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estate was made from the viewpoint of tax law rather than from the viewpoint of technical property law, and this is as it should be.²⁴

DAVID S. KENIN

THE EXEMPTION OF PROCEEDS FROM A VOLUNTARY SALE OF HOMESTEAD PROPERTY

The plaintiff-appellant secured a writ of garnishment against the proceeds of a voluntary sale of the defendant-appellees' homestead property. Subsequently, the court dissolved the writ upholding the defendants' contention that the constitutional provision¹ exempting homestead property from forced sale extended to the proceeds of this sale. On appeal, the District Court of Appeal, Second District, noting the lower court's construction of a constitutional provision, transferred² the case to the Florida Supreme Court.³ *Held*, reversed and remanded⁴ with directions to apply the following rule: All or any portion of the proceeds of a voluntary sale will be exempt from forced levy, provided the vendor can show by a preponderance of the evidence the existence of a bona fide pre-sale intention to reinvest the designated amount in another homestead within a reasonable time. These proceeds must be kept segregated from other monies⁵ and must not be put to intervening use. *Orange Brevard Plumbing & Heating Co. v. LaCroix*, 137 So.2d 201 (Fla. 1962).

The underlying purpose of exempting homestead property from forced sale is to conserve the home⁶ in order to protect "the family from dependence and want."⁷ The first homestead exemption law was enacted

24. *Commissioner v. Estate of Church*, 335 U.S. 632 (1949); *Commissioner v. Wemyss*, 324 U.S. 303 (1945); *Helvering v. Hallock*, 309 U.S. 106 (1940).

1. FLA. CONST. art. X, § 1. "A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court . . ."

2. FLA. APP. R. 2.1(a)(5)(d). "When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion . . . enter an order transferring [the case] . . . to the court having jurisdiction."

3. FLA. APP. R. 2.1(a)(5)(a). "Appeals from trial courts may be taken directly to the Supreme Court as a matter of right . . . from final judgments . . . construing a controlling provision of the Florida or Federal Constitution . . ."

4. See note 31 *infra*.

5. *Cullen v. Harris*, 111 Mich. 20, 69 N.W. 78 (1896).

6. WAPLES, HOMESTEAD AND EXEMPTIONS 3 (1893).

7. THOMPSON, HOMESTEAD AND EXEMPTIONS 39 (1886); *Beall v. Pinckney*, 150 F.2d 467, 470 (5th Cir. 1945); 16 FLA. JUR. *Homestead* § 4 (1957); 26 AM. JUR. *Homestead* § 6 (1940); BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.03, at 467, 471 (1959). In *Collins v. Collins*, 150 Fla. 374, 377, 7 So.2d 443, 444 (1942), the court said: "The purpose of the homestead is to shelter the family and to provide it a refuge from the stresses and strains of misfortune."

in Texas in 1839,⁸ and modifications of this prototype have subsequently been adopted by the great majority of American jurisdictions⁹ and several foreign nations.¹⁰ Despite this wide acceptance of the homestead concept, there has been a noticeable lack of legislation expressly dealing with the proceeds of a voluntary sale of homestead property.¹¹

The majority of jurisdictions¹² have refused to allow an extension of the forced sale exemption to proceeds of a voluntary sale on the ground that to do so is beyond the limits of permissible statutory construction.¹³ These courts hold that the voluntary sale extinguishes the homestead right, thus making the proceeds subject to garnishment as personalty.¹⁴

8. Act of Jan. 26, 1839, Laws of the Republic of Tex., 3d Cong., 1st Sess. 113. See generally Cole, *The Homestead Provisions in the Texas Constitution*, 3 TEXAS L. REV. 217 (1925).

9. "There are homestead exemption laws throughout the United States, with the exception only of Delaware, the District of Columbia, Maryland, Pennsylvania and Rhode Island." Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1290 (1950). For a comprehensive treatment of Florida Homestead Law see Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption* (pts. 1-3, 4, 5), 2 U. FLA. L. REV. 12, 219, 346 (1949).

10. 7 ENCYC. SOC. SCI. 441, 443-444 (1942). The following countries have adopted the American type homestead exemption with various limitations on the value exempt: Canada (the values in the various provinces range from \$1500-3000); New Zealand (\$1000); Australia (£1500); Switzerland (size limited to the needs of the family); France (8000 francs); Germany (limited to as much land as can be cultivated by the family). See *State Homestead Exemption Laws*, 46 YALE L.J. 1023, 1035-1037 (1936).

