THE REPRESENTATIVE ACTION: THE MODERN POSITION.

The earlier, equitable fortunes of the representative action a preceding article has traced.[1] In retrospect these fortunes make a most disconcerting report; for if true that equity raised and reared the action, it is no less true that equity also ruined it. The major events need to be briefly re-emphasised. The representative action had two procedural jobs. The first was to enable an over-numerous class of persons to sue and be sued. This, which can be called its external function, caused actually little difficulty. However real difficulty arose as regards the second job connected with litigation *within* large groups, usually trading companies or partnerships. Here the representative action became the necessary device not only to bring numerous partners before a court, but to permit such partners or share-holders to obtain the dissolution of their concern, since more often than not a winding-up was the shareholders' only way of regaining their subscriptions or at least some of their equivalent property. It is, moreover, in connection with this internal job that equity developed the notion of 'common interest'. Speaking broadly, the purpose of this was to provide some criterion by which to judge the merits of a representative suit. Obviously, a demand for dissolution ought to express the common interest of all members or partners involved; such a demand should not succeed if it was frivolous or vexatious or was pressed by only a small minority. But the latter function of the action lost its practical significance when the Winding-Up Acts introduced new methods of dissolution[2] and when further legislation established the registered company.[3] Still, and this is the interesting point, the action retained its traditional status on the practice books. And, indeed, when later codified in the Rules of the Supreme Court, the representative procedure that survived, was the old chancery action, as though times had not changed. The actual terms of Order 16, rule 9, are these:

1 Stoljar, *The Representative Action: An Equitable Post-Mortem,* (1956) 3 U. WESTERN AUST. ANN. L. REV. 479.

2 There were four such Acts (1844, 1846, 1848 and 1849), but the most interesting are those of 1846 and 1848. The former was meant to facilitate the dissolution of certain railway companies, the shareholders being given the right to call meetings at which a specific majority could decide upon dissolution. The latter (1848) Act provided "further facilities" for winding-up by way of Petition to the Court of Chancery. The 1849 Act extended the 1848 facilities to partnerships, associations and companies of not less than seven members.

3 See generally GOWER, MODERN COMPANY LAW (1954), 41 ff.

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised to defend in such cause or matter, on behalf or for the benefit of all persons interested."

Our modern law, as we shall see, has largely become a textual interpretation of rule 9, in particular of the words 'same (or common) interest'. Yet the law is still far from clear. We must try to find out more.[4]

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Among modern cases *Duke of Bedford v. Ellis*[5] is invariably treated as the leading authority. But its true importance seems to have been much overrated and misunderstood. What will now be shown is that the decision, important though it is, is authority only for a particular type of representative action, and indeed only a somewhat secondary type. The facts concerned Covent Garden Market belonging to the Duke of Bedford, but regulated by an Act of Parliament of 1828. This statute introduced different rights for different users: those coming to the market to buy would have to pay nothing, while those coming to sell would have to pay rent and toll. For some reason or other, the Act further distinguished between middlemen and growers, granting the latter certain advantages.[6] The plaintiffs presently complained that the Duke had persistently ignored these statutory rights and had further preferred middlemen by enacting an excessive toll from the growers. The growers therefore sought a declaration to restrain the infringement of their preferential rights as well as an account of the moneys by which they had been allegedly overcharged. The Duke objected that the plaintiffs could not bring a representative action, as it was not an action claiming a beneficial proprietary right. Such an objection had been upheld in *Temperton v. Russell*,[7] but the House of Lords was now against "so restricting

4 The modern law is generally dealt with in ODGERS ON PLEADING AND PRACTICE (15th ed. 1955), 23; 26 HALSBURY'S LAWS OF ENGLAND (Hailsham ed. 1937), 17-18, and its AUSTRALIAN AND NEW ZEALAND PILOT (1938) 5, 20. For more detailed discussions, see Lloyd, *Actions Instituted by or against Unincorporated Bodies*, (1949) 12 MOD. L. REV. 409; Witner, *Trade Union Liability: The Problem of the Unincorporated Corporation*, (1941) 51 YALE L. J. 40. (The latter article deals mainly with the American law).

5 [1901] A.C. 1.

