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THE HOMESTEAD EXEMPTION.

Owing to the continued and augmenting pressure of the financial revulsion which commenced in the year 1857, questions relating to HOMESTEAD EXEMPTIONS are constantly arising in the courts of those states where laws of this character exist. Many of these questions are equally novel, important and difficult. Statutes exempting Homesteads from judicial sale now exist in perhaps a majority of the states.[1] In a number of the states such exemption has been made the subject of express Constitutional provision.[2] The main *object* of the laws, whether statutory or constitutional, is in all cases the same. The leading ideas and general features of various statutes are not substantially dissimilar. But the amount exempted, both as to *value* and *quantity*, the manner of arriving at and subjecting to sale the excess, with many other minor and subordinate details are not precisely alike in scarcely any two of the states. Many of the statutes are crude, defective and imper-

[1] Among others in Ohio, Illinois, New York, Wisconsin, Massachusetts, Texas, Maine, California, Michigan, New Hampshire, Iowa, Vermont, and, in a qualified manner, in Mississippi, Pennsylvania, Indiana and Louisiana.

[2] Texas, Wisconsin, Indiana and California.

fect,—a fact always noticed and frequently deprecated by judges whose perplexing duty it has been to construe and apply them. *Holden* vs. *Pinney*, 6 Cal. 235; *Helfenstein* vs. *Gore*, 3 Iowa 287; *Keyes* vs. *Hill*, 30 Verm. 767.

The decisions, as will presently be seen, even when made under statutes whose provisions were substantially the same, are more than usually inharmonious. This is attributable in part, doubtless, to the *novelty* of the questions presented, for in most of the states where such statutes now exist, the policy of exempting homesteads was not adopted until comparatively a recent date. It is also to be ascribed in part, no doubt, to the intricate character of many of the questions presented for adjudication; for in every department of the law there are and will ever continue to be questions so nearly poised that it is vain to expect an entire concurrence of professional or judicial opinion. While this is so, I am, after a pretty thorough examination of the various statutes and decisions, fully convinced that much of the conflict would have been avoided, if the courts had been more fully aware of the decisions of sister courts in other states.

Although the title—HOMESTEAD—had no place in the Reports until about ten years since, and none in the Digests until about six years ago, so many decisions have since been made, that I believe it to be practicable to classify them, and to deduce from them (in some instances not without uncertainty and doubt, to be sure,) many general principles. I am not aware that such a task has before, at least to any considerable extent, been attempted. I have aimed constantly to keep in view the influence and operation of special statutes and particular phraseology, and when the decisions have turned upon these, the circumstance has been carefully noted.

In all the statutes which have come under my observation, the *extent* of the ground of the homestead or the *value* is limited; sometimes there is a limitation in both of these respects. There is usually a restriction as to alienation; the husband, if married, being prohibited from selling or conveying the homestead, unless the wife concurs in and signs the conveyance. The substance in

these and other particulars of the Acts of some of the States is briefly given in the note.[1] With this before us we shall the better

[1] OHIO.—Act passed March 23, 1850. Exempts "from sale on any execution on any judgment or decree the family homestead of each head of a family to the extent of $500 in value." (§ 1.) Provides for homestead rights in leased estates. (§ 5.) Mortgage executed by husband alone does not affect right of wife or family. (§ 9.) Swan's St. pp. 711, 712.

ILLINOIS.—Act passed February 11, 1851. R. St. p. 650. Exempts "from levy and forced sale under execution, the lot of ground and buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the extent in value of $1000." * * * * "No release or waiver of such exemption shall be valid, unless in writing, subscribed by the householder and acknowledged like deeds," &c. (§ 1.)

NEW YORK.—Act passed April 10, 1850. R. St. 615. Substantially and almost literally like the Illinois statute above. The act requires the deed to the party, or the "Homestead Exemption Book," to show that the property is a homestead, to entitle it to exemption. The Illinois statute does not so require.

WISCONSIN.—The constitution requires the legislature to provide "wholesome laws, exempting a reasonable amount of property from seizure or sale" for future debts. "A homestead" not exceeding forty acres in the country, used for agricultural purposes, or not exceeding one-quarter of an acre in a town or city, "and the dwelling-house owned and occupied by any resident of the state, shall not be subject to forced sale on execution." § 23, R. St. pp. 785, 798. A deed or mortgage of the homestead "shall not be valid without the signature of the wife," &c. Afterwards the Act of May 17, 1858, provided that the owner might remove from, or sell or convey, the homestead, without making it liable. And that no judgment, in either *Federal* or state courts, shall be a lien on the homestead. No limit as to value of homestead.

