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## LEE DEFEATS BEN HUR

ARTHUR JOHN KEEFFE, STANLEY M. LEVY AND RICHARD P. DONOVAN\*

"A class action is an illustration of a situation where it is not feasible for all persons whose interests may be affected by an action to be made parties to it. It was invented by equity for situations in which the number of persons having substantially identical interests in the subject matter of litigation is so great that it is impracticable to join all of them as parties, in accordance with the usual rules of procedure, and in which an issue is raised which is common to all of such persons."<sup>1</sup>

Strange as it may seem, however, the problem of the class suit and its effect upon the members of the class involved have not been thoroughly analyzed by many writers. Though much has been written on the subject the commentators do not get down to bed rock in their analyses; instead they seem to accept without question the theories of Moore or Blume or Street, the modern pioneers in this wilderness.

The existing confusion and uncertainty surrounding the nature of the class action, and the failure of this procedural device to accomplish the ends of which it is capable, suggest that a critical inquiry into the present-day doctrines of the class suit might well be in order, and that attention might well be given to the drawbacks, as well as the merits, of the reasoning which these three writers have developed.

### *Street's View*

Street divides class suits into what he calls two "radically different types."

The "true," which he describes this way:

"In the first type, which is that of the true class suit, it will be found that the subject-matter of the suit is a fund or property over which the court can and does acquire an effective jurisdiction by the joining of

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\*The writers of this piece have had the benefit of an unpublished study by Dean Robert S. Stevens on class suits. We have also profited from his reading and criticism of our manuscript. Our debt to him is very great and we take this way of inadequately expressing it. We also wish to acknowledge that in writing this piece we have had the aid of the prior research of Professor Keefe for the Law Revision Commission of the State of New York, published in N. Y. LEG. DOC. 1942 No. 65(J), p. 73.

<sup>1</sup>RESTATEMENT, JUDGMENTS § 86, comment b (1942).

some persons as plaintiffs or defendants who may be considered representative of all those who are interested in the same fund or property."<sup>2</sup>

and the "spurious," which he describes this way:

"In the other type of cases, the suit is not concerned with a fund or property at all, but with a personal liability. Here the suit is not a class suit in any proper sense. We may call it the spurious class suit. Illustrations of this type of suit are found in suits by or against involuntary associations brought in respect of some legal liability or against numerous defendants to enjoin a threatened injury. Suits for injunction against strikes and other forms of combinations resulting in interference with trade or business fall within this class when they are prosecuted in the form of class suits. It is not even necessary in such cases that the numerous defendants should comprise any formal aggregate or association of persons."<sup>3</sup>

#### *Blume's View*

Blume's leading article on representative suits appeared in 1932.<sup>4</sup> In it, under the subheading "Not True Representative Suits (?)," he wrote:

"There is doubt as to whether a suit brought by one or more of a class for the benefit of all, when each could have sued alone, is, in any proper sense, a representative suit."<sup>5</sup>

After quoting Clark<sup>6</sup> and Street, presenting the view that it is not, Blume states:

"It can be argued, however, that a suit by one of a class for the benefit of all, when each could have sued alone, is a true representative suit because other members of the class are—or should be—estopped from bringing later suits for the same relief if they knew of the representative suit in time to intervene."<sup>7</sup>

But unfortunately the merits of that argument are not further considered in the article, for it continues:

"But even if the view be taken that there is no representation, the fact remains that there are many situations in which one or more may bring a suit in the *form* of a representative suit although joinder is deemed permissive and not required. By suing for all, the plaintiff who starts the

<sup>2</sup>1 STREET, FEDERAL EQUITY PRACTICE 342 (1909).

<sup>3</sup>*Ibid.*

<sup>4</sup>Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878 (1932).

<sup>5</sup>*Id.* at 897.

<sup>6</sup>CLARK, CODE PLEADING 280, n. 202 (1928).

<sup>7</sup>Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878, 898 (1932).

suit invites the others to come in, and his statement that he sues for himself and others like situated is neither false nor absurd and should not be ignored as surplusage. If the term 'representative' is unsatisfactory, the suit might be called 'an action inviting joinder.'"<sup>8</sup>

*Rule 23 of the Federal Rules of Civil Procedure*

It was after Blume wrote that the Federal Rules of Civil Procedure were drafted to become effective in 1938. The draftsmen of the Rules studied the problem and the result of their research is Rule 23, which so far as pertinent reads:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."<sup>9</sup>

*Moore's View*

Moore, in his treatise on the Federal Rules, explains the basis of Rule 23's division of class suits into the three types, "true," "hybrid," and "spurious."<sup>10</sup>

<sup>8</sup>*Ibid.*

<sup>9</sup>FED. R. CIV. P., 23(a), 28 U. S. C. foll. § 723c (1940).

<sup>10</sup>"It may be salutary and perhaps refreshing to pause for a moment to write an epitaph for Moore's accursed labels, 'true,' 'hybrid,' and 'spurious.' It may be a matter of concern only to the purist that this terminology is ludicrous and that the plaintiff must stubbornly insist that he has a spurious suit against the equally stubborn insistence of the defendant that it is not spurious; it may be a matter of concern only to the West Publishing Company that the phrase 'spurious class suit held maintainable' must now appear in head notes; it may be a matter of concern only to the logician that we are given three species of class suits the first of which is really a class suit, the second of which is partly a class suit, and the last of which isn't a class suit at all; but it is a matter of general concern that so perverse a value judgment is expressed by this application of the terms 'true' and 'spurious' to suits of equivalent social importance and function. Given the penchant of the legal mind for psittacistic repetition of labels—*res gestae, res ipsa loquitur, champerty and maintenance, or power coupled with an interest, for example*—it is imperative that the class suit of sub-paragraph (a) (3) be saved from the damnation of the faint, faint praise carried by the word 'spurious.'" Kalven and Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. OF CHI. L. REV. 684, 707 n. 73 (1941).

"The classification which the rule Rule 23 makes is dependent upon the jural relationships of the members of the class. The jurisdictional requisites and the effect of the judgment, though not stated by the rule, vary, also, with the type of class action. For these reasons it is advisable to designate the actions in three groups."

—(1) The True Class Suit.

"Various tests have been proposed to determine whether a suit was a true class action. . . . These efforts . . . are . . . significant. They illustrate the desire of courts to find a unity of interests between the parties. This can be expressed better in terms of joinder. The 'true class suit' is one wherein, but for the class action device, the joinder of all interested persons would be essential. This would be in cases where the right sought to be enforced was joint, common or derivative. . . ."11

—(2) The Hybrid Class Action.

"This action is unique, but its importance is decreasing. Though the class has a mutuality of interests in the question involved, still the rights of the members of the class are neither joint nor common; they are several. In addition to the question of fact common to all, there is, in lieu of joint or common interests, the presence of property which calls for distribution or management. This type of action is exemplified by a creditor's bill for the appointment of a receiver. . . ."12

—(3) The Spurious Class Suit.

