LEYSER V. RINDSKOPF, 1885-NMSC-018, 3 N.M. 382, 5 P. 540 (S. Ct. 1885)

Simon Leyser
vs.
Rindskopf Brothers & Company

No. 197

SUPREME COURT OF NEW MEXICO

1885-NMSC-018, 3 N.M. 382, 5 P. 540

January 30, 1885, Filed

Error to Second Judicial District, Sorocco County.

COUNSEL

Fiske & Warren, for plaintiff in error.

Neill B. Field, for defendants in error.

JUDGES

Wilson, J. Axtell, C. J., concurs.

AUTHOR: WILSON

OPINION

*{*383}* **{1}** This was an action of **assumpsit,** commenced in the court below upon a declaration containing*{*384}* the common counts in **indebitatus assumpsit.** The defendant below filed the usual plea of **non-assumpsit,** and also pleaded specially that he had a cause of action against the plaintiffs below for damages sustained by reason of the plaintiffs below having sued out an attachment prematurely, to recover for the same goods, etc., sued for in the action of **assumpsit.** The facts set forth in the plea were not denied. The plaintiffs demurred to the special plea, and, upon hearing, the court sustained the demurrer.

{2} The only question in this case is, did the court below commit error in rejecting the defendant's defense contained in his special plea.

{3} Set-off in this territory is regulated by statute, which provides that a defendant may plead, as a set-off or counter claim, "a cause of action in favor of the defendant arising out of the contracts or transactions set forth in the declaration or connected with the

subject of the action." The statute had been more liberal, and permitted the defendant to set off any cause of action which he held against the plaintiff which was matured at the time of pleading. This liberality, upon experiment, was found to operate injuriously or unsatisfactorily, and after a trial of some two years the legislature repealed the clause last stated. It is not claimed by the plaintiff in error that ordinary actions of tort can be set off under the existing statute; but it is claimed that the action offered to be set off, although tort, had the merit of arising out of the contract upon which the plaintiff claimed to recover in the action of **assumpsit,** or was connected with the subject of the action. Counsel for plaintiff in error have cited several Texas cases, some of them, apparently, much like the case under consideration. But it is not shown how nearly, if at all, the Texas statute of set-off is like the statute in this territory; and what is equally unsatisfactory to me, is that the reasoning of the judges of *{*385}* Texas, added to the elaborate argument of the counsel, was unsuccessful in bringing the reasons for their conclusions to my comprehension.

{4} It is still an unsolved problem in my mind how an unsuccessful attachment was connected with a sale and purchase of goods that had been consummated six months before the writ of attachment was issued or executed. If this theory be true, then, if an action of trespass had been commenced by the defendant below, in the language of Chief Justice Hemphill, in 14 Tex. 662 at 669, (**Wiley** v. **Traiwick,**) for "wrongfully, maliciously, and oppressively" suing out the attachment, and levying the same on his goods and effects, then the claim for the value of the goods sued for in the **assumpsit** suit would have been a proper subject of set-off in the action of trespass, for the reason that it arose out of the same transaction or was connected with it. This position would hardly have been sustained by the Texas court, yet I am not able to see why it would not be a necessary result, upon the same basis of reasoning.

{5} The case in 60 Ky. 121, 3 Met. 121, (**Nolle** v. **Thompson,**) is, in facts and principle, identical with the case under consideration. There, as here, an attachment had been sued out to secure the claim that was in controversy in the action pending between the parties. The attachment there, as in this case, had been wrongfully sued out and levied. There, as here, the defendant pleaded it specially as a set-off, with the additional allegations that the plaintiffs were nonresidents, and had no property out of which he could make the damages asked to be set off. Judge Duvall, in refusing to allow the set-off, said: "Now, the cause of action attempted to be set off did not arise out of the contract set forth in the petition as the foundation of the plaintiffs' claim; nor can it be said to have arisen out of any transaction set forth in the petition as the foundation of the action. On the contrary, the matters alleged in the counter-claim are *{*386}* wholly foreign to anything constituting the foundation or subject of the plaintiffs' claim. The debt due upon the note sued on constitutes the only foundation or subject of the action, and the facts set up in the answer have no connection with that debt, and relate exclusively to the remedy or mode of proceeding adopted by the plaintiffs to enforce the collection of the debt."

{6} While the Texas cases and the Kentucky case are all entitled to great respect and profound consideration, yet neither of them is binding on us further than the reasoning

convinces our judgment. The case in 3 Metc., (Ky.,) above cited, being in facts and principle like the case under consideration, and the reasoning of the judge in that case being in harmony and accord with ours, we arrive at the same conclusion: that the set-off offered in the court below was properly refused.

{7} The error assigned is overruled, and the judgment of the court below is affirmed.