MASSACHUSETTS.—Exempts "from attachment, levy on execution and sale for debts" the homestead, whether possessed by lease or otherwise, to the extent of $800. Wife must join in any conveyance or release in the same manner as she joins in releasing dower. If the parties are interested partition may be had. (13 Gray 21; 2 Id. 383.)

INDIANA.—Similar constitutional provision to Wisconsin. The legislature under this have exempted (Act of February 17, 1852, R. St., vol. ii., p. 337) property to the amount of $300. It may be real or personal, or both, at debtor's election. If real property, no "mortgage or sale is valid, unless acknowledged by the wife in due form of law." (9 Ind. 109.) Property to exempt from execution only in actions upon contracts. 9 Ind. 196.

PENNSYLVANIA.—*Quasi* homestead act. (Act of April 9, 1849, Dunlop's Laws, p. 1088.) While the act does not mention homestead, it exempts "from levy and sale property owned by or in possession of the debtor, to the extent of $300;" and

appreciate the exact force and value of the decisions to be cited from those states.

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the defendant may elect to retain the amount *in real estate.* [When he may elect, &c., 4 Harris 300; 6 Id. 307; 11 Id. 310. How waived. 12 Id. 426.]

TEXAS.—Constitution provides "that the homestead" (defining extent and value) "shall not be subject to forced sale for debts hereafter contracted." "Nor shall the owner, if a married man, alien the same, unless by the consent of his wife, in such manner as the legislature shall point out."

NEW HAMPSHIRE.—Act of July 4, 1851, exempts "the family homestead of the head of each family to the value of $500;" declares it "not to be assets while occupied by widow or any of the minor children," and that no release or waiver shall be valid, unless executed by husband and wife; if the wife be dead and there are minor children, the consent of the judge of probate must be had, &c.

MISSISSIPPI.—Act of 22d January, 1841, exempts to every white citizen, being the head of a family one hundred and sixty *acres of land.* Laws, 1841, p. 113. Nor is such land assets for the payment of debts. *Morrison* vs. *McDaniell*, 30 Miss. 218.

MICHIGAN.—Law provides "that a homestead not to exceed forty acres, or one lot in town not to exceed in value $1500, and the dwelling-house thereon, &c., owned and occupied, shall not be subject to forced sale on execution." Act of 25 March, 1848, and New Const. art. XVI. § 1.

No mortgage or alienation is valid without the signature of the wife.

MAINE.—Exempts (Act 1850) lands and buildings not exceeding $500 in value. Must file certificate with register of deeds in order to claim the exemption.

IOWA.—Code of 1851 exempts "from judicial sale the homestead of every head of a family. Widow or widower, though without children, deemed head of family, while continuing to occupy. A conveyance by owner, if married, is of no validity unless the husband and wife concur in and sign such conveyance."

It is made liable for taxes, mechanics' liens, and prior debts, and debts created prior to the acquisition of the homestead. "The homestead must embrace the house used as a home by the owner thereof." If he has two or more, he may select which he will retain as a homestead. Tracts of land "must be contiguous, unless they are habitually and in good faith used as part of the same homestead." No limit as to value, but only to extent. Failure to record in "Homestead Book," does not make it liable.

CALIFORNIA.—By section 15 of the constitution it is provided, that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

The act of the legislature requires the homestead to consist of a certain quantity of land with the dwelling-house, &c., not exceeding in value $5000.

LOUISIANA.—Act of March 17, 1852, entitled "An act to provide a homestead for the widow and children of deceased persons." The act gives to necessitous widows and children the preferred right to $1000 out of the estate of the deceased.

The subject will be treated under the following arrangement:—

I.—Object of the Homestead Exemption, and Rules of Construction.

II.—Legal Attributes of a Homestead—Nature and Extent of Right.

III.—The Homestead Right—how Parted with or Lost:—

1. *By Voluntary Sale and Conveyance:*
2. *By Judicial Sale under Mortgage:*
3. *By total and absolute Abandonment.*

IV.—Whether a Judgment is a Lien upon the Homestead.

V.—Homestead Right subordinate to Vendor's Claim for Purchase-Money, &c.