11. The following statutory provisions deal expressly with the proceeds of a voluntary sale. The period of time within which reinvestment is permitted is noted also where applicable: CAL. CIV. CODE § 1265 (1960) (six month exemption period); IDAHO CODE ANN. § 55-113 (1947) (six month exemption period); ILL. ANN. STAT. ch. 52, § 6 (1951) (six month exemption period); MINN. STAT. ANN. § 510.07 (1947) (one year exemption period); MISS. CODE ANN. § 329 (1942) (no time limitation whatever); NEB. REV. STAT. § 40-116 (1960) (six month exemption period); TEX. CIV. STAT. art. 3834 (Vernon 1945) (six month exemption period); UTAH CODE ANN. § 28-1-2 (1953) (one year exemption period); VA. CODE ANN. § 34-20 (1950); WASH. REV. CODE § 612.090 (1958) (one year exemption period); WIS. STAT. ANN. § 272-20 (1958) (two year exemption period); WYO. STAT. ANN. § 1-503 (1957). For construction of the words "[sale by] execution or otherwise" in the Wyoming statute, to encompass a voluntary sale, see *United States v. Field*, 190 F. Supp. 216 (D. Wyo. 1960).

12. See, e.g., *Drennan v. Wheatley*, 210 Ark. 222, 195 S.W.2d 43 (1946); *Wright v. Westheimer*, 3 Hasb. 232, 28 Pac. 430 (Idaho 1891); *Fred v. Bramen*, 97 Minn. 484, 107 N.W. 159 (1906); *Lane v. Richardson*, 104 N.C. 642, 10 S.E. 189 (1889); *Smith v. Hart*, 46 S.D. 582, 207 N.W. 657 (1926); *Kirby v. Giddings*, 75 Tex. 679, 13 S.W. 27 (1890); *Mann v. Kelsey*, 71 Tex. 609, 12 S.W. 43 (1888); *Womack v. Stokes*, 12 Tex. Civ. App. 648, 35 S.W. 82 (1896); *Annot.*, 19 L.R.A. 37 (1892); *Annot.*, 45 Am. St. Rep. 238 (1893); *Annot.*, [1917c] *Annot. Cas.* 1002; *Annot.*, 1 A.L.R. 814 (1926); 26 AM. JUR. *Homestead* § 48 (1940); 40 C.J.S. *Homestead* § 71 (1944). In *Giddens v. Williamson*, 65 Ala. 439, 442 (1880), the court said: "[W]hen it [the homestead] was sold, and converted into money, by the voluntary act of the owner, and not by legal compulsion . . . the homestead exemption . . . was waived and gone, and did not follow the money." The rationale in *Frieberg v. Waltzem*, 85 Tex. 264, 266, 34 Am. St. Rep. 808, 810 (1892) was: "[T]he reinvestment and acquisition of another homestead must be complete before the protection can be invoked; for it is the homestead itself which the constitution exempts, not the money with which one can be acquired in the future."

13. *Wright v. Westheimer*, 3 Hasb. 232, 28 Pac. 430 (Idaho 1891); *Drennan v. Wheatley*, 210 Ark. 222, 195 S.W.2d 43 (1946); *WAPLES*, *op. cit. supra* note 6, at 47.

14. *Lane v. Richardson*, 104 N.C. 642, 10 S.E. 189 (1889); *Tucker v. Stell*, 169 Ark. 1, 272 S.W. 864 (1925).

The minority¹⁵ agree that exemptions are the province of the legislature, but hold that an exemption of the proceeds of a voluntary sale may be implied from existing exemption provisions,¹⁶ provided the vendor can prove he intends to reinvest in another homestead¹⁷ within a reasonable time.¹⁸ According to this view, the proceeds¹⁹ retain the character of the previous exempt property²⁰ for the period of time from the sale of the homestead until the purchase of another. The rationale of this *in transitu* immunity is found in the application of the rule of liberal construction of homestead laws to already existing homestead provisions. Accordingly, those provisions permitting the sale of the homestead free of liens and encumbrances,²¹ the exchange of homesteads,²² and the sale of a homestead and the acquisition of a new one exempt in an amount

