

1937

Class Suits and the Federal Rules

Hiram H. Lesar

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Lesar, Hiram H., "Class Suits and the Federal Rules" (1937). *Minnesota Law Review*. 1493.
<https://scholarship.law.umn.edu/mlr/1493>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

CLASS SUITS AND THE FEDERAL RULES*

By HIRAM H. LESAR†

I. THE FEDERAL RULES

IN sharp contrast with the narrow rules of joinder then prevailing in suits at law, ancient equity practice, in order that complete justice might be done in one action, required all persons materially interested in the subject-matter or the object of a suit to be made parties to it, either as plaintiffs or defendants.¹ A companion principle was to the effect that a person must have his day in court before an adjudication could affect him. Yet it became apparent that in some cases adherence to these rules would work a denial of justice. To avoid that result and still protect persons not actually parties to the suit, the procedural device of a representative suit was early developed and formed an exception to the equity rules of joinder.² Where the members of a class were so numerous that it was impracticable to join them all, a few were permitted to sue, or to be sued, on behalf of the

†Assistant Professor of Law, University of Kansas.

*Proposed Federal Rule 23 on class actions was drafted by Professor J. W. Moore, of the University of Chicago, whose analysis of the rule as first drafted appears in his article, *Federal Rules of Civil Procedure: Some Problems Raised by The Preliminary Draft*, (1937) 25 *Geo. L. J.* 551, 570 et seq. The advisory committee, however, rejected that part of Professor Moore's suggested rule which dealt with the effect of the judgment and the requisites of jurisdiction, on the ground that these questions were substantive and not procedural. See comment after Rule 23, *Proposed Rules of Civil Procedure for the District Courts of the United States* (Report of the Advisory Committee on Rules for Civil Procedure, April, 1937). The present paper, written while the writer was a Sterling Fellow at the Yale Law School (1936-1937), presents his interpretation and criticism of the proposed rule, based upon an examination of the leading articles and principal federal decisions on class suits. The writer is indebted to the work of Professor Moore, particularly his keen analysis of class actions into three types as stated in Federal Rule 23.

¹ Daniell, *Chancery Pleading & Practice*, 6th Am. ed., 192, where the author points out that equity required the plaintiff to bring in as plaintiffs or defendants all persons who were necessary to enable it to do complete justice, "and that he should so far bind the rights of all persons interested in the subject as to render performance of the decree which he seeks safe to the party called upon to perform it, by preventing his being sued or molested again respecting the same matter either at Law or in Equity."

²Some of the earlier cases were: *Brown v. Vermuden*, (1676) 1 *Cas.* in *Ch.* 272 (suit against a parish to establish the right to a tithe); *City of London v. Richmond*, (1701) *Prec. Ch.* 156, 2 *Vern.* 421 (suit against shareholders); *Cockburn v. Thompson*, (1809) 16 *Ves.* 321 (suit by members of a voluntary association); *Meux v. Maltby*, (1818) 2 *Swan.* 277 (suit against some members of a joint stock company). See also *Madox, Firma Burgi*, ch. 7, p. 136.

whole class.³ This was a matter of indulgence, since joinder otherwise would have been required.

But there also developed in equity practice a type of joinder of parties which was not required but optional with the plaintiffs. So joinder was deemed permissive "when owners of separate lands united to enjoin a common injury or nuisance or the levy of an illegal tax or rate; when persons injured by the same or identical fraudulent misrepresentations sued to be put in statu quo; and when creditors who had recovered separate judgments against a common debtor brought a creditor's bill."⁴ Representative or class suits came to be employed in most, if not all, of these situations. It must be remembered, however, that, among other reasons, joinder was here allowed in order to prevent a multiplicity of suits, to avert delay in proceedings and to save expense. The allowance of a representative suit in these cases, then, was a matter of convenience.

With the advent of reformed procedure, the equity doctrine found expression in the codes, the usual provision reading as follows:

"When the question is one of common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."⁵

Other statutes begin "when the subject-matter of the controversy is one of common or general interest to many persons"⁶ and "where there are numerous persons having the same interest in one cause or matter."⁷ A great deal of confusion has arisen as to what constitutes "a common or general interest," "the subject-matter of the controversy," and "the same interest in one cause or matter;" and there have been conflicting statements as to what situations were meant to be embraced within the clause, "or where the parties are numerous."⁸ Sometimes the courts have

³See Cooper, *Equity Pleading* 39; 1 Daniell, *Chancery Pleading & Practice*, 6th Am. ed., 235 et seq.; Story, *Equity Pleading*, 19th ed., sec. 94 et seq.

⁴Clark, *Code Planning* 248.

⁵Alabama, Code (Michie, 1928) sec. 5701. These statutes are collected in Clark, *Code Pleading* 277, n. 182 and Wheaton, *Representative Suits Involving Numerous Litigants* (1934) 19 *Cornell L. Q.* 399, n. 1.

⁶Philippine, Code Civ. Proc. (De Joya, 1925) sec. 118.

⁷Rules of Sup. Ct. England, (1935) Order XVI, Rule 9.

⁸Wheaton, *Representative Suits Involving Numerous Litigants*, (1934) 19 *Cornell L. Q.* 399, 407 et seq.; see also Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, (1932) 30 *Mich. L. Rev.* 878.

said that the latter clause creates a second class of cases, founded on mere numerousness, but the decisions actually require a common interest of some sort in this situation too.⁹

The first federal rule on the subject was Equity Rule 48 of the Rules of 1842, which was quite clearly related to joinder of parties, since in terms it authorized the court to dispense with parties in the class suit situation.¹⁰ A proviso was added to Rule 48, however, stating that in such cases the decree should be without prejudice to the rights and claims of all the absent parties. The intended purpose and scope of this saving clause has been the subject of some speculation.¹¹ When the present Federal Equity Rule 38 was adopted in 1912, this feature of the old Rule 48 was omitted. Rule 38 provided:

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.¹²

The Bar Committee of the circuit court of appeals of the second circuit, upon whose recommendation Rule 38 was promulgated, advised the omission of the last sentence of the former Rule 48 "for the reason that in every true 'class suit' the decree is necessarily binding upon all parties included in the decree."¹³ The form of Rule 38 is like that of the state acts.

In general it was recognized that these rules merely stated formally what was the established equity practice. The plaintiff should so state his bill that it appears that he is suing on behalf of a class,¹⁴ and he should have such an interest that he could

⁹Wheaton, *Representative Suits Involving Numerous Litigants*, (1934) 19 Cornell L. Q. 399, 434; see Pomeroy, *Code Remedies*, 5th ed., sec. 286.

¹⁰This rule read: "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." (1842) 1 How. lvi. See 28 U. S. C. A. sec. 723, note 283, 2 Mason's U. S. Code, tit. 28, sec. 723.

¹¹See 1 Street, *Federal Equity Practice*, sec. 550.

¹²(1912) 226 U. S. appendix p. 11, 33 Sup. Ct. xxix; see 28 U. S. C. A. sec. 723, 2 Mason's U. S. Code, tit. 28, sec. 723.

¹³Hopkins, *Federal Equity Rules*, 8th ed., 240.

¹⁴Hoe v. Wilson, (1870) 9 Wall. (U.S.) 501, 19 L. Ed. 762; McArthur v. Scott, (1885) 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; Motley v. Southern Ry., (C.C. Ga. 1911) 184 Fed. 956; Ball v. Bank of Bay Biscayne, (S.D. Fla. 1930) 43 F. (2d) 214. The best general statement concerning this matter is found in McClelland v. Rose, (C.C.A. 5th Cir. 1918) 247 Fed. 721, 724, where the court said:

"In order for a judgment or decree in a suit to be binding upon others

have joined with them in the prosecution of the suit.¹⁵ Care must be taken that there is a fair representation,¹⁶ and for this purpose the court may, if necessary, re-align the parties plaintiff and defendant.¹⁷ Where federal jurisdiction is based upon diversity of citizenship, only the citizenship of the original parties, not that of other members of the class, is considered.¹⁸ All members of the class, of course, may come in under the decree and take advantage of it.¹⁹ The filing of the original bill stops the running of the statute of limitations against all members of the class.²⁰ Where the suit is successful in establishing or preserving a fund, costs and attorney's fees are paid from the fund, so that all members of the class share in the expenses of the successful plaintiff;²¹ and, irrespective of the success of the suit, those who

than those who are brought before the court, it should be made to appear from the record in the case that such a result is contemplated; that there are persons not before the court having an interest in common with those who sue or defend, and why such others are not brought in; and, further, the relation to the subject-matter of the suit of those who sue or defend for others as well as themselves should be so disclosed as to present for the determination of the court the question whether they do or do not properly represent, not only themselves, but others not before the court, who are similarly concerned in the issues they raise or contest."

¹⁵*Georgetown v. Alexandria Canal Co.*, (1838) 12 Pet. (U.S.) 91, 9 L. Ed. 1012.

¹⁶*Smith v. Swormstedt*, (1853) 16 How. (U.S.) 288, 14 L. Ed. 942.

¹⁷*See Irwin v. Missouri Valley Bridge & Iron Co.*, (C.C.A. 7th Cir. 1927) 19 F. (2d) 300, 303.

¹⁸*Stewart v. Dunham*, (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Supreme Tribe of Ben Hur v. Cauble*, (1921) 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673; *Belmont Nail Co. v. Columbia Iron & Steel Co.*, (C.C. Pa. 1891) 46 Fed. 336; *Doan v. Consolidated-Progressive Oil Corporation*, (D.C. Del. 1920) 271 Fed. 12; *McGarry v. Lenz*, (S.D. Ohio 1925) 9 F. (2d) 680.

