A DISTANT MIRROR: THE BILL OF PEACE IN EARLY AMERICAN MASS TORTS AND ITS IMPLICATIONS FOR MODERN CLASS ACTIONS

Thomas D. Rowe, Jr.*

I. INTRODUCTION

Professor Yeazell's Article in this symposium[1] treats several historical aspects of class-action practice that are relevant to modern settlement-class issues. His title refers to "defendant classes," which can include numerous actual or potential claimants with the party potentially liable seeking a way to combine claims against it in pursuit of economy and repose. This form of use of the class device points up an important characteristic of at least some settlement-class practice: Those who might be sued for damages by many claimants may, in a practical sense, take a plaintiff-like initiative in invoking the class device vis-à-vis those who would ordinarily be suing them. To be sure, the formal alignment when parties seeking class certification and settlement approval bring a proposed mass-tort settlement to a court remains that of claimants as a plaintiff class, aligned against a defendant who would be liable for monetary relief. Much of the initiative for the settlement effort and use of the class device, though, may have come from the "defendant," who thus takes on to some extent the role of relief-seeker, and may be at least as much beneficiary as victim of the class action.

Yeazell suggests that such uses of collective or representative litigation *against* large groups were a fairly common feature in the historical antecedents of the modern class action.[2] Indeed, they may even have been somewhat more so than

---

* Elvin R. Latty Professor of Law, Duke University School of Law. B.A. Yale, 1964; M.Phil. Oxford, 1967; J.D. Harvard, 1970. I am grateful for comments by Paul Carrington and Michele Longino and research assistance from Stephen Cirami of the Duke law class of 1998.

1. Stephen C. Yeazell, *The Past and Future of Defendant Classes in Collective Litigation*, 39 ARIZ. L. REV. 687 (1997).

2. *See id.* at 687, 688 ("medieval representative litigation saw roughly equal numbers of plaintiff and defendant classes"), 704 (characterizing "group litigation...[historically] as an engine that could be used by—but also against—unincorporated persons").

his Article demonstrates. Encountering the defendant-initiative settlement class, I had thought it sounded reminiscent of some aspects of the old "bill of peace," a traditional equitable device that was sometimes available to deal with problems of multiplicity of litigation. This symposium provided me an occasion for a look at some early American cases involving the bill of peace in mass-tort or similar situations; this Comment reports on the results of that investigation and its potential implications for modern class actions. The "deep sleep" of collective litigation from seventeenth-century England to mid-twentieth century America[3] was not complete, for some American counsel, courts, and commentators in the late nineteenth and early twentieth centuries faced issues with considerable modern resonance as they contemplated possible uses of the bill of peace.

II. A THUMBNAIL DESCRIPTION OF THE BILL OF PEACE

In both English and American equity, multiplicity of claims at law or in other equitable actions—whether from a single harassing adversary or from multiple proper claimants—could be a ground for equitable relief in the form of a single proceeding, which might involve injunctions against independent actions and decision on at least possibly dispositive common issues in the multiple lawsuits.[4] The cases involving attempts to use the bill of peace that have some bearing on modern mass torts arose out of such situations as mine disasters;[5] floods from dam

3. *See id.* at 694.

4. The classic discussion of the potential of the bill of peace for dealing with multiple related claims is Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932), substantially reprinted in ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 149–98 (1950) [hereafter cited to book version only]. The leading reference on the device through five editions over sixty years was *Pomeroy's Equity Jurisprudence*. *See generally, e.g.*, 1 SPENCER W. SYMONS, A TREATISE ON EQUITY JURISPRUDENCE §§ 243–75 (5th ed. 1941); 1 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 243–75 (1881).