15. See, e.g., *Ill.*: Watson v. Saxer, 102 Ill. 585 (1882). *Iowa*: Fardal v. Satre, 200 Iowa 1109, 206 N.W. 22 (1925); Schuttloffel v. Collins, 98 Iowa 576, 67 N.W. 397 (1896); Mann v. Corrington, 93 Iowa 108, 61 N.W. 409 (1894); State v. Geddis, 44 Iowa 537 (1876). *Kan.*: Bank v. Dempsey, 135 Kan. 608, 11 P.2d 735 (1932). *Ky.*: Mason v. Southern Deposit Bank, 229 Ky. 728, 17 S.W.2d 1022 (1929); Marcum v. Edwards, 181 Ky. 683, 205 S.W. 798 (1918); John Staun & Co. v. Proctor, 152 Ky. 142, 153 S.W. 196 (1913). *Mich.*: Schumann v. Davis, 215 Mich. 19, 183 N.W. 740 (1921); Holley v. Redinger, 164 Mich. 31, 129 N.W. 6 (1910). *Miss.*: Meacham v. Edmonson, 54 Miss. 746 (1877). *Okla.*: Farmers' State Bank v. Hess, 120 Okla. 210, 251 Pac. 73 (1926); State v. Brown, 92 Okla. 137, 218 Pac. 816 (1923); Field v. Goat, 70 Okla. 113, 173 Pac. 364 (1918). *Wash.*: Becher v. Shaw, 44 Wash. 166, 87 Pac. 71 (1906). *Wis.*: Watkins v. Blatschinski, 40 Wis. 374 (1876) (Wisconsin subsequently codified this law under Wis. STAT. ANN. § 272.20 (1959)). See annotations, note 12 *supra*.

16. "In many states, however, the statute expressly or impliedly allows a debtor to sell his homestead for the purpose of investing in another homestead and protects the proceeds prior to such reinvestment. In some states the proceeds are thus protected for a limited time only." 15 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 594 (2d ed. 1900); Becher v. Shaw, 44 Wash. 166, 168, 87 Pac. 71, 72 (1906).

17. Huskins v. Hanlon, 72 Iowa 37 (1887). There must be an intention to reinvest the proceeds in another homestead at the time of the sale of the original homestead. Smith v. Gore, 23 Kan. 488, 33 Am. Rep. 188 (1880). It is not sufficient that the intention was formed two years after the sale of the original homestead, nor would a present intention to procure another homestead two years hence be allowable. Campbell v. Campbell, 129 Iowa 317, 105 N.W. 583 (1906); Lear v. Totten, 77 Ky. (14 Bush) 101 (1878); Smith v. Hart, 49 S.D. 582, 207 N.W. 657 (1926).

18. *In re* Gibson, 33 F. Supp. 838 (E.D. Ky. 1940); Blakeslee v. Paul, 272 Iowa 738, 238 N.W. 447 (1931); Fardal v. Satre, 200 Iowa 1109, 206 N.W. 22 (1925); Benham v. Chamberlain & Co., 39 Iowa 358 (1874); Marcum v. Edwards, 181 Ky. 683, 205 S.W. 798 (1918); Lear v. Totten, 77 Ky. (14 Bush) 101 (1878).

19. Millsap v. Faulkes, 236 Iowa 848, 20 N.W.2d 40 (1945) (proceeds exempted while in transit are the net proceeds); Fardal v. Satre, 200 Iowa 1109, 206 N.W. 22, 25 (1925); Annot., 161 A.L.R. 1256 (1946); THOMPSON, *op. cit. supra* note 7, at 332.

20. The court finds a similarity between this theory and that of equitable conversion. The effect of equitable conversion is that "land which is directed to be converted into money is treated as money and money directed to be invested in land is treated as land." Trotter v. Van Pelt, 144 Fla. 517, 524, 198 So. 215, 218 (1940).

21. Bank v. Dempsey, 135 Kan. 608, 11 P.2d 735 (1932); Becher v. Shaw, 44 Wash. 166, 169, 87 Pac. 71, 72 (1906). "Sections 5219 and 5247, which authorize the sale of the homestead free from all claims or liens and the acquisition of a new homestead exempt from attachment or execution, by implication exempt the proceeds of the sale of the homestead . . . for a reasonable time . . ." Watkins v. Blatschinski, 40 Wis. 347, 350 (1876).

