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Jurisdictional Amount in Representative Suits

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JURISDICTIONAL AMOUNT IN REPRESENTATIVE SUITS

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THIS discussion has as its center the problem of whether the claims of joined plaintiffs may be aggregated to constitute the amount required for jurisdiction in cases in which one or more may sue for the benefit of all. Federal cases are discussed almost exclusively because of the importance of the problem in federal practice and because of the confusion and conflicts found in the authorities.

A general test for determining when claims of joined plaintiffs may be aggregated for the purposes of jurisdiction was laid down by the Supreme Court of the United States in 1916:

"The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, is is enough if their interests collectively equal the jurisdictional amount."[1] In an earlier case the test was stated in part as follows:

"If several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction."[2]

In cases in which some of a class may properly sue for the benefit of all, "though the rights of the several persons may be separate and distinct," "there must be a common interest or common right, which the bill seeks to establish and enforce."[3] In a case at circuit Mr. Justice Nelson stated that the interest which

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[1]Pinel v. Pinel, (1916) 240 U. S. 594, 596, 36 Sup. Ct. 416, 417, 60 L. Ed. 817.

[2]Clay v. Field, (1891) 138 U. S. 464, 479, 11 Sup. Ct. 419, 34 L. Ed. 1044.

[3]Smith v. Swormstedt, (1853) 16 How. (U.S.) 288, 302, 14 L. Ed. 942.

will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only "an interest in the question, but one in common in the subject-matter of the suit."[4] This view was quoted with approval by Mr. Justice Shiras in 1897,[5] but in 1912 the equity rules provided that some may sue for all "when the question is one of common or general interest."[6]

From the above statements it appears that a representative suit may be employed only when the joined plaintiffs are seeking to enforce some "common interest" or "common right" or have a "common interest in the subject-matter" or "question" before the court, and that the claims of joined plaintiffs may be aggregated for the purposes of jurisdiction when the plaintiffs unite to enforce a "single title or right" in which they have a "common and undivided interest." It appears, also, that in either case the interests of the plaintiffs may be separate as among themselves.

The general tests for permitting the use of representative suits and for allowing aggregation of interests for purposes of jurisdiction being apparently identical, the conclusion would seem to follow that whenever a representative suit is properly employed the value of the interests of the plaintiffs as a group should be deemed the amount in dispute rather than the value of the separate interests of the individual plaintiffs. It is the writer's view that this conclusion should follow in each such case, but a reference to the decisions will show that in many cases where representative suits have been employed, either properly or without objection, permission to aggregate the interests has been denied.

Creditors' Suits

In the comparatively recent case of *Lion Bonding & Surety Co. v. Karatz*[7] a non-judgment creditor sought to have certain assets of a foreign corporation placed in the hands of receivers for the benefit of creditors. The plaintiff alleged that his complaint was on behalf of himself and all other parties similarly situated, but asked that the amount due him be ascertained and declared

[4]Cutting v. Gilbert, (C.C.N.Y. 1865) 5 Blatch. 259, 261, Fed. Cas. No. 3,519.

[5]Scott v. Donald, (1897) 165 U. S. 107, 115, 17 Sup. Ct. 262, 41 L. Ed. 648.

[6]Rule 38.

[7](1923) 262 U. S: 77, 43 Sup. Ct. 480, 67 L. Ed. 871.

a first lien upon the assets. Mr. Justice Brandeis remarked that the case was not like those "in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount." He also said:

"In the case at bar, if several creditors of the company, each with a debt less than $3,000, had joined as plaintiffs, the demands could not have been aggregated in order to confer jurisdiction. Nor can Karatz's allegation that he sued on behalf of others similarly situated help him."

While the plaintiff in the above case undertook to sue for the benefit of all similarly situated it is very doubtful whether he could be considered as representing any class of the defendant's creditors. Not having reduced his claim to judgment it would have been necessary for him to establish it in the suit, and in this contest no other creditor would have had any interest whatsoever. Furthermore, his demand that his claim be declared a first lien on the assets seems inconsistent with his allegation that he was suing for the benefit of all. As a non-judgment creditor he could not properly represent judgment creditors, and since only the latter could maintain a creditors' bill, he had no standing in equity either individually or as a representative. If Karatz had been qualified to represent the other creditors there was nothing to show that other creditors would come in with claims sufficient in amount to aggregate the minimum required for jurisdiction. Only by joining others with him as named plaintiffs would this have appeared, but even if he had done so it would have been unavailing according to the opinion of the court.

In *Stewart v. Dunham,* decided by the Supreme Court in 1885,[8] a bill had been filed by some creditors on behalf of themselves and "all other creditors who might come in and share the costs of the litigation," to reach property of the debtor alleged to have been fraudulently transferred. Some of the creditors proved up claims amounting to less than $5,000 and as to them it was held that the defendants could not appeal. "The matter in dispute as between the defendants and each of the plaintiffs was the amount of the claim of that plaintiff."[9] The first case cited as authority for the holding was *Seaver v. Bigelows* in which actual joinder in a

[8](1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329.

