UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 26 | Number 2 Article 14

2-1-1948

Pleading and Parties -- Class Actions in North Carolina

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A recent Virginia decision held that certain operative facts must exist before the class action rule may be invoked.[1] Furthermore if such a suit is allowed there is a proper procedure for conducting it to which it must conform. The summary method in which the court disposed of the subject affords little as a guide to future cases. The North Carolina decisions have shown the same tendency with the result that the status of the law is at most problematical. This situation has arisen largely due to the inadequacy of the statute which permits such actions.

The North Carolina Code requires all parties to an action to actually join. There is an exception to this rule:

> "When the question is one of common or general interest of many persons or where the parties are so numerous that it is impractical to bring them all before the court one or more may sue or defend for the benefit of all."[2]

This provision was originally put in the Code to enact a rule of equity pleadings that where the parties to an action were very numerous or it was impractical to bring them all before the court, one or more could sue or defend for the benefit of those who did not actually join. The statute is so worded, however, that the North Carolina court has construed it to not only enact the equity rule ("parties are so numerous") but to enlarge its scope so as to permit a class action where "the question is one of common or general interest."[3] The problem is in determining what factors constitute each of these permissive clauses. Courts of other states cannot agree on these factors and the result has been a myriad of rules honored only in their breach.[4] The North Carolina decisions are so few that the status of the law in this state is indeterminate. The following construction which has been given the statute seems to at least be consistent with the North Carolina cases.

(1) Where the question is one of a common or general interest of many persons one or more may sue or defend for the rest. "Many" merely means more than one person since the emphasis of the clause is on "interest" and not on the impracticability of joinder.[5] Thus if two

[1] O'Hara v. Pittston Co., 42 S. E. 2d 269, 279 (Va. 1947).

[2] N. C. GEN. STAT. (1943) §1-70.

[3] Foster v. Hackett, 112 N. C. 546, 554, 17 S. E. 426, 427 (1893) ("Section 185 of the Code reaffirms this principle, and enlarges its operation, by allowing one to sue for all others, both where the parties are very numerous, and where they have common interests, in all actions, without regard to their nature."); Bronson v. Wilmington, North Carolina Life Insurance Co., 85 N. C. 411, 414 (1881).

[4] See Blume, *The "Common Questions" Principle in the Code Provisions for Representative Suits*, 30 MICH. L. REV. 878 (1932).

[5] Hilton Bridge Construction Co. v. Foster, 26 Misc. 338, 57 N. Y. Supp. 140 (1899) (The court decided that three persons were not so numerous as to make joinder impracticable but went on to observe that three did have a common interest in the suit and that such number was sufficient to constitute "many."); McKenzie v. L'Armoureux, 11 Barb. 516 (N. Y. 1851).

or more persons have causes of action so closely related that the joinder sections of the Code would permit, but not require, these persons to join in one action a class suit may be proper though, of course, it is not mandatory.

A case to which this clause is applicable arises when a tenant in common sues for possession of land in his behalf and in behalf of his co-tenants. The co-tenants do not have to join because the right to possession is deemed of common or general interest to them all.[6] The suit would seem proper under this clause if there was only one other tenant in common.

Of similar effect are the cases where representation of remaindermen is involved. The North Carolina court, contrary to the overwhelming weight of authority,[7] has held that a life tenant does not have a sufficient common interest with a vested remainderman to represent him.[8] On the other hand a remainderman *in esse* has sufficient common interest with a remainderman of the same class *in posse* to represent him.[9]

Other situations have arisen in this state where the statute has been invoked on a "common interest" basis rather than on the impracticability of joining all parties.[10] In most of these cases joinder of all parties would have been impractical but nonetheless it was not the test used in determining if the class suit was proper.

(2) Where the parties are so numerous as to make it impractical for all to join one may sue or defend for the benefit of the others. This provision is the true equity rule poorly stated. It seems to allow the class suit only in situations where impracticability of joinder exists because the parties are numerous. This was not the equity rule nor is it the North Carolina rule.[11] Where it is impracticable to join parties because they are out of the jurisdiction, are unknown, cannot be located, are not *in esse,* or for other reasons making it inconvenient or impossible to join them the class suit has been allowed.[12] Whether a number is so large that it would be impracticable to join all the parties is dependent, not upon any arbitrary limit, but rather upon the circumstances of each particular case.[13] The common interest which constitutes a

[6] Allred v. Smith, 135 N. C. 443, 47 S. E. 597 (1904); Foster v. Hackett, 112 N. C. 546, 554, 17 S. E. 426, 427 (1895).

[7] Jordan v. Jordan, 145 Tenn. 378, 239 S. W. 423 (1922).

[8] Springs v. Scott, 132 N. C. 548, 44 S. E. 116 (1903); Williams v. Hassell, 74 N. C. 434 (1876); Watson v. Watson, 56 N. C. 400 (1857).

[9] Beam v. Gilkey, 225 N. C. 520, 35 S. E. 2d 641; Yancey's Case, 124 N. C. 151, 32 S. E. 491 (1899).

[10] Jones v. Commissioners, 143 N. C. 59, 55 S. E. 427 (1906) (taxpayers); Nash v. Sutton, 109 N. C. 550, 14 S. E. 77 (1891) (church members).

[11] Foster v. Hackett, 112 N. C. 546, 554, 17 S. E. 426, 427 (1893); STORY, COMMENTARIES ON EQUITY PLEADINGS §§80-104 (2d ed. 1840).

[12] Smith v. Swormstedt, 57 U. S. 288 (1853); Etheridge v. Vernoy, 71 N. C. 184 (1874); Vann v. Hargett, 22 N. C. 31 (1838).