'I.—Object of the Homestead Exemption and Rules of Construction.—The object of all rules or maxims of interpretation is to discover the true intent and meaning of a law or constitution. When the words are explicit and unambiguous they, of course, are to govern. If doubt exists recourse must be had to the occasion and necessity of the provision, the mischief felt, and the remedy had in view by the law-making power. When the intention thus collected is clearly ascertained it will be followed, though contrary to the letter of the statute. This principle finds an appropriate illustration in a case decided under a statute similar in character to those we are now discussing. Thus, where the act exempted "all sheep to the number of ten with *their* fleeces," &c.,

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Vermont.—Act declares that "if any head of a family shall decease, leaving a widow, his homestead, to the value of $500, shall wholly pass to his widow and children without being subject to the payment of the debts of the deceased, unless specially chargeable thereon," &c. (§ 4.)

Exempts homestead and yearly products in favor of the housekeeper or head of a family.

Shall not be alienated or encumbered, except by the joint deed of the husband and wife, executed and acknowledged by her, the same as if it was real estate to which she holds the title.

Georgia.—Acts of 1841 and 1843, exempt fifty acres of land to each white citizen of the state, and five additional acres for each child under the age of fifteen. Both husband and wife must join in conveying. Act does not protect property from judgments founded *on torts. Davis* vs. *Hensen*, 29 Geo. 345.

it was held that the intent was to secure to the family wool equal in amount to that grown on a given number of sheep, though the debtor should not be the *owner* of the sheep. *Hall* vs. *Penney*, 11 Wend. 44. So where the statute exempted "one cow and one *swine*," the question was made that after the animal was slaughtered and packed away for use it was no longer a *swine*, and, therefore, not exempt. But the Supreme Court of Massachusetts very properly held otherwise, observing that "the statute *intended* the sustenance of a poor family," and is to be sensibly construed in view of the objects aimed at. *Gibson* vs. *Jenney*, 15 Mass. 205; *Simonds* vs. *Powers*, 28 Verm. 355; *Johnson* vs. *Richardson*, 33 Miss. 465.

The statement of this elementary principle of construction, and these illustrations of its application, sufficiently show the importance, in the construction and application of homestead laws, of keeping in constant view the object and design of the legislature in their enactment.

The homestead policy has been characterized by the courts as "beneficent," (4 Cal. 23, 26,) "liberal, wise, and benevolent," (1 Iowa 441, 512,) "humane in its character," &c. (28 Verm. 674.) The leading object of the homestead exemption is, of course, to protect and preserve the *home*,—a home not for the husband alone, but for him and his wife and children. *Floyd* vs. *Mosier*, 1 Iowa 512; 6 Id. 30. "A place where they may live in society beyond the reach of financial misfortune and the demands of creditors." Per BALDWIN, J., in *Parsons* vs. *Livingston et al.*, 11 Iowa 106. *Beecher* vs. *Baldy*, 7 Mich. 506; *Robinson* vs. *Wiley*, 15 N. Y. 492. The beneficent provisions of the law are especially designed to guard the wife and children against the neglect, the misfortunes, and improvidence of the father and husband. *Cook* vs. *McChristian*, 4 Cal. 23, 26; *North* vs. *Shearn*, 15 Texas 176; *Wood* vs. *Wheeler*, 7 Id. 13, 20; *Keyes* vs. *Hill*, 30 Verm. 759. And the *children*, equally with the wife, are within the benefits designed to be conferred by the statute. *Lies* vs. *De Diablar*, 12 Cal. 327; *Dickson* vs. *Chorn*, 6 Iowa 30; *Norris* vs. *Moulton*, 34 N. H. 392; *Johnson* vs. *Rich-*

ardson, 33 Miss. 464; *Walters* vs. *The People*, 21 Ill. 178; *Vanzant* vs. *Vanzant*, 23 Ill. 536.

The homestead policy has also a *political* bearing; and in this view it has a broader range and other objects than the mere security of the husband and children against want. "The design," says the Supreme Court of Texas, "is to protect citizens and families not simply from destitution, but to cherish those feelings of independence so essential to the maintenance of free institutions." *Franklin* vs. *Coffee*, 18 Texas 413. The same idea was years before expressed and enforced by one of the most sagacious and able of American statesman. Advocating, in 1829, in the United States Senate, the adoption of a general homestead policy, Colonel Benton said:—"Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply tenants." (1 Thirty Years' View, pp. 103, 104.)