22. Mann v. Corrington, 93 Iowa 108, 61 N.W. 409 (1894); Field v. Goat, 70 Okla. 113, 173 Pac. 364 (1918); American Sur. Co. v. Gibson, 65 Okla. 206, 166 Pac. 112 (1917).

equal to the former's worth²³ have been construed impliedly to authorize an exemption of voluntary sale proceeds.²⁴

In this case of first impression, the Florida Supreme Court adopted the minority view by employing the two step process utilized by these courts. The first step was the recognition that Florida has followed the rule of liberal construction²⁵ as evidenced by the decisions which extended the homestead exemption to fire insurance proceeds²⁶ and to damages awarded as a result of a conversion of homestead property.²⁷ The second step involved the application of this general rule to the provisions of the Florida Constitution which permit the alienation of the homestead.²⁸ The court also considered a prior declaration that the consideration received for a homestead takes the place of the property²⁹ and decisions from other minority jurisdictions having similar homestead provisions.³⁰

In the instant case, the defendants succeeded in having the circuit court dissolve a writ of garnishment upon the basis of an affidavit³¹

23. *Elliot v. Till*, 219 Iowa 649, 259 N.W. 460 (1935); *Fardal v. Satre*, 200 Iowa 1109, 206 N.W. 22 (1925); *Schuttloffel v. Collins*, 98 Iowa 576, 67 N.W. 397 (1896); *State v. Geddis*, 44 Iowa 537 (1876).

24. "The law does not, *in express terms* in any case exempt money or credits, merely because they are proceeds of a homestead, they are exempted only by a sort of equitable fiction drawn from the spirit of the homestead exemption laws and adopted for the purpose of enabling persons to exchange their homesteads when they desire." *Smith v. Gore*, 23 Kan. 347, 349, 33 Am. Rep. 188, 190 (1880).

25. *Hill v. First Nat'l Bank*, 73 Fla. 1092, 75 So. 614 (1917); *Pasco v. Harley*, 72 Fla. 819, 75 So. 30 (1917). "It is settled in Florida that section 1, Article X, of the [Florida] Constitution, relating to homestead, should be liberally construed in the interest of the home, and that a homestead exemption extends to any right or interest the head of a family may hold in land." *Bessemer Properties, Inc. v. Gamble*, 158 Fla. 38, 39, 27 So.2d 832, 833 (1946).

26. *Kohn v. Coats*, 103 Fla. 264, 138 So. 760 (1931). *Contra*, Annot., 63 A.L.R. 1283, 1288 (1929).

27. *Hill v. First Nat'l Bank*, 79 Fla. 391, 84 So. 190 (1920); *Mudge v. Laming*, 68 Iowa 641, 27 N.W. 793 (1886); *Kaiser v. Seaton*, 62 Iowa 463, 17 N.W. 664 (1883); Annot., 20 A.L.R. 270, 276 (1920).

28. FLA. CONST. art. X, § 4, states that "Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife if such relationship exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law." FLA. CONST. art. X, § 1, states that "[R]eal estate shall not be alienable without the joint consent of husband and wife, when that relation exists. . . ."

29. *Norman v. Kannon*, 133 Fla. 710, 182 So. 903 (1938).

30. The homestead provisions for the jurisdictions cited in the majority opinion are not entirely similar to Florida's, except for Kansas. For a criticism of the Florida and Kansas type provision see Cole, *supra* note 8, at 222. See Ky.: *Marcum v. Edwards*, 181 Ky. 683, 205 N.W. 798 (1918); KY. REV. STAT. § 427.080 (1953) (\$1000 exemption limitation). Kan.: *First Nat'l Bank v. Dempsey*, 135 Kan. 608, 11 P.2d 735 (1932); *Smith v. Gore*, 23 Kan. 488 (1800); KAN. CONST. art. XV, § 9. Iowa: *State v. Geddis*, 44 Iowa 537 (1876). "Where . . . a new homestead has been acquired with the proceeds of the old, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been." IOWA CODE ANN. § 561.20 (1950). Okla.: *State v. Brown*, 92 Okla. 137, 218 Pac. 816 (1923); *Field v. Goat*, 70 Okla. 113, 173 Pac. 364 (1918); OKLA. CONST. art. 12, § 1 (\$5000 exemption limitation). See note 49 *infra*.

31. The court reversed the circuit court's decision because the affidavit, which was the

attesting that after the closing they rented a house where they intended to reside until they could purchase another home with the funds in the hands of the garnishees.

