

ALLEN, J. The payments, having been made generally on the account, must be first applied to the items of legal sales. This application of the payments satisfied all the charges in the account claimed to be legal except the item of \$52. *Caldwell v. Wentworth*, 14 N. H. 436; *Kidder v. Norris*, 18 N. H. 532; *Hall v. Clement*, 41 N. H. 166; *Richards v. Columbia*, 55 N. H. 96.

The item of \$52 was a charge for ten gallons of Irish whiskey. By the laws of Massachusetts, in force at the time the sale was made, the sale of spirituous liquor was prohibited, except that liquors of foreign production, imported under the laws of the United States, might be sold by the importer in the original package in which they were imported. Mass. Laws of 1869, c. 415, ss. 27, 30. The exception from total prohibition gave no right to sell imported spirituous liquors except in the original package, nor did it authorize any owner to sell them after they left the hands of the importer. It did not extend beyond the limits placed by the federal constitution on the power of a state to restrict foreign and inter-state commerce by legislation. *Brown v. Maryland*, 12 Wh. 419; *License Cases*, 5 How. 504; *State v. Robinson*, 49 Me. 285.

There was no evidence that the ten gallons were sold in the original package in which they were imported, nor that they were sold to the defendant by the importer. It was an unlawful sale, and the payments made by the defendant having satisfied the legal charges of the account, the plaintiff can recover nothing.

Judgment on the verdict.

BINGHAM, J., did not sit: the others concurred.

WHITTEMORE & a. v. CARKIN.

The levy of an execution on an equity of redemption, which failed because the debtor had a homestead right in the equity levied upon of greater value, of which the execution creditor had notice, will not bar an action on the judgment, under Gen. St., c. 201, s. 5.

DEBT, on a judgment. Plea, the levy of an execution issued on the judgment upon an equity of redemption in land, the sale of the equity under the levy to the plaintiffs, and the return of the execution satisfied. Replication, that the levy failed by reason of the homestead right of the defendant in the equity of redemption of greater value than the equity levied upon. Rejoinder, that the plaintiffs, at the time of the levy, had knowledge of the defendant's homestead right, and, in view of all the circumstances, directed the officer to proceed

with the levy, and purchased the equity at the execution sale. Sur-rejoinder, that, at the time of the levy and sale, the plaintiffs, in good faith, understood that the defendant had abandoned his homestead right, and had good reason to suppose that the defendant then had no homestead right in the equity levied upon. Demurrer to the sur-rejoinder.

Woodward & Wellington and *G. Y. Sawyer & Sawyer, Jr.*, for the plaintiffs.

Faulkners & Batchelder, for the defendant.

ALLEN, J. A purchase of the equity of redemption by the plaintiffs, with notice of the defendant's claim to a homestead right, was no waiver of the remedy provided by statute (Gen. St., c. 201, s. 5) for a failure to secure the property levied upon. The levy was made in good faith, and was an honest endeavor to collect the judgment, and the law does not make the failure of one attempt a bar to another. There was no agreement to accept the possibility of gaining a title in satisfaction of the judgment, nor to forego the use of the statute remedy in case the levy proved fruitless. A waiver of the right to use the remedy could not be implied by the failure of an attempt for which the remedy was provided.

The plaintiffs were not estopped from claiming the remedy. Their proceeding did not take the land from the defendant, nor mislead him, nor in any way cause him to change his position. The plaintiffs took nothing by their levy, and the failure to gain a title was not caused by the levy nor by any fault of theirs. The statute remedy operates in this case with the same force that it would if the execution had been levied upon land owned by a third person, of whose title the plaintiffs had notice. *Barker v. Wendell*, 12 N. H. 119. The defendant's rejoinder was not a sufficient answer to the replication.

Case discharged.

BINGHAM, J., did not sit: the others concurred.

WOODWARD & a. v. TUPPER & Tr.

In foreign attachment, the trustee cannot set off against a debt due from himself to the defendant, a debt due from the defendant to the trustee as administrator.

FOREIGN ATTACHMENT. The trustee is indebted to the defendant, and is administrator of C, to whose estate the defendant is indebted.