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PROCEDURE—THE COMMON FUND PROBLEM IN  
MISSOURI CLASS ACTIONS

A recent Missouri Supreme Court decision<sup>1</sup> raises two questions concerning class actions in this state:

(1) It presents anew the question of the status of the rarely used<sup>2</sup> spurious class action.

(2) It establishes an insurance company liability policy as a common fund for which a representative action may be brought.

*Barnard v. Murphy*<sup>3</sup>

Plaintiffs, who were three of defendant's customers, sued to recover the value of food spoiled due to inadequate refrigeration in defendant's locker plant. They brought a class action under Supreme Court Rule 52.08 on behalf of themselves and all "renters or lessees of locker space (in defendant's locker plant) who are so numerous as to make it impracticable to bring them all before the court." The amount in dispute being in excess of \$15,000.00, jurisdiction of defendant's appeal was in the supreme court.<sup>4</sup>

Defendant insisted that this was not a proper class action and that plaintiffs had no joint or common cause of action against him, but only several contracts; that no common or joint property or fund existed and no joint or common relief could be granted. Defendant admitted his plant was under the control and regulation of the locker plant act<sup>5</sup> which in part requires:

The operators of all locker plants shall furnish satisfactory locker content insurance to indemnify users against loss . . . in a minimum amount for each locker or locker plant . . . ; provided, however, that such operator

1. *Barnard v. Murphy*, 365 S.W.2d 614 (Mo. 1963).

2. The lack of use in Missouri is due to the availability of the permissive joinder technique, which provides the same result in most cases—that of binding the parties before the court. It is used more often in the federal courts as diversity of citizenship is not necessary for intervening parties in a spurious class action. Diversity is not required by the state courts. *California Apparel Creators v. Weider of California*, 162 F.2d 893, 897 (2d Cir. 1947).

3. 365 S.W.2d 614 (Mo. 1963).

4. Mo. CONST. art. V, § 3; § 477.040, RSMo 1959. However, the requisite jurisdictional amount here depends upon a finding of other than a spurious class action. In the federal courts aggregation of claims in spurious and hybrid actions is not permitted as they lack a common or joint interest. Each claimant, as to his own claim, must meet all jurisdictional requirements as to the amount in controversy. *Knowles v. War Damage Corp.*, 171 F.2d 15 (D.C. Cir. 1948); *California Apparel Creators v. Weider of California*, 162 F.2d 893 (2d Cir. 1947); *Central Mexico Light & Power Co. v. Munch*, 116 F.2d 85 (2d Cir. 1940); *Giesecke v. Denver Tramway Corp.*, 81 F.Supp. 957 (D. Del. 1949); *Batman v. Louisville Gas & Elec. Co.*, 187 Ky. 659, 220 S.W. 318 (1920); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 569 (Wright ed. 1961); 3 MOORE, FEDERAL PRACTICE § 23.13 (2d ed. 1948). The court did not discuss this problem in *Barnard v. Murphy*.

5. §§ 196.450-.515, RSMo 1959.

may, and is hereby authorized to, collect the *pro rata* amount of the premium for such insurance from the user in addition to the locker rental as an additional service.<sup>6</sup>

The court held that though the rights of the class members were several, a representative action was in order as the defendant held an insurance policy required by the Missouri statute for the purpose of indemnifying locker users against loss; and that "any policy issued pursuant to those provisions would of necessity constitute a common fund . . . ."<sup>7</sup> The court said that this policy constituted a common fund, thus permitting plaintiffs to maintain a class action under section (a)(3) of Supreme Court Rule 52.08. This rule provides for a class action if: (1) Persons constituting a class are very numerous or it is impracticable to bring them all before the court; (2) the character of the right is "several"; and (3) there is a common question of law or fact affecting the several rights and a common relief is sought. The court also said that if for some reason the theory of "common fund" was not applicable, section (a)(2) of the rule would authorize the maintenance of the action. This section provides for such action when the character of the right sought to be enforced for the class is "several and the object of the action is the adjudication of claims which do or may affect specific property involved in the action."

