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COMMENT ON RECENT DECISIONS

CONSTITUTIONAL LAW—DUE PROCESS OF LAW UNDER FOURTEENTH AMENDMENT—RES JUDICATA—CLASS SUITS—[United States].—Landowners in a Chicago residential district signed a restrictive agreement designed to prevent renting or selling to negroes. Signatures of ninety-five per cent of the owners of the neighborhood were required to make the agreement effective. In an action to enforce the agreement against a breaching signer, it was stipulated between the parties that the required quota of signatures had been obtained.[1] Subsequently, the instant action was brought to enjoin the purchase by defendant, a negro, of land of a signing owner. Defendant contended that the agreement was inoperative because the required quota of signatures had not been obtained. On appeal, the Supreme Court of Illinois held that the plaintiffs in the previous suit had represented all other signers, including defendant's grantor, and that defendant, since he claimed under a party represented in the prior proceeding, was bound by the finding that the necessary number of owners had signed.[2] On certiorari the Supreme Court of the United States *held* that there was no such community of interest between the plaintiffs in the previous action and present defendant's grantor as to establish a representative relation between them within the doctrine of class suits; and, therefore, to hold present defendant bound by issues concluded in the previous action was to deny him due process of law. *Hansberry v. Lee.*[3]

It has been held that the due process clause of the Fourteenth Amendment requires a state court to give all parties a hearing, or an opportunity to be heard, before passing judgment.[4] This constitutional requirement is qualified, however, by the doctrine of *res judicata* when a cause of action or a controverted issue has been fairly litigated in a prior action between the parties.[5] This doctrine has been extended to actions by a party in privity with litigants in a prior action involving identical issues, provided only that the initial litigants were afforded due opportunity for hearing.[6]

1. Burke v. Klieman (1934) 277 Ill. App. 519.
2. Lee v. Hansberry (1939) 372 Ill. 369.
3. (1940) 61 S. Ct. 115.
4. In the case of Chicago, B. & Q. R. R. v. Chicago (1897) 166 U. S. 226, 235, citing Davidson v. New Orleans (1877) 96 U. S. 97, 102, the Court said: "In determining what is due process of law regard must be had to substance, not to form. This court referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under forms of state legislation.'" See: Pennoyer v. Neff (1877) 95 U. S. 714; Scott v. McNeal (1894) 154 U. S. 34; Coe v. Armour Fertilizer Works (1915) 237 U. S. 413; Postal Telegraph Cable Co. v. Newport (1918) 247 U. S. 464.
5. Southern Pac. R. R. v. United States (1897) 168 U. S. 1; Postal Telegraph Cable Co. v. Newport (1918) 247 U. S. 464. See 1 Greenleaf, *Evidence* (16th ed. 1899) 656, sec. 522.
6. Postal Telegraph Cable Co. v. Newport (1918) 247 U. S. 464; Old Wayne Mut. Life Assoc. v. McDonough (1907) 204 U. S. 8; Comment (1941) 26 WASHINGTON U. LAW QUARTERLY 268.

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Also, when a party to a present action has actively participated in a previous action upon the same issues, though not nominally a litigant, he has been duly represented and cannot resist the enforcement of the decree or bring another action.[7]

Another recognized extension of the doctrine of *res judicata* is the class suit. When members of a class have a common interest and are too numerous to be effectually joined, a judgment in an action by or against a member of the class, acting in a representative capacity, is binding upon all members as to issues common to them all.[8] Thus, when shareholders of a corporation are made severally liable by statute for the corporate debts, a judgment against the corporation will be conclusive as to the existence and amount of the debt; and a judgment against individual shareholders, acting in that capacity, will be conclusive as to the liability of all.[9] The mere fact of acquiring shares is an assumption of such liability.[10] So, too, incorporated fraternal and insurance societies stand as representatives of their members.[11] Determinations of right and fact in class suits are conclusive in subsequent actions by or against members of the class.[12]

The doctrine of the class suit is not always applicable when there is an ostensible common interest. An initial common interest may sometimes ultimately become adverse.[13] In an action involving a class, the interest of the members must be "identical and in no way conflicting,"[14] and the action must affect all in the same respect.[15] When the rights at issue are those of certain persons as individuals rather than as members of a class, the action is not representative, and a judgment will not conclude the rights of other members of the class.[16] Similarly, a judgment concluding the

7. Plumb v. Goodnow's Adm'r (1887) 123 U. S. 560.

8. Smith v. Swormstedt (U. S. 1853) 16 How. 288; Bacon v. Robertson (U. S. 1855) 18 How. 480; Wallace v. Adams (1907) 204 U. S. 415.

