tion; and (2) a *conclusion* by the court that the record was made in the regular course of business, at or near the time of the act, condition or event and that the sources of information, method and time of preparation justify admission. The testimony may come from the custodian or other qualified witness. The conclusion may, if the facts are sufficient, be reached by inference.

Paul D. Engstrand, Jr.

PARTIES: REPRESENTATIVE SUITS UNDER FEDERAL RULE 23 (a) (3).

The class suit, developed in the English courts of chancery as a necessary exception to the rules of compulsory joinder, provided relief in situations where it was impossible or impracticable to join all of the interested parties.[1] The usual code provisions enacted in America follow this equity doctrine, providing that where the question is one of common or general interest of many persons, or where the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or be sued on behalf of the whole.[2] Despite the use of the terms "common interest *or* numerous parties" the action has in general been extended no further than those situations in which a common interest is involved; the mere fact that there are numerous parties has been held insufficient to justify a class action.[3] While the phrase "common or general interest" has proved difficult of definition, the accepted rule has been to permit a class suit wherever joinder of the parties represented would be permissive or compulsory under the conventional joinder of parties statutes,[4] *i.e.*, those represented must have an interest in the subject of the action and in the relief demanded.[5]

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[1] CLARK, CODE PLEADING (2nd ed. 1947) § 63; 1 DANIELLS' CHANCERY PLEADING AND PRACTICE (6th ed. 1894) 184; STORY, EQUITY PLEADING (10th ed. 1892) § 94. Such actions were said to be a matter of indulgence on the part of the court since otherwise joinder would have been required. Lesar, *Class Suits and the Federal Rules* (1937) 22 MINN. L. REV. 34; McLaughlin, *The Mystery of the Representative Suit* (1938) 26 GEO. L. REV. 878; 39 AM. JUR. 920.

[2] *E.g.*, CAL. CODE CIV. PROC. § 382; N.Y. CIV. PRACTICE ACT § 195. See POMEROY, CODE REMEDIES (5th ed. 1929) 286; Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 CORN. L. Q. 399.

[3] See POMEROY, *loc. cit. supra* note 2; Blume, *The Common Questions Principle in the Code Provisions for Representative Suits* (1932) 30 MICH. L. REV. 878.

[4] "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs . . ." *E.g.*, ARKANSAS DIG. STATS. (Pope, 1937) § 1311; KAN. GEN. STAT. (Corrick, 1935) § 60-410; OHIO, CODE (Baldwin, 1940) § 11254; see POMEROY, *op. cit. supra* note 2, § 111.

[5] Georgetown v. Alexandria Canal Co. (1838) 37 U.S. (12 Pet.) 91; Lightle v. Kirby (1937) 194 Ark. 535, 108 S.W. (2d) 896; Brenner v. Title Guarantee & Trust Co. (1937) 276 N.Y. 230, 11 N.E. (2d) 890, 114 A. L. R. 1010; George v. Benjamin (1898) 100 Wis. 622, 76 N.W. 619.

This narrow conception of the plaintiff class suit,[6] based on a historical necessity that is no longer of substantial importance, has prevented the action from becoming an effective group remedy for many common wrongs. In modern society where business torts frequently injure large and widely scattered groups, members of such groups often find themselves in a poor position to recover for those injuries. Relief might be afforded them through administrative commissions. However, the scope of administrative relief has been confined, for the most part, to preventive action rather than to the awarding of damages.[7] Left to recovery by private action, the individual may find that the costs are entirely disproportionate to his interest. In an attempt to alleviate this situation, some states have liberalized joinder of parties provisions to permit joinder where there is a common question of law or fact among the parties even though common relief is not sought.[8] While this represents a great forward step, it is obviously not an effective remedy in situations where great numbers of widely scattered persons are involved.

With the liberalization of the joinder rules the question arose whether the class suit provisions would be interpreted to extend that action to situations where separate relief was sought by many persons. The English courts and those state courts which have passed on the question have denied such extension,[9] generally on the ground that adequate representation will not be secured to absent parties[10] bound

[6] This note is limited to actions in which *plaintiff* represents the class. Obviously different problems are presented when the object of a suit is to obtain a binding judgment *against* members of a class who are not before the court. See Kalvern and Rosenfield, *The Contemporary Function of the Class Suit* (1941) 8 CHI. L. REV. 684, 696, n. 39; McLaughlin, *op. cit. supra* note 1, at 892.

