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THE WISCONSIN HOMESTEAD EXEMPTION LAW

WILLIAM L. CROW

A BIT OF HISTORY

HOMESTEAD debt exemption is rooted in a public policy which shelters the family against the storms of financial misfortune. It is better business, in time of stress, to protect the home than the creditors. “Home,” it was wisely quoted in one Wisconsin decision, “is the chief school of human virtue. Its responsibilities, joys, sorrows, smiles, tears, hopes, and solicitudes form the chief interest of human life.”

Exemption in Wisconsin is as old as the state itself. A provision, much discussed before the people of Wisconsin Territory, was incorporated in the first rejected constitution, exempting a homestead of the debtor from forced sale by the creditor. The second constitutional convention, called immediately after the first constitution had been rejected, created a constitution which placed a mandate upon the legislature in these words of the Declaration of Rights: “The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted.” The debtor was given a sphere of absolute legal immunity, for the same constitution in the next preceding section prohibited imprisonment for debt.

1 Warsco v. Oshkosh S. T. Co., 190 Wis. 87, 208 N.W. 913 (1926).
2 See Hoyt v. Howe, 3 Wis. 752 (1854), which incorporates some homestead history.
3 Wis. Const. art. I, § 17.
Pursuant to a mandate of the constitution of Wisconsin which was adopted on March 13, 1848, the legislature passed the first homestead law, crude in form, but well meant, reading as follows: "A homestead (here indicating the territorial extent) shall not be subject to forced sale on execution or any other final process from a court, for any debt or liability contracted after the first day of January, in the year one thousand eight hundred and forty-nine." 

Six years after the passage of the law appeared the first case dealing with its interpretation. The question presented was this: May the lien of a judgment be enforced upon the debtor's alienation of his homestead, or upon his ceasing to occupy it as such by his voluntary act? The court held that it could. But Justice Smith, in an interesting dissenting opinion, thought that such a judgment lien should not be enforced, and stated that the statute should be liberally construed. He felt that if the defect of the statute could not be remedied by judicial interpretation, the matter should be corrected by the legislature. In 1858 legislative action brought the law into conformity with the dissenting opinion. "The owner of a homestead," read the amendment, "may remove therefrom, or sell or convey the same, and such removal or sale and conveyance shall not render such homestead subject or liable to forced sale on execution or other final process..."

The law limiting a homestead to a value of $5000 was not enacted until 1901, although the abuses of an unlimited homestead exemption were pointed out as early as 1859. In this year the case of Phelps v. Rooney came to the Supreme Court of Wisconsin for a decision. Rooney, owning a building valued at about $15,000, leased a lower part of it as a store at $1500 a year, and resided in the upper part. The court held that there was no forfeiture of the benefit of the exemption though the most valuable part of the building was devoted to other than residence purposes. "Few candid persons," explained the court, "would

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4 Wis. Laws 1849, c. 102.
5 Hoyt v. Howe, 3 Wis. 785, 764 (1854). "Can it be," wrote Justice Smith, "* * * that the legislature should so have arranged its details as to make the homestead of the unfortunate debtor his prison; that the beneficent intention of the constitution and the law * * * was only an ingenious device to confine all the energies of the man to the narrow limits of his homestead? * * * That there must be forever the small center around which he must move continually * * *? for, as soon as he should change his quarters, the fangs of a judgment lien, held in reserve, and masked by the law, would fasten upon his home."
6 Wis. Laws 1858, c. 137.
7 Wis. Stat. (1933) § 272.20.
8 Wis. Laws 1901, c. 269. This unsatisfactory condition of excessive exemption was not peculiar to Wisconsin. Hon. H. Teichmueller in 1901 wrote in 35 Am. L. Rev. 413: "Homesteads of inordinate value serve as hiding places of ill gotten gains, and losses may be unloaded upon duped creditors. * * * A money valuation as the basis of homestead exemption is the only effectual remedy I can conceive."
9 9 Wis. 70 (1859).
contend that the law was not defective, and that the grossest abuses do not find sanction under its provisions in many cases every day. Instead of securing to the debtor a reasonable amount of property, and a dwelling house for himself and family, of limited value, we have a statute which exempts a homestead which frequently is worth ten, twenty, or forty thousand dollars.” But the court construed the statute exactly as it read. Justice Dixon, dissenting, referred to the possibility of holding the law unconstitutional. However, in his opinion, it could be supported by restricting the homestead to that part of the building occupied as a dwelling.10