9. Bernheimer v. Converse (1907) 206 U. S. 516; Converse v. Hamilton (1912) 224 U. S. 243; Selig v. Hamilton (1914) 234 U. S. 652; Marin v. Augedahl (1918) 247 U. S. 142; Chandler v. Peketz (1936) 297 U. S. 609. Cf. The New England Divisions Case (1923) 261 U. S. 184, which holds that the Interstate Commerce Commission may set a general rate schedule by using "typical evidence," and that the various affected carriers in the class to which that evidence is applicable are precluded from separate adjudication of their claims.

10. Royal Arcanum v. Green (1915) 237 U. S. 531. See Converse v. Hamilton (1912) 224 U. S. 243; Chandler v. Peketz (1936) 297 U. S. 609.

11. Royal Arcanum v. Green (1915) 237 U. S. 531; Hartford Life Ins. Co. v. Ibs (1915) 237 U. S. 662; Supreme Tribe of Ben-Hur v. Cauble (1921) 255 U. S. 356.

12. Southern Pac. R. R. v. United States (1897) 168 U. S. 1; Hartford Life Ins. Co. v. Ibs (1915) 237 U. S. 662. The Supreme Court of the United States has taken cognizance of, and allows, class suits. 28 U. S. C. A. (1928) Equity Rule 38.

13. Terry v. Bank of Cape Fear (C. C. W. D. N. C. 1884) 20 Fed. 777; Weidenfield v. Northern Pac. Ry. (C. C. A. 8, 1904) 129 Fed. 305.

14. Terry v. Bank of Cape Fear (C. C. W. D. N. C. 1884) 20 Fed. 777, 781.

15. Ribon v. Railroad Cos. (U. S. 1872) 16 Wall. 446; Weidenfield v. Northern Pac. Ry. (C. C. A. 8, 1904) 129 Fed. 305.

16. McQuillen v. National Cash Reg. Co. (D. C. D. Md. 1938) 22 F. Supp. 867, aff'd (C. C. A. 4, 1940) 112 F. (2d) 877.

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rights of members of a class will not conclude an individual as to issues personal to him.[17] Mere allegation that the suit is brought in behalf of all will not withstand the defense of non-joinder.[18] In all these imperfect, "quasi-class" actions, a failure to join all parties is a failure of due process as to those not joined if it is sought to assert against them the decree or the findings of fact and law supporting it.[19]

Analytically, it would seem that the representative status of plaintiff in the previous action on the agreement involved in the instant case was at best dubious, owing to the uncertain character of the class he purported to represent. If he represented all the signing landowners, he was in the anomalous position of representing the very defendant whom he sued. If he represented only those signers interested in enforcing the agreement, it cannot with certainty be said that the class included the instant defendant's grantor, who now asserts a contrary interest. Moreover, the constituency of such a class at any given moment would be well-nigh indeterminable, and would be subject to change without notice, at the whim of the individual owners.[20] Such shifting sands are hardly a suitable foundation for a holding that defendant was precluded by representation from an effective litigation of the contested issue. This is the more true because the issue was previously disposed of by stipulation between the parties. Since it cannot with certainty be said that defendant's grantor was legally represented in the previous action, defendant is entitled under the due process clause of the Fourteenth Amendment to a fair hearing on the issues necessary to sustain his position. R. T. S.

CONSTITUTIONAL LAW—POWER OF PRESIDENT TO REMOVE ADMINISTRATIVE OFFICERS—EFFECT OF STATUTORY LIMITATIONS—[Federal].—The act which established the Tennessee Valley Authority[1] provides that the President may remove directors if they appoint employees on a political basis. The President removed the petitioner solely because he felt it was in the best interest of the administration of the Authority. Petitioner sued for back salary, alleging that the methods and grounds specified by the act are exclusive. *Held:* The President has inherent power to remove an executive officer appointed by him, even though the officer was appointed for a fixed

17. Coe v. Armour Fertilizer Works (1915) 237 U. S. 413.
18. Wabash R. R. v. Adelbert College (1908) 208 U. S. 38.
19. See cases cited supra notes 13, 14, 15, 16, 17.
20. In Lee v. Hansberry (1939) 372 Ill. 369, 379-380, Shaw, J., said: "There could be no certainty nor even any probability that they all would agree on a course of conduct to be followed at any particular time or under any particular circumstances. There was no common right nor any common fund, nor any common or undivided *res* to be dealt with, and certainly no one ever had any right or power to speak for any one but himself."

The conclusion of the foregoing quotation is founded upon the consideration that each property owner owned his land in severalty, his obligation under the agreement was several, and he might or might not wish to enforce or contest the validity of the agreement.

1. Tennessee Valley Authority Act (1933) 48 Stat. 58, c. 32, 16 U. S. C. A. (Supp. 1940) secs. 831-831dd.

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