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Raymond B. Marcin

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## Searching for the Origin of the Class Action

Raymond B. Marcin\*

It was a curious time in the history of the English nation, a shadow-time with echoes of a dimmer and murkier age. The English Isle itself was reeling from catastrophes, both natural and political. The Great Plague and the Great Fire of London, with scarcely a year's breathing space between them, had left the city's population decimated and her homes and churches in ruin. The nation itself was hesitantly regrouping from the shuddering excesses of the Cromwellian interregnum. Witches and demons peopled the consciousness of even serious-minded folk.

In that alien moment of time, in a tiny corner of the disorganized land, a clergyman was annoyed to find his parish finances in desperate straits. Worselworth was mining country, and its Vicar, Reverend Carrier, traced the cause of his money problems to one of the shires of his vicarage in particular. The Derbyshire miners were not paying their tithes. Since the mines were rich in lead ore and production was good, the Reverend Carrier was not about to let the miners use the chaotic religious and political situation as an excuse to neglect their parish financial obligations. He boldly brought suit against the miners, owners and workers alike, and asserted title to one-tenth of the lead-ore output of the mines. The miners named four of their number to defend the suit, but to no avail. The Vicar won. The clear import of the enterprising clergyman's victory must have shocked the mine owners of the shire, for one of them, Mr. Vermuden, quickly intervened in the litigation and pressed upon the court his insistence that he was not bound by the tithing decree because he had not been made a party to the Vicar's suit. Mr. Vermuden's claim eventually reached the Lord Chancellor, and by that time, the Reverend Carrier had been replaced as Vicar of Worselworth by the Reverend Brown. And so final victory fell to Reverend Brown when the Chancellor held that Mr. Vermuden

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\* A.B. 1959, St. John's Seminary; A.B. 1961, Fairfield University; J.D., 1964 Fordham University; Assistant Professor of Law, Catholic University of America.

and all the other mine owners and workers were bound by the original decree even though they were not individually named in the suit.

*Brown v. Vermuden*<sup>1</sup> would have been a completely forgotten precedent on an obscure and vanishing point of ecclesiastical law were it not for one small accident of history: scholars have generally recognized the Reverend Carrier's boldly innovative suit as the first reported example of the class action.<sup>2</sup> The language of the Lord Chancellor's decision in *Brown* is cryptic, however, and somewhat puzzling. It contains none of the detailed explanations one might expect to find in an opinion christening a new form of action. Indeed the tone of the Chancellor's language seems to assume that class actions had been recognized in courts of the past:

If the Defendant [Vermuden] should not be bound, Suits of this Nature, as in case of Inclosures, Suits against the Inhabitants for Suit to a Mill, and the like, would be infinite, and impossible to be ended.<sup>3</sup>

Although *Brown* is, perhaps, the first fully litigated decision sustaining a class action, earlier fragments reveal that the origin of the class action goes

1. 22 Eng. Rep. 796, 802 (Ch. 1676).

2. Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 164, 201 (1950); J. POMEROY, *EQUITY JURISPRUDENCE* 246, at 467-68 (5th Ed. 1941); J. STORY, *COMMENTARIES ON EQUITY PLEADINGS* §§ 94-121, at 122 (1838); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1260 (1961); Simeone, *Class Suits Under the Codes*, 7 CASE W. RES. L. REV. 5, 8 n.24 (1955); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 CORNELL L.Q. 399 (1934). *But see* G. CALVERT, *A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY* 19 (1837). Calvert mentions the earlier case of *Cranborne v. Crispe*, 23 Eng. Rep. 57 (Ch. 1673), but that was not a true class action. The case involved the obligations of numerous defendants to repay a bond. A difficulty arose in that many of the defendants were defaulting and a master appointed by the court was having trouble ascertaining which of the many defendants had assets. The court reasoned that, because this particular case had been inordinately delayed and the parties were so many, the equity rule requiring all the bond obligors to be made parties could be dispensed with. The court thereupon ordered the matter to proceed against those obligors who had assets and were before the court. Those obligors who paid were to have a right of contribution from the others who had not yet been made parties and had assets. In effect, the court left the rights and responsibilities of the nonappearing bond obligors unlitigated. The case, then, stands for the principle that the equity rule that all persons materially interested in a suit in equity must be made parties is merely a "rule of conscience" to obviate the need of subsequent suits and, therefore, may be dispensed with under proper circumstances:

For the Reason why *all the Obligors, their Heirs, Executors or Administrators* are to be made *Parties* in Equity was, and is only a *Rule of Conscience*, and to save those who are severally charged, the Trouble of a new suit for Contribution against those who were not charged; but this is not of absolute Necessity, and therefore may be dispensed withall, especially in this Case where the Parties are so many, and the Delays so multiplied and continued. 23 Eng. Rep. at 57 (Italics in original).