6 "It may be that at the time the Act was passed market gardeners in the county of Middlesex were not without influence in the electorate. It may be that in those days protection was not such an odious thing as it is now in the eyes of some people who worship political economy:" *per* Lord Macnaghten at 6-7.

7 [1893] 1 Q.B. 435. For this case see further at note 39 *infra*.

the rule,[8] which was only meant to apply the practice of the Court of Chancery to all divisions of the High Court."[9] Lord Macnaghten explained the basis of rule 9 in words which have become famous:

> "Under the old practice the Court required the presence of all parties interested in the matter in suit . . . But when the parties were [too] numerous . . . the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."[10]

Thus in "considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members."[11] So that restricting the rule to persons having a beneficial proprietary interest would not only be "opposed to precedent", it would also not be "in accordance with common sense."[12] In short, there was no valid theoretical or practical objection to the present representative suit, since the terms of the statutory rule were clearly satisfied. Though the present plaintiffs had no common proprietary claim, they certainly had the required common or same interest as members of a class: "All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter."[13]

Lord Macnaghten's views look like an impressive vindication of the broadest operation of the representative suit. Yet there are some questions which must now be asked: Was the representative action either necessary or convenient in this case? Was the action the only mode of testing or enforcing the alleged right? What, more generally, were the plaintiffs (Ellis and his five friends) trying to do? Surely the main issue was the definition of the status or class of 'grower' in the Act

8 *i.e.*, rule 9 of Order 16.

9 [1901] A.C. at 8.

10 *Ibid.*, at 8.

11 *Ibid.*, at 8.

12 *Ibid.*, at 8. Even the earliest instances of the representative action, as Lord Macnaghten argued, had no such proprietary right or claim. For example, a creditor or parishioner seeking to establish a modus in lieu of tithes had no proprietary interest in the personal or real property of the debtor or owner. See Chaytor v. Trinity College, (1796) 3 Anst. 841, 145 E.R. 1056. The noble lord also derided the idea expressed below by the Court of Appeal that the representative action had gone a long way since the days of Lord Eldon: "I do not think, my Lords, that we have advanced much beyond [Lord Eldon] in the last hundred years."

13 [1901] A.C. at 9.

of 1828, since only this would indicate the persons upon whom the statutory privileges were conferred. And if the present plaintiffs had, as growers, exactly the 'same interest' in the cause or complaint, their common interest sprang from their being members of the same class. Thus even if Ellis had brought an individual or private action, or had started a test action, or had brought a joint action with a few friends, seeking a judicial declaration as to the precise meaning of 'grower' in the Covent Garden Market Act, the net result of all these actions would each have been the same. But it might be still tempting to think that a representative action would have been more helpful in this case. For, one might say, would not an action on behalf of *all* growers named and unnamed, have settled the matter once and for all? Consider the problem again. The purpose now was to establish the precise privileges of the 'grower' class. This could be done by establishing the statutory meaning of 'grower', yet a meaning which would not change whether Ellis sued separately, jointly or in a representative capacity. What other advantage could a representative action have? Could one not say, for example, that *one* plaintiff suing by or for himself would only establish the status of *one* named grower, while a representative action would establish the rights of *all* Covent Garden growers; they would, at any rate, not have to bring further actions to enforce their rights as growers. A moment's consideration shows how illusory this advantage is. For the representative action, inasmuch as it extends to unnamed plaintiffs does not establish the personal rights of these representees, but establishes class-rights alone. Thus, in *Duke of Bedford,* the representative action, though successful, established the specific rights of Ellis and the five other named plaintiffs; the rights of the whole class of growers, on the other hand, were only generally, and not specifically, recognised. Suppose that a grower named Smith demanded preferential rights at Covent Garden. To succeed he would have to show not only that (i) growers have certain statutory privileges, but also that (ii) *he* was a grower, coming within the statutory class of growers. However, the Duke of Bedford could, without disputing (i) compel Smith to show (ii), which is something Smith could not really do except by bringing his own action to enforce his own personal right. Yet to the extent that the Duke could compel Smith to go to court, it would matter little whether Ellis had already brought a successful representative action or whether he had merely sued in his own name for his own private benefit.[14] This argument, it should be stressed, does not mean to suggest that in *Duke of Bedford*

