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Homesteads - Acquisition and Establishment - Constitutionality of Declaration Statute

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against double jeopardy," applies the "same evidence" test.¹⁸ In a North Dakota statutory enactment, pertinent to the topic of this article, can be found a provision which is cognate to and apparently designed after the "necessarily included offense" doctrine.¹⁹

It is submitted that there can be no doubt as to the pre-emptiveness and high favor put on the prohibition of double jeopardy, but the courts in construing and applying this protection have not been uniform and have used subtle distinctions between jeopardy and offense in creating the perplexing inconsistencies. The court in the instant case adhered to the "same transaction" test. This test appears to be the most reasonable and fairest as it tends to insure that the punishment will be commensurate to the violation of the defendant.

MIKLOS L. LONKAI

HOMESTEADS — ACQUISITION AND ESTABLISHMENT — CONSTITUTIONALITY OF DECLARATION STATUTE. — Plaintiff, a lumberman, furnished a contractor with lumber to be used for the construction of a home on land owned by the contractor but to be sold to the defendant by an executory contract entered into before plaintiff furnished the lumber. Defendant from and after the making of this contract intended to occupy the premises as a homestead. After title passed to the defendant, the plaintiff brought an action to enforce a material man's lien on the property. The Supreme Court held, one justice dissenting, that the property was impressed with homestead character from the time of the contract between the defendant and the contractor, and that a statute which provides "if the property is not marked off, platted, and recorded as hereinbefore provided, it shall not have the character or the exemption rights of a homestead unless it is actually occupied as

17. N.D. Const. art. I, § 13, "No person shall be twice put in jeopardy for the same offense . . ."

18. *State v. Panchuk*, 35 N.D. 669, 207 N.W. 991 (1926). "The constitutional and statutory guaranty is against second jeopardy for the same offense. In order that one prosecution may be said for the same offense as another, within the language of the text as formulated by the weight of authority, it must appear that the offenses described in the information or indictments are the same **in law and in fact**".

19. N.D. Cent. Code § 29-22-35 (1961). "If the defendant has been convicted or acquitted upon an information or indictment for an offense consisting of different degrees, the conviction or acquittal is a bar to another information or indictment for the offense charged or for any lower degree of that offense or for an offense necessarily included therein."

such by the owner," is unconstitutional.¹ *Brodsky v. Maloney*, 105 N. W. 2d 911 (S. D. 1960).

The principle underlying the homestead exemption is the protection of the family from certain classes of creditors, and not the exemption of a certain amount of real estate.² In a number of states a condition precedent to the establishment of a homestead is the recording of a declaration of homestead,³ or the presentation of a schedule of property to a designated county official.⁴ Statutory provisions of six states provide that when the homesteader's land is levied upon, he may petition the levying officer at any time prior to the sale of the homestead and cause a declaration of homestead to be filed.⁵ Of the remaining states, with the exception of those states having no homestead exemption laws, a failure to record a written declaration of homestead will not destroy the homestead exemption so long as actual⁶ or constructive⁷ occupancy is present.

In North Dakota the head of the family may make a declaration of homestead⁸ which must be recorded to be effectual.⁹ But failure to make a declaration does not impair the homestead right.¹⁰ Though the right of homestead is not defeated thereby, no presumption exists as to the existence or location of the homestead if the property be greater in value or area than that fixed by law.¹¹ Conversely, if one asserting the right occupies a homeplace which is within the limits prescribed by law, a presumption obtains that the homestead has been selec-

1. S.D. Code § 51.1713 (1959).

2. *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429 (1889).

3. Ala. Code tit. 7 § 633 (1958); Ariz. Code Ann. § 33-1102 (A) (1956); Cal. Civ. Proc. Code § 1262 (1954); Colo. Rev. Stat. § 77-3-2 (1963); Idaho Code Ann. § 55-1203 (1947); Me. Rev. Stat. ch. 112 § 69 (1954); Mont. Code Ann. § 33-126 (1947); Nev. Code Ann. § 115.020 (1957); Va. Code Ann. § 34-6 (1950); W. Va. Code Ann. § 3912 (1955); Wash. Rev. State. § 6.12.070 (Cum. Supp. 1959).

4. Ga. Code Ann. § 51-201 (1935); Ind. State Ann. § 2-35-11 (1948).

5. Kan. Gen. Stat. § 60-3502 (1949); N. C. Gen. Stat. § 1-371 (1953); Ohio Rev. Code § 2329.77 (1955); S.C. Code § 34-2 (1952); Vt. Stat. Ann. tit. 27, § 102 (198); Wis. Stat. Ann. § 272.21 (1958).

6. Delaware, Maryland, Pennsylvania, Rhode Island, and the District of Columbia have no homestead exemption laws.

7. *Kersee v. Bushart*, 203 Ark. 668, 158 S.W.2d 915 (1942) (homestead based on actual occupancy); *Anderson Mill and Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588 (1931); *Mounger v. Gandy*, 110 Miss. 133, 69 So. 817 (1915).

8. *Jefferson v. Henderson*, 140 Okla. 86, 232 Pac. 677 (1929) (Actual occupancy or intent to occupy with some overt act evidencing such intent is necessary); see *Silvers v. Welch* 127 Tex. 58, 91 S.W.2d 686 (1936).

9. N.D. Cent. Code § 47-18-17 (1961).

10. N.D. Cent. Code § 47-18-20 (1961).

11. *Conlon v. City of Dickinson*, 72 N.D. 190, 5 N.W.2d 411 (1942), see *Foogman v. Patterson* 9 N.D. 254, 261, 83 N.W.2d 15, 17 (1900).

12. *Foogman v. Patterson*, 9 N.D. 261, 83 N.W. 15 (1900).

ted.¹³ However, premises cannot be impressed with homestead character by occupation alone; intention to occupy as a homestead must exist.¹⁴

Homestead rights are, and should be favored in law. However, the result reached in this case points up the need for some form of positive action from those claiming a homestead exemption. It is submitted that there should be a balancing of interests between the privilege to claim a homestead exemption, and the rights of those claiming under mechanic's lien laws. In the absence of such a distinction, anyone with an unrecorded instrument may claim the premises as a homestead based on his undisclosed intent, thus depriving the builder of any lien or claim on the property.

DONALD J. OLSON

LABOR LAW — PUBLIC EMPLOYEES — RIGHT TO STRIKE AND BARGAIN COLLECTIVELY — The city of Los Angeles seeks a declaratory judgment to determine whether the employees of the city's bus system may strike. The employees of the two transit companies acquired from private business by the plaintiff had the right to strike prior to acquisition. The Supreme Court of California *held*, two justices dissenting, the words "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" in the Act¹ creating the Transit Authority implied defendants right to strike. *Metropolitan Transit Authority v. Brotherhood Railroad Trainmen*, 8 Cal. Rptr. 1, 355 P.2d 905 (1960).

Commenting on the Boston police strike, Calvin Coolidge stated "there is no right to strike against public safety by anyone anywhere at any time".² Activities of school teach-

13. *Birks v. Globe International Protective Bureau*, 56 N.D. 613, 620, 218 N.W. 864, 867 (1928) wherein the court said by way of dicta that the ownership, occupation, and use may be, and frequently is, unmistakable evidence of selection, and this is especially true when the property is within the legal limits.

14. *Brokken v. Baumann*, 10 N.D. 453, 88 N.W. 84 (1901).

1. Los Angeles Metropolitan Transit Authority Act § 3.6 (c) (1957), as amended, (1959) "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. 1 Lab. L. J. 612 (May, 1950).