[7] See BALLANTINE, CORPORATIONS (Rev. ed. 1946) 862.

[8] *E.g.*, CAL. CODE CIV. PROC. § 378; N. Y. CIV. PRACTICE ACT § 209; FED. RULES CIV. PROC. Rule 20.

[9] Trailmobile v. Whirls (C. C. A. 6th, 1946) 154 F. (2d) 866; Jellen v. O'Brien (1928) 89 Cal. App. 505, 264 Pac. 1115; Ballin v. L. A. County Fair (1941) 43 Cal. App. (2d) (Supp.) 884, 111 P. (2d) 753; Watson v. Santa Carmelita etc. Co. (1943) 58 Cal. App. (2d) 709, 137 P. (2d) 757; Kimes v. City of Gary (1946) ..... Ind. ....., 66 N.E. (2d) 888; Pecos Valley Artesian Conservancy Dist. v. Peters (1945) 50 N. M. 165, 173 P. (2d) 490; Pemberton v. Board of Education of Toledo (1940) 67 Ohio App. 175, 36 N. E. (2d) 170; Markt & Co., Limited v. Knight Steamship Company, Limited [1910] 2 K. B. 1021. Clark lists the following states as having adopted representative suit statutes that are counterparts of the federal rule and so would presumably follow the federal cases discussed *infra*: Arizona, Colorado, Iowa, Michigan, Missouri, New Mexico, and Texas. *Op. cit. supra* note 1, at 404, n. 234.

[10] "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* when he has not been made a party." Pennoyer v. Neff (1877) 95 U. S. 714. See STORY, *op. cit. supra* note 1, § 72. Nonetheless the Supreme Court has held that if the parties of record adequately represent the interests of the other members of the class the requirements of due process are fulfilled and the judgment may bind those not personally before the court. Smith et al. v. Swormstedt et al. (1853) 57 U.S. (16 How.) 288; Royal Aranum v. Green (1915) 237 U.S. 531; Hartford Life Ins. Co. v. Ibs (1914) 237 U.S. 662; Hartford Life Ins. Co. v. Barber (1917)

by *res judicata* under the traditional view of the judgment in a class suit,[11] since separate relief is sought.

The possibility of a new approach to the problem, however, permitting the use of the class-suit device where separate relief is demanded, yet avoiding the perils of binding absent parties by a suit in which they are not adequately represented, is suggested by Rule 23(a) (3) of the Federal Rules of Civil Procedure:

> (a) Representations: If persons constituting a class are so numerous as to make it impractical 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 . . . is: . . . (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

As originally drafted, this rule provided for representative suits where separate relief was demanded, and specified that such a suit would be binding only on those who actually became parties by joinder or by intervention.[12] As finally adopted, however, the rule included the requirement of a "common relief"; and the provision that the suit would not be *res judicata* as to absent parties was omitted as being substantive and so beyond the scope of a procedural code.[13]

Thus left open were the questions: May separate relief be obtained in a class suit?[14] If so, is the decision *res judicata* on absent parties? Until the Supreme Court considers these issues no definitive answer can be given. However, three different positions on rule 23(a)(3) have been taken in the circuit courts.

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245 U.S. 146; Supreme Tribe of Ben-Hur v. Cauble (1921) 255 U.S. 356; Hansberry v. Lee (1940) 311 U.S. 32; Note (1934) 34 COL. L. REV. 118, 132.

[11] Smith et al. v. Swormstedt et al., *supra* note 10; Von Schmidt v. Huntington (1850) 1 Cal. 55; Fallon v. Superior Court (1939) 33 Cal. App. (2d) 48, 90 P. (2d) 858; Easton v. Hall (1926) 323 Ill. 397, 154 N.E. 216; Brown v. Werblin (1930) 138 Misc. 29, 244 N.Y. Supp. 209; RESTATEMENT, JUDGMENTS (1942) § 26; 1 FREEMAN ON JUDGMENTS (5th ed. 1925) § 407. Clark says that actions for several relief have been called "non-derivative" representative actions. He feels that to class them as representative actions at all is confusing since the main features of such actions are lacking, and that such cases are rather ones for intervention or consolidation of action. He adds, however, that rule 23(a) (3) by express provision allows such actions. *Op. cit. supra* note 1, at 402, n. 225.

