
January 1957

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Recommended Citation

L. A. Duffy, Comment, *The Doctrine of Virtual Representation in Texas*, 11 Sw L.J. 210 (1957)
<https://scholar.smu.edu/smulr/vol11/iss2/7>

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THE DOCTRINE OF VIRTUAL REPRESENTATION IN TEXAS

Of universal application in the United States is the rule that judgments and decrees are binding only upon the parties to the controversy. Like many legal rules, equity has developed exceptions to alleviate what in some instances would be an intolerable result. The doctrine of virtual representation, more popularly known as the class suit, is such an exception. Developed in the equity courts of England, this rule has been generally accepted in varying forms throughout the country,¹ and several states have adopted the doctrine by statute.² Texas, at one time or another, has applied almost all facets of the rule, although only part of it has been codified.³

ELEMENTS OF THE DOCTRINE

The doctrine of virtual representation recognizes that there are situations where all requisite parties cannot appear before the court, and therefore provides that the absent proper parties can be represented by persons present who hold the same interest in the controversy and who will therefore adequately protect the absent proper parties' interest. Absent parties will in fact be *virtually represented* and justice will not fail because of their absence.⁴ The doctrine is most often applied in cases involving numerous parties, *i.e.*, where proper parties with identical interests are so numerous that all of them cannot be conveniently brought before the court. Such cases arise in receivers' suits to assess insurance subscribers' liability,⁵ proceedings to determine water rights,⁶ suits to determine tax liability of a given class,⁷ and suits to enforce stockholders' rights.⁸ Other

¹ STORY, EQUITY PLEADING § 96 (10th ed. 1892).

² Examples of specific code provisions are: CAL. CODE CIV. PROC. § 373.5 (Deering 1953); MO. REV. STAT. § 507.070 (1949); NEB. REV. STAT. § 25-319 (1943); OHIO REV. STAT. § 2307.21 (1953).

³ TEX. RULES CIV. PROC. ANN. rule 42 (1955); TEX. REV. CIV. STAT. ANN. art. 2320 (b), 2320 (c) (1950); TEX. TRUST ACT ANN. art. 7425b-25 (E) (1951).

⁴ A typical situation is the case where there are numerous parties plaintiff and some are beyond the jurisdiction of the court. To prevent a dismissal, the court may determine whether the absent parties' interests are substantially identical with the interests of the parties plaintiff. If such is found to be the case, the court can set out in its judgment that the absent parties were virtually represented and that the judgment is binding as to them as well as to the actual parties to the suit. *Bearden v. Texas Co.*, 60 S.W.2d 1031 (Tex. Comm. App. 1933).

⁵ *Gray v. Moore*, 172 S.W.2d 746 (Tex. Civ. App. 1953) *error ref. w.o.m.*

⁶ *Hidalgo County Water Improvement Dist. No. 2 v. Cameron County Water Control and Improvement Dist. No. 5*, 253 S.W.2d 294 (Tex. Civ. App. 1952) *error ref. n.r.e.*

⁷ *Harris County Tax Assessor-Collector v. Reed*, 225 S.W.2d 586 (Tex. Civ. App. 1950), *rev'd on other grounds*, 149 Tex. 122, 229 S.W.2d 787 (1950).

⁸ *Continental Oil Co. v. Henderson*, 180 S.W.2d 998 (Tex. Civ. App. 1944) *error ref. w.o.m.*

facets of the doctrine involve unborn remaindermen,⁹ *i.e.*, where members of the class are unborn; unascertained members of a class,¹⁰ *i.e.*, where executory interests have not vested; and trusts, where the trustee is permitted to represent the cestuis que trust.¹¹ Note that in all instances except trusts there is a common interest between the representative and the class. In the case of trusts there is a representative because of the nature of trusts.