Agreeing with the lower court that this declared intention could impress the proceeds with the character of the exempt homestead property, the Florida Supreme Court held that this did not contradict the rule established in *Oliver v. Snowden*.³² In that case it was held that there must be an actual occupation as well as an intention to create a permanent homestead in order for the homestead right to attach to the property.³³ The court in the instant case reasoned that since the defendants were not attempting to create a new homestead right, but rather to perpetuate an already existing one, the rules of law utilized in these cases were distinguishable.³⁴

The basis of the majority's rationale is not entirely convincing. Constitutional provisions that merely allow property to be alienated do not imply that the proceeds of a voluntary sale are to be exempt. The court's contention that these provisions authorize an exemption appears to be more a product of fiction than of implication.³⁵ While a previous declara-

only evidence before the trial court, did not designate the time within which reinvestment was intended, the total amount of the proceeds received for the original homestead, nor how much of the \$6000 in the garnishee's control was intended to be reinvested into a new homestead. In *Smith v. Hart*, 49 S.D. 582, 207 N.W. 657, 659 (1926), the court, holding that the claimant had failed to establish a bona fide intention to reinvest the proceeds of a voluntary sale into another homestead, stated that "the affidavit speaks in the present tense only. It was sworn to on September 3, 1925, the contract for sale of the homestead having been made on August 21, 1925. There is no allegation whatever that the intention of acquiring a second South Dakota homestead existed at the time of contracting to sell the first homestead, or at any other time prior to the date of the affidavit."

32. 18 Fla. 823 (1882).

33. See also, *Matthews v. Jeacle*, 61 Fla. 686, 55 So. 865 (1911) (the homestead no longer existed when the widow moved off the premises and rented it); *Murphy v. Farquhar*, 39 Fla. 350, 22 So. 681 (1897) (the court found abandonment of the premises evidenced by the transfer of separate ownership to the wife to bar the creditors, in lieu of the homestead which he knew would be forfeited after he actually left the premises); *Drucker v. Rosenstein*, 19 Fla. 191 (1882) (the intention to build on a parcel of land is not sufficient to make it a homestead in the absence of actual occupation); *Solary v. Hewlett*, 18 Fla. 756 (1882) (the owner alleged that he was intending to make repairs and then occupy the land as homestead, but the land was occupied by tenants at the time and the owner did not allege he had taken any steps towards actually repairing the premises); *Hill v. Franklin*, 54 Miss. 632, 635 (1877): "This immunity depends upon two contingencies, first, occupancy as a home; second, that the owner shall have a family."

34. "The purchase of the new homestead is regarded as merely the continuance of the old homestead and not the formation of a new one . . ." *Skiles v. Shropshire*, 50 S.W.2d 402, 404 (Tex. Civ. App. 1932). "[S]uch removal only . . . suspends the continuous possession without suspending the continuous home." *Watkins v. Blatschinski*, 40 Wis. 347, 351 (1876).

35. The court relied on the alienation provision permitting the sale of the homestead with the joint consent of husband and wife and the fact that the head of a family residing in the state may acquire a subsequent homestead which will be exempt upon the satisfaction of all the homestead requirements as was the former. However, "as a general rule . . . in the absence of any statute to the contrary . . . the voluntary sale of a homestead by husband and wife is a complete extinguishment of the homestead right." THOMPSON, HOMESTEAD AND

tion of the court did state that the consideration paid for the homestead took the property's place, it was used in a qualified sense.³⁶ The decisions exempting fire insurance and damages recovered from an unlawful levy upon the homestead dealt with involuntary conversions. Thus, their serving as a basis for the applicability of the general rule of liberal construction to the instant proposition is not persuasive.

While the court has established a rule embodying comprehensive limitations in order to prevent abuse of the privilege recognized, it has unfortunately failed to define these limits adequately. As a result, until there is sufficient application of this holding to varying factual situations, the debtor, creditor and lawyer will find it difficult to predetermine the rights and liabilities of those claiming an interest in the fund.