"This is a permissive joinder device. The presence of numerous persons interested in a common question of law or fact warrants its use by persons desiring to clean up a litigious situation. Assume that a railroad negligently sets fire to property, and widespread damage to many property owners ensues. Here there is a question of law or fact common to many persons. . . ."13

### *The Theories in Action*

To bring more sharply into focus the distinctions which Street and Moore attempt to draw, consider the following situations:

(1) *A* sues on behalf of himself and other similarly situated members of a fraternal benefit society to enjoin the society and its officers from using the society's funds as they propose to do under a plan to reorganize the society.<sup>14</sup>

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Unfortunately the epitaph has been sounded prematurely. The "accursed labels" show signs of living to a ripe old age.

<sup>11</sup>2 MOORE'S FEDERAL PRACTICE 2235 (1938).

<sup>12</sup>*Id.* at 2239.

<sup>13</sup>*Id.* at 2241.

<sup>14</sup>Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356, 41 Sup. Ct. 338 (1921), is a landmark case in the class suit field. The Tribe was an Indiana fraternal benefit asso-

(2) The church of which *B* is a member splits into two groups. *B* sues on behalf of himself and other similarly situated members of one of the groups to establish that group's claim to a pro rata share of the funds held by the parent church.<sup>15</sup>

ciation with thousands of members scattered throughout the United States. When its officers adopted a plan of reorganizing the society in order to prevent its threatened insolvency and disruption, there was dissatisfaction among the membership. 524 of the dissatisfied Class A members of the Tribe, all nonresidents of Indiana, brought suit in federal court in Indiana against the Supreme Tribe and its officers, who were all Indiana citizens. The suit was a class suit, brought and prosecuted for the benefit of all members of Class A, who numbered over 70,000 and, attacking the reorganization plan, plaintiffs sought to enjoin the improper use by defendants of Tribe trust funds, "in which all the complainants and other members of Class A . . . had a common and indivisible interest."

A hearing was had before a master, and his report included the finding that the suit was a true class suit, "presenting questions of common interest to all the members of Class A and affecting their joint interests in funds and in internal management of the society." The decree entered by the district court dismissed complainants' bill for want of equity, and no appeal was taken.

No Class A member residing in Indiana intervened in that suit at any time. Nowhere in the reports is it indicated that they, or indeed any other Class A members, received formal notice of the suit or had actual notice of its pendency. Four years later, however, the Indiana Class A members were heard from, for acting on the theory that the prior suit had not determined their rights, they started actions similar to it in the Indiana state courts.

The Tribe applied to federal district court in Indiana for an ancillary bill to enjoin the state court actions, asserting that the state court plaintiffs were bound by the dismissal decree entered in the earlier suit. The district court denied the injunction, reasoning that since diversity jurisdiction would have been lacking if they had been parties, they were not bound by the dismissal.

On appeal, the Supreme Court reversed, squarely holding that the class suit decree was conclusive on all members of Class A. The Court relied on the character of the right involved in that suit and buttressed its reasoning by mention of the deletion of the last sentence of old Equity Rule 38. The rule read: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." As the rule had formerly read it contained also the following provision: ". . . but in such cases the decree shall be without prejudice to the rights and claims of the absent parties." The Court pointed out that it would be an unfortunate state of affairs if the Indiana citizens were not concluded by the decree while all other Class A members were, for then the rights of most of the class might be determined by a decree rendered on a theory which might later be repudiated in another forum as to a part of the same class. A class suit decree, said the Court, must bind all of the class properly represented else the federal courts will not have the jurisdiction in class suits to which they are obviously entitled, and it gave the illustrations of the shareholder, the creditor, and the person not yet in esse being bound by decrees of representative actions involving their rights.

<sup>15</sup>*Smith v. Swormstedt*, 16 How. 288, 14 L. Ed. 942 (U. S. 1853). After the division of the Methodist Episcopal Church into two branches, a suit was brought on behalf of the southern branch to establish its right to an interest in the funds of the "Book Concern." The Book Concern had been established by the traveling preachers of the church prior to its division. They had used their own capital, their primary idea being to disseminate religious knowledge. It was early decided, however, to devote the profits to the relief of traveling, aged, and supernumerary preachers and their families. Through

(3) *C* sues on behalf of himself and other similarly situated taxpayers to enjoin a revenue commissioner from collecting a certain tax alleged to be unconstitutional.<sup>16</sup>

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the labor of all the ministers the Book Concern had grown to be worth about \$200,000 at the time of suit.

The persons named as plaintiffs were preachers in the southern church, and, as such, interested in the fund. They sued on behalf of themselves and the many hundred other preachers of the southern division. The preachers of the northern church, the adverse claimants, were also numerous, and a few of them were made defendants as representative of all. There is no indication that notice of the suit was given to the preachers having an interest in the fund's disposition.

It was held that the bill presented a proper case where some might sue on behalf of all interested in the one subject matter, and where some might be sued as representatives of many. In discussing this point the Court said:

"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

"The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right may be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise." 16 How. 288, 303, 14 L. Ed. 942, 948 (U. S. 1853).

<sup>16</sup>In *Gramling v. Maxwell*, 52 F. 2d 256 (W. D. N. C. 1931), the facts were these: Gramling, a South Carolina peach grower, operated 100 trucks for a part of each year selling peaches throughout the western part of North Carolina. He had no place of business in the latter state, but simply peddled the peaches as best he could directly from the trucks.

A North Carolina statute provided that any person not maintaining a permanent place of business in the state who sold fresh produce must pay a \$50 license tax for each truck he operated in North Carolina. The statute then went on to state, however, that the tax should not apply to persons selling produce grown in North Carolina.

When the North Carolina revenue commissioner, Maxwell, sought to enforce the tax against Gramling, the latter brought suit in federal court on behalf of himself and all others similarly situated to enjoin its collection. The three-judge court declared the tax unconstitutional as a burden on interstate commerce and enjoined defendant from enforcing the tax against plaintiff and the others on whose behalf the suit was prosecuted.

One of the main contentions of the defendant was that North Carolina provided an adequate remedy at law for plaintiff, for he might have paid the tax under protest and sued for its recovery with interest, and therefore there was no basis for federal equity jurisdiction. In answer to this the court said:

"The case is not one, however, involving merely the right of a single taxpayer. It is a class suit instituted in behalf of a large number of peach growers affected by the statute; and we think that it may be maintained in equity for the purpose of avoiding the multiplicity of suits which would otherwise result. Whatever may have been the

(4) *D* sues on behalf of himself and other signers of a restrictive covenant to enjoin *X*, also a signer, from breaking the covenant.<sup>17</sup>

Many other examples could be set forth, but these four nicely illustrate the basis of the problem that is fundamental and is the test of the appropriateness of a class suit—the effect of the judgment. In cases (1) and (2) the judgment will be binding on the entire class, according to Moore and Street, while only those who actually bring or intervene in the suit will be concluded by the judgment in cases (3) and (4). Cases (1) and (2) are “true” class suits, it is reasoned, because the judgment will bind all members of the class whether actual parties or not, while cases (3) and (4) are merely “spurious” class suits because, it is assumed, the judgment cannot be binding upon all members of the class but can be conclusive against only those who were actual parties.