[9]Comment on Stewart v. Dunham, (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329, found in Gibson v. Shufeldt, (1887) 122 U. S. 27, 39, 7 Sup. Ct. 1066, 30 L. Ed. 1083.

creditors' bill was characterized as being "permitted by the mere indulgence of the court, for its convenience, and to save expense."[10]

In the leading case of *Clay v. Field*,[11] Mr. Justice Bradley gave a list of the "principal cases" in which the interest of the parties had been deemed "common and undivided" for the purposes of jurisdiction. In this list was *Handley v. Stutz*,[12] a creditors' suit decided earlier at the same term of court. In *Handley v. Stutz* several judgment creditors, for themselves and all other creditors, brought suit against a corporation and sixteen of its stockholders alleged to have paid nothing for their stock to require such stockholders to pay the sums due by them, and prayed that the fund so realized be administered by the court for the benefit of the creditors of the corporation. After pointing out that a bill of this kind could only be maintained by one or more creditors in behalf of all, and not by any one creditor to secure payment of his own debt to the exclusion of others, Mr. Justice Gray said:

a. As to trial court's jurisdiction:

"The sums alleged to be due from the corporation to the original plaintiffs amounting to more than $2,000 the circuit court had jurisdiction of the case, and authority to administer and distribute the amounts, due from the individual defendants to the corporation for unpaid subscriptions to stock as a trust fund for the benefit of all the creditors of the corporation, and for that purpose to permit creditors, who had not originally joined in the bill, to come in and prove their claims before a master."

b. As to appellate court's jurisdiction:

"The trust fund so administered and ordered to be distributed by the circuit court amounting to much more than $5,000, the appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some[13] of the creditors are less than that sum. It was immaterial to appellants how the sums decreed to be paid by them should be distributed, and (which is more decisive) such a bill as this could not have been filed by one creditor in his own behalf only, and the case does not fall under that class in which creditors, who might have sued severally, join in one bill for convenience and to save expense."

The features which distinguish *Handley v. Stutz* from cred-

[10](1866) 5 Wall. (U.S.) 208, 18 L. Ed. 595.
[11](1891) 138 U. S. 464, 480, 11 Sup. Ct. 419, 34 L. Ed. 1044.
[12](1890) 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706.
[13]The word "some" must have been used inadvertently as no claim as allowed by the master's report exceeded $5,000.

itors' suits in which claims of creditors cannot be aggregated for the purposes of jurisdiction were neatly summed up by a lower federal court in a case deemed similar to *Handley v. Stutz*. The judge said:

"Here, as in *Handley v. Stutz,* the fund sought to be distributed is in excess of the jurisdictional amount; and the claims of all the claimants are in the aggregate more than that amount; it is immaterial to the defendant how the sums . . . should be distributed; and this bill . . . could not have been filed by one creditor solely in his own behalf."[14]

(*a*) *Amount of Trust Fund.*—The reference made in *Handley v. Stutz* to the fact that the trust fund amounted to more than $5,000 is significant, but easily misunderstood. If the trust fund had not exceeded $5,000 no matter how large the claims of the creditors had been, either singly or in the aggregate, the amount in controversy would not have been sufficient. In a number of cases the chancery court of early New York held that claims of creditors could be added to obtain the amount required for jurisdiction,[15] but it also held that the property of the debtor, as claimed by the complaint, had to exceed the required amount in value.[16] On the other hand, if the claims of the creditors, when added, had fallen short of the minimum required, it is equally plain that the court would not have had jurisdiction as the creditors would have been entitled to recover judgment only for the amounts of their claims no matter how large the fund had been.

(*b*) *Claims of "Original" Plaintiffs.*—As to the trial court's jurisdiction, it was said: "The sums alleged to be due from the corporation to the original plaintiffs amounting to more than $2,000 the circuit court had jurisdiction." From this statement it is apparent that it was not the amount of the trust fund, but the amount claimed by the "original" plaintiffs, which determined jurisdiction.[17] At the beginning of the suit only the claims of the named or "original" plaintiffs were known and could be evaluated. While all the other creditors were represented and had a right to

[14]Jones v. Mutual Fidelity Co., (C.C. Del. 1903) 123 Fed. 506, 514.

[15]Dix v. Briggs, (1842) 9 Paige (N.Y.) 595; Sizer v. Miller, (1842) 9 Paige (N.Y.) 605; Bailey v. Burton, (1831) 8 Wend. (N.Y.) 339.

[16]Smets v. Williams, (1834) 4 Paige (N.Y.) 364; Van Cleef v. Sickels, (1834) 2 Edw. (N.Y.) 392.

[17]Furthermore, the court said: "The contest is upon the sufficiency in amount of the creditors' claims to support the jurisdiction of the circuit court in the first instance, and of this court on appeal."

come in, the amounts of their claims were unknown until proved before the master.

(*c*) *No Interest in Distribution.*—In practically all, if not all, creditors' suits there are at least two defendants—the debtor and the person who has the debtor's property. The defendant who has the property is interested only in holding it against the claims of the creditors as a group; once he has been ordered to give it up he loses all interest in it and it is immaterial to him how it will be distributed among the creditors. The debtor does have an interest in seeing that his property is distributed only to those creditors who have legitimate claims, but in the typical case the proceeding for proof of claims is but little more than a formality. In the federal courts and in many of the states claims must be reduced to judgment before they can be proved, and, so strict is this rule, it is further required that the judgments be local, as distinguished from foreign, judgments. The debtor cannot attack the judgments collaterally and there is little or no occasion for dispute between the debtor and any individual creditor.

(*d*) *Representative Suit Required.*—The fact that a creditors' bill such as was filed in *Handley v. Stutz* could not have been filed by one creditor in his own behalf alone but could only be maintained in behalf of all the creditors, was considered the "more decisive" feature of the case. This fact prevented the suit from being stigmatized as one in which the plaintiffs had joined merely for convenience and to save expense.

