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Civil Practice Act Cases

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over the fund as a price to becoming surety.[16] It is likewise beside the point as to whether or not the surety is a "paid" one, for even a compensated surety has rights before the law. The fundamental fact remains that the creditor who makes such an application of payment in derogation of the rights of the surety is acting inequitably and should be held to account.

The modern trend, if there is one, seems to be against the compensated surety unless he can show an actual fraud on his rights. Some indication of a change may be seen in more recent federal cases,[17] but until the state courts return to fundamental principles of justice in this regard, the law will remain in a state of confusion.[18]

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CIVIL PRACTICE ACT CASES

MUNICIPAL CORPORATIONS—RIGHTS AND REMEDIES OF TAXPAYERS —WHETHER TAXPAYER MUST MAKE DEMAND UPON MUNICIPAL CORPORATION AS CONDITION PRECEDENT TO FILING SUIT IN ITS NAME AND ON ITS BEHALF—The Illinois Appellate Court for the First District recently had occasion to consider, in *People ex rel. City of Chicago* v. *Schreiber,*[1] the circumstances under which a taxpayer might bring suit in the name of and on behalf of a municipal corporation against a public officer to recover funds allegedly improperly retained by the latter.[2] A prior suit had been filed by a taxpayer to compel an accounting of such money and it was his contention that since his suit had been filed first, it was a bar to a subsequent mandamus

[16] In Salt Lake City v. O'Connor, 68 Utah 233 at 242, 249 P. 810 at 814 (1926), however, the court said: "When a surety . . . permits money on the contract to be paid the contractor unconditionally, which it must know he may use for general purposes, we see no sufficient reason for sustaining any claim or equity in behalf of the surety, in such money, after it has been paid to another in the due course of business. The risk of such loss is one of the hazards which the surety, for a fixed consideration, assumes by its contract." See also Standard Oil Co. v. Day, 161 Minn. 281, 201 N. W. 410, 41 A. L. R. 1291 (1924); Grover v. Board of Education, 102 N. J. Eq. 415, 141 A. 81 (1928), affirmed in 104 N. J. Eq. 197, 144 A. 918 (1929); Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429, 157 N. W. 96 (1916).

[17] In Maryland Casualty Co. v. City of South Norfolk, 54 F. (2d) 1032 (1932), the court permitted the creditor to apply the fund as he saw fit. One year later, in United States v. Johnson, Smathers & Rollins, 67 F. (2d) 121 at 123 (1933), the same court declared that where payment is made to the creditor with the "identical money for the payment of which the surety is bound" such fund must go toward the extinguishment of the secured debt.

[18] Although the federal courts may formulate their own rules as to bonds on federal contracts, they must still be guided by state decisions on state matters by reason of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).

[1] 322 Ill. App. 452, 54 N. E. (2d) 862 (1944).

[2] It appeared that a city clerk had collected fees for issuing state fishing and hunting licenses and had retained a portion of the amounts collected as a commission which, it was contended, should have been turned over to the city treasury. The court held that the sums so retained were not fees and earnings of the city clerk under Ill. Rev. Stat. 1943, Ch. 24, §172, but belonged to the official in his private capacity.

action brought by the municipal corporation for the same purpose. To advance his contention, he sought leave to intervene in the city's action but his petition was denied. Upon appeal from such order, it was decided that the taxpayer had no standing in court in the absence of a showing or at least an allegation that the proper city official had refused or failed to institute proceedings after notice and demand.

The Illinois Appellate Court, by so holding for the first time in the history of this state, has added Illinois to the list of jurisdictions which have already answered the question in the same fashion. Early decisions on the subject proceeded from an analogy to suits brought by stockholders against officers of private corporations where the rule prevails that such stockholder should first make a demand upon the directors before he may bring suit in the name of the corporation.[3] In some jurisdictions, however, the necessity for such a demand in the case of municipal corporations is imposed by statutory enactment which may even go so far as to prescribe the form of the demand.[4] It has been held that such statutory requirements must be followed strictly.[5]

