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# HOMESTEAD PROVISIONS IN NORTH DAKOTA

FLOYD B. SPERRY\*

Creditors may lament their very existence but homestead laws have firmly established their place in American jurisprudence. The basis of homestead provisions can be traced back to the Twelve Tables, which required that insolvent debtors sacrifice their bodies to their creditors. And for hundreds of years after that, debtors fared little better.

There have been two materially different forms of homestead legislation in this country. The federal homestead law exempted from debts lands homesteaded from the public domain until the issue of a patent therefore; state homestead laws authorized the head of a family to designate property, owned or to be acquired, to be exempt under law from his future debts.<sup>1</sup>

The homestead is peculiarly an American institution, the common law having no analogous interest or estate.<sup>2</sup> It follows, then, that homestead rights exist only by virtue of constitutional and statutory provisions.<sup>3</sup> In North Dakota homesteads are provided for by the Constitution<sup>4</sup> and defined by statute.<sup>5</sup> Basically, the homestead statutes provide (1) protection of a family from judgment liens, executions or forced sales,<sup>6</sup> (2) a means of strictly regulating transfer of property necessary for existence of a family,<sup>7</sup> and (3) an orderly mode of descent of such property.<sup>8</sup> Homestead rights have been described as "wholesome and salutary regulations in

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1. 2 THOMPSON, REAL PROPERTY § 969 (permanent ed. 1939).

2. *Barney v. Leeds*, 51 N.H. 253, 261 (1872).

3. *First State Bank v. Fischer*, 67 N.D. 400, 404, 272 N.W. 752, 755 (1937).

4. "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law; and a reasonable amount of personal property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvement thereof, in such manner as may be prescribed by law." N.D. CONST. § 208.

5. "The homestead of every head of the family residing in this state shall consist:

1. If within a town plat, of not to exceed two acres of land upon which the claimant resides, and the improvements thereon, and not exceeding in value twenty-five thousand dollars over and above liens or encumbrances or both.

2. If not within a town plat, of not to exceed in the aggregate more than one hundred sixty acres, and the dwelling house situated thereon in which the homestead claimant resides, with all its appurtenances, and all other improvements on said land regardless of the value of the same.

Such homestead shall be exempt from judgment lien and from execution or forced sale, except as otherwise provided in this chapter. In no case shall the homestead embrace different lots or tracts of land unless they are contiguous." N.D. CENT. CODE § 47-18-01 (1960).

6. *Ibid.*

7. N.D. CENT. CODE § 47-18-05 (1960).

8. N.D. CENT. CODE § 30-16-02 (1960).

furtherance of a wise, generous and humane public policy, encouraging the establishment and maintenance of homes. . . ."<sup>9</sup> The distinctive purpose of homestead exemption laws is to afford debtors who are heads of families certain immunities which are intended to secure for their families the necessaries and comforts of life.<sup>10</sup> A mere debtor who is not the head of a family is not accorded any such immunities. The right of exemption is guaranteed a family, and all doubt should be resolved in its favor where facts appear consistent with a good-faith claim of a homestead right.<sup>11</sup> Relinquishment of a homestead is not favored in the law. The offering of property for sale does not constitute an abandonment of the claim of a homestead right, the right being associated with the theory of domicile in determining whether the homestead has been abandoned.<sup>12</sup>

Either the husband or wife may claim the exemption as head of the family, but in no case is each entitled to a homestead.<sup>13</sup> The head of a family may include a person who has residing with him, on the premises and under his care and maintenance, his children or children of a deceased spouse, whether by birth or by adoption, and such other relatives as a minor brother or sister, minor children of a deceased brother or sister, a parent, grandparent, a parent or grandparent of a deceased spouse, an unmarried sister or any of the above-mentioned relatives who having obtained the age of majority are unable to care for or support themselves.<sup>14</sup>

While the statutes describe and limit the homestead "exemption,"<sup>15</sup> they also convey the legal concept that a homestead is an "estate."<sup>16</sup> In case of intestacy, property subject to homestead provisions vests in the surviving spouse for life or until remarriage, or, in the absence of a surviving spouse, in the minor children.<sup>17</sup> In addition, the survivors inherit the interest to which they would be entitled by succession. The homestead character of property ceases to exist when the surviving spouse dies or remarries or the minor children obtain their majority.<sup>18</sup> The homestead is subject to execution or forced sale in the satisfaction of judgments in certain instances.<sup>19</sup> However, a prior judgment lien does not become divested by subsequently acquired rights, which may otherwise constitute a homestead.<sup>20</sup> While judgment liens have been held not

9. *Dieter v. Fraine*, 20 N.D. 484, 489, 128 N.W. 684, 686 (1910).