**WHAT IS A WISCONSIN HOMESTEAD**

Now, just what is meant by a homestead? Both statute and judicial decision give answer to the question. The Supreme Court of Wisconsin defines it as “the land where is situated the dwelling of the owner and family.”11 But what is the meaning of “land”? This is a query to which the decisions have given an answer in substantial detail.

*The homestead may be less than a fee.* The statutes of Wisconsin provide that the exemption shall extend “to any estate less than a fee held by any person by lease, contract or otherwise.”12 This includes an equitable interest not amounting to a perfect title in law;13 to an interest represented by a contract to purchase land;14 or to property held under a lease. “It is . . . true,” said the court in *Beranek v. Beranek*, “that, in so far as leased property is susceptible of being conserved in a home, it is governed by the same rules that apply to homesteads based upon property held by more enduring titles.”15

*The homestead may consist of an equity in mortgaged property.* This was decided in *Northwestern Securities Company v. Nelson*.16 And the fact that the owner of a homestead subjects it to a mortgage does not lessen his right against other creditors to assert the homestead exemption to the limit provided by the statute.17

*Only the dwelling house and its appurtenances are exempted.* This is stated in the statute. But what is meant by “appurtenances”? It was decided in *Casselman v. Packard* that no more of a lot in a city or vil-

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10 *Phelps v. Rooney*, 9 Wis. 70 (1859). The court here pointed to the specific wording of the constitution which made it “the privilege of the debtor to enjoy the necessary comforts of life * * * recognized by wholesome laws exempting a reasonable amount of property from seizure or sale.” P. 71. The italics are his. See also *Krueger v. Groth*, 190 Wis. 387, 209 N.W. 772 (1926) for a comment on pertinent legislative history.

11 *Bunker v. Locke*, 15 Wis. 635 (1862).

12 *Wis. Stat.* (1933) § 272.20.

13 *McCabe v. Mazzuchelli*, 13 Wis. 478 (1861).

14 *Chopin v. Runte*, 75 Wis. 361, 44 N.W. 258 (1890).

15 *Beranek v. Beranek*, 113 Wis. 272, 275, 89 N.W. 146 (1902).

16 191 Wis. 580, 211 N.W. 798 (1927).

lage can be held as a homestead than is actually occupied for that purpose, and stores and offices erected thereon and rented by the debtor, with the portions of the lot on which they are situated, are not exempt from forced sale on execution. In *Schoffen v. Landauer* it was stated that if there were two dwellings or a dwelling and other buildings on the quarter acre, one dwelling occupied as a homestead and the other leased to tenants, the houses leased and the ground upon which they stand are not exempt unless the rented buildings should be occupied by servants in the employment of the owner.

The homestead must be in compact form. It was pointed out in an early case that it was not the legislative intent that the homestead should include non-contiguous tracts lying distant from each other. "If this were the meaning of the statute," said the court, "there would be an obvious impropriety in speaking of the homestead as consisting of any quantity of land not exceeding forty acres, and the dwelling house thereon." The situation presented in the case of *Hornby v. Sikes* called for the application of the principle laid down in *Bunker v. Locke*. A dwelling house was on a two acre lot. Twenty-seven rods away was a 38-acre plot. The court held that the latter parcel was not a part of the homestead. But if the tracts of land are contiguous and are used and occupied as a homestead, it matters not that they are not wholly within the bounds of a legal subdivision.

