THE REPRESENTATIVE ACTION: AN EQUITABLE POST-MORTEM.

In actions involving numerous parties Equity long ago permitted a few parties to represent the many; representative parties could sue, or be sued, on behalf or on account of themselves and others.[1] These "others" were not co-plaintiffs or co-defendants.[2] They and their representors were rather a class, the membership of which could range from six to sixty thousand;[3] the representors did the suing and defending, while the representees were excused not only from appearance in court but also from having to be named on the record. But the representative action was more than a procedural innovation. The quantification of parties went beyond a difference in numbers; the difference of degree became a difference in kind both as regards situation and legal solution. The complexities of this transition make a fascinating chapter of equitable jurisdiction, although that chapter has, practically speaking, been closed for a century or more.[4] Even so, no post-mortem is ever without its elements of prognosis.

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The representative action had some antecedents outside equity. There is just enough evidence to show that the idea of suing a representative class was not unknown to the common law of the seventeenth century. In *Hackwell v. Eustman*[5] the executors of a deceased merchant brought action of account against one of his surviving partners, charging him as general bailiff of the partnership goods and profits. The defendant pleaded that he was only one of three partners and that all of them should have been joined in the action. The King's Bench thought this a mischievous suggestion, since one of the partners might always resist joinder. Not surprisingly the court wished to

1 Since the Judicature Act, the representative action has left its equitable domain to become a codified rule of civil procedure: see R.S.C., 0.16, r. 9; 26 HALSBURY'S LAWS OF ENGLAND (2 ed., 1937) 17-18; and for corresponding Australasian provisions, see 26 HALSBURY'S AUSTRALIAN AND NEW ZEALAND PILOT (1938), 5, 20. For a discussion of the modern law, see Lloyd, *Actions Instituted by or against Unincorporated Bodies,* (1949) 12 MOD. L. REV. 409.

2 On this see R.S.C., O. 16, rr. 1 and 4; and generally, 26 HALSBURY'S LAWS OF ENGLAND, 19, 22-23.

3 Five parties are not now regarded as "numerous": Re Braybrook, [1916] W.N. 74, 60 Sol. Jo. 307. There were sixty thousand "parties" in Davis v. Fish, cited in (1823) You. at 425, 159 E.R. at 1059, and discussed at note 45 *infra.*

4 The reasons for this will appear later; see at note 116 *infra.*

5 (1616) Cro. Jac. 410, 79 E.R. 350.

protect the dead partner's share, in conformity with the old rule that *jus accrescendi inter mercatores locum non habet.*[6] What is more surprising is that the court should let in a doctrine of general bailiff to obviate one requirement of joint ownership, namely the requirement that joint owners were all necessary, and not "severable", parties in litigation of their joint or common property.[7]

In equity itself, the representative idea makes its first clear appearance in *City of London v. Richmond.*[8] The City granted a lease of a water-pipe to H. for fifteen years, which lease H. assigned over to R. and several others. The pipe, warranted by the builder to carry twenty tons of water an hour, did not carry more than six tons, so that what the lessees had hoped would be a profitable business of supplying water became very much of a losing bargain.[9] Sued for the rent, the lessees objected that all the "sharers" were not made parties. The objection was dismissed because the undertaking, having been divided into 900 shares "in the way of stock-jobbing",[10] there were too many persons concerned; to bring them all before the court was therefore impracticable, it would have made it impossible for the plaintiff ever to recover.[11] A year later in *Quintine v. Yard*[12] the same principle was applied to parties who being abroad were unavailable. *A.* devised an annuity to *B.*, but left all his real and personal estate to *C. C.*, having paid the annuity for several years, then charged it on his total estate. He left his English property to his daughters living in England, but his foreign estate to other daughters living overseas. In an action by the annuitant against the English daughters alone, it was claimed that the other daughters should also have been made parties. For "though at Law the Party may take his Remedy against which he pleases, yet in Equity all must be Parties,

6 *Cf.* LINDLEY ON PARTNERSHIP (11 ed., 1950), 428.

7 *Cf.* WILLIAMS, PERSONAL PROPERTY (18 ed., 1926), 518 ff.

8 (1701) 2 Vern. 421, 23 E.R. 870; affirmed in House of Lords, 1 Bro. P.C. 516, 1 E.R. 727.

9 The further contention, that equity should not "decree" so hard and unreasonable a bargain, was dismissed by the court (Lord Keeper Wright) as immaterial since "there is the same reason that a bad bargain, if fair, and without fraud, should be decreed, as if it had been a good one."

10 I Bro. P.C. at 518, 1 E.R. at 728; 2 Vern. at 422, 23 E.R. at 870.

11 *Ibid.* Another disputed point was Equity's jurisdiction, the point being that this was a case "at law" as an action in debt for rent: 1 Bro. P.C. at 517. The explanation was that the assignees might not be liable at law, for there was no privity of estate; the assignees would only be liable for the actual enjoyment of the thing demised; in short, liable only as long as they remained in possession: 2 Vern. at 423.

12 (1702) 1 Eq. Ca. Abr. 74, 21 E.R. 886.

that Right may be done to all at the same time."[13] This the other side admitted, though only "in case it may be easily done; yet it is impracticable in this Case, and therefore ought not to be required; and so held [by Lord Keeper]."[14] Again in *Chancey v. May*,[15] the action had to do not with representative defendants but for the first time with representative plaintiffs. The treasurer and manager of a brass-works filed a bill on behalf of themselves and all the other proprietors and partners in the undertaking except the defendants (the preceding treasurers and managers), calling the latter to account for several misapplications of the partnership funds. The defendants demurred that all the partners were not parties, since "every [partner] had the same right to call [the defendants] to an account, and then they might be harassed and perplexed with multiplicity of suits." But the court disallowed the demurrer; first, because the plaintiffs sued on behalf of themselves and all other proprietors (except the defendants), so that "all the rest were in effect parties"; second, because "there would be continual abatements by death or otherwise, and no coming at justice, if all were to be made parties."[16]

After these relatively simple cases, *Horsley v. Bell*[17] presented a more difficult situation. Under an act of Parliament, passed for the purpose of making a certain river navigable, many persons were appointed commissioners to put the statute into execution. The plaintiff did some building work under the scheme, for which he was paid except for a sum of £400 he now claimed from the defendants. His work had been ordered at various meetings of the commissioners, but the defendants named by the plaintiff had not been present at all the meetings, nor had they joined in all the orders. Having no more money, the defendants refused to pay, and the question canvassed was whether they were personally liable. One argument was that the contractor did not give personal credit to the commissioners, but had trusted the undertaking itself: "he knew the nature of it, and the situation of the commissioners; and though he might not know what

13 *Ibid.* For a similar statement of what may respectively be done at law or in equity, see at note 22 *infra.*

14 *Ibid.* The decision, though illustrating the increasing acceptance of representative actions, leaves much unanswered. Were the English daughters to pay the whole annuity and then seek contribution from their foreign sisters? Or were they merely to pay their own share to the plaintiff? As we shall see, equity was to go a long way in reaching represented or common assets and funds; but how did it bring into account foreign estates?

