The History Behind *Hansberry v. Lee*

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This Article provides the factual background to Hansberry v. Lee, *the famous class action case. During the early 1900's, Chicago's black population was kept effectively segregated, primarily through the use of racially restrictive covenants. However, in the 1930's, this system began to break down. The growth of the black population caused an increased demand for black housing, while the Depression reduced the market for white housing. It was at this time that Carl Hansberry bought a house that was covered by a restrictive covenant, generating a lawsuit to have the covenant enforced and the Hansberrys evicted.*

Tracing the lawsuit as it progressed toward the Supreme Court, the author notes that the Court could have invalidated the Hansberry *judgment for several reasons, including fraud, the then existing Illinois class action law, the constitutional validity of the restrictive covenants, and the lower court's improper use of res judicata. Surprisingly, however, the Supreme Court ignored these flaws, and the racism behind them, and instead focused on the due process considerations involved in binding an individual to a class action judgment. The author concludes that* Hansberry*'s importance may be as a substantive decision leading directly to* Shelley v. Kraemer.

INTRODUCTION

This Article, investigating *Hansberry v. Lee*'s[1] factual background, grew out of a student's comment after a civil procedure class. In teaching class actions, *Hansberry* is a classic, usually the first case in the class action section of civil procedure textbooks.[2] My class session went

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[1] 311 U.S. 32 (1940).

[2] *E.g.*, R. BROUSSEAU, CIVIL PROCEDURE 15-53 (1982); R. CASAD & P. SIMON,

according to plan. I initially explained racially restrictive covenants and their validity until *Shelley v. Kraemer*[3] in 1948, and then began a Socratic examination of *Hansberry*. The case sought to enforce a racially restrictive covenant and the covenant's validity turned on the result of a prior case. The question then becomes whether Hansberry is bound by the prior case, *Burke v. Kleiman*,[4] which was a class action. The Court held he was not bound because the class was composed of members with conflicting goals:

> 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.[5]

Then, the students realized that (a) it is constitutional to have a class action that binds the class members to the class judgment; (b) whether the prior class action binds the class members may be decided collaterally in a subsequent lawsuit;[6] and (c) without "adequate representation" the class members are not bound. I discussed Rule 23's requirements of "adequate representation" and "typicality." Afterward, I upset the students' complacency by asking how much consistency between class members' views is required: what if some members in a prison suit are masochists and like cruel and unusual punishment? What if, in a school desegregation suit, some students do not want to be bussed?[7] I discussed questions of opt-out rights[8] and social policy concerning the advisability of representative lawsuits in general and class actions in particular, and then wrapped up.

This analysis of *Hansberry* was upset by one of my students, Mr. C.O. Travis, who, while working as a garbageman, was attending John Marshall Law School at night. "Professor, did you know that Hansberry in *Hansberry v. Lee* was Lorraine Hansberry's father and that *A*

CIVIL PROCEDURE 421 (1983); J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 640 (4th ed. 1985); R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 1115 (5th ed. 1984).

[3] 334 U.S. 1 (1948).

[4] 277 Ill. App. 519 (1934).

[5] *Hansberry*, 311 U.S. at 45.

[6] *See, e.g.*, Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Kamp, *Adjudicating the Rights of the Plaintiff Class: Current Procedural Problems*, 26 ST. LOUIS U.L.J. 364 (1982); Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

[7] *See* Yeazell, *From Group Litigation to Class Action Part II: Interest, Class and Representation*, 27 UCLA L. REV. 1067, 1112-13 (1980).

[8] FED. R. CIV. P. 23(c)(2)(A).

Raisin in the Sun was based on her family's experience?" Lorraine Hansberry had attended Mr. Travis' high school in Chicago. I did not know, and at first did not believe it. Some investigation, however, revealed that Mr. Travis was right. What was the history of the Hansberry family? The answer involves black, Chicago, and legal history, leads to a re-examination of the *Hansberry* case, and provides insights into the judicial process.

I. The Background of the *Hansberry* Case

The conflict in *Hansberry*, caused by the Hansberrys' move into an all-white neighborhood, derived from Chicago's increasing black population. Between 1900 and 1934, the city's black population grew from 30,000 to 236,000.[9] During this time, however, blacks were continuously more segregated. In 1910, 25% of blacks lived in areas of under 5% black population. None lived in areas of over 90% concentration. By 1934, less than 5% lived in areas of under 5% concentration, while 65% lived in areas that were 90% or more black.[10] Geographically, blacks were concentrated in two narrow corridors stretching westward and southward from downtown Chicago.