It is not to be doubted that a large proportion of our wonderful national growth and prosperity is directly attributable to the fact that so much of the land is owned in fee simple, and that the great mass of farmers cultivate it as owners and not as tenants. They have therefore happily been spared from knowing and feeling the deep and exhaustive meaning, the o'erfraught and painful significance of the words DISTRESS and RENT.

There is some want of agreement among the authorities as to whether statutes of exemption should be *strictly* or *liberally* construed. By some courts it is considered that statutes of this character are not *remedial* in their nature, and being in derogation of the common law, are not entitled to a liberal construction. *Rue* vs. *Alter*, 5 Denio 119; *Allen* vs. *Cook*, 26 Barb. 374. But the prevailing opinion is that, in view of their benevolent and humane character, they are entitled to be liberally viewed by the courts.

Hoitt vs. *Webb*, 36 N. H. 166; *True* vs. *Morrill*, 28 Verm. 674; *Charless* vs. *Lamberson*, 1 Iowa 441. And are remedial in their nature: *Deere* vs. *Chapman*, 25 Ill. 610; *Richardson* vs. *Burbell*, 10 Met. 507; 22 Conn. 338; 21 Ill. 44; *Hill* vs. *Johnson*, 29 Penn. St. R. 363.

The question, however, whether they shall be liberally or rigidly interpreted is not of much practical importance. They should be *sensibly* construed, with a view to secure the object aimed at their enactment. *Gibson* vs. *Jenney*, 15 Mass. 205.

Indeed, "the current of authority at the present day," says Mr. Justice BRONSON, "is in favor of reading statutes according to the most natural and obvious import of the language, without resorting to subtle or forced constructions for the purpose either of limiting or extending their operation. Courts cannot correct what they may deem excesses or omissions in legislation." *Waller* vs. *Harris*, 20 Wend. 562. See, also, observations of REDFIELD, C. J., in *Howe* vs. *Adams*, 28 Verm. 543.

In connection with the foregoing, the further thought must be borne in mind, that the homestead exemption is created by, and is based wholly upon statute law, or constitutional provision. It hence results that the party claiming the right or privilege must accept of it, if at all, under just the qualifications and conditions, neither fewer or different, under which the law gives it. And whether he asserts this right as a plaintiff, or maintains it as a defendant, he must, by his pleadings and proof, bring his case within the provisions of the law.[1] *Helfenstein* vs. *Gore*, 3 Iowa 287; 1 Id. 441; *Beecher* vs. *Baldy*, 7 Mich. 501; *Walters* vs. *The People*, 18 Ill. 194; *Kitchell* vs. *Burgwin*, 21 Ill. 44. Or at least "within the spirit and equity of the act." Per BENNETT, J., in *True* vs. *Morrill*, 28 Verm. 674.

[1] Thus, where the statute gives a homestead, *provided* it does not exceed a specified value, if the property when reduced to the smallest quantity, such as the dwelling-house and appurtenances exceeds such value, it is not exempt. *Helfenstein* vs. *Gore*, *supra*. Cited and approved: *Beecher* vs. *Baldy*, 7 Mich. 500. And while it is competent for the legislature, in such case, to exempt something out of it, or in lieu of it, as an equivalent in value, it is a matter of legislation, and not of judicial discretion, to say what the equivalent shall be. Id.

Some of the statutes require the defendant to take certain steps to obtain the benefit of the exemption. When this is the case, the requirements of the statute must be pursued before levy, or at least before sale, or conveyance by the husband. *Manning* vs. *Dove*, 10 Rich. S. C. (Law) 395; *Frierson* vs. *Wesbery*, 11 Id. 353; *Slanker* vs. *Beardsly*, 9 Ohio St. 589; *Helfenstein* vs. *Gore*, 3 Iowa 292; *People* vs. *Plumsted*, 2 Mich. (Gibbs) 469; *Frost* vs. *Shaw*, 3 Ohio St. 270; *Clark* vs. *Potter*, 15 Gray 21; *Lawton* vs. *Bruce*, 39 Maine 484; *Pinkerton* vs. *Tumlin*, 22 Geo. 165; *Herschfeldt* vs. *George*, 6 Mich. 456; 7 Id. 510; *Line's Appeal*, 2 Grant's Cases 197. And the wife and children are, in such case, affected by the failure or default of the head of the family to do what the statute requires. *Davenport* vs. *Alston*, 14 Georgia 271; *Crow* vs. *Whitworth*, 20 Id. 38; *Tadlock* vs. *Eccles*, 20 Texas 782; *Brewer* vs. *Wall*, 23 Id. 589; *Getzler* vs. *Saroni*, 18 Ill. 518; *Simpson* vs. *Simpson*, 30 Ala. 225. When such is the requirement of the statute, there must be not only ownership and occupation, but a *selection* of the premises as a homestead. *People* vs. *Plumsted*, *supra*. See, also, *Beecher* vs. *Baldy*, 7 Mich. 503, 505. But such selection, unless the statute so requires, need not be in writing. Id. Nor need it be recorded if the law does not so provide. *Cook* vs. *McChristian*, 4 Cal. 23, 26; *Reynolds* vs. *Pixley*, 6 Cal. 165.