15 (1722) Prec. Ch. 592, 24 E.R. 265.

16 *Ibid.*

17 (1778) 1 Amb. at 770, 27 E.R. at 494.

fund they had, he was willing to engage, confiding in the success of the scheme, without looking to the commissioners to be his paymasters, otherwise then out of the money they might receive, either by subscriptions or by tolls."[18] Another argument was that it would be most undesirable to impose personal liability on the commissioners: "nobody would engage in a public trust upon such terms."[19] There was however judgment for plaintiff. "[It] would be hard", said Ashhurst J.,[20] "that the plaintiff, who has done the work at a reasonable price, without any extraordinary profit, should have no remedy." Indeed, the respective merits were "nothing like so great on one side as the other. The Commissioners have their remedy upon the monies subscribed, and not paid in; for, though there is no summary method of enforcing the payment of them, yet they certainly have a remedy, and there has been sufficient subscribed, so that they have only the trouble of collecting it." Moreover, "this is one general work, [and what] is done by the several sets of commissioners is a ratification of acts done before, in the prosecution of one general design. Even criminally, persons acting in one general design will be liable, though they are never proved to have been altogether *(sic)*, and that, as being a criminal, is much a stronger case."[21] Gould J. also stressed this aspect of agency and ratification: "It is like a partnership; they who, at any time, have acted, have undertaken a partnership; [an] action at law would have lain against any one of them, and that he [i.e., each individual commissioner] must have sought his remedy against the others."[22] Similarly in *Cullen v. Duke of Queensberry*.[23] The plaintiff filed a bill against Lord Queensberry and four others who constituted the annual committee of a ladies' club. At a meeting in 1775, at which about 100 members were present, the plaintiff was asked to expend money in the purchase and furnishing of a club-house. Since he did not know all the numerous members, he now proceded against the annual committeemen. The latter contended that they were not personally liable and that all the

18 1 Amb. at 772, 27 E.R. at 495.

19 *Ibid.*

20 1 Bro. C.C. at 103. note (2).

21 *Ibid.*

22 *Ibid.* Lord Bathurst L.C., considering this a new case, had called in two common law judges. However, in Pochin v. Pawley, (1736) 1 Black. W. 670n., 96 E.R. 391, in assumpsit by labourers against the surveyor of a turnpike road, it was held that the action should have been brought against the commissioners or their treasurer. *Cf.* also Melchart v. Halsey, (1771) 3 Wils. K.B. 149, 95 E.R. 982; Vernon v. Blackerby, (1740) 2 Atk. 144, 26 E.R. 491 ('a most extraordinary bill').

23 (1781) 1 Bro. C.C. 101, 28 E.R. 1011; 1 Bro. P.C. 396 (H.L.), 1 E.R. 646.

members should have been joined. However, Lord Chancellor Thurlow's judgment against them was upheld by the House of Lords. Both this and the previous decision illustrate a new and important point. The plaintiff had no other remedy than against the defendants he did join. In the commissioners' case, the orders were given by a body whose composition fluctuated at various times. In the case of the ladies' club, some of the members were married women and some were minors, and it would (to say the least) have been "extremely difficult to establish a demand in law against the husbands of the Lady-members, or against the minors become adult."[24]

It was in *Lloyd v. Loaring*,[25] another club-case, that "representation" became a means of attack within the class itself. The plaintiffs on behalf of themselves and all other members of a masonic lodge sued Loaring and four other members for the return of books and papers of the society which the latter had removed. "As to the objection (the plaintiffs argued), that [they] have not a legal, known, character, entitling them to sue, not being incorporated, they do not sue as a corporation, or affect a corporate character. They sue as a voluntary society, composed of individual members, and in their individual capacity, on behalf of themselves and all the other members. What has that appearance is merely description."[26] This distinction between appearance and reality contained a difficulty which Lord Eldon saw: "If this is not a corporation, how could these five [defendants] remove these articles?" Loaring had as much right to possess the society's property as any other member; if he was to have

24 1 Bro. P.C. at 404, 1 E.R. at 651-652. Indeed, to "suggest that the [plaintiff] was entitled to a reimbursement, and at the same time, to state that for that purpose he was to make all the Members of the Club parties to his bill, was equivalent to saying, that he had received an injury, which ought to be redressed, but that he should have no remedy:" *ibid.* But even though the defendants were held personally liable for the whole debt, this did not mean thaat they were to be the sole scapegoats and without further recourse to the representees. In Horsley v. Bell (*supra*) a right of contribution is explicitly stated by Ashhurst J. and implied by Gould J. (see at notes 21 and 22 *supra*). Similarly, in the Queensberry case, the tacit assumption seems to have been that the committeemen could get reimbursement either from the other members or, at any rate, from the assets of the club. For the modern position, see DALY'S CLUB LAW (5 ed., 1954), 30 ff.

25 (1802) 6 Ves. Jun. 773, 31 E.R. 1302.

26 6 Ves. Jun. at 776, 31 E.R. at 1303. They also referred to the voluntary society as a partnership, but this usage would now be incorrect: LINDLEY, *op. cit.* 15. However, the plaintiffs' point was that this was a "joint-tenancy" and that the defendants were joint owners with the other members, so that nothing could be done against their unauthorised taking by way of theft or trespass: "This is not a felony, as contended." The plaintiffs, however, took their main stand on Chancey v. May, note 15 *supra*.

no such right this meant to recognise the society's constitution as well as the right of a majority to bind the minority. Thus "there is a great affectation of a corporate character. They [the plaintiffs] speak of their laws and constitutions", yet it was "the absolute duty of Courts of Justice not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the Record." If, however, the Lord Chancellor allowed the defendants' demurrer, he also granted the plaintiffs leave to amend. For though the plaintiffs could not sue as a voluntary society, they could sue as individuals who "have such a joint interest in a chattel, that this Court would take notice of that interest, and of agreement upon it, not with reference to them as a voluntary society, but as individuals . . . Suppose Mr. Worseley's silver cup was taken away from the Middle Temple: the society must some way or other be permitted to sue."[27] It is clear that Lord Eldon, try though he might, hardly solved his fundamental dilemma; there was a revealing gap in his statement that only *individuals* could appear on the record, but that the *society* must be able to sue. But could the society sue, be it only in the name of some individuals, without the court taking notice of the society's constitution? And to have the cup returned to the Inn, was it not necessary to locate its proper and "constitutional" depositaries? Fortunately, the Lord Chancellor could persuade himself that he was following old law: "I have seen strong passages, as falling from Lord *Hardwicke,* that, where a great many individuals are jointly interested, there are more cases