¹⁹*Myers v. Fenn*, (1867) 5 Wall. (U.S.) 205, 18 L. Ed. 604; *Johnson v. Waters*, (1884) 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; *Stewart v. Dunham*, (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *In re Dennett*, (C.C.A. 9th Cir. 1915) 221 Fed. 350. For the form of the decree in a creditors' bill, see *Johnson v. Waters*, (1884) 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547.

²⁰*Richmond v. Irons*, (1887) 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Newgass v. Atlantic & D. Ry.*, (C.C. Va. 1894) 72 Fed. 712; see note (1934) 34 Colum. L. Rev. 118, 131.

The same rule applies to laches. *Southern Pacific Co. v. Bogert*, (1919) 250 U. S. 483, 39 Sup. Ct. 533, 63 L. Ed. 1099.

²¹*Trustees v. Greenough*, (1881) 105 U. S. 527, 26 L. Ed. 1157 (bondholders); *Central Railroad & Banking Co. v. Pettus*, (1885) 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915 (creditors); *Richmond v. Irons*, (1887) 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864 (creditors); *Hutchinson Box Board & Paper Co. v. Van Horn*, (C.C.A. 8th Cir. 1924) 299 Fed. 424; *Nolte v. Hudson Nav. Co.*, (C.C.A. 2d Cir. 1931) 47 F. (2d) 166.

"One jointly interested with others in a common fund who brings and prosecutes a suit for its preservation and administration, as in a general creditors' suit, is equitably entitled to reimbursement of his costs, including reasonable fees of his counsel, to be paid either out of the fund itself or by

intervene must contribute to the expenses of the action.²² These matters have raised no particular difficulties.

Concerning other questions arising in cases under Rule 38, however, the authorities are not so harmonious. In some cases where a certain sum must be involved in order to give a federal court jurisdiction, the courts have held that each plaintiff in a suit on behalf of the class must have a claim of the requisite jurisdictional amount; in other representative suits, the courts have permitted aggregation of the amounts claimed, and some writers have contended that this should always be done.²³ There have also been divergent holdings in regard to the effect of the decree, i.e. whether it is conclusive upon all represented or only on those who are parties to the suit.²⁴ While Rule 38 applies only to equity suits, the similar section in state codes would seem applicable to actions at law under the Conformity Act. But, although an analogous procedure has been sanctioned judicially in cases before the Federal Trade Commission and before the court of claims,²⁵ some courts have doubted if the class suit could

proportionate contribution from those receiving the benefit of litigation." *Muskegon Boiler Works v. Tennessee Valley Iron & R. Co.*, (D.C. Tenn. 1921) 274 Fed. 836, 837.

²²In *Edwards v. Bay State Gas Co.*, (C.C. Dela. 1904) 130 Fed. 242, a stockholders' derivative suit, the court imposed costs, apportioned per capita, on the withdrawal of an intervener. The contention of the plaintiff that costs should be assessed against the intervener in proportion to the number of shares he held, the result if the corporation itself had begun the suit or if expenses were deducted from the fund recovered, was denied, the court pointing out that in reality the suit at this stage was that of the plaintiff and interveners. See note (1934) 34 Colum. L. Rev. 118, 140.

In *Chick v. Northwestern Shoe Co.*, (C.C. Ill. 1895) 118 Fed. 933, 935, a creditors' bill was brought to recover property alleged to have been fraudulently transferred and to enforce the statutory liability of directors. Two banks, creditors to the extent of two-thirds of the debt of the corporation, and who had received the property said to have been fraudulently transferred, were made defendants. They also filed claims. A motion by the plaintiff that all creditors contribute an amount equal to five percent of their claims in order to carry on the litigation, or have their claims stricken out, was granted. In commenting upon the plight of the defendant banks who were thus required to pay two-thirds of the costs of suing themselves, the court said, "the incongruity arises from their own acts in seeking to share in the proceeds which may be obtained from them upon proof of the alleged illegal acts with which they are charged." A creditor of course, submits himself to the jurisdiction of the court by filing a claim. *Alexander v. Hillman*, (1935) 296 U. S. 222, 56 Sup. Ct. 204, 80 L. Ed. 192.

²³See *Blume, Jurisdictional Amount in Representative Suits*, (1931) 15 MINNESOTA LAW REVIEW 501; *Wheaton, Representative Suits Involving Numerous Litigants*, (1934) 19 Corn. L. Q. 399, 418, 435.

²⁴See *Wheaton, Representative Suits Involving Numerous Litigants*, (1934) 19 Corn. L. Q. 399, 427 et seq.; note (1934) 34 Colum. L. Rev. 118, 132.

²⁵*Southern Hardware Ass'n v. Federal Trade Commission*, (C.C.A. 5th Cir. 1923) 290 Fed. 773; *Chamber of Commerce v. Federal Trade Commis-*

be utilized in cases at law.²⁶ Finally, there has been some uncertainty as to the amount of control which the original parties to a class suit could, or ought to, exercise over the proceedings.

The advisory committee evidently had these questions in mind when it drafted Rule 23 of the proposed Federal Rules of Civil Procedure. That Rule reads in part as follows:

Rule 23. Class Actions.

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such number of them as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants, 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 such 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.* No class action shall be dismissed or compromised without the approval of the court on such notice to other members of the class as the court may require.²⁷

It will be observed that the rule attempts to define three different types of class actions, and to limit the amount of control over the action exercisable by the original parties. In view of the importance which the distinctions thus drawn have with reference

sion, (C.C.A. 8th Cir. 1926) 13 F. (2d) 673; *United States v. "Old Settlers,"* (1893) 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509 (Court of Claims); *Winton v. Amos*, (1921) 255 U. S. 373, 41 Sup. Ct. 342, 65 L. Ed. 684 (Court of Claims).

²⁶*McNary v. Guaranty Trust Co.*, (N.D. Ohio 1934) 6 F. Supp. 616, criticized in note (1934) 19 Corn. L. Q. 614; see also *Fletcher v. Burt*, (C.C.A. 6th Cir. 1903) 126 Fed. 619.

But class suits at law have been maintained in federal courts: *Penny v. Central Coal and Coke Co.*, (C.C.A. 8th Cir. 1905) 138 Fed. 769 (trespass for injury to freehold of a religious society); *Stearns Coal & Lumber Co. v. Van Winkle*, (C.C.A. 6th Cir. 1915) 221 Fed. 590 (ejectment brought by shareholders of a corporation whose charter had expired); see *Brusselback v. Cago Corporation*, (S.D. N.Y. 1936) 14 F. Supp. 993 (dismissing action in equity by bondholders to recover stockholders' liability on ground the suit should have been at law); *Clark and Moore*, *A New Federal Civil Procedure—II. Pleadings and Parties*, (1935) 44 Yale L. J. 1291, 1321.

²⁷Proposed Rules of Civil Procedure for the District Courts of the United States (Report of the Advisory Committee on Rules for Civil Procedure, April, 1937).

to the problems posed above, each part of the rule, together with the decided cases in point, will be considered separately.

II. CLASSIFICATION OF SUITS

It has long been recognized that the class suit device has been, and should be, extended to cases other than those to fit whose peculiar needs it was first developed. Street made a questionable assimilation of the older cases to proceedings in rem by stating that the true, as distinguished from the "spurious," class suit concerns property and not personal liability.²⁸ Similar is a statement that the class suit will lie only where there is a limited fund.²⁹ Subsection (a) of proposed Federal Rule 23 attempts to distinguish the cases on the basis of the character of the rights of members of the class. A consideration of the principal federal decisions will disclose the validity of this method of classification.

A. True Class Actions.—Of frequent occurrence are suits by and against persons as representatives of a voluntary association. The members of such an association have joint interests in the association property; they are jointly, or by statute jointly and severally, liable on contracts made to carry out the objects for which the organization was formed; and they are jointly and severally liable for torts committed by the association.³⁰ So where a few members sue on behalf of all the members, a joint right is being enforced. A representative number have thus been permitted to maintain a bill to quiet title to the common property and enjoin a nuisance,³¹ and to bring an action of trespass to recover the value of coal taken from the common lands.³² Con-

²⁸1 Street, Federal Equity Practice, sec. 547.

²⁹See note (1934) 20 Va. L. Rev. 564.

³⁰See 4 Cyc. 310; Dicey, Parties to Actions, 2d Am. ed., Rules 20, 56, 104; Sturges, Unincorporated Associations as Parties to Actions, (1924) 33 Yale L. J. 383, 384.

³¹Beatty v. Kurtz, (1829) 2 Pet. (U.S.) 566, 7 L. Ed. 521 (church).

³²Penny v. Central Coal & Coke Co., (C.C.A. 8th Cir. 1905) 138 Fed. 769 (association—church). The action being at law, the suit was based upon the Arkansas code provision for class actions.

In United States v. "Old Settlers," (1893) 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509, a class suit was brought in the court of claims on behalf of a tribe of Indians to recover money alleged to be due them from the United States under a treaty.

In International News Service v. Associated Press, (1918) 248 U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293, the Associated Press, an incorporated cooperative association, sued to enjoin the defendant from inducing members of the association to violate its articles and by-laws, and from bribing the employees of such members to furnish before publication news items supplied by the Associated Press. In answer to the argument that the lower court granted relief applicable to particular members

versely, class actions have been maintained against representatives of members of an association to enforce joint tort and contractual liabilities.³³ It is true that an unincorporated association has capacity to sue or be sued in its own name under some state statutes, and that these statutes sometimes may be used in law actions in federal courts under the Conformity Act.³⁴ The rule in the *Coronado Case*³⁵ accords a like capacity to the association for the purpose of enforcing for or against it a federal substantive right. Since an unincorporated association has no citizenship,³⁶ however, the class suit must still be resorted to where federal jurisdiction is predicated upon diversity of citizenship.