In determining the area of the homestead tract, streets are included in the city while highways are excluded in the country. This rule is the result of the judicial determination of legislative intention. To include one-half the area of an abutting city street would have the effect of greatly limiting the size of city homesteads, especially those that happened to be on the corner of intersecting streets. To apply such a rule in the country would be unnecessary, and would lead to the practice of adding to a government subdivision of forty acres such additional land as would equal the abutting or transversing highways. This, the court pointed out, could not be a proper construction of the statute.

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28 16 Wis. 114 (1862). A distinction is made between a horizontal and a vertical division of property. The horizontal division was not recognized in *Phelps v. Rooney*, 9 Wis. 70 (1859). Chief Justice Dixon, in a dissenting opinion, stated that the distinction between that case and the *Casselman* case was only a difference between perpendicular and horizontal lines, a distinction he believed to be untenable.

19 60 Wis. 334, 19 N.W. 95 (1884).

20 *Bunker v. Locke*, 15 Wis. 635 (1862).

21 Streams or highways do not, of course, interfere with contiguity. See *Binsel v. Grogan*, 67 Wis. 147, 29 N.W. 895 (1886).

22 56 Wis. 382, 14 N.W. 278 (1882).


24 *Eaton Center Co-op. Cheese Co. v. Kalkofen*, 209 Wis. 170, 244 N.W. 620 (1932).
A building need not be devoted exclusively to a home in order to have the character of a homestead. This rule was established in Phelps v. Rooney. On the authority of this case a hotel covering less than a quarter acre was exempted, the owner occupying part of it as his dwelling. The court felt that a principle to the effect that the chief use should determine the character of a building would have been better, but would not undertake to abrogate a rule of such long standing.

The homestead exemption extends to the interests of tenants in common. Section 272.20 of the statutes, to which reference has already been made, states: "Such exemption extends to . . . the interest . . . of a tenant in common or two or more tenants in common." Before this provision of the law had been incorporated, the Supreme Court in West v. Ward had said: "The law might very reasonably provide that a homestead might be claimed in any individual interest, establishing at the same time some mode by which it should be set apart and ascertained. Perhaps such provision would be no more than the spirit of the constitutional provision upon this subject fairly requires. But the legislature has done neither, and the court cannot supply the defect, if it is one."

Materials deposited on homestead land for the repair of the house or appurtenant buildings are a part of it. Consequently, lath, shingles, and lumber purchased by a debtor for the purpose of putting his homestead in better condition, and which are actually deposited upon the land included in the homestead, share in the exemption.

Judicial Construction of the Homestead Statute

The Supreme Court of Wisconsin has had several opportunities to construe the homestead statute, which statute, for the purpose of this article, is set out in part below. Construed words or phrases have been italicized.

"A homestead to be selected by the owner thereof consisting, when not included in any city or village, of any quantity of land, not exceeding forty acres, used for agricultural purposes; and when included in any city or village of any quantity of land not exceeding one-fourth of an acre and the dwelling house thereon and its appurtenances owned and occupied by any resident of this state shall be exempt from seizure or sale on execution, from the lien of every judgment and from liability in any form for the debts of such owner to the amount in value of five thousand dollars . . . ."

23 9 Wis. 70 (1859).
26 Harriman v. Queens Ins. Co., 49 Wis. 71, 5 N.W. 21 (1886).
27 26 Wis. 579 (1870).
28 Krueger v. Pierce, 37 Wis. 269 (1875). See also Scofield v. Hopkins, 61 Wis. 370, 21 N.W. 259 (1884).
First of all, in keeping with the spirit of the constitutional provision and with the policy of the homestead statute, the Supreme Court has often reiterated the cardinal rule that the law is to be liberally construed.\textsuperscript{29}

