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HOMESTEAD LAW

IN

WISCONSIN.

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Homestead Law in Wisconsin.

The first constitution which was presented to the people of this state, then a territory, contained a provision securing to the debtor from forced sale, a homestead. This provision was thoroughly discussed before the people, and while it fell with the rejected constitution, yet the next convention, called immediately thereafter, not only recognized the principle of exemption, but made it mandatory upon the legislature to provide "wholesome laws exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability thereafter contracted."

Sec. 17, art. I., Const.

Hoyt vs. Howe, 3 Wis., 761.

In pursuance of this constitutional mandate, the first session of the legislature enacted, in July, 1848, a homestead exemption law.

See page 40, laws of 1848. This law as then passed is found, unchanged, in the revised statutes of 1849 as secs. 51 and 52, ch. 102.

These sections are found unchanged in the revised statutes of 1858. See secs. 23 and 24, ch. 134, R. S. 1858.

These sections, somewhat modified, are now found as section 2983, R. S. 1878, and said section is to-day the same as the revision of 1878 left it.

These sections, 23 and 24, ch. 134, R. S. 1858, and section 2983, R. S. 1878, comprehend nearly all the law on the subject. The history of the legislation and of judicial decisions on the subject is seen by comparing sec. 2983, R. S. 1878, with the law as found in the revised statutes of 1858.

Read carefully secs. 23 and 24, ch. 134, R. S. 1858, and sec. 2983, R. S. 1878, and copy same into notes.

It should be here stated however that by section 1, ch. 269 laws 1901, section 2983 was amended so as to limit the exemption "to the amount in value of five thousand dollars."

The word "homestead" signifies the prescribed quantity of land, or lands, on which is situated the dwelling house used as a home. The chief characteristic and attribute of the homestead, therefore, as the word itself implies, is the land where is situated the dwelling and family of the owner.

Bunker vs. Locke, 15 Wis., 635, 636.
Phelps vs. Rooney, 9 Wis., 83.
Prior vs. Stone, 70 Am. Dec., 348n.

The statute exempts the homestead from execution, or other final process, from the court, for any debt, or liability, except laborers' and mechanics' liens, or lawfully executed mortgages, and (as added by the revisers), "purchase-money liens;" but it is declared that no mortgage or alienation of a homestead, by a married man, shall be valid without the signature of the wife. See sec. 2203, R. S. 1878.

Secs. 25, 26 and 27, ch. 134, R. S. 1858, relate to the selecting of a homestead by the owner. These sections, somewhat modified to meet the decisions of the court, are now found as sec. 2984, R. S. Read and compare carefully these sections.

Sec. 28, ch. 134, R. S. 1858, provided for the exemption of the dwelling-house claimed as a homestead on land not owned by the man claiming the exemption, but which he was in rightful possession of by lease or otherwise.

In *Plato vs. Cady,* 12 W is., 461 (1860), it was held that the assignment by a married man, of the house thus owned, was not against the prohibition contained in sec. 24, ch. 134, R. S. 1858, on alienation of the homestead, without signature of the wife; thus holding that the law, as it then stood, only prohibited the *owner* of land, constituting a homestead, from alienating the same without signature of wife.

After this decision, and by ch. 172, laws of 1867, the legislature amended said section 28, so as to bring the particular class of homsteads described in that section, within the general prohibition against alienation by the husband, without the signature of the wife. This has remained the law of this state ever since. So that any mortgage, or other alienation, by a married man of

that which the law exempts as his homestead, without the signature of his wife, is absolutely void.

See latter part of sec. 2203, R. S. 1878.

If he is in possession under a lease, which provides that the property shall be used exclusively as a hotel, the fact that he lives in the house will not make it a homestead, and husband may assign such lease without signature of wife.

Greene vs. Pierce, 60 Wis., 375.

In *Hoyt vs. Howe,* 3 Wis., 752 (1854), our court held that under sec. 51, ch. 103, R. S. 1849, same as sec. 23, ch. 134, R. S. 1858, the exemption of the debtor's homestead continued only so long as he owned and occupied it as a homestead; that the lien of a judgment against him in a court of record attached to the homestead as much as to other lands, and when he sold the homestead to another, it became liable for the past judgments against him. This was in effect to make a man's homestead his prison.