Creditors frequently are given a right to enforce the statutory liability of stockholders or directors of a corporation. Where the right is given to all the creditors, and not to each individual creditor, and the statute is said to contemplate a fund for the common benefit, the right may be classed as common. In such

of the Associated Press, the Supreme Court stated that while, except for their numbers, the members were necessary parties, the plaintiff represented them under Equity Rule 38. Accord: *Associated Press v. KVOB, Inc.* (D.C. Wash. 1934) 9 F. Supp. 279.

³³*Yardley v. Philler*, (C.C. Pa. 1893) 58 Fed. 746 (bill brought by a receiver against the committee of a clearing house association to recover the proceeds of checks retained by the association and alleged to be a preference); *Society of Shakers v. Watson*, (C.C.A. 6th Cir. 1895) 68 Fed. 730 (bill brought against defendants as representatives of a society to subject the common property to payment of certain notes). See *Colt v. Hicks*, (1932) 97 Ind. App. 177, 179 N. E. 335 (action by beneficiary of a member of a union against the union to recover death benefits). In *Winton v. Amos*, (1921) 255 U. S. 373, 41 Sup. Ct. 342, 65 L. Ed. 684, a congressional act, authorizing a suit in the Court of Claims by the plaintiff against the governor of the Choctaw Nation, to settle the plaintiff's claim against the Nation for services rendered in securing citizenship in the Nation for the Mississippi Choctaws, was said to authorize a class suit similar to that in Equity Rule 38.

See *United States v. Coal Dealers' Ass'n*, (C.C. Cal. 1898) 85 Fed. 252 (bill in equity, naming an association and 17 individual members as defendants, to dissolve the association as an unlawful combination in restraint of trade); *Evenson v. Spaulding*, (C.C.A. 9th Cir. 1907) 150 Fed. 517 (bill to enjoin a conspiracy in restraint of trade—Old Equity Rule 48 applied).

³⁴See *Clark and Moore, A New Federal Civil Procedure—II. Pleadings and Parties*, (1935) 44 Yale L. J. 1291, 1315-1317.

³⁵*United Mine Workers of America v. Coronado Coal Co.*, (1922) 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762. See *Sturges. Unincorporated Associations as Parties to Action*, (1924) 33 Yale L. J. 383. The rule of the *Coronado* case is adopted in Federal Rule 17.

³⁶*Thomas v. Board of Trustees of Ohio State University*, (1904) 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160; *Russell v. Central Labor Union*, (D.C. Ill. 1924) 1 F. (2d) 412 (suit against labor unions for tort—demurrer on ground that court had no jurisdiction because citizenship of members not shown, sustained); *Livering & Garrigues v. Morrin*, (C.C.A. 2d Cir. 1932) 61 F. (2d) 115, aff'd (1933) 289 U. S. 103, 53 Sup. Ct. 549, 77 L. Ed. 1062.

cases it has been held that there must be a suit in equity where all creditors should be joined or a class suit brought.³⁷ Class actions have been brought in various other situations where the action may be said to have been brought to enforce a common right. An action by part of the members of a voluntary association against the entity to secure a division of, or to settle rights in, the common property, to enjoin the unlawful use of common funds, or to enforce compliance with the constitution or articles of the association, would seem to involve the enforcement of a common right.³⁸ Upon the expiration or forfeiture of a corporation's charter its stockholders become tenants in common of the property and may, in a representative action, recover the property and have it apportioned among them.³⁹

³⁷Pollard v. Bailey, (1874) 20 Wall. (U.S.) 520, 22 L. Ed. 376; Terry v. Little, (1880) 101 U. S. 216, 25 L. Ed. 864; Patterson v. Lynde, (1883) 106 U. S. 519, 1 Sup. Ct. 432, 27 L. Ed. 265; Alsop v. Conway, (C.C.A. 6th Cir. 1911) 188 Fed. 568. See United States Smelting Co. v. Hofkin, (D.C. Pa. 1917) 245 Fed. 896 (class suit by creditors to enforce statutory liability of directors); Brusselback v. Cago Corporation, (C.C.A. 2d Cir. 1936) 85 F. (2d) 20 (reversing (D.C. N.Y. 1936) 14 F. Supp. 993 and allowing a class suit by bondholders to recover stockholders' liability); Brusselback v. Chicago Joint Stock Land Bank, (C.C.A. 7th Cir. 1936) 85 F. (2d) 617.

"The plaintiff under both the general equity practice and Equity Rule 38 (28 U.S.C.A. following section 723) is entitled to maintain this suit in its own behalf and on behalf of all other creditors of the bank." Reconstruction Finance Corporation v. Central Republic Trust Co., (D.C. Ill. 1935) 11 F. Supp. 976 (same corporation as in Brusselback cases, supra).

Under the National Banking Act, the order of the comptroller of the currency declaring to what extent the individual liability of the stockholders shall be enforced is conclusive, and the receiver sues at law. Casey v. Galli, (1877) 94 U. S. 673, 24 L. Ed. 168, 307. The New York banking law is similar. Broderick v. American General Corporation, (C.C.A. 4th Cir. 1934) 71 F. (2d) 864.

If the individual creditor is given a separate right to enforce the liability, a class suit would have to come under subsection (a) (3) of Rule 23.

³⁸See Smith v. Swormstedt, (1853) 16 How. (U.S.) 288, 14 L. Ed. 942 (plaintiffs, representing 1,500 Southern Methodist preachers, sued the defendants, representing 3,800 Northern preachers, to secure a division of the property of the old association); Hartford Life Insurance Co. v. Ibs, (1915) 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165 (class suit brought by certificate holders in mutual assessment insurance association to determine rights in a mortuary fund); Supreme Tribe of Ben Hur v. Cauble, (1921) 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673 (persons representing a class of members in a fraternal benefit society attack a reorganization plan); Helm v. Zarecor, (D.C. Tenn. 1913) 213 Fed. 648 (like Smith v. Swormstedt, (1853) 16 How. (U.S.) 288, 14 L. Ed. 942); Sharpe v. Bonham, (D.C. Tenn. 1913) 213 Fed. 660 (same as previous case); Local No. 7 of Bricklayers', etc., Union v. Bowen, (D.C. Tex. 1922) 278 Fed. 271 (bill by some members of local union against the national union to restrain action violating the constitution of the Union); Irwin v. Missouri Valley Bridge & Iron Co., (C.C.A. 7th Cir. 1927) 19 F. (2d) 300 (bill by one class of members in reciprocal insurance association against other members).

³⁹Bacon v. Robertson, (1856) 18 How. (U.S.) 480, 15 L. Ed. 499

"Secondary" rights referred to in the rule include those which normally are called derivative. Common among these are suits by some of the stockholders of a corporation, on behalf of all stockholders, against the corporation and its directors. The primary right belongs to the corporation, and the stockholders derive their right to enforce it because the corporation, controlled by the board of directors, neglects or refuses to do so.⁴⁰ All stockholders, of course, have an interest. Such actions may be brought to set aside illegal, ultra vires, or fraudulent contracts, to restrain the misapplication of corporate funds, and to secure the return of property wrongfully transferred.⁴¹ Of like nature are class actions by members against the officers of a voluntary association to recover money wrongfully taken.⁴² Taxpayers' actions to challenge illegal municipal acts also proceed upon this theory. The action may be to enjoin ultra vires acts of the city, to compel repayment to the municipal corporation of sums illegally paid out by its officers, or to enforce any other cause of action belonging to the municipality where its officers wrongfully refuse to act.⁴³ If the purpose of the action is thus to vindicate a public, as

(charter forfeited—suit against trustee who had funds remaining after all debts paid); *Stearns Coal & Lumber Co. v. Van Winkle*, (C.C.A. 6th Cir. 1915) 221 Fed. 590 (ejectment—used state class action statute).

⁴⁰See *Ballantine*, Corporation Law, secs. 186 et seq. Sometimes it is said that these suits have two phases, one to compel the corporation to sue, the other the suit by the corporation asserted by the stockholders. See *Cantor v. Sachs*, (1932) 18 Del. Ch. 359, 365, 162 Atl. 73, 76.

⁴¹*Davenport v. Dows*, (1874) 18 Wall. (U.S.) 626, 21 L. Ed. 938 (to enjoin payment of illegal tax); *Southern Pacific Co. v. Bogert*, (1919) 250 U. S. 483, 39 Sup. Ct. 533, 63 L. Ed. 1099 (to set aside fraudulent conveyance of assets to majority stockholders); *Thouron v. East Tennessee, V. & G. Ry.*, (C.C. Tenn. 1889) 38 Fed. 673 (to enjoin ultra vires act); *Hill v. Glasgow R. Co.*, (C.C. Ky. 1888) 41 Fed. 610 (to restrain misapplication of corporate funds); *Larabee v. Dolley*, (C.C. Kan. 1909) 175 Fed. 365; *Backus v. Brooks*, (C.C.A. 2d Cir. 1912) 195 Fed. 452; *Carpenter v. Knollwood Cemetery*, (D.C. Mass. 1912) 198 Fed. 297; *Dana v. Morgan*, (D.C. N.Y. 1914) 219 Fed. 313 (to set aside fraudulent contract); *In re Dennett*, (C.C.A. 9th Cir. 1915) 221 Fed. 350 (to recover property wrongly transferred); *Bogert v. Southern Pacific Co.*, (C.C.A. 2d Cir. 1923) 290 Fed. 727; *Hutchinson Box Board & Paper Co. v. Van Horn*, (C.C.A. 8th Cir. 1924) 299 Fed. 424; *Luster v. Martin*, (C.C.A. 7th Cir. 1932) 58 F. (2d) 537.