Specifically, when is property “used for agricultural purposes”? In the case of \textit{Binzel v. Grogan}\textsuperscript{30} it appeared that all the owner did on the premises was to keep and feed his horses. The court went on to point out that it was to be conceded that the property was used for at least one agricultural purpose. “But we do not think,” continued the court, “the statute should receive a literal construction. . . . The fisherman may build his home upon the barren beach, using his land only for the spreading of his nets and the mooring of his vessels; or the hunter may build his home in a forest and make no use whatever of the land appurtenant to his dwelling except to pass over it; yet we entertain no doubt whatever that the legislature intended . . . to protect these men . . . .”

Again, must the premises be “owned and occupied” in order to be exempt? In \textit{Scofield v. Hopkins}\textsuperscript{31} the owner had prepared the land for a residence, had dug and curbed a well, and had placed upon the land the stone for the foundation of his dwelling and other buildings, but there was no dwelling house on the land and he had not occupied it as a homestead. But the intention was definite to make the property a homestead. The court, referring to the policy of liberal construction, stated that “occupancy required by the statute does not mean actual physical occupation by the owner personally. . . . If it is . . . true that there can be no exemption until there is a dwelling-house upon the premises, actually occupied by the debtor personally, then it would be almost impossible for a homeless debtor, with judgments docketed against him, to get the benefit of the law; for the very instant he acquired the title, the judgment lien would attach. Under such a construction, the only way of securing such benefit would be to select premises with a dwelling already thereon, and then actually occupy, with the family, prior to the acquisition. But such strict literalism would do violence to the obvious intent of the legislature, and the whole current of authority in this state upon this subject.” The rule is then stated: “The \textit{bona fide} intention of acquiring the premises for a homestead, without defrauding anyone, evidenced by overt acts in fitting them to become such, followed by actual occupancy in a reasonable time, must be

\textsuperscript{29} See \textit{Krueger v. Pierce}, 37 Wis. 269 (1875); \textit{Jarvis v. Moe}, 38 Wis. 440 (1875); \textit{Zimmer v. Pauley}, 51 Wis. 282, 8 N.W. 219 (1881); \textit{Scofield v. Hopkins}, 61 Wis. 370, 21 N.W. 259 (1884).

\textsuperscript{30} 67 Wis. 147, 29 N.W. 895 (1886).

\textsuperscript{31} 61 Wis. 370, 21 N.W. 259 (1884).
held to give to the premises answering the description prescribed in the statute the character of a homestead..."\textsuperscript{32}

From what "debts" is there an exemption? Does this include a judgment growing out of a tort action? "Although," said the court in Smith v. Omans,\textsuperscript{33} "there may be a technical distinction between 'debt' and 'damages,' still the word 'debt' itself is commonly and generally used to describe all obligations to pay money, whether arising from contract or imposed by law as a compensation for injuries." It was the conclusion of the court that the word was used in its general sense.

\section*{Impairment of the Homestead}

The provision of the statute dealing with the impairment of the homestead reads as follows: "... and such exemption shall not be impaired by temporary removal with the intention to reoccupy the same as a homestead nor by a sale thereof..."\textsuperscript{34}

The meaning of "temporary removal" has come to the court for construction on a few occasions. In the case of McDermott v. Kernan\textsuperscript{35} a widow living on the second floor of a building in which there was a saloon and dance hall below, removed so that her children might have a more satisfactory environment. She rented the premises and left some furniture, with the intention of returning later, at all events when her daughters had married. About seven years later, after she had given an absolute deed to the property for the purpose of securing a loan, the question arose as to the impairment of her homestead exemption right. The court, quoting from the case of Jarvis v. Moe\textsuperscript{36}, where the authorities have been extensively collected and the law stated, held her right had not been impaired. In this case, the owner had rented his homestead; and owning another building in the same city had moved into it, where he maintained a hotel. He claimed that he intended to return to his former premises upon being able to rent or sell the hotel. As a matter of fact the hotel did not prosper, and a heavy incumbrance forced a surrender. The presumption that the owner removed \textit{animo manendi} was not rebutted by \textit{ex post facto} declarations\textsuperscript{37}—declarations closely connected in motive and time with the failure of the hotel. The court said, furthermore, that "The intention which is sufficient to rebut

\textsuperscript{32} See also Estate of Arndt, 199 Wis. 1, 225 N.W. 134 (1929). In this case there was a mere mental determination to set aside a particular property as a homestead without any overt act. Hence there was no occupancy.