[14] For a similar point, see also text at note 25 *infra*.

the representative action was inappropriate or that the Duke's objection was valid and should have been upheld. Certainly, his objection was purely technical and without any real merit, so that there was no good reason to dismiss the plaintiffs' case. But the previous argument does mean to call attention to one peculiarity, namely, that the action by operating to establish the public or statutory right of a specified class, here operates in the nature of a test action instead of a representative action in the classical sense. The present type of representative action is but an alternative procedure; it is not the *only* method of establishing rights and duties when the parties, because too numerous, could not otherwise litigate.

These features are also brought out in a more recent case, *Smith v. Cardiff Corporation*.[15] The defendants were obliged to increase the rents payable by their own tenants. Instead of raising rents uniformly, the scheme proposed was to make the increases on a differential basis according to individual incomes, the effect being that the more affluent tenants would subsidise the poorer ones. A representative action was brought to attack this scheme as *ultra vires*, with four tenants suing for a declaration "on behalf of themselves and all other tenants of houses provided by the defendants." The Court of Appeal held this action to fall outside the strict terms of Order 16, rule 9. For while the tenants might have a 'common interest' to oppose increases, they had no 'common grievance'. As the richer would have to subsidise the poorer, there were two classes of tenants whose interests, far from being identical, were in fact in conflict. Although the actual decision can (as we shall shortly see) be justified on other grounds, the reasons so far advanced were not very satisfactory. For one thing, the plaintiffs could quite easily have formulated a common grievance by limiting the relevant class of plaintiffs, i.e. by including only those tenants who were about to be adversely affected, a class of 8,000 out of 13,000 tenants.[16] For another thing, had the Cardiff Corporation proposed uniform increases, every condition which the Court of Appeal required would have been satisfied, since all the tenants would have had both a common interest and a common grievance. This makes it somewhat absurb to say that whereas 8,000 tenants could not challenge the new increases, the 13,000 tenants could. And perhaps this explains another and even more surprising argument by the Master of the Rolls. Although one might think that the conditions of rule 9 were met, since

15 [1954] 1 Q.B. 210.

16 There were about 13,000 tenants of whom 8,000 were going to be directly affected. The remaining 5,000 tenants were not immediately liable to have their rents increased.

the 13,000 tenants all had identical weekly tenancies, "on second thoughts one's inclination would at once be in the other direction; for, taking the rule according to its own language and without for the moment considering any expositions of it in the decided cases, it is not easy to see how these 13,000 individual tenants can be said to have 'the same interest in one cause or matter'. The truth is that they have very similar or, if you like, identical, interests in very similar or identical matters."[17] Since, the argument continued, all the weekly tenancies were determined by the corporation as a necessary preliminary to putting the new scheme into effect, the tenants were mere licensees who as "ex-tenants" had "no more right to continue in occupation . . . than any other person who may come along and ask to be taken on as a tenant of one of the houses according to the terms of the new scheme."[18] It will be obvious that on this reasoning no class of weekly tenants, big or small, could have enough in common which was a common interest or something which was an interest at all. Nor was this reasoning at peace with Lord Macnaghten's remarks in *Duke of Bedford,* to the effect that what needs considering is "what is common to the class, not what differentiates the cases of individual members," since in this kind of action it matters not whether the individual plaintiffs have been inconvenienced or wronged; what matters is that "the alleged rights of a class are being denied or ignored."[19] Clearly, the latter interpretation of 'common interest' was not only wide enough to cover the present weekly tenants as a class, it also gave context to some of Lord Macnaghten's other words, words relating to "common grievance" and to the "relief sought having to be beneficial to all whom the plaintiff proposes to represent."[20] These last words the Court of Appeal now used in support of its own result. The present 13,000 plaintiffs, it was said, consisted of two classes of tenants whose interests clashed. In a sense, this was true, but also irrelevant. For there still remained a class of 8,000 tenants with a common interest, a common grievance and all seeking common relief that undeniably would have been beneficial to them all.