The *Cranborne* case sheds interesting light on the flexibility of the equity requirement that all interested persons be made parties, but it was not a class action, since the liability of the nonjoined obligors was left for future suits for contribution.

3. 22 Eng. Rep. at 797.

beyond the seventeenth century and indeed beyond the pale of Chancery itself to the misty era of the Eyres of thirteenth and fourteenth-century England.

### *Beginning The Search*

Class actions today are largely the creatures of statute and rule. Extant statutes and rules can be divided by content into three types: (1) those which are patterned on the class action rule in the 1849 amendments to the New York Field Code,<sup>4</sup> (2) those which follow the 1938 version of the federal class action rule,<sup>5</sup> and (3) those which have adopted the 1966 revision of the federal class action rule.<sup>6</sup> All trace their origins, however, to the unwritten practices of English Chancery at a time before the adoption of our own judicial system.<sup>7</sup> Chancery early developed the general rule that all persons materially interested in the subject matter of a suit in equity must be made parties to it, either as plaintiffs or as defendants, however numerous they may be. Professor Story has traced the origin of the class action to a necessary exception to that general rule in equity in three types of cases: (1) those in which the question involved is of common or general interest, (2) those in which the parties have formed a voluntary association for public or private purposes, and (3) those in which the parties are so

4. ALA. CODE APP. tit. 7, § 128, App. (Equity Rule 31 1958); ARK. STAT. ANN. § 27-809 (1947); CAL. CIV. PRO. CODE § 382 (Supp. 1972); CONN. GEN. STAT. ANN. § 52-105 (1958); FLA. R. CIV. PRO. § 1.220 (1967); IND. ANN. STAT. § 2-220 (1967); MD. R. CIV. PRO. § 209 (West 1970); NEB. REV. STAT. § 25-319 (1943); N.M. STAT. ANN. § 21-1-1(23), § 21-6-1 (1970); N.Y. CIV. PRAC. LAW § 1005 (McKinney 1963); OHIO REV. CODE ANN. § 2307.21 (Page 1954); OKLA. STAT. ANN. tit. 12, § 233 (1960); ORE. REV. STAT. § 13.170 (1968); S.C. CODE ANN. § 10-205 (1962); and WIS. STAT. ANN. § 260.12 (1957).

5. ALASKA R. CIV. PRO. 23 (1970); DEL. CODE ANN. Ch. Rule 23 (1971); GA. CODE ANN. § 81A-123 (1967); HAWAII R. CIV. P. 23 (1968); IDAHO R. CIV. PRO. 23 (1969); IOWA CODE ANN. R. CIV. PRO. 42 (1951); LA. CODE CIV. PRO. ANN. art. 591, 592 (West 1960); ME. R. CIV. PRO. 23 (1973); MICH. STAT. ANN. GEN. CT. RULE 208 (1964); MO. ANN. STAT. § 507.070 (1964); N.J. R. CIV. PRO. 4:36 (1968); N.C. GEN. STAT. § 1A-1 Rule 23 (1969); PA. R. CIV. PRO. 23 (1966); R.I. R. CIV. PRO. 23 (1966); WEST'S TEX. R. CIV. PRO. 42 (1970); UTAH CODE ANN. R. CIV. PRO. 23 (1953); and W. VA. R. CIV. PRO. 23 (1964).

6. ARIZ. REV. STAT. ANN. R. CIV. PRO. 23 (Supp. 1969); KAN. STAT. ANN. § 60-223 (1969); KY. REV. STAT. ANN. R. CIV. PRO. 23.01, 23.02 (1968); MINN. STAT. ANN. R. CIV. PRO. 23 (1968); MONT. REV. CODES ANN. R. CIV. PRO. 23 (1971); S.D. COMPILED LAWS ANN. § 15-6-23 (1969); TENN. CODE ANN. R. CIV. PRO. 23 (1971); WASH. CT. RULE 23 (1967); and WYO. STAT. ANN. R. CIV. PRO. 23 (1971).

7. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366 (1921); Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853). The class in the Smith case comprised "the traveling and worn out preachers in connection with the society of the Methodist Episcopal Church South in the United States." *Id.* at 298. The controversy arose out of the distribution of church property between separate churches after the Methodist Episcopal Church split in two over the issue of slave ownership by ministers. The Supreme Court, in tracing the propriety of the class action device to Chancery practice cited, *inter alia*, J. STORY, COMMENTARIES ON EQUITY PLEADINGS (1838). See notes 8 and 9 *infra*.

numerous as to make it impracticable to bring them all before the court.<sup>8</sup> Story's list of the three exceptions to the joinder rule of English equity was compiled from an empirical study of the seventeenth and eighteenth-century Chancery decisions,<sup>9</sup> and whereas the first two of Story's exceptions have doubtless had their influence on the modern structure of the class action, it is the third, or numerous parties exception, that holds our interest: the radical ideas that one party may sue or be sued on behalf of numerous unnamed but similarly situated parties even though the interests of the unnamed parties, though similar, may be separate and distinct,<sup>10</sup> and that the decree in favor of or against the representative party was binding on the entire class of unnamed parties.<sup>11</sup>

*Brown v. Vermuden* involved the tithing obligations of mine owners and workers. The defendants, both named and unnamed, were, of course, similarly situated: they all either owned or worked in mines and were members of Vicar Brown's church. The interest of each in his or her tithing obligation must be viewed as separate, in that some may have discharged their obligations entirely, others partially, others not at all. For Chancery to rule that a decree against the four miners who appeared and defended the suit was binding against all the other unnamed and nonappearing miners was a radical departure indeed.<sup>12</sup> The Chancellor's penchant for having everyone who might conceivably have an interest in the litigation made a party might explain his willingness to allow impracticably numerous parties to litigate or defend by representative, but it does not fully explain his patent acceptance of the idea that the rights and fortunes of unnamed and absent persons may be foreclosed by representative decree.

Professor Chafee satisfied the quandary somewhat by approaching the origin of the class action through that other Chancery device—the Bill of Peace.<sup>13</sup> One type of bill of peace involved the situation in which several or numerous persons (*e.g.* the citizens of a town, the parishioners of a parish, or the shareholders in a joint venture) might have identical causes of action

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8. J. STORY, COMMENTARIES ON EQUITY PLEADINGS, § 72, at 74 (1838).

9. *Id.* § 97, at 97-98.

10. On the origin of the class action in the numerous parties exception to the necessary parties rules of Chancery, see Simeone, *Class Suits Under the Codes*, 7 CASE W. RES. L. REV. 5 (1955).

11. JAMES, CIVIL PROCEDURE, § 10.18, at 494 (1965).

12. *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722) is another clear example of Justice Story's third class action category, *i.e.*, numerous parties with similar though separate interests. Chancey, the treasurer of the Temple Mills Brass Works, and its president, in behalf of themselves and "all other proprietors and partners" sued the former officers of the factory for an accounting of the proceeds of a sea venture. Many of the proprietors were seamen and that fact may have moved the court to uphold Chancey's status as a class representative.

13. Z. CHAFEE, SOME PROBLEMS OF EQUITY, 200 (1950).

against someone or might owe identical obligations to someone. The several or numerous persons might not have been joint obligors and therefore could not have sued or been sued together at common law. Or, if they were joint obligors, they might have been too numerous for a manageable suit at common law. But the bill of peace in equity provided a solution and satisfied another of the Chancellor's penchants: to avoid a multiplicity of suits. Professor Chafee's approach, stressing the Chancellor's firm desire to avoid repetitious suits explains equity's willingness to allow the rights of absent class members to be foreclosed, as in *Brown v. Vermuden*,<sup>14</sup> and consequently provides a fuller compositional setting for the birth of the class action. But what of the Chancellor's apparent references, in *Brown v. Vermuden*, to unnamed prior groupings of cases?<sup>15</sup> Is it that such suits were common in the lower courts of the day, but none till *Brown* had been reported, or did the class action practice have deeper, more remote origins?

#### *Earlier Fragments*

Fragmentary evidence reveals that class litigation appears to have existed long before *Brown v. Vermuden*.

