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Class Actions in Montana under Rule 23(a)(3)

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NOTES

CLASS ACTIONS IN MONTANA UNDER RULE 23(a)(3)

Joinder of parties in civil litigation has presented a problem to Anglo-American courts for hundreds of years.[1] Eventually, the class or representative suit appeared as an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation (and hence subject to compulsory joinder) was so great that their joinder as parties in conformity with regular joinder rules was impracticable or impossible.[2] Rules developed for the class or representative suit were eventually codified in an advanced form both in code pleading jurisdictions[3] and in the federal courts.[4]

With the adoption of the Montana Rules of Civil Procedure,[5] Montana lawyers now have substantially the same procedural rules as those governing the trial of civil actions in the federal courts. In the field of class actions, much confusion has been encountered in the federal courts in applying Federal Rule 23 to various fact situations.[6] This is particularly true in the type of action designated by Federal Rule 23(a)(3).[7]

It is the purpose of this note to compare Rule 23(a)(3) with the procedures available under the superseded Montana code provision for representative suits and to discuss the possible utility of Rule 23(a)(3) in Montana in the light of Montana Rule 23(d).

Representative Suits and Class Actions Under the Code Pleading

There are two sections of the Revised Codes of Montana, 1947, which allowed actions to be brought on behalf of or against a group of persons without complying with joinder provisions.

The first of these, which was superseded by Montana Rule 23,[8] was section 93-2821. This section reads in part as follows: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

This is the so-called "representative suit" provision. This provision is framed as an exception to the compulsory joinder provision of the first part of section 93-2821, which requires joinder of all parties "united in interest" and provides for joinder of the recalcitrant proper party plain-

[1]Common-law compulsory joinder was discussed by the English courts as early as the year 1588. CLARK, CODE PLEADING 349 n.1 (2d ed. 1947).
[2]Hansberry v. Lee, 311 U.S. 32, 41 (1940); for a discussion of the history of the class suit see 3 MOORE, FEDERAL PRACTICE ¶ 23.02 (2d ed. 1948). (Hereinafter, 3 MOORE, FEDERAL PRACTICE (2d ed. 1948) will be cited 3 MOORE.)
[3]See, *e.g.*, REVISED CODES OF MONTANA, 1947, §§ 93-2821 and 93-2827. (Hereinafter, REVISED CODES OF MONTANA will be cited R.C.M.)
See, *e.g.*, FEDERAL RUES OF CIVIL PROCEDURE, Rule 23. (Hereinafter, the FEDERAL RULES OF CIVIL PROCEDURE will be referred to as the FEDERAL RULES.)
[5]Laws of Mont. 1961, ch. 13, § 83; R.C.M. 1947, §§ 93-2701-1 to 93-2711-7, inclusive. (Hereinafter, the Montana Rules of Civil Procedure will be refered to as the Montana Rules.)
[6]Note, 46 COLUM. L. REV. 818, 822 (1946).
[7]*Id.* at 825.
[8]Laws of Mont. 1961, ch. 13, § 83; R.C.M. 1947, § 93-2711-7.

tiff as a defendant. But, there appear to be two exceptions included in the "representative suit" provision of the section: (1) When the question is one of "a common or general interest, of many persons"; and (2) "when the parties are numerous, and it is impracticable to bring them all before the court."

The first exception would seem to allow a representative suit when the suit involved many persons who could be permissively joined in the action under the provisions of section 93-2811.[9] Although this has never been expressly stated by the Montana Supreme Court, it is supported by dictum in *State ex rel. Lewis & Clark County v. District Court*,[10] wherein the court stated: "It will be observed that [the representative suit provision] does not require that those for whom the suit is brought shall be 'similarly situated' to the plaintiffs named in the complaint, but that it is sufficient if they be commonly or generally interested in the subject matter involved in the suit, and thus the finely drawn distinctions which might grow out of the phrase 'similarly situated' are avoided."

The second exception would seem to be an exception only to the compulsory joinder provisions of the first part of section 93-2821, and allows a representative suit in cases where the parties are "united in interest" but are numerous and it is impracticable to bring them all before the court. This was recognized, although not explicity, by the Montana Supreme Court in *Cantrell v. Benefit Ass'n of Railway Employees*,[11] wherein the court seemed to find that the parties were united in interest, but held that the demurrer of the defendant on the ground of misjoinder of parties plaintiff was properly overruled in view of the second exception to section 93-2821.