For example, how does one determine how much the debtor actually intended to reinvest?³⁷ How is the existence of this pre-sale intent proved?³⁸ What circumstances will affect the determination of a reason-

EXEMPTIONS 609 (1886). Also, satisfaction of the homestead requirements is a prerequisite to exemption. As stated by the court in the Texas case of *Friberg v. Waltzem*, 85 Tex. 264, 266, 34 Am. St. Rep. 808, 810 (1892): "[T]he reinvestment and acquisition of another homestead must be complete before the protection can be invoked; for it is the homestead itself which the constitution exempts, not the money with which one can be acquired in the future." In the instant case, Mr. Justice Drew stated in regard to section 1 of article X that "when a voluntary sale of a homestead has been made by husband and wife in the manner provided by the Constitution itself . . . the proceeds become personalty . . . and are protected from forced sale to the extent of the value of \$1000.00 specifically mentioned in the Constitution. So far as this provision of the Constitution is concerned, there can be no distinction between the head of a family who sells his homestead for cash and his neighbor, likewise the head of a family, who does not own a homestead but has the same amount of cash. A simple example will illustrate the fallacy of the idea that the whole proceeds of a voluntary sale . . . are exempt. A and B reside in homes adjacent to each other of the same size and value. Both are the heads of a family. A owns his property while B rents his. A voluntarily sells his homestead for \$x and receives . . . cash with the intention of buying another home. Under the theory that the proceeds of the sale are exempt, A's \$x would be exempt from forced sale while B's would not. Such an obviously fallacious interpretation is absurd." *Orange Brevard Plumbing and Heating Co. v. LaCroix*, 137 So.2d 201, 215 (Fla. 1962).

36. *Norman v. Kannon*, 133 Fla. 710, 182 So. 903 (1938). The court held that a transfer of the homestead between spouses for consideration was permissible under the constitution as compared to one without consideration. The court felt that the homestead rights of the child were protected in this instance, since the purchase price serves to replace the property.

37. Where there is no value limitation on the amount of the homestead exempt from forced sale, then there is no guide by which to concretely determine in advance the amount of proceeds which the debtor intends to invest in a new homestead. From the cases it would seem that the creditor's chances of establishing the extent of the proceeds exempt would require a knowledge of the value of the present and prospective homesteads. Mr. Justice Drew in his dissent laments that the majority's decision "commits this court to the proposition that it is a judicial function to determine in every instance when a homestead is sold the amount of and the extent to which the proceeds derived from the sale are exempt . . ." *Orange Brevard Plumbing & Heating Co. v. LaCroix*, 137 So.2d 201, 207 (Fla. 1962).

38. See *Stone v. Bowling*, 191 Ark. 671, 87 S.W.2d 49 (1935); *Elliot v. Till*, 219 Iowa 649, 259 N.W. 460 (1935) (testimony by bank cashier corroborated evidence that the Elliots had intended to utilize the proceeds for purchase of a new home). "The length of

able time within which reinvestment must be made?³⁹ Need one restrict reinvestment to the state wherein the former homestead was situated?⁴⁰ Does the mode or duration of the transaction affect the exemption?⁴¹ What is contemplated by the restriction that the funds may not be put to intervening use?⁴² What happens to the fund should the head of the family die before reinvestment of the money?⁴³

The court has acted upon a question that should be decided by the legislature. However, legislation on this particular question alone is not sufficient, since it is ancillary to the major problem in Florida's homestead exemption laws. Florida is one of the few remaining jurisdictions without a *value* limitation on the extent of the homestead property that

time intervening between the sale of the old and the acquiring of the new [homestead] is not essentially controlling . . . There is nothing in the facts inconsistent with such an intention, although a considerable time has elapsed since the sale of the homestead." State v. Geddis, 44 Iowa 537, 539 (1876); Smith v. Gore, 23 Kan. 488, 33 Am. Rep. 188 (1880); Cooper v. Arnett, 95 Ky. 603, 26 S.W. 811 (1894) (acts are sufficient to disprove such an intention); State v. Brown, 92 Okla. 137, 218 Pac. 816 (1923). "It appears to be a required condition precedent to any such exemption that the claimant must clearly and affirmatively establish that at the time of selling the first homestead there existed, and has continued, a definite actual and bona fide intention to reinvest the proceeds in a second homestead in the same state." Smith v. Hart, 49 S.D. 582, 583, 207 N.W. 657, 658 (1926).

39. See Robinson v. Charleton, 104 Iowa 296, 73 N.W. 616 (1897) (time consuming judicial procedure did not serve to extend the reasonable time allowance). In State v. Brown, 92 Okla. 137, 140, 218 Pac. 816, 818 (1923), the court held that the vendor's serious illness which resulted in several months of hospitalization affected when a reasonable time would elapse. "The question of reasonable time is, of course, governed by the same rules of law that govern and define what constitutes a 'reasonable time.'" Thorsby v. Babcock, 36 Cal. 2d 202, 222 P.2d 863 (1950) (although the time allowance for reinvestment was six months by statute, the courts allowed a belated reinvestment to preserve the homestead exemption). This utilization of the court's discretion in the presence of a statute illustrates the desire for some flexibility in those jurisdictions where there is a liberal construction of homestead laws.