27 See 6 Ves. Jun. at 777-779, 31 E.R. at 1304-1305. Lord Eldon also alluded to Fells v. Read, (1796) 3 Ves. Jun. 70, 30 E.R. 899, a case where he had argued as counsel without success. There the plaintiffs were members of the club consisting of persons who had served as overseers of the poor. Since 1713 the club possessed a silver tobacco-box which was kept by the acting overseer for the time being, who had to produce it at all the meetings and to deliver it to the succeeding overseer. The box was given to Read when he became overseer, but he failed to hand it over after he resigned the office. A meeting was called at which it was decided to take legal proceedings, though two members objected to them. It was held by Lord Loughborough that Read had to restore. Equity, he thought, had jurisdiction partly on the analogy of the Puseyhorn and the Patera of the Duke of Somerset, and partly on the analogy of trust, Read being a depositary upon an express trust and thus compelled to act according to the trust. Another remedy, according to the court was that the next overseer, having a special property, could have sued Read in assumpsit. In Fells v. Read the court did not nowever explain who were the *cestuis que trustent,* nor advert to the corporate character of the club: see Nutbrown v. Thornton, (1804) 10 Ves. Jun. 160, at 163, 32 E.R. 805, at 806. Fells v. Read was cited in support of representative plaintiffs in Lloyd v. Loaring (*supra*): but in a note to Moffat v. Farquharson, (1788) 2 Bro. C.C. 338, 29 E.R. 189, it is stated that in fact every member of the Overseers' Club was before the Court.

than those, which are familiar, of creditors and legatees, where the Court will let a few represent the whole. There is one case very familiar, in which the Court has allowed a very few to represent the whole world."[28]

But the representative action was not confined to quasi-corporate bodies such as partnerships or clubs; it was also used against corporate bodies, simply because no real distinction between a partnership and a company was as yet made. For example, in *Adair v. New River Co.*,[29] the plaintiff claimed part of the profits from the proprietors of a corporation, suing them in their corporate name as well as individually. The latter objected that, since the profits were to be paid out of land, the plaintiff must bring in all the proprietors; for if distress is granted, a right to contribution arises.[30] But in Lord Eldon's view, the parties were all there: "those, who are present, representing those who are absent."[31] Should, he asked, a strict rule of joinder prevail to destroy its very purpose, that is, prevail "where it is actually impracticable to bring all parties, or where it is attended with inconvenience, almost amounting to that: as well as where all can be brought without inconvenience."[32] Lord Eldon again insisted that the representative action was not a new thing. Not only had creditors and legatees long been able to claim on behalf of themselves and others,[33] but a person, having a general right at common law that those in a large district would not grind corn except at his mill, could sue in equity to enforce his right, without having to bring actions against every individual.[34]

28 6 Ves. Jun. 773, at 779; 31 E.R. 1302, at 1305. Some of the old cases referred to were the so-called 'theatre cases': see *Ex parte* O'Reily, (1790) 1 Ves. Jun. 112, at 130, 30 E.R. 256, at 264, where in a petition for the application of the Great Seal to a royal patent, jurisdiction was maintained on the ground of partnership; nor was want of parties seriously contested. See on this Cockburn v. Thompson, (1809) 16 Ves. Jun. 321, at 324; 33 E.R. 1005 at 1006.

29 (1805) 11 Ves. Jun. 429, 32 E.R. 1153.

30 11 Ves. Jun., at 434. As for the company, the defendants argued that it was not suable at all; it was said that the company never became a trustee for the plaintiff and that its position was that of "mere stakeholders:" *Ibid.*, at 438.

31 *Ibid.*, at 445.

32 *Ibid.*, at 444.

33 *Ibid.* Another example: To a bill to establish a custom all persons interested are not necessary parties, yet all are bound: *Ibid.*, at 439. The persons suing could be tenants or copyholders of a manor or the inhabitants of a parish: See 13 Ves. Jun. 397, at 400; 33 E.R. 343, at 344. Yet these were not particularly telling examples, for it was never doubted that general right or custom could be litigated either at common law or equity. For this point see further note 120, *infra*.

34 11 Ves. Jun. at 444-445. And *cf.* Cuthbert v. Westwood, (1726) Gilb. Rep. 230, where it was held that in a bill to establish a payment in lieu of

The following cases reinforced this current of authority. In *Good v. Blewitt*[35] a bill was filed by the captain on behalf of himself and the crew of a privateer against the owners for an account of the distribution of prize-money; and the court had little difficulty in following *Chancey v. May*.[36] In *Cockburn v. Thompson*[37] several persons brought a bill on behalf of themselves and all the other proprietors of a friendly society ("The Philanthropic Annuity Institution"), against its solicitor for an account of the society's funds. Thompson, the defendant, demurred for want of parties, but Lord Eldon would have none of this. For if, as he explained, the demurrer was maintainable, many of "these Institutions, known to subsist in this great metropolis in the nature of partnership, all Assurance Companies, for instance, if they have not a corporate character, no law can be administered in any Court of Justice among the members of such Societies", members "who, being to subscribe annually, and divide the profits, are all partners."[38] Nor was the Lord Chancellor unmindful of the interests of the absent representees. Although not parties on the record, "yet the Court can by arrangement afterwards introduce the persons, as *Quasi* parties"; it "will give the opportunity of introducing them by a subsequent proceeding."[39] For this purpose, the court will "find the means of ascertaining . . . the partnership account", i.e., the account of all the parties, and the Court may reserve "a proportion of the assets for the result of (this) inquiry."[40] Finally, in *Meux v. Maltby*,[41] *A.* agreed to let *B.* a house for 21 years, *B.* agreeing to pay part of the building costs. *B.* paid that sum, entered into possession, but no lease was executed. The lessor later sold the

tithes it was not necessary to join all the numerous landowners as defendants. To same effect, Biscoe v. Undertakers of Land-Bank, (1705) 2 Eq. Ca. Abr. 166, pl.7.

35 (1807) 13 Ves. Jun. 397, 33 E.R. 343. *Cf.* Leigh v. Thomas, (1715) 2 Ves. Sen. 312, 28 E.R. 201; Pearson v. Belchier, (1799) 4 Ves. Jun. 627, 31 E.R. 323; Brown v. Harris, (1807) 13 Ves. Jun. 552, 33 E.R. 401; Moffat v. Farquharson, (1788) 2 Bro. C.C. 338, 29 E.R. 189, to the effect that one part-owner of a ship cannot bring a bill for an account of the profits of the ship, on behalf of himself and other part-owners, seems clearly wrong: See *ibid.*, note (1).

