Michigan Law Review

Volume 43 | Issue 2

1944

PARTIES - WHETHER ACTION FOR MONEY JUDGMENT BY HOLDER OF UNSECURED BONDS CONSTITUTES "CLASS" SUIT BINDING ON ALL OWNERS OF THAT SERIES WHO DID NOT APPEAR

William Houston
University of Michigan Law School

PARTIES — WHETHER ACTION FOR MONEY JUDGMENT BY HOLDER OF UNSECURED BONDS CONSTITUTES "CLASS" SUIT BINDING ON ALL OWNERS OF THAT SERIES WHO DID NOT APPEAR — The Chicago Board of Education had issued a certain series of refunding bonds, and later defaulted on interest coupons, numbered 16, attached to the bonds. Prior to the present suit a suit in equity had been instituted against the board by some of the owners of these bonds, on behalf of themselves and all other owners of bonds in this series, in which they prayed for judgment for the amount of interest due to each owner, together with costs, and attorney's fees. Defendant made a motion to dismiss that suit on the ground that such action could not be maintained as a class suit, but the motion was denied. The Newberry Library, plaintiff in the present suit, though an owner of bonds in the same series, did not appear as party to the prior suit. While the prior suit was still pending, the Newberry Library brought the present action at law and sought judgment on the coupons, numbered 16, attached to bonds of the same series owned by it. The defendant filed a motion

in the nature of a plea in abatement on the theory that the library was by representation a party to the equity suit, and there was therefore another suit pending between the present parties on the same cause of action. *Held*, an action to recover interest on certain bonds brought by the owner thereof in behalf of himself and all other owners of bonds of the same series is not a proper "class" or "representative" suit; and a decree in such an action would not be res judicata as to bond owners who did not join. *Newberry Library v. Board of Education of City of Chicago*, (Ill. 1944) 55 N.E. (2d) 147.

It is a well-settled doctrine that one is not bound by a judgment in personam if he has neither been made a party by service of process, nor has appeared as party to the suit.[1] Any enforcement of a judgment so obtained would not be "due process" under the Fifth and Fourteenth Amendments,[2] but an apparent exception exists in the case of a "class" or "representative" suit.[3] In judicial opinions there has been a lack of precision or uniformity as to the requirements for such a suit.[4] Generally, one or more may conduct or defend the litigation and the judgment will be binding on all members of the class represented only "(1) where the question is one of a common or general interest . . . (2) where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous and though they have, or may have, separate and distinct interests; yet it is impracticable to bring them all before the Court." [5] But it must appear that the interest of the parties not present was similar to and consistent with the interest of those who conducted the suit, and, if it may be said that the latter fairly represented the former, the court will proceed to a decree binding on all members of the class.[6] The law of the forum determines the necessary requirements of a class suit and who constitute the class.[7] The Fourteenth Amendment does not require a state

[1] Pennoyer v. Neff, 95 U.S. 714 (1877); 1 FREEMAN, JUDGMENTS, 5th ed., § 407 (1925).

[2] Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 38 S. Ct. 566 (1917); Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 27 S. Ct. 236 (1907).

[3] Reasons advanced for allowing class suits have been (1) to prevent failure of justice, (2) to prevent multiplicity of suits, and (3) as a matter of convenience. For citations see, Wheaton, "Representative Suits Involving Numerous Litigants," 9 CORN. L. Q. 399 at 401 (1934).

[4] See Blume, "The 'Common Questions' Principle in the Code Provision for Representative Suits," 30 MICH. L. REV. 878 (1932); Wheaton, "Representative Suits Involving Numerous Litigants," 19 CORN. L. Q. (399 1934).

[5] STORY, EQUITY PLEADING, 2d ed., § 97 (1840); see also, Smith v. Swormstedt, 16 How. (57 U.S.) 288 (1853); Hartford Life Ins. Co. v. Barber, 245 U.S. 146, 38 S. Ct. 54 (1917); Christopher v. Brusselback, 302 U.S. 500, 58 S. Ct. 350 (1938); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 41 St. Ct. 338 (1921); 1 FREEMAN, JUDGMENTS, 5th ed., §§ 435, 436 (1925).

[6] Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Eng. Rep. 1005 (1809); Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115 (1940); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 16 How. (57 U.S.) 288 (1853); STORY, EQUITY PLEADING, 2d ed., § 97 (1840).

[7] Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 32

to adopt any special rule or formula for determining when there has been a sufficient representation to make the judgment, order, or decree conclusive as to all members of the class. As long as it can be said that the procedure adopted insures adequate protection of the interests of the absent parties, the "due process" rule has been complied with.[8] In the principal case the court held that this condition was not satisfied unless there was "a common or joint interest, not only in the question involved but likewise interest in common in the remedy and subject matter of the suit itself." [9] The writer's searches have revealed no cases where a holder of unsecured bonds was permitted to bring a representative suit thereon when the remedy sought was only a money judgment. Separate and distinct money claims of various kinds arising in different situations have been rejected as a basis for class suits.[10] The courts have ordinarily permitted class suits only where, in addition to the common questions of law and fact, there is sought also a common remedy,[11] or the parties have a common interest in

S. Ct. 641 (1912); CONFLICTS RESTATEMENT, § 450, comment d. (1934); GOODRICH, CONFLICT OF LAWS 553 (1938).

[8] Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581 (1897); Avery v. Alabama, 308 U.S. 444, 60 S. Ct. 321 (1939).

