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PARTIES — REPRESENTATIVE SUITS — IS REPRESENTED PERSON A PARTY? — The petitioner was a member of the class against whom a decree was rendered in a class suit. The petitioner was not named as a party and had no actual notice of the proceedings although notice was published according to court rules.[1] After the time for appeal had expired, petitioner

[1] Michigan Supreme Court Rule No. 77, adopted June 7, 1937.

filed a petition to reopen the decree, under the terms of a statute[2] which gave this right to any defendant against whom a court had rendered a decree without personal service. The petition was dismissed and the petitioner appealed. *Held*, order affirmed because the petitioner was not a party to the suit within the terms of the statute. *American State Savings Bank, Trustee, v. American State Savings Bank*, 288 Mich. 78, 284 N. W. 652 (1939).

For some purposes an unnamed member of a class is treated as a party to a suit involving the class even though he has not intervened to become a party of record. In the true class suit he is bound by the decree.[3] The statute of limitations does not run against a represented plaintiff during the continuance of the suit.[4] This is still true even though the suit is dismissed before a decree is rendered.[5] In other cases the unnamed member of a class has not been treated as a party of record. His citizenship is not considered in determining diversity of citizenship for purposes of federal jurisdiction.[6] An unnamed defendant was not a party within the terms of a statute forbidding a personal judgment against an unserved defendant.[7] In still other cases the courts have not been uniform. Probably an unnamed member of the class bears such a relationship to a class suit that he would be disqualified as a "party in interest" from being judge in the cause; [8] but some Texas cases seem to hold the contrary.[9] There is disagreement whether

[2] "In any case where personal service was not had . . . if the defendant against whom any decree shall have been made . . . shall afterward appear and petition to be heard, the party so petitioning shall be admitted to answer the plaintiff's bill . . . and the suit shall then proceed in like manner as if such defendant had appeared in due season and no decree had been made." 3 Mich. Comp. Laws (1929), §§ 14344-14346; Stat. Ann. (1937), §§ 27.1112-27.1114.

[3] Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356, 41 S. Ct. 338 (1920). See Moore and Cohn, "Federal Class Actions," 32 ILL. L. REV. 307 at 314 (1937), for the distinction between the three types of class suits: true, hybrid, and spurious. See Moore and Cohn, "Federal Class Actions—Jurisdiction and Effect of Judgment," 32 ILL. L. REV. 555 at 556 (1938), for discussion of the effect of the judgment in each type of class suit.

[4] Sterndale v. Hankinson, 1 Sim. 393, 57 Eng. Rep. 625 (1827); Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 788 (1887); Newgass v. Atlantic & D. Ry., (C. C. Va. 1894) 72 F. 712.

[5] Sterndale v. Hankinson, 1 Sim. 393, 57 Eng. Rep. 625 (1827); CLARK, CODE PLEADING 279 (1928).

[6] Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356, 41 S. Ct. 338 (1920).

[7] Southern Ornamental Iron Works v. Morrow, (Tex. Civ. App. 1937) 101 S. W. (2d) 336.

[8] Lindsay-Strathmore Irrigation District v. Superior Court of Tulare County, 182 Cal. 315, 187 P. 1056 (1920).

[9] Houston Cemetery Co. v. Drew, 13 Tex. Civ. App. 536, 36 S. W. 802 (1896). In this case a representative action on behalf of the lot owners and shareholders was begun to compel a cemetery association to take better care of the cemetery property. The fitness of the judge was attacked on two grounds: that his brother was a shareholder and that his relatives were buried in the cemetery. The court held that the brother who was a shareholder was not a party to the suit because he was not named. If he had been a party to the suit, the judge would have been disqualified by article V, section 11 of the Texas Constitution. The court did not decide whether the liability of the ceme-

the amount due the unnamed parties can be added to that claimed by the parties of record for the purposes of jurisdiction.[10] If the court had held that the petitioner was a party in the principal case, the result would have been to nullify the effectiveness of the class suit in Michigan. Each unnamed member of the class would have the right to reopen, in as many individual cases, the same case that was tried by class representatives because the parties were so numerous. It seems fair to deny the unnamed party a right to reopen because the merits have been tried by adversary hearing, while the statute the petitioner claimed under was passed to allow reopening where the defendant was not served personally and the decree was entered by default.

tery was as a quasi-public corporation or only as a private corporation to its shareholders and lot owners, but in either case the burial of the judge's relatives did not make him a party in interest, although if the liability had been on the first ground the judge could have become a party of record. See City of Dallas v. Armour & Co., (Tex. Civ. App. 1919) 216 S. W. 222.

[10] Cowell v. City Water Supply Co., (C. C. A. 8th, 1903) 121 F. 53. This case held that the amount in controversy for jurisdictional purposes was the aggregate of only those parties who had joined in the suit. Local No. 7, etc. v. Bowen, (D. C. Tex. 1922) 278 F. 271, contra.