2d 846 (Cal. App. 1952)	Creditors to set aside transfer	Attorneys		Paragraph 10— "pray that the transfer be set aside for the benefit of creditors . . . in- cluding plaintiff."		Firmly believe that a class ac- tion is effective in handling a multi-party problem	
5. Nieman-Marcus v. Libel Lait, 13 F.R.D. 311 (S.D.N.Y. 1952)		Attorneys, judge	Settlement made with nominal pay- ment to litigants, but a large sum for widely advertised re- tractions and coun- sel fees				

Notice Given Before Trial	Pre-Trial Conference	Intervention	Disposition of Proceeds	Judgment	Attorneys Fees	Discovery
No	No	No one	Checks sent for amount found due in journal entry	Journal entry stip- ulated amount due each member filed	Paid by employer	Interrogatories sent to employer to de- termine amounts due

No notice given before or during law suit but notice given after judgment of appellate court	Tried before California adopted pretrial practice. Counsel say that this would be advantageous because many issues so laboriously argued in appellate court could be raised and determined before trial	Intervention permitted after judgment. Persons who had not joined permitted to intervene, but no one in fact did	Master appointed to hear and determine the claims of creditors	Judgment established the order and procedure by which claims could be proved. In court's amended findings of fact and conclusions all creditors . . . who have presented and established their claims . . . shall participate ratably in any recovery	Granted out of class funds

Case	Type	Letters To	Disposition	Petition	Number In Class	Benefits	Drawbacks
6. <i>Schempf v. Armour & Co.</i> , 5 F.R.D. 294 (D. Minn. 1946)	FLSA	Attorneys		"Plaintiff, individually, and as agent and representative of all other employees of defendant corporation similarly situated"			
7. <i>Locke v. City of Detroit</i> , 335 Mich. 29, 55 N.W.2d 161 (1952)	Employees suit to recover compensation from City	Attorneys			34		
8. <i>Pentland v. Dravo Corp.</i> , 152 F.2d 851 (3d Cir. 1945)	FLSA	Attorneys	Case settled after court of appeals reversed decision of district court entering judgment on pleadings. Settlement carried on by U.S. Navy	43 plaintiffs "bring this action on own behalf as representatives and on behalf of employees or former employees of the defendant"			
9. <i>Cohon v. Oscar L. Paris Co.</i> , 17 Ill. App. 2d 21, 149 N.E.2d 472 (1958)	Suit to recover sums paid as Illinois Retailer's Occupation Tax	Attorneys	Trustee appointed to supervise and direct the distribution of funds and to report to the court; notice given in a newspaper for 4 consecutive weeks	"Such customers for and on behalf of whom the plaintiff prosecutes the instant cause of action, constitute a class, and since there are hundreds of them, they are at this time unknown to plaintiff and too numerous, it becomes highly impractical to bring them all before the court. This action will prevent and avoid a multiplicity of suits. Plaintiff can and will prosecute the action by able counsel and all members of the class will be adequately and fully represented . . ." "Plaintiff files the suit in his own behalf and in behalf of others similarly situated who may care to join herein and pay the proportionate share of the costs, fees and expenses entailed in the prosecution of this suit"	100's		

Notice Given Before Trial	Pre-Trial Conference	Intervention	Disposition of Proceeds	Judgment	Attorneys Fees	Discovery

Employees to be compensated, determined by job classification—then mathematical computation

General depositions to establish nature of defendant's business

No

Fee fixed by court and taken from class fund

None