5. *See, e.g.*, Vandalia Coal Co. v. Lawson, 87 N.E. 47 (Ind. App. 1909) (rejecting use of bill of peace seeking both an injunction against further proceedings in 18 lawsuits brought by plaintiffs claiming injury in coal-mine explosion, and a single trial in equity to avoid multiplicity of actions); Southern Steel Co. v. Hopkins, 47 So. 274 (Ala. 1908) (approving use of bill seeking injunction against suits brought by representatives of 110 coal miners killed in explosion):

> [W]here numerous parties are jointly and severally claiming against one,...and the same title or right of defense will be called into question, and will be determinative of the issue for or against all, a case for the interposition of equity to avoid a multiplicity of suits is made without the aid of any independent equity. The fact that this unity of claim or defense frequently or generally arises from privity or joint action by or between the many affords an obvious instance of the application of the rule, and it has induced some to suppose that the junction and unity of interest calling for the application of the rule is limited to such cases. But the association and unity of interest in the many as to the other party may be brought about just as well by the nature of the transaction or the situation and relation of the parties, independent of all privity or joint action.

bursts;[6] nuisances like water blockage[7] or diversion,[8] riparian pollution,[9] and noxious emissions;[10] and multiple fires from railroad-engine sparks.[11] The device

---

Id. at 276. On a second appeal, the Alabama Supreme Court reversed its position and adopted a narrower view of the appropriate circumstances for use of the bill of peace. *See* Southern Steel Co. v. Hopkins, 57 So. 11, 15 (Ala. 1911) (rejecting use of bill for mere "common interest in the questions of law and of fact" as opposed to "community of interest in the subject-matter," and expressing concern about danger of delay and possible need for separate trials on individual liability and damage issues).

6. *See, e.g.*, Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884 (9th Cir. 1953) (approving possible use of bill of peace by flood-damage defendant that had already been sued by multiple claimants in six actions); Montgomery Light & Water Power Co. v. Charles, 258 F. 723 (M.D. Ala. 1919) (granting injunction against further pursuit of 130 state and federal suits by landowners for property and crop losses from flood following dam burst; finding sufficient "'common tie'" and "'identity of interest in the same questions of law and of fact'" to prevent dismissal of bill, and upholding power company's defenses against claims of negligence because rains causing dam collapse were extraordinary and similar floods had occurred before present dam was built).

7. *See, e.g.*, Hamilton v. Alabama Power Co., 70 So. 737 (Ala. 1915) (rejecting effort to use bill of peace in suit brought by power company maintaining dam alleged to have caused both sickness and property damage).

8. Georgia Power Co. v. Hudson, 49 F.2d 66 (4th Cir. 1931) (rejecting attempt by company maintaining power dam to use bill against suits for water-flow consequences).

9. For a modern example, see Leaf River Forest Prods., Inc. v. Deakle, 661 So. 2d 188, 192–94 (Miss. 1995) (approving possible use of bill of peace by defendants in other suits in several Mississippi state courts alleging dioxin pollution of river). The focus of this comment is not on the modern availability of the bill of peace, which in many jurisdictions might be regarded as superseded by the class action. In *Leaf River*, however, the Mississippi Supreme Court stated that "[w]hile the label 'bill of peace' may not have survived the adoption of the [Mississippi Rules of Civil Procedure], the chancery court's authority to grant substantive relief through equity remains viable and available." *Id.* at 192. *See generally id.* (citations omitted):

> Bills of peace are not ordinarily allowed in cases where many claims of personal or property damage have been made against a single negligent act of the defendant because the determination of a common question would not relieve the necessity of numerous actions at law and because the right to a jury trial is considered of paramount importance to such plaintiffs. However, in cases where "extreme hardship" would result to the defendant, such as where the defendant is subject to numerous suits in differing counties, some of which may be given the same or overlapping trial dates, all of which arise from the same act of negligence, the court should provide relief if any can be given.

10. *See, e.g.*, Roanoke Guano Co. v. Saunders, 56 So. 198 (Ala. 1911) (rejecting effort by owner of fertilizer factory emitting sulphuric fumes to use bill of peace to enjoin lawsuits by neighboring landowners and have damages determined in single action); Ducktown Sulphur, Copper & Iron Co. v. Fain, 70 S.W. 813 (Tenn. 1902) (rejecting bill seeking injunction against multiple nuisance suits for damage to timber from emissions by complainant's works).

11. *See, e.g.*, Tribbette v. Illinois Cent. R.R., 12 So. 32 (Miss. 1892) (reversing, for want of "community of right" as opposed to mere "community of interest," trial court's injunction of multiple suits against railroad for fire allegedly caused by sparks from railroad engine).

could in addition be used in other contexts and at the initiative of the numerous claimants, in such cases as challenges to widely applicable tax assessments.[12] Potentially liable mass-tort defendants' efforts at using the bill of peace seemed to arise after claimants had already filed numerous actions, which gave reality to the threat of multiple suits, and may as a practical matter have been necessary to get a court to consider using the device in such contexts.