To remedy this, the legislature, in 1858, passed an act declaring that the owner of a homestead, under the laws of this state, may remove therefrom or sell and convey the same, and such removal or sale and conveyance should not render such homestead liable to forced sale on execution or other process *hereinafter* issued on a judgment or decree of any court of Wisconsin, or district court of the United States, nor should any judgment or decree of such court be a lien for any purpose whatever.

See ch. 137, laws of 1858.

Held, that this law applied only to judgments rendered *after* its passage.

Seamans vs. Carter, 15 Wis., 548 (1862).

The law of 1858 provided that the owner of a homestead "may remove therefrom," and that "such removal" "shall not render such homestead subject or liable to forced sale on execution," etc.

Held, that this statute meant temporary removal, with *animo revertendi,* and not a permanent removal, with *animo manendi.*

Jarvis vs. Moe, 38 Wis., 440.

See, also:

Zimmer vs. Pauley, 51 Wis., 282.

Moore vs. Smead, 89 Wis., 558, 568.

Blackburn vs. Lake Shore Traffic Co., 90 Wis., 362.

But actual physical occupancy, not necessary.

Scofield vs. Hopkins, 61 Wis., 373.

This is the construction our court put upon the homestead statute as it stood before the act of 1858, a construction, however, not made until after the passage of that act.

In re Phalen, 16 Wis., 76.

Herrick vs. Graves, 16 Wis., 157.

Jarvis vs. Moe, 38 Wis., 440.

The rule as announced in *Jarvis vs. Moe,* 38 Wis., 440, is now found in sec. 2983, R. S. 1878, as follows: "And such exemption shall not be impaired by temporary removal with the intention to re-occupy the same as a homestead."

Phelps vs. Root, 68 Wis., 129.

McDermott vs. Kernon, 72 Wis., 268.

Moneys due to the grantor of the homestead, as a part of the purchase-price, were held not to be liable to garnishment, when debtor intended in good faith to use the money to purchase another homestead.

Watkins vs. Blatschinski, 40 Wis., 347 (1876).

The rule of the above decision was incorporated into sec. 2983, R. S. 1878, which provides that the homestead exemption "shall extend to the proceeds derived from such sale when held with the intention to procure another homestead therewith, for a period not exceeding two years."

Right to the exemption is not waived by debtor using part of the proceeds to pay debts and support family.

Binzel vs. Grogan, 67 Wis., 147.

Held, that the statute does not require as a condition of such exemption, that the debtor shall continue to reside in this state during the two years, nor that he shall intend to procure another homestead in this state. CASSODAY, J., dissenting.

Hewitt vs. Allen, 54 Wis., 583.

Moneys arising from the insurance of the homestead property are exempt from attachment or sale on execution, or any final process of the court. See sec. 31, ch. 134, R. S. 1858; same as subdiv. 17, sec. 2982, R. S. 1878.

So also is the surplus on foreclosure sale of the homestead.

Clancey vs. Alme, 98 Wis., 229, 73 N. W. 1014.

OTHER QUESTIONS THAT HAVE ARISEN UNDER THE STATUTE AND BEEN DECIDED BY OUR SUPREME COURT.

1. The law contemplates that the homestead should form one body; it cannot be made up of disconnected tracts. It may be divided into separate lots by streams of water, highways, railways, etc., but must form one body as compact as possible, subject to such easements.

Bunker vs. Locke, 15 Wis., 635 (1862).
Binzel vs. Grogan, 67 Wis., 149.
Hornby vs. Sikes, 56 Wis., 383.

2. The question whether a building is a homestead does not depend upon its situation, external appearance or internal arrangement, but upon the fact that it is really and truly occupied as a dwelling house by the owner and his family; and the owner does not forfeit the right of devoting a portion of the building to another use than the residence of his family. DIXON, C. J., dissenting.

The homestead provided by the statute is restricted only by the amount of the land mentioned therein, and not by the value or use thereof, provided it is used for a dwelling-house.

Phelps vs. Rooney, 9 Wis., 70.

Within the principle of this decision, a building occupied as a homestead, and used by the owner as a hotel, is exempt.