It is significant to note that the Montana Supreme Court has construed the joinder statutes and the representative suit provision liberally, with a view toward promoting justice and avoiding multiplicity of litigation.[12]

A third instance under the code pleading of Montana where suit may be brought against a group of persons without joining all parties is set forth in section 93-2827.[13] This section is applicable only where the group of persons is joined together as an association and the group is defendant; it does not allow the association to sue in the name of the association.[14] The effect of an action brought under this section is somewhat narrower than the representative suit statute. The persons against whom the action is brought must be associated in a business and transacting such business under a common name, with the judgment to bind the joint property of all the

[9]"All persons having an interest in the subject of the action, and in obtaining the relief demanded,, may be joined as plaintiffs, except when otherwise provided by this chapter." This provision has been superseded by Montana Rule 20(a), R.C.M. 1947, § 93-2704-4.

[10]90 Mont. 213, 300 Pac. 544 (1931).

[11]136 Mont. 426, 348 P.2d 345 (1959).

[12]See *e.g.*, Cantrell v. Benefit Ass'n of Railway Employees, 136 Mont. 426, 348 P.2d 345, 349 (1959).

[13]"When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability."

[14]Doll v. Hennessy Mercantile Co., 33 Mont. 80, 81 Pac. 625 (1905).

associates. This being so, a judgment against the associates would have no effect on the individual property of the associates, which would not be true of a complsory-joinder type representative suit judgment.[15]

The statute may seem on its face somewhat broader than the representative suit statute in that there is no requirement that the members of the association meet the requirements for either compulsory or permissive joinder. The only requiremen would seem to be that the plaintiff state facts sufficient to constitute a cause of action against the association as an entity. However, it might be argued that this in effect is a requirement that the parties be united in interest, because the judgment would bind all members of the association and the joint property of the association. Thus, the fact that the association members are sued as an entity would seem to be a necessary recognition that all of the members of the association would be parties under the compulsory joinder statute.

The leading Montana case in which this section has been applied is *Vance v. McGinley*,[16] in which a suit against the president of a labor union was held not to be a suit against the union members under section 93-2827. The court, in dictum, stated that a voluntary association of laborers may be sued in its common name.

Section 93-2827, it can be seen, is limited to a special type of suitation where the plaintiff is bringing an action against any voluntary association in the name of the association. Because of the special nature of the action, this statute was not repealed by the adoption of the Montana Rules of Civil Procedure.[17]

Class Actions Under Federal Rule 23(a)(3)

The requirement that a class action concern only parties which would be joinable under either the compulsory joinder or permissive joinder statutes under code pleading has been modified somewhat by Federal Rule 23(a)(3). This rule states in pertinent part:

> If persons constituting a class are so numerous as to make it impracticable to ring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
> . . .
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

It should be noted that the parties must be so numerous as to make it

[15]See Richardson v. Kelly, 144 Tex. 497, 191 S.W.2d 857 (1945), wherein the judgment for plaintiff in what Professor Moore terms a "true" class action was held to bind the entire defendant class and resulted in individual liability. Professor Moore defines the "true" class action as "one wherein, but for the class action device, he joinder of all interested persons would be essential." 3 MOORE ¶ 23.08, at 3435. Thus, the "true" class action is the same as the compulsory-joinder type of representative suit.

[16]39 Mont. 46, 101 Pac. 247 (1909).

[17]*Supra* note 8.

impracticable to bring them all before the court in *all* Federal class actions,[18] while this is not true in the code pleading representative suit.[19]

Two of the difficulties which have attended the application of Rule 23 in the Federal courts are the conceptual tie-up of Rule 23(a) with joinder of parties[20] and the labels which Professor Moore has attached to the three situations in which the class suit is available.[21] Both of these have been extensively criticized by the commentators.[22] In this note, although each of the foregoing bear to some extent upon the problem, major emphasis will be placed upon the question of whether the judgment in a Rule 23(a)(3) action, which Professor Moore calls a "spurious" class action, is or should be binding upon absent parties.