This segregation was accomplished in two ways: violence and the racially restrictive covenant.[11] After the violence of the 1910's and 1920's subsided, racially restrictive covenants were developed. "Around these black zones, an organized endeavor was put in place to subject the property to racially restrictive covenants. Although prior to the '20's, several individual owners and developers had placed race restrictions on their deeds, covenants covering entire neighborhoods were uncommon in Chicago."[12] Such covenants were legal — in 1926, the Supreme Court dismissed for want of jurisdiction a case upholding a racially restrictive covenant in *Corrigan v. Buckley*.[13]

After the *Corrigan* decision, the Chicago Real Estate Board started a program to cover neighborhoods with the covenants.[14] They prepared a

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[9] Cayton, *Negroes Live in Chicago*, 15 Opportunity 366, 366 (1937).

[10] *Id.* at 367, population table.

[11] T. Philpott, The Slum and the Ghetto: Neighborhood Deterioration and Middle-Class Reform, Chicago, 1880-1930, at 185 (1978).

[12] *Id.* at 189.

[13] 271 U.S. 323 (1926).

[14] T. Philpott, *supra* note 11, at 189; Interviews with Robert Kratovil, Professor of Law, John Marshall Law School [hereafter Kratovil]. Professor Kratovil has personal knowledge of the operation of the covenants, having worked for Chicago Title and Trust Company from 1927 until 1974, in capacities ranging from office boy to general counsel.

model covenant. (The *Hansberry* covenant was based on this model.) Then the Board sent out speakers and organizers across the city to get the covenants adopted. Organizing a neighborhood to adopt a covenant was a massive task. Legal descriptions and signatures had to be obtained, and then the covenants had to be filed with the Recorder of Deeds.[15] Notary publics were hired to notarize and then record signatures. Subsequently, if any black persons moved into the area, they were reported, a suit filed against their occupancy, and an injunction obtained. By the late 1920's, black neighborhoods were hemmed in on all sides by the racial covenants. Up to 85 percent of Chicago was covered by such covenants.[16]

The racially restrictive covenants legally prevented occupancy by blacks. They bound the signer and subsequent purchasers, showing up as an "objection" in any title search. Courts would routinely enforce the covenants, ordering vacation of the premises on pain of contempt.[17] The covenant in *Hansberry* is typical. It stated that the owner

> does hereby covenant and agree with each and every other of the parties hereto, that his said parcel of land is now and until January 1, 1948, and thereafter until this agreement shall be abrogated as hereinafter provided, shall be subject to the restrictions and provisions hereinafter set forth, and that he will make no sale, contract of sale, conveyance, lease or agreement and give no license or permission in violation of such restrictions or provisions . . . .[18]

The restriction was that "no part of said premises shall in any manner be used or occupied directly by a negro or negroes." However, this did not prevent blacks from serving as janitors, chauffeurs, and house servants:

> Provided that this restriction shall not prevent the occupation, during the period of their employment, of janitors' or chauffeurs' quarters in the basement or in a barn or garage in the rear, or of servants' quarters by negro janitors, chauffeurs or house servants, respectively, actually employed as such for service in and about the premises by the rightful owner or occupant of said premises.[19]

"Negro" was defined as "every person having one-eighth part or more of negro blood, or having any appreciable admixture of negro blood, and every person who is what is commonly known as a colored

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[15] T. PHILPOTT, *supra* note 11, at 191.

[16] Helfield & Groner, *Race Discrimination in Housing*, 57 YALE L.J. 426, 430 n.21 (1948).

[17] Kratovil, *supra* note 14.

[18] Burke v. Kleiman, 277 Ill. App. 519, 523 (1934).

[19] *Id.*

person."[20] The last clause was put in to avoid problems of proof in establishing one-eighth Negro blood.[21]

The covenants ran with the land and any party could enforce them in equity:

> The covenants, restrictions and agreements herein contained shall be considered as appurtenant to and running with the land and shall be binding upon and for the benefit of each party hereto and may be enforced by any of the parties hereto by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance. . . .[22]

"Parties" included anyone who signed a covenant covering the same area:

> It is understood for convenience a number of counterpart or concurrent instruments have been prepared of even date herewith, the test of each of which is substantially the same as that of this instrument, and that the execution of any one of such instruments shall have the same effect as the execution of this instrument by the same person would have, and it is understood that parties to this agreement shall include not only those persons who shall sign this instrument but also all persons who shall sign any of said counterpart or concurrent instruments and this instrument and all of said counterpart or concurrent instruments shall constitute one agreement.[23]