The corporation should be made a defendant: *Davenport v. Dows*, (1874) 18 Wall. (U.S.) 626, 21 L. Ed. 938. See note (1934) 43 Yale L. J. 661. The plaintiff, of course, must be a stockholder: *Whitaker v. Whitaker Iron Co.*, (D.C. W. Va. 1916) 238 Fed. 980.

The present Equity Rule 27, relating to the necessary averments in a bill brought by a stockholder or shareholder, is carried over into Federal Rule 23(b) with slight change.

⁴²See *Haynes v. Fraternal Aid Union*, (D.C. Kan. 1929) 34 F. (2d) 305.

⁴³*Brown v. Trousdale*, (1891) 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987 (to restrain assessment and collection of taxes to pay invalid bond

distinguishable from a private, right, it should be brought as a class action.⁴⁴ Actions by creditors to enforce the payment of unpaid stock subscriptions likewise probably are founded on a secondary right, the primary right belonging to the corporation.⁴⁵ The action must be brought for the benefit of all creditors.⁴⁶

Where representative suits by secured bondholders are classified depends largely upon the terms of the trust indenture with which the bonds are issued. If the mortgage is made directly to the bondholders, their right to foreclose would seem to be joint or common.⁴⁷ But ordinarily the mortgage runs in favor of a trustee, who has the primary duty to protect the security, and he represents the holders of bonds thereby secured.⁴⁸ On the failure or inability of the trustee to perform his duty, some of the bondholders may sue on behalf of all to secure a foreclosure.⁴⁹

issue, and to enjoin holders from collecting on the bonds); *McIntosh v. Pittsburgh*, (C.C. Pa. 1901) 112 Fed. 705 (see *infra*, note 60); *Risley v. City of Utica*, (C.C. N.Y. 1909) 173 Fed. 502 (to restrain collection of tax to pay to a water company under an allegedly invalid contract); 22 Cyc. 897; 4 *Dillon, Municipal Corporations*, 5th ed., sec. 1588; 6 *McQuillin, Municipal Corporations*, sec. 2740 et seq.; note (1933) 33 *Colum. L. Rev.* 1014.

"Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question." *Crampton v. Zabriskie*, (1880) 101 U. S. 601, 609, 25 L. Ed. 1070.

⁴⁴ *McQuillin, Municipal Corporations*, sec. 2748.

⁴⁵ See *Ballantine, Corporation Law*, sec. 199.

⁴⁶ *George W. Signor Tie Co. v. Monett & S. W. Const. Co.*, (D.C. Mo. 1912) 198 Fed. 412; *John A. Roebing's Sons Co. v. Kinnicutt*, (D.C. N.Y. 1917) 248 Fed. 596. Creditors may file a bill to force the corporation to levy an assessment for the unpaid balance. *Handley v. Stutz*, (1891) 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227. If a receiver or a trustee in bankruptcy is appointed for the corporation, he has the sole right to sue to collect unpaid subscriptions. *Reagan v. Midland Packing Co.*, (D.C. Ia. 1924) 298 Fed. 500. See *Hawkins v. Glenn*, (1889) 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184.

⁴⁷ See *Railroad Co. v. Orr*, (1874) 18 Wall. (U.S.) 471, 21 L. Ed. 810 (15 not numerous so all should have joined).

⁴⁸ *Beals v. Illinois, M. & T. R. Co.*, (1890) 133 U. S. 290, 10 Sup. Ct. 314, 33 L. Ed. 608; *Bullard v. City of Cisco, Tex.*, (1933) 290 U. S. 179, 54 Sup. Ct. 177, 78 L. Ed. 254; *Guaranty Trust Co. v. Minneapolis & St. L. R.*, (C.C.A. 8th Cir. 1931) 52 F. (2d) 418; *Campbell v. Railroad Co.*, (C.C. Tex. 1871) 4 Fed. Cas. No. 2366. See *Rodgers, Rights and Duties of the Committee in Bondholders' Reorganizations*, (1929) 42 *Harv. L. Rev.* 899, 903.

⁴⁹ *Galveston R. Co. v. Cowdrey*, (1871) 11 Wall. (U.S.) 459, 20 L. Ed. 199 (trustee dead); *Toler v. East Tennessee, V. & G. Ry.*, (D.C. Tenn. 1894) 67 Fed. 168 (trustee refused to foreclose); *Wilmer v. Atlanta & R. Air Line Ry.*, (C.C. Ga. 1875) 30 Fed. Cas. No. 17,776. See *Dewing, Financial Policy of Corporations* 3d ed., 80; 1 *Quindry, Bonds and Bondholders*, secs. 72, 88, 96, 227.

Similarly, they may bring a class suit to secure the appointment of a successor trustee,⁵⁰ and, where their protective committee has bought in the property on foreclosure and fraudulently issued bonds, a bondholders' representative suit to cancel the fraudulent bonds may be maintained.⁵¹ A suit by cestuis on behalf of themselves and all other beneficiaries under a trust deed, against the trustee and the heirs of the settlor, to quiet title to the trust property, the trustee having refused to bring the suit, also would seem to involve the enforcement of a secondary right.⁵² Finally, some of the distributees of an estate may bring a class suit against an executor or an administrator to obtain distribution of property or to construe a will.⁵³ Conversely, an action may be brought against some heirs as representing all.⁵⁴

In general these are the cases for which the equity doctrine as to class suits was first developed, namely, as Dean Clark has correctly pointed out,⁵⁵ cases where joinder otherwise would be compulsory. They are not limited necessarily to cases involving property, the test suggested by Street.⁵⁶ For purposes of the class action, it is immaterial whether the right sought to be enforced by or against the class is joint or common, but the use of "joint" does serve to discredit the erroneous idea, advanced by the Wis-

⁵⁰*Acken v. New York Title & Mortgage Co.*, (D.C. N.Y. 1934) 9 F. Supp. 521.

⁵¹*Cowell v. City Water Supply Co.*, (C.C.A. 8th Cir. 1903) 121 Fed. 53. See *Trustees v. Greenough*, (1881) 105 U. S. 527, 26 L. Ed. 1157 (similar suit against trustee).

⁵²*Bowdoin College v. Merritt*, (C.C. Cal. 1893) 54 Fed. 55. See *Carnahan v. Peabody*, (D.C. N.Y. 1929) 31 F. (2d) 311 *aff'd* (C.C.A. 2d Cir. 1930) 36 F. (2d) 1019 (suit by cestuis to enforce the trust and for an accounting).

⁵³See *Payne v. Hook*, (1869) 7 Wall. (U.S.) 425, 19 L. Ed. 260 (against public administrator to obtain distribution); *McArthur v. Scott*, (1885) 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *McClelland v. Rose*, (C.C.A. 5th Cir. 1918) 247 Fed. 721 (to construe will). In *Hoe v. Wilson*, (1870) 9 Wall. (U.S.) 501, 19 L. Ed. 762, a suit by heirs to set aside a sale of deceased's realty on a bill filed by a creditor, it was held that all heirs must join, there being only thirteen of them.

As to when the executor represents other heirs and legatees in a suit by one to construe a will, see *Stevens v. Smith*, (C.C.A. 6th Cir. 1903) 126 Fed. 706; *Schnepfe v. Schnepfe*, (C.C.A. 4th Cir. 1916) 230 Fed. 781.

⁵⁴*Alger v. Anderson*, (C.C. Tenn. 1897) 78 Fed. 729 (suit by purchaser against some heirs at law of vendor).

⁵⁵Clark, Code Pleading, sec. 63. Some criticism has been made of his statement. See Blume, the "Common Questions" Principle in the Code Provision for Representative Suits, (1932) 30 Mich. L. Rev. 878, 897-898; note (1934) 34 Colum. L. Rev. 118, 119, n. 4. This criticism is due in part to a failure to recognize the distinctions between the effects of the decree in various classes of cases.

⁵⁶Street, Federal Equity Practice, sec. 547.

consin court,⁵⁷ that the class suit exception does not apply to persons who are united in interest.

Just as it is true that justice might never be done if it were necessary to join all parties with interests in the subject-matter or the object of a suit, it also is true that even when a class action is permitted in such situations, the decree may be ineffective unless absent persons can be bound by it. If those persons are members of a class and have a right or other legal relation in common or jointly with actual parties who must necessarily set up the same claim or defense as the absent parties would, there are practical reasons for saying that the court should make its decree effective and not have to re-try the case at a later date. Where the members of a class have a secondary right, the owner of the primary right could enforce it for the benefit of the class, thereby precluding them,⁵⁸ and there is no reason why some member of the class should not fill the same representative role. In an early case in which the plaintiff had established a right against a class of which the plaintiff was a member, the lord chancellor said, "If the Defendant should not be found, suits of this nature . . . would be infinite and impossible to be ended."⁵⁹ Therefore, the decree in all true class actions, representation being adequate and there being no fraud or collusion, is conclusive upon the class—*res judicata*.⁶⁰

⁵⁷See *George v. Benjamin*, (1898) 100 Wis. 622, 76 N. W. 619, cited favorably in 30 Cyc. 134.

⁵⁸Stockholders are thus bound by a judgment rendered in a suit by or against the corporation. The same is true where a trustee represents cestuis. See *Chicago, R. I. & P. Ry. v. Schendel*, (1926) 270 U. S. 611, 46 Sup. Ct. 420, 70 L. Ed. 757.

⁵⁹*Brown v. Vermuden*, (1676) 1 Cas. M. Ch. 272.

