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The Homestead Exemption Laws of Texas and Some Difficulties that Arise in their Practical Application

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T A B L E O F C O N T E N T S.

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I N T R O D U C T I O N .

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The people of the State of Texas, in the exercise of their sovereign power, have made an involintary appropriation and dedication of a portion of a man's property to the use of himself and family; and by the organic law of the State this property is not subject to forced sale. He still owns the property but his power of disposition is limited. This idea of the appropriation of a portion of a man's property, in some cases aginst his will, is an old one. The dower right of the wife which by statute gives the widow, for her life, one third interest in her husband's realty, aginst creditors, is an example. It might also be interesting to enquire if the modern homestead is not simply an extension of what was anciently called the widow's quarantine. In Magna Charta, Chap. 7, we find it provides

that the widow shall tarry in the chief house of her husband for forty days after his death, within which time dower shall be assigned unto her, which time in law is called quarantine. "But some have said that by the ancient law of England the woman should continue a whole year in her husband's house within which time if dower was not assigned she might recover it, and this was certainly the law of England before the conquest." (1)

However this may be, Texas was the first State in the Union to pass a homestead law, and in 1839 statutes were enacted creating the exemption. This legislation has been followed in varying forms in most of the States and one noticeable fact is, that the exemptions are more exorbitant and extravagant than in other sections of the Union.

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(1) Coke Lit. 32 b.

In the South it was claimed that the devastating influence of the Civil War created the necessity for the passage of these laws which are, in many respects, opposed to the fundamental principles of our government.

Viewed in the light of experience, it is to be feared that principles and policies, not otherwise than pernicious, dictated the passage of these laws. They were passed, primarily, for the protection of the debtor; but justice demands that the creditor should also be protected. The rights of the creditor seem to have been lost sight of when the law made it possible for the debtor to take refuge behind these exemption laws and shun the payment of his honest debts. Chief Justice Marshall, in Ogden v. Saunder's, said that the tendency of these laws was to "impair commercial intercourse and threaten the existance of credit." Let us see how this can be. In the first place capitalist

do not seek investments in sections of the country where the payment of just debts can be so easily avoided. Rates of interest will be higher, and even home capital will be invested elsewhere owing to the destruction of confidence in business transactions. Ten per cent interest in Texas is thought to be a moderate charge. Now would it not be an amusing, as well as instructive, task to enquire into the cause of this? There is in the State a population of about two and a half million and each family is entitled to have as exempt property : two hundred acres of land, upon which no value is set or a lot or lots not to exceed in value five thousand dollars; but for convenience this may be taken for the average value.

Allowing five people to constitute a family and supposing each family owns a homestead, which of course is not the case, we can find by multiplying the value of the

homestead by the number of families, the amount of exempt property in the State. The great bulk of the business of the country is transacted on a credit basis and is it not the withdrawing, as a basis of credit, of such a vast amount of property one of the causes of a high rate of interest ? Viewed in this light, it is not difficult to see that it would be beneficial to the State to legislate more in favor of the creditor and subject all property to the payment of debts.

CONSTITUTIONAL PROVISIONS.

The Constitution of the State of Texas declares:-

First, -The legislature shall have power, and it shall be their duty, to protect by law from forced sale a certain portion of the property of all heads of families.

Second,- The homestead of a family not to exceed two hundred acres of land (not included in a city, town, or villiage) or any city, town, or villiage lot or lots not to exceed fifty dollars in value at the time of their destination as a homestead, and without reference to the value of any improvements thereon, shall not be subject to forced sale for debts, except they be for the purchase money thereof, for the taxes assessed thereon, or for the labor and materials expended thereon.

Third,- Nor shall the owner, if a married man, be at liberty

to alienate the same unless by consent of the wife and in such manner as may be prescribed by law. (1)

The Constitution of 1876 makes the following additional provisions relating to homestead exemptions :- No mortgage, trust deed or other lien on the homestead shall ever be valid except for the purchase money therefor or improvements made thereon as heretofore provided, whether such mortgage or trust deed, or other lien shall have been created by husband alone or together with his wife and all pretended sales of the homestead involving any condition of defeasance shall be void. (2)

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(1) Constitution of Texas, 1869, Art. XII. sec.15.