While Illinois has no statute directly in point, it has a law regarding suits to prevent the disbursements of public funds.[6] The purpose of that statute was clearly expressed in the case of *Hill* v. *County of La Salle,*[7] where it was said that: "Prior to the enactment of the statute a taxpayer might institute, as a matter of right, a suit to restrain State officers, as well as other public officers, from disbursing public funds. These suits were often well founded, but when prosecuted for some ulterior or malicious motive they might, and sometimes did, seriously embarrass the proper administration of public affairs. When the right of a public officer charged with the duty and responsibility of the proper application of public funds to disburse such funds is challenged by a lawsuit, it is obvious that for his own protection he will refuse to pay out the money in his custody until the suit is finally adjudicated. Hence the General Assembly, as a check upon the indiscriminate institution of such suits, provided by the act of June 21, 1917, that when a taxpayer seeks to enjoin a State officer from disbursing public funds, he must by a petition show that there is reasonable ground for filing the bill and obtain leave for that purpose. The act provides a summary proceeding to determine whether a bill in equity to enjoin the disbursement of public moneys by State officers is justified and should be filed, and by that proceeding seeks to prevent unwarranted inter-

[3] Reed v. Cunningham, 126 Ia. 302, 101 N. W. 1055 (1905); Merrimon v. Southern Paving & Construction Co., 142 N. Car. 539, 55 S. E. 366 (1906).

[4] State v. School District No. 97, Blaine County, 186 Okla. 177, 97 P. (2d) 548 (1939).

[5] State v. Muskogee Iron Works, 187 Okla. 419, 103 P. (2d) 101 (1940).

[6] Ill. Rev. Stat. 1943, Ch. 102, §§11, 12, and 14.

[7] 326 Ill. 508, 158 N. E. 112 (1927).

ference with the performance of certain public duties." [8] It is questionable, however, whether this provision could, by any stretch of the imagination, be extended to cover the type of situation involved in the instant case.

To the general rule noted above, there has been added an exception to the effect that where circumstances exist which would make demand futile, the taxpayer may bring suit without a prior demand and refusal.[9] Such exception is usually based on general grounds of logic and policy. It has, however, occasionally been supported by the added analogy of the private corporation situation wherein a stockholder may sometimes sue without prior demand, particularly where it appears that such a demand would be futile or might even provide an opportunity for the guilty directors or officers to dissipate the corporate assets before a reasonable time elapsed after demand.[10] Justified though such exception may be where there is no statutory requirement for a demand, it might not obtain if there is a positive statutory requirement as is the case in at least the state of Oklahoma.[11] Since the statute law of Illinois is silent on the subject, it would seem to be reasonable that the court in the instant case should state that the general rule is "that a demand upon the proper public official to bring suit in the name and on behalf of the city is a condition precedent to the maintenance of a taxpayer's suit, unless it is shown that such a demand would be useless." [12] Although the last clause was pure dictum, the court seems clearly

[8] 326 Ill. 508 at 515, 158 N. E. 112 at 115.

[9] Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826 (1899); Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 P. 261 (1900); Briare v. Mathews, 202 Cal. 1, 258 P. 939 (1927); Newberry v. Evans, 97 Cal. App. 120, 275 P. 465 (1929); Shipp v. Rodes, 196 Ky. 523, 245 S. W. 157 (1922); Taylor v. Todd, 241 Ky. 605, 44 S. W. (2d) 606 (1932); Commonwealth v. Mauney, 258 Ky. 429, 80 S. W. (2d) 568 (1935); Pike County v. Young, 266 Ky. 588, 99 S. W. (2d) 749 (1936); Ward v. Buckingham, 268 Ky. 297, 104 S. W. (2d) 994 (1937); Regan v. Babcock, 188 Minn. 192, 247 N. W. 12 (1933); School Dist. No. 2 of Silver Bow County v. Richards, 62 Mont. 141, 205 P. 206 (1922); Jones v. Town of North Wilkesboro, 150 N. Car. 646, 64 S. E. 866 (1909); Atkinson v. Greene, 197 N. Car. 118, 147 S. E. 811 (1929); State v. Hunt, 132 Ohio St. 568, 9 N. E. (2d) 676 (1937); Hoekman v. Iowa Civil Tp., 28 S. D. 206, 132 N. W. 1004 (1911); Burns v. City of Nashville, 142 Tenn. 541, 221 S. W. 828 (1920); Malone v. Peay, 157 Tenn. 429, 7 S. W. (2d) 40 (1928); City of Corpus Christi v. Flato, 83 S. W. (2d) 433 (Tex. Civ. App.) (1935); Sauer v. Monroe, 171 Va. 421, 199 S. E. 487 (1938); Beyer v. Town of Crandon, 98 Wis. 306, 73 N. W. 771 (1898); In re Cole's Estate, 102 Wis. 1, 78 N. W. 402 (1899); Egaard v. School Dist. No. 5, 109 Wis. 366, 85 N. W. 369 (1901); Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460 (1902); Wilcox v. Porth, 154 Wis. 422, 143 N. W. 165 (1913); Ryan v. Olson, 183 Wis. 290, 197 N. W. 727 (1924); Coyle v. Richter, 203 Wis. 590, 234 N. W. 906 (1931); Shulz v. Kissling, 228 Wis. 282, 280 N. W. 388 (1938); Reetz v. Kitch, 230 Wis. 1, 283 N. W. 348 (1939).