Taxpayers' Suits

Where an injunction is sought, some of the cases say that the amount in controversy is the value of the right or thing which the complainant seeks to enjoin.[18] In most cases, however, the test has been the value of the right which the complainant seeks to protect. Where several complainants join in a suit for an injunction a question often arises as to whether each must have an interest equal to the minimum required for jurisdiction or whether it is sufficient if the interests of all aggregate such amount. In *Russell v. Stansell* land within a particular district had been assessed for taxation, and three owners for themselves and as members of a

[18]Mississippi, etc., R. Co. v. Ward, (1862) 2 Black (U.S.) 485, 492, 17 L. Ed. 311, criticized by Prof. Dobie in (1925) 38 Harv. L. Rev. 733.
[19](1881) 105 U. S. 303, 304, 26 L. Ed. 989.

committee appointed at a mass meeting of the several owners, sought to have the collection of the tax enjoined. The amounts charged against the three named complainants individually were $7.58, $205.14 and $229.29, and no single individual among all the parties represented by the committee could in any event be made liable for an amount exceeding $2,500. The injunction was denied, and an appeal taken to the Supreme Court of the United States. The appeal was dismissed, Chief Justice Waite saying:[19]

"While the appellants, and those whom they have been chosen to represent, are all interested in the question on which their liability to the appellee depends, they are separately charged with the several amounts assessed against them. There is no joint responsibility resting on them as a body . . . .While the appellants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint is made, their object was to relieve each separate owner from the amount for which he personally, or his property, was found accountable. . . . Such distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal."

In *Ogden City v. Armstrong* the facts were much the same as in *Russell v. Stansell,* and it was held on the authority of that case that as the record disclosed that none of the complainants, save one, was assessed with an amount sufficient to have enabled him to take the case to the Supreme Court on appeal, the appeal must be dismissed as to such parties.[20] In *Rogers v. Hennepin County,* three complainants, for themselves and others like situated (numbering altogether five hundred and fifty), sought to enjoin the collection of a tax under forty dollars assessed against each of them. Defendants objected that the demands against all could not be aggregated in order to confer jurisdiction. The district court sustained the objection upon authority of *Wheless v. St. Louis*[21] and the Supreme Court, without discussion, held that it

[20] (1897) 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444.

[21] (1901) 180 U. S. 379, 382, 21 Sup. Ct. 402, 45 L. Ed. 563. In this case various lots of land threatened with assessment were owned in severalty and the assessment against no one lot amounted to $2,000. It was held that the trial court was without jurisdiction. Chief Justice Fuller said: "The 'matter in dispute' within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party . . . . The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected, or relieved, in a certain sum, and not in the whole amount of the assessment." It does not appear that a representative suit was employed, but the court's language seems broad enough to cover such cases.

committed no error in so doing.[22] In *Scott v. Frazier*[23] the complainants were taxpayers of North Dakota who alleged that the suit was brought "on behalf of themselves and all other taxpayers of the state." There was no allegation that the loss or injury to any complainant amounted to $3,000 and Mr. Justice Day said: "It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant."

In *Brown v. Trousdale,*[24] decided after *Russell v. Stansell* but before the other cases cited above, several hundred taxpayers of a county in Kentucky, for themselves and others associated with them numbering about 1,200, and on behalf of all other taxpayers of the county, "and for the benefit likewise of said county," filed their bill of complaint against certain officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection. An injunction was also asked as incidental to the principal relief, against the collection of a particular tax levied to meet the interest on the bonds. It was argued by counsel for appellees that claims cannot be aggregated to give jurisdiction, e.g. where several creditors unite in a suit in equity each claiming a pro rata share of common property, each creditor's right to appeal depends on his own claim. The court through Chief Justice Fuller said:

"The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs, and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in this regard."

[22] (1916) 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469.
[23] (1920) 253 U. S. 243, 40 Sup. Ct. 503, 64 L. Ed. 883.
[24] (1891) 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987.

As to the main proceeding the chief justice took pains to point out that the grievance complained of was common, not only to the named or original plaintiffs, but to all whom they professed to represent; that the relief sought could not be legally injurious to any of the taxpayers of the county; and that the interest of those who did not join was identical with the interest of those who did. This language of the chief justice is significant as it clearly shows that he considered the suit to be one in which one or more might properly sue for the benefit of all. He did not, apparently, think it necessary to go further and determine whether the joinder of plaintiffs was required or was merely for convenience and to save expense. The common interest necessary for a representative suit being present, the common interest necessary for aggregation was also present. The suit having been brought for the benefit of all the taxpayers, the taxes or charges which the plaintiffs,—i.e. all the taxpayers—sought to escape were in amount exactly the same as the taxes sought to be collected, i.e. the amount of the principal and interest on the bonds. This being true, there was no occasion to do more than glance at the amount of the bonds to see that the court had jurisdiction of the appeal.

That it was the interest of the complainants and not the value of the bonds which constituted the amount in dispute in *Brown v. Trousdale* seems certain from a remark of the court in a case decided a few years later. In *Colvin v. City of Jacksonville,*[25] a single taxpayer sought to restrain the issue, sale, etc., of a certain issue of bonds amounting to $1,000,000. It was held that the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy. Reference was made to the case of *El Paso Water Co. v. City of El Paso,*[26] decided subsequent to *Brown v. Trousdale,* in which it had been said:

"The bill is filed by the plaintiff to protect its individual interest, and to prevent damage to itself. It must therefore affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5,000."

In the *Colvin Case* it was stated that the *El Paso Case* was decisive, and that *Brown v. Trousdale* was not to the contrary.

[25] (1895) 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053.

[26] (1894) 152 U. S. 157, 159, 14 Sup. Ct. 494, 38 L. Ed. 396.

STOCKHOLDERS' SUITS

An appellate division of the supreme court of New York has said:[27]

"Representative actions in which one sues for the benefit of all are very common. Those with which we are most familiar are not only representative, but derivative in the sense that the plaintiff sues not in his own right, but in the right of another. Such are actions by a stockholder in the right of the corporation, or a creditor in the right of a receiver. The object of all such actions is to realize a fund to be paid, not directly to the plaintiff, but to the corporation, or receiver or other person in whose right the plaintiff sues, thence to be distributed among those entitled to share in it."

Since the object of a stockholders' suit is to assert rights of the corporation for its benefit and indirectly for the benefit of all the stockholders it is evident that those bringing the suit cannot have redress of wrongs done them individually. Whether the suit is by one stockholder, a few joined, all joined, or one or more for the benefit of all, the relief asked for is just the same, viz., protection of some right of the corporation. It is usual for such suits to be brought as representative suits, but if this form is not employed the suits are nevertheless in effect for the benefit of all.