*Are the Present Distinctions Justifiable or Desirable?*

But a little reflection would seem to indicate that there are more than surface similarities between the examples posed. Each instance presents a picture of one individual suing on behalf of himself and of the class of which he is a member to ascertain and determine the answers to questions in which, it is reasonable to assume, each member of that class has a direct interest. In each instance there is the same possibility of inadequate representation of the class' interests by the party bringing the suit, the same opportunity for a bad-faith settlement by that party, and the same chance that certain of the class on whose behalf the suit is allegedly brought would prefer, in reality, that it not be brought or even that it turn out “against” them. In each case there is one question (or several related questions) of law or fact upon which the result turns and which, logically, should be capable of more thorough and satisfactory determination in one single suit in which the views and arguments of all may be put forward than in several suits, the results of which may even be completely opposite determinations as to

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rule formerly as to the right to maintain a class suit of this character in the federal courts, we think that, since the adoption of the 38th Equity Rule (28 U.S.C.A. § 723), the right to maintain such a suit cannot be denied. . . . And, if such a suit may be maintained, there can be no question but that it is speedier, more efficacious, and more satisfactory for all parties concerned than the institution of a hundred or more actions at law for the recovery of taxes paid under protest. The remedy provided by the statute cannot, therefore, in view of the situation, be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation.” 52 F. 2d 256, 260 (W. D. N. C. 1931).

<sup>17</sup>*Hansberry v. Lee*, 311 U. S. 32, 61 Sup. Ct. 115 (1940), discussed in text at notes 28-33 *infra*.

the rights of members of one and the same class. The party or parties who oppose the interests of the class would seem to desire final settlement of the basic issue in a single suit as much in one of the four instances as in another; and in each situation there would seem to be the same degree of public interest in avoiding unnecessary litigation and in bringing to an end in an efficient and economical fashion such litigation as there must be.

Yet the judgment binds the class in some cases and not in others; and whether it does or not is dependent, according to Moore, on the "jural relationships"<sup>18</sup> of the members of the class and the subject-matter of the action. If this means anything it must mean that the binding effect of the judgment depends upon whether the character of the right sought to be enforced is joint, common, or several.

But granting that there exist in the law examples of distinctions based on differences among jural relationships, does it necessarily follow that we must make distinctions on this basis as to the binding effect of class suit judgments? In other words (and without essaying facetiousness), granting that a black dog can be distinguished from a white one, the distinction is of no force when the necessity of obtaining a dog license arises. Is there not danger of falling into an attitude of unthinking formalism, like that of the old common law, when we start assuming that all legal distinctions are meritorious in and of themselves and forget that they should be constantly examined in the light of the purpose they were originally drawn to serve?

The four illustrative cases which were presented above to aid in the consideration of possible class suit distinctions may strike a responsive chord in many memories. Three of them are leading cases from the United States Supreme Court. Example (3) is not, but it is the case of *Gramling v. Maxwell*,<sup>19</sup> ideal for the purposes of discussion because it is one of four cases cited by the Advisory Committee on the Federal Rules as illustrative of the "spurious" class suit.<sup>20</sup>

#### *The "True" Class Suit Versus the "Spurious"*

Example (3) should be carefully compared with example (1), the well-known *Ben Hur* case.<sup>21</sup> In the latter case, the Class A members who sued sought to enforce their right not to have funds of the association misapplied;

<sup>18</sup>The jural relationships determine which of the three types a particular class suit is, and the type it is determines the binding effect of the judgment. 2 MOORE'S FEDERAL PRACTICE 2235, 2283 *et seq.* (1938).

<sup>19</sup>52 F. 2d 256 (W. D. N. C. 1931). See note 16 *supra*.

<sup>20</sup>See Advisory Committee Note to FED. R. Civ. P. 23 (a) (3), 28 U. S. C. foll. § 723c (1940).

<sup>21</sup>255 U. S. 356, 41 Sup. Ct. 338 (1921). See note 14 *supra*.

the former case, i.e., *Gramling v. Maxwell*, was an attempt to uphold the right not to be subjected to an invalid tax. Is the right in the former any more or less "common" than that in the latter? In each case, an individual member of the class might have waived his right without prejudice to other members of the class. In the *Ben Hur* case, the right of a Class A member would depend upon the validity of his membership or policy, which would in turn be subject to attack on the ground of fraud against him individually and without reference to other members of the class. As a matter of fact, the South Carolina peach growers in the *Gramling* case may fairly be said to have a right among them which is, if anything, more "common" than that of the Class A members, for it would seem that the status of all the class depends upon the answer to a single question—whether the tax is a burden on interstate commerce—and it would seem that once that question is determined favorably for the class there would be no occasion for raising any question peculiar to only one of the class.<sup>22</sup>

Nor does it seem sound to attempt to distinguish the rights of the Class A members from those of the peach growers on the ground that the former grew out of a single transaction. However single and unified we might be willing to call a transaction which is really a series of separate contracts

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<sup>22</sup>That the courts themselves have been unable to differentiate clearly between the various classifications of class suits as outlined by Moore is well illustrated by the opinion of Judge Goodrich of the Third Circuit Court of Appeals in the case of *Pentland v. Dravo Corp.*, 152 F. 2d 851 (C. C. A. 3d 1945). There, the suit was brought under the provisions of the Fair Labor Standards Act and in the course of his opinion Judge Goodrich discusses the distinctions between the various types of class suits.

Judge Goodrich starts off by stating, with apparent approval, the Judgments Restatement's illustration of what he terms a true class suit, namely, that of a taxpayer "who sues county tax assessors on behalf of himself and all other taxpayers alleging that his assessment is invalid because a wrong method of assessment was used." He then goes on to state that Moore gives an "explicit answer" as to when we have a "true" class action. Yet Moore, upon whom Judge Goodrich relies, places the taxpayer suit in the "spurious" category. (See Advisory Committee Note to FED. R. CIV. P. 23 (a) (3), 28 U. S. C. foll. § 723c (1940), and 2 MOORE'S FEDERAL PRACTICE 2243, 2244 (1938), referring to *Gramling v. Maxwell*, note 16 *supra*, as "spurious." *Gramling v. Maxwell* seems indistinguishable from the illustration offered by the Judgments Restatement.) In other words, Moore and the Restatement disagree and Judge Goodrich seems to cite both with complete confidence.