The covenant was useful only if most of the owners had signed it. Thus, a covenant's effectiveness required that a certain percentage of owners participate. Thus, the issue in dispute in *Hansberry* — actual percentage of the signatures in the affected area — was a key requirement:

> This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety five per cent of the frontage above described, or their heirs or assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928.[24]

The covenant challenged by the Hansberrys covered a subdivision known as "South Park" or "Washington Park." This area was a three by four block rectangle[25] bounded on the north by Washington Park, on the east by Cottage Grove, on the south by 63rd Street, and on the

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[20] *Id.* at 526.
[21] Kratovil, *supra* note 14.
[22] *Burke*, 277 Ill. App. at 524.
[23] *Id.* at 525.
[24] *Id.* at 524.
[25] One block equals one-eighth mile.

west by South Park Avenue. A race track, torn down in 1908, formerly occupied the land.[26] This area was populated by whites, but surrounded on the west and south by black areas.

In 1940, only three black families lived in the area.[27] West of the subdivision, the population went from 10% to 100% nonwhite. To the south, 90 to 100% of the population was nonwhite.

To the east, however, were the white areas of Hyde Park and Woodlawn, where the nonwhite population was only 0.1 to 9.9%.[28] The South Park subdivision, therefore, was seen as a barrier between the black community and Woodlawn.[29]

In 1928, a group of white businessmen, the Woodlawn Property Owners Association, organized a covenant to cover the South Park neighborhood. The covenant had the support of outside real estate organizations, institutions, banks, and mortgage companies. Contradictory evidence exists about the participation of the University of Chicago, located in Hyde Park. A 1937 article stated that the university was trying to establish a "buffer state," and had contributed funds to the Woodlawn Property Owners Association.[30] The University did not deny this. Robert Hutchins, then president of the university, stated: "However unsatisfactory they [the covenants] may be they are the only means at present available by which the members of the associations [neighbor associations] can stabilize the conditions under which they desire to live."[31]

The effective system of segregation created by the racially restrictive covenants began to break down in the 1930's. Two phenomena contributed to this breakdown: the growth of Chicago's black population and the Depression. Together they produced an increased black demand for housing and a depressed market for white housing. Hansberry was able to buy his house because he was the only person who wanted it.[32]

Chicago's black population grew in the first third of the twentieth century. In 1900, it was 30,000; in 1934, 236,000.[33] At the same time,

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[26] H. MAYER & R. WADE, CHICAGO: GROWTH OF A METROPOLIS 206 (1969).

[27] E. Schietinger, Racial Succession and Changing Property Values in Residential Chicago 36 (1953) (unpublished thesis, Univ. of Chicago).

[28] CHICAGO PLANNING COMMISSION, LAND USE IN CHICAGO 182-83 (1942).

[29] Lindstrom, The Negro Invasion of Washington Park Subdivision 6 (1941) (unpublished M.A. thesis, Univ. of Chicago).

[30] Cayton, *No Friendly Voice*, 16 OPPORTUNITY 12 (1938) (continuation of Cayton, *supra* note 9).

[31] *Id.*

[32] Lindstrom, *supra* note 29, at 19-20.

[33] Cayton, *supra* note 9, at 366.

the process of continually increasing segregation restricted blacks to the ghetto.[34] In 1910, 24% of the total black population lived in areas in which 95% of the people were white. In 1934, only 3% of the black population lived in such areas. In 1910, the highest concentration of blacks to the general population was between 60-69%; in 1934, 87% of blacks lived in areas that were over 70% black; 69% lived in areas that were 99% black.[35] In 1937, it was estimated that there were 50,000 more black people than units available.[36] Blacks had to pay 20 to 50% more than whites for comparable housing.[37]

Contemporaneously, the Depression reduced the market for white housing. In the Washington Park subdivision, the population decreased by 13.8 percent between 1930 and 1934.[38] In the 1930's, "there was no market among white people for property in the subdivision."[39] The prior owner of the Hansberry home, Burke, had left the house vacant at the time he moved from the subdivision.[40] Thus, most of those who wanted to rent or buy in white areas were blacks:

> The Supreme Court eventually ruled in favor of the blacks, but even before that ruling [*Hansberry*], other white property owners opened their buildings to blacks and extracted high rentals for accommodations which were unable to attract white tenants. Rather than suffer financial losses, they elected to violate existing covenants and fill their vacant units with blacks.[41]

One of these owners was Burke, who was an officer in the Woodlawn Property Owners Association and whose wife, Olive Ida Burke, had successfully sued, in *Burke v. Kleiman*, to enforce the covenant. Burke afterwards "resigned his position and withdrew from the association with ill feelings, and stated several times that he would put negroes in every block of that property."[42] In order to sell to the Hansberrys, Burke set up a dummy transaction in which Jan D. Crook bought the property to convey to the Hansberrys. In the suit to enforce the covenant against the Hansberrys, it was alleged that

> through fraudulent concealment on the part of the defendants James T.