Under the Rule 23(a)(1) and (2) types of action, there is little difficulty as to *res judicata*. A Rule 23(a)(1) action is one in which there would traditionally be compulsory joinder and it has been fairly well settled that the class is bound if adequately represented.[23] In a Rule 23(a)(2) action the specific property is within the control of the court and its disposition of the property is binding.[24]

Under Rule 23(a)(3), however, the Federal courts have held that parties who neglect or refuse to enter the suit are not bound by the decree.[25] This line of authority has severely limited the possible utility of the Rule 23(a)(3) type of action in the Federal practice. One writer feels that this restriction precludes suits under Rule 23(a)(3) from being properly designated as class suits.[26] At best, the institution of a Rule 23(a)(3) action has been considered an invitation to the absent parties to intervene in the action, within the framework of permissive joinder.[27]

Federal Rule 24(a)(2) provides for intervention as a matter of right when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.[28] As previously noted, under the current authority, the applicant will not be bound by the judgment if he does not intervene in a Rule 23(a)(3) action. Yet, he is in the anomalous position of being unable

[18]Professor Moore points out that there is a contrariety of opinion as to the meaning of "numerous" in the federal courts, with the determination depending largely upon the facts of the case. 3 MOORE ¶ 23.05. The word "numerous" must be read in conjunction with "impracticable," thus necessitating a case-by-case decision and precluding any general statement as to what number will suffice.

[19]In the alternate situation contemplated by section 93-2821, when the question is one of a "common or general interest, of many persons" the requirement of many persons has been held to be satisfied when only a few have an interest in the suit. 3 MOORE ¶ 23.05.

[20]See 3 MOORE ¶ 23.08, at 3435 n.6, and ¶ 23.10[1], at 3442.

[21]These are the "true" [Rule 23(a)(1)], "hybrid" [Rule 23(a)(2)], and "spurious" [Rule 23(a)(3)], class actions. 3 MOORE ¶ 23.03, at 3418, n.9.

[22]See, *e.g.*, Kalven & Rosenfield, *Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Note, 46 COLUM. L. REV. 818 (1946); Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORN. L. Q. 327 (1948); CHAFEE, SOME PROBLEMS IN EQUITY 243-58 (1950).

[23]Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

[24]Leadville Coal Co. v. McCreery, 141 U.S. 475 (1891).

[25]3 MOORE ¶ 23.11[3], citing, *inter alia*, Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85 (C.C.E.D.N.C. 1910) and Wabash Railroad Co. v. Adelbert College, 208 U.S. 38 (1908).

[26]Note, 46 COLUM. L. REV. 818, 825 (1946).

[27]3 MOORE ¶ 23.11.

[28]FEDERAL RULE 24; compare MONTANA RULE 24, R.C.M. 1947, § 93-2704.8.

to intervene as a matter of right because he is not bound by the judgment in the action, as previously noted.

An absent party may intervene with permission of the court upon timely application when his claim or defense and the main action have a question of law or fact in common.[29] Thus an absent party in a Rule 23(a)(3) action may intervene under these conditions.

This does not present much of a problem in the case of intervention prior to trial of the action on the merits because application for intervention would be timely if made at that point in the proceding. However, a problem arises when either the plaintiff or defendant representative has successfully prosecuted or defended the suit and the absent members of the class wish to share in the fruits of the decision.

The question has been most prevalent in the Fair Labor Standards Act cases, where courts have treated employee class actions as "spurious" and have held that employees who were not parties of record through intervention or otherwise could not benefit by the final judgment.[30] Often, courts have gone further and limited the time for intervention to some date in advance of the trial of the case.[31]

There are several lines of thought concerning intervention after the trial of the action.[32] If the absent parties are members of a successful plaintiff class, there is little reason for refusing to allow them to interview and share the results of the decision. The defendant has had his day in court and, it must be assumed, has defended himself as ably as possible. It is reasonable to allow the absent parties to prove their claims for redress against the defendant in an ancillary proceeding without requiring them to sue the defendant individually, thereby requiring both parties to go through the time and expense of re-litigating the questions of law and fact.[33]

Professor Moore argues that to allow intervention of absent parties plaintiff after judgment on the questions of law and fact would be to allow members of the class to sit back and take advantage of a favorable judgment, but not be bound by an unfavorable judgment.[34] It is argued that this, in effect, allows the party plaintiff two days in court. This question would only arise when the plaintiff class is unsuccessful. In effect, Professor Moore seems to feel that if the plaintiff wishes to be bound by the judgment, he should intervene before the judgment and take his chances on being bound by an unfavorable judgment as well as being able to share in the fruits of a favorable judgment.