\textsuperscript{33} 17 Wis. 395 (1863).
\textsuperscript{34} Wis. Stat. (1933) § 272.20.
\textsuperscript{35} 72 Wis. 268, 39 N.W. 537 (1888).
\textsuperscript{36} 38 Wis. 440 (1875).
\textsuperscript{37} See Blackburn v. Lake Shore Traffic Co., 90 Wis. 362, 63 N.W. 289 (1890), which also points out the futility of \textit{ex post facto} professions after circumstances have rendered a return advantageous.
the presumption must be positive and certain, not conditional or indefinite." And in *Moore v. Smead* the court held that where a person removed to another state with no certain intention of returning, but contemplating a vague possibility, a court or jury might justifiably hold that he had abandoned his homestead. But if there is clear evidence of a temporary removal, the fact that one had moved to a distant state and had voted there was not conclusive on the question of abandonment.

A "temporary removal" is not synonymous with what is practically a life-long purpose. In the case of *Pedersen v. Nielsen* the owner of homestead property in a small community was absent for eight years in a sister state while she earned her living as a librarian, there being no local opportunity to pursue her chosen profession. But she expected to be absent long enough for her son to obtain both a master's and a doctor's degree, to earn money to pay her debts, which were quite substantial, and to provide a competency for her old age. All this would require a long and indefinite period amounting to a substantial part of a lifetime. The Supreme Court held, contrary to the trial court, that there was an abandonment of the homestead. "To hold otherwise," wrote Justice Owen, "would render it difficult to visualize a situation where continued, protracted, indefinite absence, accompanied by the exercise of the rights of citizenship in another state, could be held to constitute an abandonment."

### JOINDER OF THE WIFE IN HOMESTEAD ALIENATION

On the subject of the alienation of a homestead, the statutes of Wisconsin provide as follows: "But no mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, without the wife's consent, evidenced by her act in joining in the deed, mortgage or other conveyance, shall be valid or of any effect whatever, except a conveyance from husband or wife."  

A matter closely connected with alienation is presented by the question—May the husband abandon the homestead without the wife's consent? The answer was given in *Beranek v. Beranek* where it was said: "But with all the liberality of construction, and the desire to preserve the homestead right in its fullest fruition, there are limitations and restrictions surrounding it which are regarded quite potential for its de-

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38 89 Wis. 558, 62 N.W. 426 (1895). See also *In the Matter of the Estate of John Phelan*, 16 Wis. 76 (1862).
40 212 Wis. 608, 250 N.W. 400 (1933).
41 Wis. Stat. (1933) § 235.01.
42 113 Wis. 272, 89 N.W. 146 (1902).
struction. In the first place, the homestead law creates no estate in the wife, living with the husband. It only creates a disability on the part of the husband to alienate the homestead without her consent, evidenced by her signature to her alienation. . . . As by his act the premises were originally impressed with the character of a homestead, so by his act they may be abandoned as such. The wife, from the nature of her dependent relation to her husband . . . must abide the consequences of such abandonment.”