36 See note 15 *supra*.

37 (1809) 16 Ves. Jun. 321, 33 E.R. 1005. In Ansell v. Esdaile in the Exchequer, cited 13 Ves. Jun. at 400, a bill for an account and distribution against the treasurer of a Tontine Club, by some members on behalf of themselves and all the rest, was upheld.

38 16 Ves. Jun. at 324.

39 *Ibid.*, at 326-327.

40 *Ibid.*, at 328.

41 (1818) 2 Swanst. 277, 36 E.R. 621.

house to *C.*, subject to notice of *B.'s* incumbrance; *C.* sold the house to *D.* and *F.* in trust for a dock company incorporated by statute. *B.* now sued for specific performance and quiet possession as against *M.*, the company's treasurer, and several proprietors. It was clear, said Plumer M.R., that if "this were a case between party and party, there could be no defence", so that the "single question is, whether there is a defect of parties to the suit."[42] Here "the only novelty is, that the bill requires an act to be done by the absentees. Not having them before the Court, though their rights may be bound, there is a difficulty in making them act"; but while "it would hardly be sufficient . . . for a few to execute a lease on behalf of the rest . . . that difficulty presents no objection to binding the rights of the parties not before the Court . . . (The Court) . . . must go as far as it can."[43] So what the Master did was to "bind the right, declare the (plaintiff) entitled to the lease, and restrain the treasurer from disturbing their possession."[44] In effect, if not in form, the agreement for a lease became as specifically performed as if all the parties had been before the court and as if all of them had joined in the demise to the lessee.

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So far the law was firm and clear. But in 1823 there began a distinctly different trend. Two cases, in particular, mark the turning-point; two cases which show Lord Eldon in a new and more doubting mood. In the first, *Davis v. Fish*,[45] a suit was instituted by four members[46] of the Norwich Union Fire Association against its directors, secretary, and treasurer, the object being to dissolve the partnership. Refusing the decree on an interlocutory motion, Lord Eldon added some significant comments. He recalled that the Statute of Monopolies[47] forbade persons to form speculative associations or to raise transferable stock, "but that it had also been determined that a dozen persons may insure or guarantee each other, and, when once it was established that twelve might act on such a principle, it was impossible to put a limit to the number."[48] But to administer justice to such a mass of people, Acts of Parliament were frequently obtained

42 2 Swanst. at 281.

43 *Ibid.*, at 284-285.

44 *Ibid.*, at 286.

45 (1823) cited in You. 425, 159 E.R. 1059.

46 Apparently, as was usual, on behalf of themselves and all other members.

47 (1624) 21 Jac. 1, c. 3. See on this GOWER, MODERN COMPANY LAW (1954), 26, n.18.

48 You. at 425. In the Norwich Union sixty thousand people had so combined; see at note 51 *infra*.

by which the secretary, treasurer or other single company officer could sue or be sued for the association at large. Indeed, "so far such an association may be called a quasi corporation, having the power, and, to a given extent, the privileges of a body, without having been incorporated."[49] Unfortunately, Lord Eldon's further thoughts were far less incisive. He contrasted the treasurer's right to sue on the one hand with his liability to be sued on the other. "[For] although justice might be done in causes in which the association was complaining, by the use of one name instead of sixty thousand, the same means of justice could not be rendered in the person of one defendant."[50] Yet why not? The company officer, he explained, might not be worth the money for which he was sued; but even if he did have ample means and paid the money, "he would have to seek contribution from the members, which might be practicable with a manageable number, but which must be next to impossible with sixty thousand persons."[51] Nevertheless, was it not the job of the representative action to provide just for this impossibility? Lord Eldon however continued: "The present case is reduced to a mere matter of partnership; [can] it be said that a man does not know his own partners nor the nature of the concern of which he is a member? There is no excuse, therefore, from the nature of the body, for their not naming them and bringing them before the Court."[52] These words were clearly incompatible not only with his previous reference to unmanageable numbers, but also, with much he had said in earlier cases. Perhaps Lord Eldon's words were intended for another and more specific purpose, i.e., to build

49 You. at 426.

50 *Ibid.*

51 *Ibid.*

52 At 427-428, Lord Eldon confessed how he and Lord Thurlow had suffered over their decisions in the cases of the unfortunate bakers and widows: Pearce v. Piper, (1808) 17 Ves. Jun. 1, 34 E.R. 1, and The Widows' Case (1785) therein cited. The former case was typical. A friendly society, the Amicable Society of Master Bakers, was formed in 1798 for raising an annuity fund. In 1806 it became clear that (the subscriptions being too low, annuities too high with too many surviving) the society could no longer exist and the committee recommended its dissolution. Although Lord Eldon (following Lord Thurlow) refused to wind up the society, he was instrumental in its reconstruction, i.e., subscriptions were to be raised to permit the society to discharge its obligations. It is therefore difficult to see what sort of power the court was lacking or what else could have been done in these circumstances. Both decisions, moreover, did not deny the availability of the representative action; if anything they confirmed it: See also Lord Eldon's remarks in Cockburn v. Thompson, (1809) 16 Ves. Jun. 321 at 324, 33 E.R. 1005 at 1006. In brief, the reference to the previous unfortunates seems nothing more than an irrelevant flourish.

support for his refusal to grant the demanded dissolution. Even if so, his tactics were singularly clumsy.

The second case of difficulty was *Van Sandau v. Moore*.[53] Van Sandau, a solicitor by profession, applied for some shares for which he paid a deposit. The company was later incorporated by statute, and a deed of settlement was prepared containing the regulations of management. This deed was signed by many shareholders, but Van Sandau, believing he had been unfairly treated, refused to sign it. Although the directors offered to repay his deposit, Van Sandau was determined to put an end to the company. He filed a bill for dissolution against the directors as representative defendants, but then something unexpected happened; many of the defendants put in separate answers. The purpose of this clever scheme was not only to delay the proceedings, but also to make the plaintiff's costs quite forbidding. While the Vice-Chancellor thought that the record could not be so loaded, Lord Eldon held that each party had the right to a separate defence and that the defendants could not be compelled to put in a common answer. It can be seen that behind this procedural talk the real issue was simply whether an (apparently) vexatious plaintiff could force the dissolution of the company or partnership. This issue raised obviously far wider problems, problems concerning the legitimate grounds for dissolution as well as minority-protection. What, however, was abundantly clear was that these problems could not be properly attacked within the technical context of a demurrer for want of parties.