II.—Legal Attributes of a Homestead—Nature and Extent of Right.—A homestead is a house used as a home, together with the prescribed quantity of land on which the house is situated. The word *home* is to have its ordinary and usual signification. "*Stethe* or *sted* betokeneth," says Lord Coke, "properly the bank of a river, and in many places *a place*." Co. Litt. 4, 6. Homestead therefore means the home-place.[1] Richardson, C. J., 7 N. H. 245; 39 Id. 483.

[1] The term "homestead" does not necessarily imply all those parcels of land which may adjoin. 7 N. H. 245. Nor does it apply to leased property, though it adjoins premises used as a homestead, when such leased property is occupied by tenants and was never occupied as a home by the owner. And property thus leased constitutes no part of the homestead even though the homestead proper

"The homestead is the dwelling-place of the family where they permanently reside." *Cook* vs. *McChristian*, 4 Cal. 26. In general it may be said that to constitute a homestead there must be *actual occupation* and *use* of the premises as a *home* by the *family*. The premises must be appropriated, dedicated or used for the purpose designated by the law, to wit: as a "*home*"—a place to abide and reside in—a place for the family. This use must be actual and not constructive. It may be laid down as a general rule that the premises do not become impressed with the legal character of a homestead until actual residence and occupation by the family as a home.[1] *Holden* vs. *Pinney*, 6 Cal. 235, 625; *Norris* vs. *Moulton*, 34 N. H. 392; *Benedict* vs. *Bunnell*, 7 Cal. 245; *Meyer* vs. *Claus*, 15 Texas 516; *Wisner* vs. *Farnham*, 2 Mich. 472; *Rix* vs. *McHenry*, 7 Cal. 89; *Charless* vs. *Lamberson*, 1 Iowa 435; *Rhodes* vs. *McCormick*, 4 Iowa 373; *Williams* vs. *Swetland*, 10 Iowa 51; *Philleo* vs. *Smalley*, 23 Texas 498; *Horn* vs. *Tufts*, 39 N. H. 478,

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does not equal the value allowed by statute. *Hoitt* vs. *Webb*, 39 N. H. 158; *Davis* vs. *Andrews*, 30 Verm. 678; *Walters* vs. *The People*, 18 Ill. 194; S. C. 21 Ill. 178, where it is held that the "occupancy" required by the statute may be by tenants. So held, also, in 23 Ill. 536.

1 It seems to be the opinion of the Supreme Court of Texas (but the point was not necessarily involved in the case) that a homestead exemption will attach by "*preparations* to improve of such a character and to such an extent as to manifest beyond doubt the intention to complete the improvements, and reside upon the place as a home." *Franklin* vs. *Coffee*, 18 Texas 413; 20 Id. 11; 15 Id. 176.

But in Iowa the contrary has been expressly ruled. It is held that premises do not become a homestead *until actually occupied* by the owner *as a home*, and therefore if they should be levied on prior to such occupancy, and pending the making of improvements with a view to reside thereon, they would be liable. Constructive occupation by fencing and cultivating will not do. *Charless* vs. *Lamberson*, 1 Iowa 435. See, also, *Wisner* vs. *Farnham*, 2 Mich. 472. It is believed that the latter view is not only more correct as a question of construction, but sounder as a matter of policy.

Actual occupation, however, as a residence by the husband with his housekeeper, he awaiting the arrival of his wife and children from another state, has been held sufficient to impress the homestead character upon the premises. Hence, a conveyance by the husband *alone*, prior to the arrival of the wife and family, was adjudged to be void. *Williams* vs. *Sweatland*, 10 Iowa 51. But see *Holden* vs. *Pinney*, 6 Cal. 235, and other cases, *infra*.

