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PARTIES - REPRESENTATIVE SUITS AS RES JUDICATA- REJECTION OF DOCTRINE OF CLASS SUITS IN SUCCESSIVE ACTIONS TO ENFORCE MUTUAL COVENANTS IN LAND

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PARTIES — REPRESENTATIVE SUITS AS RES JUDICATA — REJECTION OF DOCTRINE OF CLASS SUITS IN SUCCESSIVE ACTIONS TO ENFORCE MUTUAL COVENANTS IN LAND — Some 500 frontage owners in a certain described residential district entered into mutual covenants which stipulated against the sale to, or occupation of, such land by negroes. In an action to enjoin a breach of one of these covenants the defense was asserted that a condition precedent requiring ninety-five per cent of the frontage owners to sign the agreement had not been performed. On a trial of the merits it was found that only about fifty-four per cent of the frontage owners had actually signed. However, in a prior action,[1] an owner, on behalf of herself and other like property owners, had sought successfully to enjoin a similar breach regarding other land within the described area. The parties there had stipulated that the conditions of the agreement were fully performed, the controversy having been whether the agreement should be unenforceable due to changed conditions. The Supreme Court of Illinois affirmed the ruling of the circuit court that the issue of performance of the condition precedent was res judicata due to this previous class suit.[2] *Held*, because the defendants in the prior action were not designated as representing a class and because the interests of the plaintiff there were so conflicting with the interests of the defendant in this action, the former adjudication could not bind defendant. *Hansberry v. Lee*, (U. S. 1940) 61 S. Ct. 115.

The class suit[3] is an exception to the general rule in equity that all persons materially interested in the subject matter of the suit are to be made parties to it in order that complete justice may be done.[4] Rather than require all the parties to be brought into court the effect and purpose of the class suit is to adjudicate the interests of absent parties through the representative in court.[5] As this is an apparent departure from the constitutional guaranty that every party is entitled to his day in court and suggests violation of the due process clauses of the Fifth and Fourteenth Amendments, the limitations of these suits are construed strictly.[6] There are two essential requisites of a representative suit which must be met, whether that suit be brought under the regular equity prac-

[1] Burke v. Kleiman, 277 Ill. App. 519 (1934).

[2] Lee v. Hansberry, 372 Ill. 369, 24 N. E. (2d) 37 (1939), noted in 7 UNIV. CHI. L. REV. 563 (1940). The principal case has been noted in 89 UNIV. PA. L. REV. 525 (1941); 21 BOST. UNIV. L. REV. 132 (1941).

[3] For a description and explanation of the various "class" or "representative" suits, see McLaughlin, "The Mystery of the Representative Suit," 26 GEO. L. J. 878 (1938).

[4] STORY, EQUITY PLEADINGS, 10th ed., §§ 72, 94, 97 (1892).

[5] That a "class" or "representative" suit is res judicata and binding on the represented party as to all issues which were, or which might have been, litigated in that suit, see 38 MICH. L. REV. 419 (1940); 2 KAN. ST. B. A. J. 297 (1934).

[6] One not designated a party or made such by service of process is not bound by a judgment in personam. Pennoyer v. Neff, 95 U. S. 714 (1878). And enforcement of a judgment against such a person would be denial of due process. Postal Telegraph Cable Co. v. Newport, 247 U. S. 464, 38 S. Ct. 566 (1918); Old Wayne Mut. Life Assn. v. McDonough, 204 U. S. 8, 27 S. Ct. 236 (1907). Cf. dissenting opinion of Justice Shaw in Lee v. Hansberry, 372 Ill. 369 at 379, 24 N. E. (2d) 37 (1939).

tice or under the modern codes:[7] (1) the parties must be so numerous that it would be impracticable to bring them all into open court; and, (2) the parties must stand in the same situation, having one common or general interest which can be enforced or protected for the common benefit of all, and without prejudice to any. The "common interest" for purposes of a representative suit is a broader concept than privity or a joint interest in the subject matter and may consist of merely a question of fact or law on which the individual rights of all the parties depend. The test is really whether the controversy can be settled expeditiously and yet with perfect fairness to all parties concerned by allowing one party to represent the rest.[8] It is this test which is the more important limitation on class suits and is stressed by the principal case. The general interest of the represented parties in the outcome of the suit must be the same as that of the representative. There must be no special claims or liabilities,[9] the interest must be common to all,[10] and the position of the representative must carry through the adjudication.[11] In the last analysis the purpose of this requirement is to protect the interest of the absent represented party.[12] If this can be done, then the "rule of fairness" of due process should be satisfied and the courts can properly make one law suit where there were several before. The court in the principal case properly recognized that the enforcement of mutual restrictive covenants in one action against all possible breaches was not a proper application of the class suit doctrine. Although the parties plaintiff might fall within a class,[13] the parties defendant would not. The obligations or liabilities created by

[7] As to class suits under the codes, see Blume, "The 'Common Questions' Principle in the Code Provisions for Representative Suits," 30 MICH. L. REV. 878 (1932); Wheaton, "Representative Suits Involving Numerous Litigants," 19 CORN. L. Q. 399 (1934); Moore and Cohn, "Federal Class Actions," 32 ILL. L. REV. 307 (1937); Moore and Cohn, "Federal Class Actions—Jurisdiction and Effect of Judgment," 32 ILL. L. REV. 555 (1937); Mosse, "Representation Orders," 85 L. J. 324 (1938).

[8] STORY, EQUITY PLEADINGS, 10th ed., § 126 (1892).

[9] Chafee, "Bills of Peace with Multiple Parties," 45 HARV. L. REV. 1297 at 1308 (1932): "On the other hand, if the unjoined persons have special claims or liabilities, their rights are personal and can not be concluded in their absence. This cardinal principle of class suits has frequently been expressed as requiring that the subject matter of suit must be in the nature of a 'general right.'"

[10] In Ayres v. Carver, 17 How. (58 U. S.) 591 (1854), the Court refused to consider as members of a class a number of persons who were upon various parts of a tract of land through the alleged wrongful act of a single third party.

[11] Where a taxpayer sold his lot before actually going to trial, though after commencement of the action, he could no longer represent others in the district in protesting a sewer assessment. Alber v. City of Kansas City, 138 Kan. 184, 25 P. (2d) 364 (1933).

[12] ". . . no case has come to my attention where the court has failed to make absolutely certain, in advance, that the parties to represent a class must be selected with such care and have such personal interest in the litigation as to guarantee that rights of all will be fully protected." Dissenting opinion of Justice Shaw in Lee v. Hansberry, 372 Ill. 369 at 379, 24 N. E. (2d) 37 (1939).

[13] The purpose of putting parties plaintiff in a class seems to be to prevent double vexation for defendant. The cases are found collected in annotations in 21 A. L. R.

a restrictive agreement are not joint, but run severally from each individual promisor,[14] while the corresponding rights are held jointly by all frontage owners against the promisor. Any defenses an individual owner might have are personal and his interests could not possibly be protected by a different owner in another suit.[15] Thus it is seen that the decision in the present case is no departure from the established principles of res judicata and the requirement that a party must be in court to be bound by the judgment.

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1281 (1922); 33 A. L. R. 676 (1924); 60 A. L. R. 1223 (1929); 89 A. L. R. 812 (1934).

[14] Principal case, 61 S. Ct. at 119.

[15] Such defenses might be fraud in obtaining the signature, laches in enforcement, and abrogation of the covenant by mortgage foreclosure. 7 UNIV. CHI. L. REV. 563 (1940).