The unfortunate effects of this approach were soon to appear in *Long v. Yonge*.[54] Forty-seven members of the Norwich Equitable Insurance Company brought a bill on behalf of themselves and all the other members of that company. The bill, having stated that the company was formed in 1807 as a partnership between the existing members for the time being, and further alleging serious neglect and mismanagement in the appointment of directors and trustees, prayed for a dissolution of the company, for the taking of accounts and the distribution of its assets. The defendants demurred for want of equity and parties. As regards the latter, they argued that the "parties are mutual insurers, and the society, [though] a partnership . . . stands

[53] (1826) 1 Russ. 441, 38 E.R. 171. For earlier proceedings, see 2 Sim. & St. 509, 57 E.R. 440.

[54] (1830) 2 Sim. 369, 57 E.R. 827. See also Blain v. Agar, (1826) 1 Sim. 37, 57 E.R. 493; (1828) 2 Sim. 289, 57 E.R. 797.

upon quite a different footing from a partnership for an unlimited period. Every time that a new insurance is made there is a new contract entered into. It is, therefore, a partnership which is to continue until the expiration of every insurance, that is to say, for 4,000 different periods."[55] In other words, all interested parties had to be joined, since the "consequence of granting the prayer of this bill will be to cancel the policies of 4,000 individuals in the absence of them all, except the few who are upon the record." Such a dissolution, moreover, might "not be for the common benefit, nor is there anything to show that it is the wish of the body, that the partnership should be put an end to."[56] Against this the plaintiffs could cite much authority in their favour, from *Chancey v. May*[57] to *Cockburn v. Thompson.*[58] Their "equity", too, looked very convincing. For the deed of settlement had provided for nine trustees and twelve directors; only less than half of them were still alive; could one maintain, asked the plaintiffs, "that persons can be bound to go on with a partnership to be regulated by four trustees and five directors, where the deed prescribes that it shall be managed by a greater number of each?"[59] Shadwell V.-C. sidetracked the equity and concentrated on the want of parties. To get rid of *Cockburn v. Thompson,* he distinguished it as a case where the defendant had to account for sums received, so that in effect this was a suit against him personally; hence Thompson could not complain that all members were not parties.[60] More broadly, the Vice-Chancellor would admit but two exceptions to the general rule that all interested parties must be named on the record. Specifically his exceptions were (i) where several persons had distinct rights against a common fund or against one individual; (ii) where one person had a right against several individuals liable to common obligations. The result was that if a bill "asks to deprive 4,000 persons of their present rights, the Plaintiffs ought not to be at liberty to stir in the case until they have made every one of those individuals parties."[61]

55 2 Sim. at 375.

56 *Ibid.*, at 376.

57 See note 15, *supra.*

58 See note 37, *supra.*

59 2 Sim. at 382.

60 *Ibid.*, at 380.

61 *Ibid.*, at 387. Observe that *every* member had to be a party. The Vice-Chancellor had earlier (*ibid.*, at 380) suggested that the question of dissolution could have been *"bona fide* raised", if some members who were against dissolution had been made parties. Although nothing came of this suggestion, the court following Davis v. Fish and Van Sandau v. Moore (*supra*), it was acted upon in the next case (see note 65 *infra*), in

If the decision dealt a fatal blow to any possible further action, it was substantively perhaps more justifiable for this reason, that it mattered little whether or not all the trustees and directors were alive and acting, especially when their numerical deficiency did not really hamper the company's business, nor (presumably) affected the wishes of the majority of members. Yet the decision also shook the foundations of the representative action, since (at least on the surface) it vigorously insisted on a total joinder of parties. It was this which led to more confusion. For example, in *Evans v. Stokes*,[62] the French Brandy Distillery Company, established in 1825, was actually dissolved in 1828 by majority of shareholders at a special general meeting. After this the partnership premises and property were sold to one of the defendants, one who had originally "projected" or promoted the company. The plaintiffs, suing on behalf of themselves and all the other shareholders except the defendants, prayed for an account and the avoidance of these allegedly fraudulent transactions. The defendants made a preliminary objection to want of parties, their main ground being that the representative plaintiffs had no "common interest" and that the dissolution of the partnership was approved by, and was beneficial to, a majority of proprietors.[63] Still, the plaintiffs were not opposing dissolution, but sought relief against the transactions following the already accomplished dissolution. Lord Langdale M.R. did not see this difference. To him it was "perfectly obvious that a suit where . . . the rights of all the partners are to be determined, . . . cannot be prosecuted in the absence of any of those partners."[64] He added: "The cases, in which suits have been permitted to be instituted by a few persons on behalf of themselves and a numerous body of other persons, have been cases in which there was plainly a community of interest between the Plaintiffs and those whom they represented; but this is a case in which it is not disputed that there is a great diversity of interests as between different classes of the members of this partnership."[65]

The phrase "community of interest" had originated some years earlier, when its meaning was however different from that now given to it by Lord Langdale. Thus in *Hitchens v. Congreve*,[66] where a fraud

Richardson v. Larpent (see at notes 95 and 99 *infra*) and in Richardson v. Hastings (at note 121 *infra*).

62 (1836) 1 Keen 25, 48 E.R. 215.

63 1 Keen at 30.

64 *Ibid.*, at 32.

65 *Ibid.*, at 32-33. In the end, however, the court granted leave to amend in order to add parties.

66 (1828) 6 L.J. Ch. (O.S.) 162.

had been committed by the directors on the shareholders, Lord Lyndhurst L.C. allowed a few shareholders to represent the whole body. In his opinion two hundred or more members were too large a body to make justice attainable, and since all the shareholders had the "same interest" in recovering the money, "What inconvenience can there be in two or three of the number suing on behalf of all?"[67] Similarly, in *Small v. Attwood*,[68] the plaintiffs sued on behalf of themselves and nearly six hundred other partners in order to vacate certain purchases induced by misrepresentation. Lord Lyndhurst found no difficulty in allowing the representative action. If all the partners were to be named as parties, "it would be utterly impossible that the suit could ever come to its termination."[69] It is worth mention that defendants' counsel had presented a most remarkable argument to show that the plaintiffs could hardly pretend to a true community of interest. Suppose, he suggested, that some of the partners objected to the contract being rescinded; they might have overpaid, but they might still hope that their purchases would sell very favourably in a rising market. Or suppose, counsel continued, that the defendants were in "little concert" or in "league" with the plaintiffs in order to get rid of the contract behind the backs of the absent partners; here, in allowing the representative action, the court would in fact lend support to a fraudulent manoeuvre.[70] Yet Lord Lyndhurst was not impressed by these hypotheses. As for the latter possibility of collusion, "if such a case in point of evidence should be presented, the Court in that case would know how to deal with it."[71] As for the former point the court said nothing; but it is evident that counsel's suggestion made *any* community of interest quite impossible, for one could always either imagine or find some person who, taking more unorthodox views of business prospects, would differ from and thereby demolish the community of interest.[72] Yet "community of interest" was not to escape this self-defeating interpretation. In *Harvey v. Bignold*[73] the defendants had greatly mismanaged, the company became a very losing concern, and the plaintiffs naturally wanted its affairs wound up. But Langdale M.R. allowed the usual demurrer, insisting that all

67 *Ibid.*, at 172.