[12] Moore aud Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment* (1938) 32 ILL. L. REV. 555. In order to bring an action in a federal court there must be a complete diversity of citizenship between parties plaintiff and defendant. Strawbridge v. Curtiss (1806) 7 U.S. (3 Cranch) 267. It has been suggested that this requirement places a limitation on joinder of parties and that a liberal class action is a solution to this limitation. See 2 MOORE, FEDERAL PRACTICE (1938) § 23.04; CLARK, *op. cit. supra* note 1, § 63.

[13] Moore and Cohn, *loc. cit. supra* note 12; Sunderland, *The New Federal Rules* (1938) 45 W. VA. L. REV. 5.

[14] See Note (1942) 30 CALIF. L. REV. 350, which queries whether the requirement of "common relief" might not limit the scope of rule 23 (a) (3).

The first point of view, represented by the second and third circuits, holds that the action will be allowed when several relief is sought but that the judgment will bind those before the court and those who come in and are made parties but no others. The leading case in the second circuit is *York v. Guaranty Trust Co. of New York*[15] where an action was brought by one of the holders of a note secured by stocks held in trust by defendant for an alleged wrong done by the trustee. The trustee had failed to sue to enforce the security of the notes and instead had taken part in a plan to exchange and refinance them. The trustee's part in the plan was not revealed to the holders. Plaintiff declined to accept the refinancing plan and brought suit for breach of fiduciary duty to herself and others who had not accepted the plan. The trial court rendered judgment on the pleadings for defendant, apparently on other grounds. However, the parties issue was argued on appeal. The circuit court said that it would allow such a suit as a class action even though the defendant might have a defense against some of the claimants not of record. Such defenses, if proved, would be good only against those particular parties. The court suggested that a means of allowing the other members of the class to take advantage of the suit, once the court decided for the plaintiff of record, would be to notify all other members of the class and invite them to intervene; judgment would be entered in favor only of those who intervened within a reasonable time.[16] In a later case the court indicated that as long as the face of the complaint places the action under rule 23(a) (3), too much attention need not be given to the question of whether the parties before the court adequately represent the class since only those so before it and those who come in and are made parties will be bound.[17]

In the third circuit it has been said that representative suits may be maintained where the rights of numerous parties are dependent on common questions of law or fact despite the fact that individual recoveries may be had by members of the class in different amounts.[18] This circuit in its first consideration of these "spurious"[19] class suits had no occasion to decide whether the judgment was binding only on those before the court or on all members of the class. In a later case under the Fair Labor Standards Act it held that plaintiffs would be allowed

[15] (C. C. A. 2d, 1944) 143 F. (2d) 503.

[16] For other suggested means of allowing other members of the class to take advantage of the action, see Tolliver v. Cudahy Packing Co. (E. D. Tenn. 1941) 39 Fed. Supp. 337; Kalvern and Rosenfield, *loc. cit. supra* note 6.

[17] Oppenheimer v. F. J. Young & Co. (C. C. A. 2d, 1944) 144 F. (2d) 387.

[18] Independence Shares Corporation v. Deckert (C. C. A. 3rd, 1939) 108 F. (2d) 51, *rev'd on other grounds*, (1940) 311 U.S. 282.

[19] Moore classes these actions as: "true", those arising under rule 23 (a) (1); "hybrid", those under rule 23 (a) (2); and "spurious", those arising under rule 23 (a) (3). *Loc. cit. supra* note 12.

to sue under rule 23(a) (3) on behalf of themselves and others similarly situated for the recovery of unpaid overtime wages.[20] The object of the action was said to be "to clear up a litigious situation". The judgment was to be binding only on those before the court and those who intervened.