483; *True* vs. *Morrill*, 28 Verm. 672; *Mithery* vs. *Walker*, 17 Texas 593, 582; *Prior* vs. *Stone*, 19 Texas 371; *Davis* vs. *Andrews*, 30 Verm. 678; *Earle* vs. *Earle*, 9 Texas 630; *Kitchell* vs. *Burgwin*, 21 Ill. 45; *Walters* vs. *The People*, 21 Id. 178.

Upon the principle that the homestead right does not become perfect until actual residence by the *family*, a mortgage, executed alone by a married man who was himself living upon the premises, but whose wife had never resided in the state, is valid, even though the premises become the home of both after the execution of the mortgage. *Holden* vs. *Pinney*, 6 Cal. 235, 630; *Meyer* vs. *Claus*, 15 Texas 516; *Keiffer* vs. *Barney*, 31 Ala. 192; *Allen* vs. *Manasse*, 4 Id. 554. But see *Williams* vs. *Sweatland*, *supra*.

So where a man's wife was absent for near two years in another state, on a visit, and during such absence the husband purchased and improved certain property with the *intention* of making it his home, and before the return of the wife executed a mortgage upon it, the property was holden not to be a homestead as against the mortgagee. *Rix* vs. *McHenry*, 7 Cal. 89; S. P. *Benedict* vs. *Burnell*, 7 Id. 245; *Wisner* vs. *Farnham*, 2 Mich. (Gibbs) 472.

It is the duty of the husband to furnish a home for the family. If after marriage he takes his wife to reside upon property that was his before the marriage, such property thereby becomes a homestead with all the incidents of a homestead. *Bevalk* vs. *Kraemer*, 8 Cal. 66. But a trustee cannot acquire on land held in trust a homestead right unincumbered by the trust. *Shepherd* vs. *White*, 11 Texas 346.

"A man's homestead must (*per* BELL, J., 23 Texas 502) be his place of residence; the place where he lives; where he usually sleeps and eats; where he surrounds himself with the ordinary insignia of a home, and where he may enjoy its immunities and privacy." S. P. 39 N. H. 483. It follows from the foregoing that a homestead necessarily includes the idea of a *house* which is the home of the family. *Franklin* vs. *Coffee*, 18 Texas 413; *Charless* vs. *Lamberson*, 1 Iowa 435.

Most of the statutes provide that the homestead shall consist of a certain quantity of *land*, with the dwelling-house thereon, &c.

When such is the case a homestead right cannot be asserted where the party asserting it has *no* interest in the *land*, but only in the building. Title to the land, or a right to demand title, or an interest in the land, is essential. So held as against the wife, where the house was erected on land which the husband, after his second marriage, purchased in the name of his children by a previous marriage, but with funds owned by him prior to his marriage with the wife who set up the homestead claim. *Smith* vs. *Smith*, 12 Cal. 216; *Farmer* vs. *Simpson*, 6 Texas 303; *Beecher* vs. *Baldy*, 7 Mich. 501; *Shepherd* vs. *White*, *ubi supra*. Some of the statutes like that of Ohio expressly provide that a homestead may exist in estates less than freehold; *e. g.* leasehold estates. Aside from statutory provision to the contrary, no good reason is perceived why the homestead right should be limited to estates in fee simple. And where the statute exempts a homestead "*owned* by the debtor," it is held that a life estate or a lesser interest than absolute ownership is within the protection of the statute. *The statute protects any interest of the debtor which might be sold on execution.* This, doubtless, is the true test. *Deere* vs. *Chapman*, 25 Ill. 610; 33 Miss. 462. If the other requisites concur, the homestead right will attach, without express statutory provision to that effect, in favor of a lessee for years. *Peland* vs. *De Bevard*, Iowa Supreme Court, MS., June 1862.