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[34] *Id.* at 367.
[35] *Id.* at 366.
[36] *Id.*
[37] *Iron Ring in Housing*, 47 THE CRISIS 205 (July 1940) [hereafter *Iron Ring*].
[38] Lindstrom, *supra* note 29, at 5.
[39] *Id.* at 19.
[40] *Id.* at 19-20.
[41] A. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960, at 30 (1983).
[42] Lee v. Hansberry, 372 Ill. 369, 374, 24 N.E.2d 37, 39-40 (1939).

> Burke and Harry A. Price, from the Bank [First National Bank of Englewood], of the fact that Hansberry was a negro and that the property was being purchased for him, a deed was procured from the bank to Jay D. Crook who, in fact, purchased for Hansberry.

Thus, Mr. Burke was one of the defendants in *Hansberry*, attacking the decree obtained in a prior suit by his wife, Olive.

The defendant, Carl A. Hansberry, was an active man who had had varied careers, including deputy United States Marshal, businessman, and unsuccessful Republican candidate for Congress. He distributed pamphlets on black civil rights under the name of "The Hansberry Foundation." His daughter Lorraine described him:

> My father was typical of a generation of Negroes who believed that the "American way" could successfully be made to work to democratize the United States. Thus, twenty-five years ago, he spent a small personal fortune, his considerable talents, and many years of his life fighting, in association with NAACP attorneys, Chicago's "restrictive covenants" in one of this nation's ugliest ghettoes.
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> That fight also required that our family occupy the disputed property in a hellishly hostile "white neighborhood" in which literally howling mobs surrounded our house. . . . One of these missiles almost took the life of the then eight-year old signer of this letter. My memories of this "correct" way of fighting white supremacy in America include being spat at, cursed and pummeled in the daily trek to and from school. And I also remember my desperate and courageous mother, patrolling our household all night with a loaded German luger, doggedly guarding her four children, while my father fought the respectable part of the battle in the Washington court.
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> The fact that my father and the NAACP "won" a Supreme Court decision, in a now famous case which bears his name in the law books, is — ironically — the sort of "progress" our satisfied friends allude to when they presume to deride the more radical means of struggle. The cost, in emotional turmoil, time and money, which contributed to my father's early death as a permanently embittered exile in a foreign country when he saw that after such sacrificial efforts the Negroes of Chicago were as ghetto-locked as ever, does not seem to figure in their calculations.[43]

The sale generated the lawsuit to enforce the covenant and evict the Hansberrys, *Lee v. Hansberry*. The complaint alleged a conspiracy on the part of the defendants to destroy the agreement by selling or leasing property in the restricted area to Negroes. Plaintiffs were successful below, the court restraining Burke "from leasing or selling any real estate within the restricted area to negroes, or to white persons for the purpose of selling or leasing to negroes, restraining . . . the Supreme

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[43] L. HANSBERRY, TO BE YOUNG, GIFTED AND BLACK 20-21 (adapted by R. Nemiroff 1969).

Liberty Life Insurance company from making any further loans on real estate in the restricted area to negroes or for occupancy by negroes; declaring the conveyance to Hansberry and wife void and ordering them to remove from the premises, and holding the restrictive agreement valid and in full force and effect."[44]

The main arguments considered by the Illinois Supreme Court concerned the covenant's interpretation and validity under its own terms. No constitutional objection was considered.

The evidentiary basis of the rulings against the defendants below were not challenged except as to one Israel Katz. The court found that his statement that "he would sell his property to anybody, including negroes," was sufficient evidence to enjoin him from doing so.[45]

The appellants argued that enjoining the mortgage company from making loans in the restricted area to Negroes or for Negro occupancy was improper, because mortgages were exempted from the restrictive agreement. The Illinois Supreme Court ruled that the language merely provided that violating the restrictive agreement was an insufficient reason to invalidate a mortgage. "It does not give mortgagees a license to conspire to destroy the agreement, as the evidence shows this insurance company was doing."[46]

The main argument in the case revolved around the question whether the requisite number of owners had signed the agreement. The agreement was to be "of no force or effect" unless signed by owners of 95 percent of the area's frontage. The plaintiffs in *Lee* argued that this question was res judicata, determined by the prior case of *Burke*. The trial court in *Hansberry* found that actually only 54 percent had signed the agreement, but that the question was res judicata.