(2) Constitution of Texas, 1876, Art. XVI. sec.50.

HOMESTEAD DEFINED.

A homestead necessarily includes the idea of a house for residence or mansion house. In Franklin v. Coffee, 18 Texas 413, it is further said that" the dwelling may be a splendid mansion or a mere cabin, or tent, open to the winds and the rains of heaven." If there be either, it is under the protection of the law, but there must be a home residence before the two hundred adjoining acres can be claimed as a homestead."

HOW DESIGNATED.

The general doctrine is that an actual residence is required to impress upon the premises the character of a homestead- but in this State no such residence is required; nor is it absolutely essential that a house be built or improvements be made. There must be a preparation to improve and if this is of such a character as to manifest beyond doubt an intention to occupy the premises as a homestead, it is sufficient. (1)

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(1) Franklin v. Coffeee, (18 Texas 413.)

LIMITATIONS.

The limitation of a rural homestead is acres while that in a town or city is value. It will be noticed that the Constitution says nothing about the value of the two hundred acres which it allows to be dedicated as a homestead and it specially provides that the lot or lots in a town or city used as a homestead shall not exceed in value five thousand dollars, ($ 5000.) exclusive of any improvements which may placed thereon. The agencies of wealth and development may increase the value of a homestead indefinitely, still, so long as it is used as such it is exempt from the payment of all debts except those mentioned in the Constitution. So a debtor, owning in a town or city, a "lot or lots" not exceeding in value five thousand dollars may place improvements thereon worth millions of dollars but which are, never-

theless, beyond the reach of creditors. The wisdom of such exemptions as these may be questioned. The homestead exemption laws have been characterized as "wise and beneficent" and in their general features they ~~are~~ undoubtedly are, but it seems contrary to public policy to permit a person to have the absolute ownership of property and at the same time to have the accumulations and profits derivable therefrom placed beyond the reach of just creditors.

WIAT IS INCLUDED IN TIE WORD "FAMILY".

Tie term family in tie Constitution is used in its generic sense, embracing a noushold composed of parents and children, or other relatives or domestics and servants, in short every collective body of persons living together within tie same ourtilege, subsisting in common, directing their attention to a common object-tie promotion of their mutual interests and social happiness. (1)

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(1) Wilson v. Cochran, (31 Tex. 677.)

RURAL, MIXED AND URBAN HOMESTEADS.

In many instances in this State, the corporate limits of towns and villages have been extended so as to include the whole or a part of lands previously used as a rural homestead. This is a question of great importance to persons having homesteads near the corporate limits of rapidly growing towns and cities.

The decisions in this State seem to be uniform, that where the corporate limits of the town or city have been extended so as to include a rural homestead, this of itself, does not change the character of the homestead, "not until the plan or plot of the town is extended a cordingly, either by buildings or survey, or at least an ordinance establishing streets &c.." (1)

In this case the extension of the town limits subse-

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(1) Taylor v. Boulware, (17 Texas 74.)

quently to the acquisition of the place in question as a homestead included a portion of the land, on which portion was situated the residence of the owner. A judgment was obtained aginst the debtor and the land was sold under execution. The question to be decided by the court was, "could the debtor's homestead be restricted to the portion of the land taken in by the extension of the town limits and on which stood his residence." The court decided that the homestead was not restricted to the land included in the extension of the town limits. My. Justice Lipscomb, delivering the opinion if the court reasoned as follows:- "The protection of the homestead from forced sale was no doubt a favorite object with the convention, and the constitutional provision intended to insure that object, has been regarded as entitled to a liberal constuction. The term "lot or lots" used in the Constitution must be taked and construed in the

popular sense of those terms; and, when so used, never would be considered as embracing land within the jurisdictional limits of the corporation, not connected with the plan of the city. It might be important to the administration of the police laws of the corporation that such lands and those who owned and occupied them, should be within its jurisdiction; but until streets have been extended through the land connecting it with the plan of the town, the land could not be called a lot of the town."