III. WHAT THE CASES DO AND DON'T CONSIDER...

Some of the arguments in the bill-of-peace cases from the late nineteenth and early twentieth centuries are arcane and seem of little present relevance, while others are likely to sound fairly familiar to a present-day American lawyer. Still other matters that loom large in present class-action controversies come up little if at all, limiting the pertinence of the old lore to current issues. To dispose first of areas that are key today but seem to find little if any echo in the reported bill-of-peace cases that I have examined, three stand out by their absence: consideration of representativeness issues, opt-out rights or anything closely resembling them, and settlement itself. This seems to have been a corner of the law in which the focus was on commonality, not the selection and adequacy of representatives for a large group.[13] Further, the presumption appears to have been that if a bill of peace was proper, the equity court could either force joinder to resolve common issues one way or the other by temporarily enjoining individual damage proceedings or, in case of a finding for the claimants' adversary on the merits, use its injunctive powers to end the entire matter.[14] The idea of opt-outs does not seem to have come into being until much later, possibly with the revisions of Federal Rule of Civil

---

12. *See, e.g.*, City of Chicago v. Collins, 51 N.E. 907 (Ill. 1898) (upholding equity jurisdiction over bill brought by hundreds of taxpayers, seeking injunction against tax on wheeled vehicles that would affect several hundred thousand taxpayers).

13. Even the idea of lead counsel for a group of numerous and similarly situated parties, or at least judicial imposition of lead counsel if the parties did not coalesce on one, may not have been developed. If Chafee's description is accurate, equity courts were accustomed in bill-of-peace and other cases to dealing with multiple lawyers when cases before them had multiple parties. *See* CHAFEE, *supra* note 4, at 189–90 (a difficulty "of handling in one suit many disputes and many parties...is the crowding and confusion in the courtroom if each party has his own lawyer.... [B]ut an equity judge often has to put up with [multiplicity of lawyers] in other situations than a bill of peace, so that he need not be baffled by it there.").

14. *See, e.g.*, Montgomery Light & Water Power Co. v. Charles, 258 F. 723 (M.D. Ala. 1919), described in *supra* note 6; CHAFEE, *supra* note 4, at 184–85:

> [T]he possibilities of consolidation or a model suit become much wider if the court uses the injunction as well as direct control [over proceedings already pending before it]. If some members of the multitude have not yet begun suit against the adversary, or have sued him in another court, the judge who is charged with the administrative problem of multiplicity can sometimes force consolidation by enjoining those nonparticipating members from suing at all unless they immediately intervene in the consolidated jury action.

Procedure 23 that took effect in 1966.[15] Perhaps because the remedy afforded by a bill of peace could thus be drastic, threshold litigation was heavy and use of the bill in mass-tort situations often denied.[16] And concomitantly with many threshold denials, in the cases I have found there is very little on disposition of the underlying disputes. In particular, with reference to modern controversies, I have seen nothing about settlements—which is not surprising, given the lack of any requirement of court approval for settlements in bill-of-peace practice.[17]

Instead, the debates on use of the bill of peace in mass-tort cases were over a mix of arcane doctrinal and fairly functional issues. The most heated controversy, pitting a majority of the courts against the leading commentators, concerned a matter phrased in highly conceptual terms but freighted with practical consequences: should the bill of peace be available only if the numerous claimants had some narrowly defined "community of right," or could a mere "community of interest"—such as that shared by mass-tort claimants with common issues of law or fact—suffice?[18] Even the narrower view would not have confined the bill of peace so narrowly as to make it like interpleader, available mainly for logically inconsistent claims to a single stake;[19] but the practical impact of the narrower view, which commanded a majority but not unanimity in the cases I have examined, was to rule out any counterpart of a non-opt-out common-issue-only class action.[20] In the majority view, in addition to multiplicity and commonality, at least one of several factors that had traditionally been recognized as a basis for the exercise of

---

15. *See* FED. R. CIV. P. 23(c)(2) ("The notice [in any class action maintained under Rule 23(b)(3)] shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date....").

16. *See* cases cited in *supra* notes 5, 7–8, 10–11.

