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FEDERAL PRACTICE - CLASS SUITS - COMMUNITY OF INTEREST UNDER FEDERAL EQUITY RULE 38

FEDERAL PRACTICE — CLASS SUITS — COMMUNITY OF INTEREST UNDER FEDERAL EQUITY RULE 38 — Plaintiff filed suit in a federal court, sitting in equity, in behalf of himself and others, to enjoin the collection of an illegal tax imposed by North Carolina upon peddlers of foreign fruit within that state. He alleged that 400 others were similarly situated and that over 100 of them had contributed to the expense of the litigation. *Held*, the individual legal remedy available under state statute was inadequate in view of the multiplicity of suits it necessitated, and the plaintiff was entitled under Federal Equity Rule 38 (post) to bring a class suit to enjoin the collection of the tax. Injunction granted. *Gramling v. Maxwell* (D. C. N. C. 1931) 52 F.(2d) 256.

A question arises as to whether the interests of individual tax payers are so related as to permit a class suit in their favor. Prior to 1912 the federal courts seem to have denied any right to a class suit where there was involved only a common interest in a question of law. As early as 1820 Justice Story stated that a few might sue for the many "where the question is of general interest." *West v. Randall et al*, 2 Mason 181, but it is to be noted that that case involved a common interest in the actual subject matter. In 1838, in his work COMMENTARIES ON EQUITY PLEADINGS, 10th ed., sec. 97 (1892), Story again pointed out that one or more might sue in behalf of several interested parties "where the question is one of common or general interest." The Supreme Court, in *Smith et al. v. Swormstedt et al.*, 16 How. 288, 14 L. ed. 942 (1853), purported to follow Story's rule, but seems to have interpreted it to

require a common "interest or right," and permitted a class suit where there was, again, a common interest in the subject matter. A circuit court, in *Cutting v. Gilbert*, 5 Blatchf. 259 (1865), clearly differentiated between an interest in a question of law and an interest in the subject matter, and refused a class suit in the absence of the latter. The rule there laid down was quoted with approval in *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. ed. 648 (1897), and there is dicta in its support in *Russell v. Stansell*, 105 U. S. 303, 26 L. ed. 989 (1881). Rule 38 of the Federal Equity Rules, adopted in 1912, provides, "When the question is one of general or common interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." (28 U. S. C. A. 21). Except for one instance of dicta to the contrary, *State of Ohio v. Cox* (D. C. Ohio 1919) 257 Fed. 334, the courts have seemed quite ready to interpret the rule, clothed almost entirely in the words of Story, supra, as modifying the old requirement of a common interest in the subject matter to one of a common interest in the controlling question of law involved. *Merchants' and Manufacturers' Traffic Association of Sacramento et al. v. United States et al.* (D. C. Cal. 1915) 231 Fed. 292; *Chew et al. v. First Presbyterian Church of Wilmington, Del., Inc., et al.* (D. C. Del. 1916) 237 Fed. 219; *Commodores Point Terminal Co. et al. v. Hudnall et al.* (D. C. Fla. 1922) 283 Fed. 150. The principal case is not the first involving such an interpretation of the rule as applied to taxation cases, it having previously been determined that taxpayers have a sufficient common interest in the question involved to warrant a class suit. *Little et al. v. Tanner et al.* (D. C. Wash. 1913) 208 Fed. 605 — rev'd on other grounds, 240 U. S. 369, 36 Sup. Ct. 379, 60 L. ed. 691 (1915); *Everglades Drainage League et al. v. Napoleon B. Broward Drainage District et al.* (D. C. Fla. 1918) 253 Fed. 246. It appears, therefore, that the federal courts interpret Rule 38 to permit any sizeable group of individuals possessing a common interest in the basic question of law involved and seeking one form of relief common to them all, to institute a class suit. Such being true, it is believed that the court in the principal case correctly held that, "Whatever may have been the rule formerly as to the right to maintain a class suit of this character, in the federal courts, we think that since the adoption of the 38th Equity Rule, the right to maintain such a suit can not be denied."