The same conclusion is reached in the important case of Basset v. Messner, (30 Texas 604.), but by a course of reasoning not analogous nor by any means as sound as that given in the case of Taylor v. Boulware, supra.

The court says that the authority to subject to taxation for municipal purposes the property of those who are opposed to the extension of the town limits should not be

given to the inhabitants of a town by a vote of two thirds of their number. "If such were the case, it would always be perilous to own a homestead of two hundred acres in proximity to one of these towns or villages, because the temptation of these corporations to absorb these rural homesteads for purposes of taxation and for augmenting the local revenue, might be to strong to be withstood, and private rights already vested under constitutional law might be lessened, varied and impaired, at the caprice, the whim, or the greed of a body of individuals, who might accomplish what the legislature itself would be incompetent to do." And the court further intimates that if the husband should consent to such extension, the assent of the wife would have to be obtained in writing before the change in the character of the homestead would be complete and final.

CHARACTER OF THE INTEREST.

The mere occupancy of a place as a homestead changes the character of the estate in California. It is converted into a kind of joint tenancy with the right of survivorship between husband and wife. (1) But it seems to be the better doctrine to hold that the homestead interest is not a definite estate in the land, therefore not subject to alienation nor is its value capable of being appraised by a creditor and setapart for his benefit in execution proceedings. (2)

In this State the prime object of the Constitution is kept constantly in view, that object being to secure a homestead to the family. The rights and interests of either the husband or wife are not changed by the possession

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(1) 4 California 288.

(2) 28 Vermont 544.

and occupancy of the premises as a homestead, the title remains unchanged and no infringment upon property is made futher than is necessary to carry out the object designed.(1)

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(1) Stewart v. Mackey, (16 Texas 56.)

WIAT ARE TIE RIGITS OF TIE FAMILY

IN TIE IOMESTEAD ?

The character of the interest which the family of the debtor as in the homestead is something more than a mere chance of being protected. The family has a right independent of the debtor, therefore he cannot waive their rights and lessen the benefits intended to be conferred upon them.

The husband and wife may by deed of trust duly executed and acknowledged in the manner prescribed by law, legally encumber the homestead to secure the payment of a debt, the sale of the trustee not being a forced sale.

FORCED SALE.

The Constitution after describing the limits of the homestead, says:- It "shall not be subject to forced sale for debts, except they be for the purchase money thereof, for the taxes assessed thereon, or for labor and materials expended thereon." By "a forced sale" is meant a sale under judicial process, done in accordance with the law regulating such sales. "Therefore the homestead which is exempted by the Constitution from 'forced sale' cannot be sold under process of the court, and it matters not what form the contract assumes, nor how willing the head of the family may be, it is an immunity conferred by the Constitution for the purposes beyond the mere pleasure of the individual and cannot be renounced." (1)

This same case holds that the husband, with the as-

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(1) Simpson & Keene v. Williamson, (6 Texas 101.)

sent of the wife in the form prescribed by law, may make an absolute sale of the homestead or may mortgage it to be sold on default, but the power of sale must be vested in the mortagee because"a mortgage depending for its enforcement on judicial process would be inefectual for the reason that it would be forced."

This exemption from forced sale, though, seems to apply only so long as the premises are held and occupied as a homestead and as soon as the property is abandoned and another homestead acquired the mortgage may be foreclosed by judicial process. And it has been held that after the abandonment the mortagees lien in a suit of foreclosure is to be given the preference over all other creditors, the mortgage taking effect as a lien the moment the homestead is abandoned. (1)

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(1) Stewart v. Mackey, (18 Texas 56.)

ARE LIENS UPON THE HOMESTEAD GOOD ?

The Constitution of 1875, says:-"No mortgage, trust deed or other lien on the homestead shall ever be valid except for the purchase money thereof, or improvements thereon, as in hereinbefore provided, whether such mortgage, or trust deed or other lien (shall have been created by the husband, alone, or together with his wife; and all pretended sales of the homestead) in volving any condition of defeasance shall be void."