A fourteenth century petition filed with the Chancellor provides a fairly common prototype class-action example and suggests an additional explanation of its genesis.<sup>16</sup> In it, one Robert de Wesnam is accused of menacing, threatening, and assaulting the parson of the church of Hilgay and preventing him from carrying out his priestly ministrations. For the parson's complaint to have been cognizable by the Chancellor, he had of course to allege that for one reason or another he lacked an adequate remedy at law. The clergyman alleged the numerousness of Wesnam's associates as the reason why he could not obtain relief at common law:

[T]he said Robert de Wesnam hath so many evil-doers associated and confederated with him, and is of such horrible maintenance, so that the said suppliant [Hilgay] can never come to this recovery against him and the others at common law without your [the Chancellor's] most gracious aid.<sup>17</sup>

*Hilgay v. Wesnam* suggests suing excessively numerous defendants as one device for establishing the lack of an adequate remedy at law. In the year prior to *Hilgay* an ousted landholder sought the Chancellor's aid in regaining his estates from three named and thirty unnamed usurpers.<sup>18</sup> We

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14. 22 Eng. Rep. 796 (Ch. 1676).

15. *Id.* at 797.

16. *Hilgay v. Wasnam*, 10 SELD. SOCIETY 44 (No. 41, Ch. 1399) (1896).

17. *Id.* at 45.

18. *de Bridesall v. de Bulmer*, 10 SELD. SOCIETY 40 (No. 36, Ch. 1398) (1896).

saw earlier two plausible explanations for the rise of the class action: equity's desire to avoid a multiplicity of suits and the need for a manageable device to handle equity's insistence that all interested persons, no matter how numerous, be made parties. *Hilgay* and its fragmentary fellows give a third explanation: the tendency of litigants who preferred equity to allege the large number of their opponents and thus establish the lack of an adequate remedy at law.

Class actions on the plaintiff's side were similarly known prior to the seventeenth century. Fifteenth-century Chancery fragments relate the case of a former mayor of the city of Carlisle who refused to give up certain bonds that he had executed in behalf of the citizens of Carlisle and which had become due. The new mayor, representing all the citizens of the city, sued in Chancery for the return of the bonds.<sup>19</sup>

It is clear, then, that certain basic versions of the class action were in use in Chancery long prior to *Brown v. Vermuden*. But did the class action ever receive conscious judicial recognition prior to *Brown v. Vermuden*, and did it exist in pre-Chancery equity? The term "pre-Chancery equity" almost suggests anachronism and anomaly. But equity and the class action did indeed predate Chancery.

### *The Eyres*

Prior to the Norman Conquest, the King himself often traveled about the countryside administering justice.<sup>20</sup> After William came to power, the practice continued and, perhaps because of the need to consolidate the new order, increased in scope. Royal commissioners began touring the land in the King's stead, at first on purely fiscal and administrative business, and later, by the time of Stephen's reign, on judicial missions.<sup>21</sup> The authority of many of these early itinerant justices was limited, *e.g.*, the assizes. But some were commissioned by the King to hear all pleas; their authority—the General Eyre.<sup>22</sup>

The General Eyre, with its almost unlimited civil jurisdiction grew to maturity in the twelfth century, flourished in the thirteenth century, and died abruptly in the fourteenth century.<sup>23</sup> It is now known that, during the heyday of the General Eyre, its justices administered a large equitable jurisdiction—this in the era when Chancery was just beginning to change from

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19. *Maire v. Stockton*, 10 SELD. SOCIETY 150 (No. 144, Ch. 1465) (1896).

20. HOLDSWORTH, A HISTORY OF ENGLISH LAW 49 (1931).

21. *Id.*

22. *Id.* at 264-65.

23. *Id.* at 271-72, 449.

a secretariat to a court of equity.<sup>24</sup> The justices in Eyre acted under a direct royal commission to administer justice, and to that extent and in that role, they represented the person of the King. It was the downfall of the General Eyre, and the consequent loss of its equitable forum that was partly responsible for the rise of Chancery as a full-fledged court of equity.<sup>25</sup>

If equity itself appeared as a developed system of justice in the pre-Chancery Eyres, we would expect to find evidence of the class action there as well.

