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Article 9

Homestead: Alienation; Abandonment; Estoppel

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felt that the insurance companies could not get the cooperation from the policy holders to which they are entitled. The limitation of liability as made in the *Cleary* case will be a considerable deterrent to hubands or wives suing the other under circumstances where no culpable negligence exists.

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Homestead: Alienation; Abandonment; Estoppel.—Article I, Section 17 of the Wisconsin Constitution provides that "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 hereafter contracted."

In pursuance of this section the statutes state "A homestead shall be exempt from execution . . . . for the debts of such owner to the amount in value of $5000"[1] . . . ., and the section providing for methods of conveyancing says, "but no mortgage or other alienation by a married man of his homestead exempt from execution or any interest therein, legal or equitable, present or future, by deed or otherwise without his wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance shall be valid or of any effect whatever. . . ."[2] The plaintiff and defendants in *Krueger v. Groth et ux*[3] each owned a homestead consisting of farm lands and buildings. By an oral agreement between Krueger, the plaintiff, and Groth, who, with his wife, is a defendant, an exchange of the farms was decided upon and carried out as to the occupation of the respective premises.

After several months occupation of Krueger's former farm and homestead, the defendants, the Groths, refused to consumate the oral agreement by an exchange of deeds, contending that the oral agreement was void for lack of the wife's joining in the conveyance of the homestead.

In an action for specific performance the trial court sustained the defendants but on appeal the case went to the plaintiffs.

In this case the court bases its decision on the ground of abandonment and equitable estoppel. "The homstead exemption being a privilege and not a title to land, it had lost, by defendants voluntary acts, all existence or efficacy." "Manifestly the defendants cannot have the benefits of two homesteads at one and the same time."

Under a statute similar to our own it was said, "Where a husband and wife orally agree to sell their homestead and the vendee pays the purchase price, enters into possession and makes improvements with the knowledge and consent of the wife she cannot successfully defend in a suit for specific performance."[4] In applying the doctrine of estoppel the court does not confine itself to facts, representations, or concealments as of the time of the transaction but also to subsequent conduct relied upon by the opposite party to his damage.

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[1] Wis. Stat. 272.20.

[2] Wis. Stat. 235.01.

[3] 190 Wis.—,209 N.W. 773.

[4] 10 Idaho 459—109 Am. St. Rep. 214.

In the dissenting opinion reference is made to the many cases favoring a strict interpretation of the statutes as where a mortgage executed by the husband to provide necessities was declared ineffective even though the wife was living apart from him at the time and also[5] where the court refused to correct a description in the mortgage so as to include the homestead when such inclusion was the clear intention of the mortgagors and the only objection to such reformation was that the wife did not join in writing.[6]

The books are replete with decisions similar to those quoted not only from our own court but from almost every state in the Union.[7]

As to the abandonment of the homestead subsequent to the oral agreement it is said, "the contract sought to be enforced is concededly void. The contract was void because at the time it was entered into the subject matter was a homestead." In speaking of a like contract the court said,

> The deed of trust executed by Busby without the joinder of his wife, as required by statute is not valid and its invalidity was not cured by subsequent removal from the homestead whether such removal was temporary or permanent. The validity or invalidity of the deed of trust was determined by the conditions existing when it was executed and not by what occurred afterward.[8]

On the question of estoppel it is said,

> If it should be said that the homestead right is a mere privilege which the wife may waive or which may be lost under the doctrine of estoppel, a very efficient way would be open to evade and nullify the statute. Such right is placed high above the reach of any such dangers by the absolute disability to alienate the homestead in any manner except by a joint conveyance of some kind signed by the husband and wife.[9]

Previous to the enactment of chapter 45 of the laws of 1905 the statute on alienation of homesteads read as follows: "No mortgage or other alienation by a married man of his homestead, exempt by law from execution shall be valid or of any effect as to such homestead without the signature of his wife to the same."

Under this statute the court held that a husband might alienate insofar as the alienation did not interfere with the homestead right and that a deed from him alone conveyed an equitable interest which entitled the vendee to the legal title as soon as the homestead right ceased.[10]

In 1905 the legislature amended the section to read as quoted at the outset of this note. It would seem clear from this that it was and is the intention of the legislature that the exemption statutes should be a protection of the home for the benefit of the entire family and the general welfare of society. There is some slight suggestion that the decision here is in accord with the modern trend of legislation removing the common-law disabilities of married women hinting that if she be given equal rights she should be charged with equal duties. We are inclined to feel that the protection sought by the homestead alienation statutes is

[5] *Herron v. Knapp Stout Co.* 72 Wis. 553 40 N.W. 149.

[6] *Gotfredsen Bros. v. Dusing* 145 Wis. 659 129 N.W. 647.

[7] (See list of cases at 95 Am. Stat. Rep. 921.)

[8] *Cummings v. Busby* 62 Miss. 197.

[9] *Cumps v. Kiyo* 104 Wis. 656 80 N.W. 937.

[10] *Conrad v. Swamb,* 53 Wis. 372, 10 N.W. 395; *Ferguson v. Mason,* 60 Wis. 377, 19 N.W. 925; *Jerdee v. Furbush,* 115 Wis. 277, 91 N.W. 661.

not provided merely for married women as such but is intended for their protection in their peculiar capacity as homemakers and the natural heads of families.

The law has always lent its aid to upholding the sanctity of the home and the family. Especially deplorable at this time when so many forces are at work tending to destroy them is any decision or law which tends to make easier the despoilation of these bulwarks of society.

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