

BARNARDIN v. NORTHALL et al.

(Circuit Court, D. Indiana. November 10, 1897.)

No. 9,358.

COSTS—ATTORNEY'S FEE—DEPOSITIONS.

Under Rev. St. § 824, an attorney's fee of \$2.50 for each deposition is not taxable until the deposition has both been taken and admitted in evidence.

This was a suit in equity by Alfred L. Barnardin against William H. Northall and others. The cause was heard on defendants' motion to strike the amended bill from the files.

Church & Church, for complainant.

Robert H. Parkinson, for defendants.

BAKER, District Judge. On September 28, 1897, leave was granted complainant to file an amended bill on payment of "all the costs of the suit to date." The costs taxed by the clerk were paid, and the amended bill was filed. The defendant now moves to strike the amended bill from the files because an attorney's fee of \$2.50 was not taxed and paid upon each deposition that was taken in the cause. The only depositions in the cause were taken by the complainant. They have never been admitted in evidence upon a hearing before the court or a master in chancery. There has not been any hearing of the cause. They have never been offered in evidence. They have not even been published. It is impossible for the court to say whether they would have been published or offered in evidence if the cause had proceeded under the original bill. The statute is as follows: "* * * For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents." Rev. St. § 824. It was held by this court in *Indianapolis Water Co. v. American Straw-Board Co.*, 65 Fed. 534, that under this statute attorney's fees on depositions are allowable only when there is "a concurrence of three things, viz.: (1) There must be a deposition; (2) it must have been taken in a cause; and (3) it must have been admitted in evidence therein." The contention of the defendant is that, when a deposition is "taken," it is "admitted in evidence." If such were the case, the words "admitted in evidence" would be mere surplusage. It is a rule in the construction of statutes that effect shall, if possible, be given to every part of them. It is evident that congress meant by the words "admitted in evidence" something more than the mere taking of a deposition. An attorney's fee on depositions is not taxable until they are both taken and admitted in evidence. The admission of depositions in evidence involves an exercise of judicial functions which are not vested in an examiner or other ministerial officer. These depositions may or may not be legally entitled to be admitted in evidence. If a fee were taxable for the taking of a deposition, it might be contended that another fee would be taxable when the deposition is thereafter admitted in evidence. But it is plain that a single fee is taxable for a single deposition, under the conditions

which are prescribed by the statute. The fee is annexed to the deposition under those conditions. When the costs were taxed in this case, the statutory conditions had not been complied with. The depositions had been taken, but they had not been admitted in evidence. Attorney's fees upon them were, therefore, not taxable, and the taxation by the clerk was correct. The motion of the defendant to strike the amended bill from the files is accordingly overruled.

CAREY v. ROOSEVELT et al.

(Circuit Court, S. D. New York. November 12, 1897.)

1. EXECUTORS AND ADMINISTRATORS—LEGATEES—JUDGMENT—PRIVITY.

While, in general, a judgment against executors or administrators *c. t. a.* is not binding on legatees when the suit is commenced or revived after the administrators' accounts have been settled, and all the property in their hands paid over to the legatees and trustees under the will, pursuant to a decree of the proper court, yet it is so binding if the legatees voluntarily assumed the expense of defending the action, and made themselves privies to it, and had the same benefits in connection therewith as if they had been named as defendants.

2. LIMITATION OF ACTIONS—ACTION ON JUDGMENT.

If an action on a judgment is not itself barred by the statute of limitations, the fact that the original claim which is merged in the judgment was so barred is immaterial.

3. LACHES—ACTION ON JUDGMENT—DEMURRER.

In a suit on a judgment the alleged laches of the complainant in prosecuting the original action, if available at all, cannot be considered on demurrer, if the bill excuses the delay and imputes it to those who defended that action.

This was a suit in equity by George G. Carey, as trustee, etc., against John E. Roosevelt and others, as trustees and legatees under the will of Amos Cotting, deceased, to enforce payment of a judgment previously rendered against the administrator *c. t. a.* of said Cotting's estate. The cause was heard on demurrer to the amended bill.

The demurrer to the original bill was sustained and the complainant had leave to amend. (81 Fed. 608, where the principal facts are stated.) Thereafter the complainants filed an amended bill. Among other new averments are the following: "And your orator further says that, as he is informed and believes to be true, the defense of the said action at law was conducted, and all proceedings therein were taken, by the said defendants Roosevelt and Schermerhorn, with the knowledge and consent, and at the instance and request, of the other defendants, beneficiaries under said will, to wit, the defendants, J. Egmont Schermerhorn, as executor of Elizabeth Cotting, deceased, and Jameson Cotting and Katie T. Schermerhorn individually, and of the defendants, John E. Roosevelt and W. Emlen Roosevelt, as trustees of the trusts created by the said will of Amos Cotting for the benefit of Elizabeth Cotting, deceased, and of the said defendants, Katie T. Schermerhorn and Jameson Cotting, and that such defense was conducted by them for the sole benefit of the said trust estate and of the said trustees and beneficiaries. That a large proportion of the expenses of such defense, including the fees of their attorneys and counsel, and including also the expenses and counsel fees incident to the proceeding in the surrogate's court hereinafter referred to, was borne by the said trustees and paid by them out of the trust funds, and the amount thereof was charged by them ratably against the shares of the said beneficiaries therein, who consented thereto and severally paid, or consented to such payment of, the charges so made against their respective ratable shares in the trust funds; and that said trustees and bene-