The complainant's contention was "that unless an injunction is granted, said neighborhood will become mixed, both white and colored with its attendant evils."[47] In *Burke*, the defense was that conditions had so changed in the area that enforcing the decree would be inequitable. Certain facts were stipulated, including that more than the required 95 percent of frontage owners had signed the covenants.[48] The court in *Burke* found that the neighborhood had not changed materially and affirmed the decree, summarily rejecting the constitutional

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[44] *Lee*, 372 Ill. at 372, 24 N.E.2d at 39.
[45] *Id.* at 375, 24 N.E.2d at 40.
[46] *Id.*
[47] Burke, 277 Ill. App. at 524.
[48] *Id.* at 522.

argument.[49]

The Illinois Supreme Court, in *Lee v. Hansberry*, found that *Burke* "was a class or representative suit."[50] Thus, "other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings."[51] That the finding was stipulated did not render the decree any less binding. The court found no evidence of fraud or collusion in procuring the stipulation. Thus the questions of execution and validity were res judicata, and res judicata extends to all matters that might have been raised. The covenant's validity could not be relitigated and the decree evicting the Hansberrys was affirmed.

Hansberry petitioned for certiorari to the Supreme Court. His lawyers hoped to have racially restrictive covenants declared unconstitutional.[52] Their main arguments, however, went to the propriety of the class action — only their last argument went to the purported constitutional violation.[53]

II. The Legal Options in *Hansberry*

There were many possible reasons for invalidating the *Hansberry* judgment. On a procedural level, res judicata or collateral estoppel would not apply to establish the "fact" of the percentage of signatures. This was not litigated in a prior adjudication. Collateral estoppel is defined as ". . . matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended are conclusive upon the parties and their privies; and they are collaterally estopped as to such matters in other litigation involving a different cause of action."[54] The number of signatures was never controverted; it was stipulated in the prior action. There is no indication that the fact was stipulated for any purpose outside of the *Burke* case.

Nor does res judicata apply. Professor Moore writes:

> Res judicata is a salutary doctrine of repose that gives conclusive finality to a final, valid judgment; and if the judgment is on the merits, precludes further litigation of the same cause of action between the same parties or those in such legal relationship to them that they are said to be in privity and bound by the judgment.[55]

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[49] *Id.* at 534.
[50] *Lee*, 372 Ill. at 373, 24 N.E.2d. at 38-39.
[51] *Id.* at 373, 24 N.E.2d at 39.
[52] *Iron Ring*, *supra* note 37.
[53] Hansberry v. Lee, 311 U.S. 32, 33-35 (1940).
[54] 1B Moore's Federal Practice ¶ 0.401, at 11-13, 17-18 (2d ed. 1980).
[55] *Id.*

The Illinois Supreme Court relied on this doctrine in *Lee*.[56]

If the Illinois court believed that Carl Hansberry was bound because the lack of signatures should have been raised in the prior case, it ignored the fact that Hansberry was not represented in *Burke*. *Burke*'s majority opinion gives no indication that the defendants were sued as a class. The stipulation lists individual defendants as owners and the black tenant of a particular apartment. *Lee*'s majority opinion speaks in terms of a plaintiff class:

> It thus appears that *Burke v. Kleiman*, *supra*, was a class or representative suit. It cannot be seriously contended that it was not properly a representative suit. There was a class of individuals who had common rights and who needed protection. They were so numerous it would have imposed an unreasonable hardship and burden on them to require all members to be made parties to the suit. Under such circumstances we have repeatedly held that a court of equity has jurisdiction of representative suits, and where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings.[57]

Confusingly enough, *Lee*'s dissent speaks in terms of a defendant class:

> The opinion in this case states that the defendants were so numerous that it would have imposed an unreasonable hardship and burden to make them all parties to the suit . . . . It is true there were five hundred defendants, but even the humblest of these five hundred had a right to his day in court, to be made a party to the suit and to be given an opportunity to defend it.[58]

If the suit was a plaintiff class action, then Hansberry — or any other member of the plaintiff class — could hardly be bound by a failure of the defendant to raise a defense. If the defendants were sued as a class, then we have a Catch-22 situation. All property owners in the area would constitute the class. Hansberry is then sued to void his ownership interest. He would be bound by the prior decision and thus prevented from being a property owner because he is a property owner and thus part of the class. Once not a property owner, however, he would not be bound. Thus, binding Hansberry to *Burke*'s result is wrong under res judicata and collateral estoppel.