⁶⁰*Smith v. Swormstedt*, (1853) 16 How. (U.S.) 288, 14 L. Ed. 942 (members of a voluntary association); *Supreme Council of Royal Arcanum v. Green*, (1915) 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089 (certificate holders' suit to determine rights in mortuary fund under mutual assessment plan insurance—prior suit in state court held conclusive); *Supreme Tribe of Ben Hur v. Cauble*, (1921) 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673 (common right—similar to previous case); *McIntosh v. Pittsburgh*, (C.C. Pa. 1901) 112 Fed. 705 (taxpayers—prior decree held binding on the class); *Dana v. Morgan*, (D.C. N.Y. 1914) 219 Fed. 313 (stockholders' bill — secondary right — dismissed on ground decree in previous suit by another stockholder was *res judicata*); *McClelland v. Rose*, (C.C.A. 5th Cir. 1918) 247 Fed. 721 (suit by heirs—suits by other heirs after decree in class suit enjoined); see *Seminole Securities Co. v. Southern Life Ins. Co.*, (C.C. N.C. 1910) 182 Fed. 85. In *Wallace v. Adams*, (1907) 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547, it was held that Congress had provided for such a result in the particular case. See 1 Freeman, *Judgments*, 5th ed., secs. 436 et seq.

In *McArthur v. Scott*, (1885) 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015, the court pointed out that Old Equity Rule 48 saved the rights of absent parties, but *Smith v. Swormstedt*, (1853) 16 How. (U.S.) 288,

Where a certain amount must be in controversy in order to support either the jurisdiction of the federal court or the right of appeal, the amount in a true class action is that of the claim sought to be enforced for or against the class.⁶¹ In other words,

14 L. Ed. 942 properly disregarded the saving clause in a true class suit. See also a dictum in *Coann v. Atlanta Cotton Factory Co.*, (C.C. Ga. 1882) 14 Fed. 4, that Old Equity Rule 48 saved the rights of absent parties.

The decree may be impeached by absent members of the class if there was fraud. *Campbell v. Railroad Co.*, (C.C. Tex. 1871) 4 Fed. Cas. No. 2366.

Pomeroy's statement in his *Code Remedies*, 5th ed., sec. 297, that the decree is not binding on those who do not come in formally unless they have notice and an opportunity to become parties, is erroneous. It is criticized in *Wheaton, Representative Suits Involving Numerous Litigants*, (1934) 19 *Cornell L. Q.* 399, 428.

"A fair test of the right to maintain a class suit is whether a decree would be binding on absent persons said to be members of the class. In a true class suit the decree is binding on such persons." *Bickford's v. Federal Reserve Bank of New York*, (D.C. N.Y. 1933) 5 F. Supp. 875 (the court denied that there could be any but true class suits).

⁶¹Suits by creditors to enforce the common right to collect stockholders' liability: *Alsop v. Conway*, (C.C.A. 6th Cir. 1911) 188 Fed. 568; *Brusselback v. Cago Corporation*, (C.C.A. 2d Cir. 1936) 85 F. (2d) 20; *Brusselback v. Chicago Joint Stock Land Bank*, (C.C.A. 7th Cir. 1936) 85 F. (2d) 617; *Reconstruction Finance Corporation v. Central Republic Trust Co.*, (D.C. Ill. 1935) 11 F. Supp. 976. Suits by creditors to recover unpaid stock subscriptions: *Handley v. Stutz*, (1890) 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706; *Putnam v. Timothy Dry-Goods & Carpet Co.*, (C.C. Tenn. 1897) 79 Fed. 454; *Reagan v. Midland Packing Co.*, (D.C. Iowa 1924) 298 Fed. 500. In these cases the courts often say that the amount in controversy is the "fund" or "trust fund" to be administered.

Suit by members of a reciprocal insurance association to enforce a common right: *Irwin v. Missouri Valley Bridge & Iron Co.*, (C.C.A. 7th Cir. 1927) 19 F. (2d) 300.

Suits by stockholders to enforce a secondary right: *Hill v. Glasgow R. Co.*, (C.C. Ky. 1888) 41 Fed. 610 (value of corporation's right); *Larabee v. Dolley*, (C.C. Kan. 1909) 175 Fed. 365; *Carpenter v. Knollwood Cemetery*, (D.C. Mass. 1912) 198 Fed. 297 (value of aggregate interests of whole class); *Hutchinson Box Board Paper Co. v. Van Horn*, (C.C.A. 8th Cir. 1924) 299 Fed. 424.

Suit by bondholders to enforce a secondary right: *New Orleans Pacific Railway v. Parker*, (1892) 143 U. S. 42, 12 Sup. Ct. 364, 30 L. Ed. 66 (appeal). Cf. *Cowell v. City Water Supply Co.*, (C.C.A. 8th Cir. 1903) 121 Fed. 53, which is distinguishable on the ground mentioned in the concurring opinion, namely, that plaintiff asked for a judgment for himself so that the suit was not really a class suit.

In a taxpayers' suit to enforce a secondary right, seeking an injunction against collection by holders of bonds illegally issued and against levying taxes to pay them, the amount in controversy was held to be the value of the bonds—the value of the primary right. *Brown v. Trousdale*, (1891) 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987. If the purpose of the suit is merely to vindicate a personal, and not a public right, a class suit brought by a taxpayer falls under subsection (a) (3) of Federal Rule 23, and each party must have a claim equal to the jurisdictional amount. See *Russell v. Stansell*, (1881) 105 U. S. 303, 26 L. Ed. 989; *Ogden City v. Armstrong*, (1897) 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; *Rogers v. Hennepin County*, (1916) 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469.

the amount in controversy is the value of the aggregate interests of the whole class. If the suit is to enforce a secondary right, it often is said that the amount is the value of the primary right, but this is the same thing, since the primary right is held for the benefit of the whole class.

B. Hybrid Class Actions.—Subsection (a) (3) of Federal Rule 23 provides for what have been called hybrid class actions.⁶² An example is a bill by a creditor on behalf of himself and others similarly situated to throw a corporation into receivership and to set aside a fraudulent conveyance.⁶³ These cases formed the first and most important extension of the class suit procedure. Each creditor's claim is several, for he ordinarily could sue alone,⁶⁴ but the purpose of the class suit is to secure an equitable distribution of the assets to all creditors entitled thereto. With some exceptions, the bill must be filed by judgment creditors;⁶⁵ creditors who are not parties must be given an opportunity to come in and

These cases apparently were misconstrued in *Elliott v. Board of Trustees*, (C.C.A. 5th Cir. 1931) 53 F. (2d) 845.

The general statement on jurisdictional amount is that "when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Pinel v. Pinel*, (1916) 240 U. S. 594, 596, 36 Sup. Ct. 416, 417, 60 L. Ed. 817. Accord: *Shields v. Thomas*, (1854) 17 How. (U.S.) 3, 15 L. Ed. 93; *Clay v. Field*, (1891) 138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044.

⁶²See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, (1937) 25 Geo. L. J. 551, 574.

⁶³See *Richmond v. Irons*, (1887) 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Central R. & Banking Co. v. Pettus*, (1885) 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; *Stewart v. Dunham*, (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Gibson v. Shufeldt*, (1887) 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083; *State of Maine Lumber Co. v. Kingfield Co.*, (D.C. Conn. 1914) 218 Fed. 902.

⁶⁴*Ball v. Bank of Bay Biscayne*, (D.C. Fla. 1930) 43 F. (2d) 214. Cf. *Jones v. Mutual Fidelity Co.*, (C.C. Dela. 1903) 123 Fed. 506 where, by statute, one creditor could not sue alone. If one creditor brings a bill in equity to reach equitable assets for himself, he is seeking a priority. See *Hanna, Cases on Creditors' Rights* 48, n. 7.

⁶⁵It has been said that only judgment creditors may share in the fruits of the suit: *George v. St. Louis Cable & W. Ry.*, (C.C. Mo. 1890) 44 Fed. 117, and that creditors coming in under the decree must have been creditors at the time of the filing of the bill: *Richmond v. Irons*, (1887) 121 U. S. 27, 7 Sup. Ct. 788. It seems, however, that all creditors—including unsecured, those without judgments, and subsequent creditors—may come in under the decree, but equity respects the priorities of the various classes. See *Atlas Ry. Supply Co. v. Lake & River Ry. Co.*, (C.C. Ohio 1905) 134 Fed. 503; *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, (D.C. N.Y. 1935) 10 F. Supp. 512, aff'd (C.C.A. 2d Cir. 1935) 76 F. (2d) 1002. In some states a creditors' bill can be brought by creditors without judgments. See *Fink v. Patterson*, (C.C. Va. 1884) 21 Fed. 602.

prove their claims.⁶⁶ After the opportunity to file claims has been afforded, the court may give a final decree settling the rights of the various claimants in the fund collected by the receiver.

The final decree determines all rights in the fund. It is conclusive as to actual parties, those who come in under the decree, and as to all rights in the fund.⁶⁷ As to creditors who do not come in, however, the decree is *res judicata* only to the extent that it affects the funds; it is not *res judicata* as to the amount and validity of their claims. But persons who do not come in usually lose their claims, for there ordinarily is no other property available out of which to satisfy them. The creditor who files the bill, and each creditor joining with him as an original party, must have a claim of the requisite jurisdictional amount,⁶⁸ and there must be diversity of citizenship between such persons and the defendant. Only the claims and citizenship⁶⁹ of the actual parties, however, are looked to in order to determine jurisdiction. Persons coming in under the decree and filing claims are subject to the jurisdiction of the court, but they are not technically parties.