Aetna Casualty and Surety Company, the locker content insurer, was joined with defendant Murphy, the locker owner, as co-defendant. Plaintiffs alleged that the "proceeds from said policy represent a common fund to which all members of the plaintiff class are entitled."<sup>8</sup> Aetna's answer admitted its policy was in full force and effect, and that the policy proceeds represented a *common fund* to which all members of the plaintiff class were entitled. The court says therefore "defendant Murphy's mere denial that the policy constituted a common fund and insured only the named plaintiffs cannot serve to destroy the solemn admission of Aetna."<sup>9</sup> Murphy did not introduce the policy into evidence and his "bald assertion that it did not constitute a common fund . . . does not amount to proof of the fact."<sup>10</sup>

It is not apparent why Murphy objected to a class action. Possibly the insurance coverage was not sufficient to meet the claims of the locker renters and he wanted to make it more difficult for the locker renters to sue. There is no suggestion that the named plaintiffs were not fairly chosen or that they did not adequately represent the class.<sup>11</sup> Also, the members of the supposed class were notified of this action and that the suit would be maintained in behalf of each unless he advised to the contrary.

6. § 196.510(2), RSMo 1959.

7. *Barnard v. Murphy*, *supra* note 1, at 619.

8. *Id.* at 617.

9. *Id.* at 619.

10. *Ibid.*

11. This is required as a condition precedent to any class action in Missouri. Mo. R. Crv. P. 52.09(a).

## I. INTRODUCTION

It is a well established constitutional principle that no person shall be concluded by a judgment of a court either in respect to his person or property in any litigation in which he is not designated a party or to which he has not been made a party by service or process or appearance.<sup>12</sup> To this general rule there is an exception which permits a court under some circumstances to render a judgment binding on all members of the class although only some members of the class are named as parties.<sup>13</sup> Any rule which permits a court to foreclose the rights of one who has had no notice of the suit and who has not had his day in court is harsh, and if ever applied, should be done so with extreme caution. The representation in Missouri must be shown to be adequate and fair.<sup>14</sup> The requirements of the Supreme Court Rule are not directory but mandatory. They reveal the court's solicitude for the constitutionality of Rule 52.08 by requiring the elements of due process to be accorded to all absent persons whom others who bring the suit would bind as a class.<sup>15</sup> Plaintiffs here had apparently given adequate notice, although Missouri does not have a rule requiring such notice.

In order to understand the implications of this case on Missouri case law concerning class actions, it is necessary to consider:

- (1) The present status of the spurious class action in Missouri.
- (2) The possibility of a liability insurance policy constituting a common fund.

## II. DIFFICULTIES WITH THE SPURIOUS CLASS ACTION IN MISSOURI

### A. *The Federal Rules Approach*

In the courts following the Federal Rules of Civil Procedure on class actions, with Professor Moore's authoritative breakdown into the "true," "hybrid" and "spurious" classifications,<sup>16</sup> the spurious action is no more than mere permissive joinder.<sup>17</sup> The problem concerning the characteristics of a common fund appears

12. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Scott v. McNeal*, 154 U.S. 34 (1894); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D. Cal. 1957); *Shipley v. Pittsburgh & L.E. R.R.*, 70 F.Supp. 870 (W.D. Pa. 1947).

13. *Hansberry v. Lee*, 311 U.S. 32 (1940); *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).

14. *Mo. R. Civ. P. 52.09(a)*; *Hribernik v. Reorganized School Dist. R-3*, 276 S.W.2d 596 (St. L. Mo. App. 1955).

15. *Id.* at 599.

16. 3 MOORE, FEDERAL PRACTICE § 23.07 (2d ed. 1948).

17. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 601 (10th Cir. 1961) (dissenting opinion); *California Apparel Creators v. Weider of California*, 162 F.2d 893, 897 (2d Cir. 1947); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466, 482 (S.D. Cal. 1957); 3 MOORE, *op. cit. supra* note 16, § 23.10; McQuie, *The Proposed Rules of Civil Procedure for Missouri*, 18 Mo. L. REV. 280 (1953). This statement is questioned in 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 562.3 (Wright ed. 1961), but recognition is given to its application in the courts. The authors suggest more importance should be given to the spurious class action. Suggestions are also made relative to the abolition of the tripartite division of FED. R. CIV. P. 23(a). Although distinguished commentators occasionally have set forth similar views, the Original Advisory Committee's Proposed

only under the hybrid classification,<sup>18</sup> and seems to have no relation to the spurious class action.<sup>19</sup>

The spurious class action fulfills a particular jurisdictional need in the federal courts. Under the Federal Rules the spurious action allows persons similarly situated to intervene without regard to jurisdictional limitations present under the permissive joinder rule.<sup>20</sup> In Missouri, permissive joinder is available under Rule 52.05. As diversity of citizenship is not needed to give the court jurisdiction, there seems to be no practical need for the spurious action in Missouri.

One great concern about spurious class actions has been a fear that the spurious action would someday be extended to include tort actions where many parties are injured. Moore offers the example of a railroad negligently setting fire to property belonging to several property owners.<sup>21</sup> He points out that a judgment therein should be binding only on those who intervene. Another example is a bus accident where several persons receive personal injuries. If a representative action binding all persons in the bus at the time of the accident were allowed, the parties would not have their choice of time and place to sue. Even assuming adequate representation, they might be prejudiced by the reputation or situation of the representatives in court, and they might not have a full and fair opportunity to demonstrate their personal injuries and status with the same time and consideration given them in a separate action.

### B. Conflicts of the Rules in Missouri

The spurious clause in Missouri<sup>22</sup> is the same for our purposes as Federal Rule 23(a)(3). But Missouri also has Rule 52.09(d) which in effect prohibits spurious class actions in Missouri. "No class suit shall be maintained under Rule

Amendment of 1955, which would have equated the judgment effects of the three types of class suits was not adopted. The merits of such a suggestion are not within the scope of this article. As to this problem, see 2 BARRON & HOLTZOFF, *op. cit. supra* §§ 561-572, particularly §§ 562.3, 572 and 573; CHAFEE, SOME PROBLEMS OF EQUITY 243, 295 (1950); MOORE, FEDERAL PRACTICE-RULES & OFFICIAL FORMS 562 (1961); WRIGHT, FEDERAL COURTS § 72 (1963); Keefee, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327 (1948).

18. *Kanz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Pentland v. Dravo Corp.*, 152 F.2d 851 (3rd Cir. 1945); *Pennsylvania Co. for Ins. v. Deckert*, 123 F.2d 979 (3rd Cir. 1941); 2 BARRON & HOLTZOFF, *op. cit. supra* note 17, § 562; 3 MOORE, *op. cit. supra* note 16, § 23.09. It has been suggested in one federal district court that if a claim of a party bringing a class action is personal and separate though payable out of a common fund, the action is spurious. *Giesecke v. Denver Tramway Corporation*, 81 F.Supp. 957 (D. Del. 1949). *But see Pennsylvania Co. for Ins. v. Deckert*, *supra* at 983, and 2 BARRON & HOLTZOFF, *op. cit. supra* § 562.2.

Hybrid actions are seldom used today, being limited mainly to rather rare credit reorganization suits. 2 BARRON & HOLTZOFF, *op. cit. supra* § 562.2; 3 MOORE, *op. cit. supra* § 23.09.

19. The court in the instant case equated "common relief" with "common fund." This seemed to them to justify a representative action.

20. 2 BARRON & HOLTZOFF, *op. cit. supra* note 17, § 562.3; 3 MOORE, *op. cit. supra* note 16, § 23.10.

21. 3 MOORE, *op. cit. supra* note 16, § 23.10.

22. Mo. R. Civ. P. 52.08(a)(3).

52.08 unless the judgment or decree will be binding upon all members of the class." In the instant case, the court implies a spurious action brought under section (a)(3) is in fact a representative action sufficient to bind all members of the class, whether or not they have intervened. This seems to be a departure from the past understanding.

Carr, in his treatise entitled *Missouri Civil Procedure*,<sup>23</sup> says we need not concern ourselves with the various conflicting federal decisions as to the proper scope and incidents of the spurious class action because the Supreme Court by Rule 52.09(d)<sup>24</sup> expressly limits it. Elsewhere, it is suggested the spurious action is destroyed.<sup>25</sup> While federal decisions say that all spurious class members are only bound if all have intervened, it would seem that if all parties have intervened, there is no need of a class suit.