All facets of the doctrine are governed by four rules, the compliance with which is a prerequisite to a valid judgment binding all parties. These rules, in order, are (1) the representatives of the class must have the same interest in the controversy as the class represented,¹² (2) the representatives must have no interests in the suit antagonistic to the interests of the class,¹³ (3) there must be no fraud or collusion, nor may there be a friendly suit,¹⁴ and (4) the court must find in its judgment that the class was fairly and adequately represented.¹⁵ Due process of law is complied with so long as these rules are followed,¹⁶ and what is adequate representation is within the court's discretion.¹⁷

APPLICATION OF THE DOCTRINE

The first appearance of the doctrine of virtual representation in Texas was in *Carleton v. Roberts*,¹⁸ where an objection was raised that there were numerous interested subscribers who were not named parties-plaintiff to the suit. This contention was answered by the Commission of Appeals as follows:

While the rule that all parties in interest ought to be made parties is well established, so also are the exceptions to it. One is where (as the petition in this case discloses) the parties are very numerous, and it would be impracticable to join them; that it would produce interminable delay and would probably obstruct the purposes of justice.¹⁹

The petition clearly indicated that the subscribers constituted the

⁹ *Weinburg v. Werft*, 309 Ky. 731, 218 S.W.2d 398 (1949).

¹⁰ *Groves v. Burton*, 123 N.E.2d 204 (Ind. App. 1954).

¹¹ 3 BOGERT, TRUSTS AND TRUSTEES § 593 (1946).

¹² *Richardson v. Kelly*, 144 Tex. 497, 191 S.W.2d 857 (1945).

¹³ *Matthews v. Landowner's Oil Ass'n*, 204 S.W.2d 647 (Tex. Civ. App. 1947) *error ref. n.r.e.*

¹⁴ *Knioum v. Slattery*, 239 S.W.2d 865 (Tex. Civ. App. 1951) *error ref.*

¹⁵ *Knioum v. Slattery*, *supra* note 14.

¹⁶ *Hoffman, Denial of Due Process Through Use of the Class Suit*, 25 TEXAS L. REV. 64 (1947). See also *Ussery v. Darrow*, 238 Ala. 67, 188 So. 885 (1939).

¹⁷ *Felton v. Kansas City M. & O. Ry. Co.*, 143 S.W. 650 (Tex. Civ. App. 1912); *Tyree v. Road Dist. No. 5, Navarro County*, 199 S.W. 644 (Tex. Civ. App. 1917) *error ref.*

¹⁸ 1 Posey 587 (Tex. Comm. App. 1880).

¹⁹ 1 Posey at 593.

citizens of Bonham and vicinity, that the class interest was fairly represented, and that plaintiffs were members of that class. The authority for the holding was Story's *Equity Pleading*, Sections 94, 97, 114a and 115.

The doctrine was next recognized in the case of *Miller v. Foster*,²⁰ another Commission of Appeals case, in which a will providing for contingent remaindermen was set aside. The court held that since members of the class were minors, a guardian ad litem was necessary, and his representation of the living contingent remaindermen was deemed to be the representation of the interests of the unborn contingent remaindermen. Upon a finding that the necessary requirements were followed, the court held that the order setting aside the will was final and binding on all interested parties. The Supreme Court approved the result of the case, but it is not clear that the Court also adopted the doctrine of virtual representation, since two alternative reasons were given for the holding by the Commission of Appeals.

These two cases were the sole authority for the doctrine of virtual representation until the turn of the century, when a flurry of cases involving the numerous parties aspect of the rule were decided in various courts of appeals.²¹ By 1919, the Court of Civil Appeals in *City of Dallas v. Armour*²² said:

We apprehend that it is unnecessary at this time to cite authority in support of the right in equity to maintain class suits (involving numerous parties.)

This view was crystalized in Rule 42 of the Texas Rules of Civil Procedure. Unfortunately, Rule 42 applies only to cases where parties are too numerous. With the exception of Articles 2320b,²³ 2320c,²⁴

²⁰ 76 Tex. 479, 13 S.W. 529 (Tex. Comm. App. 1889).

²¹ *Standard Light & Power v. Munsey*, 33 Tex. Civ. App. 416, 76 S.W. 931 (1903) *error ref.*; and cases cited note 17 *supra*.

²² 216 S.W. 222, 224 (Tex. Civ. App. 1919) *error ref.*

²³ Article 2320b, TEX. REV. CIV. STAT. ANN. (1950), provides for the appointment of a receiver to lease oil and gas interests where the owners are either out of state residents or residents whose whereabouts have been unknown for the preceding five years. The court retains control over all acts done by the receiver. Note that this statute applies only to mineral leases. The case of *Gilles v. Yarborough*, 224 S.W.2d 720, (Tex. Civ. App. 1949) infers that the court may exercise its general equity powers under Article 2293, Sec. 3, and appoint a receiver in other cases not specified by statute. This decision, however, seems to unduly stretch the interpretation of Article 2293.