In *Hill v. Glasgow R. Co.*[28] it was argued that the circuit court did not have jurisdiction because the complainant's interest in the controversy did not exceed $2,000. The circuit judge said:

"This position is not well taken. It overlooks and mistakes the true theory of the bill, which is not the assertion of the complainant's private right, but those of the company in which he has an interest."

The view expressed in the above case that it is the value of the interest of the corporation and not the value of the interest of the individual stockholder which determines jurisdiction has been stated in a number of other federal cases,[29] and is the accepted view. Since the interest of the corporation sought to be protected in a stockholders' suit is exactly equal in value to an aggregate of the interests of all the stockholders asserted in such suit,

[27]Atkins v. Trowbridge, (1914) 162 App. Div. 629, 636, 148 N. Y. S. 181, 186.

[28](C.C. Ky. 1888) 41 Fed. 610, 613.

[29]Larabee v. Dolley, (C.C. Kan. 1909) 175 Fed. 365; Hutchinson Box & Paper Co. v. Van Horn, (C.C.A. 8th Cir. 1924) 299 Fed. 424; Haynes v. Fraternal Aid Union, (D.C. Kan. 1929) 34 F. (2d) 305. Also see Carpenter v. Knollwood Cemetery, (D.C. Mass. 1912) 198 Fed. 297.

it is of no practical importance whether it be said that the one or the other is the amount involved.

In view of the fact that it is a right of the corporation which is sought to be protected by a stockholders' suit and in view of the further fact that any recovery must be for the corporation and in its name, it may be urged that the corporation is the real plaintiff in such a case and there is no occasion to consider the value of the interests of the stockholders who are named and represented as plaintiffs. Looked at apart from the mechanics of bringing the suit this would seem to be true, but it must be recognized that the stockholders are allowed to sue in their names because those having authority to sue in the corporation's name refuse to do so. The corporation must be made a defendant,[30] and where jurisdiction in the federal courts depends on diversity of citizenship the named plaintiffs must not be of the same state as the defendant corporation.[31] While the interests of the stockholders are secondary and derivative, they are nevertheless such as may properly give the stockholders the status of plaintiffs in the case.

There is another type of suit which may be called a "stockholders' suit" but which is not derivative in character,—a suit in which stockholders as such assert rights against the corporation. A case of this kind was very recently before the circuit court of appeals, second circuit.[32] Defendant corporation had made to the common shareholders an offer of the "right" to subscribe for one share of new stock for every ten shares held by them, at $45 per share, but later withdrew the offer. One Cohn, owner of 300 shares, filed a bill "on behalf of himself and any other shareholders who might join and share the expense of the suit" asserting that defendant's offer was not revocable, and praying a declaration that the withdrawal of the offer was unlawful, and that the defendant be directed to issue the promised warrants. Two other stockholders intervened as plaintiffs, one, the owner of 160 shares, and the other, the owner of 4,320 shares. The court held that Cohn's 300 "rights" were not worth $3,000 on the date of the filing of the bill; that the value of the first inter-

[30]Venner v. Great Northern Ry., (1909) 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666.

[31]New Jersey Central R. R. v. Mills, (1885) 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949.

[32]Cohn v. Cities Service Co., (C.C.A. 2nd Cir. 1930) 45 F. (2d) 687.

venor's 160 "rights" could not be "tacked to Cohn's to give jurisdiction, for each spoke in his several right;" and that the second intervenor's 4,320 "rights," which alone were sufficient in amount, could not give jurisdiction because the second intervenor was a citizen of the same state as the defendant.

In the above opinion no question was raised as to the propriety of one stockholder's bringing the suit for the benefit of himself and others. It was assumed apparently that the "question" whether the defendant's offer was revocable was one of "common interest" to the stockholders as a class. How much is involved in the decision of this common question? If the decision is made in a proper representative suit and is binding on all members of the class, it is easy to see that the amount in dispute is the value of the "rights" of all stockholders who have not received their new shares of stock. There may be some doubt as to whether a judgment in this type of representative suit is binding on members of the class who did not intervene, but there is no apparent reason why they should not be bound, especially if they know of the pendency of the suit in time to intervene. If, in such a suit, the court should hold that the offer was revocable, could other stockholders raise this question again and again in separate suits? In this connection it is well to recall the decision of the Supreme Court in *Supreme Tribe of Ben-Hur v. Cauble,*[33] decided in 1921. In 1913 a citizen of Kentucky and five hundred and twenty-three other complainants of states other than Indiana sued the Supreme Tribe of Ben-Hur, an Indiana society, in the federal district court of Indiana, to enjoin what was claimed to be an unlawful use of trust funds in which complainants and all other Class-A members had a common but indivisible interest. The suit was for the benefit of all Class-A members numbering more than seventy thousand. A decree in favor of defendant resulted. Actions against the society were later brought by Indiana holders of Class-A certificates in the state courts raising the same questions. The society by ancillary bill asked the federal court to enjoin these actions, claiming that the original suit was a class suit and that the rights of the Class-A holders were fully adjudicated therein. The lower court held that Indiana citizens were not bound by the decree in the original suit as such class suit did not include Indiana citizens, for if

[33] (1921) 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673.

it did there was no diversity of citizenship. The Supreme Court reversed this decision and called attention to the change in equity Rule 38 omitting a clause which had provided that decrees in representative suits should be without prejudice to absent parties. The court felt that it would be very unfortunate if some of a class should be bound by such a decree and others not.

In whatever court the *Cohn Case* is tried, if the decree is binding on all the stockholders, the amount in dispute will be the value of the interests of the stockholders as a class, and it is hard to see how the value of the interest of the stockholder who happens to institute the suit in any way controls or determines the amount in controversy in the suit.

