The Representative Suit in Wisconsin

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COMMENTS

THE REPRESENTATIVE SUIT IN WISCONSIN

The statute authorizing representative suits in Wisconsin reads:

... "and when the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole".¹

This provision of the Wisconsin Code, or slight variations there-from, has been enacted in most of the states of the Union, and, probably, has given rise to a greater variety of interpretation and construction by the courts of the United States than any other single code provision. No attempt will be made to follow the many courts through their decisions under this provision, but only an examination into the position of the Wisconsin Supreme Court on the problem of representative suits will be made.

The first inquiry should be directed to the determination of what the statute intended or attempted to accomplish. The first two clauses of Section 260.12 of the Wisconsin Statutes, relating to joinder of necessary parties plaintiff and defendant, appeared in the "First Report of the Commissioners on Practice and Pleading" in New York in 1848, and the third clause, the provision for representative suits, was added by the New York Assembly in 1849. The latter clause was added because:

"The Legislature seems to have apprehended that, by adopting the rule reported by the Commissioners, it might be understood to have rejected the kindred rules embraced in the latter clause of the section. To prevent this misapprehension the latter clause was added, thus retaining in the new practice the same rules by which to determine whether the proper parties were before the court which then prevailed in the Court of Chancery".²

It is apparent that the provision for representative suits was added in order that the chancery practise in regard thereto should be incorporated into the code. Wisconsin enacted the New York representative suit provision when it adopted the code in 1856, and it has remained in the statutes unchanged to this day. As one of the reasons for adoption, the original code provides: "that the dis-

¹ Wis. Stat., Sec. 260.12: "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should be joined as plaintiff cannot be obtained he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole . . ."

tinction between legal and equitable remedies should no longer con-
tinue, and that a uniform course of proceeding, in all cases, should
be established".3 There should be no question then, but that the Wis-
consin Legislature, in enacting its code, intended to incorporate the
rules of equity therein, and further, to establish an uniform proceed-
ing that would govern both equitable actions and actions at law.

The next inquiry should be to determine just what were these
rules of equity in respect to representative suits that the code sought
to perpetuate. Mr. Justice Story, in his work on *Equity Pleading*,
after stating that the general rule in courts of equity is that all
persons materially interested in the subject-matter, or object, of the
suit should be made parties thereto, goes on to list the exceptions
to that rule as (1) where the party is without the jurisdiction of
the court; (2) where the party is not in existence or is unknown;
(3) where the parties are exceedingly numerous and it would be
impracticable to join them without interminable delays and other
inconveniences, which would obstruct and probably defeat the pur-
poses of justice".4

Mr. Justice Story then goes on to say that these exceptions to
the general rule:

"turn upon the same principles upon which the rule is founded.
They are resolvable into this, either that the court must wholly
deny the plaintiff the equitable relief to which he is entitled,
or that the relief must be granted without making other persons
parties. The latter is deemed the least evil, whenever the court
can proceed to do justice between the parties before it, without
disturbing the rights or injuring the interests of the absent
parties, who are equally entitled to its protection. And even
in the cases in which the court will thus administer relief, so
solicitous is it to attain the purposes of substantial justice, that
it will generally require the bill to be filed, not only in behalf
of the plaintiff, but also in behalf of all other persons interested,
who are not directly made parties, so that they may come in
under the decree and take the benefit of it, or show it to be
erroneous or entitle themselves to a rehearing".5

He then states:

"The most usual cases arranging themselves under this
head are (1) where the question is one of a common or general
interest, and one or more may sue or defend for the benefit
of the whole; (2) where the parties form a voluntary associ-
ation for public or private purposes, and those who sue or defend
may fairly be presumed to represent the rights and interests
of the whole; (3) where the parties are very numerous, and

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3 Wis. Laws, Ch. 120, sec. 23 (1856).
4 Equity Pleadings, 5th Ed. secs. 72-95 (1852).
5 Ibid., sec. 96.
although they have, or may have, separate and distinct interests, yet it is impracticable to bring them all before the court".\(^6\)