These same arguments would seem to be as applicable in the case of intervention after judgment in the case of a defendant class.

There is the further question as to whether it is desirable to take the step of giving the courts the power to require the absent members of the

[29] *Ibid.*
[30] 3 MOORE ¶ 23.12, at 3474 nn. 16 & 17, citing, *inter alia*, Brooks v. Southern Dairies, Inc., 38 F. Supp. 588 (S.D. Fla. 1941), and Shain v. Armour & Co., 40 F. Supp. 488 (W.D. Ky. 1941).
[31] *Id.* at 3475 n.18, citing, *inter alia*, Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969 (S.D. Cal. 1942), and Lockwood v. Hercules Powder Co., 7 F.R.D. 24 (W.D. Mo. 1947).
[32] See 33 CORNELL L. Q. 327, 42 ILL. L. REV. 518, 46 COLUM. L. REV. 818.
[33] Such a procedure for Fair Labor Standards Act cases was suggested in Tolliver v. Cudahy Packing Co., Inc., 39 F. Supp. 337, 339 (E.D. Tenn. 1941).
[34] 3 MOORE ¶ 23.13, at 3476.

class to intervene or otherwise be brought into the suit and what requirements must be met in order for such a procedure to be in conformity with the due process requirement of the fourteenth amendment.

The Effect of Montana Rule 23(d)

With respect to class actions, the Montana Rules of Civil Procedure deviate from the Federal Rules of Civil Procedure in one important point. This is the inclusion of Rule 23(d)[85] in the Montana Rules which provides:

> (d) *Orders to Ensure Adequate Representation.* The court at any stage of an action under subdivision (a) of this rule may impose such terms as shall fairly and adequately protest the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment or of any other proceedings in the action, including notice to come in and present claims and defenses. When, notwithstanding such orders, the representation appears to the court inadequate fairly to protect the interests of absent parties, the court may, at any time prior to judgment, order an amendment to the pleadings, eliminating therefrom all reference to representation of the absent parties, and the court may order the entry of judgment in such form as to affect only the parties to the action and those adequately represented.

The inclusion of this provision may well be the answer to the problems which have plagued the federal courts in applying Rule 23(a)(3) and provides a means whereby the district court in the conduct of litigation has within its power an adequate procedure to make the class action binding upon all or any of the parties, at the court's discretion.

The first sentence of Rule 23(d) gives the court broad power to impose terms at any stage of the action which will protect the interests of the class. This includes, but is not limited to, the power to order that notice be given to absent parties of any proceeding in the action or give notice to the absent parties to come in and present claims and defenses.

There is some merit to the argument against allowing *res judicata* in federal class actions where the class is a defendant. The defendants named in the suit as representatives may be carefully picked by the plaintiff for their inability or reluctance to put on a strong defense. If the defendant class suffers an adverse judgment, then to have the absent parties bound by the judgment may be undesirable in such a case. Also, in the action in which the class is a defendant, there is often danger of collusion or unfair dealing.

Under Montana Rule 23(d), however, the concluding sentence allows the court to eliminate all class-representation aspects from the action, and thereby limit the suit to the parties actually present in court. This provision gives the court adequate power to meet the dangers described above when the class is a defendant. The court may eliminate the class suit aspects of a suit if it determines that there is collusion or unfair dealing

[85] R.C.M. 1947, § 93-2704-7.

or that the defendant representative is unable or reluctant to present a strong defense.