Harriman vs. Queen's Ins. Co., 49 Wis., 72.

So also a house occupied under a five year lease constitutes the homestead of the occupant.

Beranek vs. Beranek, 113 Wis., 272, 89 N. W. 146.

3. The phrase "used for agricultural purposes" as applied to lands outside of villages and cities, has been in the homestead law of Wisconsin ever since it was first enacted in July, 1848. See page 40, laws of 1848. Our court has held that by section 2983, R. S., the legislature intended fully to execute the mandate of sec. 17, art. I., of the constitution; and under that statute the homestead of a debtor, which he owns and occupies, together with the specified quantity of land appurtenant thereto, is exempt from seizure or sale, without regard to the use to which he put such land, or the business he pursues thereon.

Binzel vs. Grogan, 67 Wis., 147 (1886).

4. If there are situated on the exempted lot various buildings, besides the dwelling-house, which are rented for stores, offices, etc., and occupied as such, these other buildings are not included in the homsetead exemption.

Casselman vs. Packard, 16 Wis., 115.

5. If the premises are unoccupied as a homestead at the time the judgment is docketed, the debtor cannot defeat or prevent its enforcement by afterwards moving in and occupying them as a homestead.

So that if a judgment debtor, owning two lots of land, one of which is his homestead, sells his homestead and thereafter occupies the other lot as such, the lien of the judgment on such other lot is thereby not removed.

Bridge vs. Ward, 35 Wis., 687.

Where the owner of a homestead abandons it, as such, still retaining the legal title, judgments docketed against him become liens upon the land at once, without any proceedings in equity to enforce them.

Moore vs. Smead, 89 Wis., 558.

6. The language of the homestead statute, until the revision of 1878, was that the homestead should be exempted from sale "for any debt or liability contracted after the first day of January, in the year one thousand eight hundred and forty nine." Our court decided that the law exempts a homestead from a judgment rendered in an action of tort, as well as a judgment in any other civil action.

Smith vs. Omans, 17 Wis., 406.

The wording of the present statute, sec. 2983, R. S., is, that such homestead shall be exempt "from the lien of every judgment, and from liability in any form for the debts of such owner."

7. The exemption extends to and protects the homestead, though it be held only under an equitable title, such as a land contract, and the owner, if a married man, cannot make an alienation of such homestead without the signature of his wife.

McKay vs. Mazzuchelli, 13 Wis., 478.

8. If the husband makes a deed or mortgage, without the signature of the wife, which embraces the homestead and other lands,

the instrument will be good as against the land not included in the homestead.

Haight vs. Houle, 19 Wis., 472.

9. Our court held, in the above case, that a deed or mortgage of the homestead, signed and sealed by the wife, but not acknowledged by her according to law, is wholly ineffectual and void, not only as to her, but also as to the husband, who signed with her, though his acknowledgment was in proper form.

Haight vs. Houle, 19 Wis., 472, 475.

The above case, on this last point, was overruled in *Godfrey vs. Thornton*, 46 Wis., 677 (opinion by RYAN C. J.). It was held that the wife, living the husband, has no estate in the homestead, and that a mortgage duly executed by the husband, of the homestead owned by him, and duly signed by the wife, but not acknowledged, was a valid mortgage of his interest therein, though ineffectual to release the wife's right of dower. That is, the statute, sec. 2203, requires merely the wife's *signature* to the husband's conveyance of the homestead to enable him to convey same, and not a *conveyance* by her, as is required to bar her dower.

This case also holds that the husband may change his homestead or place of residence against the wish or consent of the wife, and thereby is enabled to make legal transfer of the same, without the signature of his wife—subject, of course, to her inchoate dower right.

Our court has held that a conveyance by the husband of a reversion in the homestead land, but reserving to himself the sole use and control thereof during the lifetime of himself and wife, or either of them, is valid without the signature of the wife. State the reason for this decision.

Ferguson vs. Mason, 60 Wis., 377, 386.

See, also, *Will of Root*, 81 Wis., 263, 267.

But where there is coupled with such a reservation as is found in Ferguson v. Mason, a further provision (whether in the deed itself or another instrument made at the same time and as a part of the same transaction) to the effect that the grantee shall have a home in the dwelling and use the land in company with the grantor, though the use is under the grantor's direction

and control, such deed is absolutely void, as being an encroachment upon the wife's homestead right.