40. See Dalton v. Webb, 83 Iowa 478, 50 N.W. 58 (1891); Rodgers v. Raisor, 60 Iowa 355, 14 N.W. 317 (1882); Caldwell v. Seiver, 85 Ky. 38, 2 S.W. 651 (1887); William Cameron & Co. v. Abbott, 258 S.W. 562 (Tex. Civ. App. 1924); Hewitt v. Allen, 54 Wis. 583, 12 N.W. 45 (1882). For comparison see the following cases regarding chattels brought into other states for temporary use: Teager v. Landsley, 69 Iowa 725, 27 N.W. 739 (1886); Mumper v. Wilson, 72 Iowa 163, 33 N.W. 449 (1877); Carroll v. First State Bank, 148 S.W. 818 (Tex. App. 1912).

41. See Schuttoffel v. Collins, 98 Iowa 576, 67 N.W. 397 (1896); State v. Geddis, 44 Iowa 537 (1876); Schumann v. Davis, 215 Mich. 19, 183 N.W. 740 (1921); Whittenberg v. Lloyd, 49 Tex. 633 (1878).

42. Courts have held temporary investment of the exempt proceeds in mortgages which a banker agreed to relieve the plaintiff of at any time was not such intervening use as to cause loss of the exemption. Elliot v. Till, 219 Iowa 649, 259 N.W. 460 (1935). A debtor cannot utilize proceeds in trading for an indefinite time and then invest them into another homestead and claim the house exempt from antecedent debts. Fitch v. Duckwall, 25 Ky. L. Rep. 1535, 78 S.W. 185 (1904). Money arising from, or the securities given for, the consideration price of the homestead would not be exempt if the debtor should use them in trade, or use them in the purchase of non-exempt property. Watkins v. Blatschinski, 40 Wis. 347, 351 (1876).

43. See Schuttoffel v. Collins, 98 Iowa 576, 67 N.W. 397 (1896); Meacham v. Edmonson, 54 Miss. 746 (1877); See generally, Haskins, *Homestead Rights of the Surviving Spouse*, 37 IOWA L. REV. 36 (1951).

can be regarded as exempt.⁴⁴ Therefore, a statute that simply limited the amount of proceeds from a voluntary sale that could be exempt without placing a value limitation of the same amount on all homestead property would have the effect of penalizing a family which attempted to move, even if to improve its condition.⁴⁵

While a holding by the court that the proceeds of a voluntary sale were not exempt would, of course, have the same detrimental effect,⁴⁶ it should not be avoided if the only alternative is an invasion by the court into the legislature's sphere of responsibility. The court's failure to follow the majority's example of judicial restraint⁴⁷ has resulted in the creation of a multitude of uncertainties in an area of this state's law which is already noted for its chameleon-like character.⁴⁸

The court's present decision could be justified as an implementation and the natural consequence of the legislative intent to afford the debtor an inordinate degree of protection, as evidenced by the unlimited value of the homestead exemption in Florida. In view of the obvious need for constitutional revision in this area,⁴⁹ this view is only a rationalization

44. Cole, *The Homestead Provisions of the Texas Constitution*, 3 TEXAS L. REV. 217, 222 (1925); THOMPSON, *HOMESTEAD AND EXEMPTIONS* 88 (1886).

45. "This construction [allowing the exemption of the proceeds from a voluntary sale of homestead proceeds] works no hardship upon, nor is it in any wise inequitable, to the creditor, since he was entitled to nothing before the sale of the homestead. On the contrary, to hold otherwise would prevent the debtor from exercising the right to improve his condition by acquiring another homestead with the proceeds of his first one." *Marcum v. Edwards*, 181 Ky. 683, 68, 205 S.W. 798, 800 (1918).