[10] Osburn v. Stone, 170 Cal. 480, 150 P. 367 (1915); Burns v. Essling, 154 Minn. 304, 191 N. W. 899 (1923); Murphy v. City of Greensboro, 190 N. Car. 268, 129 S. E. 614 (1925); Peeler v. Luther, 175 Tenn. 454, 135 S. W. (2d) 926 (1940).

[11] Vaughan v. Latta, 168 Okla. 492, 33 P. (2d) 795 (1934).

[12] 322 Ill. App. 452 at 483, 54 N. E. (2d) 862 at 875.

to indicate that the entire rule together with its exception is to be regarded as the law of this jurisdiction.

Assuming that a demand had been made in the instant case, there would still have remained the question of whether the taxpayer's suit had been filed prematurely. The purpose of the demand is to allow the proper public official a reasonable opportunity to take action on behalf of the public and in its name. The institution of suit by the taxpayer after demand but before the lapse of a reasonable time would defeat the purpose of such notice. It has been held, therefore, that where written demand was left on the proper official's desk the day before the suit was filed, the hurry on the plaintiff's part was unreasonable.[13] Even where notice and demand is required by statute, the suit may be premature if filed almost a month after demand has been served according to one case,[14] but in another jurisdiction it was held that inaction for seventeen days was sufficient to evidence a refusal to act.[15]

The practitioner contemplating suit on behalf of a taxpayer hereafter, would do well to observe these requirements if he expects to sustain his action against a motion to dismiss filed under Section 48 of the Illinois Civil Practice Act.[16]

G. MASCHINOT

PARTIES—PLAINTIFFS—WHETHER OR NOT A PERSON SUING AS REPRESENTATIVE OF A CLASS MUST SHOW A COMMON OR JOINT INTEREST WITH THOSE REPRESENTED NOT ONLY IN THE QUESTION LITIGATED BUT ALSO IN THE REMEDY SOUGHT—In the case of *Newberry Library* v. *Board of Education of the City of Chicago*,[1] plaintiff sued to recover on certain refunding bonds issued by defendant. A motion to dismiss in the nature of a plea in abatement[2] was made by defendant on the ground that another action was pending between the same parties for the same cause. Such prior suit[3] had been instituted by another plaintiff as a "class" suit and it was contended that the plaintiff in the instant case was adequately and properly represented therein hence not entitled to maintain a separate action. Defendant had previously sought to limit the prior action to the individual rights of the plaintiff therein on the theory that he could not maintain a representative suit, but the court hearing that case

[13] Nunnold v. City of Toledo, 52 Ohio App. 172, 3 N. E. (2d) 550 (1935).

[14] State v. Ford, 189 Okla. 299, 116 P. (2d) 988 (1941), where demand was served September 7, suit filed October 5, but the County Attorney filed his own suit on the following February 16. A dissent was based on the impossibility of determining whether the County's suit would be prosecuted diligently.

[15] Land v. Lewis, 291 Ky. 800, 165 S. W. (2d) 553 (1942).