The result of such confusion is that neither parties nor their attorneys can determine in advance of a court decision in their case into which category their action is to be placed. Also there arise cases, such as *Matlaw Corp. v. War Damage Corp.*, 164 F. 2d 281 (C. C. A. 7th 1947), which must wrestle with the "spurious"—"true" and "spurious"—"hybrid" distinctions in order to decide whether a federal court has jurisdiction—since in the "true" class action the claims may be aggregated in order to satisfy the requisite jurisdictional amount while in the "spurious" they may not be.

The obvious solution to the problem is to abolish the arbitrary distinctions among class suits and allow the rights of all the members of the class to be determined in one action.

between members and Tribe, we would seem forced to admit that the passage of the tax statute in issue in the *Gramling* case is no less a single transaction.<sup>23</sup>

*The "Hybrid" Class Suit Versus the "Spurious"*

The distinction between the "hybrid" and the "spurious" suit is likewise a will-o'-the-wisp. Indeed under Moore's analysis the "hybrid" is merely a "spurious" suit with a fund attached;<sup>24</sup> but under no analysis can it be said that the presence or absence of a specific fund has any connection with what we may call the "abstract rights" of the parties. The reason for making a distinction based on the fund is a procedural rather than a substantive one, rather one of form than of substance, rather based on the supposed requirements of due process than on any careful, logical analysis of the rights of the parties.<sup>25</sup> A legal wrong gives rise to a cause of action for damages springing from the wrong. Many persons may have the identical cause of action, arising from the same wrong. The right to come against the fund arises from a wrong—and that wrong is the same and gives rise to the same cause of action whether there is or is not a fund.<sup>26</sup>

<sup>23</sup>"Oneness" of subject matter—whether based on the existence of a fund or of "common" or "joint" or "derivative" rights in controversy—has been premised as underlying the rule that the "true" and the "hybrid" class suits determine the rights of all of the class. But is there any less a "oneness" in the "spurious" suit?

A valid answer to those who assert there is would seem to be found in the opinion by Judge Evans in *Weeks v. Bareco Oil Co.*, 125 F. 2d 84 (C. C. A. 7th 1941). That case was a civil statutory action by two jobbers of gasoline, on their own behalf and as representatives of a class of 900 jobbers, to recover treble damages for injuries allegedly caused by an unlawful combination to fix gasoline prices. The court stated that the action could have been maintained as a class action had plaintiffs shown they adequately represented the interests of the class. Failure of such a showing, however, required dismissal of the action as a class action, though it could of course continue as an individual action. The defendants asserted that the action could not in any case be brought as a "spurious" class suit, since there was lacking a "common question"; but the court went out of its way to answer that argument and in showing the presence of a "common question" it so described the rights involved as to indicate they were indistinguishable from "joint or common" rights:

"The statutory tort, incidental to a criminal conspiracy, is a single thing, a single wrong, and though a compound of many acts and persons, it has a singleness of object, an integral core.

"The illegal conspiracy gives rise to one statutory cause of action for damages incident to the violation of law. Many persons may have the identical cause of action, arising from the same wrong, but varying in scope of damage to each, depending upon the effect of the illegal act upon the individual." 125 F. 2d 84, 88 (C. C. A. 7th 1941).

<sup>24</sup>2 MOORE'S FEDERAL PRACTICE 2239, 2240 (1938).

<sup>25</sup>Unquestionably a fund case is procedurally different in that there is *in rem* jurisdiction which supports service of process outside the territorial limits of the court that holds the fund.

<sup>26</sup>See *Pennsylvania Co. for Insurances v. Deckert*, 123 F. 2d 979, 983 (C. C. A. 3d 1941), discussed in note 42 *infra*.

*Has Not Hansberry v. Lee Reversed the Ben Hur Case?*

To state that the judgment in a "true" class action binds all members of the class because the rights of all of the members of the class are before the court,<sup>27</sup> is to beg the question in issue. What brings the rights of a party before a court? Members of a "spurious" class who know an action is being brought to litigate questions affecting their rights and who expressly or by silence assent to the named plaintiff's statement that he represents them would seem to have placed their rights before the court in a much clearer fashion than members of a "true" class who never hear of the action until judgment has been entered. And yet the latter class is bound by the judgment, at least under the Advisory Committee's interpretation of the *Ben Hur* case, in which, it is to be recalled, there was no showing that notice was ever given to any of the class other than the named plaintiffs.

It seems unlikely, however, that the *Ben Hur* case, were it to come up for the first time today, would reach the same result, for its doctrine as to res judicata seems irreconcilable with the position of the Supreme Court in the case of *Hansberry v. Lee*,<sup>28</sup> illustration (4), above.

In the *Hansberry* case several hundred white property owners had entered into a restrictive covenant against negro occupation of property in their subdivision. The restrictive covenant was to become effective only if owners of 95% of the frontage signed it. In 1934 Mrs. Burke, one of the signers, sued on behalf of herself and others similarly situated to enjoin a violation of the covenant. It was stipulated by the defendant that the required 95% had signed the covenant, and the case went to the chancellor on an agreed statement of facts, the only issue being whether local conditions had so changed as to render the covenant inequitable. The chancellor held they had not and granted the injunction.<sup>29</sup>

Five years later Mrs. Lee, another party to the covenant, sued on behalf of herself and others similarly situated to enjoin another violation of the covenant, but this time the defendants set up the defense, and the chancellor found, that owners of the required 95% of the frontage had never signed the covenant. Despite this finding the chancellor ruled that the covenant was valid and in force because all of the property owners were bound by the decree in *Burke v. Kleiman*,<sup>30</sup> which was a class suit and hence res

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<sup>27</sup>See *Smith v. Swormstedt*, 16 How. 288, 303, 14 L. Ed. 942, 948 (U. S. 1853).

<sup>28</sup>311 U. S. 32, 61 Sup. Ct. 115 (1940).

<sup>29</sup>*Burke v. Kleiman*, 277 Ill. App. 519 (1934).

<sup>30</sup>277 Ill. App. 519 (1934). See note 29 *supra*.

judicata as to the whole class. The chancellor's decree was affirmed by the Supreme Court of Illinois.<sup>31</sup>

The Supreme Court of the United States, however, reversed,<sup>32</sup> on the ground that it was a denial of due process to hold that all members of the class were bound by the decree in the first action.

"It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. *Smith v. Swormstedt*, supra; *Supreme Tribe of Ben-Hur v. Cauble*, supra. . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative."<sup>33</sup>

But does the Court mean to base its holding on the distinction attempted to be drawn in the above paragraph? It is submitted it does not, because the distinction is one without substance. There is no such thing as a class action in which it can be said that each and every one of the absent members—those without notice of the proceedings—wishes the representatives of the class to assert a right in his behalf. Is it conceivable that every one of the 70,000 Class A members in the *Ben Hur* case desired to have the Tribe's officers enjoined from proceeding with the planned reorganization? It would seem more than likely that some of the class wished the Tribe's finances to be on a sound basis even if it might cost them some loss of benefits or standing relative to other classes of membership of the Tribe. At any rate, it seems fallacious to assume without inquiry that 70,000 people agreed, even in general, with the representatives who brought the suit.