[9] Principal case at 153. See also, Scott v. Donald, 165 U.S. 107, 17 S. Ct. 262 (1897); Spear v. Greene Co., 246 Mass. 259, 140 N. E. 795 (1923). For a discussion of community of interest, which is essential, see 132 A.L.R. 749 (1941).

[10] In Garfein v. Stiglitz, 260 Ky. 430, 86 S.W. (2d) 155 (1935), plaintiff and many others had made overpayment for auto licenses. Plaintiff sought money judgment on behalf of himself and all the others who had made this overpayment. The court held separate distinct claims were not enough; that in cases permitting representative suits " . . . there seems to have been a tangible something in which the many persons had the necessary common or general interest, as a trust fund, an insolvent estate, liens on the same designated property . . . ." (p. 432).

In Smith v. Sparks Milling Co., 219 Ind. 576, 39 N. E. (2d) 125 (1942), plaintiff paid, as part of the price in a contract with defendant, the processing tax levied under the AAA. Many others had made contracts with the defendant in exactly the same form. The court denied his right to bring a representative suit to recover back the money for himself and the others.

Pemberton v. Board of Education, 67 Ohio App. 175, 36 N. E. (2d) 170 (1940) involved separate and distinct claims against a school district for unpaid salaries.

Spear v. H. V. Greene Co., 246 Mass. 259 (1923) was a suit by forty persons representing 60,000 stockholders who had been defrauded. "Mere community of interest in the questions of law or of fact at issue in a controversy or in the kind of relief to be afforded does not go far enough to warrant a class suit. Avoidance of multiplicity of suits is not enough" (p. 267).

In Farmers Co-op Oil Co. v. Socony Vacuum Oil Co., (C.C.A. 8th, 1942) 133 F. (2d) 101, plaintiff on behalf of its members brought action to recover treble damages under the provisions of the Clayton Act. This was held not a class suit, for, while there was a common question of law and fact, a common relief was not sought; they in reality were seeking to enforce causes of action which were several and damages would be different.

[11] Where property was mortgaged to trustee to secure bonds, one owner on behalf of himself and all other bond owners was allowed to obtain an injunction against the

some specific, tangible fund or res.[12] Neither of these factors appears in the principal case.

William Houston

conveyance of the property free from the mortgage by the trustee and mortgagor. Black v. Elkhorn Coal Co., 233 Ky. 588, 26 S. W. (2d) 481 (1930).

Owners in severalty of water rights on a certain race were held to have such a common or general interest respecting the invasion of their respective rights by the wrongful act of a party in cutting off the common source that a few such owners could seek an injunction for the benefit of all. Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152, 103 N.Y.S. 822 (1907).

Plaintiff, a member of a hairdressers' association, was allowed to sue in behalf of himself and all other members to obtain a declaratory judgment that defendant's patent was not infringed by any of the members. National Hairdressers' & C. Assn. v. Philad Co., (D.C. Del., 1940) 34 F. Supp. 264.

Suit was allowed by a bondholder for himself and other holders to compel diking commissioners to make further assessments and levies and to compel county treasurer to collect unpaid taxes, in order to raise funds to pay off bonds. Perkins v. Diking Dist. No. 3, 162 Wash. 227, 298 P. 462 (1931).

Action was permitted by a few holders of notes in behalf of themselves and all other holders of notes in the same series to secure performance of an original contract of security, to abrogate that which was done in fraud of their rights, and to appoint a receiver. Pacific American Gasoline Co. v. Miller, (Tex. Civ. App., 1934) 76 S.W. (2d) 833.

[12] A suit by a group of members of an association was allowed against another group of such members for an accounting by the latter group and pro rata division of common property. Smith v. Swormstedt, 16 How. (57 U.S.) 288 (1853).

Suit by a part of the bondholders to foreclose a trust deed. Baumann v. Harrison, (D.C. App., Cal., 1941) 115 P. (2d) 531.

Suit by owners of a part of a series of bonds for repayment of diverted funds, which were security for all the bonds, was permitted. Rollins v. Board of Drainage Commissioners, 281 Ky. 771, 136 S.W. (2d) 1094 (1939).

A holder of a portion of the bonds secured by a deed of trust was allowed, in order to protect the mortgaged property, to file a bill in his own behalf and, in behalf of all others who owned bonds of that series, to enjoin the trustee's payment of a tax on the property. Carter v. Rodewald, 108 Ill. 351 (1884).

An action by a few of the creditors was allowed on behalf of themselves and all other creditors of the same insolvent party to compel an accounting and distribution of the assets in the hands of the assignee for the benefit of creditors. Kerr v. Blodgett, 48 N.Y. 62 (1871).