Suits to Recover Money

When *joint* obligees are too numerous to be made actual parties to an action, one or more may sue for the benefit of all.[34] In such cases the amount in dispute is the sum due the parties jointly, and when that sum equals the minimum required for jurisdiction, it is of no consequence that the interest of each individual is less than the required amount. Speaking of the matter in dispute in *Shields v. Thomas,*[35] Chief Justice Taney said:

"It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

Where numerous persons, not *joint* obligees, have claims for money against the same defendant involving common questions of law or fact it may be convenient for some to sue for the benefit of all. The first of a series of interesting Kentucky cases dealing with the problem of jurisdictional amount in this type of representative suit was *Oswald v. Morris*[36] decided by the court of appeals of Kentucky in 1891. An action was brought by the assignee of an insolvent company to ascertain the ownership of

[34]George v. Benjamin, (1898) 100 Wis. 622, 76 N. W. 619; Hodge v. Nalty, (1899) 104 Wis. 464, 80 N. W. 726. These cases should be read together.

[35](1854) 17 How. (U.S.) 3, 15 L. Ed. 93.

[36](1891) 92 Ky. 48, 17 S. W. 167.

whiskey for which the company had issued various warehouse receipts. The court ordered the claimants to file their warehouse receipts and, to meet the expense of determining the true owners, directed that each holder pay a registration fee of ten cents per barrel. After the ownership had been established four of the claimants, by answer and cross-petition, sought to recover, for themselves and all others similarly situated, the money paid to the assignee, and other sums claimed by them under their warehouse receipts for leakage, and for taxes paid on such leakage. Judgment was in favor of the claimants for the leakage, and for the assignee on the other claims. The claimants appealed and there was a motion to dismiss the appeal for want of jurisdiction. The record showed that the registration fund amounted to over $7,000 and the tax on the excess of "outage" to nearly $4,000. It was argued that since each individual claim of the four claimants was less than $100 the trial court had no jurisdiction and that the claims of those suing and represented could not be added to constitute $3,000, the minimum required for an appeal. Without passing on the question raised as to the trial court's jurisdiction the court of appeals held that the claims could not be regarded as a unit for the purpose of an appeal. In reaching its decision the court held that the parties did not have the common or general interest required by the provision for representative suits. In so holding the question of whether claims less than the amount required for jurisdiction may be aggregated in proper representative suits to constitute the jurisdictional amount was left undecided. If any conclusion can be drawn from the opinion on this point, it is that where the parties have, within the meaning of the code, "a common or general interest," the claims of those represented as well as those named as plaintiffs may be considered in determining jurisdiction. The court said:

"Where there is really within the meaning of the law a common interest, and one sues for the benefit of all, the consent of those not parties to the suit is, in the absence of objection from them, to be presumed."[37]

The next case to be noticed is *McCann v. City of Louisville*[38] decided in 1901. Two suits were brought in the circuit court by

[37]Also see Flint v. Spurr, (1856) 17 B. Mon. (Ky.) 499, where it is said in syllabus: "Where parties claiming an interest are numerous, and suit is brought for their benefit, with others who are active in its prosecution, their assent to its prosecution will be presumed, unless they show their disapprobation."

[38](1901) 23 Ky. L. Rep. 558, 63 S. W. 446.

abutting property owners for themselves and all others to recover from the city the amounts paid by them to contractors upon apportionment warrants for the cost of construction of sundry dry cisterns, wells, fire hydrants, and water attachments constructed according to ordinances of the city. While these actions were pending thirteen hundred suits were brought in two justice of the peace courts by individual property owners to recover amounts paid on similar warrants by each of them respectively. Writs of prohibition were issued to the justices of the peace restraining them from trying the thirteen hundred cases. It was held that the two suits in the circuit court were proper representative suits, the question of the right of the property owners who paid the apportionment warrants to recover back the amounts paid involving "a common or general interest of all who made such payments," and the circuit court having acquired jurisdiction of all such claims, the justices of the peace had no jurisdiction. It was pointed out by the court that the purpose of the section authorizing some of a class to sue for all is "to avoid a multiplicity of suits and settle the rights of all parties having a common or general interest in one suit." The question of jurisdictional amount was not discussed, but as the amounts of the claims filed in the justice courts ranged from $10 to less than $1 it is clear that the circuit court had no jurisdiction of such claims if each claim was to be considered alone in determining the amount required for jurisdiction.

Later in the same year, 1901, *Oswald v. Morris* was expressly overruled and the *McCann Case* followed in the familiar case of *Commonwealth v. Scott*[39]. In a well-considered opinion the court of appeals held that one of a large number of taxpayers from whom a tax has been illegally collected may sue for the benefit of all to recover the sums paid, and that the amount in controversy in such an action, both in the trial court and for the purpose of an appeal by plaintiff, is the entire trust fund[40] sued for, and not mere-

[39] (1901) 112 Ky. 252, 23 Ky. L. Rep. 1488, 65 S. W. 596, 55 L. R. A. 597.