17. *Cf.* FED. R. CIV. P. 23(e) ("A class action shall not be dismissed or compromised without the approval of the court....").

18. The conceptual debate seems not worth trying to explain in any detail in the text. Chafee gives a good summary and critique in his *Bills of Peace with Multiple Parties, see* CHAFEE, *supra* note 4, at 170–83, and crystallizes the disagreement as being "between the advocates of the liberal view, that multiplicity of suits is in itself a sufficient reason for getting into equity, and the restricted view, that such multiplicity is not enough unless accompanied by one of the additional factors present in the early cases." *Id.* at 170. *See also* William Weiner & Delphine Szyndrowski, *The Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935, 937 n.10 (1987) (quoting main English and American authorities): "[A] debate existed as to whether equity could take jurisdiction of such cases merely to avoid a multiplicity of suits or whether additional factors, such as privity or common title, were necessary before equity could assert jurisdiction."

19. *Cf.* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 535 (1967) (footnote omitted): "[O]ur view of interpleader means that it cannot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort. But interpleader was never intended to perform such a function, to be an all-purpose 'bill of peace.'"

20. *See, e.g.*, In re Asbestos Litigation, 90 F.3d 963 (5th Cir.), *reh'g en banc denied*, 101 F.3d 368 (5th Cir. 1966), *petitions for cert. filed sub nom.* Flanagan v. Ahearn, 65 U.S.L.W. 3611 (U.S. Feb. 27, 1997) (No. 96–1379), *and sub nom.* Ortiz v. Fibreboard Corp., 65 U.S.L.W. 3631 (U.S. Mar. 3, 1997) (No. 96–1394).

equity jurisdiction had to be present.[21]

Precedent aside, the practical concerns raised in the debate over availability of the bill of peace for mass torts included possible effects on rights to trial by jury, impacts on individual claimants' choices of venue, potential trial problems from the degree of relatedness of claims that would be involved, possible delay, and whether a bill-of-peace proceeding could be adequately dispositive given individual issues. These cases arose when many states had not yet merged law and equity, and thus assertion of equity jurisdiction through use of the bill of peace could raise the possibility of denial of jury-trial rights that would be available if the individual damage claims went forward in actions at law.[22] Chafee recognized "the fear that large corporate defendants will readily escape jury trials after widespread disasters if multiplicity of lawsuits becomes a recognized ground of equitable jurisdiction,"[23] suggesting measures including consolidation before a single jury or a test case before a jury as alternatives to a total denial of the bill of peace.[24] Today, of course, merger of law and equity would readily permit retention of rights to trial by jury in any modern analogue to a bill-of-peace proceeding. The prospect of jury confusion in a large case, though, would be a live concern in the last decade of our

---

21. The leading case for this view was Tribette v. Illinois Cent. R.R., 70 Miss. 182, 12 So. 32 (1892):

> There must be some recognized ground of equitable interference, or some community of interest in the subject-matter of controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there "is a *community of interest merely in the question of law or fact involved*," etc., as stated by Pomeroy . . .

Id. at 188 (quoting POMEROY, *supra* note 4, § 268, at 292) (emphasis partly in original and partly added by court).

22. *See, e.g.*, Barston v. Mingo Drainage Dist., 264 F. 224, 227 (E.D. Mo. 1920) ("the larger number of cases, and especially the more recent ones, seem to incline toward confining the jurisdiction of equity within a narrower field, in order to conserve and preserve in its full integrity the right to trial by jury"), *aff'd sub nom.* Bartson v. Mingo Drainage Dist., 284 F. 52 (8th Cir. 1922); Turner v. City of Mobile, 33 So. 132, 147 (Ala. 1902) ("All that has been decided or said by this court bearing on the subject [of equity jurisdiction to prevent a multiplicity of suits] evidences an inclination toward the confinement of the jurisdiction to a narrow field, and a purpose to conserve in its full integrity the right of trial at law and by juries...."); Weiner & Szyndrowski, *supra* note 18, at 938 n.10 (one "reason for the debate" between broad and narrow views of the bill of peace was that "when equity took jurisdiction it deprived the parties of a jury trial").