There was a further argument. Thus Evershed M.R. declared that he was not sorry to reach the conclusion at which he arrived. If in this case the plaintiffs had been right, it would be "startling . . . to note what the consequences might be." Suppose, by way of example, that there is an increase in railway rates and that one person brings

17 At 218.
18 At 219.
19 [1901] A.C. at 7.
20 See *ibid.,* at 8; and see *supra.*

an action on behalf of himself and all other season ticket holders, an action to challenge the validity of the increase, whether the other ticket holders like this or not. Of course, those season ticket holders who disliked being represented, could disclaim the action and ask to be joined as defendants. Still, contended the Master of the Rolls, "such a result involves a serious inroad upon the ordinary individual's liberty to make his own terms with some other party with whom he is under no obligation to make any contract at all, if he does not want to."[21] The force of this objection is difficult to gauge. Indeed, the objection fails to observe that there cannot be any litigation in situations as these, unless the interest or right in question is in the nature of a public or statutory right. For the complaint of the ticket holders, as that of our previous tenants, does not relate so much to a branch of contract and the like, but is a complaint about an administrative authority having acted improperly. Hence any person coming within a described class can enforce his class-rights, and this whether the other class-members like it or not. Be this as it may, the Court's actual decision was not unsatisfactory. Though the action was regarded as outside Order 16, rule 9, the defendants were pressed to allow the plaintiffs to amend the writ. After which it could be treated as an action by the four named plaintiffs alone. The practical effect of amendment was that the suit could then proceed as a test action as to whether the defendants possessed the statutory powers they claimed. To them, moreover, it could matter nothing what procedural form the action took, provided the question of costs was taken care of. In all, it was a surprising ending after all the ado about the representative action and its technical appropriateness. The whole difficulty was easily resolved by a slight amendment of the writ, and the chief practical difference between the one action and the other only lay in a slight change of name.

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A further question arises next: Is the representative suit available for the enforcement of a private claim as distinct from a public (statutory or customary) right? As regards this a most important case is *Markt v. Knight Steamship Co.*[22] The plaintiffs shipped goods from New York to Japan on the Knight Commander, a ship belonging to the defendant company. The ship was sunk on her voyage by a Russian cruiser for carrying contraband of war. The plaintiffs now sued in damages or for a declaration, on behalf of themselves and 44

21 [1954] 1 Q.B. at 222.
22 [1910] 2 K.B. 1021.

other owners whose cargoes were lost. Yet the Court of Appeal held that no representative suit would lie, because the plaintiffs and their representees were together not "persons having the same interest in one cause or matter." The relevant arguments are most instructive and cannot be left undiscussed. For the defendant shipowners it was said that the shipments were different for each shipper, involving different goods and different bills of lading so that the claims and defences might be different too. A shipper, for example, who has shipped contraband would be in a different position from a shipper who had shipped 'innocent' goods. Thus, a representative action would raise heterogeneous issues in respect of each shipper respectively. The action would therefore go far beyond the "limits" set by *Duke of Bedford v. Ellis*.[23] Indeed, even if the various shippers had been joined as plaintiffs by name, there would have been no valid joinder as permitted by rule 1 of Order 16. For the plaintiffs it was said, on the other hand, that all shippers represented had a common interest as the main facts were common to all of them. There was, at any rate, an emphatic community of interest as far as the shippers of non-contraband goods were concerned, since their complaint was precisely this, that the shipowners had broken their contract with them by carrying contraband cargoes in the same ship. If, furthermore, it was true that each shipper could have brought a separate writ, this might have been stigmatised as oppressive and unnecessarily expensive. The plaintiffs therefore decided that their best course was to proceed by representative action, on behalf of all shippers who had shipped non-contraband goods.[24]

These arguments contain some important clues. For once it was admitted that every shipper could bring a separate writ, the central question became only this: should each shipper sue individually, or should he combine with other shippers in some form of 'collective' suit. If the former, no further question could arise; nor could this course be any longer stigmatised as oppressive, as the plaintiffs had feared it might. If, however, the plaintiffs were to eschew such multiplicity of actions and to adopt a form of 'collective' suit, which of two possible procedures were they to choose, the joint action or the representative suit? In other words, were they to proceed under rule 1 or rule 9 of Order 16? The last problem was perhaps less important than it looked. It could not have mattered very much whether all the 40 odd shippers were actually named in the writ or whether they re-

23 [1901] A.C. 1.

