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THE REPRESENTATIVE ACTION AS A PLEADING DEVICE

The causes underlying the adoption of the representative or class action are those which prompted the adoption of pleading codes in code jurisdictions. The representative action is designed to simplify litigation, to render the administration of justice more convenient for parties and tribunal, and to eliminate a multiplicity of suits where the rights and liabilities of numerous and similarly interested litigants may be fairly adjudicated in a single action.

Use of the representative action is predicated in part upon the existence of a number of parties plaintiff or defendant whose "common interest" in a controverted question is such as to constitute them a "class" of litigants, which will be affected favorably or adversely in the same manner by the judicial determinations to be made. When numerous parties are so related by a "community of interest," an action may be sued or defended by one or more representatives of their class. Representatives and represented alike are generally bound by the judgment or decree of the court. Section 260.12 of the Wisconsin statutes, in which provision is made for the use of the representative action, is typical of statutes found in code jurisdictions.

"... 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."

It is important to note at the outset that the statute presents two distinct, alternative situations, the presence of either of which satisfies the statutory prerequisites. While the presence of both situations in a single action is perhaps the rule rather than the exception, the language of the statute is unmistakably clear, i.e., the class action may be employed either (A) when the question is one of common or general interest of many persons or (B) when the parties are very numerous and it may be impracticable to bring them all before the court. Some writers view the statutory distinction between the two situations as academic. Pomeroy, in commenting on the probability of situation (B) above existing alone, stated: "... it is difficult to conceive of an action in which a very large number of persons should be capable of joining as plaintiffs—so large that it would be impracticable to bring them all actually before the court—unless the question to be determined was one of common or general interest to all." Logical justification for the separation of the situations is not lacking, how-

1 The terms "representative action" and "class action" are used indiscriminately by the courts.
2 It is important that local statutes be consulted for variations.
3 POMEROY, CODE REMEDIES (3rd Ed.), Section 389.
ever, if viewed as meaning that when situation (A) is relied on alone there must be numerous parties, but less parties than required in situation (B); and that when reliance is on situation (B) alone, there must be some degree of interest among the parties, but less than the common interest required in situation (A).

The *common or general* interest required by the statute does not admit of precise definition. The determination of the type of *interest* which a number of parties plaintiff or defendant have in the subject matter of a particular controversy is one of the most vexatious of pleading problems. Obviously, the ultimate explanation of so broad a term in a legislative enactment as *common interest* is dependent upon judicial construction. Courts have declared the use of the representative action to be proper and have found a *common interest* among plaintiffs or defendants in the following types of action:

1. By bondholders to foreclose a trust deed and to obtain the appointment of a receiver.
2. By creditors of a defunct bank to enforce the statutory liability of stockholders.
3. By retail dealers to restrain an illegal conspiracy among wholesalers who combined to drive non-combination members out of business.
4. By stockholders of a dissolved corporation to recover on a promissory note.
5. By heirs claiming title under a will to set aside a fraudulent conveyance.
6. By taxpayers to restrain the collection of, or to recover, taxes illegally assessed.
7. By beneficiary to recover death benefits from an unincorporated association (trade union) insuring the lives of its members.
8. By legatees, entitled to separate benefits, to establish a will.

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4 Under compulsory joinder statutes, e.g., plaintiffs or defendants who are "united in interest" must be joined. Other statutes permit the voluntary joinder of parties plaintiff or defendant who "have an interest in the subject of the action and in obtaining the relief demanded." Space does not permit a discussion of the differences between the "common or general interest" of the class action statute and the various other types of "interest" mentioned in pleading statutes.

7 Hawarden v. Lehigh Coal Co., 111 Wis. 545, 87 N.W. 472 (1901).
8 Marshall v. Wittig, 205 Wis. 510, 238 N.W. 390 (1931).
9 Thames v. Jones, 97 N.C. 121, 1 S.E. 692 (1887).
10 Commonwealth v. Scott, 112 Ky. 252, 65 S.W. 596 (1901).
11 Colt v. Hicks, 97 Ind. App. 177, 179 N.E. 335 (1932).
(9) By trustees to recover trust funds.\\footnote{13}
(10) By printing employers of a city to enjoin members of a typographical union from conspiring to compel employers to accept a closed shop.\\footnote{14}
(11) By creditors to obtain the appointment of successor trustees of mortgage certificates issued by a guaranty company.\\footnote{15}
(12) By policy holders to enjoin the use of company funds.\\footnote{16}
(13) By negro children to restrain the enforcement of an order prohibiting their participation in the social functions of a public school.\\footnote{17}
(14) In partition proceedings of property held under a will (by defendants).\\footnote{18}

The foregoing illustrations indicate that the representative action is more adaptable to equitable than to purely legal proceedings. No distinction is made in the statute, however, between legal and equitable proceedings, and the representative action is equally available in the former upon compliance with the statutory requirements.