It appears to the writer that a showing of numerosness, or the fact that the parties are unknown or difficult to ascertain, is required to maintain a representative action in all three classes of cases as set down by Mr. Justice Story. In speaking of the first class of cases, those in which there is a common or general interest, Mr. Justice Story gives as examples thereof, (1) a bill brought by a few of the crew of a privateer on behalf of themselves and all the rest of the crew, when it was not known how many were still alive or where they were; (2) a bill brought by a few creditors in behalf of themselves and all the creditors of a deceased person, "where all the persons answering that description cannot easily be discovered or ascertained;" (3) a bill brought by creditors of an insolvent estate, where a few are permitted to bring the action "to remedy the practical inconvenience of making a great number of parties to the suit;" (4) and in a similar bill of creditors "because of the utter impracticability of making all the interested persons actual and technical parties, from their being unknown or being so exceedingly numerous, that any obligation to join them all would amount to a positive denial of justice, which constitutes the main grounds of the doctrine;" (5) where he quotes Lord Redesdale, "that this seems to have been permitted purely to save expense and delay. If a great number of creditors thus specially provided for by a deed of trust were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements by the death of creditors; and if many were made defendants, the same inconvenience might happen and additional expense would unavoidably be incurred;" (6) where a distribution of an estate of a deceased person is to be made among his next of kin, "where it may be uncertain who are all the persons answering that description, but also, where they are known, and yet they are exceedingly numerous," (7) where it being stated that "they (cestuis que trust) were very numerous (more than fifty in number) the Vice Chancellor said that they ought regularly to be all made parties to the suit; but as they were very numerous and as the bill was filed on behalf of themselves and the other appointees, the rule might be dispensed with".\(^7\)

Mr. Justice Story, in speaking on parties to a suit in cases of trust, states several exceptions to the general rule that the trustees and beneficiaries are necessary parties. These are:

"where there is a small property to be divided among a large number of cestuis que trust, who are foreigners resident abroad;"

\(^6\) Ibid., sec. 97.

\(^7\) Ibid., sec. 98-106.
where the cestuis que trust are very numerous, or the description of them is so general that it is difficult or impracticable to ascertain, in the first instance, who are all the persons included therein, or many are unknown or are resident abroad. The last position may be illustrated by the case, where the class of persons interested and entitled to share in a property are very numerous; there the rule whether all or part of them should be inserted in the suit, is a question of mere convenience to be decided by the court; and in many cases the court will permit a few to sue in behalf of all'.

It is submitted that in all the cases of exceptions and citations given by Mr. Justice Story in elaboration upon his first class of cases in which representative suits are permitted, two ideas prevail; (1) that the parties must be very numerous, or (2) that the parties are unknown, absent, or very difficult to ascertain. In no instance does it appear that a representative suit was maintained where the question of numerousness was lacking.

As to the second class of cases, the cases and explanations of Mr. Justice Story all lead to the conclusion that numerousness is a requirement. It is well summed up in the quotation, "In such a case (a bill brought by a few members on behalf of a voluntary association) it seems proper, if indeed it be not indispensable, to charge in the bill that the members are numerous, and many unknown".

In Mitford's and Tyler's work on Equity, the same requirement of numerousness is apparent. They state:

"It sometimes happens that compliance with the principle which requires the joinder in a suit in equity of all parties interested in the matter in controversy is practically impossible, because the persons interested are too indefinite or too numerous to be individually joined in the suit. In such case, the principle in its application is modified upon the doctrine of representation, so that one or more members of a class may sue or be sued on behalf of the whole".