²⁴ Article 2320c, TEX. REV. CIV. STAT. ANN. (1950), provides for a receiver to be appointed by the court in cases where there are contingent interests or unborn contingent owners, however the statute requires that all persons in being be cited in the manner required in a suit to try title to land. Under true virtual representation, those parties represented need not be cited.

and 7425b-25 (E),²⁵ which cover special cases, the doctrine of virtual representation as applied to unborn remaindermen and other contingent interests rests entirely on case law, of which there is precious little. Aside from *Miller v. Foster*, the reported cases involving unborn remaindermen and unascertained class members can only be traced back to 1925.

In the case of *Johnston v. Johnston*,²⁶ a will granting a life estate to *F*, with remainder over to his children, was in issue. Since *F* was still living, it was conceivable that more children could be born. Yet to protect the remaindermen from a tax-income squeeze that threatened to make the land worthless (it was restricted to farm use by the will), sale of the land became necessary. *F* and two remaindermen brought suit against two other remaindermen to set aside the restrictive provision and sell the land. *D*'s contended that unborn remaindermen could not be bound by a judgment for *P*. The court found the necessity for sale valid, and ordered an impartial receiver to sell the land for the best price. The income from the reinvested proceeds was to go to *F* for life, and at his death the remaindermen were to share according to the will. The possible remaindermen not *in esse* were thus protected by the court, after their interests were adequately represented by the living remaindermen. A sequel to this case, *Cornelison v. First Nat'l Bank*²⁷ demonstrates that the procedure set up by the court must be strictly complied with in order to bind the unborn remaindermen. In the latter case a mineral lease failed because all living remaindermen would not agree to the terms; therefore, the court would not approve the sale. Since the court was charged with the protection of the unborn remaindermen's interests, its approval was purely discretionary.

Another way of handling the above type situation is suggested by *Wilder v. Cox*.²⁸ Here the life tenant and two of seven remaindermen sold their interests in land. The other five remaindermen were minors, and a guardian asked the court for permission to sell the 5/7 interest remaining in order to pay for the education and maintenance of the wards. The court granted the order but in a separate order set out that \$1500 of the \$4500 received from the sale was

²⁵ Article 7425b-25 (E), TEX. TRUST ACT ANN. (1951), provides that a trustee's responsibilities and duties include the power to compromise, contest, arbitrate or settle any claim against or for the trust estate. Of course the trust instrument can vary this, but under the statute, case law has been codified and beneficiaries are no longer necessary parties where the trustee's interests do not conflict. *McDonald v. Alvis*, 154 Tex. 570, 281 S.W.2d 330 (1955).

²⁶ 276 S.W. 776 (Tex. Civ. App. 1925).

²⁷ 218 S.W.2d 888 (Tex. Civ. App. 1949) *error ref. n.r.e.* In connection with the strict compliance required, see also *Gage v. Curtner*, 215 S.W.2d 411 (Tex. Civ. App. 1948).

²⁸ 104 S.W.2d 897 (Tex. Civ. App. 1937) *error disp.*

to be set aside for possible unborn remaindermen, since the life tenant could still have children. Note that this was not an adversary proceeding, but a guardian's sale, yet the Court of Civil Appeals, citing *Johnston v. Johnston*, held that unborn remaindermen were bound and their interests protected.

The *Johnston* and *Wilder* cases were decided prior to Rule 42, and rested on equity's power as set out in Story's *Equity Pleading* and Freeman on *Judgments*. Since Rule 42, as it now reads, specifically applies to numerous parties, the question arose whether any other portion of the doctrine of virtual representation applied. The case of *Bradley v. Henry*²⁹ only partially answers this, since it has no writ of error history. The case involved a deed that set up a life estate with remainder over to grandchildren of the grantor living at the grantor's death. Recission for non-delivery was sought with living contingent remaindermen made parties, and upon order of recission the land was conveyed to *D. D* then refused to carry out the contract on the ground that title was clouded, *i.e.*, unborn contingent remaindermen were not bound by the recission order. The Court of Civil Appeals held that, "irrespective of the application vel non of Rule 42, Texas Rules of Civil Procedure . . ." there was a proper representative action; otherwise clouded titles would be incurable for long periods. Oddly enough, this case cited only Texas cases involving numerous parties and made no reference to the *Johnston* or *Wilder* cases.