Another basis for reversing the judgment was fraud. The Woodlawn

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[56] "It is well settled that the doctrine of res judicata extends not only to matters actually determined in the former suit, but also embraces all grounds of recovery and defense involved and which might have been raised." *Lee*, 372 Ill. at 374, 24 N.E.2d at 40.

[57] *Id.* at 373, 24 N.E.2d at 39.

[58] *Id.* at 377-78, 24 N.E.2d at 41.

Property Owners Association's executive secretary, Fred Helman, stated that he knew that 95 percent of the frontage owners had not signed the agreement.[59] The dissent states that the stipulation was arrived at collusively.[60] Failure to litigate an issue fully and fairly is a traditional exception to preclusion.[61]

Another argument could be made against the existence of the class in *Burke* under the then existing class action law of Illinois. At that time — indeed up to the passage of the Illinois Class Action Act[62] — Illinois courts frequently held that one had to share undivided property rights in order to participate in a class action. As stated in the dissent, "it seems clear to me that a class suit cannot properly be entertained except in that very limited field of cases where the parties have not only a common and general interest among themselves but also an identical right to be protected in a single and undivided res."[63]

This argument reflects a position that a class action could not litigate a common issue, but could only involve those who shared a property right.[64] Other cases restricted the use of class actions to common funds. In *Peoples Store of Roseland v. McKibben*,[65] plaintiffs sought to sue as a class of sellers to institutions, seeking refunds and an injunction relating to sales taxes. The court ruled that the common interest in a tax exemption was not enough. The lack of a common fund and the independent nature of each sale made by each vendor defeated the class suit. *Newberry Library v. Board of Education*[66] continued the restrictive view. *Newberry Library* involved the same issue as *Hansberry*, whether a prior suit was properly a class action and thus had a preclusive effect on the present suit. A bondholder sued for payment of an interest coupon. The court held that the purported class members were all owners of the same bond issue and all were interested in recovering their interest coupon, "yet the purchase of bonds by each was a transaction separate and distinct from that of purchase of bonds by the others. There was no joint action or interest in such purchases."[67]

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[59] *Id.* at 376, 24 N.E.2d at 40.

[60] *Id.* at 377, 24 N.E.2d at 41 (Shaw, J., dissenting); *see also* Lindstrom, *supra* note 29, at 32.

[61] RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(C) (1982).

[62] ILL. REV. STAT. ch. 110, §§ 2-801-2-806 (1983).

[63] *Lee*, 372 Ill. at 379, 24 N.E.2d at 42 (Shaw, J., dissenting).

[64] Such a rule was imposed in an English case, Temperton v. Russell, 1 Q.B. 435 (1893).

[65] 379 Ill. 148, 39 N.E.2d 995 (1942).

[66] 387 Ill. 85, 55 N.E.2d 147 (1944).

[67] *Id.* at 96, 55 N.E.2d at 153.

Thus, *Hansberry* could have decided that the class in *Burke* could not be maintained absent a common fund. If the individual purchase of the bonds in *Newberry Library* defeated a class action, the individual signing of the covenant could also defeat it.

There was also the question of the constitutional validity of the restrictive covenants. Hansberry's attorneys wanted to have such covenants declared unconstitutional, although they put that argument last.[68] They would have to wait eight years, however, for *Shelley v. Kraemer*, for the Court to rule that judicial enforcement of restrictive covenants constituted state action and thus violated the fourteenth amendment:

> These are cases in which the States have made available to such individuals the full coercive power of the government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.[69]

Shelley's language finally acknowledges Carl Hansberry's ambition — his desire to own his own house. The human situation, later portrayed by Lorraine Hansberry in *A Raisin in the Sun*, was that enforcing the decree would evict the Hansberrys from their home. Such an eviction would deprive them of the rights of home ownership enjoyed by other Americans.

III. The *Hansberry* Decision

The decision in *Lee* was riddled with objections ranging from res judicata to the Constitution. *Lee*'s basic unfairness and racism underlay these objections. *Hansberry*'s surprising characteristic is that it ignored all these flaws. The Court retreated into a theoretical treatise on class actions, ignoring the organized racism embodied in enforcing the covenants. The Court instead looked at the due process considerations involved in binding one to a class action judgment. After reciting the prior history, the Court launched into an abstract essay on class actions:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . . A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statutes

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[68] Hansberry v. Lee, 311 U.S. 32, 33-37 (1940).

[69] *Shelley*, 334 U.S. 1, 19 (1947).