Cooper, in his work on Equity Pleading, also requires a showing of numerousness in order to maintain a representative action. He states:

"And there are several cases, besides those of creditors and legatees, in which where a great many individuals are interested, a few will be permitted to represent the whole, and sue in this court. Even in cases where there is not a necessity, from the extent of the property and number of owners, of allowing a few to represent the whole, the court will dispense with parties interested, if it appears by the bill that they

8 Ibid., sec. 207 a, b.
9 Ibid., sec. 116.
10 Pleadings and Practice in Equity, p. 22.
are out of the jurisdiction of the court, or that their claim is
litigating elsewhere, or that the plaintiff does not know who
such persons are and seeks a discovery of them,".11

This expression of the rule in chancery is in accord with that of
Mr. Justice Story.

That this analysis, that numerosity is required in all three of
Mr. Justice Story's classes of cases, is correct is borne out by the
language of the Federal Rules upon the subject of class actions;
the old Federal Equity Rule 48,12 Equity Rule 38,13 and the present
Federal Rule 23.14 The requirement necessary to maintain a class
action has always been stated that there must be a common or general
interest to many persons constituting a class so numerous as to make
it impracticable to bring them all before the court. Professor Moore
states that "in large measures Story's analysis has been the basis for
the Federal Rule".15

The present English Orders, which are an enactment of the rules
developed in the courts of equity, also require that the parties be
numerous, and English Order 16, Rule 9, reads:

"Where there are numerous persons having the same interest
in one cause or matter, one or more of such persons may sue
or be sued, or may be authorized by the Court or a judge
to defend in such cause or matter on behalf or for the benefit
of all persons so interested".16

In Hansberry v. Lee, Mr. Justice Stone characterized the class
suit as "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".17

From the foregoing examination it appears that the general rule
in equity was that set down by Mr. Justice Story, and that numer-
ousness was invariably required in order to maintain a representa-
tive action.

It is apparent that the language of the statutes was taken from
the statement made by Mr. Justice Story, but in enacting the second

11 Equity Pleading, sec. 187 (1813).
12 Fed. Eq. Rule 48—"When the parties on either side are very numerous, and can-
ot, 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 with the suit . . . ."
13 Fed. Eq. Rule 38—"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 . . . ."
14 Fed. Rule 23—"If persons constituting a class are so numerous as to make it
impracticable to bring them all before the court . . . ."
16 The Annual Practise, p. 258 (1942).
provision of the representative suit section of the statute, the words, "although they have, or may have, separate and distinct interests," were omitted from Mr. Justice Story's third class of cases. Judge Moore, in commenting upon this omission, says:

"This omission cannot mean that the Legislative Assembly intended thereby to limit the third exception to cases in which the very numerous parties mentioned had a joint and indivisible interest in the subject matter of the suit, for to give the statute such construction would render the exception superfluous, as the preceding clause of the section extends the second exception to that very class of parties, but limits it to a less number. It is manifest that the language so omitted was explanatory only, and is implied from the first exceptions in the statute, thus rendering the words omitted unnecessary; and hence the statute, instead of amending the exceptions to the rules of equity in respect to parties, is a legislative recognition thereof."

Mr. Justice Story, in speaking of the third exception to the general rule of equity in respect of parties, where they are very numerous, says:

"In this class of cases there is usually a privity of interest between the parties, but such privity is not the foundation of the exception. On the contrary, it is sustained in some cases, where no such privity exists. However, in all of them there always exists a common interest or common right, which the bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish or to narrow or take away. It is obvious that under such circumstances the interests of persons not actual parties to the suit may be in some measure affected by the decree, but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice."

It is apparent from the foregoing that Mr. Justice Story's third class of cases, where the parties are very numerous, was not intended to be limited to those cases in which the parties were united in interest.

Turning now to the Wisconsin cases on the subject, the earliest case appearing in the reports is one in which twenty stockholders brought an action for themselves and all other stockholders of a corporation to set aside fraudulent stock subscriptions and to restrain the defendants from acting in the name of the corporation. The court upheld the right of the several stockholders to sue in behalf of all, stating:

"The bill alleges that the stockholders are very numerous, and are unknown to the complainants and shows a case of

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19 Equity Pleading, sec. 120.
common right in the complainants and all others whom they represent. A more appropriate case, 'for some of the large number having a common right to maintain a suit in behalf of themselves and fellows, in aid of that common right,' cannot well occur''.