#### *The Channel Islanders' Case*

If *Brown v. Vermuden* deserves recognition as the first judicial *upholding* of a class action upon challenge, then the *Channel Islands case*<sup>26</sup> decided by a General Eyre and ultimately by the King's Council in the early fourteenth century deserves recognition as an early and perhaps the first judicial *creation* of a class action. Some twenty or twenty-five miles off the northwestern coast of France at the mouth of the Gulf of St. Malo lie the islands of Jersey, Guernsey, Alderney, and Sark—the Channel Islands. British to this day, they were granted by Edward I to Sir Otes Grandison for the term of his life sometime late in the thirteenth century. It was in large measure the excesses of Sir Otes's administration of the islands which led to the *Channel Islands* case. Norman by heritage and (until the thirteenth century) by rule, the Channel Islanders viewed Sir Otes's minions as extortioners and oppressors. Citizens' complaints of fiscal and judicial improprieties were sent to the King. Chief among the islanders' grievances was a confiscatory decree of Sir Otes insisting that all debts and rents due him or the Crown be paid in sound French currency instead of the debased local coinage of the islands. The order had the effect of tripling all debts and rents in one fell swoop. Deluged by the wave of consumer reaction and petition, King Edward II appointed and commissioned two justices in Eyre to hear and determine the complaints of the islanders.<sup>27</sup> Edward's two appointees, Sir John of Fressingfield and Sir William Russell, had both served on prior General Eyres of the islands, however, and had on those occasions sustained Sir Otes's actions. The new Eyre amounted to nothing more than an appeal from the actions of certain justices to those same justices. Fressingfield and Russell certainly viewed it so, and in their order in effect denying jurisdiction it was they, the Justices in General Eyre of the Channel Islands, who created the first consumers' class action in 1309.

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24. *Id.* at 403, 448. See also YEAR BOOKS OF EDWARD II, 27 SELD. SOCIETY xxi *et seq.* (1912).

25. HOLDSWORTH, *supra* note 20, at 449.

26. *Discart v. Otes*, 30 SELD. SOCIETY 137 (No. 158, P.C. 1309) (1914).

27. 30 Seld. Society xxxv (1914).

The Commissioners have adjudged that these complainants must thrash this matter out with the King's Council; and, after some discussion, the complainants were told that they must appear *coram Rege Ubicunque etc.* a month after Michaelmas; and that a single complainant should argue the case for all, and that the determination of the King's Council in that one case would govern the judgment in all similar complaints.<sup>28</sup>

It certainly appears that every class-action element that was present in the seventeenth-century case of *Brown v. Vermuden* was fully present in the fourteenth-century *Channel Islands* case: a class of similarly situated individuals, one or more representatives of the class, and a judgment binding on all members of the class, even the unnamed and nonappearing.

Should Sir John of Fressingfield and Sir William Russell, then, be credited with the honor hitherto often given to the Vicar of Worselworth, *i.e.*, the authorship of the first class action? No, indeed, for Sir John and Sir William in all likelihood took the idea for the dispensing of justice on numerous similar complaints in one representative class action from the stalwart and imperturbable islanders themselves. Perhaps the best candidates for the title "authors of the original class action" are John the mason, Piers Howel, Robert the tawer, Samson Lemoeine, Andrew Lesant, and Thomas Amend. It was they who, as some of the many tenants of a parcel of property known as Andrew's wharf in the parish of St. Peter Port, filed a challenge to the effectuation of Sir Otes's order trebling their rents on their own behalf *and on behalf of all the other tenants*.<sup>29</sup> Because Sir John had been a member of the earlier General Eyre sustaining the order, he and Sir William referred this challenge to the King's Council along with all the other islanders' complaints. One likes to think that in assessing the obvious conflict of interest, Sir John and Sir William paused on this one complaint of many to note the innovative time-saving device used by the tenants of Andrew's wharf, and that the justices incorporated it into their eventual order.

The islanders did appear at Westminster on the assigned day and one of them, Phillip of Carteret, presented their case. Alas, they were all ordered to pay their debts and rents in the sounder currency. Thus was the first consumer class action lost.<sup>30</sup>

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28. *Id.* at xxxvii.

29. *John the Mason v. Certain Bailiffs and Ministers*, 30 SELD. SOCIETY 139 (No. 161, P.C. 1309) (1914).