Could not the language of the Supreme Court in the *Hansberry* case be applied with equal facility to the *Ben Hur* case—i.e., should not the Class A members have been considered as "free alternatively either to assert rights or to challenge them"? One is hard put to understand how the Supreme Court can say that the *Burke v. Kleiman* judgment did not bind the entire class because some of the class might not have wished to uphold the covenant had they been parties in that earlier action, and at the same time cite as authority the *Ben Hur* case where it is just as likely that some of the class might not have wished to attack the planned reorganization of the Tribe.

It would seem accurate to say that the fundamental reason why the

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<sup>31</sup>*Lee v. Hansberry*, 372 Ill. 369, 24 N. E. 2d 37 (1939).

<sup>32</sup>*Hansberry v. Lee*, 311 U. S. 32, 61 Sup. Ct. 115 (1940).

<sup>33</sup>*Id.* at 44, 61 Sup. Ct. at 119.

Supreme Court of Illinois was reversed in the *Hansberry* case—though imperfectly expressed—was that the lack of notice to all members of the class in *Burke v. Kleiman* precluded the decree in that suit from binding the entire class. That the *Burke* case decree would have been *res judicata* as to the class had notice been given is indicated by the following statements from the Supreme Court's opinion:

"Nevertheless, there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here; as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; . . . nor does it compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, . . . this court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."<sup>34</sup>

The Court then made this most significant statement:

"Nor do we find it necessary for the decision of this case to say that, when the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could not constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."<sup>35</sup>

The paragraph immediately above clearly refers to the "spurious" class, and thus *Hansberry v. Lee* may well be termed a standing invitation to Congress and the states to do something about class suit judgments—particularly the judgments in the "spurious" class suits. It is unfortunate that in eight years the invitation has not been accepted.

#### *Class Suits and the Statute of Limitations*

A problem that cannot be avoided in any discussion of class suits is that of the statute of limitations. Assume *A* brings a class suit on behalf of himself and all others similarly situated. Before trial the statutory period of

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<sup>34</sup>*Id.* at 42, 61 Sup. Ct. at 118.

<sup>35</sup>*Id.* at 43, 61 Sup. Ct. at 119.

limitation expires. Then *B* moves to intervene in the suit as party plaintiff along with *A*. Should the defense of the statute of limitations be good against *B*, or should the commencement of *A*'s class action toll the statute for *B* and other members of the class who later wish to intervene?

The Supreme Court considered this question in 1887, in *Richmond v. Irons*,<sup>36</sup> and held that *B* was not barred. In that case, Irons, a judgment creditor, filed an amended bill as of October 5, 1876, on his own behalf and on behalf of all creditors who might become parties, against all the stockholders of an insolvent national bank. He asked an accounting and thereafter an assessment against each defendant of his stockholder's liability.

In refusing to limit recovery to those creditors who actually became parties before the period of limitation expired the Court said:

"That amended bill is to be considered from the date of its filing, as a bill on behalf of all the creditors of the bank who should come in under it and prove their claims. When any creditor appeared during the progress of the cause to set up and establish his claim, it was necessary for him to prove that at the time of filing the bill he was a creditor of the bank; any defence which existed at that time to his claim, either to diminish or defeat it, might be interposed either before the master or on the hearing to the court. The creditor, having established his claim, became entitled to the benefit of the proceeding as virtually a party complainant from the beginning, and the time that had elapsed from the filing of the bill to the proof of his claim would not be counted as a part of the time relied on to bar the creditor's right to sue the stockholders. In other words, if he proves himself to be a creditor with a valid claim against the bank, he becomes a complainant by relation to the time of the filing of the bill. . . .

"It follows, therefore, that the statute sought to be applied in the present case ceased to run as against the complainants from the date when the bill was filed, in October, 1876, under which they subsequently established their right to come in as participants in the benefits of the decree."<sup>37</sup>

In our day the rule of *Richmond v. Irons* has been re-examined and followed by Judge Frank of the Second Circuit in *York v. Guaranty Trust Co.*<sup>38</sup> A class suit had been brought by a noteholder against the indenture trustee, alleging fraud and misrepresentation in obtaining the noteholders' consent to a reorganization. Miss York attempted to intervene in that suit, but

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<sup>36</sup>121 U. S. 27, 7 Sup. Ct. 788 (1887).

<sup>37</sup>*Id.* at 52, 55, 7 Sup. Ct. at 799, 800.

<sup>38</sup>143 F. 2d 503 (C. C. A. 2d 1944), *rev'd on other grounds*, 326 U. S. 99, 65 Sup. Ct. 1464 (1945).

her application was denied.<sup>39</sup> She began her own action several months later, suing on behalf of herself and other similarly situated noteholders who had not accepted the reorganization offer, charging a breach by the defendant of its duties and obligations as indenture trustee and seeking an accounting. One of the defendant's contentions was that relief could not be granted to "similarly situated noteholders" against whom, individually, the statute had run.

In discussing this point, Judge Frank cited *Richmond v. Irons* and quoted from *Dobson v. Simonton*<sup>40</sup> as follows:

"It would be a strange anomaly in the law, if it should allow an action to be brought for a party, and he should thus be encouraged to rely upon it, and not seek legal redress otherwise than by it, and yet when he came, in the course of his action, to prove his debt, and share in the fund, to treat him as having, by such reliance, lost it by the lapse of time, happening after the bringing of the action. The law will not mislead—it is just and faithful, and will not tolerate, much less uphold, a rule of practice, that works such injustice and absurdity."<sup>41</sup>

Judge Frank continues:

"As to suits under [Rule 23 (a)] (3) ['spurious'], no less than those under (1) ['true'] or (2) ['hybrid'], the Rule unequivocally tells all persons having claims of the type therein described that one or more of them may begin such a class action 'on behalf of all' when the 'class' is 'so numerous as to make it impracticable to bring them all before the court.' Any non-accepting noteholders, relying on that assurance, were justified in believing that plaintiff's suit was begun on their behalf although they were not before the court. To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule into a trap."<sup>42</sup>

<sup>39</sup>*Hackner v. Guaranty Trust Co.*, 117 F. 2d 95 (C. C. A. 2d 1940), *cert. denied*, 313 U. S. 559, 61 Sup. Ct. 835 (1941).

<sup>40</sup>93 N. C. 268 (1885).

<sup>41</sup>143 F. 2d 503, 529 (C. C. A. 2d 1944).