> of the United States . . . prescribe, . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.[70]

The Court held that class actions could bind the class members in certain cases:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.[71]

The Court rejected the argument that class actions must involve a common fund or property interest rather than a common question:

> 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 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.[72]

In the present case, however, the procedure insured full and fair consideration of the common issue because of a division within the class:

> If those who thus seek to secure the benefits of the agreement were rightly regarded by the state Supreme Court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the same sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.
>
> Because of the dual and potentially conflicting interests of those who are punitive parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. . . .
>
> Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to

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[70] *Hansberry*, 311 U.S. at 40-41.
[71] *Id.* at 42-43.
[72] *Id.* at 43.

absent parties which due process requires.[73]

The Court concluded that:

> The plaintiffs in the Burke case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others; and, even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests, it does not appear that they could rightly discharge.[74]

Carl Augustus Hansberry's move into the South Park subdivision created two cultural artifacts: *A Raisin in the Sun* and *Hansberry v. Lee*. While the play concentrates on the human drama, the individual and social reality of the conflict created by the Hansberrys, Burkes, and the Woodlawn Property Owners Association, are strangely absent from the legal opinion.

The opinion exemplifies the abstracting nature of the legal process. Law is, of course, a substitute for violence, a resolution of conflict in a formal context. "A lawsuit is a process by which a court resolves a controversy between people over some matter."[75] The *Hansberry* opinion, then, is a replacement of the real issues, created by a system of apartheid, with unreal ones: the law involved. *Hansberry*, however, to an extreme extent denies reality in favor of writing an abstract essay on due process in class actions.

In an article written in the 1930's, Professor Martin applied the philosophy of legal realism to racially restrictive covenants.[76] In it, he argued for an examination of the social desirability of restrictive covenants and an investigation of the "social phenomena of Negro migration":

> Most white people do not want Negroes for neighbors. For many years

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[73] *Id.* at 44-45.

[74] *Id.* at 45-46.

[75] D. LOUISELL, G. HAZARD, & C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL 1 (5th ed. 1983).

[76] Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721 (1934).

> this race prejudice alone seemed adequate to secure the type of domiciliary segregation which the majority desired. In recent years, however, Negro incursions into so-called white territory have become more numerous, and white landowners have resorted to legal devices to secure race exclusiveness in residential sections. In considering the validity of these segregation devices the courts have ordinarily purported to take into account the social desirability of the end sought. No examination has been made of the factors back of Negro migration into white territory. No thought has been given to the problem of where the Negroes of our communities are to live. The social advantage or inevitability of race diffusion as against segregation has not been weighted. Traditional legal standards such as the due process clause of the Fourteenth Amendment, and the Rule Against Restraints on Alienation together with the usual supporting data are apparently all the material which a court uses to determine the validity of a segregation device. Legal rules of this type do not furnish a definitive basis for the disposition of controversies. They are generalities which do no more than suggest the extremes of legal validity and invalidity. Adjudication of litigation which does not fall at either of these poles must depend ultimately on something outside of the rules themselves. In cases of Negro segregation it would seem that this controlling factor should be an appraisal of the social desirability of the device in question. Probably this is an influence in the decision of some of these cases but the opinion would be much more convincing if it showed as much appreciation of the social phenomena of Negro migration in the twentieth century as it does of the fifteenth century pronouncements of Littleton on the restraining of alienation.[77]

Hansberry ignores all of this. This repression of reality must occur for a reason. The Court must not have wanted to deal with the racial and constitutional issues involved. Categorizing the case as concerning the constitutional parameters of class actions allowed the Court to give the Hansberrys the victory while sidestepping any adjudication of the covenant's constitutional validity.

As to the class action edicts laid down, however, the meaning of *Hansberry* has been obscure ever since. "Although Hansberry v. Lee was not decided under the Rules, it has ever since affected the way those rules are read — and almost impossibly bedeviled the way the courts think about the concept of interest in class actions."[78] Taken literally, the following language from *Hansberry* would prohibit all class actions:

> 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 groups, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interest in either

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[77] *Id.* 721-22.

[78] Yeazell, *supra* note 7, at 1102.

alternative.[79]

Professor Wright states:

> The language of the Court, however, seems unduly broad. In any conceivable case, some of the members of the class will wish to assert their rights while others will not wish to do so. Thus the familiar case of the stockholders' derivative suit is almost invariably brought by minority stockholders to challenge action that a majority of the stockholders approve. Yet it is routinely regarded as an appropriate class suit. Another familiar class suit is that in which one or more taxpayers of a community, suing on behalf of all, challenge the validity of a proposed public expenditure. It is difficult to believe that there has never been such a case in which a good many of the taxpayers would not have preferred that their rights not be enforced, because of their interest in having the expenditure made. Yet no one has ever doubted the propriety of bringing such a suit as a class action.[80]