[40] It is doubtful that a trust fund was involved. See Whaley v. Comm., (1901) 110 Ky. 154, 23 Ky. L. Rep. 1292, 61 S. W. 35 where facts of similar case are given. There is nothing to show what had been done with the tax money and so far as appears there was no trust res. In the early case referred to as holding that money collected by illegal taxation is a trust fund (Blair v. Turnpike Co., (1868) 4 Bush. (Ky.) 157) the term "trust fund" was very loosely used, the decision being that taxes illegally collected for a turnpike should not be ordered paid to the turnpike company but should be held by the sheriff "until otherwise appropriated legally." The court added gratuitously that the sheriff "holds the money . . . as a trust fund for the benefit of the taxpayers who contributed that fund."

ly the amount of plaintiff's share of the fund. The court quoted at length from Pomeroy's justly-celebrated discussion of the jurisdiction of equity based upon the prevention of a multiplicity of suits, where he says that "the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy."[41]

Some two weeks after the decision of *Commonwealth v. Scott* the court handed down its opinion in *Gorley v. City of Louisville*.[42] In this case ten members of the police force sued for themselves and others to recover compensation for the services of plaintiffs as policemen. Defendant demurred on the ground that the circuit court had no jurisdiction "as to the subject of the action, neither of the plaintiffs having a claim, as set forth in their petition, in excess of $50," and on the ground that a representative suit was not proper. The demurrer was sustained by the trial court, but the decision was reversed on appeal. The *McCann Case* was relied on to show the propriety of employing a representative suit and having decided this point the court apparently thought it unnecessary to give further reasons for holding that the lower court had jurisdiction.

In 1917 a case was before the court of appeals in which several consumers of gas and electricity, for themselves and all other consumers within the city, sued the gas and electric company to recover overcharges.[43] Their several claims aggregated $172, the largest being for $25, and the smallest for $3. It was objected that the trial court had no jurisdiction as the claim of no one plaintiff exceeded the sum of $50. In holding that a representative suit could not be employed and that the lower court had no jurisdiction the court of appeals said:

"As the claim of neither plaintiff exceeds $50, the jurisdiction of the circuit court depended upon the fact whether one or more of the plaintiffs could sue not only for themselves, but also on

[41] 1 Pomeroy, Eq. Jur., 4th ed., sec. 269.

[42] (1901) 23 Ky. L. Rep. 1782, 65 S. W. 844, 846.

[43] Union Light, Heat & Power Co. v. Mulligan, (1917) 177 Ky. 662, 197 S. W. 1081, 1085.

behalf of all others having similar claims against the appellant, and in that way join claims sufficient to aggregate more than $50 in amount."

This statement plainly implies that in those cases where some may properly sue for all the aggregate of the claims determines jurisdiction, the only difficulty being whether the case is one in which some may properly represent the rest.

A case very similar to the last one was decided in 1920. Speaking of the code provision allowing some of a class to sue for all the court said:

"Under all of the authorities, there must be some community of interest in the subject-matter of the controversy before a court can exercise in one case jurisdiction over separate claims of different parties under which circumstances the jurisdiction depends, not upon the amount of one or all of the separate claims, but upon the amount or character of the subject-matter, that is, in the thing in which they have the community of interest."[44]

It is possible to apply this test to *Commonweath v. Scott* by considering the various sums paid by the taxpayers as one trust fund of which the court took jurisdiction for the purposes of distribution —a very doubtful view—but how can it be applied in the *Gorley Case* in which the policemen sought the amounts due them as compensation?

In the fairly recent case of *Duke v. Boyd County*[45] three policemen, in their own behalf and for the use and benefit of about twenty-five policemen and ex-policemen, sued to recover $6,514.25, being the aggregate amount of their claims against the county for arrests made under a statute providing for a fee of $5.00 to be paid any peace officer making an arrest under the act. It was held that a representative suit was proper, following the *Gorley Case,* but no question as to jurisdictional amount was raised. If that question had been raised, how could it be said that "jurisdiction depends, not upon the amount of one or all of the separate claims, but upon the amount or character of the subject-matter, that is the thing in which they have the community of interest?" In this case the 'subject-matter' or 'thing' in which the plaintiffs had a 'community of interest' was not the separate sums due each plaintiff but the common question of law involved, viz., whether the statute in question was constitutional. Where the common interest which makes a representative suit possible is a common

[44]Batman v. Louisville Gas & Electric Co., (1920) 187 Ky. 659, 220 S. W. 318.

[45](1928) 225 Ky. 112, 7 S. W. (2d) 839.

question of law or fact there is no 'subject-matter' or 'thing' which can be evaluated, and the matter in dispute should be deemed—as it apparently was in some of the earlier Kentucky cases—to be the aggregate of the interests of the plaintiffs in the suit.

IDENTITY OF THE COMMON INTERESTS

Two of the most useful tests for determining when the interests of joined plaintiffs may be considered common and undivided for the purpose of federal jurisdiction were applied in *Handley v. Stutz.* From what was said in that case and others it seems fairly safe to say that interests will be deemed common and undivided when (1) joinder of plaintiffs is required and (2) there is no occasion for separate contests between the defendants and individual plaintiffs. It does not follow necessarily, however, that if these tests are not met the interests will be deemed separate and distinct.

The first test cannot be applied alone as it may be that joinder will be required by some arbitrary rule although on the trial there will be separate contests between the defendants and the individual plaintiffs.[46] The second test cannot be applied alone for there may be cases in which the contest will be between the defendants and the plaintiffs as a group, yet, joinder of plaintiffs not being required, the case will be classified as one in which the plaintiffs are permitted to unite merely for convenience and to save expense.

In all suits brought properly by some for the benefit of all the contest is between the plaintiffs as a group on the one hand and the defendants on the other. There can be no separate contests be-

[46]In Oliver v. Alexander, (1832) 6 Pet. (U.S.) 143, 8 L. Ed. 349, seamen were required to join in a libel for wages yet it was held that the demands of the seamen could not be consolidated into an aggregate thus making the whole matter in dispute. Mr. Justice Story said: "Although the libel is thus in form joint, the contract is always treated in the admiralty according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his co-libellants. The defense which is good against one seaman, may be wholly inapplicable to another. One may have been paid; another may not have performed the service; and another may have forfeited in whole or in part his claim to wages. . . . The whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit; is in reality a mere joinder of distinct causes of action by distinct parties, growing out of the same contract." In Seaver v. Biglows, (1866) 5 Wall. (U.S.) 208, 18 L. Ed. 595, Mr. Justice Nelson cited Oliver v. Alexander and remarked that a creditors' bill is analogous to a proceeding in admiralty in behalf of seamen for wages. This analogy was far-fetched and unfortunate.

tween the defendants and individual plaintiffs, except, perhaps, incidentally or in a collateral proceeding. The plaintiffs constitute a 'class' and the main contest is between the defendants and that class. If the second test could be applied alone it would be fairly safe to say that in all proper representative suits the interests of the plaintiffs may be aggregated for the purposes of jurisdiction. But we cannot ignore the view often expressed that claims cannot be aggregated where joinder of plaintiffs is merely for convenience and to save expense.