24 For these arguments see [1910] 2 K.B. at 1023-4.

mained unnamed. As the plaintiffs wished to establish in the first place the shipowners' liability for the loss of the non-contraband goods, their interest and their claims were exactly alike, even though each shipper would subsequently obtain different damages simply because the quantities shipped were not the same. Moreover, as Buckley L.J. remarkably well explained, "to enable the represented firms to recover the damages which open the footing of the declaration may be recoverable by them requires, no doubt, further steps, *such as are always necessary in a representative action to give to the represented parties the particular relief to which he is entitled in respect of the common relief which is for the benefit of all.* Subsequent proceedings would be necessary, and in these it would be open to the defendants to contend that as regards any particular plaintiff by representation he was for some reason personal to himself not entitled to recover. Such difficulties occur in every representative action."[25] The majority, unfortunately, disagreed. Vaughan Williams L.J. vigorously denied the existence of a "common purpose" or "bond or connection uniting the persons whom the plaintiffs affect to represent."[26] The plaintiffs not only lacked the common statutory origin as in *Bedford v. Ellis,*[27] but also a common fund as in *Beeching v. Lloyd.*[28] To Fletcher Moulton L.J. the writ was "hopelessly bad." For one thing, the representative class was not sufficiently defined.[29] For another, "the machinery of a representative suit is absolutely inapplicable" to a claim for damages, because "the relief being sought is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action."[30] The Lord Justice later elaborated this point: "To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases."[31] But, surely, the same objection would apply to a joinder under Order 16, rule 1. If every shipper's claim for damages had to be dealt with separately, what was the point of joining plaintiffs in one action when their individual

25 *Ibid.*, at 1047-8. The italics are mine.

26 *Ibid.*, at 1027.

27 [1901] A.C. 1.

28 (1855) 3 Drew. 227, 61 E.R. 890. For a full discussion of this case, see Stoljar, *loc. cit.*, at 498.

29 [1910] 2 K.B. at 1034: "A mere list [of names] tells the Court nothing, more especially when that list does not appear on the record."

30 *Ibid.*, at 1035.

31 *Ibid.*, at 1040-1. In Bedford v. Ellis, *supra,* there had also been a claim for damages, but this was presently distinguished on the ground that it was not, as here, a principal claim.

measure of relief and damages might not be the same. And yet it was rule 1 which, Fletcher Moulton L.J. seemed to suggest, was the correct procedure in this case.[32] It becomes very obvious that these refinements made very little sense.[33] One practical effect was certainly to restrict the application of rule 9, but another result was to enlarge the complementary scope of rule 1. Moreover, failing either of these rules, the plaintiffs could each bring a separate action, at greater cost both to the public and to themselves. Need one add that where alternatives complement each other and counter-balance, restrictions such as the previous ones serve no real purpose at all?

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The final aspect of the representative suit also recalls its oldest sense. The action is again not merely an alternative, it is the only way to the courts. In the cases that follow we shall watch is operation against numerous defendants who cannot be attacked save in a representative form. Thus in *Mercantile Marine Service Association v. Toms*,[34] an unincorporated and unregistered union was sued in libel by another association. More specifically, the plaintiffs issued the writ against Toms and two others (the chairman, vice-chairman and secretary) as representing themselves and all the other 15,000 members of the Imperial Merchant Service Guild. The action failed, since the court refused to make the required order under rule 9:[35] "I have great difficulty [said Swinfen Eady L.J.] in seeing that in this case there are numerous persons *having the same interest* in this cause or matter within the meaning of the rule."[36] The defendants did not have the same interest, because (as the argument ran) the various members of the union might have different defences. For example, the members of the management committee might defend that the words were not defamatory or did not refer to the plaintiffs; the other members might argue that they did not authorise the publication of the

32 See his remarks, *ibid.*, at 1037, 1040-1.

33 One suggested reason for sharply differentiating between the two courses of action was the question of costs. How could the defendant be certain of his costs from an unnamed and unsuccessful plaintiff: see Fletcher Moulton L.J., *ibid.*, at 1037. But this was an exaggerated fear. Not only were costs anyhow in the discretion of the court, but the costs were secure from the plaintiffs that were named. Indeed, more than the latter would, in case of failure, have to pay, the defendant was anyhow not entitled to.