10. *Ness v. Jones*, 10 N.D. 587, 591, 88 N.W. 706, 708 (1901).

11. *Mandan Mercantile Co. v. Sexton*, 29 N.D. 602, 151 N.W. 780 (1915).

12. *Larson v. Cole*, 76 N.D. 32, 33 N.W.2d 325 (1948).

13. N.D. CENT. CODE § 47-18-02 (1960); see also *Ness v. Jones*, 10 N.D. 587, 88 N.W. 706 (1901).

14. N.D. CENT. CODE § 47-18-02 (1960).

15. *Supra* note 5.

16. N.D. CENT. CODE § 30-16-02 (1960).

17. N.D. CENT. CODE §§ 30-16-04 (1960) and 56-01-04 (Supp. 1963).

18. *Ruble v. Grafton Nat. Bank*, 64 N.D. 129, 250 N.W. 785 (1933).

19. N.D. CENT. CODE § 47-18-04 (1960).

20. *First State Bank v. Fischer*, 67 N.D. 400, 272 N.W. 752 (1937).

to affect property occupied as a homestead when the judgment is entered, they may attach when the homestead is abandoned.<sup>21</sup>

Numerous decisions have been handed down with reference to the statute governing conveyance of a homestead,<sup>22</sup> particularly since the discovery of oil in North Dakota, where mineral deeds or other transfers of real property, including the homestead, were made. The court has distinguished between the taking of acknowledgements as to the homestead property of married persons compared with other real estate interests in making a transfer effective.<sup>23</sup>

Because of the value limitation on certain homestead property<sup>24</sup> it becomes important to creditors to have the property appraised. This is provided for in the code.<sup>25</sup> The judgment creditor may apply to the district court in the county in which the homestead is situated for appointment of persons to appraise the value of the homestead. If the homestead is in an estate, then proceedings to have the property set aside are properly brought under Sections 30-16-05 and 30-16-07.<sup>26</sup> Application for appraisers must be made upon a verified petition, setting out the fact that an execution has been levied upon the alleged homestead, the name of the creditor and the determination that the value of the homestead exceeds the amount of the exemption.<sup>27</sup> The petition must be filed with the clerk and a copy, with notice of time and place, must be served upon the plaintiff at least 10 days before the hearing. At the hearing the court, on proof of service of the notice and petition and upon proof of the facts stated in the petition, may appoint three disinterested residents of the county to appraise the value of the homestead.

The appraisers must take an oath, examine the premises and appraise the value of the homestead property.<sup>28</sup> Should the appraised value exceed the amount of the homestead exemption, the appraisers must then determine whether the real property claimed can be divided without material injury. The report must be returned to the judge of the district court making the appointment within 15 days after the appointments and must show in writing the appraised value and determination of whether the property can be divided.<sup>29</sup> Should the report make it appear that division may be made without material injury, the court should direct the appraisers to set off

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21. *Small v. Cunningham*, 120 N.W.2d 13, (N.D. 1963).

22. N.D. CENT. CODE § 47-18-05 (1960).

23. See *Watson v. Kresse*, 130 N.W.2d 602 (N.D. 1964), where the court says that usually transfer of estate in realty is not required to be acknowledged or witnessed to be valid, but the homestead of a married person cannot be conveyed or encumbered unless the instrument transferring interest therein is executed and acknowledged by husband and wife.

24. N.D. CENT. CODE § 47-18-01 (1960).

25. N.D. CENT. CODE §§ 47-18-06 through 47-18-15 (1960).

26. *Farmers State Bank v. Bartley*, 53 N.D. 376, 206 N.W. 414 (1925).

27. N.D. CENT. CODE § 47-18-07 (1960).

28. N.D. CENT. CODE § 47-18-10 (1960).

29. N.D. CENT. CODE § 47-18-11 (1960).

to the plaintiff so much of the real property, including the residence, as will amount in value to the homestead exemption. The execution may then be enforced against the remainder of the real property.<sup>30</sup>

Should it appear from the appraisers' report that the real property claimed as a homestead exceeds in value the amount of the exemption and that it cannot be divided without material injury, the court must then make an order directing its sale under the execution. No bid may be received unless it exceeds the amount of the homestead exemption.<sup>31</sup> Proceeds from the sale must be paid to the claimant and the balance applied to satisfaction of the execution. If the execution is against a husband whose wife is living, the court may direct the \$25,000 to be deposited in court, to be paid out only on joint receipt of the husband and wife.<sup>32</sup> The wife may intervene in the sale proceedings, or the court may have her brought in, for the purpose of determining her rights.<sup>33</sup>

Proceeds from the sale of homestead property—whether conveyed voluntarily or in satisfaction of a lien—are entitled to the same protection against legal process as the law gives to the homestead itself, beyond the amount necessary to satisfy the lien and not exceeding the amount of a homestead exemption.<sup>34</sup>