The true representative suit as it developed in the old equity practice was considered an exception to the rule which required all persons materially interested in the subject-matter or object of a suit to be made parties to it either as plaintiffs or defendants.[47] Since representation was allowed as a substitute for required joinder, such joinder was not merely for convenience and to save expense. There developed, however, in equity practice a type of joinder of parties which was not required, but optional with the plaintiffs. Among the common situations in which joinder was deemed permissive were "when owners of separate lands united to enjoin a common injury or nuisance or the levy of an illegal tax or rate; when persons injured by the same or identical fraudulent misrepresentations sued to be put in statu quo; and when creditors who had recovered separate judgments against a common debtor brought a creditor's bill."[48] In most, if not all, of these situations representative suits may be employed, and it must be recognized that in such suits joinder is allowed for convenience and to save expense.

Creditors' suits fall into two distinct groups depending on whether joinder of plaintiffs is 'permissive' or 'required.' The basis of this distinction is not found in arbitrary rules of joinder, but in a consideration of whether the court is called upon to administer a fund for the benefit of all the creditors. If such a fund is to be administered the suit must be in effect, if not in form, for the benefit of all,[49] and in such a case the claims of the plaintiffs may

[47]Story, Eq. Pl. sec. 95.

[48]Clark, Code Pleading, 248.

[49]Iauch v. De Socarras, (1898) 56 N. J. Eq. 524, 527, 39 Atl. 381. Pitney, V. C., said: "That class of creditors' bills in which the suit can properly be said to be necessarily brought for the benefit of other creditors besides the complainant comprise those which seek to reach, establish, and administer assets in the hands of a trustee, who holds them either voluntarily, or, by force of circumstances, involuntarily, for the benefit of all the creditors. They may be classed as follows:

be aggregated to constitute the minimum required for jurisdiction. In certain situations, however, two or more creditors may sue for themselves alone to reach assets of their common debtor and when such assets are recovered they are not administered for the benefit of all the creditors but applied only, or at least primarily, to the payment of the plaintiffs' claims.[50] Joinder in such a suit is clearly permissive as each creditor could have sued alone.

The objects of the two types of creditors' suits are wholly dissimilar. In the one there is an interest in having a fund administered for the creditors as a class; in the other the plaintiffs are seeking to have their own judgments satisfied to the exclusion of the creditors as a class. In the one a representative suit may be properly employed; in the other such a suit is plainly an impossibility, i. e. without changing the nature of the suit. If, however, in a situation where some creditors are permitted to sue for their own benefit alone, they sue for the benefit of all, the character of the suit is entirely changed. The suit becomes one to administer a fund, and is not an equitable levy. It follows, then, that in all creditors' suits brought as representative suits the object is to have a fund administered for the benefit of all the creditors. Whether

"First. Suits to administer the estate of a decedent, held by an administrator or executor, and apply the same to the payment of his debt.

"Second. Where a living creditor voluntarily assigns property to a trustee for the benefit of his creditors, and a creditor seeks to have the trust administered.

"Third. Where there is an assignment by operation of law for the equal benefit of the creditors, such as occurred in all instances of attachments against foreign or absconding debtors under our statute, until the recent change in that respect.

"Fourth. Cases where a creditor of a corporation seeks to reach unpaid subscriptions to stock. . . .

"Fifth. A creditors' bill under our chancery act (sections 88, 94), in which equitable assets are reached by a receiver, and are all subject to the debts of the defendant, but are not distributed pari passu, and the complainant is first paid."

To the classes thus enumerated should be added other exceptional cases where the creditor is allowed to pursue his remedy in equity without first having reduced his claim to judgment. 5 Pomeroy, Eq. Jur., 4th ed. sec. 2317, p. 5137, citing Day v. Washburn, (1860) 24 How. (U.S.) 352, 16 L. Ed. 712.

In Elmore v. Speer, (1858) 27 Ga. 193, 73 Am. Dec. 729, it was said: "The assets which the creditor proposes to reach are not equitable, but legal assets. . . . A single creditor may file a bill to reach legal assets, and if he gains thereby a priority over other creditors, he will be entitled to retain it. . . . And when a single creditor is in pursuit of legal assets he cannot be forced to divide with other creditors. It is otherwise with equitable assets."

[50]Iauch v. De Socarras, (1898) 56 N. J. Eq. 524, 39 Atl. 381. Also see Freedman's Savings & Trust Co. v. Earle, (1884) 110 U. S. 710, 716, 4 Sup. Ct. 226, 28 L. Ed. 301.

the representative suit be one in which joinder is 'required' or one in which joinder is 'permissive' the object of the suit is just the same and the nature of the common interest is just the same. If the common interest in a 'required joinder' case is such as will permit the claims of the creditors to be aggregated for the purposes of jurisdiction, it is hard to see why the same common interest in a 'permissive' joinder case should not likewise permit aggregation.