34 [1916] 2 K.B. 243.

35 An order is necessary because Order 16, rule 9, requires the Court to "authorise certain persons to defend on behalf of other persons" but this if the latter refuse to defend.

36 [1916] 2 K.B. at 246. My italics.

libel, that they were on the high seas and knew nothing about the matter."[37] Both Swinfen Eady and Pickford L.JJ. purported to follow established authority, although (as the Court admitted) there were "many dicta in wide terms" on the other side.[38]

This conflicting authority needs brief elucidation at this point. In *Temperton v. Russell*[39] the president and secretary of a builders' union were sued in a representative capacity for organising strikes causing interference with contractual relations. The plaintiff claimed damages and an injunction. Damages were held unavailable because equity had never awarded such relief in tort, and had only intervened to protect, what Lindley L.J. called, a "beneficial proprietary right."[40] Nor was the injunction granted, on the ground that this was an equitable remedy, so that no order could be framed so as to bind persons merely represented and not actually parties to the proceedings. The notion of a 'beneficial proprietary right' was further emphasised in *Wood v. McCarthy,*[41] where, however, the main question was a different one. Wood, a member of a labour protection league sued the president and secretary of that league as representors of its 4,000 other members. He brought this action to enforce a rule of the league which provided that in the event of a member being permanently disabled a levy of 6d. would be made on every member for his benefit. Although the Court granted an order (mandamus) directing the levy, Wills J. still sharply distinguished an action in tort from a beneficial or proprietary claim.[42] Of the authority on the other side, there is above all the famous *Taff Vale Case.*[43] The case raises wider issues, but its present relevance is that it shook the previous distinction between torts and beneficial claims. A registered union being sued for 'watching and besetting' the plaintiffs' servants and procuring breaches of contract, the main question was whether a union registered under the Trade Union Acts (1871 and 1876) was a suable legal entity. The contention had been (one also approved of by the Court of Appeal)[44] that a union could not be sued *eo nomine,* since registration did not constitute incorporation. On the other hand, the fact (as Farwell J.

37 *Ibid.,* at 247.
38 *Ibid.,* at 248.
39 [1893] 1 Q.B. 435.
40 *Ibid.,* at 438.
41 [1893] 1 Q.B. 775.
42 *Ibid.,* at 77-8.
43 Taff Vale Railway v. Amalgamated Society of Railway Servants, [1901] A.C. 426.
44 [1901] 1 K.B. 170.

had argued) that the legislature had authorised unions to hold property and to act through agents involved the correlative that unions were to be liable to the extent of their property for the acts and defaults of their agents.[45] Lords Macnaghten and Lindley closely followed this reasoning. "The registered name [the former said] is nothing more than a collective name for all the members;" in other words, registration was merely a substitute for the representative action which action, moreover, was available for suing a trade union, registered or unregistered, provided "the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body."[46] In Lord Macnaghten's opinion *Temperton v. Russell*[47] was an "absurb case", because the "persons there selected . . . were selected in defiance of all rule or principle. They were not the managers of the union—they had no control over it or over its funds. They represented nobody but themselves."[48] Lord Lindley, for his part, now retracted his own "unfortunate observations made on [Order 6, rule 9,] in *Temperton v. Russell* [which] have been happily corrected in this House in *Duke of Bedford v. Ellis*[49] and in the course of the argument in the present case."[50] In short, the difference between suing the union by representative action or suing the union as a registered body was a difference "not . . . of substance but of mere form."[51] Thus the union became liable not because of any 'corporate' theory, but because the members were anyhow liable for the acts of their agents, the representative action only making them suable as a whole. Lord Macnaghten's previous remarks make it perhaps advisable to bring the action against the officers controlling the union and its funds.[52] Subject to this qualification, however, there should be no further

45 [1901] A.C. at 429.

46 *Ibid.*, at 438.