The Federal Advisory Committee proposed the rule later adopted as Montana Rule 23(d) in its May 1954 draft.[36] Professor Moore criticized this addition to Rule 23 on two grounds:[37] (1) It is an unwarranted interference with the rights of non-parties to choose their own counsel and press their claims as they see fit; (2) it would broaden the doctrine of *res judicata* which Professor Moore feels is beyond the scope of the Rules. Apparently with this criticism in mind, the Advisory Committee in its Proposed Amendment of 1955, changed the second sentence of the rule to read: "It may order that notice be given, in such manner as it may direct, . . . including notice to the absent parties *that they may* come in and present claims and defenses *if they so desire.*"[38] (Emphasis supplied.) The Committee stated in its Note to the proposed amendment: "The amended rule does not undertake to regulate the effect of res judicata upon the judgment in a class action."[39]

Apparently the Committee was careful to avoid any possibility of changing rules of *res judicata* because of the clause in the Enabling Act[40] which required that the Federal Rules must "neither abridge, enlarge, nor modify the substantive rights of any litigant." The Montana Rules of Civil Procedure were enacted by the legislature and are not rules adopted by order of court; therefore there is no substantive limitation to be considered,[41] the legislature not having seen fit to impose any such requirement as is found in the Federal Enabling Act.

A consideration of the effect which is to be given to a judgment in a class action must include the extent to which the due process clause of the fourteenth amendment limits the power of the court to make the judgment conclusive upon members of the class who are not actually parties or participants in the litigation.

The Supreme Court of the United States considered the limits of state action in this regard in the case of *Hansberry v. Lee*:[42]

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. [Citation.] A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R.S. § 905, 28 U.S.C. § 687, prescribe [citation]; and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. [Citation.]
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> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of

[36] MOORE, FEDERAL PRACTICE (pamphlet) 563 (1961).
[37] *Id.* at 563, 564.
[38] *Id.* at 562.
[39] *Id.* at 563.
[40] 28 U.S.C.A. § 20.72 (1959).
[41] Laws of Mont. 1959, ch. 255.
[42] 311 U.S. 32 (1940).

the class are parties, may bind members of the class or those represented who were not made parties to it. [Citation.]

[T]he Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgment in class suits [citation]; nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests . . . this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of absent parties who are to be bound by it. [Citation.]

. . . Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single question of fact or law, a state could not constitutionally adopt a procedure whereby some of *the members of the class could stand in judgment for all,* provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. [Emphasis supplied.]

It is submitted that the Montana legislature, in adopting Rule 23(d), has adopted a procedure whereby some members of the class can constitutionaly "stand in judgment for all." Rule 23(d) contains all of the provisions necessary to insure the protection of absent parties to the suit, and particularly contains provisions which are devised to insure that those present are of the same class as those absent and which enable the court to conduct the litigation so as to insure the full and fair consideration of the common issue. This the court may do at any stage of the action by imposing such terms as it deems necessary to protect the absent members of the class, including giving notice to the absent members of any of the proceedings in the action or notice to come in and present claims or defenses. If, prior to judgment, the court still believes that the representation was inadequate to protect the interests of absent members of the class, it may delete any reference in the pleadings or in the judgment to persons who are not parties to the proceeding or who were not adequately represented. If members named by the representative as being purportedly members of the class appeared to the court not to be of the same class as the representative, then the court could eliminate all reference to them in the pleadings or the judgment.

In view of the opening of the door by the Supreme Court of the United States by the foregoing language to the application of *res judicata* in Rule 23(a)(3) actions, there would seem to be no valid reason for the Montana courts to fail to respond to the opportunity to realize the full utility of this type of action.

As to the contention of Professor Moore that Rule 23(d) is an unwarranted interference with the rights of non-parties to choose their own counsel and to press their claims as they see fit, it would seem that this argument could be answered by the rationale which led to bills of peace

and class actions at the outset—the desire to avoid multiplicity of suits and to bring litigation to a speedy end in one action.[43]

Notice Requirements Under Rule 23(d)

It is arguable that *Hansberry v. Lee* stands for the proposition that due process requirements in a Rule 23(a)(3) action are satisfied if those representing the class are actually of the same class as the absent members and there is adequate representation[44] and that notice to the absent parties would only be required if necessary to insure that there was adequate representation. The language of the Court might be taken as impliedly modifying the requirements set forth as early as 1850[45] that a party be afforded notice and a reasonable time and opportunity to be heard.