The problem of who can represent whom in a class action is a pressing issue of current concern, for example, in school desegregation suits. Professor Bell criticizes the plaintiffs' suit to integrate the Boston schools because many black parents who were members of class actions did not want bussing.[81]

Some of the problems of interpreting *Hansberry* disappear, however, if we look at the facts of the case. The Court's words "free to assert or deny" did not refer to an abstract possibility — that is exactly what had happened. The party enforcing the covenant in *Burke* was the wife of the person who had sold his house to Carl Hansberry. The court had in front of it parties who had shifted their position — the example of the Burkes explicitly showed the class conflict. Although the language is so sweeping it could apply to and invalidate every class action, what actually happened in *Burke* and *Hansberry* was unique — the husband of the class representative in the first action had become a defendant and sought to subvert the goals of the plaintiff class.

Given this reality, *Hansberry* may actually stand for very little — a class action cannot bind those who shift sides in subsequent lawsuits. *Hansberry* invalidates the Illinois procedure, but the Illinois procedure was flawed in at least five or six ways. What the Illinois Supreme Court was trying to achieve in *Lee* was procedurally impossible. The court was trying to establish the covenant's validity against all future

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[79] *Hansberry*, 311 U.S. at 45.

[80] C. WRIGHT, LAW OF FEDERAL COURTS 474-75 (4th ed. 1983).

[81] Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 507-11 (1976); *see also* Yeazell, *supra* note 7, at 1111-19.

litigants.[82] *Burke* just could not be used for this. There was no way that Carl Hansberry could be a member of the plaintiff class in *Burke*. If the class is defined as all present and future property owners, Hansberry could never be an owner by the terms of that decree. Nor was there a defendant class that adequately represented the Hansberrys.

CONCLUSION

Hansberry is a strange case. Upon examination, its procedural teachings evaporate, leaving one with severe doubts about its applicability outside of its facts. It may be more important as a substantive decision, one that leads directly to *Shelley v. Kraemer*.

The injunction was requested in *Burke* to prevent the "evil of a mixed neighborhood." "[T]he contention of the complainant is that unless an injunction is granted, said neighborhood will become mixed, both white and colored with its attendant evils."[83] But if the white plaintiff in *Burke* could not represent the black defendant Carl Hansberry, or even her husband who wanted to sell the house, then it must be that not everyone saw a mixed neighborhood as evil. In 1926, the Court was sure enough of a legal and social consensus supporting segregation to dismiss summarily a suit challenging racially restrictive covenants.[84] By the 1940's, however, this consensus had broken down. The property owners were unwilling to uphold the covenants at the cost of letting their apartments go unrented and homes unsold, and blacks were not content to remain in the ghetto.[85] As stated by Professor Yeazell:

> The combination of these factors was surely insuperable in 1940. Social attitudes toward disfavored races were changing, and the clear perceptions of the relative values of racial segregation and integration surmisable in the judicial mind of 1921 or 1981 were in transition. The several conflicting positions that might plausibly have been asserted as interests of the class made it impossible for a court to decide what the class interests were.

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[82] Compare a similar attempt to establish the unreasonable dangerousness of all asbestos in asbestos litigation in Migues v. Fibreboard Corp., 662 F.2d 1182 (5th Cir. 1982).

[83] Burke v. Kleiman, 277 Ill. App. 519, 530-31 (1934).

[84] Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill is "void" in that it is contrary to and forbidden by the Fifth, Thirteenth, and Fourteenth Amendments. This contention is entirely lacking in substance or color of merit.

Corrigan v. Buckley, 271 U.S. 323, 329-30 (1926).

[85] A. HIRSCH, *supra* note 41.

> Moreover, once one perceives that more than one interest was plausibly assertible, the earlier class suit collapses, for the plaintiffs in Burke v. Kleiman had presumed only to represent a single interest. The Court's reaction to such weltering confusion was simple and extreme: it bolted back to the secure world of liberal individualism. . . . It may be that in situations of social flux the very concept of abstractly defined social interest dissolves, leaving only the individual as the definer of his good.[86]

It follows that in enforcing the covenants the judiciary was not just upholding a consensus as to the rightness of segregation, a view shared by blacks and whites, but was rather preventing citizens, on the basis of race, from doing what they wanted to do, buying and selling houses wherever they wanted to. A state's deprivation of that right because a person is black must then violate the fourteenth amendment.

Today, the South Park subdivision is totally black, as is Woodlawn, the area that the covenant was to protect from the black influx. South Parkway, one of the area's boundaries, has been renamed Dr. Martin Luther King, Jr. Drive.

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[86] Yeazell, *supra* note 7, at 1106-07.