

BLODGETT, J. A motion is made for retaxing the costs in this case. The case was a suit in equity, and the defendant appeared in his own behalf, filed his own answer, examined his own witnesses, and argued his own cause. The suit terminated in favor of the defendant, and the clerk in taxing the costs allowed the defendant a docket fee of \$20, and a fee of \$2.50 for each deposition taken, and the motion now is to retax the costs on the ground that these fees cannot be allowed to the defendant, he not being an attorney at law. I think the motion is well taken. The statute of the United States, (section 823, Rev. St.,) under which these fees are taxed, reads as follows: "The following, and no other, compensation shall be allowed to attorneys, solicitors, and proctors in the courts of the United States;" and then proceeds under section 824, as follows: "On a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars; and for each deposition taken and admitted in evidence in the cause, two dollars and fifty cents." In the case of *Vulcanite Co. v. Osgood*, 13 O. G. 325, Judge SHEPLY had substantially the same question under consideration, and there held that the docket fee allowed by these two sections can only be allowed to an attorney or solicitor of the court; that these costs are not recoverable to the defendant himself, but to his attorneys. And the reason in support of this conclusion is that, where a party is obliged by reason of his unfamiliarity with proceedings in courts to employ an attorney or solicitor, the law gives him this fee to aid in compensating his attorney; but if a party is not obliged to resort to a lawyer for assistance, then the allowance is not recoverable. The motion to retax is therefore sustained, and the clerk is directed to strike out from the fee-bill, as taxed, the allowance of \$20 for a docket fee, and the allowance of \$2.50 for each deposition.

NEWBERRY *et al.* v. ROBINSON *et al.*

(Circuit Court, S. D. New York. December 20, 1888.)

1. EXECUTORS AND ADMINISTRATORS—FOREIGN ADMINISTRATOR—ACTIONS BY.
An administratrix who recovers judgment makes the debt hers individually, and she may sue thereon out of the state where she was appointed; allegations showing representative capacity being treated as surplusage.¹
2. STATUTES—PLEADING—UNITED STATES COURTS—JUDICIAL NOTICE.
The United States courts take judicial notice of the statutes of the states, and an objection that they are not well pleaded cannot be sustained.

In Equity. On demurrer to bill.

This action is brought by Helen S. Newberry, as administratrix of John S. Newberry, deceased, and James McMillan, citizens of Michigan,

¹Respecting the authority of a personal representative outside the jurisdiction in which he was appointed, see *Gove v. Gove*, (N. H.) 15 Atl. Rep. 121, and note; *Allan v. Fairbanks*, 36 Fed. Rep. 402; *In re Cape May, etc., Co.*, (N. J.) 16 Atl. Rep. 191.

against Nelson Robinson, Frank C. Hollins, Walston H. Brown, and Arthur J. Moulton, citizens of New York, and others, alleged to be stockholders of the Lake Erie & Western Railway Company, to enforce a statutory liability created by the laws of Ohio, where the company was incorporated. Helen S. Newberry was duly appointed administratrix by the probate court of Wayne county, Mich., and on the 2d of April, 1887, she, in her representative capacity, and James McMillan, recovered a judgment against the railway company, upon which execution was issued, and returned *nulla bona*. The bill prays for a discovery, and that the amounts found due from the various stockholders shall be applied in satisfaction of the judgment. The defendants above named and the railway company demur on the ground that Helen S. Newberry, as a foreign administratrix, has no standing or capacity to sue in this court, and on the further ground, assigned *ore tenus* at the argument, that the laws of Ohio creating the liability are not properly pleaded.

William W. Cook and Scribner & Hurd, for complainants.