Notwithstanding the above Constitutional provision the contract of the husband to convey the land used and occupied as a homestead, without the wife's concurrance is not void. This was so held in Stewart v. Mackey, (16 Texas 57), when the court says:-"The only question is, whether the mortgage, though inefectual at the time of execution could be enforced subsequently, and after the

homestead which has been mortgaged, was abandoned and another one acquired..... The entire object of the law and Connstitution is to secure a homestead and no infringement upon the husband's rights and property, except such as may be necessary for the object designed, is intended by the law or is to be presumed. Under this view, the husband may in conformity with the law, make any disposition whatever of the homestead, being his own property, provided his act does not interfere with the absolute enjoyment and use of the homestead by the husband, wife, and family". By this decision it will be seen that the husband may mortgage the homestead without the consent of the wife, "subject to the contingincies that the homestead may not be changed"&c..

According to the modern theory of mortgages, property is not alienated when mortgaged. The mortgage serves only as a lien upon the premises. But in the case of a mortgage

on a homestead wherein lies the force of the lien. Take a case where the husband does mortgage the homestead subject to the conditions mentioned in the Constitution. What possible benefit can accrue to the husband from such a mortgage ? Subsequent cases have upheld the doctrine of the case quoted above, but as stated, it does not seem consistant to the Constitution. The Constitution says the mortgage shall be void, yet these cases hold that, although the mortgage is void when given, and continues to be a nullity so long as the premises are held as a homestead, yet the moment the homestead is abondoned, the lien created by the mortgage springs into life, and has full force and effect as though valid from its incipiancy.

A lien given upon land before it is dedicated or occupied as a homestead is not impaired by the debtor subsequently occupying the land as a homestead. In the case of

Chipman v. Mc Kiney (41 Texas 76), the husband conveyed a lot which was community property, to a trustee to secure a debt. The husband afterwards occupied the lot as a homestead and in a suit brought by the trustee for the enforcement of the trust it was held that the occupation of the lot subsequent to its conveyance to the trustee did not exempt it from foreclosure, and sale to satisfy the trust.

The above rule seems to apply only in case of a voluntary lien being given by the debtor. It does not apply in the case of a statutory lien of a judgment upon the reality of the debtor. This is shown in the decision in the case of Stone v. Darnell, (20 Texas 11.), where the plaintiff purchased the land at a sale under an execution aginst the defendant, and the defense was that the premises were the defendant's homestead. When levy was made there was no settlement upon the land. But after the levy was made and

before the date of the sale the defendant built a house on the land and moved into it three days previous to the sale. The judge charged the jury:-"That if the proof shows that at the date of the sheriff's sale the defendant anf family resided on the tract of land, then it was his homestead, and exempt from forced sale. The time of the sale is the time to which we must look in ascertaining the fact of homestead or not." This doctrine was affirmed in the case of Mac Manus v. Campbell, (37 Texas 267.), in which case it was held that a debtor who has no homestead may acquire one with all its immunity from sale under judgments aginst him, and it is immaterial that the judgments were in existance when he acquired the homestead; and these principles are applicable to a debtor who, having a homestead of less value or extent than the legal maximum enlarges it to the maximum."

VENDOR'S LIEN.

The homestead is not exempt from sale for judgment obtained for the purchase money. This question was decided in the case of Farmer v. Simpson, (6 Texas 393.), where it is said that,"a homestead is not acquired until the title to the land on which such homestead is established, is acquired or until the party is in a position to demand title, and all liens acquired before the homestead has been established must be raised or it will be subject to a forced sale for the satisfaction of such liens. The vendee does not get a good title until the purchase money debt is discharged. He gets no such an estate in lands as will support the right of homestead aginst the person to whom the purchase money is due. The Constitution says that the exempt portion of reality shall not be a source for the payment of debts.

The debtor's property is not withdrawn absolutely and is made inapplicable to the compulsory payment of debts. This being the case how can judgments be liens at all on this exempt portion of realty ? The organic law of the State withdraws a portion of the debtor's property from the hold of the creditor, and so long as it is occupied as a homestead no lien can attach. In Black v. Epperson, (40 Texas 162.), it is held, that, a debtor can sell his homestead and with the proceeds of the sale acquire another homestead without subjecting the abandoned to his general debts, the vendee taking aginst the judgment creditors who otherwise would have a lien. This is manifestly right and just toward the vendee for he would have no reason to believe that the mere buying of the land would bring into activity a judgment lien which had hitherto been a nullity. If the vendee did not

take as aginst the judgment creditors he would have to satisfy the lien which was made operative the moment the land came into his possession, else the vendor's creditor could take the land under the lien. It will be thus seen that the vendee might be forced to pay for the land twice, if the law were otherwise.