One attempted justification of 52.09(d) is that it eliminates the possible constitutional objection of binding the absent members of the class not before the court.<sup>26</sup> It seems unfair to allow a class member to stay out until a favorable decision is made, and then come in for a portion of the money. This is like placing a bet after the wheel stops turning.<sup>27</sup>

Although there is a clear conflict between Rule 52.08(a)(3), which creates a spurious class actions and 52.09(d), which seems to prohibit the spurious class action, the Missouri Supreme Court failed to adopt the Civil Procedure Committee's recommendation that 52.08(a)(3) be stricken.<sup>28</sup> While awaiting final decision from the court on this recommendation, one writer saw the proposed elimination of the spurious clause as "not lamentable since the permissive joinder statute can be used as effectively."<sup>29</sup>

### III. DIFFICULTIES WITH THE HYBRID APPROACH—THE COMMON FUND

#### A. Requirement of a Common Fund

It is not clear why the court construed 52.08(a)(3) to require a finding of a common fund, nor does it appear why section (a)(3), the spurious clause, was used in preference to (a)(2), the hybrid clause. Plaintiffs had argued their class action was based on the hybrid clause.<sup>30</sup> There is the additional problem of whether this kind of insurance constitutes a common fund.

23. § 68 (1947).

24. At that time Supreme Court Rule 3.07(d).

25. Note, 3 ST. LOUIS U.L.J. 391 (1955); Crawford, *Class Actions Under the Missouri Code*, 18 U. KAN. CITY L. REV. 103, 114 (1949).

26. *First Nat. Bank v. Edwards*, 136 S.C. 305, 132 S.E. 824 (1926); Crawford, *supra* note 25, at 114. This constitutional problem, if indeed it is, may also be present in true class actions, but there it is outweighed by other considerations.

27. This is seen as permissible, however, in WRIGHT, *FEDERAL COURTS* § 72 (1963).

28. Blackmar, *Missouri's Proposed Civil Rules—A Critical Synopsis*, 21 U. KAN. CITY L. REV. 57, 60 (1952).

29. McQuie, *supra* note 17, at 285.

30. Brief for Respondent, p. 4, *Barnard v. Murphy*, 365 S.W.2d 614 (Mo. 1963) (Doc. No. 49086).

Spurious class actions are rarely, if ever, concerned with the existence of a common fund.<sup>31</sup> The court did correctly seek a showing of common relief, which is necessary before allowing individuals with several rights to join together as a class in Missouri.<sup>32</sup> Here that common relief was apparently thought to be the unity of the fund.

But the required common relief called for in section (a)(3), the spurious clause, has historically been interpreted much less strictly.<sup>33</sup> Common relief is not joint relief. Its purpose is to permit joinder to parties who have separable causes of action. Common relief emanates from the same original source, where the claims of all beneficiaries flow from the same fountain but are allowed not in a joint judgment, but in several judgments.<sup>34</sup> Common relief is requested when all members of the class are seeking, or are entitled to, the same *kind* of relief, i.e. damages or specific performance. Common relief may be sought even though individuals may recover separate judgments different in amounts.<sup>35</sup>

The common fund reasoning in the spurious class action is complicated by the court's language that "even if the theory of 'common fund' eventually should fail for some reason not here appearing, clause (a)(2) [the hybrid clause] of S. Ct. Rule 52.08 would, as we read it, clearly authorize the maintenance of these actions . . . as a class action."<sup>36</sup> It would seem that if the theory of common fund would fail for some reason, this failure would also doom any prospect of a hybrid class action. The hybrid action requires for its very existence a common fund.<sup>37</sup>

#### B. Proceeds of Liability Insurance as a Common Fund.

The court said a common fund exists because of the judicial admission of Aetna,<sup>38</sup> and proceeded to give these two reasons: First, that Aetna admitted it was, and second, because section 196.510(2)<sup>39</sup> required the defendant to furnish locker content insurance to indemnify his locker users against loss. This seemed to warrant the conclusion that any policy issued pursuant to those provisions would of necessity constitute a common fund irrespective of whether it was written on

31. Pennsylvania Co. for Ins. v. Deckert, *supra* note 18, at 983; 2 BARRON & HOLTZOFF, *op. cit. supra* note 17, § 562.2, .3; 3 MOORE, *op. cit. supra* note 16, § 23.09.