The next question which arises is this—Are there any exceptions to the statute in this matter of alienation? The cases in Wisconsin give an answer. Suppose a husband mortgages the homestead to his wife for the purpose of securing a debt from the former to the latter. In such a situation, it was held on the authority of Riehl v. Bingenheimer that the mortgage was valid although the wife did not sign, as the statute had no application to a conveyance of a homestead by a husband to his wife. Where, also, a husband and wife exchanged their homestead for another, entering into possession, the court held that the signature of the wife was not necessary, the wife having subjected herself to the provisions of equitable estoppel. “Although,” said the court, “the constitutional and legislative provisions for such exemption have been steadfastly upheld, however far reaching the results may seem in many instances to be found in the decisions, nevertheless the right in the wife to invoke the protection of the statutes concerning the establishment of or alienation of interests in the homestead is not so absolute and unqualified as to be beyond recognized and well established equitable doctrine.” But no exception to the statute is made simply because the wife is living apart from the husband, or because the husband, old, infirm, and poor, mortgages the homestead in order to obtain the necessities of life.

**Exemption of the Homestead Proceeds**

It is further provided by Section 272.20 of the statutes that the exemption “shall extend to the proceeds derived from such sale to an amount not exceeding five thousand dollars, while held, with the inten-

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43 28 Wis. 84 (1871).
44 Wochoska v. Wochoska, 45 Wis. 423 (1878).
45 Krueger v. Groth, 190 Wis. 387, 209 N.W. 772 (1926). Justice Owen wrote a vigorous dissenting opinion. “If,” he stated, “this decision does not smother the statute requiring the wife to join in a conveyance of the homestead, then that statute has unusual vitality. * * * The present decision points the way to a practical nullification of this statute. Under the present decision the husband may barter away a comfortable homestead, install his family in a shack on a back alley, and upon the establishment of such second homestead—his wife accompanying him in obedience to her plain marital duty—the alienation of the comfortable homestead becomes valid and the husband may dissipate the proceeds thereof in satisfaction of his most profligate desires. Who can deny that the public policy embodied in the statute is thereby defeated?”
tion to procure another homestead therewith, for a period not exceeding two years.\footnote{48}

In the construction of this statute, it has been held that the use by the debtor of a portion of the proceeds of the homestead to pay debts and maintain a family does not impair the exemption of the balance which is to be used to buy another homestead;\footnote{47} and that if the homestead, along with other property, is encumbered by a common mortgage, such other property will be used to satisfy the mortgage debt, and the surplus remaining will be deemed proceeds of the sale of the homestead, and therefore exempt.\footnote{48} Furthermore, it has been decided, in keeping with a liberal statutory interpretation, that there is no requirement that the debtor shall continue to reside in Wisconsin during the two years, nor that he shall intend to purchase another homestead in the state.\footnote{49}

\textbf{General Comment}

It is the purpose of this article neither to set out the complete homestead law of Wisconsin nor to make reference to all of the decisions of the state which have a bearing upon its construction. Many points of detail have therefore been intentionally omitted. The practicing attorney who has a particular problem to solve can find completeness in the existing digests. It has been the purpose here rather to present the historical background of the law, to delineate its broad underlying philosophy, and, in a few bold strokes, to call attention to the nature of its judicial construction. This will account, in part, for the generous references to dissenting opinions. The approach is, therefore, particularly for law school students, or for those whose practice has not been of long standing.

\footnote{46} See Bailey \textit{v. Steve}, 70 Wis. 316, 35 N.W. 735 (1887).
\footnote{47} Binzel \textit{v. Grogan}, 67 Wis. 147, 29 N.W. 895 (1886).
\footnote{48} See Hoppe \textit{v. Goldberg}, 82 Wis. 660, 53 N.W. 17 (1892); Clancey \textit{v. Alme}, 98 Wis. 229, 73 N.W. 1014 (1898).
\footnote{49} Hewitt \textit{v. Allen}, 54 Wis. 583, 12 N.W. 45 (1882). Justice Cassoday, in a dissenting opinion, said: "It would seem that exemption laws, as well as all other laws of a state granting special benefits, are presumptively for those within the state, and not those who are citizens and permanent residents of other states."