47 See note 39 *supra*.

48 [1901] A.C. at 439. These strictures were not really justified, for in Temperton v. Russell the persons sued were the president and secretary of the union: see text at note 39 *supra*.

49 [1901] A.C. 1, at 10.

50 [1901] A.C. 1, at 443.

51 *Ibid.*, at 444.

52 But see Parr v. Lancashire & Cheshire Miners' Federation, [1913] 1 Ch. 366, where in an action concerning the mis-application of funds and expulsion, it was objected that the president, vice-president, treasurer and secretary did not represent the union and that the plaintiff should have sued the executive committee and the trustees. The former officials, Neville J. held, were quite sufficiently representative as defendants, though of course the committee and trustees could also have been joined.

doubt that a representative suit can serve in tort-actions to obtain an injunction or damages.[53]

Somewhat similar problems arose as regards claims in contract. In *Walker v. Sur*,[54] the plaintiff, an architect, sued for personal services, naming four defendants as representing an unincorporated religious society most of the members of which resided abroad. Vaughan Williams L.J., while saying that he did not thoroughly understand Order 16, rule 9, argued that the four defendants had been arbitrarily chosen: they were neither the committee, nor the managers, nor the trustees. Though rule 9 was certainly meant to facilitate suits against unincorporated aggregates of people, the rule did not leave it to the plaintiff's discretion as to who the representative defendants should be. But why, one must ask, was the selection of defendants so important, since any defendant, whoever he was, merely represented the members as a whole? Kennedy L.J. gave a somewhat better explanation. The defendants here selected and being sued had no common fund. Yet without such a fund it was impossible to fix the exact liability. Judgment for plaintiff would make liable a large number of persons, including incoming and outgoing members, though there was no reason why the latter should have to pay.[55] This difficulty also came up in *Barker v. Allanson*.[56] The plaintiff, in 1921, supplied goods to 89 out of 1083 members of a Durham miners' lodge. The members so supplied were quite unknown to the plaintiff who acted at the request of the lodge. Though between 1922 and 1930 the plaintiff received various payments on account, there remained a debt of some £136. When in 1936, the plaintiff started action for this amount, the majority of the 1921 members had died and only 19 out of the 89 members to whom goods were supplied were still members of the lodge. One question in debate was whether the plaintiff "could treat the existing members of the lodge as liable for the unpaid balance

53 Campbell v. Thompson, [1953] 1 Q.B. 445, is the most recent demonstration. The plaintiff was a former employee of an unincorporated members' club where she sustained injurieis in a fall on the club premises. Suing the chairman and secretary of the house committee as representing themselves and all other members, the latter were held liable for negligence as employers and occupiers of the club. After this decision it is doubtful what further significance can be attached to Brown v. Lewis, (1896) 12 T.L.R. 455, where the committee of a football club having employed an incompetent person to repair a stand for spectators which collapsed, the committee were held primarily liable.

54 [1914] 2 K.B. 930.

55 *Ibid.*, at 936-7.

56 [1937] 1 K.B. 463.

of the goods ordered in 1921."[57] The plaintiff contended that he had given credit to the lodge, and not to its individual members, so that a change in membership was immaterial to the issue. But the Court of Appeal rejected this: "The vital thing to remember [the Court said] is that judgment against representative defendants means judgment against each individual person covered by the representation . . . The reason why the position of all represented defendants must be the same as that of those who represent them is simply because that is the hypothesis on which alone such an order is authorised by the rule."[58] In 1936 there was obviously so little "identity of position" between the representors and representees that the latter were not really "represented" by the former. Such reasoning, it can be seen must eliminate the representative action wherever brought against the members of an unincorporated association, that is, nearly every significant case. Large memberships are bound to fluctuate, so that the required "identity of position" between representors and representees would only rarely exist. Moreover, if the Court's reasoning is pressed, we are soon brought back to the earlier but rejected argument, namely, that Order 16, rule 9, is not available for claims in damages, whether contract or tort, because at least new or incoming members could always say that their position was entirely different from the rest, since they could never have authorised what the agents did before their time.