32. Mo. R. Civ. P. 52.08; Hribernik v. Reorganized School Dist. R-3, 276 S.W.2d 596, 598 (St. L. Mo. App. 1955); Missouri Veterinary Medical Ass'n v. Glisan, 230 S.W.2d 169, 172 (St. L. Mo. App. 1950).

33. Moser v. Keller, 303 S.W.2d 135 (Mo. 1951); 2 BARRON & HOLTZOFF, *op. cit. supra* note 17, § 562.3; 3 MOORE, *op. cit. supra* note 16, § 23.10.

34. Kanz v. Anheuser-Busch, Inc., 194 F.2d 737 (7th Cir. 1952).

35. Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941).

36. Barnard v. Murphy, *supra* note 1, at 619.

37. Commonly recognized as having a mutuality of interest in the thing involved, and still the rights of the class members are several, rather than joint or common.

38. Aetna could make such an admission without changing its liability, but defendant Murphy, the locker owner, who denied existence of a common fund was apparently prejudiced by the admission.

39. RSMo 1959.

the basis of each locker or on the plant as a unit.<sup>40</sup> The question immediately arising is why this would of necessity constitute a common fund.

The obligation which the statute imposed upon the locker plant owner was not delegable. Although he could by contract acquire an indemnitor, his liability was not a matter in rem. Defendant was liable to each person who rented a locker—not to a group of people similarly situated as a group, merely because they coincidentally rented lockers at the same location. Suppose the insurance policy did not provide sufficient coverage for the loss, or the policy had lapsed. Any excess liability on defendant's part should be the same as any original liability had there been no insurance. Some locker renters may be completely paid by the insurance company. Others may not. Their rights vary from others in the supposed class. These additional rights belong to each party individually.<sup>41</sup>

If the locker renters made contributions, or were assessed a given amount for a fund to be established and held for them as a group, with no others taking part, to be distributed upon suffering a loss, and at that time distributing the money on a pro-rata basis, the situation might well be different. But here the members of the alleged class apparently did no more than pay premiums to an insurance company whose liability was fixed to a maximum by the policy and a minimum by the statute.

Suppose the class representatives lost the instant case on the negligence question. The individual rights of the claimants not parties should not be cut off. In cases where a common fund does exist, such as the right of one person over another to receive disputed property, there is justification for a judgment which determines all rights. But here we are involved with the adjudication of several rights, each seeking only the amount he personally is owed. One locker renter has no rights to collect any other party's money, or power to determine another's right to collect. Other parties should be able to choose their own counsel and press their claims in such forums and manner as they see fit.<sup>42</sup>

The problem of the unknown claimant cannot be overlooked in a decision such as this. It is conceivable that in a similar case some claimant might remain unknown. Suppose the locker plant, along with the records, was totally destroyed by fire. It seems highly unlikely that 250 to 300 lessees would all be convenient to sources where they might learn about the loss.

If the insurance policy is found to be a common fund, by either admission or statutory construction, then an adjudication on that fund should extinguish the rights of all parties.<sup>43</sup> Absent members of the class without notice would therefore be bound.

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40. *Barnard v. Murphy*, *supra* note 1, at 619.

41. *Shipley v. Pittsburgh & L.E.R.R.*, 70 F.Supp. 870 (W.D. Pa. 1947). The instant case imposed liability on the defendant locker owner because of his breach of duty and would not be limited by the amount of insurance, as contrasted with fire insurance which might be payable although defendant did not breach any duty.