[13] *In re* Engelhard, 231 U. S. 646 (1914).

class under this clause is one in which joinder of all the parties would be required if it were not for the class action statute.

Many of the problems arising under the statute have been due, not to the ambiguity of the statute, but to its failure to cover verbally the particular situation.

Although the statute applies to actions at law and in equity it is silent as to the proper procedure for conducting such a suit. The courts have held that the action must be begun as a class action[14] and sufficient facts alleged to show the necessity of such a suit.[15] A court order is probably necessary permitting the class action and it is generally conceded to be discretionary with the trial court as to whether the requirements of a class suit have been met.[16] The represented parties should be allowed to actually join in the suit on request.[17] Those of the class who are effected by the judgment must contribute their ratable share to the expense of the suit.[18] The suit probably could not be discharged by the actual parties without the consent of those represented if it would in any manner prejudice the rights of the latter.[19] The suit has been held applicable to cases before administrative tribunals.[20]

All courts require those of the class who represent the others to meet certain requirements and yet the statute does not cover this point. Either plaintiffs or defendants may be represented[21] but one permitted to sue for another's benefit must show a personal interest in the action.[22] Those named as representatives must have an interest which is co-extensive and wholly compatible, mutual and not conflicting, with the interests of those whom they would represent.[23] Facts must be alleged to satisfy the court of the sincerity of the representation. Unless these requirements of adequate representation are met due process of law has not been afforded the absent parties.[24]

The statute says nothing as to the effect a judgment will have on the

[14] O'Hara v. Pittston Co., 42 S. E. 2d 269, 279 (Va. 1947).

[15] Foster v. Hackett, 112 N. C. 546, 554, 17 S. E. 426, 427 (1893); Vann v. Hargett, 22 N. C. 31, 36 (1838) ("When a sufficient reason to excuse the defect of parties is suggested by the bill.").

[16] *In re* Engelhard, 231 U. S. 646 (1914).

[17] Cobb v. Elizabeth City, 75 N. C. 1 (1876) ("We think the amendment made by the Judge, by permitting other taxpayers to be joined as plaintiffs, was within his power and was proper.").

[18] Farmers and Merchants Bank v. Federal Reserve Bank, 183 N. C. 546, 112 S. E. 252 (1922).

[19] Belmont Nail Co. v. Columbia Iron & Steel Co., 46 Fed. 336 (C. C. W. D. Pa. 1891).

[20] Note, 25 MICH. L. REV. 184-5 (1926).

[21] Thames v. Jones, 97 N. C. 121 (1887).

[22] Yarborough v. North Carolina Park Commission, 196 N. C. 284, 288, 145 S. E. 563, 567 (1928).

[23] Deal v. Sexton, 144 N. C. 157, 161, 56 S. E. 691, 693 (1907); *see* however, Perry v. Whitaker, 71 N. C. 477 (1874) (fact that the class had divergent views as to their rights did not make the class suit improper).

[24] Hansberry v. Lee, 311 U. S. 32 (1940).

absent parties and the cases have shown a reluctance to discuss the question.[25] The authorities are in dispute as to the considerations which determine the effect of the judgment.[26] The federal statute proceeds on the theory that the jural relations which constitute the class are the determining factor.[27] Others contend it hinges on whether joinder in the action would have been compulsory or permissive. The two views are not necessarily inconsistent and in effect they say that where the interests of the class are joint, common, or secondary so that the class would ordinarily be required to join then the judgment will be conclusive to all parties just as if they were before the court.[28] If the interests of the class are several so that the parties would be permitted but not required to join then they are accordingly permitted the effects of the judgment but not required to take them. The absent parties indicate their choice by actually joining in the action at some stage.[29] Notice of the action to the absent parties is probably not essential for the judgment to be binding[30] nor does the fact that the absent parties are under a disability change the result.[31]

This summation of the law is largely taken from court dicta and inferences drawn from the cases in which the problem has arisen. The statute affords little aid and the cases of other states construing similar statutes are in hopeless conflict.[32] The corresponding federal statute was recognized to be inadequate and was accordingly revised. It would seem that any clarification of the statute, which involves a field of law "receiving new recognition because of the growing number of instances where parties to litigation are multitudinous," would indeed be helpful.

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[25] Foster v. Hackett, 112 N. C. 546, 554, 17 S. E. 426, 427 (1893); Bronson v. Insurance Co., 85 N. C. 411, 415 (1881).

[26] See Wheaton, *Representative Suits Involving Numerous Litigants*, 19 CORN. L. Q. 399, 427 (1933).

[27] 2 MOORE, FEDERAL PRACTICE §23.04 (1938).

[28] Taylor v. Insurance Co., 214 N. C. 770, 200 S. E. 882 (1938).

[29] Farmers and Merchants Bank v. Federal Reserve Bank, 183 N. C. 546, 112 S. E. 252 (1922); First National Bank of Florence v. Edwards, 134 S. C. 348, 132 S. E. 824 (1926); Honesdale Co. v. Montgomery, 56 W. Va. 397, 49 S. E. 433 (1904).

[30] RESTATEMENT, JUDGMENTS §86 comment *h* (1942) ("If they [the absent parties] were adequately represented, however, it is immaterial that they were not given notice or did not know of the existence of the action."); *Contra:* Towle v. Donnell, 49 F. 2d 49 (C. C. A. 6th 1931).

[31] Carswell v. Creswell, 217 N. C. 40, 7 S. E. 2d 58 (1939).

[32] An illustration of the confusion which exists is in the indecision as to whether the statute is applicable to suits against unincorporated associations. See in this connection Notes, 10 N. C. L. REV. 313 (1932); 25 N. C. L. REV. 319 (1947).