68 (1832) You. 407, 159 E.R. 1051; 6 Cl. & F. 232, 7 E.R. 684 (H.L.). See also Walburn v. Ingilby, (1833) 1 My. & K. 61, 39 E.R. 61.

69 You. at 458.

70 *Ibid.*, at 419-420.

71 *Ibid.*, at 459.

72 It may be pointed out that counsel was neither absurd nor inconsistent, since he took his stand on Davis v. Fish (1823), cited at 425.

73 (1845) 8 Beav. 343, 50 E.R. 135.

parties had to be joined except where there was a plain community of interest between the plaintiffs on the record and those on whose behalf they were suing.[74] Yet if the parties had no community in this case, where could they have? Lord Langdale himself seemed baffled when he remarked: "it would be difficult to find an instance in which such [community] would be consistent with the facts of the case."[75] If, indeed, the parties here had different interests, this was only true in a somewhat special sense, a sense where the fact that the parties were owing, or were being owed, different sums of money amounted to a difference of substance. Nevertheless, all that Lord Langdale could do was to deplore the state of the law and call for legislation.[76] On the other hand, the plaintiffs were given leave to amend to bring them within a new principle which had in the meantime developed. This principle needs now to be looked at.

* * * *

After *Evans v. Stokes*[77] attempts were begun to limit its sweeping doctrine. The first and most important attempt was *Wallworth v. Holt*.[78] Some shareholders of an incorporated but insolvent joint stock company on their own behalf and that of all other members (except the defendants) sued for an account of the partnership's assets. The account prayed for was not to obtain a share of the profits, but to realise the common assets in order to liquidate debts and liabilities; in short and in effect, an application to wind up the company. Understandably Cottenham L.C. felt great difficulty between two seemingly inconsistent principles: "there are strong authorities for holding that to a bill praying a dissolution all the partners must be parties", yet "this bill alleges that they are so numerous as to make that impossible."[79] Nevertheless it was necessary to avoid "an absolute denial of justice" and to adapt equity to "the existing state of society."[80] Lord Cottenham, finally, found a solution by following an idea of Lord Brougham, namely, that want of parties could not be pleaded if a dissolution was not prayed.[81] Three years later, in *Deeks v. Stan-*

74 8 Beav. at 346.

75 *Ibid.*, at 345.

76 Much of the law he deplored was largely of his own making. Yet there was some justice in his complaint that "the persons being so numerous you don't know how to grapple with the rights of the parties:" *Ibid.*, at 346.

77 See note 62 *supra*.

78 (1841) 4 My. & Cr. 619, 41 E.R. 238.

79 4 My. & Cr. at 635.

80 *Ibid.* For similar statements, see Mare v. Malachy, (1836) 1 My. & Cr. 559, 40 E.R. 490; Taylor v. Salmon, (1838) 4 My. & Cr. 134, 41 E.R. 53.

81 Walburn v. Ingilby, (1833) 1 My. & K. 61, at 76; 39 E.R. 604, at 610.

hope,[82] some shareholders of a banking company alleged that their company had been grossly mismanaged, that some of the accounts were fabricated and fraudulent, and that in fact the company had ceased business and was defunct. They therefore asked for the taking of accounts and for a declaration that the bank "was dissolved or ought to be dissolved and might be dissolved by the decree of the Court."[83] Shadwell V.-C. upheld a demurrer for want of parties, because a "train of decisions" and a "uniform series of decisions" had established the invariable rule, i.e., that "where a bill is filed for the dissolution of a partnership, *that* cannot be effected unless you have all the parties interested before the Court."[84] Reliance was placed on *Evans v. Stokes*,[85] and *Wallworth v. Holt*[86] was distinguished. The latter, said the Vice-Chancellor, was not a bill for dissolution and Lord Cottenham's remarks were only "opinions theoretically expressed . . . on the subject."[87] Indeed, if "the Lord Chancellor should think that, at the present time, it is right that the law should be altered, *he* may alter it; but I am not at liberty to do so."[88] This denunciation made the actual decision of Shadwell V.-C. most surprising. For, despite everything, he was prepared to follow the principle of *Wallworth v. Holt*, as some of Lord Cottenham's remarks were "exactly applicable." They were applicable because in both cases the company's business was discontinued and suspended, so that an account could be granted without having to grant a dissolution.[89] So while the demurrer was allowed, the plaintiffs were granted leave to amend; this they did and subsequently succeeded.[90] The discussion continued in *Wilson v. Stan-*

82 (1844) 14 Sim. 57, 200; 60 E.R. 278, 334.

83 14 Sim. at 63.

84 *Ibid.*, at 67.

85 See note 77, *supra*.

86 See note 78, *supra*.

87 14 Sim. at 67.

88 *Ibid.*, at 68. The Lord Chancellor, closely following Evans v. Stokes (*supra*), also distinguished and "put out of the case" Cockburn v. Thompson (*supra*); there the parties never objected to want of parties and "what Lord Eldon determined was that Thompson should not [object to] it, for he had nothing to do with the matter. It was quite collateral to him whether the partnership was dissolved or not:" *Ibid.*

89 At 69, 74-75. The judge's other remarks were, in view of his earlier utterances, even more curious: "we have certain persons suing on behalf of themselves and all others except the Defendants; and Defendants constitute the remainder", so "that if you did make it necessary to have all the shareholders parties, it would be impossible that there could be any relief at all" (at 74).

90 See 2 Sim. 200, 60 E.R. 334, for further proceedings regarding the costs arising out of the order to amend.

hope.[91] Wilson, on behalf of himself and all other shareholders (except defendants), prayed an account of all costs and disbursements and a return of the assets to all the shareholders. The company was provisionally formed in 1845 for the purpose of establishing a direct railway between London and Manchester, but before the company was properly formed, its object had been wholly frustrated by some shady dealings on the part of the provisional management committee. The plaintiff said that he could not conveniently discover the names of all the shareholders, and that the interests of all the representees were anyhow identical with his own. Actually the inconvenience of discovering the names had considerably lessened.[92] But the plaintiff's argument was now easily upheld; the action was seen as being for a most legitimate purpose, i.e., clearing and redistributing the assets of a concern which had been abandoned. Moreover, *Cockburn v. Thompson,* whose authority had previously been gravely questioned, now came in for praise as a very relevant decision, relevant because it was an action brought by one person on behalf of himself and all others, and relevant also because of the "principles which a great judge laid down."[93]

From these cases an important point finally emerged. Generally speaking, equity would not intervene to dissolve a going concern, but would intervene where the concern was practically defunct or frustrated.[94] Thus, though without perhaps distinctly perceiving it, the courts distinguished between two types of dissolution. One dissolution demanded by one faction of members or partners against another; a second type of dissolution, best described as "winding up", the object of which was to divide and distribute the assets of an undertaking when its existence had become commercially futile. In the first case

91 (1846) 2 Coll. 629, 63 E.R. 892.