Towne vs. Gensch, 101 Wis., 445; 76 N. W. 1096.

Where husband gives a mortgage, signed by wife, intended to cover homestead, but by mistake does not, such mortgage cannot be reformed in an action for that purpose, after the death of the husband, so as to make it cover the homestead, even with the consent of the wife. Such consent is not equivalent to her signing the mortgage of the homestead as required by sec. 2203, R. S.

O'Malley vs. Ruddy, 79 Wis., 147.

Petesch vs. Hanbach, 48 Wis., 443.

Where mortgage on homestead, signed by husband and wife, is set aside on ground of mental incompetence of husband, the wife is not bound either by way of estoppel, or otherwise, by such mortgage, either as to her dower or homestead rights. Separate and apart from her husband, she cannot convey or bind, by deed or mortgage, her dower or homestead right.

Brothers vs. Bank of Kaukauna, 84 Wis., 381, 396.

The policy of the statute (section 2203) is not to give the wife a mere personal right for her personal benefit which she may waive or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it. It is not a right that can be lost on the principle of equitable estopple. It can only be lost by a joint conveyance of some kind signed by the husband and the wife.

Crumps vs. Kiyo, 104 Wis., 656; 80 N. W. 937.

10. The benefit of the homestead exemption law not restricted to married men.

Myers vs. Ford, 22 Wis., 139.

11. If agricultural land, occupied as a homestead, is by the act of the legislature annexed to or included within the limits of a city or incorporated village, even against the wishes of the owner who still continues to use it for agricultural purposes only, the law exempts such lands used for agricultural purposes no longer. The exemption is abridged so as to include one quarter of an acre with the dwelling house thereon and its appurtenances.

Bull vs. Conroe, 13 Wis., 233.

Q. Is the homestead right in Wisconsin a vested right, and if so, to what extent?

12. Our court decided in *West vs. Ward,* 26 Wis., 579 (1870), that to constitute a homestead, within the meaning of the statute, the land must be owned by the plaintiffs in severalty, so that it could be set out by metes and bounds from that which was not exempt.

This defect was remedied by sec. 2983, R. S., which provides: "Such exemption shall extend to land, not exceeding, altogether, the amount aforsaid (forty acres of agricultural lands or one-quarter of acre within city or village), owned by husband and wife jointly, or in common, and to the interest therein of a tenant in common, or to two or more tenants in common, having a homestead thereon, with the consent express or implied, of the co-tenants."

13. By the law of this state, it is decided that the owner of a lot adjoining a street owns to the center of the street, subject to the public easements. Our court has held, however, that land included in a public street or alley is not to be reckoned in the measurement for the homestead exemption. The homestead statute exempts land "owned" *and "occupied."* While the owner of land owns to the center of the street, he has no right to *occupy the street.*

Weisbrod vs. Daenicke, 36 Wis. 73 (1874).

14. The owner of a homestead is not limited to forty acres according to government survey, on which the house is situated, but may make such selection, in as compact a form as practicable, as he may choose, so that such selection will include all of the buildings.

Kent vs. Agard, 22 Wis., 150.

This case also held that where a mortgage, upon a tract larger than the forty acres, proves to be a valid lien upon the homestead only, and the right of selection of forty acres, which shall constitute the homestead, has not been exercised by the mortgagor up to the time of the sale of the mortgaged premises, the right of selection passes to the purchaser at the sale, as incident to the homestead right. But the purchaser could not maintain ejectment for the homestead, without first having selected the forty acres, and having given notice to those in possession of his intention to bring ejectment.

The above case as to the last proposition, was overruled by *Kent vs. Lasley,* 48 Wis., 257, where the court holds that the owner of a legal subdivision of land precisely equal to the statutory measure of a homestead right, whose dwelling house is situate upon such subdivision, who has made no different selection, will be held to have selected that subdivision for his homestead, although he also owns adjoining lands from which he might have selected his homestead in part.

It is now the law of this state that where a debtor fails to select, at the time of execution sale, his homestead, he is confined thereafter to the legal subdivision on which the dwelling house stands.