<sup>42</sup>*Ibid.* The only decision to the contrary we have located is *Pennsylvania Co. for Insurances v. Deckert*, 123 F. 2d 979 (C. C. A. 3d 1941), where the court said that if before a "spurious" class suit was begun the statute had already run against one who later desired to intervene, the commencement of the class action by another member of the class whose right was not barred would not revive the intervenor's right. Plaintiff sued on behalf of himself and all others similarly situated to enforce the liability of defendant for misrepresentation in the sale of securities, in violation of § 12(2) of the Securities Act of 1933. The district court, treating the action as a "hybrid" class suit, ruled against defendant, who appealed and assigned as error, *inter alia*, the district court's order permitting the addition of parties-plaintiff whose causes of action should be considered barred by the provisions of limitation of § 13 of the Securities Act.

The circuit court, despite the fact that the order was interlocutory and not appeal-

The great procedural virtue of the class suit, therefore, is that once it is properly instituted, the other members of the class may intervene in it free from the bar of the statute of limitations.

And this makes it most important to the profession that we know a class suit when we see it.

*Why Not Accept the Invitation in Hansberry v. Lee?*

Returning to the comparison of the *Ben Hur* and *Hansberry* cases, our analysis has disclosed the problem that exists. The task is to provide a procedure that, while allowing a decree which will be res judicata as to all members of the class with respect to the substantive issues of the case, nevertheless will conform to the requirements of due process of law.

The objections to making provisions for such a change are well-known. They are based, usually, on one of two premises—that we must not deprive any litigant of his “day in court”, and that we cannot constitutionally provide for a judgment in a “spurious” class suit which will bind persons other than those participating in the action as parties or as intervenors.

The argument that an individual must not be deprived of his day in court

able except upon final judgment, nevertheless expressed its views upon the order and upon the application of § 13, and concluded that a member of the class might not intervene as an additional party-plaintiff if he had purchased his securities more than three years prior to the commencement of the suit. The court reasoned that the suit was a “spurious”, not a “hybrid”, suit and that the statute had thus run against those individuals. If, however, the court said, those desiring to intervene could show fraud and conspiracy to defraud on the part of the defendant, a constructive trust might arise and the statute would not bar them—for then the situation would be that of a trust coming to an end, with the necessity of distributing the fund to those equitably entitled to it.

The court also said that if the defendant should turn out to be insolvent and a receiver should be appointed, those individuals whose claims were otherwise held barred might then intervene. The reasoning: upon appointment of a receiver the suit against defendant would become a “hybrid” suit and § 13 would no longer be applicable as a bar.

The situation seems no clearer as a result of this decision, and the case does not seem good authority because it fails to cite and discuss *Richmond v. Irons*. Further, the decision is inconsistent with the decision of the same circuit in *Pentland v. Dravo Corp.*, 152 F. 2d 851 (C. C. A. 3d 1945).

*Cf.* Kalven and Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. OF CHI. L. REV. 684, 712 n. 88 (1941): “Where the statute of limitations has run while the suit is pending, there may be some technical difficulty in allowing participation by the absentees, if their rights are said not to be before the court prior to the running of the statute. It would seem clear that none of the supposed policies behind the statute support barring of the absentees. The defendant is apprised of the nature of claims of each and of the probability that it will be enforced against him. It is not a ‘stale’ claim, there is no loss of relevant evidence, and finally, little would be gained by having the absentees intervene at an earlier date in the proceeding. Participation might be based on the theory that the absentees ratify the plaintiff’s suit on their behalf and that by familiar agency principles the ratification relates back to the date of commencement of the class action. . . .”

is a shibboleth more emotional than rational when applied to the problems of class suits. But even accepting it at face value, its weakness in the class suit field becomes readily apparent when the following considerations are taken into account:

*First*, under any plan to extend the binding effect of class suit judgments there is no intention of depriving anyone of his day in court. Generally speaking, anyone interested in the question in issue will be entitled to his one day in court subject only to the condition that he has enough ambition to go to court and participate in the litigation.<sup>43</sup>

*Second*, under the present rules governing "spurious" class suit judgments it is not hard to perceive how an interested person may with a good deal of truth be said to have *two* days in court, for he may sit back and decline to participate in the class suit when it is brought and then later, after it has been carried through to judgment, sue in his own behalf with the benefit of full disclosure of his adversary's case.

*Third*, since the idea of a day in court for everyone is based on the principles of natural justice and fair play, we might well consider the position of the party opposing the class. Is it fair or just to him to be called upon to fight a number of suits all turning upon the same identical issue?

*Fourth*, is it not much fairer to society as a whole—the group that pays the bills for long-drawn-out and costly litigation—to settle as much as possible in a single suit?

And *fifth*, touching again upon the theme of justice and fair play, a single suit whose judgment binds the entire class will afford a much stronger protection against fraudulent suits, bad faith settlements, and phony dismissals than the present system, for each member of the class will be on his guard against such tricks lest he find himself bound by them through his failure appropriately to object to them.

In this connection it might be observed that there seems to be no eminently successful method of fighting collusive settlements of class actions that does not include calling for and considering the opinion of any member of the class who might oppose settlement. Refusal by the court to permit the compromise and settlement of any class action at all has been suggested but is undesirable on two grounds: (a) that it is not in the interests of justice to close the door to good-faith settlements merely to avoid the collusive ones, and (b) that it is at best a negative approach, containing no safeguard

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<sup>43</sup>The matter of multiple counsel fees coming out of a class suit recovery has raised difficulty in the past and is a topic worthy of separate treatment. It is suggested that the court should, in its discretion, limit the number of counsel so as to avoid this danger.

that the representative who desires to settle but is prohibited from so doing will in good faith put forth his best efforts to win the suit.<sup>44</sup>

*Forum Non Conveniens*

As desirable as an adequate class suit procedure is, we must, of course, remember that not every forum is the convenient and desirable one. If the class suit is to develop as a service to our society, provision should be made in both the state and federal machinery for transfer of the suit to the most practicable forum. Otherwise, the maintenance of class suits in far-off jurisdictions will do harm instead of good.

*Pennoyer v. Neff*

The constitutional objections to making the class suit judgment binding on all the class seem a good deal stronger than those based on the supposed deprivation of a person's "day in court". Indeed at first blush it might seem an insurmountable task in the face of the constitutional requisites for due process of law as they were set forth in *Pennoyer v. Neff*.<sup>45</sup> Due process as there outlined required, first, notice to the parties involved, and, second, jurisdiction over either parties or *res*. In class suits where literally hundreds of members of a class may be scattered anywhere over the 48 states, the territories, and in foreign countries, the task of obtaining jurisdiction over them *in personam*, in the traditional sense, is impossible.

There are two problems—federal class suit procedure and state:

*Federal Class Suits.* Under Rule 23 as presently written, the question arises whether a class suit judgment binding on members of the class outside the jurisdiction can be based upon the district court's observing the caveat in *Hansberry v. Lee* and giving notice to the absent members.