23. CHAFEE, *supra* note 4, at 182.

24. *See id.* at 184–89. *Cf.* FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment:

> That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions.

century as it was in the first.[25]

Less prominently urged as a ground for making the bill of peace unavailable for mass torts was a concern with which some modern venue-transferees could sympathize: centralization of their cases in a venue other than where they had filed their suits.[26] Chafee also noted the possible "difficulties of unification...if the common questions are accompanied by special issues raised by the various members of the multitude";[27] he suggested various practical alternatives short of unvarying denial of the bill of peace as responses.[28] Occasionally, too, the cases mention the dangers of delay and subsequent individual trials following a bill-of-peace proceeding that failed to resolve the entire matter. [29]

---

25. *See* Vandalia Coal Co. v. Lawson, 87 N.E. 47, 55 (Ind. App. 1909) ("The possibility that the jury might confuse the evidence relating to so many separate parties is strong.").

26. *See* Tribette v. Illinois Cent. R.R., 70 Miss. 182, 190–91, 32 So. 32, 33–34 (quoted from official reporter) (1892) (emphasis in original):

> The wrecking of a railroad train might give rise to a hundred actions for damages, instituted in a dozen different counties, under our law as to venue of suits against railroad companies, in some of which executors or administrators, or parents and children might sue for the death of a passenger, and, in others, claims would be for divers injuries. If Pomeroy's test be maintainable, all of these numerous plaintiffs, having a *community of interest in the questions of fact and law*, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief (damages), could be brought before a chancery court in one suit to avoid multiplicity of suits! But we forbear[.] Surely the learned author would shrink from the contemplation of such a spectacle....

27. CHAFEE, *supra* note 4, at 190. *Cf.* FED. R. CIV. P. 23(b)(3) (requiring court finding "that the questions of law or fact common to the class predominate over any questions affecting only individual members").

28. CHAFEE, *supra* note 4, at 191–92 ("the court will have to consider the relative magnitude of the common questions and the independent questions.... [T]he controversy may be so simple that the common questions can be handled by a single jury, or so tangled that they must be tried over and over by many juries."). None of the cases I have reviewed seemed to contemplate the possibility of what we would today know as bifurcation, although Chafee mentioned the idea of settling "only the common question in one suit and then allow[ing] the independent questions to proceed in separate equity suits." *Id.* at 193.

29. *See* Southern Steel Co. v. Hopkins, 57 So. 11, 15 (Ala. 1911) ("Suppose the equity of the bill should be sustained and the parties proceed to trial, and the complainant fail, then the parties plaintiff, after a delay of many years, will have to be remitted to courts of law to try each of these cases separately."); Weiner & Szyndrowski, *supra* note 18, at 938 n.10 (giving as a second main reason for the debate between broad and narrow views of bill of peace that "without privity (where rights are separate and distinct) a decision on the whole matter could not be rendered and thus a multiplicity of suits would occur anyway, destroying the very reason for the Bill of Peace").

IV. ...AND WHAT THE HISTORY MAY IMPLY FOR MODERN PROCEEDINGS

This sampling of cases on the use or non-use of the bill of peace in early mass-tort cases obviously has no more than limited significance for modern class-action issues, but some implications for present-day debates seem fair to draw. First, the history provides additional support for Yeazell's point that defense initiative to invoke collective proceedings against numerous claimants is not outlandish or unprecedented. Whether we can deal adequately with the problems of defense-initiated settlement classes, or for that matter with the use of class actions for mass torts in general, is of course another question. Second, the balance in the cases of some availability of the bill of peace, coupled with its very cautious use, may give ammunition to both sides of arguments over such problems as non-opt-out damage class actions. On the one hand, there is precedent for the avoidance of multiplicity receiving enough weight to support the strong medicine of a mandatory injunction and common resolution of issues in a mass-tort case.[30] On the other, several courts' invocations of all sorts of conceptual and practical reasons to turn back efforts at invoking the bill of peace reflect the many concerns that retain validity in modern proceedings. The late nineteenth and early twentieth century courts may have been too rigid in their often total rejection of the bill of peace for mass-tort litigation. Their wariness and the practical grounds for it, though, can still instruct us to exercise caution and to consider modern safeguards such as opt-out provisions when we find ourselves tempted by the possibilities of highly ambitious consolidation.

30. *See, e.g.*, Montgomery Light & Water Power Co. v. Charles, 258 F. 723 (M.D. Ala. 1919), summarized in *supra* note 6.