Towards the end of his judgment Scott L.J. produced a more tenable point: "[We] are not prejudging a wholly different type of case which may conceivably arise some day in the event of a trade union or friendly society or a club having a rule which (a) authorises the distribution of goods by way of assistance in kind; and (b) treats the cash cost of supplying the goods as a charge upon the general fund."[59] Thus, if in the present case there had been such a rule authorising the officers of the lodge to give assistance in kind to be paid out of the fund and the members for the time being, irrespective of whether they were members at the time the assistance is advanced, the decision would have been different. Nor was this (as the judge thought)[60] an entirely hypothetical case, for *Wood v. McCarthy*[61] already discussed, came very close to the suggested facts. On the other hand, *Ideal Films Ltd. v. Richards*[62] could not be explained in this

57 *Ibid.*, at 472.
58 *Ibid.*, at 475.
59 *Ibid.*, at 476.
60 *Ibid.*, at 477.
61 [1893] 1 Q.B. 775; and see at note 41 *supra*.
62 [1927] 1 K.B. 374.

way.[63] There some films were supplied to a union branch of Welsh miners for exhibitions in their recreation hall, and the plaintiffs brought a representative action to recover the agreed price. The action succeeded, without anything being said about special rules charging the hiring money on the members or on their fund; the branch probably had no such specific rules. How then do we distinguish between this decision and that in *Barker v. Allanson.* The explanation must be found in an adaption of the *ultra vires* theory. In *Richards* the films were hired on behalf and for the benefit of all members of the branch: it was an incidental activity for such an association with a recreation hall. In *Allanson,* on the other hand, the supply of goods to needy members must be regarded as outside the usual purposes of a union branch, unless its members expressly agree to act as a society for mutual aid, so that at any rate new members may know that their contributions or their credit may be used philanthropically.[64] But this qualification apart, the deducible rule clearly is that a representative action will lie, or that Order 16, rule 9, will apply to the enforcement of contractual claims, providedt he relevant contracts are entered into for the benefit of all representees.[65]

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The essence of the matter then seems to be this. Our modern representative action is of two types. One type which only serves as

63 But compare Greer L.J. in Barker v. Allanson, *supra,* at 474.

64 'Philanthropic' may perhaps be too strong a word to express the assistance given to needy members. But the word is only intended to point to the difference between aid given to some or a few and contracts entered into on behalf of all members. *Laches* might perhaps have been an alternative ground defeating the plaintiff in Barker v. Allanson. He should have known that the membership was fluctuating and that the composition of the common fund would alter; knowing this, he should have tried to settle his account with the union much sooner than he did. Finally one may suggest that Barker v. Allanson was a wrong decision, to the extent that the supply to needy members should have been regarded as a usual or *intra vires* act: see, for example, Pare v. Clegg, (1861) 29 Beav. 589, 54 E.R. 756. Still, the decision whether right or wrong, does remind one that the agents of an unincorporated association may act outside the scope of their authority, and that when they do no representative action will lie.

65 For a different view, see Lloyd, *loc. cit.* 413-4.

66 The point in text only concerns actions *against* unincorporated associations. As far as actions *by* such bodies are concerned, the difficulties seem much smaller. For one can think of only one case where a representative action would be indispensable, namely, when an association sues for defamation. Otherwise, an association, not being a trading partnership, would have occasion to protect its property only, for which task one would think the trustees eminently suitable. But see Jarrott v. Ackerley, (1915) 85 L.J. Ch. 135 which (if going beyond the narrow construction of a property statute) defies understanding.

alternative procedure, since the parties can always sue or be sued either separately or jointly or by way of a test action. The convenience of representation thus simply consists of avoiding the cost and waste of multiplicity of suits. The other type of representative action is of much deeper significance. For rule 9 makes possible suits against large numbers of persons often far too numerous to be practicably brought into court.[66] Moreover, these persons would not, as defendants, be individually liable but only 'collectively' so, since the acts of their agents were done on behalf of them all. Convenience now becomes a necessity, if unincorporated or unregistered associations with no other suable status are at all to be liable in contract or in tort.[67]

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67 Of course, no such difficulty arises where the association is registered or incorporated: National Union of General and Municipal Workers v. Gillian, [1946] K.B. 81.

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