E. C. Henderson and Cary & Whitridge, for defendants.

COXE, J., (*after stating the facts as above.*) There is no doubt as to the general rule that an administrator cannot sue or be sued in his official capacity outside the limits of the state where he was appointed. *Vaughan v. Northrup*, 15 Pet. 1. It is also well settled that a judgment in legal effect creates a new debt, and it is this debt, so evidenced, that the complainants are seeking to enforce. Unquestionably the complainant Newberry could have maintained an action against the railway company upon the judgment in this state, in her personal capacity. She could have so brought this action. The recovery of the judgment left the debt due to her, not as administratrix, but as an individual. Strike from the bill the allegations relating to her appointment as administratrix, etc., and it states a good cause of action. But these allegations are mere *descriptio personæ*, and may be rejected as surplusage. This has frequently been done in analogous cases. Indeed, it is not easy to see how the complainants can obtain relief in any other form. *Biddle v. Wilkins*, 1 Pet. 686; *Bonafous v. Walker*, 2 Term R. 126; *Wilkinson v. Culver*, 23 Blatchf. 416, 25 Fed. Rep. 639; *Talmage v. Chapel*, 16 Mass. 71; *Nichols v. Smith*, 7 Hun, 580; *Bright v. Currie*, 5 Sandf. 433; *Murray v. Church*, 1 Hun, 49. So considered, the cause of action seems simple enough. The complainants have a judgment which is evidence that the railway company owes them as individuals the sum of \$16,048. This debt they have endeavored to collect of the company, but the execution issued upon their judgment has been returned unsatisfied. The laws of the state where the company was created provide that in such circumstances the shareholders shall be liable to contribute to a limited extent towards the payment of the debt. The action is in the nature of a creditor's bill to reach the money which, under the statute, should be contributed to the payment of the judgment. *Hatch v. Dana*, 101 U. S. 205; *Henry v. Railroad Co.*, 17 Ohio, 187; *Ogilvie v. Insurance Co.*, 22 How. 380. The second ground of demurrer is not well taken, for the reason that

the constitution and statutes of Ohio "are matters of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. Rep. 857; *Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. Rep. 757. The demurrers are overruled. The defendants may answer within 20 days.

IRONS v. MANUFACTURERS' NAT. BANK et al.

(Circuit Court, N. D. Illinois. December 3, 1883.)

1. GUARANTY—RELEASE.

A bank guarantied the payment of notes executed by P., and discounted for the bank by defendant, which were secured by trust deeds. Upon the liquidation of the bank, dealings were had by which the real estate held as security was transferred to the president of the bank in liquidation, who assumed to act for the bank, and he executed his notes for the amount of P.'s indebtedness, and P., in consideration of a quitclaim deed, was released from all liability on the notes. *Held*, that his release operated to release the guaranty by the bank.

2. JUDGMENT—RES ADJUDICATA.

A judgment obtained by defendant on the bank's guaranty, after the bank had gone into liquidation, is not conclusive on the stockholders of the bank, who are shown to have had no knowledge of the release at the time the judgment was obtained.

3. BANKS—NATIONAL BANKS—LIQUIDATION—COSTS.

In proceedings against the stockholders of a national bank that has gone into liquidation, to ascertain and recover assessments for the indebtedness, the stockholders are liable for costs as if they were co-defendants in any ordinary action.

4. SAME.

Where the proceedings are being prosecuted by one creditor as representative of all, and the stockholders appeal from a decree against them, which decree is reversed, with costs, the costs incurred by appellee in defense of the appeal will be deducted before any dividend will be declared.

In Equity. On exceptions to report of master.

D. J. Schuyler and *Henry B. Mason*, for creditors and receiver.

Harvey B. Hurd and *Henry G. Miller*, for defendants.

Charles W. Thomas and *F. A. McConaughy*, for claimant.

BLODGETT, J. This cause was referred to one of the masters of the court to ascertain and report the amount of indebtedness owing by the defendant bank, and the amount of assessment to be made against the stockholders of the bank for the purpose of paying such indebtedness, in conformity with the opinion of the supreme court, when this cause was before that court on appeal, which is reported in 121 U. S. 27, 7 Sup. Ct. Rep. 788. The report of the master has been filed, and all parties seem satisfied with his findings, except the People's Bank of Belleville, who had presented a large claim against the bank, which the master has disallowed, and exceptions are filed by this claimant; the substance of these exceptions being that the master has erred in finding that the defendant bank is not liable on this claim. This claim of the People's Bank of