Martin vs. C. Aultman & Co., 80 Wis., 150.

The right of selection how modified, if at all, by chapter 269, laws of 1901, limiting value of exemption to $5,000.

As to assignment of homestead in case of death of owner leaving widow and children, see section 3873 R. S.

15. Lumber and other building material purchased by a debtor for the purpose of repairs of the dwelling-house and paid for by him, and deposited upon the premises, with intention to use the same in repairing the dwelling, are exempt.

Krueger vs. Pierce, 37 Wis., 269, 271.

16. The statute extends its protection to one who buys land with the intention of building on it, and to the lumber and material actually upon the ground, designed for use in the construction of the house. Such land is "owned and occupied" with in the meaning of the statute, as interpreted by our court.

Schofield vs. Hopkins, 61 Wis., 370.

Shaw vs. Kirby, 93 Wis., 379.

See, also, *Zimmer vs. Pauley,* 51 Wis., 282.

Hoppe vs. Goldberg, 82 Wis., 660.

17. Prior to ch. 133, laws of 1870, where a mortgage covered the homestead and also *other property* which was subject to the lien of a subsequent judgment, the mortgagor had no right to have the latter exhausted to satisfy the mortgage, in order to preserve his homestead.

White vs. Polleys, 20 Wis., 530.

The court applied the rule that where on has a lien upon two estates, and another a subsequent lien upon only one of them,

the former will be compelled first to exhaust the subject of his exclusive lien before he resorts to the doubly-charged estate.

The law of 1870 changed this rule by requiring that, where any portion of the mortgaged premises consists of a homestead which can be sold separately without injury to the owner, in that case the homestead shall not be offered for sale, until all other lands conveyed by the mortgage shall have been offered and sold.

Hansen vs. Edgar, 34 Wis., 653.
Smith vs. Wait, 39 Wis., 512.
Rozek vs. Redzinski, 87 Wis., 525, 530.

The law of 1870 is now found in sec. 3163, R. S.

18. Sec. 2, ch. 137, laws of 1858, provides that, upon the death of the owner of a homestead, the same should descend to his widow, to be held by her during widowhood, free from the encumbrances of all judgments and claims against deceased except mortgages lawfully executed thereon. This law found on page 798, R. S., 1858.

19. The above remained a law of this state until ch. 270, laws of 1864. The revisers of 1878 embodied this act in sec. 2271, R. S., making certain verbal amendments. This section provides, in substance, as follows:

"Such homestead, upon the owner's death, he not having lawfully devised the same, shall descend, free from all judgments and claims against such deceased owner, except mortgages lawfully executed, laborers' and mechanics' liens, as follows;

"1. If he shall have no lawful issue, to his widow.

"2. If he leaves widow and issue, to the widow during widowhood, and upon her marriage or death, to his heirs as other real property.

"3. If he leaves issue and no widow, to such issue as other real property.

"4. If he leaves no issue or widow, such homestead shall descend as other real property, subject to lawful liens thereon." (These would be what?)

The law remained as above, until sec. 2271 was amended by ch. 301, laws of 1883, by adding at the end thereof, in substance as follows:

"1. In case deceased owner left no widow, or minor child, surviving, such homestead shall be subject to (1) expenses of last sickness, (2) funeral expenses, and (3) expenses of administration.

"2. In case he leaves surviving no widow, child or grandchild, homestead descends subject to all debts and liabilities of the deceased owner."

Under the provisions of this section, the homestead descends discharged of any lien thereon for purchase money. That is, this statute abrogates the common law right to acquire a vendor's lien on the homestead, and such statute is valid.

Berger vs. Berger, 104 Wis., 282; 80 N. W. 585.

20. The widow to whom dower and other real estate has been assigned is entitled upon marrying again to dower in the homestead.

Bresee vs. Stiles, 22 Wis., 120.

21. Wife has no estate in the homestead, living the husband.

Godfrey vs. Thornton, 46 Wis., 677.

Mash vs. Bloom, 126 Wis., 385.

22. For the provision, when the homestead is part only of a tract of land, the whole of which was subject to a mortgage at the time of the death of the owner, and the part of land not included in the homestead and included in the mortgage, cannot be sold separately. See sec. 3884, R. S.