Any person who is the head of the family may make a declaration of homestead; failure to make such a declaration does not impair the homestead right.<sup>35</sup> The declaration, containing the status of the person making it, whether or not the husband and wife join in the same, the fact of residence on the premises, a description of the property and its estimated value, must be recorded in the office of the Register of Deeds in the county in which the land is situated.<sup>36</sup> Sale and disposition of one homestead does not prevent selection or purchase of another.<sup>37</sup>

The county court of the county in which the homestead is situated may make an order upon application of the owner or his executor, administrator or, upon proof of mental illness, legal representative permitting sale, conveyance or encumbrance of the homestead.<sup>38</sup> However, a sale, conveyance or encumbrance made in violation of the statute is void.<sup>39</sup> In the case of the mentally ill, notice of application to convey the homestead shall be served upon such persons as directed by the county court and time shall be fixed for a hearing.<sup>40</sup> Should an order be made granting permission to sell and convey

30. N.D. CENT. CODE § 47-18-12 (1960).

31. N.D. CENT. CODE § 47-18-13 (1960).

32. N.D. CENT. CODE § 47-18-14 (1960).

33. *Federal Land Bank v. Rutten*, 102 F.2d 359 (8th Cir. 1939).

34. N.D. CENT. CODE § 47-18-16 (1960).

35. N.D. CENT. CODE § 47-18-17 (1960).

36. *Larson v. Cole*, 76 N.D. 32, 33 N.W.2d 325 (1948).

37. N.D. CENT. CODE § 47-18-21 (1960).

38. N.D. CENT. CODE § 47-18-22 (1960).

39. See *Grotberg v. First National Bank*, 54 N.D. 548, 210 N.W. 21 (1926).

40. N.D. CENT. CODE § 47-18-24 (1960).

the homestead, the property may then be sold, but a part of the proceeds, not to exceed one-third, shall be set aside and invested under direction of the court for the use and benefit of the mentally ill spouse.<sup>41</sup> If the husband or wife dies while mentally ill the sum so set aside reverts to the survivor or, if he or she is dead, descends in accordance with the laws of succession.<sup>42</sup> Subject to the homestead estate and payment of decedent's debts, the homestead, like other real property of the testator, may be devised to persons other than those mentioned in the statute governing descent and distribution of real property subject to homestead estate.<sup>43</sup>

Under these conditions it would appear that the homestead property passes both by the law of inheritance and through the homestead preservation. A surviving spouse would be protected to the extent of the homestead right and would also inherit her interest in the same property, which again would be subject to the right of the homestead for life or until remarriage.<sup>44</sup>

A trailer home located on real property owned by the head of the family would have the same status as any other property defined in Section 47-18-01, and the owner would have the same exemption. The question posed a more difficult problem when the mobile home was located on someone else's property. Until July 1, 1961, the head of the family owning a trailer home had no special protection, but that has been changed by legislation.<sup>45</sup> Aside from this particular section, a homestead must include real estate; the mobile home acquires additional status for this purpose.

The North Dakota statutory provisions relating to homesteads have been changed from time to time, and, with the interpretations of the Supreme Court, they now appear to be very complete not only with reference to homesteads but also in regard to the related question of exemptions. Section 47-18-01, however, contains provisions which, in our rapidly developing society, may raise some new and difficult problems.

One question that has been litigated many times in the past is whether the improvements on a homestead, as defined, may be used for purposes other than a residence and still retain the homestead status. Such situations often arise where a dwelling contains a place of business operated by the family. Obviously the valuation question would still control, should the amount exceed the exemption of 25,000 dollars. In a number of cases, the courts have held that even though the property is not used solely as a place of residence, but embraces improvements for other purposes, it still

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41. N.D. CENT. CODE § 47-18-26 (1960).

42. N.D. CENT. CODE § 56-01-04 (Supp. 1963).

43. N.D. CENT. CODE § 30-16-04 (1960).

44. See *Meldinger v. Security State Bank*, 55 N.D. 301, 312 N.W. 850 (1927).

45. N.D. CENT. CODE § 28-22-02 (Supp. 1963).

retains a homestead status.<sup>46</sup> The philosophy behind this rule is that it places the business man, with his shop, who happens to live within a town plat upon a basis similar to that preserved for farmers, who are given a much broader exemption—a quarter section of land and all of the improvements thereon, irrespective of value. It can be seen that carrying on a business from a rural homestead would involve no serious problem if the family lived there, as the question of valuation would not be present. Establishments or places of labor or occupation are adjuncts of a man's homestead and should be within the meaning of the statutes providing for it. The object of the homestead exemption is to secure to a debtor not only a house to live in but the means of making a livelihood.<sup>47</sup> Whether the provisions are politic or impolitic appears to be a question with which the courts are not concerned, but one for the legislatures. In the mind of the philosophic economist, taking a broad view of the interests and objects of human society, such exemption has many reasons in its favor, and the creditors cannot complain of injustice for the reason that they had knowledge of such conditions when they extended credit. It is purely a question of policy: that is, whether the advantages obtained by the exemptions are equivalent to the disadvantage arising from the unwillingness of capital to remain in a community where such an exemption exists.