A similar situation probably arises where many persons have

⁶⁶See *Myers v. Fenn*, (1867) 5 Wall. (U.S.) 205, 18 L. Ed. 604; *Johnson v. Waters*, (1884) 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547. The form of the decree in such cases is set out in the latter case.

In *Employers' Liability Assurance Corp. v. Astoria Mahogany Co.*, (C.C.A. 2d Cir. 1925) 6 F. (2d) 945, it was held that a claim presented over a year after the time fixed for filing claims in the interlocutory decree should be accepted, where there was no prejudice arising from the delay.

⁶⁷*Kerrison v. Stewart*, (1876) 93 U. S. 155, 23 L. Ed. 843 (no priority in fund through deed of trust declared fraudulent); *Leadville Coal Co. v. McCreery*, (1891) 141 U. S. 475, 12 Sup. Ct. 28, 35 L. Ed. 824 (creditor who has notice and fails to file claim before final judgment can assert no rights in proceeds of sale of debtor's assets); *Throckmorton v. Hickman*, (C.C.A. 3d Cir. 1922) 279 Fed. 196; *Phipps v. Chicago, R. I. & P. Ry.*, (C.C.A. 8th Cir. 1922) 284 Fed. 945; *In re Dayton Coal & Iron Co.*, (D.C. Tenn. 1922) 291 Fed. 390; *Towle v. Donnell*, (C.C.A. 6th Cir. 1931) 49 F. (2d) 49. Accord: *Story, Equity Pleadings*, 10th ed., sec. 99; see *Arnold and James, Cases on Trials, Judgments and Appeals* 175, 176.

No funds should be set aside for creditors who do not present claims. *Richmond v. Irons*, (1887) 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864.

⁶⁸*Lion Bonding & Surety Co. v. Karatz*, (1923) 262 U. S. 77, 43 Sup. Ct. 480, 67 L. Ed. 871; *Smithson v. Hubbell*, (C.C. Wash. 1897) 81 Fed. 593; *Planta v. H. M. Reich Co.*, (C.C.A. 2d Cir. 1935) 77 F. (2d) 888. Cf. *Jones v. Mutual Fidelity Co.*, (C.C. Dela. 1903) 123 Fed. 506, 514, where the Delaware-statute required the suit to be for the benefit of all creditors.

The same is true as to the amount involved in determining the right to appeal: *Stewart v. Dunham*, (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Gibson v. Shufeldt*, (1887) 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083.

⁶⁹*Stewart v. Dunham*, (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329.

been defrauded, as by a fake brokerage business,⁷⁰ on different contracts, and a class suit is brought by one of the defrauded persons against the defrauder to enjoin the paying out of moneys so received, to appoint a receiver, and for an accounting. In so far as the "trust fund" is concerned, the effect of the decree and the jurisdictional requirements should be the same as in creditors' actions. The converse case might be one in which a stakeholder, holding property subject to many claims, puts it in the custody of the court and names representatives of the class as defendants.⁷¹

C. *Spurious Class Actions*.—In the third type of actions, provided for by subsection (a) (3) of Rule 23, the only community of interest is in questions of law or fact. Class actions are not permitted in such situations either in England⁷² or in New York.⁷³ Liberal rules of joinder in those jurisdictions, securing reduction of counsel fees, duplication of proof and reduction in the number of suits, make these actions unnecessary. Writers who have thought otherwise were thinking of further curtailment of litigation in terms of a class action wherein the decree is conclusive.⁷⁴ They overlook factors, such as that various defenses (estoppel, set-off, contributory negligence, etc.) may exist against some complainants and not against others, which indicate that parties whose rights are separable should not be concluded from asserting those rights by a judgment rendered in an action to which they were not parties.

The use of the class suit device in such cases, however, may be justified in the federal courts. For, where each plaintiff has a separate right, each must have a claim of \$3,000, and there must be diversity of citizenship between all plaintiffs and all defendants. And probably each person who attempts to intervene, there being no absolute right to intervene, must have an

⁷⁰Cook v. Flagg, (D.C. N.Y. 1915) 255 Fed. 195.

⁷¹See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, (1937) 25 Geo. L. J. 551.

⁷²Markt & Co. v. Knight Steamship Co. [1910] 2 K. B. 1021. It is said that a class action will not lie where the relief sought is damages. See also Barrett v. Harris, (1921) 21 Ont. W. N. 293, noted (1922) 36 Harv. L. Rev. 89.

⁷³Bouten v. Van Buren, (1920) 229 N. Y. 17, 127 N. E. 477; see Cherry v. Howell, (D.C. N.Y. 1931) 4 F. Supp. 597, noted (1934) 20 Va. L. Rev. 564. Cf. Atkins v. Trowbridge, (1914) 162 App. Div. 629, 148 N. Y. S. 181.

⁷⁴See Blume, The "Common Questions" Principle in the Code Provision for Representative Suits, (1932) 30 Mich. L. Rev. 878; Wheaton, Representative Suits Involving Numerous Litigants (1934) 19 Cornell L. Q. 399, n. 1.

independent ground of federal jurisdiction.⁷⁵ This means that if numerous persons have a cause of action against one defendant and there is a common question of law or fact involved, some will be able to sue in the federal courts, while others will have to sue in state courts. Yet, because the parties are numerous, it would seem desirable to avoid a multiplicity of suits and resolve a litigious situation by allowing all to assert their rights in one action. If a class action can be brought, this can be accomplished, since in those actions only the original parties need have the jurisdictional requisites; the intervener's citizenship or the amount of his claim is immaterial.⁷⁶ The defendant can hardly object to this procedure; there is no injury to him. Nor do the members of the class have anything to lose if the decree is not conclusive upon members who do not come in; the class action does not then affect substantive rights as it does in the true class action; it is merely a procedural device.

As a matter of fact, class actions have been permitted by the federal courts in cases where the rights are several and the community of interest is only in the law or facts.⁷⁷ For example, such a suit, on behalf of all merchants and jobbers in certain cities, has been maintained against the Interstate Commerce Commission to restrain it from enforcing a rate order providing higher freight rates to those cities than to other cities.⁷⁸ The rights of each shipper would appear to be several. In *Ayres v. Carver*,⁷⁹ the plaintiff, claiming equitable title to a tract of land, brought a

⁷⁵*Fulton Nat'l Bank v. Hosier*, (1925) 267 U. S. 276, 45 Sup. Ct. 261, 69 L. Ed. 609; *Cochrane v. W. F. Potts Son & Co.*, (C.C.A. 5th Cir. 1931) 47 F. (2d) 1026. See Moore and Levi, *Federal Intervention—The Right To Intervene and Reorganization*, (1936) 45 *Yale L. J.* 565, 582.

⁷⁶*Stewart v. Dunham*, (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Supreme Tribe of Ben Hur v. Cauble*, (1921) 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673; *Belmont Nail Co. v. Columbia Iron & Steel Co.*, (C.C. Pa. 1891) 46 Fed. 336.

⁷⁷See note (1932) 30 *Mich. L. Rev.* 624. Story approved of such actions. See his dictum in *West v. Randall*, (C.C. R.I. 1820) 29 *Fed. Cas. No. 17,424*, and Story, *Equity Pleading*, 10th ed., sec. 97; see also I Pomeroy, *Equity Jurisprudence*, sec. 269.

⁷⁸*Merchants' & Manufacturers' Traffic Ass'n of Sacramento v. United States*, (D.C. Cal. 1915) 231 *Fed.* 292.

⁷⁹(1854) 17 *How. (U.S.)* 591, 15 L. Ed. 179. See *Prentice v. Duluth Storage & Forwarding Co.*, (C.C.A. 8th Cir. 1893) 58 *Fed.* 437 (class action by landowners to quiet title against defendant); *Thompson v. Emmett Irr. Dist.*, (C.C.A. 9th Cir. 1915) 227 *Fed.* 560 (class action by bondholders to quiet title); *Commodores Point Terminal Co. v. Hudnall*, (D.C. Fla. 1922) 283 *Fed.* 150. See also *Osborne v. Wis. Cen. R. R.*, (C.C. Wis. 1890) 43 *Fed.* 824, 827 (not a class suit); Chaffee, *Bills of Peace With Multiple Parties*, (1932) 45 *Harv. L. Rev.* 1297, 1317 et seq.

bill against some two hundred persons who had severally bought with notice parcels of it since his right accrued, praying that their conveyances be set aside as in fraud of his rights. The trial court named seven persons to defend and represent the others. On appeal, the Supreme Court, not denying that the procedure was proper, stated that the decree in such a case would not determine the rights of absent parties, their rights being separate and independent. In *Chev v. First Presbyterian Church*,⁸⁰ owners of lots in a cemetery were permitted to bring a bill in behalf of themselves and other lot owners to restrain threatened destruction and removal of tombs and vaults. Other cases of this type where the action has been recognized are a suit by some shareholders on behalf of all to compel a corporation to issue new shares, in accordance with an offer to them of "rights" to subscribe,⁸¹ and a suit by some telephone subscribers on behalf of all to compel the company to perform the several contracts by preventing interruptions in the service.⁸²

The courts frequently have allowed one taxpayer to bring a bill on behalf of himself and all others similarly interested to enjoin the collection of a tax alleged to be illegal.⁸³ Primarily, the taxpayer is asserting his individual right; there is a common question of law. These are to be distinguished from cases in which the taxpayer brings a true class suit to vindicate a common or public right.⁸⁴ Actions to enjoin other unconstitutional statutes might very well be put in this category, there being a common question of law, but the right to bring a class action for that purpose has been denied.⁸⁵

Class actions in behalf of numerous persons allegedly defrauded by the same or similar acts of the defendant have been both per-

⁸⁰(D.C. Dela. 1916) 237 Fed. 219.