In considering the nature of the interest of the plaintiffs in a taxpayers' suit it should be noted that an injunction may be sought "to prevent the creation of a debt which will necessarily result in increased taxation, to prevent the levy of a tax, to prevent a contemplated or pending assessment of a tax, to prevent the collection of a tax already assessed, to prevent a tax sale of lands, to restrain the issuance of a tax-deed," etc.[51] It is obvious that the rule as to who may or should be parties to the suit will depend largely on the stage of the proceedings at which the relief is sought. In the early stages the interests of all the taxpayers are closely united, while at the later stages they become separate and distinct. Where injunctions have been sought at the earliest stage, i. e., to prevent the creation of a debt which will necessarily result in increased taxation, it has been seriously argued that the grievance is purely a public grievance to be redressed on the application of the proper public authorities.[52] In a case at circuit in which a single taxpayer had sought to enjoin state officers from executing and issuing bonds intended as a donation to a railroad Mr. Justice Bradley denied the injunction because he thought that a man could not maintain a private suit for an injury sustained in common with every other citizen.[53] Where injunctions have been sought at a later stage, e. g., to prevent the collection of a tax already assessed, the rights to be protected have become so far distinct as to make it doubtful whether complaining taxpayers may properly join in such a suit or some sue for the benefit of all. In *Cutting v. Gilbert*[54] a bill had been filed by several bankers, as well for themselves as all others in the same interest, to restrain the collection of certain internal revenue taxes. While recognizing

[51]4 Cooley, Taxation, 4th ed., sec. 1656.

[52]4 Cooley, Taxation, 4th ed., sec. 1657.

[53]Morgan v. Graham, (C.C. 5th Cir. 1871) 1 Woods 124. In this connection see Crampton v. Zabriskie, (1879) 101 U. S. 601, 609, 25 L. Ed. 1070.

[54](C.C.N.Y. 1865) 5 Blatch. 259, 261, Fed. Cas. No. 3,519, quoted from with approval by the Supreme Court in Scott v. Donald, (1897) 165 U. S. 107, 115, 17 Sup. Ct. 262, 41 L. Ed. 648.

the desirability of preventing a multiplicity of suits it was held that the complainants could not join in the petition for injunction. In *Kvello v. City of Lisbon*,[55] decided by the supreme court of North Dakota in 1917, it was held that while one assessed owner might sue for himself and others to enjoin the collection of an assessment, it was error to enjoin collection from owners who had not actually come in and made themselves parties to the suit.

In determining whether the interests of the plaintiffs in a taxpayers' suit are sufficiently common and undivided to allow them to be aggregated for the purposes of jurisdiction, the stage of the tax procedure should be of controlling importance. In the early stages the interests are so closely united that it may be impossible to determine the value of an individual interest. In the later stages the interests become separate and distinct. The real problem is determining where to draw the line. It is the writer's view that the line should be drawn at the same place that it is drawn in determining whether a representative suit may be employed. If the taxpayers have a common interest that will make it proper for some to sue for the benefit of all they should be deemed to have a common interest for the purposes of jurisdiction.

In suits by stockholders brought to assert some right of the corporation it is clear that the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." It is this same common interest which makes it proper, if not necessary, for the suit to be brought as a representative suit for the benefit of all.

In suits to recover money if the plaintiffs have a *joint* right it is easy to see that the common and undivided interest which determines jurisdiction is the same common and undivided interest which requires joinder of plaintiffs or a representative suit where the plaintiffs are too numerous to be named as actual parties on the record. Where the plaintiffs are not *joint* obligees there is much doubt as to whether they can join at all in one action to recover their respective claims, to say nothing of allowing some to sue for the benefit of all. Where such a representative suit is permitted, as in Kentucky, (according to some of the cases) the interest which makes such a suit possible is apparently an interest in some common question of law or fact. As suggested above, the amount in dispute in such a case should be deemed to be the aggregate of the interests of the plaintiffs in the suit.

[55](1917) 38 N. D. 71, 164 N. W. 305, 310, 315.

Questions of Policy

In many situations it is exceedingly difficult to determine whether the interests of the plaintiffs are sufficiently common and undivided to allow them to be aggregated for the purposes of jurisdiction. It is equally difficult to decide whether one should be allowed to sue for the benefit of all. In determining when a representative suit may be properly employed the courts are concerned with substantial identity of interest and not with formal or technical rules of joinder. Before some may sue for all, the parties before the court and those represented must be in the same situation and alike interested in having the questions involved in the case decided a particular way. Having decided that there is a common interest that will permit the use of a representative suit, it seems wholly unnecessary to go further and try to decide whether joinder is required or is merely for convenience and to save expense. A distinction between 'required' and 'permissive' joinder seems artificial when compared with the substantial considerations which enter into a determination of whether a representative suit may or may not be employed.

While it is plausible to say that persons should not, at will, by merely uniting in an action, be allowed to create an interest equal to the minimum required for jurisdiction, other questions of policy must be considered. Whether the considerations which have led legislative bodies to limit the jurisdiction of certain courts to cases involving more than a certain amount, have been to save those courts labor, or to uphold their dignity, or to prevent litigants from injuring themselves by setting in motion more expensive machinery than needed for the protection of their rights, it seems certain that none of these reasons apply to representative suits in which the interests of the plaintiffs as a class aggregate the required amount. In a case like *Rogers v. Hennepin County*[56] where three complainants for themselves and others like situated (numbering altogether five hundred and fifty) sought to enjoin the collection of a tax under $40 assessed against each of them, the total amount involved would be well worth the attention of a busy superior court; the question, viz., the validity of the tax, would not be beneath its dignity; and, if the plaintiffs were allowed to proceed by means of a representative suit, the expense would likely be shared by many. What might happen in a state

[56] (1916) 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469.

having a minimum requirement and not allowing aggregation was pointed out long ago by the New York court for the trial of impeachments and the correction of errors. The chief justice called attention to the fact that judgments rendered in justices' courts were said to total more than judgments rendered in the supreme court and pointed out that if creditors having such judgments could not obtain the aid of a court of equity "a great amount of property might be fraudulently disposed of with impunity."[57]

[57]Bailey v. Burton, (1831) 8 Wend. (N.Y.) 339.