

ROWE v. LANGLEY.

Plaintiff's lien equal to the taxable costs of his counsel upon his judgment is protected from any set off.

Beyond this, plaintiff as assignee of the judgment, which he purchased, took it subject to all the equities, existing at the time of his purchase.

If a loss arises it falls on him, whose duty it was to have made enquiry, and who failed to discharge such duty. *Direct* or *positive* notice of an assignment will not always be insisted on.

Generally, it may be assumed, that the power to set off judgments on *motion* rests purely in the discretion of the court, and will not be exercised as a matter of right, and will not be done when inequitable, or when the rights of others are seriously affected, but will be exercised where justice will be greatly promoted,

Augustus J. Rowe—and Levi G. Towle, plaintiff in interest, in the matter of Thomas Langley.

At the October term, 1869, the plaintiff recovered judgment. The defendant moved to set off against that judgment a judgment recovered by one Melcher against said Rowe at the January term, 1866, which was assigned to said defendant. The plaintiff's counsel claimed a lien on Rowe's judgment, for the taxable costs, and also resisted the defendant's motion, on the ground that L. G. Towle was assignee and real owner of Rowe's judgment. A commissioner reported the facts as follows :

The Melcher judgment was on a note, and amounted to about three hundred dollars. The assignment was dated January 25, 1866, and the consideration was twenty-five dollars, and an agreement to pay all counsel fees in the action. The suit *Rowe v. Langley* was assigned in good faith, without knowledge by either Rowe or Towle of the assignment of Melcher's judgment, April 9, 1867, the day of its entry. The judgment in favor of Rowe was for one hundred and thirty dollars; and the consideration of the assignment was an account of seventy-seven dollars in favor of Towle, and one of twenty-three dollars which Towle agreed to pay. Langley had no *personal* knowledge of the assignment from Rowe to Towle until the October term, 1869; although at the entry of the Rowe suit, a notice "Levi G. Towle, plaintiff in interest," was put upon the docket. But said Towle did not appear before the auditor as party or witness, nor was any mention made of said assignment at the hearing. The former case is made a part of this case, and may be referred to by the parties. The questions of law arising on the above case agreed to by the parties were reserved for the whole court.

C. U. Bell and *Towle*, for defendant, referred the court to *Andrews v. Varrell*, 46 N. H. 20; *Goodwin v. Richardson*, 44 N. H. 125; *Sanborn v. Little*, 3 N. H. 539; *Woods v. Carlisle*, 6 N. H. 28.

Wiggin, for plaintiff in interest, cited *Currier v. Boston & Maine Railroad*, 37 N. H. 225; *Jordan v. Gillen*, 44 N. H. 424; *Goodwin v. Richardson*, 44 N. H. 125; *Shapley v. Bellows*, 4 N. H. 347.

NESMITH, J. Under our practice, there can be no question as to the legal right of plaintiff's counsel to a lien upon plaintiff's judgment equal to the amount of his taxable costs. Such lien will be protected from any set-off to which the defendant could in any form be entitled. *Shapley v. Bellows*, 4 N. H. 347; *Currier v. Boston & Maine Railroad*, 37 N. H. 225; *Wells, Admir v. Hatch*, 43 N. H. 246.

The defendant Langley, purchased a judgment against the nominal plaintiff Rowe more than a year before the real plaintiff Towle took his assignment of Rowe's right of action against the said defendant. The original judgment being in the name of Melcher, before its purchase by Langley, Langley could not file it as a *mutual* set-off in this action. The plaintiff's claim having passed into judgment, the question arises, whether the aforesaid two judgments can now be either legally, or equitably set off against each other.

The plaintiff in interest says he is *bona fide* holder of his judgment for value, and without notice from any source, that defendant was the owner of the Melcher judgment, when he became the assignee of Rowe's right of action. According to a familiar rule, well established by our practice, when plaintiff became the assignee of this right of action, he took it subject to all defences against it, at the time of the assignment. *Thompson v. Emery*, 27 N. H. 269. A purchase or assignment will bind the party, who has such knowledge of facts and circumstances, as ought to put the assignee on enquiry. Special notice thereof is unnecessary, nor need the assignee exhibit the instrument, or any other evidence. *Meghan v. Mills*, 9 Johns. 64; *Anderson v. Van Allen*, 12 Johns. 343; *Davenport v. Woodbridge*, 8 Greenl. 17; 14 Serg. & Rawle 137; Hill. on Sales, 448 and 450; *Cameron v. Little*, 13 N. H. 23; *Jordan v. Gillen*, 44 N. H. 428; 1 Par. on Con. 197.

It is the duty of the assignee, before purchasing in such cases, to make enquiries, and if a loss arises, it falls on him, whose duty it was to have made the enquiries, and who has not made them. *Mangles v. Dixon*, 18 Eng. Law & Eq. 82, a leading case on this point. So assignment will not defeat previous right, where the holder of a judgment has a right, as owner thereof, to set it off against another judgment against himself. An assignment of the latter judgment does not divest him of that right. The assignee of the latter judgment is deemed to take it subject to all equities. *Chamberlin v. Day*, 3 Cow. 353; *Utica Insurance Company v. Powers*, 3 Paige 365. These two New York cases disclose a state of facts similar to the case before us. So it has been held, that a debtor may off-set a demand against the assignee, though the suit is in the name of the assignor. *Corser v. Craig*, 1 Wash. C. C. 424.

In *Wright v. Cobleigh*, 23 N. H. 35, and in *Goodwin v. Richardson*, cited by counsel, we understand, the right to off-set judgments, even when they do not stand between the same nominal parties, is recognized to exist, under a fair construction of our statute on this subject. It is a right to be exercised by a court, sitting as a court of law *ex gratia*, and wholly within their discretion, and will not be enforced when equity will not be promoted, or when the rights of others will be seriously infringed.

Courts of equity follow the same general rules on the subject of set off, as courts of law, 1 Atkyns Rep. 237. *Duncan v. Lyon*, 3 Johnson Ch. 351; 1 Ben. Munroe, 194; 14 Johnson Rep. 63; 4 Conn. Rep. 302. Where injustice is likely to be done by reason of the insolvency of one of the parties, courts of law sometimes interpose their equitable powers. See the above cases last cited, also 1 Peere Williams Rep. 325. There is only this principle to be regarded, that a party in equity is entitled to a set off as a matter of right and courts of law allow a set off of judgments only, as before suggested, *ex gratia*. *Simpson v. Hart*, 14 Johnson Rep. 63.

Governed by the aforesaid rules, we think justice will be promoted between the parties to the record, *first*, by allowing plaintiff to receive his legal costs of suit. *Second*, defendant may set off his Melcher judgment, against plaintiff's claim limiting the amount to what he actually paid out, viz. \$25.00, together with the actual costs paid by defendant, or for which he became liable in obtaining the Melcher judgment with interest on these sums from the time of payment up to the rendition of judgment in this case. If necessary, the clerk may be commissioner to adjust damages and costs, according to this order.

WILLEY v. PAUL.

Where the lessee of a boat is using it to fulfil a contract with a third person, and it is wrongfully taken from him by the lessor, he cannot, in an action of trespass, recover damages for what he lost by thus being prevented from completing his contract, if such damages are not specially averred in the declaration.

TRESPASS, by Reuben Willey against Henry Paul, for that the defendant at &c., on &c., with force, &c., "a certain boat or gondola of the plaintiff of the value of five hundred dollars, then and there took and carried away, and the plaintiff's ropes, chains, cables and moorings of the same, then and there broke, threw overboard,