⁸¹Cohn v. Cities Service Co., (C.C.A. 2d Cir. 1930) 45 F. (2d) 687.

⁸²Stephens v. Ohio State Telephone Co., (D.C. Ohio 1917) 240 Fed. 759.

⁸³Little v. Tanner, (D.C. Wash. 1913) 208 Fed. 605; Nolen v. Riechman, (D.C. Tenn. 1915) 225 Fed. 812; Gramling v. Maxwell, (D.C. N.C. 1931) 52 F. (2d) 256; note (1932) 30 Mich. L. Rev. 624. In *State of Ohio v. Cox*, (D.C. Ohio 1919) 257 Fed. 334, the taxpayer sued to enjoin the governor of Ohio from transmitting the prohibition amendment to the general assembly, and the court said in a dictum that a class suit would not lie, since the taxpayers' rights were several.

⁸⁴See supra p. 15. *Elliott v. Board of Trustees*, (C.C.A. 5th Cir. 1931) 53 F. (2d) 845 probably was a true class suit, but the court did not think so; it confused the case with other suits by taxpayers.

⁸⁵See *Scott v. Donald*, (1897) 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648; *Baker v. Portland*, (C.C. Or. 1879) 2 Fed. Cas. No. 777; *Raich v. Truax*, (D.C. Ariz. 1915) 219 Fed. 273.

mitted and denied. In *Ayer v. Kemper*,⁸⁶ the bill was framed in equity against a former receiver to hold him as constructive trustee of profits made from the purchase of notes, alleged to have been secured by fraudulent representations and suppression of material facts while acting in a fiduciary capacity. The court recognized that the suit was a "spurious" class suit. But in *Cherry v. Howell*,⁸⁷ where the action was brought at law by two bondholders who, with numerous others, were defrauded by a false prospectus, a class action was denied because, by virtue of the Conformity Act, the action was brought under the New York statute, and New York does not recognize the spurious class action. Under the Federal Rules, of course, the state acts will not apply; it will make no difference that the action was formerly cognizable at law.

The classification of class actions against unions to enjoin threatened acts of violence, with the usual blanket labor injunctions, may seem problematical.⁸⁸ It usually is stated that one who is not an actual party to an injunction cannot be held for its violation.⁸⁹ This question, however, seldom arises. For one reason, the plaintiff may always bring in other parties by supplemental process.⁹⁰ Again, the court always has power to punish for contempt one who interferes with its order, as by doing the acts restrained by the order, or by aiding others to do so, when he has knowledge thereof.⁹¹ Ordinarily all members of the class are thus forced to

⁸⁶(C.C.A. 2d Cir. 1931) 48 F. (2d) 11. Cf. *Associated Almond Growers of Paso Robles v. Wymond*, (C.C.A. 9th Cir. 1930) 42 F. (2d) 1.

⁸⁷(D.C. N.Y. 1931) 4 F. Supp. 597, approved in note (1934) 20 Va. L. Rev. 564. See also *Bickford's v. Federal Reserve Bank of New York*, (D.C. N.Y. 1933) 5 F. Supp. 875.

⁸⁸For such cases, see *Hitchman Coal & Coke Co. v. Mitchell*, (1917) 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260 (court indicates injunction not binding on members of the class not served with process); *Oxley Stave Co. v. Coopers' International Union of North America*, (C.C. Kan. 1896) 72 Fed. 695; *American Steel and Wire Co. v. Wire Drawers' Unions*, (C.C. Ohio 1898) 90 Fed. 598; *A. R. Barnes v. Berry*, (C.C. Ohio 1907) 156 Fed. 72; *Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor*, (C.C. Mont. 1907) 156 Fed. 809; *Hill v. Eagle Glass & Mfg. Co.*, (C.C.A. 4th Cir. 1915) 219 Fed. 719.

⁸⁹In *re Reese*, (C.C.A. 8th Cir. 1901) 107 Fed. 942, 945; *Wellesley v. Mornington*, (1848) 11 Beav. 180; 2 High, Injunctions, 4th ed., sec. 1435.

⁹⁰*American Steel and Wire Co. v. Wire Drawers' Unions*, (C.C. Ohio 1898) 90 Fed. 598, 605.

⁹¹See *Bessette v. W. B. Conkey & Co.*, (1904) 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; *Ex parte Lennon*, (C.C.A. 6th Cir. 1894) 64 Fed. 320 and cases cited; *In re Reese*, (C.C.A. 8th Cir. 1901) 107 Fed. 942, 945; *Wellesley v. Mornington*, (1848) 11 Beav. 180, 181; 22 Cyc. 1012; *Frankfurter and Greene, The Labor Injunction* 86, 87, 123

obey the court order, the plaintiff taking care to see that all have notice, and therefore it is not necessary to classify such actions.

The decree in the spurious class action should be binding only upon the original parties, those who intervene, and their privies; it has been so held.⁹² Each original plaintiff,⁹³ but not each intervener,⁹⁴ must have an independent ground for federal jurisdiction. As it has been stated with regard to the amount in controversy: "Separate plaintiffs are allowed to pool their separate demands in order to total the jurisdictional amount only when they join to enforce a single title or right in which they have a common or undivided interest, not distinct interests. Where the joinder is not grounded upon such common right, but is merely one for convenience, the demand of each must amount to the jurisdictional minimum."⁹⁵

One possible technical objection to the wording of Rule 23 may be made at this point. It will be observed that the rule makes the classification of a particular class action depend upon the "character of the right or rights sought to be enforced for or against the class." Suppose that an unincorporated association operates a freight ship. The vessel carries contraband of war in

et seq.; 2 High, Injunctions, 4th ed., sec. 1415; note (1921) 15 A. L. R. 387.

See also *St. Louis I. M. & S. R. Co. v. McKnight*, (1917) 244 U. S. 368, 37 Sup. Ct. 611, 61 L. Ed. 1200 and *Wabash Ry. Co. v. Koenig*, (C.C.A. 8th Cir. 1921) 274 Fed. 909 (suits by railroad company against state officers and some shippers to test validity of a rate order and to enjoin all shippers from suing for damages for failure of the railroad to follow the rate set), which seem to involve the same principle.

⁹²*Ayres v. Carver*, (1854) 17 How. (U.S.) 591, 594, 15 L. Ed. 179; *Ayer v. Kemper*, (C.C.A. 2d Cir. 1931) 48 F. (2d) 11, 14 (original plaintiff and six interveners had secured a dismissal "with prejudice" and persons trying to intervene later argued that this would bar a suit by them). In the latter case, the court said: "But properly speaking, Ayer's suit was not a class suit. There is not a single interest held by all the former noteholders, . . . Ayer's suit was a 'spurious' class suit; and the decree does not bind those who are not parties." See also *Wabash R. Co. v. Adelbert College*, (1908) 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379 and *Compton v. Jesup*, (C.C.A. 6th Cir. 1895) 68 Fed. 263 (suits by unsecured bondholders to establish a lien).

⁹³*Russell v. Stansell*, (1881) 105 U. S. 303, 26 L. Ed. 989 (amount on appeal); *Colvin v. City of Jacksonville*, (1895) 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053; *Ogden City v. Armstrong*, (1897) 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; *Rogers v. Hennepin County*, (1916) 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469; *Scott v. Frazier*, (1920) 253 U. S. 243, 40 Sup. Ct. 503, 60 L. Ed. 469; *Orleans-Kenner Co. v. Dunbar*, (C.C.A. 5th Cir. 1915) 218 Fed. 344; *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, (D.C. Fla. 1918) 253 Fed. 246.

⁹⁴*Supra* note 76.

⁹⁵*Dewar v. Brooks*, (D.C. Nev. 1936) 16 F. Supp. 636.

violation of contracts with shippers and, with its cargo, is destroyed by one of the warring parties for that reason. One shipper, on behalf of himself and all the other shippers, brings an action for damages against some members of the association, as representing all.⁹⁶ The rights sought to be enforced against the defendants are several, and the class action as to the plaintiffs would come under subsection (a) (3) of Rule 23; it is a spurious class action. But if the technical language of the rule is followed strictly, the action as it affects the defendants must receive the same classification, because "right" always refers to the plaintiff's cause of action. The result is that the decree would not be conclusive upon members of the defendant association who were not made parties.

This is, of course, contrary to established equity practice, which would regard the action as a true class action in so far as it affects the defendants, and the decree as binding upon the whole class. It is unlikely that the word "right" would receive this technical construction, for Rule 23 would be regarded as stating merely the established practice. Yet, any such construction might be avoided by indicating that, for purposes of classification, the legal relations sought to be imposed upon the defendant class, as well as the rights sought to be enforced, are to be considered. Perhaps the word *liability* best indicates those legal relations to members of the profession. The object might be accomplished, then, by adding the italicized words so that the first part of Rule 23 would read:

If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such a number of them as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants, when the character of the right sought to be enforced for or against the class, *or of the liability sought to be imposed upon the class*, is . . .

The suggestions above are probably relevant only to a determination of the effect of the decree, and not to a determination of the jurisdictional requirements.