Unborn remaindermen are treated in the same manner as unascertained remaindermen in Texas. Actually the distinction between the two is whether the instrument creating the remainder created a contingent remainder or a vested remainder subject to divestment. That the result in either case is the same so far as the doctrine of virtual representation is concerned is illustrated by the case of *Peters v. Allen*,³⁰ which reads substantially like *Bradley v. Henry*. In the former case a deed provided a life estate with remainder to the life tenant's children at death, but if there were no surviving children, then a reversion to the grantor. It was held that unascertainable remaindermen could be bound, even though their representative might have been eliminated from the class by reason of death before the life tenant died.

No injustice is done by this result since ordinarily a person doesn't know when he or she is going to die, and the subsequent death of

²⁹ 239 S.W.2d 404 (Tex. Civ. App. 1951).

³⁰ 296 S.W. 929 (Tex. Civ. App. 1927).

the representative of the class would cast no reflection on the way the interests of the class were handled. Fraud, collusion, or even a friendly suit would not be inferred because of death prior to the life tenant. The interests of the class would be substantially the same, in the absence of fraud, as the other members of the expectant class.

Trustees, as representatives of the cestuis que trust in an action where the trustee has no adverse interest, do not actually come within the doctrine of virtual representation. A trustee holds his position as the result of a contractual agreement, not as one who holds an interest substantially the same as other members of a class. A Texas case that analogizes the two relationships is *Davis v. Hudgins*,³¹ wherein a suit was brought by a trustee on behalf of minority stockholders. The contention that proper parties were not before the court was denied on the ground that the trustee represented the cestuis que trust, and the determinations of the court would be binding on them. This result stems from the character of trusts and trustees, not virtual representation. Freeman on *Judgments*³² apparently was the authority who originally suggested the relationships, probably because of the similarity of results stemming from each fact pattern. The trust result is now provided for in Article 7425b-25 (E) of the Texas Civil Statutes.

CONCLUSION

It can be seen that the doctrine of virtual representation has great utility, especially in real estate transactions which involve the proposed improvement of property. Few, if any, title policies would issue on land subject to a contingent interest that was in no way bound by the sale. This underlying reason for the doctrine was well stated in *Hale v. Hale*:³³

To say that the court could not, under circumstances like these, convey away the fee, would be to assert a doctrine that would render conditional limitations and contingent remainders an intolerable evil to a growing and prosperous community. Thus to shackle estates without power of relief, unless every person having a contingent and possible interest could be brought before the court, would be to sacrifice the rights and interests of the present generation to those of posterity, and of citizens to aliens. If the whole property of the country were thus

³¹ 225 S.W. 73 (Tex. Civ. App. 1920). See also *Cavers v. Sioux Oil Co.*, 39 S.W.2d 862 (Tex. Comm. App. 1931), and *Schuster v. Crawford*, 199 S.W. 327 (Tex. Civ. App. 1917) *error dismissed*. Compare *Fant v. Ferrier Bros.*, 253 S.W. 955 (Tex. Civ. App. 1923).

³² § 435 (5th ed. 1925).

³³ 146 Ill. 227, 33 N.E. 858, 868 (1893).

situated, it is obvious that all improvement and advance would be completely checked.

In a state such as Texas, where expansion is rampant, it seems foolhardy to allow such a tool to lie unused; but in light of the uncertainty that exists in view of the limited scope of Rule 42, no real use *can* be made of it. In view of the safeguards that the courts have utilized in prior applications of the rule, there seems to be no valid objection to an amendment to Rule 42 which would include the entire application of the doctrine of virtual representation. Such a course of action would do no more than state what is already an equitable power of the court. Unless Rule 42, as it now reads, is to be interpreted as a restrictive rule, the courts already hold in the ancient power of equity the right to apply the doctrine of virtual representation in preventing a failure of justice.

Experience has shown that the numerous parties rule works no hardship on anyone. The safeguards which require that a proceeding be neither a fraudulent nor collusive suit are enforceable in a bill of review in Equity. The safeguards which require the representative to have the same interest (and no adverse interest) as the class represented is insured by the court. This latter all comes under the requirement of adequate representation, the finding of which is at the discretion of the court. With these safeguards, plus the desirable end to be gained — none other than the release of the future's grip upon the present's ability to progress — a clear statement of policy by the legislature in the form of an encompassing adoption of the doctrine of virtual representation would be most desirable.

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