Another area of manifest potential for litigation involves the issue of discrimination between urban and rural homesteads. Much room is left for controversy under the North Dakota statute. It will be observed that if the homestead is within a town plat—and this does not mean only an incorporated city—the exemption may include but two acres, with improvements, not to exceed 25,000 dollars, above the liens or encumbrances, or both. If the homestead happens to lie outside of a town plat the acreage can amount to a quarter section of land and all of the improvements thereon, irrespective of value. The latter exemption seemingly would apply not only to farms but also to non-farm residences located outside a town plat. With the growing trend toward establishment of non-farm residences outside the limits of towns and cities to avoid the confinement, high taxes and other restrictions imposed by municipalities, a question arises as to the constitutionality of the exemption as applied in some instances. For example, if two neighboring families each own \$50,000 homes but one is just inside the city limits and the other is just outside, the former is subject to a

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46. *E.g.*, *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223 (1888); *Kelly v. Baker*, 10 Minn. 154 (1865); *Askley v. Chamberlain*, 16 Cal. 181 (1860); *Phelps v. Rooney*, 9 Wis. 55 (1859).

47. *Green v. Richardson*, 122 La. 361, 47 So. 682 (1908); *De Ford v. Painter*, 3 Okla. 80, 41 Pac. 96 (1895).

\$25,000 limitation on its homestead exemption while the other's exemption is unlimited.

Sections 11 and 20 of the North Dakota Constitution<sup>48</sup> may have some application in a contest over the validity of the provisions of section 47-18-01 of the Century Code. The North Dakota Supreme Court has held that every presumption is in favor of the propriety and constitutionality of legislation<sup>49</sup> and that classification reasonably necessary to effect the purposes of a law otherwise within the province of the legislature to enact will not render the law unconstitutional. Notwithstanding constitutional inhibitions such as those contained in sections 11 and 20, the legislature may provide a certain classification of citizens to be differently affected by the same general rule.<sup>51</sup> However, classification for legislation must rest on some difference which has a reasonable and just relation to the act in respect to which the classification is proposed.<sup>52</sup> And there is still another test: while proper classification is permitted, arbitrary and unreasonable discrimination is forbidden.<sup>53</sup>

The basis for the rural exemption is historical in that it was assumed that 160 acres represented the amount of land, with improvements on it, that would be required for a family's livelihood. Thus, to a certain extent the unrestricted exemption on rural property is understandable when it applies to farm homesteads which would require a sizeable amount of land to provide a means of support for the farm family. But what is the justification for the statutory discrimination between the town dweller and the non-farm rural dweller? It would appear that the distinction is not only arbitrary but also that the purpose of the legislation was never to provide the one with an advantage over the other.

It is fair to say that this is a question that would justify a contest for an interpretation and which might justify a careful revision of this section of the exemption laws, particularly in light of the developments in urban and rural living.

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48. Section 11 reads: "All laws of a general nature shall have a uniform operation." Section 20 provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

49. *O'Laughlin v. Carlson*, 30 N.D. 213, 219, 152 N.W. 675, 677 (1915).

50. *State v. Miller*, 129 N.W.2d 356, 364 (N.D. 1964).

51. *State ex rel. Dorval v. Hamilton*, 20 N.D. 592, 597, 129 N.W. 916, 918 (1910).

52. *Beleal v. Northern Pac. Ry. Co.*, 15 N.D. 318, 325, 108 N.W. 33, 35 (1906).

53. *Vermont Loan & Trust Co. v. Whithed*, 2 N.D. 82, 94, 49 N.W. 318, 320 (1891), where the court goes on to say: "From the foregoing proposition it follows of necessity that the legislature has power to classify persons and subjects for the purpose of legislation and to enact laws applying specially to such classes, and, while the laws thus enacted operate uniformly upon all members of the class, they are not vulnerable to the constitutional inhibition under consideration. But this power of the legislature is circumscribed. It is not an arbitrary power, waiting the will or the whim of the legislature. Its exercise must always be within the limits of reason, and of a necessity more or less pronounced. Classification must be based upon such differences in situation, constitution or purposes, between the persons or things included in the class and those excluded therefrom, as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation in the line of the statute in which the classification appears."