[16] Ill. Rev. Stat. 1943, Ch. 110, §172.

[1] 387 Ill. 85, 55 N. E. (2d) 147 (1944).

[2] Ill. Rev. Stat. 1943, Ch. 110, §172(d), permits the use of a verified motion in such situations.

[3] Delevitt v. The Board of Education, No. 43 C 9566, Circuit Court of Cook County, Illinois. That action was still pending in the nisi prius court when the instant case was decided, hence is not to be found in the appellate reports as yet.

had denied such request.[4] As a consequence of such prior action, defendant felt that the decision declaring the former proceeding to be a representative suit was res adjudicata on the question. The trial court in the instant case, acting on that same theory, sustained the motion and dismissed the suit as being unnecessary. On direct appeal,[5] the Illinois Supreme Court reversed and remanded when it found that the prior suit was not, in fact, a representative suit and concluded that any order entered therein had no binding effect on the plaintiff-appellant.

The doctrine of virtual representation has long been recognized by courts of equity as an exception to the general rule that all necessary and indispensable parties should be joined either as plaintiffs or defendants.[6] For that reason, a court of equity will entertain a suit brought by one or a few who are members of the class, provided it clearly appears to be brought not only on behalf of the actual plaintiffs but also for the benefit of all members of that class, so long as it is demonstrated that (1) the question is one of common or general interest, (2) the parties form a voluntary association and those who sue or defend may fairly be presumed to represent the rights of the whole group; or (3) the parties are very numerous and although they have, or may have, separate and distinct interests yet it is impracticable to bring them all before the court.[7]

The function and purpose of such a class suit is well summarized in a recent decision of the United States Supreme Court in the following language: "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree." [8] This convenient method of dealing with what would otherwise be an insurmountable situation is now so well recognized that if either of the factors mentioned above be found to exist the decree handed down in such a case will be binding as well upon

[4] No appeal had been taken from such ruling as it was not a "final" order within the meaning of Ill. Rev. Stat. 1943, Ch. 110, §201.

[5] Direct appeal was proper, under Ill. Rev. Stat. 1943, Ch. 110, §199, because constitutional issues concerning due process were raised and directly passed on in the trial court. The argument was that, by denying the plaintiff a right to maintain its own action, a violation of Ill. Const. 1870, Art. II, §2, and of the 14th Amendment of the U. S. Const., §1, had occurred.

[6] Smith v. Swormstedt, 57 U. S. (16 How.) 288, 14 L. Ed. 942 (1853).

[7] See Story, Equity Pleadings, 9th Ed., §97.

[8] Hansberry v. Lee, 311 U. S. 32 at 41, 61 S. Ct. 115, 85 L. Ed. 22 at 27, 132 A. L. R. 741 at 746 (1940).

those who are not formal parties as those who are, provided those who sue can be said fairly to represent the former.[9] Should the former desire not to have their rights adjudicated in such fashion they must obtain permission to intervene in the class suit.[10]

The Illinois courts, at quite an early date, accepted the doctrine of virtual representation at least in part[11] and the right of the individual to sue,[12] or be sued,[13] on behalf of the many where certain of the requirements of a class suit are met has gone unquestioned ever since. Similarly, decrees entered in such suits have been held to have the same binding effect as if the persons so represented were actually present.[14] By measuring the alleged former action involved in the instant case along the yardstick of this doctrine, it should be possible to determine whether or not it falls accurately within the category of a class suit.

[9] Hartford L. Ins. Co. v. Ibs, 237 U. S. 662, 35 S. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A 765 (1915); Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A. L. R. 741 (1940). See also Freeman, Judgments, 5th Ed., Vol. 1, §§435-6.

[10] Hairgrove v. City of Jacksonville, 366 Ill. 163, 8 N. E. (2d) 187 (1937), noted in 15 CHICAGO-KENT REVIEW 337.

[11] Carter v. Rodewald, 108 Ill. 351 (1884).