This holding appears to be in accord with the rule practiced in the courts of equity as set down by Mr. Justice Story and other writers. It should be noted that this case was decided before the code provision was enacted into the Wisconsin Statutes.

In Coleman v. White the court stated, in a suit at law by a creditor against an individual stockholder of a bank to recover a debt due from the bank, that under the General Banking Law, "the remedy of the creditor is by a suit in equity against the bank and all the stockholders, unless it be impossible or impracticable to bring them all before the court, or some other sufficient cause for the omission be shown".20

In Board of Supervisors v. Mineral Point Railroad Company, the court stated that the rule in equity, that, in suits affecting trusts the parties beneficially interested must be made parties, is subject to exceptions, one of which is, "that whenever the parties in interest are, or from the nature of the case, may be, so numerous that it would be difficult or impracticable to bring them all before the court, and their rights are such as may be fairly and fully represented and tried without joining them, the application of the rule may be dispensed with".22

In none of the Wisconsin cases cited above was any reference made to the new code provision. These cases were argued and decided on the rules of chancery in regard to parties that had developed prior to the code, and the principles stated by the Wisconsin Court were in harmony with these chancery rules. The code provision as to representative suits was first referred to in a decided case in Wisconsin in Day v. Buckingham, where it was said:

"This court has repeatedly held, in effect, that an action to enforce a statutory liability against the stockholders of an insolvent corporation should be in equity and on behalf of one or more plaintiffs and all other creditors having similar claims, against all such stockholders, and also against the corporation, unless it has been dissolved or its assets wholly exhausted. This rule was sanctioned by the court as early as Coleman v. White, 14 Wis. 700. It seems to be in harmony with the statute which declares: 'When the question is one of common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all

21 Coleman v. White, 14 Wis. 700 (1861).
22 Board of Supervisors v. Mineral Point Railroad Co., 24 Wis. 93 (1869).
before the court, one or more may sue or defend for the benefit of the whole.’ R.S. sec. 2604. This statute has been construed as merely re-enacting the rules which prevailed in equity, and which otherwise might have been held to be abolished by the Code. Barb. Parties, 50, 51. It is there said: ‘When the question involved is one of common or general interest, the action may be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are very numerous or that it would be impracticable to bring them all before the court. 1 Van Santv. Eq. Pr. 76; McKinzie v. L'Amoureux, 11 Barb. 516; Hammond v. H.R.I. & M. Co. 20 Barb. 378’.

An examination of the authorities cited by the Wisconsin court to sustain the position that when the question is one of common or general interest the action may be maintained without showing that the parties are numerous, a position contrary to the established equity rule, reveals that Barbour made the statement quoted, but that the only authority cited by him to sustain this statement is the McKinzie case. It should be noted that this same author, in his “Law of Parties” published in 1864, discusses the question of representative suits where parties are very numerous, and draws very largely upon Story’s “Equity Pleading” and his entire discussion is in accord with Story’s, and the requirement of numerousness, here as well as in Story’s work, seems to pervade the entire discussion. No reference is made in this work to McKinzie v. L’Amoureux, and nowhere is the statement made that numerousness need not be shown where there is a common or general interest.

An examination of Van Santvoord discloses that his statement that under the code the statute makes a “distinction between parties who are ‘united in interest’ and those who have a ‘common or general interest’” is based on the McKinzie case and that case alone. It should also be noted that the Hammond case cited by the court is not in point, and merely upholds the propriety of a few bringing a representative suit on behalf of many.