46. See *Morris v. Ward*, 5 Kan. 239, 247 (1896); *Gray v. Deal*, 50 Okla. 89, 95, 151 Pac. 205, 207 (1915).

47. In *Drennan v. Wheatley*, 210 Ark. 222, 224, 195 S.W.2d 43, 44 (1946), the court refused to exempt impounded funds which at the time of the sale of the homestead were intended to be reinvested in another home: "While these laws should receive a most liberal interpretation in favor of the party asserting the homestead right, courts may not, under the guise of construction, read into the constitution and the statutes something that the framers thereof did not see fit to place there." In *Wright v. Westheimer*, 3 Hasb. 232, 240, 28 Pac. 430, 433 (Idaho 1891), the court stated: "We are of the opinion that an amendment of our homestead laws, exempting the proceeds from a voluntary sale for a reasonable time, would be in the interest of humanity. For, however much such an amendment may be desired, this court will not assume the power to amend the statutes, and thus usurp the legislative functions . . . of our state government." See WAPLES, *HOMESTEAD AND EXEMPTIONS* 47 (1893).

48. Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption* (pts. 1-3, 4, 5), 2 U. FLA. L. REV. 12, 219, 346 (1949).

49. "In the majority of states the premises which may be claimed as homestead are limited as to value, but in Minnesota the only limitation is in area. This, coupled with the fact that commercial use of a portion of the homestead does not terminate the homestead exemption, and that non-homestead property may be converted into homestead to avoid just debts, has permitted unscrupulous debtors to use the homestead law as a haven from their creditors." 25 MINN. L. REV. 66, 67, 68 (1941). See Haskins, *Homestead Exemption*, 63 HARV. L. REV. 1289, 1292 (1950); Cole, *supra* note 44, at 224; Teichmuller, *The Homestead Law*, 35 AM. L. REV. 413, 415 (1901). "It seems unfair today, just as it did . . . thirty years ago to ignore the element of value." Woodward, *The Homestead Exemption: The Continuing Need for Constitutional Revision*, 35 TEXAS L. REV. 1047, 1048 (1957). "A money valuation as the basis of the homestead exemption is the only effectual remedy I can conceive." Teichmuller, *supra* at 415.

of the decision rather than a justification. It can only be hoped that the probable consequences of this decision will prompt the legislature to recommend to Florida voters a constitutional amendment which will eliminate the inequities of the present homestead provisions.⁵⁰

WALTER WAYNE SYLVESTER

A DIVORCED MOTHER'S RIGHT OF ACTION UNDER THE WRONGFUL DEATH OF MINORS ACT

The parents of a minor child were remarried to each other subsequent to a divorce decree which awarded custody to the mother. A second divorce decree made no provision for the child's custody. In an action by the divorced mother for the minor's wrongful death, the trial court rendered a judgment in her favor. On appeal, *held*, reversed: remarriage of the parents voids the custody provisions of a prior divorce decree, and when a second divorce decree contains no custody provision, a mother cannot recover for the minor child's wrongful death under the Wrongful Death of Minors Act.¹ *Eppes v. Covey*, 141 So.2d 747 (Fla. App. 1962).

50. There arises the question of how much freedom the legislature has in enacting a value limitation on homestead property. FLA. CONST. art. X, § 6 states: "The legislature shall enact such laws as may be necessary to enforce the provisions of this Article." The legislature would appear to be restricted from enacting such a law correcting an inequity which has its basis in the constitution.

Constitutional amendment is the answer to the problem and according to some writers an even more drastic approach is needed. "[I]t is doubtful that a state constitution should contain any provisions with reference to the homestead exemption. Experience in other states indicates that the legislative body may be trusted to give adequate protection to homestead rights. If statutes prove to be inequitable, unwise or inadequate, they can be changed . . . [I]n any revision of the constitution the question of eliminating any reference to the homestead exemption is one serious consideration. Should any mention be considered necessary, it should be limited to a declaration of general policy, leaving to the legislature the task of effective implementation." Woodward, *supra* note 49, at 1047, 1053.

1. FLA. STAT. § 768.03 (1961), reads: "Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or default of any individual, or by the wrongful act, negligence, carelessness or default of any private association or persons, or by the wrongful act, negligence, carelessness or default of any officer, agent or employee of any private association of persons, acting in his capacity as such officer, agent or employee, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any officer or agent, or employee of any corporation acting in his capacity as such officer, agent or employee, the father of such minor child, or if the father be not living, the mother may maintain an action against such individual, private association of persons, or corporation, and may recover, not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess." In *Ward v. Baskin*, 94 So.2d 859, 860 (Fla. 1957), the Florida Supreme Court recognized that this statute is "peculiar to Florida with no exact counterpart in any other state." It added: "The peculiarity consists in the provision that when suing for the wrongful death of a minor child, the father is authorized to recover damages not only for the loss of