[12] Plaintiff has been permitted to sue in a representative capacity under the first exception in Carter v. Rodewald, 108 Ill. 351 (1884); Groves v. Farmers State Bank of Woodlawn, 368 Ill. 35, 12 N. E. (2d) 618 (1938); Snyder v. Aetna Const. Co., 272 Ill. App. 591 (1933); Flanagan v. City of Chicago, 311 Ill. App. 135, 35 N. E. (2d) 545 (1941), but the right was denied, because of an adverse interest to the class, in Langson v. Goldberg, 373 Ill. 297, 26 N. E. (2d) 111 (1940), affirming 298 Ill. App. 229, 18 N. E. (2d) 729 (1939); South East Nat. Bank v. Board of Education, 298 Ill. App. 92, 18 N. E. (2d) 584 (1938), or because another representative suit was already pending, in Leonard v. Bye, 361 Ill. 185, 197 N. E. 546 (1935). Action has also been permitted where the representative plaintiff was a member of a voluntary association, under the second exception, in Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009 (1895). Cases falling under the third exception have been rejected in Peoples Store of Roseland v. McKibbin, 379 Ill. 148, 39 N. E. (2d) 995 (1942), and Fetherston v. National Republic Bancorp., 280 Ill. App. 151 (1935), leave to appeal denied 280 Ill. App. xiv, but have been permitted if the sole remedy sought was injunctive relief, despite the assertion of multifariousness, in City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907 (1898), and Chicago Telephone Co. v. Illinois Mfrs. Ass'n, 106 Ill. App. 54 (1903).

[13] Insofar as suits against representative defendants are concerned, most of the cases involve situations where living defendants have been held to be the representatives of unborn persons who might become members of the class: Hale v. Hale, 146 Ill. 227, 33 N. E. 858 (1893); McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672 (1894); Gavin v. Curtin, 171 Ill 640, 49 N. E. 523 (1898); Fienhold v. Babcock, 275 Ill. 282, 113 N. E. 962 (1916); Longworth v. Duff, 297 Ill. 479, 130 N. E. 690 (1921); Carey v. Carey, 309 Ill. 330, 141 N. E. 156 (1923); Easton v. Hall, 323 Ill. 397, 154 N. E. 216 (1926), or where a common interest has been found to exist: Cales v. Dressler, 315 Ill. 142, 146 N. E. 162 (1925); Nelson v. Amling, 319 Ill. App. 571, 49 N. E. (2d) 868 (1943). Cases which deny such right all turn on the point that the alleged representatives were possessed of an adverse interest, as in Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62 (1921); Mortimore v. Bashore, 317 Ill. 535, 148 N. E. 317 (1925), or that the rights of the unborn persons were not adequately preserved by the decree: Dole v. Shaw, 282 Ill. 642, 118 N. E. 1044 (1918). No cases of representation by defendants falling under the second and third exceptions appear to exist.

[14] Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161 (1887).

It can be admitted that such action does not fall within the first exception since the representative plaintiff and those whom he claimed to represent lacked that "common interest" which is there regarded as essential. Although the parties were owners of bonds of the same issue, were met with the same objection to payment, and were all interested in the same type of recovery, still, as their purchases arose out of separate transactions and were not jointly made, their rights were truly independent of each other.[15] To qualify under that exception, such joint interest is required as would be found in the case of beneficiaries under the same trust,[16] shareholders in the same corporation,[17] or creditors seeking to enforce a common liability designed for their joint benefit.[18] As each of the parties was legally concerned only in his own particular claim, it is clear that the case did not meet the requirement of the first exception. It may also be admitted that the second exception was not satisfied for it was nowhere contended that the several parties concerned were members of a voluntary unincorporated association.[19]

The third exception, however, permits class suits where the parties are very numerous even though they have, or may have, separate and distinct interests, because it is impracticable to bring them all before the court. Illustrations of the application of that exception have been provided most often in cases where the class being represented stood in the position of defendants to the action,[20] but there are cases where one has been allowed to sue as plaintiff on behalf of many in the same general position even though their rights were separate and distinct.[21] If that exception were permitted to prevail in Illinois, it is submitted that the instant case would fit within such exception for, although each bondholder was concerned

[15] Joint action might have been taken by them pursuant to Ill. Rev. Stat. 1943, Ch. 110, §147, but that statute contemplates a mere amalgamation of separate claims in one suit for convenient dispatch. There is no provision in the Civil Practice Act relating to representative suits.