III. CONTROL OF THE SUIT

Passing to the question of control of the suit, the usual statement is that the original parties who bring a representative action have absolute control of the proceedings so that, until a decree

⁹⁶These were the facts in *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K. B. 1021, except that there the defendant was a corporation.

is given or others intervene, they may dismiss or settle at their discretion.⁹⁷ After the intervention of other members of the class, however, the interveners share this control.⁹⁸ Still, in the case of creditors' bills, it has been said that the appointment of a receiver removes control of the proceedings from the original parties.⁹⁹ Related to the question of control is the right of those represented in the class action to bring separate suits while that action is pending; generally it is said that they may so act. But it has been held that they may not so sue after a decree has been rendered in the class action.¹⁰⁰ One may also notice, in a bill brought by creditors on behalf of the class to enforce stockholders' liability, a prayer that all creditors be enjoined from bringing separate suits.¹⁰¹

Since the original party who brings a class action is the active one and runs the risk of having to bear the costs, there is good reason to say that he ought to have a free hand in the control of the action. Nevertheless, an absolute rule to that effect may be undesirable. For instance, it is not settled that the statute of limitations as against the claims of all members of the class is in abeyance during the pendency of a suit where the original party dismisses or compromises.¹⁰² In fact, one well may doubt this result in the spurious class action, where all claims are several and the decree is not *res judicata* except as to actual parties. An unscrupulous member of the class might thus bar the claims of other members by settling at a propitious time. Subsection (c) of Rule 23, providing that no class action may be dismissed or compromised "without the approval of the court and on such notice to other members of the class as the court

⁹⁷See *Thouron v. East Tennessee, V. & G. Ry. Co.*, (C.C. Tenn. 1889) 38 Fed. 673; *Ball v. Bank of Bay Biscayne*, (D.C. Fla. 1930) 43 F. (2d) 214.

⁹⁸"But we think the true principle is that the original parties in such representative suits retain absolute dominion and control until decree, or until others taking the benefit of the proceedings are made actual parties to the cause; that upon and after the coming in of new parties they properly have a joint voice and management with the original plaintiffs in the further progress of the cause." *Thouron v. East Tennessee, V. & G. Ry. Co.*, (C.C. Tenn. 1889) 38 Fed. 673, 679. See *Ayer v. Kemper*, (C.C.A. 2d Cir. 1931) 48 F. (2d) 11.

⁹⁹*Belmont Nail Co. v. Columbia Iron & Steel Co.*, (C.C. Pa. 1891) 46 Fed. 336.

¹⁰⁰*McClelland v. Rose*, (C.C.A. 5th Cir. 1918) 247 Fed. 721; *Phipps v. Chicago, R. I. & P. Ry.*, (C.C.A. 8th Cir. 1922) 284 Fed. 945. See *In re Engelhard & Sons Co.*, (1914) 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416.

¹⁰¹*Reconstruction Finance Corporation v. Central Republic Trust Co.*, (D.C. Ill. 1935) 11 F. Supp. 976.

¹⁰²See note (1934) 34 Colum. L. Rev. 118, 131.

by order may require" provides an adequate safeguard.^{102a} Various situations may demand different treatments, and the trial court may be trusted to protect the rights of all members of the class by the exercise of its discretion. This is a rather mild limitation on what was considered the plaintiff's absolute power.

The rule says nothing of the right of other members of the class to bring separate actions. Certainly such a practice destroys some of the values of a class action. The chief justification for allowing these separate suits is that the members represented have no assurance that the plaintiff in the class action will prosecute it diligently. If that is the objection, the court will permit intervention. At any rate, the right to pursue separate actions seems to have been regarded as correlative to the plaintiff's power of control over the class action. When dismissal of the class action lies within the discretion of the court, the allowance of separate suits ought also to be in its discretion. Generally, it would seem that such actions should be enjoined, and there is ample authority to support such power in the court where the class action is pending.¹⁰³

INTERVENTION

Being a more general problem, intervention is treated in a separate federal rule. Equity Rule 37 recognized the right of intervention, but phrased it in permissive language. Yet the courts recognized that in some cases the right to intervene is absolute. Among such cases are those where the petitioner is represented in an action and the representation is inadequate, and where property is within the custody of the court and distribution or other disposition of it may affect him adversely.¹⁰⁴ Federal Rule 24 states that the right to intervene in these situations is absolute. If the representation is adequate in a true class action, members of the class still may be permitted by the court to intervene. But since one reason given for the development of the class action is that it is impractical to carry on the suit when the numerous parties are subject to constant change by death or

^{102a}See McLaughlin, *Capacity of Plaintiff-Stockholder To Terminate a Stockholder's Suit*, (1937) 46 Yale L. J. 421.

¹⁰³See McClelland v. Rose, (C.C.A. 5th Cir. 1918) 247 Fed. 721; Phipps v. Chicago, R. I. & P. Ry., (C.C.A. 8th Cir. 1922) 284 Fed. 945; Reconstruction Finance Corporation v. Central Republic Trust Co., (D.C. Ill. 1935) 11 F. Supp. 976.

¹⁰⁴See Toler v. East Tennessee, V. & G. Ry., (D.C. Tenn. 1894) 67 Fed. 168, 171. See also Galveston R. Co. v. Cowdrey, (1871) 11 Wall. (U.S.) 459, 20 L. Ed. 199; Campbell v. Railroad Co., (C.C. Tex. 1871) 4 Fed. Cas. No. 2366 (fraud).

alienation of the various interests, intervention as technical parties well may be denied where the representation is adequate.¹⁰⁶ The decree, of course, will permit all persons represented to come or be brought in under it.

The same principles should be followed in permitting creditors to intervene in a creditors' class action. The court in *Stewart v. Dunham*¹⁰⁶ said that "it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree." Still, although they thereby submit to the jurisdiction of the court, persons who file claims are not technically parties on the record.¹⁰⁷ Normally it would seem that the proceedings may be more easily handled if intervention is curtailed.¹⁰⁸ Any creditor who files a claim may, of course, contest the validity of any other claim,¹⁰⁹ but the right to intervene to oppose the proceedings after judgment has been denied.¹¹⁰ The right to intervene in reorganization proceedings has been treated elsewhere.¹¹¹

The spurious class action presents a somewhat different situation. Since each party may have a different claim or defense, it is doubtful if any party ever adequately represents any other in all phases of the case. All persons within the class should, therefore, be allowed to intervene in order to accomplish the purposes of the action.¹¹² Intervention in such a case should be regarded

¹⁰⁶See *In re Engelhard & Sons Co.*, (1914) 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416. Intervention may be denied because of lapse of time. See *Southern Pacific Co. v. Bogert*, (1919) 250 U. S. 483, 39 Sup. Ct. 533, 63 L. Ed. 1099. There is no absolute right to intervene where representation is adequate. *Elder v. Western Mining Co.*, (C.C.A. 8th Cir. 1922) 280 Fed. 569.

¹⁰⁶(1885) 115 U. S. 61, 64, 5 Sup. Ct. 1163, 1164, 29 L. Ed. 329.

¹⁰⁷*Alexander v. Hillman*, (1935) 296 U. S. 222, 56 Sup. Ct. 204; 80 L. Ed. 192; *Reconstruction Finance Corporation v. Central Republic Trust Co.*, (D.C. Ill. 1935) 11 F. Supp. 976, 965.

¹⁰⁸In *Johnson v. Waters*, (1884) 111 U. S. 640, 675, 4 Sup. Ct. 619, 637, 28 L. Ed. 547, it is said that the proper procedure is a reference to a master with an opportunity for creditors to come in and file claims; the form of such a decree is given there. See also *Myers v. Fenn*, (1867) 5 Wall. (U.S.) 205, 18 L. Ed. 604; *Payne v. Hook*, (1869) 7 Wall. (U.S.) 425, 432, 19 L. Ed. 260.

¹⁰⁹*Richmond v. Irons*, (1887) 121 U. S. 27, 48, 7 Sup. Ct. 788, 797, 30 L. Ed. 864.

¹¹⁰*Forbes v. Memphis, E. P. & P. R. R.*, (C.C. Tex. 1872) 9 Fed. Cas. No. 4926; see *Union Trust Co. v. Jones*, (C.C.A. 4th Cir. 1926) 16 F. (2d) 236, 239.

¹¹¹See *Moore and Levi, Federal Intervention—The Right to Intervene and Reorganization*, (1936) 45 Yale L. J. 565, 595 et seq.

¹¹²See *Ayer v. Kemper*, (C.C.A. 2d Cir. 1931) 48 F. (2d) 11.

as auxiliary, requiring no new ground of jurisdiction to support it.¹¹³

Federal Rule 23 on class actions follows, in general, the pattern of the prior decisions. It may not always be a simple problem to tell when a right is common and when several. In that event, perhaps one may look to the incidents of the particular categories. The concept of *res judicata* and the jurisdictional requirements are inextricably bound up with the classification. In fact, the greatest value of Federal Rule 23 is that it clarifies this point. But *res judicata* is, after all, a practical working concept to prevent parties from imposing upon the court and upon each other, by attempting to retry cases which can fairly be called settled. And the requirement of a particular jurisdictional amount is designed to protect busy courts. If these points are remembered, the classification in the rule is suggestive enough, and the decided cases are of a sufficiently broad scope, that new cases may be readily assimilated to the classification as they arise. The rule is a great improvement over the vague generality of the usual code provisions; its frank recognition of the desirability of the spurious class action is commendable, and settles a conflict among the decisions. The explicit requirement that the original parties secure the consent of the court before compromising or dismissing the action should afford more protection to the parties represented. It also should lead to a more general prohibition against those represented bringing separate actions, a practice which tends to destroy one of the values of the representative action and of codes in general, namely, avoidance of a multiplicity of suits.

¹¹³See *Supreme Tribe of Ben Hur v. Cauble*, (1921) 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673; *Union Trust Co. v. Jones*, (C.C.A. 4th Cir. 1926) 16 F. (2d) 236. See also *Drumright v. Texas Sugarland Co.*, (C.C.A. 5th Cir. 1927) 16 F. (2d) 657.