42. MOORE, FEDERAL PRACTICE-RULES & OFFICIAL FORMS 563 (1961).

43. *Milton v. Metro*, 308 S.W.2d 769 (St. L. Mo. App. 1958); *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952); *Crawford*, *supra* note 25, at 112. It would seem that a determination by the court that this is not a judgment in rem as a



C. *When is Liability Severable?*

The basic historical difference between damages and a common fund should be noted. When an insurance company pays money, the amount payable to those injured does not suddenly disappear as if someone had stolen the leprechaun's gold. Damages do not have the common unity of a fund. Damages are personal only and a representative action should not lie where the sole relief sought is damages, because damages must be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.<sup>44</sup> Merely because an action for damages arises out of the same set of circumstances, it does not follow that all of those injured have identical rights.

This rule of law is set out in *Standard Surety & Casualty Co. v. Baker*,<sup>45</sup> an interpleader action. The plaintiff executed a bond protecting those dealing with the principal company against loss due to wrongful acts. Plaintiff's liability was limited to a certain amount. The defendants made claims against the plaintiff for individual damages. The court said such claims are not claims to the same fund or subject matter. Each claimant has a separate and distinct claim against the plaintiff. So far as plaintiff's liability on the bond is concerned, there is neither one fund nor one subject matter. If he is liable to one claimant, that liability is separable from his liability, if any, to any other claimant. The fact that plaintiff has a certain amount he owes does not mean that there is one fund or one subject matter.<sup>46</sup> There is no jural relationship between the members of the class. The right of each is distinct.

Wherein is the liability of this bonding company different from that of the defendants in the instant case? An invitation to plaintiffs to join their actions against the locker owner, defendant Murphy, should be only an invitation and not a command performance.<sup>47</sup>

hybrid action would leave the defendant liable to pay, even though the fund was extinguished. This is inconsistent with both the equitable basis for the class action and Mo. R. Civ. P. 52.09(d) which would bind all parties.

44. *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021. This English case presents the same problem as *Barnard v. Murphy*, the instant case. Defendant's ship was sunk and plaintiff's cargo lost. Plaintiffs filed a representative suit for themselves and "others owners of cargo." They argued a common interest in the shippers, although admitting each shipper had a separate interest in respect to his own goods. Another similarity is that plaintiffs did not bring the "spurious" type action provided by statute. They sued on a "hybrid" basis—one in which a common fund was involved. The court said the shippers had no common or joint interest which would justify a representative action. "[W]here the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone." 2 K.B. at 1035. Each of the parties made a separate contract of shipment respecting his own goods. There is no common interest.

45. 26 F. Supp. 956 (W.D. Mo. 1939).

46. *Accord*, *Batman v. Louisville Gas & Elec. Co.*, 187 Ky. 659, 220 S.W. 318 (1920); *Union Light, Heat & Power Co. v. Mulligan*, 177 Ky. 662, 197 S.W. 1081 (1917).

47. 3 MOORE, *op. cit. supra* note 16, § 23.10.

## IV. CONCLUSION

The basis for the instant case might be founded upon an early prediction<sup>48</sup> which suggested that "if a 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" it is possible that the members of the class would be bound, though the representative is in court on a spurious class basis.<sup>49</sup> The solution gained in this case seems to have some justification insofar as the equities involved, yet we must still question the propriety of the device used to gain the decision.

Certainly, this case might be distinguished at a later time. It could then be contended that it was founded on an admission, or upon the particular statute, or that it was shown all parties had notice of the action. None of these contentions should stand in the way of a decision, if needed, to shove aside the idea that a liability insurance policy constitutes a common fund.

The class action device is not available to plaintiffs as a mere convenience to avoid the necessity of many suits. It grows out of the rights of the parties as those rights fit within the rules set down in codes and equity procedures.

There must be a certain character to the relationship between the parties plaintiff to the suit. They must have more than just a "like" interest. It must be a "shared" interest. If there is only one pie to be cut up and passed out, then it must all be passed out. The liability of this defendant is not of the same breed. It is an obligation to satisfy the several claims against him and is not limited to a certain amount as is a common fund. It is not a sack of money which once dispersed ceases to exist.

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48. Crawford, *supra* note 25, at 124.

49. *Ibid.* Although the author saw such a possibility in the absence of Rule 52.09(d), the rule would seem to enhance the likelihood of such a result. Cf., Dickinson v. Burnham, *supra* note 43; Weeks v. Bareco Oil Co., *supra* note 35.