[16] Flanagan v. City of Chicago, 311 Ill. App. 135, 35 N. E. (2d) 545 (1941). The rationale of this case can rest only on the assumption that a fund raised from many individual special assessments constitutes a "trust" fund for the joint benefit of the several taxpayers, otherwise the situation there concerned would seem to be identical with the instant case.

[17] Snyder v. Aetna Const. Co., 272 Ill. App. 591 (1933).

[18] Groves v. Farmers State Bank of Woodlawn, 368 Ill. 35, 12 N. E. (2d) 618 (1938).

[19] For an instance of a representative suit in such situation, see Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009 (1895).

[20] In City of London v. Perkins, 3 Bro. P. C. 602, 1 Eng. Rep. 1524 (1734), the city was allowed to maintain such a suit to establish its right to a certain duty against a few defendants who dealt in the goods in question although the decision might affect all of the people of England. Mayor of York v. Pilkington, 1 Atk. 282, 26 Eng. Rep. 180 (1737), was a case in which the plaintiff's right to a fishery was upheld against the defendants, even though the latter relied on separate and distinct rights.

[21] Good v. Blewitt, 13 Ves. jun. 397, 33 Eng. Rep. 343 (1807); Adair v. The New River Company, 11 Ves. jun. 429, 32 Eng. Rep. 1153 (1805); Chancey v. May, Prec. Ch. (Finch) 592, 24 Eng. Rep. 265 (1722).

only with his own immediate right, the issue as to each appeared, on the surface at least, to be identical, i.e. that the entire issue of bonds, no matter by whom held, was void.[22] As the parties were apparently very numerous, perhaps even unknown, and a multiplicity of suits would become necessary if each was obliged to bring a separate suit, the spirit of the exception would seem to call for its application to the situation thus presented.[23]

The Illinois Supreme Court, however, has never seen fit to recognize the third exception but has limited class suits to cases falling within the first two groups only. Attempts in the past to maintain such actions on the sole ground that the persons who should be plaintiffs are too numerous to bring before the court have been rejected,[24] and, by the decision in the instant case, the court has indicated that it is unwilling to change that view. Such feeling seems to be dictated by a fear that due process will be denied to those thus represented since their rights may be determined without their knowledge and without providing them with an individual day in court. No similar fear has led the court to deny the right to sue as a representative in the other exceptional situations, even where the persons so represented are as yet unborn, hence there seems to be no logical basis for the apprehension that constitutional rights will be infringed. So long as the representative plaintiff can be said to be a fair representative of the class, that is one who will present all arguments and contentions which would be favorable to the group, it should make little difference whether he is a joint or common owner with the others or is only concerned with securing a decision on a common question which concerns all. Perhaps, since the court has not shown a willingness to utilize the whole concept of the class suit, it is time that the subject should be made the basis for statutory regulation in Illinois as is the case elsewhere.[25]

T. F. BAYER

[22] The pleadings in the Delevitt suit alleged that the refusal to pay the coupon then due was based on the Board's claim that all the bonds and interest coupons were invalid.

[23] Although other and different defences might be urged against the several holders, the fundamental issue in the case would seem to be the same and there was no indication that the plaintiff in the Delevitt case was not a competent person to sue on behalf of all. Of course, had his interest been antagonistic to the rights of those he claimed to represent or was bringing the suit for collusive purposes, the action in denying him the right of representation would be highly proper: Hansberry v. Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940).

[24] Fetherston v. National Republic Bancorp, 280 Ill. App. 151 (1935), leave to appeal denied 280 Ill. App. xiv; Peoples Store of Roseland v. McKibbin, 379 Ill. 148, 39 N. E. (2d) 995 (1942).

[25] Federal Rules of Civil Procedure, Rule 23(a)(3), 28 U. S. C. A. following §723c, permits such suits, even though the character of the right sought to be enforced is several, where "there is a common question of law or fact affecting the several rights and a common relief is sought." Thompson, Laws of New York, 1939, Part II, Civil Practice Act, §195. See also Sunderland, "The New Federal Rules," 45 W. Va. L. Q. 5 (1938), particularly p. 16.