

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.

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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.

The court reserved the question whether the trustee can set off the debt due from the defendant to the estate against the debt due from the trustee to the defendant.

*Woodward & Wellington*, for the plaintiffs.

*Lane & Dole* (with whom was *Forbes*), for the trustee.

SMITH J. The debt due from the trustee to the defendant having been attached, he is entitled to make the same defence he could if sued by his creditor. The rights of the trustee are not changed to his prejudice by the fact that the action is commenced by a creditor of the principal defendant, and not by the defendant himself. *Swamscott Machine Co. v. Partridge*, 25 N. H. 369. If this were a suit between the defendant and trustee, mutual demands only could be set off,—that is, demands due to and from the same persons in the same capacity. *Brown v. Warren*, 43 N. H. 430. If the trustee had been sued by the defendant, he could not file by way of set-off the debt due from the defendant to his intestate, for the debts would not be mutual. If the trustee should obtain a judgment against the defendant upon the demand due his intestate, he could not offset it against a judgment which the defendant might recover against him, for the judgments would not be mutual. So, for the same reason, if the trustee's intestate in his lifetime had obtained a judgment against the defendant, his administrator could not set off the judgment against a judgment obtained by the defendant against him personally. The trustee, therefore, is not prejudiced by this suit being brought by a creditor of the defendant to collect his indebtedness to the defendant.

To allow the trustee to make the set-off claimed in this suit, would allow him to pay his private claim by appropriating trust property to that purpose. It is not the policy of the law to allow a trustee to mingle trust funds with, or exchange them for, his own property. It may be said that he would be liable upon his bond to make good the amount so appropriated. But it not unfrequently happens that the bond is insufficient in amount, or becomes impaired by the principal or sureties becoming irresponsible; besides, the rights of the sureties ought not to be imperilled by suffering the principal to appropriate the trust property to himself.

It may be said that the principal defendant is insolvent, and that this is the only opportunity to collect the debt due the trustee's intestate. If that be so, it is the misfortune of the estate. The administrator cannot attach the funds in his own hands, because the plaintiff and trustee would be legally the same party. *Hoag v. Hoag*, 55 N. H. 172. That the plaintiffs in this suit are not so situated is an advantage they have over the administrator.

*Trustee chargeable.*

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