Certainly the *Hansberry* case clearly indicates that no judgment will be binding on members of the class who do not receive notice of the pendency of the action. But does it follow that such notice can, under *Pennoyer v. Neff*, be effectively given only to such members of the class as are within the state where the federal district court sits? If this be so, Rule 23 can have but limited operation in its present form.

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<sup>44</sup>*Young v. Higbee Co.*, 324 U. S. 204, 65 Sup. Ct. 594 (1945), and *Clarke v. Greenberg*, 296 N. Y. 146, 71 N. E. 2d 443 (1947), held that representative plaintiffs (in a stockholder's class action and a true stockholder's derivative action, respectively) who collected money in private compromise and settlement, could be required to account for it to the corporation. But here again there is no positive safeguard for the interests of the other shareholders since the corporation may recover from the representative plaintiff only what that plaintiff has received.

<sup>45</sup>95 U. S. 714, 24 L. Ed. 565 (1878).

The better view would seem to be to assume that in drawing Rule 23, the Supreme Court and the Congress intended that class suits could be maintained so long as the constitutional requirements of due process were observed. The answer to the question whether Rule 23 permits the giving of notice to nonresident members of the class, and the basing thereon of a binding judgment, must await a determination by the Supreme Court of the United States.

Since there is no constitutional difficulty involved, the ideal solution federalwise is for the Supreme Court Advisory Committee to anticipate the point and provide specifically in Rule 23 for the giving of such notice outside the federal district and outside the state in which the federal district court sits.<sup>46</sup>

*State Class Suits.* Granted that federal class suits might be maintained which would end in judgments binding on members of the class absent from the district and state—either by judicial approval of notice (as called for by *Hansberry v. Lee*) given under Rule 23, or by amendment of Rule 23—it must be emphasized that such a solution would be only a partial one. Class suits in the state courts would be no better off.

It is submitted, however, that nationwide service could be provided for the *state* courts based on already existing legal principles.

#### *Jurisdiction Based on Notice Alone*

The subheading immediately above does not mean that the Fourteenth Amendment is about to be jettisoned. It is rather a description of the *in personam* jurisdiction obtained under a typical nonresident motorist statute and approved by the Supreme Court in *Hess v. Pawloski*.<sup>47</sup>

The nonresident motorist problem furnishes a good example of the struggle between a rigid interpretation of *Pemoyer v. Neff* and the demand of the public interest. In recognizing and facing the implications of that struggle the Supreme Court said in the *Hess* case:

“In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him. . . . It is required that he shall actually receive and receipt for notice of the service and a copy

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<sup>46</sup>The satisfactory manner in which nationwide service has functioned in bankruptcy and interpleader cases provides strong argument for the change.

<sup>47</sup>274 U. S. 352, 47 Sup. Ct. 632 (1927).

of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense."<sup>48</sup>

Due process, in other words, must not prove a stronghold of resistance to efforts to meet the needs of the public interest.

The Supreme Court in the *Hess* case stressed the importance of the non-resident's answering for his alleged misdeeds in the state where they occurred; but of equal concern to the Court were the requirements of true due process, and to meet these the nonresident must be given notice and reasonable opportunity to be heard in defense. Emphasis was laid not on a technical compliance with due process through service on an agent within the state (the Secretary of State in most instances), but rather on *actual notice* to the defendant. In other words, it was not the ritualistic phrases in which the legal medicine man uttered the magic formula that persuaded the Court in the *Hess* case; instead it was the fact that the basic requirements of due process—notice and opportunity to be heard—were present. The Court did not—could not—say that service alone on the Secretary of State satisfied due process. For all the good that service on that official, without more, does in satisfying due process, we might just as well say that due process could be met by running around the block three times and shouting "Hallelujah" twice, and this was well brought out in *Wuchter v. Pizutti*,<sup>49</sup> decided the year after the *Hess* case. In the *Wuchter* case the Supreme Court held invalid, as lacking in due process, a statute which provided that service on a nonresident motorist could be effected by serving the Secretary of State but which contained no other provision making it reasonably probable that notice of such service would be communicated to the defendant. Thus the cornerstone of the constitutionality of the non-resident motorist statute is found in the words already quoted:

"It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense."<sup>50</sup>

Perhaps at the time of the *Hess* case legal thinking was too overawed by the supposed doctrine of *Pennoyer v. Neff* to bridge with one leap the long step to providing for service by notice alone, and so it took only the intermediate step of providing for "serving" the Secretary of State. Legal innovations must often of necessity be made piecemeal. By now, however,

<sup>48</sup>*Id.* at 356, 47 Sup. Ct. at 633.

<sup>49</sup>276 U. S. 13, 48 Sup. Ct. 259 (1928).

<sup>50</sup>274 U. S. 352 at 356, 47 Sup. Ct. 632 at 633 (1927).

the nonresident motorist statutes have become sufficiently integrated into our legal concepts to allow us to drop the outmoded fiction requiring "service" on the Secretary of State and relieve him of the burden of those formal documents which he neither sees nor has any interest in and which merely require additional clerical and filing staffs. To drop an utterly useless procedure would scarcely lay us open to the charge of violating due process.

What the Court did in the *Hess* case was simply to recognize that negligent drivers were a threat to the order and well-being of society and to refuse to stand in the way of a state's common-sense method of meeting that threat.

Applying the foregoing to the class action problem, it should take no great imagination to realize that inability properly to adjudicate as to all members of a class, without multiple actions, is likewise a problem of public concern and may in some cases rightly be said to endanger the public interest. The *Hess* case shows us the remedy, which merely waits to be put to use: a statutory provision for notice of a type similar to that which the Supreme Court approved in *Hess v. Pawloski* could with simplicity be adopted and made available by the states in class suits—and the federal government would not be long in following up with nationwide class suit service. We are not unaware of the practical problem of expense which this suggestion involves. However, if the large number of members of the class would render the requirement of notice by registered (or even ordinary) mail prohibitively expensive, the statute might provide for notice by widespread publication, in the sound discretion of the court. Whether the court would, in its discretion, permit notice to be given by publication should depend, of course, upon the number of members of the class, the amount involved in the litigation, and the probable effectiveness of the published notice in reaching the class.

It may be objected at this point that the statute which was upheld in *Hess v. Pawloski* made certain that the defendant received notice by requiring the notice to be sent by registered mail, return receipt requested, and that such a course of procedure is quite different from notice by publication. But consider in this connection New York's nonresident motorist statute, § 52 of the Vehicle and Traffic Law. This section provides that where registered mail has been refused upon attempted delivery to the prospective defendant, the plaintiff may send the required notice by ordinary mail. Were this not the case, the purpose of the statute would be nullified by the refusal of nonresident motorists to accept any registered mail.<sup>51</sup> *Quaere*, if ordinary mail

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<sup>51</sup>See also N. Y. CIV. PRAC. ACT § 229-b, setting forth similar procedure for serving

will suffice for due process, would published notice (a constitutional device already widely used) be held insufficient and unconstitutional were the statute to provide for it as an alternative means in cases where the prospective defendant refuses to receive even ordinary mail?