92 This, as Knight Bruce V.-C. pointed out (at 2 Coll. 634), "by reason of the late Act of Parliament", i.e., the Act of 1844 (7 & 8 Vict., c. 110), which provided for registration of the company and subscribers. See also GOWER, *op. cit.,* 41.

93 2 Coll. at 635. The court let fall a curious statement about the equitable attitude to demurrers: "it is a rule of the Court, more practically recognised formerly than it has been of late years, that, upon a demurrer where the question is one of any nicety or difficulty, it is not necessary to pronounce a clear and decided opinion; but that, if the Court sees that it is matter of difficult argument or of reasonable discussion, it may overrule the demurrer, saving the benefit of the question raised by it to the hearing of the cause, or, in other language, without prejudice to the question." This attitude to these demurrers perhaps did express the court's growing dislike of technical objections when the equities and the merits were all on the side of the plaintiffs. The demurrer for want of parties was slowly breaking down.

94 See also Moccatta v. Ingilby. (1836) 5 L.J. Ch. 145, 149; Seddon v. Connell, (1840) 10 Sim. 58 at 67, 59 E.R. 534 at 538 ("intestine" disputes).

the internal quarrel exploded any possible community of interest; hence no representative action was available, with the result that the quarrel would remain non-justiciable. In the second case, the economic collapse of the undertaking established some sort of manifest community of interest; it could be presumed that representors and representees alike would want to cut their financial risks or losses. There was, however, a third type of situation. Suppose that the partnership was neither defunct nor insolvent, yet some plaintiffs still wished to withdraw on the allegation that they were defrauded. The matter is exemplified by *Richardson v. Larpent.*[95] The facts were that the directors of a partnership (the British Iron Company) consisting of over five hundred members, made certain calls which the majority of shareholders paid. Some members alleged that these calls were fraudulently made, refused to pay, and furthermore filed a bill on behalf of themselves and all the other shareholders (except the defendants, the directors and officers of the company), praying for an account of the assets and their application towards the payment of the debts and liabilities. It was said that the plaintiffs, being in a minority, hardly represented all the shareholders: "How can a class of individuals . . . in a minority take the whole concern into their own hands, and enforce a general account and dissolution (for they virtually ask a dissolution) behind the backs of the majority?"[96] Yet whether the defendants were (strictly) fraudulent or not, there was a serious schism between the members, the respective parties taking very different views on vital company matters.[97] Clearly, it could "be most important to the interest of the Plaintiffs . . . to have the partnership dissolved, and yet . . . it might be impossible . . . to obtain . . . dissolution if it were necessary to have all the parties present. Such a state of things could hardly be permitted to exist by any Court of Justice, or in any civilized country."[98] The decision was that at least some of the dissentients should be joined as defendants "to discuss the present questions freely and unrestrainedly";[99] and the plaintiffs were granted leave to amend the bill.

The past difficulties about dissolution had, in addition to the legacy of *Davis v. Fish,*[100] yet another origin and explanation. For

95 (1843) 2 Y. & C.C.C. 507, 63 E.R. 227.

96 2 Y. & C.C.C. at 510.

97 The partners disagreed on when or whether the company should be dissolved and whether the capital was to be increased which would have forced the plaintiffs to make further contributions: See *ibid.*, at 513.

98 *Ibid.*, at 514, *per* Knight Bruce V.-C.

99 *Ibid.*

100 See note 45, *supra.*

equity had announced the rule that it had no jurisdiction over partnerships unless and until one partner demanded a dissolution; or, more technically expressed, the rule was that a bill for the accounts of a partnership without praying for dissolution was demurrable. This rule—known as the rule in *Forman v. Homfray*[101]—was frequently recognised on the ground that if there is no breach of duty on the part of the co-partner there is nothing to complain of, and if there has been a breach of duty, the other party should ask for dissolution.[102] Moreover, an account without dissolution could involve the court in too many practical details. For example, the partners could file supplemental bills as and when balances became due to each other, "and thus the matter might be pursued with endless changes, and supplemental bills might be filed every year that the partnership continued, and . . . till the partnership expired or the Court put an end to it."[103] In short, an account without dissolution would make the court into a virtual business manager—a rôle, needless to say, quite beyond its usual function.[104] The overriding idea was that the court must proceed to a complete settlement in the case, so that nothing was left to future litigation.[105] Yet we can now see that the rule of *Forman v. Homfray*[106] was relevant to small partnerships and not to numerous ones. As regards the small unit, it made sense to link the granting of an account with that of dissolution because the partners could all be before the court and their mutual rights and liabilities could be settled at once and in the same action. As regards the numerous partnership, such a compact settlement of claims was usually unfeasible, not only because all the parties were not and could not be before the court, but also because the rights of the absent parties had to be

101 (1813) 2 Ves. & B. 329, 35 E.R. 344; Marshall v. Colman, (1820) 2 Jac. & W. 266, 37 E.R. 629; Loscombe v. Russell, (1830) 4 Sim. 8, 58 E.R. 4. But see Knowles v. Haughton, (1805) 11 Ves. Jun. 168, 32 E.R. 1052; Harrison v. Armitage, (1819) 4 Madd. 143, 56 E.R. 661; Richards v. Davies, (1831) 2 Russ. & My. 347, 39 E.R. 427; Richardson v. Hastings, (1844) 7 Beav. 323, 49 E.R. 1089; and LINDLEY, *op. cit.* 604.

102 Loscombe v. Russell, (1830) 4 Sim. 8, at 9; 58 E.R. 4.

103 4 Sim. 8, at 11.

104 A by-product of this rule was the distinction between important and unimportant or grievous and occasional breaches, for "[with] respect to occasional breaches of agreements between partners, when they are not of so grievous a nature . . . the Court stands neuter:" 4 Sim. at 11. The object of this distinction was obviously to limit dissolution. A partner, in other words, could only obtain an account not only by praying for dissolution, but by praying for a justified dissolution.