23. The owner of a homestead may dispose of it by last will, and the devisee will take it free from all encumbrances except laborers' and mechanics' liens, and mortages lawfully executed thereon. See sec. 2280, R. S., and:

Turner vs. Scheiber, 89 Wis., 1.

Will of Root, 81 Wis., 267.

The law stood as stated above, until amended by ch. 118, laws of 1891, which makes a homestead, in case it is devised, and there is no widow or minor child, and there is not sufficient other property, subject to the payment of (1) expenses of last sickness, (2) funeral expenses, and (3) expenses of administration; and in case there is no widow or child or grandchild, it is made subject to all debts of the testator; thus making the homestead, when devised, subject to the payment of the same debts as in case owner dies intestate.

See *In re Madden's Will,* 104 Wis., 61; 80 N. W. 100.

24. Devising part of homestead of forty acres, does not divest the remainder of the character of a homestead, or make it liable for the debts of the testator.

Johnson vs. Harrison, 41 Wis., 381.

25. It is the policy of the law of this state to exempt the homestead and its proceeds from liability for the mere personal debts of its owner, not only during his lifetime, but after his decease.

Johnson vs. Harrison, 41 Wis., 381 (1877).

26. A judgment of divorce in favor of the wife, declaring that she recover a certain sum of money merely, is a mere money judgment, and execution thereon cannot issue against the homestead of the husband.

Stanley vs. Sullivan, 71 Wis., 585.

27. The revisers made the homestead expressly liable for "purchase money liens," but say that this probably declared the law merely, as it was before the revision.

As to the persons who come within the protection of this portion of the statute, see *Cary vs. Boyle,* 53 Wis., 574.

28. A deed made to defraud creditors is valid as to the homestead.

Dreutzer vs. Bell, 11 Wis., 114.
Hibbon vs. Soyer, 33 Wis., 319.
Shaw vs. Bank of Koepper, 78 Wis., 638.
Rozek vs. Redzinski, 87 Wis., 527, 530.

29. The validity of a homestead right does not depend upon the assertion or giving notice thereof to any one at any particular time.

Hoppe vs. Goldberg, 82 Wis., 660, 662.

30. The homestead statute is a beneficent one, and it is the duty of the court to construe it liberally.

Binzel vs. Grogan, 67 Wis., 47.
Scofield vs. Hopkins, 61 Wis., 373, 374.
Watkins vs. Blatschinski, 40 Wis., 352.
Jarvis vs. Moe, 38 Wis., 446.
Pym vs. Pym, 118 Wis., 662; 96 N. W. 429.

31. The use of a homestead for an unlawful purpose, such as keeping a bawdy-house, and selling liquor without license, does not render it subject to seizure or sale on execution.

Prince vs. Hake, 75 Wis., 638.

Distinguishing *Walsh vs. Call,* 32 Wis., 159, where debtor who was selling liquor without license was denied right of exemption to two hundred dollars of stock in trade, on ground that he was carrying on no trade that the law recognized.

32. A remainderman, living with the tenant for life, cannot by virtue of such possession claim the right of homestead.

Cornish vs. Frees, 74 Wis., 490, 496.

Can a homestead be *jointly* held with another? See above case at page 496.

A tenant by curtesy is entitled to the homestead exemption.

In re Kaufman, 142 Fed. 898.

33. The constitutional provision contained in sec. 17, art. I., of the constitution, made it mandatory upon the legislature to pass a homestead exemption law. There was no power to compel the legislature to pass such law, though failure to do so would be a violation of the constitution. Once having passed such a law, however, the legislature thereafter was powerless to wholly repeal such law without the contemporaneous passage of a substitute.

Bull vs. Connors, 13 Wis., 233, 237.

34. The homestead right of a widow is not subject to partition, and the circuit court has no jurisdiction in partition proceedings to order a sale so as to divest her of such right.

Voelz vs. Voelz, 88 Wis, 461.

Under chapter 336, laws of 1899, the owners of any homestead or dower right in the premises, may be made parties to a partition suit, but such interest cannot be sold against their consent, but may in such proceeding be duly assigned to the parties and the reversionary interest sold.