Connected with the subject of the necessity, in general, of actual occupation, is the question how far the homestead premises must be *contiguous*. Where, as in Iowa and some other states this matter is regulated by statute, this of course governs. Aside from statutory requisition to that effect, contiguity is not absolutely essential. Thus, where the law declared that the homestead might consist of "any town or city lot or *lots* in value not to exceed $2000," &c., it was held that lots in a town need not be adjacent, if *used* in good faith as *part of the home* for the convenience of the family. *Hancock* vs. *Morgan*, 17 Texas 582; S. P. *Prior* vs. *Stone*, 19 Texas 371. But a vacant lot, never used as part of the homestead, and wholly separated by a street from the residence of the owner, is not exempt. *Methery* vs. *Walker*, 17 Texas 593. Nor can a

separate piece of woodland from which wood was accustomed to be obtained, or a piece of land occupied only as a shop, be regarded as part of the homestead. *True* vs. *Morrill*, 28 Verm. 672; *Walters* vs. *The People*, 18 Ill. 194.[1]

It is held in California that as soon as "a place, by the occupancy, in good faith, of the family, acquires the character of a homestead, the nature of the *estate becomes changed.* It is turned into a *sort of joint tenancy* with right of survivorship, at least between husband and wife, and this estate cannot be altered or destroyed, except by the concurrence of both in the manner provided by law." *Taylor* vs. *Hargous*, 4 Cal. 268; 6 Id. 71. On the other hand, and with much better reason, it is declared by C. J. REDFIELD, 28 Verm. 544, that the homestead interest "is not a *fixed, definite estate* in the land, capable of appraisal and separation to the creditor in the execution; but it is constantly liable to variation, and to be defeated altogether by matters not of record, or by deed, but resting altogether in oral evidence." The estate, the title, whether it be in the husband or the wife, is not changed or affected, but for the purpose of securing the homestead to the family, the power of separate alienation is taken away. The law makes no infringement upon the husband's or wife's right of property, except such as may be necessary to carry out and secure the object designed. *Stewart* vs. *Mackey*, 16 Texas 56; *Gunnison* vs. *Twitchell*, 38 N. H. 62; *Davis and Wife* vs. *Andrews*, 30 Verm. 678.

But on the death of the husband, if the right of homestead survives to the widow and family, the law will protect them in the enjoyment of such right, from unjust interference on the part of either the heirs at law, or general creditors. Thus the adult heirs, though not constituting part of the family, will not be permitted to eject the widow or make her pay rent, at least so long as she

[1] The statute provided that the exemption should consist of "the lot of ground and the buildings thereon, occupied as a residence," &c. It was held that the act contemplated but *one* piece of land, and that a tract of timber land, a mile distant, yet necessary for fuel, &c., for the farm was not part of the homestead. *Walters* vs. *The People, supra;* S. C. 21 Ill. 178.

resides on the property as her home. *Keyes* vs. *Hill*, 30 Verm. 759. See further as to nature and extent of widow's and minor's rights: *Green* vs. *Crow*, 17 Texas 180; *Gimble* vs. *Goode*, 13 La. An. R. 352, 378, 398; *Succession of Foulkes*, 12 Id. 537, 885; *Fletcher* vs. *State Bank*, 37 N. H. 369; *Norris* vs. *Moulton*, 34 N. H. 392; *Walters* vs. *The People*, &c., 18 Ill. 194; S. C. 21 Ill. 178; 23 Ill. 536, where it is held that a divorced woman is entitled to the right, the husband being the guilty party. Where the right survives for the benefit of the wife and children, neither the homestead property, or the income thereof is assets or liable for the payment of the debts of the deceased. *In re, Estate of Tompkins*, 12 Cal. 114; *Wood and Wife* vs. *Wheeler*, 7 Texas 13; *Dickson* vs. *Chorn*, 6 Iowa 19, 32; 23 Texas 585; 17 Id. 135, 180.

Not only so, but the homestead right is favored by the courts, and will be protected even in the husband's lifetime, against all fraudulent schemes to defeat it. Therefore, if a deed to the homestead be delivered to the purchaser before the purchase-money is paid, and the purchase-money is attached in a suit brought by the real though not the ostensible purchaser, equity will cancel the deed so obtained.[1] *Still* vs. *Sanders*, 8 Cal. 281.