The second point of view is represented by the seventh circuit which allows the action, but makes the judgment binding on all members of the class. Thus in *Weeks v. Bareco Oil Co.*,[21] where action was brought by two jobbers against defendant oil companies charged with violation of the Sherman Act, plaintiffs sought to recover for loss of profits due to the high prices maintained through a conspiracy of the defendants. The court said that where several parties seek damages from the same defendant, to force each member of the plaintiff class to contest his individual claim in a separate suit would be to close the door of justice to all small claims.[22] However, the court indicated that the judgment would be binding on all members of the class and the court would, therefore, insist on adequate representation. In the *Weeks* case, however, it was held that the representation was not adequate since defendants were able to show that they used many different types of jobber contract in their business and therefore it was doubtful whether there was adequate representation by the two plaintiffs.[23] It is doubtful whether there could ever be "adequate" representation when separate relief is sought, and whether the practical effect of the seventh circuit rule may not be to eliminate "spurious" class action as a remedy altogether.

The third view, as presented by the eighth circuit, refuses to allow the action at all. Regardless of the existence of common questions of law or fact between the parties, recovery of damages is held not to be "common relief".[24]

Rule 23(a) (3), as construed by the second and third circuits, affords a pattern which will permit class suits to provide a maximum of social utility. By permitting an individual or a small group of the injured class to bring the action, practical difficulties of joinder can be

[20] Pentland v. Dravo Corporation (C. C. A. 3d, 1945) 152 F. (2d) 851. *Accord*: Tolliver v. Cudahy Packing Co. *supra* note 16. *Contra:* Lofther v. First Nat. Bank of Chicago (N. D. Ill. 1941) 45 Fed. Supp. 986; Fink v. Oliver Iron Mining Co. (D. Minn. 1941) 65 Fed. Supp. 316. The districts reflecting the contrary view are located in the seventh and eighth circuits whose views on "spurious" class actions are discussed *supra*.

[21] (C. C. A. 7th, 1941) 125 F. (2d) 84.

[22] When damages are held to be "common relief" one member of the class can sue on behalf of all but each must intervene and prove his own damages. Alabama Independent Serv. S. Ass'n v. Shell P. Corp. (N. D. Ala. 1939) 28 Fed. Supp. 386.

[23] On the problem of sufficient representation see Pelelas v. Caterpillar Tractor Co. (C. C. A. 7th, 1940) 113 F. (2d) 629; Atwood v. National Bank of Lima (C. C. A. 6th, 1940) 115 F. (2d) 861; MOORE, *loc. cit. supra* note 12.

[24] Farmers Co-op Co. v. Socony-Vacuum Oil Co. (C. C. A. 8th, 1942) 133 F. (2d) 101.

avoided. There will be no necessity to canvass the group in advance of the action in an attempt to reach an agreement on attorneys, procedures of action, or control of the suit. Intervention at an early stage of the suit should be permitted on a showing of possible prejudice through inadequate representation or otherwise, but the necessity of such intervention will be minimized by following the rule that absent parties are not bound by the action. Counsel fees in the conventional class actions are awarded out of the total fund recovered, thus mimimizing the burden on those who institute the suit, and at the same time, providing a strong incentive to proceed vigorously with the case.[25] Presumably a similar technique can be worked out where several recoveries are involved. If the court decides for the plaintiff then the members of the class may be notified (preferably under the supervision of the court) and given an opportunity to intervene, prove their damages, and participate in the recovery.

It has recently been suggested that the federal rules should be amended to provide for the giving of notice of the suit to all members of the class, and that thereafter the suit should be binding on all members of the class.[26] This suggestion, however, would serve to reduce the effectiveness of the class suit where several relief is sought. Other members of the class not knowing the parties bringing the suit would feel compelled to intervene to protect their own interests. The problem of control of the suit would then become serious, with many parties represented by many attorneys demanding to be heard. Furthermore, the tendency of the courts to restrict the use of the suits by requiring "adequate representation" where all members of the class are to be bound by the decision would tend to give a limiting effect to the action.

W. G. Watson, Jr.

[25] Sprague v. Ticonic National Bank (1939) 307 U.S. 161. The average fee allowed in stockholders suits amounts to about 20% of the entire recovery. See Hornstein, *The Counsel Fee in Stockholder's Derivative Suits* (1939) 39 COL. L. REV. 784; Hornstein, *New Aspects of Stockholders' Derivative Suits* (1947) 47 COL. L. REV. 1, 24.

[26] Note (1946) 46 COL. L. REV. 818.