However, assuming that no judgment will be binding on members of the class who do not receive notice of the pendency of the action, there is a question as to what notice will be adequate to bind members of the class. If the notice requirements are construed to be the same as the requirements for service of process in order to obtain personal jurisdiction, then there is little utility in bringing a Rule 23(a)(3) action, because if there can be service of process sufficient to allow personal jurisdiction, there might as well be joinder of the absent parties.

The broad limits to which requirements of notice have been extended are best illustrated by reference to *Mullane v. Central Hanover Trust Co.*, wherein the Supreme Court of the United States stated:[46]

> 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> The Court has not committed itself to any formula . . . determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensible to the process due to residents, and it has more often been held unnecessary as to nonresidents. . . .
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation.] The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. [Citation.] But if with due regard for the practicalities and peculiarities of the case these conditions are

[43]See Mason, *The Montana Rules of Civil Procedure*, 23 MONT. L. REV. 1, 42 (1961), wherein Professor Mason states: "Of course, it is to be assumed that a court will not unwarrantably interfere with the rights of nonparties by compelling appearance of persons who have their own suits pending and who object for good cause to being brought into the class action."

[44]See *supra* at note 42, particularly the last paragraph of the excerpt.

[45]"No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice and an opportunity to make his defence." Boswell's Lessee v. Otis, 9 How. 336 (1850).

[46]338 U.S. 306, 314-315 (1949).

reasonably met, the constitutional requirements are satisfied. . . .

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . . or, when conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Following the requirements set forth by the *Mullane* case, when the names of the absent parties are known to the representative, and hence available to the court, actual notice to all of the absent parties is necessary if the judgment is to be binding upon them. However, as is often the case in Rule 23(a)(3) actions, if the members of the class are so numerous as to be impossible of ascertainment, the court would be charged with the responsibility of choosing the means of notice which would be most likely to inform the absent members of the suit. It is conceivable that if the court is convinced that there is adequate representation of the parties by the representative and the absent parties are impossible of ascertainment, a judgment rendered would be binding upon the class, consistently with due process requirements, even though notice had been only by publication.[47]

A further point to be examined is whether any of the other Montana Rules of Civil Procedure place a limitation upon the manner of giving notice. Of particular importance are Rules 4[48] and 5.[49]

Rule 4 deals almost exclusively with service of the summons and complaint when the action is instituted. The only place there is a departure is in Rule 4D(4),[50] which provides:

> Whenever a statute of this state or an order of the court made pursuant thereto provides for the service of a summons or of a notice or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute or order.

Examining this provision in connection with the terms of Rule 23(d), one can see that this Rule does not change the wide discretion of the court under Rule 23(d) to direct the manner of giving notice. The statute (Rule 23(d)) does not prescribe any manner of making service, but leaves that to the discretion of the court. Thus, the provision of Rule 4D(4) merely provides that service shall be made in the manner prescribed by the order of the court, which has complete discretion under Rule 23(d) as to the manner of giving notice. To require notice to be given in the manner

[47]In Walker v. Hutchinson City, 352 U.S. 112 (1956), the Supreme Court affirmed its recognition that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.
[48]R.C.M. 1947, § 93-2702-2.
[49]R.C.M. 1947, § 93-2702-3.
[50]R.C.M. 1947, § 93-2702-2.

prescribed in Rule 4 for service of the complaint and summons would be, as pointed out earlier, to destroy the utility of the Rule 23(a)(3) action.

It is apparent from reading the entire language of Rule 5,[51] that it was not designed with the class suit in mind, at least insofar as service upon persons not nominally parties to the suit is concerned. Rule 5(b) by its language seems to be speaking entirely of persons who are parties to the suit. This would have reference to the persons who were prosecuting or defending the suit as representatives of the class and would not have refernce to absent members of the class, who are not technically parties in the sense obviously contemplated by the provisions of Rule 5.[52]

That neither Rule 4 nor Rule 5 were intended to apply in the case of notice under Rule 23(d) is strengthened by the language of that rule, particularly the phrase: "It [the court] may order that notice be given, *in such manner as it may direct. . . .*" (Emphasis supplied.) If the legislature had intended the requirements set forth by either Rule 4 or Rule 5 to be applicable to the notice provided for in Rule 23(d), it would seem only reasonable thta the legislature would have made specific reference to either of the rules rather than allowing the court to have discretion in directing the manner in which such notice be given.