If other parties have an interest in the land, as tenants in common, or as joint tenants, can a right of homestead exist if accompanied with actual residence on the land as a home? The writer sees no good reason, in view of the object and design of the homestead policy, why this question should not be answered affirmatively. The few decisions, however, which have been made touching this point are not entirely accordant. In New Hampshire it has been determined that the conveyance of an undivided interest, if possession be not abandoned, does not waive the homestead right as to the part not conveyed. *Horn* vs. *Tufts*, 39 N. H. 478; *Stat. of Mass., supra.* In California a different conclusion

[1] As to fraud in *acquisition* of the homestead, see *North* vs. *Shearn*, 15 Texas 174; *Stone* vs. *Darnell*, 20 Id. 11; *Robinson* vs. *Willey*, 15 N. Y. 489; S. C. 19 Barb. 157; *Randall* vs. *Buffington*, 10 Cal. 491. See 5 Cal. 488. Fraudulent disposition of homestead. *Wood* vs. *Chambers*, 20 Texas 247; *Dickson* vs. *Chorn*, 6 Iowa 19, 31; *Beals* vs. *Clark*, 13 Gray 18.

has been arrived at, under a statute not essentially dissimilar from that of New Hampshire. The act requires the homestead to consist of a certain quantity of land, with the dwelling-house, &c., not exceeding in value $5000. Under this it was held that homesteads could not be carved out of, or exist in lands held in, joint tenancy, or tenancy in common. *Wolf* vs. *Fleischacker*, 5 Cal. 244; *Reynolds* vs. *Pixley*, 6 Id. 165. It was even held that there could be no homestead right in lands owned by the husband, his wife and child, as tenants in common. *Giblin* vs. *Jordan*, 6 Cal. 416. In *Kellersberger* vs. *Kopp*, 6 Cal. 563, the principle was pressed still further, and it was determined that an existing homestead right was *ipso facto* destroyed by the conveyance of an undivided portion, even though the grantors and grantee both continued to occupy as their respective homes different parts of the same building. The reason assigned for this holding (5 Cal. 244), to wit: that the statute has provided no mode of separation, and because a division and appraisal would put the other owners to trouble, is not satisfactory. If the homestead owner chooses to convey part of his home, why should he thereby forfeit his right to the remainder? Creditors could not justly complain, because they would be benefited rather than injured thereby. The question whether a homestead right can exist in lands held by tenants in common is now before the Supreme Court of Iowa in *Thorn* vs. *Thorn*, and is not yet decided. The decision will appear in 13 Iowa Reports.

In considering the nature of the homestead right, one or two other subjects of importance remain, which will be briefly alluded to. In *Gary* vs. *Eastabrook*, 6 Cal. 457, the question is suggested but not decided whether there can be a homestead right in buildings used for hotels, stores, &c. It is said by WRIGHT, C. J. (*arguendo*), in *Rhodes et al.* vs. *McCormick*, 4 Iowa 368, that the object of the law is to protect the *home* and preserve it for the family, and not shops, office-rooms, and hotels, which are *rented to* and *occupied by other persons*. It is not sufficient to constitute a homestead that its owner used the front room of the building for the sale of groceries, slept in the back room, and took his meals habitually at a hotel. *Philleo* vs. *Smalley*, 23 Texas 498.

Under a statute limiting the *extent* of ground, but not the *value* of the homestead, and which provides that the "homestead must embrace the house used as a home by the owner," it was determined (one judge dissenting) that a portion of a building used as a home by the owner was exempt, but otherwise as to the remainder of the building not thus used,—the presumption, however, being that the *whole* is exempt until the contrary is shown. *Rhodes et al.* vs. *McCormick*, 4 Iowa 368.[1] (STOCKTON, J., *dissentiente.*)

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[1] The facts upon which this decision was made are thus given in DILLON'S IOWA DIGEST, p. 503, § 3:—"The house, in this case, was a three story brick building, erected on a half lot in the city of Muscatine, and costing some $8000. The 'cellar and first floor were designed by the owner (who was the head of a family and the defendant in execution) as a business house (a store); and the second and third floors as a family residence.' The second and third floors were occupied as a residence by the owner and his family, and by another person and his family, but had been previously rented in part for offices; the cellar and first floor were rented to and occupied by a tenant as a store: *Held*, that the *cellar* and *first floor* of the building were liable to be seized and sold on execution, and that the *soil* and the *second* and *third* stories were exempt." 4 Iowa 368. The majority opinion in this case was delivered by a very able judge (WRIGHT, C. J.), and the grounds upon which it rests are very forcibly argued by him. It may not be improper to add, however, that the correctness of the conclusion arrived at has been seriously questioned by many members of the bar, not on the ground that the decision, abstractly considered, was not just, but for the reason that as the statute had not provided for such a *division* of the homestead, the court could not make it, and therefore that the *whole* building was exempt or *none.*

J. F. D.

DAVENPORT, IOWA.

(To be concluded in the next number.)