In the case of George v. Benjamin, the language of the Day case is cited verbatim, and the court again cites the McKinzie case and Barbour on Parties. Since both Barbour and Van Santvoord rely on the McKinzie case as authority to support their position, and since those two authors and the McKinzie case are all that is cited by the Wisconsin court as authority for its position, all of our difficulty is traceable to the single case of McKinzie v. L'Amoureux.

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23 Day v. Buckingham, 87 Wis. 215 (1894).
24 George v. Benjamin, 100 Wis. 622 (1898).
Turning now to the case of *McKenzie v. L'Amoureux* itself, Judge Harris says:

"The section in question requires that, except in a specified case, all who are *united in interest* shall be joined as parties; and then declares that when the action involves a question of *common or general interest* to several parties, or when, though united in interest, the parties are very numerous and it is impracticable to bring them all before the court, then one or more may sue or defend for all. This I understand to be the clear and obvious import of the section".25

Judge Harris then goes on to say, "That when the question is one of *common or general interest*, the action may be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are very numerous, or that it would be impracticable to bring them all before the court. This latter provision applies indiscriminately to all actions, whether they involve questions of common interest or not." The language of this case applies the statutory provision as to the requirement of numerousness only to those cases in which the plaintiffs are united in interest, and holds that the part of the statute referring to a common or general interest means something less than united in interest.

It is interesting to note that Judge Harris cites no authority in arriving at this conclusion and this interpretation of the statute. It is immediately apparent that this interpretation of the statute — that the second provision applies to those instances where the interest is something less than united in interest, and that in this case there is no requirement of numerosness in order to maintain an action — is contrary to the rules laid down by Mr. Justice Story and elaborated upon by him, and is directly opposed by the great weight of authority as to what was the established practice in the courts of chancery. It also completely ignores the express language of the statute that the question involved must be one of common or general interest of *many* persons. It also contravenes the intention of the Legislature in adopting the code, for in the enactment it is expressly stated "that an uniform course of proceeding, in all cases, should be established." The division of the code provision into two classes, *viz*: those where the parties are united in interest, and those where there is a common or general interest, which is construed to mean something less than united in interest, sets up one course of proceeding for actions at law, for these under our rules of joinder must be united in interest, and numerosness must be shown, and a different course of procedure for suits in equity. Equity bills would come under both provisions of the statute, and

so in some cases numerosness would have to be shown, while in others it would not be a requirement.

In *Hawarden v. Youghiogheny & Lehigh Coal Co.*, the Wisconsin court reiterated the doctrine of the *McKensie* case and maintained the distinction between parties who have a common or general interest and those united in interest when it said:

"It is to be noted that there are two cases named in the statutes referred to in which one may sue for all, viz: (1) When the question is one of common or general interest of many persons, and (2) when the parties are very numerous, and it is impracticable to bring them all before the court. The latter class was under consideration in the cases of *George v. Benjamin* and *Hodges v. Nalty* (both representative actions at law on contracts); hence, what is said in those cases as to the number of persons which would be deemed 'very numerous' is inapplicable here, because this case comes under the first subdivision, which only requires the presence of a question of common or general interest of many persons".

This examination of the Wisconsin cases reveals that the rule of the *McKensie* case is quite firmly established in the jurisprudence of Wisconsin. It is submitted that this rule is opposed to the established rules of chancery that the code sought to codify, and is against the better reasoned authority as exemplified by the Federal Rules and the English Orders. It is suggested that this statute, which has been on the books unchanged for more than ninety years, might be modified so that the situation in respect to representative actions would be clarified and brought into harmony with the views of the majority. This might be accomplished by a statute which simplifies the whole problem by specifically enumerating those instances in which class actions may be maintained and by making numerosness a requirement in all cases, as was done in Federal Rule 23, or the rule of the *McKensie* case might be nullified in the same manner in which New York did it, by liberalizing their code provisions as to joinder of parties and as to representative actions.

**Thomas Carroll**

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28 *Hawarden v. Youghiogheny & Lehigh Coal Co.*, 111 Wis. 545 (1901).