

CARKIN v. BABBITT.

Lumber procured to be used in rebuilding a homestead dwelling is not exempt from attachment.

The defendant in an attachment suit cannot maintain replevin for the goods attached, unless they were by law exempt from attachment.

REPLEVIN, for lumber attached by the defendant, a deputy sheriff, in a suit against the plaintiff. The plaintiff's house, part of his homestead, and occupied by himself and his family, having been burned, he bought the lumber, and deposited it on his homestead lot, as materials for rebuilding the house. The attachment suit was founded on a judgment. The plaintiff offered to prove that an execution had been issued upon the judgment, a levy made, and the execution returned satisfied. The court reserved the questions whether the lumber was exempt from attachment as part of the homestead, and whether the evidence offered was competent.

Faulkners & Batchelder, for the plaintiff.

Woodward & Wellington, for the defendant.

CLARK, J. Materials designed for rebuilding or repairing a homestead dwelling are not included in the class of chattels protected from attachment by statute, nor are they in terms covered by the homestead act. If the lumber was exempt from attachment, it was because it had become a part of the homestead. Things movable and personal in their nature, when fitted and applied to use as a part of the realty, and necessary to its beneficial enjoyment, may be regarded as incident to it and become an essential part of it. But it is by adaptation and use that chattels acquire this character. A mere unexecuted intention of future use is not sufficient to impart it. *Burnside v. Twitchell*, 43 N. H. 390; *Wadleigh v. Janvrin*, 41 N. H. 503, 512; *Manchester Mills v. Rundlett*, 23 N. H. 271; *Woodman v. Pease*, 17 N. H. 282, 284. The character of the lumber was not changed by being placed on the homestead lot. There was nothing to designate it as exempt from attachment, or to distinguish it from ordinary lumber suitable for building purposes. It was not affixed to the soil. It was neither in form nor position as it was designed to be permanently used. It was intended, at some future time, to be made a part of the homestead dwelling, but until it became such it was not within the protection of the homestead law. Chattels are not exempt from attachment and levy under the provisions of the homestead law unless they have become a part of the homestead. We have not overlooked *Krueger v. Pierce*, 37 Wis. 269, which supports the view of the plaintiff. We are not inclined to follow that case, for the reason that we

think such a construction of the homestead act would extend its provisions beyond the limit intended by the legislature.

The lumber not being exempt from attachment, the plaintiff, being the defendant in the attachment suit, cannot maintain replevin against the defendant, who was the attaching officer. The defendant in an attachment suit cannot maintain replevin for the goods attached unless they were by law exempt from attachment. *Smith v. Huntington*, 3 N. H. 76; Gen. St., c. 226, ss. 2, 3. The evidence offered was immaterial.

Judgment for the defendant.

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

EDES v. BOARDMAN & a.

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Selectmen, for good cause shown, may abate any tax assessed by them or their predecessors.

An application by petition to the court for abatement of a tax assessed by selectmen is an appeal from the refusal of the selectmen to make such abatement as the appellant asks, and is practically an appeal from the assessment.

The power of appraising property for the purpose of taxation is such judicial power as can be constitutionally exercised by the court on appeal.

On an appeal seasonably taken by one who is not delinquent in the exhibition of an account of taxable polls and estate, the statute makes it the duty of the court to exercise a power of abatement as extensive as that of selectmen, and to make such order as justice requires.

The appeal is an equitable proceeding. However erroneous in law or in fact the assessment may be, only so much of the tax is abated as in equity the appellant ought not to pay. An abatement is not made on account of any error not injurious to him.

When for some property he is overtaxed, and for other property he is undertaxed to an equal or greater extent, in the same assessment, he is not entitled to an abatement; but he is entitled to a correction of the erroneous form of assessment when it is injurious to him.

For any error of law or fact in the assessment, for which a person is entitled to relief, he has a remedy by appeal, mandamus, or other direct proceeding, aimed at the correction or reversal of the assessment; and for such an error he cannot maintain an action for damages against selectmen who acted in good faith.

Selectmen are not liable for assessing a tax in pursuance of an unconstitutional act of the legislature, or an illegal vote of the town.