30. 30 SELD. SOCIETY xxxix (1914). A Note from the Roll following the report of one of the individual Channel Islands bills relates the suggestion that the claimant, Jordan Discart, and claimants in similar cases appear before the Council "either in person or by some one representing them all" and ends with the following cryptic statement: "Afterwards no one presented himself on that day at Westminster touching the matter of this complaint." *Discart v. Otes*, 30 SELD. SOCIETY 137, 138 (No. 158, P.C. 1309) (1914). The records of Edward's royal commissioners, however read as

The loss of a class-action suit is a common occurrence today, so common that we lawyers seldom pause to ponder the multiplied sense of disappointment that such a setback causes. One can surmise that an enormous blanket of despair might have covered the Channel Islands following this decision of the King's Council. Their oppressor had virtually imposed debt serfdom on them by a neat clerical trick, and the King's justice had upheld the deed. Did the Channel Islanders, in losing the suit, also lose that sense of unity and outraged righteousness that had given birth to the class action? One would like to think not. And so it is that our inquiry into the origin of the class action does not end here. There is a sequel.

### *The Second Channel Islanders' Case*

Perhaps it was the suspicion that Sir Otes Grandison had gotten a "home-town" decision that sustained the islanders, and preserved their sense of justice. But other "home-town" decisions must have followed in the ensuing decades and generations, for in 1565, fully a century before *Brown v. Vermuden*, we find the islanders again knocking at the Queen's door. This time the islanders sought, not merely the redress of individual or even group acts of oppression, but a revision of the entire English system of justice with respect to their islands.<sup>31</sup> Sir Otes's victory over their forebears may have had its effect on their purses, but certainly not on their character.

In the years preceding 1565, Channel Islanders were often called to answer legal process in England. Often, too, after judgments were rendered in the local courts of the islands, appeals were taken to one or another of the Queen's courts. And all this was to the consternation of the islanders, particularly so because they had understood their ancient grants of rights from the English Crown to have guaranteed a large measure of locally administered justice.<sup>32</sup> So it was that one Devyke in 1565 petitioned the Queen's Privy Council

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follows:

Afterwards upon that day Philip of Carteret and certain other of the islanders appeared at Westminster in the name of all those who complained in respect of the money etc. 30 SELD. SOCIETY xxxviii.

The decision of the King's Council is related as follows:

[T]he Court of our lord the King is of opinion that . . . arrears of this kind must now be paid in the money that is now current. And touching the rents owed for mills and other things that were let during the currency of the said feeble money at a higher rent, by reason of such debasement of the currency, arrears of such rents must be paid according to the true value of the tenements or premises as shown by the rents at which they are now let. 30 Seld. Society at xxxix.

31. *Devyke v. Petevyn*, Acta Cancellariae or Selections from the Records of the Court of Chancery, No. LX, at 369 (1847); *Reg. Lib. A.*, 1566, 1567, fo. 80.

32. *Id.* at 370.

on behalf of the inhabitants of the Isles of Jersey and Guernsey, who found themselves much grieved that divers of the same isles, contrary to their ancient charters and liberties, were called to answer here, by process awarded against them out of sundry of the Queen's Majesty's Courts of Record here; and, after judgment given in the said isles, appeals made hither unto the said Courts, to the great trouble and vexation of the said inhabitants; of which they humbly desire of their Lordships to have redress and reformation.<sup>33</sup>

It certainly appears that this is another genuine class action since the Queen's Council acknowledges that Devyke was appearing "*on behalf of the inhabitants of the Isles of Jersey and Guernsey*" and was seeking relief which "*they humbly desire*" (emphasis added). But if there were any doubt as to the genuineness of the suit as a class action, the Privy Council's order dispels it in ringing prose:

[F]rom henceforth all suits commenced there already, or hereafter to be commenced between any subjects of those isles, should be heard, ordered, and adjudged in the same isles, and not within this realm. And the like order . . . should be kept in suits arising and containing two parties, whereof the one is resident here in England, and the other in the said isles. And further . . . that no appeals should be made from any sentence in judgment, given in the said isles hither but only (according to the words of the charters) *au roy et son counsaill*; which agreeth . . . with such order and form as heretofore hath been accustomed . . .<sup>34</sup> (Italics in original)

The islanders as the class on behalf of whom Devyke had petitioned were of course bound by the order (willingly and happily). Some, moreover, may see in this second Channel Islands case elements of a defendants' class action. All English litigants and agencies of the Crown were similarly bound. Thus not only did the class action as a procedural device precede *Brown v. Vermuden*, but the complex class action tackling issues such as the fairness of procedural justice with respect to whole populations and their traditions, issues which are not yet fully explored in our own system, has been with us far longer than has been supposed. And, perhaps more importantly, thus was the second class action won!

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33. *Id.*

34. *Id.*