It is but the logical step for the several legislatures to furnish a method for serving notice, or process, on absent members of the class, to provide them with an opportunity actively to participate in the litigation or in the alternative to be bound by the actions of those members who do actively participate, and to leave the outcome in the lap of the Supreme Court. Indeed such a course would seem to be what that Court was impliedly suggesting in *Hansberry v. Lee*.

Stresses and strains pervade the whole problem of *res judicata* where public policy demands an end to litigation while traditional due process might insist on a day in court for every man on every claim or defense.<sup>52</sup> Perhaps there is no ideal solution to the conflict to be found in our man-made procedures—yet in the final analysis due process would seem less abused by holding a class to a final determination, in one fair and adequate hearing, of its rights and liabilities arising out of the subject of that action, than by the present alternative of applying *stare decisis* in assembly-line fashion in a series of separate actions by or against individual members of the class.<sup>53</sup>

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summons on a nonresident natural person doing business in the state. Cf. N. Y. REAL PROPERTY LAW § 442-g, providing for service on a nonresident real estate broker licensed to do business in New York.

<sup>52</sup>See Von Moschzisker, *Res Judicata*, 38 YALE L. J. 299 (1929).

<sup>53</sup>Should Congress and the state legislatures fail to act to provide for jurisdiction by notice alone, it is suggested that the courts themselves could take jurisdiction *in rem* by viewing the claim of the class as a *res* which is brought before the court in its entirety by those members of the class who are the original parties to the suit. It is arguable that similar reasoning underlies the *Ben Hur* case, note 14 *supra*, and *Smith v. Swormstedt*, note 15 *supra*, ("The legal and equitable rights and liabilities of all being before the court by representation . . ."). Such a view would result in a judgment *res judicata* as to all members of the class and yet conforming to the due process requirements of *Pennoyer v. Neff*.

To assert that the claim or cause of action of a class in any class suit may properly be thought of as a *res* is neither illogical nor inappropriate. The very concept of a class suit must be founded on an acceptance of an idea of "oneness" among those comprising the class. Reasoning from the premise that each class suit has some "oneness" to it, there would seem to be no fallacy in taking the position that the "oneness" is within the generally accepted definition of *res*, and that when the class suit is properly brought the court has at least *in rem* jurisdiction over the "oneness". The *res* might, then, be brought before the court in the same way that any other intangible *res* is now brought before a court of adequate jurisdiction—by an action by one with a claim against or relating to the *res*.

Add the requirement that before such an *in rem* action could be entertained notice must be given to all members of the class to be affected by the judgment and it is

*Recommendations*

Without waiting for decisive action by Congress, legislatures and courts, the Advisory Committee on the Federal Rules of Civil Procedure can provide the initial impetus toward resolving the present state of confusion and uncertainty. A redrafting of Rule 23, eliminating any reference to distinctions between types of class actions and providing that in any class suit there shall be notice to all members of the class, would be of immeasurable help.

The Commissioners on Uniform State Laws, by proposing a uniform class suit statute patterned on a model nonresident motorist statute, can offer equally effective aid in overcoming the present inertia.

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NOTE: Through the courtesy of George Wharton Pepper, Esq., The Editors of the CORNELL LAW QUARTERLY are pleased to present the following letter addressed by him to Professor Arthur John Keeffe concerning this article, "Lee Defeats Ben Hur". It is felt that Mr. Pepper's comments on this very controversial subject of class suits are of particular interest and significance because of his outstanding achievements in the field of federal procedural reform, particularly as Vice Chairman of the Supreme Court Advisory Committee on Rules of Civil Procedure.

Professor Arthur J. Keeffe,

March 24, 1948

The Cornell Law School,  
Ithaca, New York

Dear Professor Keeffe,

Agreeably with my undertaking I took the galleys home last evening and gave myself the pleasure of reading your article with care.

You argue persuasively for the convenience of a procedure which will make judgments in (3) and (4) as binding on all individuals as are judgments in (1) and (2) but you evidently sense the degree of opposition which anybody would encounter who espoused the proposed reform. As a practical matter, therefore, the question is how much strength there really is in the position of anticipated opponents. A fair appraisal of the other fellow's strength is a wise precaution to take before dropping a bomb.

You effectively dispose of the "day in court" objection. That is not much of a hurdle.

In your discussion of *Pennoyer v. Neff* and the XIVth Amendment you submitted that the concepts underlying *Pennoyer v. Neff* would not be evaded but rather met and impressed with a new vigor.

are less effective. This is because you do not come to grips with the degrees of "process" which are required by different fact-situations. As I suggested in yesterday's letter, where there is a ready-made bond of association it is relatively easy to apply the principle of volunteer representation. Stockholders are already committed to the representative function of elected directors: it is a short step, in an emergency, to substitute a volunteer. So in the case of a membership-corporation—a church, for example, or a fraternal organization. Taxpayers are, perforce, fellow-travellers and their association is essentially a corporation; but the bond of association between them belongs in the field of political science rather than in the area of voluntary economic or social effort. They have not joined the lodge or joined the church; and, in their capacity as taxpayers, they think of themselves not as associates but merely as victims of a common misfortune. The "process" that is "due" in their case may therefore easily be thought to be a much more individual process than otherwise would suffice.

People who have made similar restrictive covenants are associates only in virtue of that particular circumstance: they may be strangers to one another, like fellow-passengers who became such by separately buying tickets for the same train. If a wreck happens and the railroad is to be sued, perhaps there is due to each of them more individual treatment than if they were already lodge-members en route to the big convention.

What do you think? Is mere notice (whether general or specific) sufficient to bind X by the judgment entered in a suit by A if A and X have never consciously associated with one another?

These distinctions, I suppose, are what Moore refers to as "jural relationships". If they are mere distinctions without substantial differences they ought not to stand in the way of reform. I dislike such a classification as "true", "hybrid" and "spurious". When one speaks of a class action he should begin by defining "class". If his definition is broad enough to cover (1), (2), (3) and (4), that is the end of the matter. If his definition is too narrow to cover them all, the omitted actions are simply not class actions. In the latter event they must either be dealt with on some other theory than that of "class" or they cannot be maintained at all.

Being only 81 years of age I am perhaps more ready for legal adventure than some of my wiser (and younger) colleagues on the Committee. But even my spirit of adventure needs to be further quickened by yours before I can go off the deep end and recommend the sweeping reform that you advocate.

Faithfully yours,

GEORGE WHARTON PEPPER