In the final analysis, the adequacy of any notice would normally be decided in a collateral proceeding in which the absent party controverted the effect of the judgment as binding upon the class. The possibility that the notice given might be found inadequate in such a later proceeding should be no basis, however, for the courts to be reluctant to utilize the Rule 23(a)(3) action to the fullest possible extent in the appropriate case.

Conclusion

The legislature, with the inclusion of Rule 23(d) in the Montana Rules of Civil Procedure, has provided the courts of Montana with a means of taking advantage of the full utility of the Rule 23(a)(3) type of class action, together with the means of overcoming the constitutional and other difficulties heretofore encountered in application of Rule 23(a)(3) in the federal courts.

The courts have two alternative methods of satisfying the requirements of *Hansberry v. Lee* that those present must be of the same class as those absent and that the litigation must be so conducted as to insure the full and fair consideration of the common issue. First, the courts may impose such terms as they deem necessary, including notice to the absent parties at any stage of the action, so as fairly and adequately to protect the interests of those parties. Secondly, if the courts still find that the representation is inadequate to protect the interests of the absent parties, they may eliminate all reference to representation of these parties and allow the judgment to be entered only in such form which would affect the parties who are present or adquately represented.

[51]This rule deals with the service and filing of pleadings and other papers subsequent to the original complaint.

[52]See quotation from Hansberry v. Lee, *supra* at note 42: "[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented *who were not made parties to it.*" (Emphasis supplied.)

By full and judicious use of the procedure available to them, the courts of Montana can realize in the case of a Rule 23(a)(3) action the goal of the adoption of the new Rules in Montana—"the just, speedy, and inexpensive determination of every action."[53]

CONRAD B. FREDRICKS

COMPENSATION FOR TAKING OF FLOWAGE EASEMENTS BY CONDEMNATION

INTRODUCTION

The purpose of this paper is to discuss the issue of whether or not flowage easements are "private property" requiring just compensation for a taking by condemnation under the fifth amendment to the Constitution of the United States. A flowage easement, as the term is used in this discussion, refers to the right of one owner to flow water upon the land of another by maintenance of a dam.

Reduced to its elements, eminent domain is nothing more than the power of the sovereign to take property for public use without the consent of the owner.[1] Anything else found in the numerous definitions which have received judicial recognition merely states a limitation or qualification of the power.[2] Eminent domain as a separate identifiable concept can be traced to the natural law movement of the seventeenth century,[3] although the power to take private property for public use has doubtless been exercised since the days of the Romans.[4] Hugo Grotius apparently originated the phrase "eminent domain" in 1625.[5] He used the term to designate the power of the state over private property within its bounds, and although his theory of eminent domain was not adopted in the United States, it provided a basis for the solution of the problems which have arisen in the integration of the doctrine into our modern law. One writer has said: "Briefly stated, the concept of eminent domain created by the natural law movement rested, no matter whether the superior right of the state over private property or the idea of sovereignty was the basis, upon concepts of the power of government."[6] The Supreme Court of the United States early recognized that in a civil society, the property of a citizen or subject is subject to the lawful demands of the sovereign.[7] Thus the court has said: "The right of eminent domain is the offspring of political necessity and is inseparable from sov-

[53]MONTANA RULE 1, R.C.M. 1947, § 93-2701-1.
[1]Scott v. Toledo, 36 Fed. 385, 394 (C.C.N.D. Ohio 1888).
[2]1 NICHOLS, EMINENT DOMAIN § 1.11 (Sackman and Van Brunt, 3d ed. 1950). (Hereinafter, NICHOLS, EMINENT DOMAIN (Sackman and Van Brunt, 3d ed. 1950) will be cited NICHOLS.)
[3]1 THAYER, CASES ON CONSTITUTIONAL LAW 945 (1895).
[4]1 NICHOLS § 1.12.
[5]5 DE JURE BELLI ET PACIS, Lib. III, C. 20.
[6]Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942).
[7]Legal Tender Cases, 79 U.S. 457, 551 (1870).