BORROWED MONEY TO PURCHASE HOMESTEAD.

The purchased property is always liable where a vendee borrows money to pay for the homestead. When a vendee gives his note for the purchase money and the vendor assigns the note, the assignment carries with it the vendor's lien. (1)

But the vendor's lien does not arise in favor of a third party who pays the purchase money to the vendor for the purchaser and takes the latter's note for the amount. An interesting case on this point is that of Malone v. Kaufmen, (38 Texas 456.), Hughes sold a lot to Malone taking two notes of Malone as part of the purchase price of the lot. Malone and wife also executed a deed of trust for Hughes' benefit, the property being made a homestead; two thousand dollars being still due on the notes, at the request of

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(1) Moore v. Raymond, (15 Texas 554.)

Malone, Kaufman, the appellee, advanced the money to Malone to take up the notes. In consideration for this advancement, Malone executed two notes to Kaufman and he and his wife executed a deed of trust to secure Kaufman in this advancement. On default of payment, Kaufman brought this suit for the foreclosure of the vendor's lien on the property as a homestead. Held:-"That there was no vendor's lien secured in the contract and no cause of action." The court said that the moment the money was paid to the holder of the purchase money notes, no matter whence derived, the purchase money was paid and the vendor's lien on the lot was discharged. It would have been otherwise if Kaufman had dealt directly with the holder of the purchase money notes, paid his money to him as purchaser of the notes. The vendor's lien would then have inured to him as an incident to the notes. But in not dealing with the holder of the

purchase money notes, he made a new contract, not a contract for the purchase money but for loaned money and this new contract was not such an one as to subject the homestead to forced sale, whatever may have been the intention of the parties to the contract at the time for the reason that, "the vendor's lien is not the creature of the contract but is an incident to a contract for the purchase of land, growing out of that specific kind of contract by operation of law.

ARE THE PROCEEDS OF THE SALE OF THE HOMESTEAD EXEMPT ?

To this question it may be said that neither the Constitution nor any statute provides for such sale, therefore it may be said that when a homestead is voluntarily exchanged for money, property which is not exempt under the law, no protection can be claimed under the exemption laws for the money received in exchange. (1) The reason for the rule which subjects to forced sale property not exempt by statute which has been received in voluntary exchange for other property which was exempt, is that the statute fixes the character of the exemption and not the choice and caprice of the debtor. (2)

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(1) Whittenburg v. Lloyd, (49 Texas 633.)

(2) Schneider v. Bray, (59 Texas 669.)

In this State an insolvent debtor can purchase a homestead with money would otherwise be distributed among his creditors. The case of North v. Shearn, (15 Texas 174.), settled this question as to debts created prior to the acquisition of the homestead.

The passage of the homestead exemption laws cannot impair the validity of liens subsisting prior to such passage. Otherwise a State might pass an enforce a law which would be in conflict with the clause of the Constitution which prohibits a State from passing any law impairing the obligations of contracts.

Gun v. Barry, (15 Wallace 610.), is a leading case. It is there held that any homestead or other exemption law which attempts to divert valid liens existing at the date of its passage is Unconstitutional and void.

WAIVER OF HOMESTEAD.

The organic law of this State declares that the homestead property shall not be sold under execution. In this, the Constitution executes itself, and the provision cannot be waived. No officer of the law can levy upon and sell such property. But this provision of the Constitution should not be construed to interfere with the sale of the property or homestead by the head of the family with the consent of the wife. There seems to be no limit to the power of conveyance or disposal of the homestead with the formal legal consent of the wife. (1)

We see then, that the homestead is not exempted absolutely, but there exists the right to claim the exemption.

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(1) Jordon v. Peak, (38 Texas 429.)