However, the propriety of permitting the use of the class action in tort cases or in cases requiring the payment of money damages only is doubtful. An interpretation of the term "common or general interest" which would embrace the interest of one plaintiff in the money damages of another plaintiff would seem abortive, for, as stated in \textit{Cavanagh v. Hutcheson}, the accompanying practical difficulties in conducting such an action by representation would be substantial: "The damages alleged are tort damages; there is no common or general rule of damages that could be determined to suit the exigencies of the case. There is no common factor by which an assessment of damages could be determined to suit the exigencies of the case. Instead of aiding this court in avoiding a multiplicity of suits, it probably would increase such possibility."

\footnotesize{\\footnote{13} Wheelock v. First Presbyterian Church, 119 Cal. 447, 51 Pac. 841 (1897).\\footnote{14} Trade Press Pub. Co. v. Milw. Typo. Union, 180 Wis. 449, 193 N.W. 507 (1923).\\footnote{15} Acken v. N. Y. Title & Mortgage Co., 9 Fed. Supp. 521 (D.C. N.D. New York, 1934).\\footnote{16} Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 41 Sup. Ct. 338, 65 L.ed. 673 (1921).\\footnote{17} Jones v. Newlon, 81 Colo. 25, 253 Pac. 386, 50 A.L.R. 1263 (1927). In speaking of the propriety of using the representative action in this instance, the court remarked: "The wrong is done by entry and enforcement of the order made and enforced against each of the plaintiffs by defendants in the same capacity, injuring each of the plaintiffs in the same way, in violation of the same constitutional provision, and requiring the same judgment, i.e., the abrogation of the order."\\footnote{18} Coquillard v. Coquillard, 62 Ind. App. 426, 113 N.E. 474 (1916); Springs v. Scott, 132 N.C. 548, 44 S.E. 116 (1903); Jordan v. Jordan, 143 Tenn. 378, 239 S.W. 423 (1922).\\footnote{19} 250 N.Y. Supp. 127 (1931).}
Whether the plaintiffs or defendants in a controversy are so very numerous as to make it "impracticable to bring them all before the court," is a question to be determined by the circumstances of the particular case. Courts have consistently declined, and with wisdom, to establish maximum or minimum numbers to govern the application of this portion of the statute. Numerical considerations alone do not always determine the impracticability of bringing numerous litigants before the tribunal. The determination is obviously one which may most fairly be left to the broad discretion of the trial court.

The interpretation of the statute by the Wisconsin Supreme Court merits attention. In Newcomb v. Horton, the court held the representative action to be inapplicable to an action brought by a taxpayer in his own behalf and in behalf of other taxpayers of a school district to restrain the country treasurer from selling their lands to collect a delinquent tax. The tax was assessed to pay judgments against the district. Plaintiffs alleged that the judgments had been obtained on forged school orders and were void and illegal. The court held a common or general interest among the plaintiffs to be wanting and refused to permit the action to be brought as a representative action.

It seems difficult, however, to conceive of a case in which the use of the representative action is more desirable. Ordinarily the question of legality extends to the entire assessment, and each taxpayer has a "common interest" in that question. It is not unusual, moreover, that the taxpayers affected by the same illegal act number in the several thousands.

The Wisconsin Court in the later decision of Carstens v. Fond du Lac declared that the doctrine of the Newcomb case is limited to the facts of that case and that it has no application to cases in which the class action is employed by taxpayers to restrain the unlawful disposal of public funds or the entry into unlawful contracts which require the expenditure of public funds.

In Hodges v. Nalty a representative action by ten members of a church congregation in their own behalf and in behalf of other subscribers (65) to a church building fund was held properly brought against a defaulting subscriber. The basis of the decision was the impracticability of bringing the seventy-five subscribers before the tribunal.

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20 18 Wis. 594 (1864).
21 In Commonwealth v. Scott, supra note 10, the court, in commenting on the probable consequences of a refusal to permit a class action to be brought by taxpayers, said "Intolerable confusion, inequality in results, and vast opportunity for whimsical, ignorant, or tyrannical action affecting many of the smaller interests would ensue... It is equally manifest that it is absolutely impracticable to make all of these taxpayers parties plaintiff."
22 137 Wis. 465, 119 N.W. 117 (1909).
23 104 Wis. 464, 80 N.W. 726 (1899).
court. The presence or absence of a common interest among the plaintiffs was not discussed.

A class action was brought by ten printing employers of Milwaukee to restrain members of a typographical union from carrying out an illegal conspiracy designed to compel plaintiffs to accept a closed shop. The court held, in *Trade Press Pub. Co. v. Milw. Typo. Union*\textsuperscript{24} that since the conspiracy was directed at the employers as a class rather than as individuals, the question of the legality of defendants' conduct was one of common or general interest to the employers. Similarly, it was held in *Hawarden v. Lehigh Coal Co.*\textsuperscript{25} that retail dealers who sought to enjoin wholesalers from forcing them out of business through an illegal combination had such a common interest in the question of the legality of the combination as to permit the use of the class action.

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\textsuperscript{24} *Supra,* note 14.

\textsuperscript{25} *Supra,* note 7.