105 This point was clearly explained in Richardson v. Hastings, (1844) 7 Beav. 323, at 327-328; 49 E.R. 1089, at 1091.

106 See note 101, *supra.*

protected.[107] This made for an important difference between "single" and "multiple" suits, a difference however that was never clearly stated.[108]

One final spot of trouble was removed by *Beeching v. Lloyd.*[109] Beeching and another claimed the return of deposits (paid in respect of shares) on behalf of themselves and all other subscribers in a company. They alleged gross fraud in concocting the company and the obtaining of the deposits. That gross fraud had been committed was not in doubt; the only question was whether the defendants' technical objection was sound. Their objection was not, strictly, one to want of parties, but one to the effect that where separate frauds were practised against several persons, those persons could not join in suing for the recovery of money they had lent or paid. The latter rule had been enunciated a generation earlier in *Jones v. Garcia del Rio,*[110] though on somewhat special facts. Three persons, having lent money to the new government of Peru, now demanded the return of their loans from the Peruvian envoys in London and from the bankers to whom the advances were made. The plaintiffs made their claim on behalf of themselves and all other subscribers. They stated that the loan had been procured by fraud, since the defendants were unable to "perfect the security which they had undertaken to give for the loan,"[111] and since no Peruvian government existed as British recognition was still withheld. The defendants pleaded not only that Peru was no longer a province of Spain, but that many subscribers were quite willing to abide by the loan. After some discussion of the public policy involved, Lord Eldon rested his decision against plaintiffs on the ground that they could not file a bill on behalf of themselves and others (could not "file one bill") because each plaintiff had a distinct demand in equity and at law.[112] How then was the *Jones* case to be

107 Indeed, the (absent) representees would remain "quasi-parties" (see note 39, *supra*) or "quasi-partners" (Richardson v. Hastings, (1844) 7 Beav. 323, at 330).

108 It is worth remark that what became the principle of Wallworth v. Holt (note 78, *supra*) was, as it were, an inversion of the rule in Forman v. Homfray. The latter, as we have seen, made a bill for an account without dissolution demurrable, whereas the former principle made a bill for an account non-demurrable, provided a dissolution was not prayed. For the stages of this inversion, *cf.* Walburn v. Ingilby, (1832) 1 My. & K. 61, 70-71, 76, with Wallworth v. Holt, (1841) 4 My. & Cr. 619, 638-639.

109 (1855) 3 Drew. 227, 61 E.R. 890.

110 (1823) Tur. & R. 297, 37 E.R. 1113.

111 Tur. & R. at 298.

112 But in Colt v. Woollaston, (1723) 2 P. Wms. 154, 24 E.R. 679, plaintiffs recovered money paid to fraudulent inventors, though no issue of joinder was raised (the case discusses the interesting question whether a project

distinguished from the situation in *Beeching v. Lloyd*? In the *Jones* case, Kindersley V.-C. explained[113] the object of the Peruvian government was to borrow money from many individuals. "Now the lending of money by one person has no sort of connection with the lending by another. There is a common purpose, it is true, so far as concerns the borrower, but there is no common purpose as concerns the lenders; there is no contract between them . . . [But] if an individual induces others to enter into a partnership, and involves them by fraud to put money into what purports to be a common stock, . . . [in] such a case there is not only a common object in the persons borrowing, but a common object in those lending."[114] Essentially the same point the V.-C. had made more tersely when he pointed out that the plaintiffs' monies were partly used for the purchase of an estate, that there was thus a "common fund which might be applicable towards satisfaction of the Plaintiffs' demand", and that this common fund constituted the common interest which the plaintiffs had.[115]

* * * *

Beeching v. Lloyd[116] is also Equity's last significant contribution to the law of representative suits. For after the modern company legislation, starting in earnest in 1844[117] and culminating in the Act of 1862[118], the days of the unincorporated company of numerous partners were gone.[119] Of the long equitable experiment, only one principal beneficiary remained. This was the social club, for it is mainly in this domain that the old and purely equitable principles still apply.[120] And

for the extraction of oil from radishes was a fraud). Again, in Blain v. Agar, (1828) 2 Sim. 289, 57 E.R. 797, the plaintiffs on behalf etc. recovered money paid to fraudulent directors. The demurrer for want of parties was disallowed, because the plaintiffs stated that they did not know the name of all subscribers (at 296).

113 3 Drew. at 244.

114 *Ibid.*

115 *Ibid.*, at 243.

116 See note 109, *supra*.

117 7 & 8 Vict. c. 110. See GOWER, *op. cit.*, 41; HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, (1936) 90.

118 25 & 26 Vict. c. 89.

119 So far as we are concerned, this legislation had briefly a twofold effect; registered companies could now sue as such, and trading partnerships were limited to twenty members at most. Friendly and provident societies, too, came under increasing legislative control: *cf.* GOWER, *op. cit.*, 234, 237.

120 Of course, the representative action had always made and continued to make possible the enforcement of general or customary rights. Yet there had never been any serious difficulty in this field. Moreover, with regard to such rights the representative action had developed along somewhat different lines. There was here no need for the distinctive common interest

it is in this sense that *Richardson v. Hastings*[121] survives as the latest leading case. The Alliance Club, consisting of a hundred members, was formed in 1836. Because of financial embarrassments, it was by general agreement dissolved in 1839. Authorised to realise the assets, two committeemen (in whom the property was vested) apparently received more from the proceeds than they should. The plaintiff thereupon prayed for an account on behalf of himself and all the other members except the above two. The defendants demurred that all subscribing members should have been made parties to the suit. Lord Langdale M.R. allowed the demurrer, but gave the plaintiff leave to amend. In a further action, another member was joined as defendant, which gave rise to the same objection as before. But this time the demurrer was dismissed, if only to allow the action to proceed. "It is very possible that these gentlemen may hereafter show, that they have nothing at all to pay, or they may admit that they have sums to pay, but allege difficulties with respect to the distribution of them . . . [But] I can conceive myself of no difficulty in ordering these monies to be paid to persons who, under the direction and control of the club or the governing body of the club, have a right to distribute them."[122] Obviously, the representative action had gone a long way. Perhaps this may have ensured that members would always be gentlemen.

SAMUEL J. STOLJAR.*

in the sense discussed before. The view was that "all persons having a common right, which is invaded by a common enemy, although they may have different rights *inter se*, are entitled to join in attacking that common enemy in respect of that common right": Warrick v. Queen's College, (1871) L.R. 6 Ch. App. Cas. 716, at 726. Again, a minority could institute a suit even though the majority disapproved of it, for the majority could "neither excuse the wrong [to the common right], nor deprive all other parties of their remedy by suit:" Bromley v. Smith, (1826) 1 Sim. 8, at 11; 57 E.R. 482, at 483. See further Chaytor v. Trinity College, (1796) 3 Anst. 841, 145 E.R. 1057; Duke of Norfolk v. Myers, (1819) 4 Madd. 83, 56 E.R. 639. The enforcement of such general, customary rights was indeed a very old thing at common law. The writ of monstraverunt was especially designed for it, but it is by no means clear to what action was representative or a joint one. See generally on this writ, 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 388.

121 (1844) 7 Beav. 301, 323, 354; 49 E.R. 1081, 1089, 1102.

122 7 Beav. 323, at 331-332, *per* Lord Langdale.

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