Drake Law Review

Vol. No. 2 NOVEMBER, 1952 No. 1

INVADING THE HOMESTEAD EXEMPTION

> "The homestead may be sold to satisfy debts of each of the following classes:
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> 1. Those contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution."[1]

When is a "debt" "contracted" within the meaning of this provision?[2]

Not surprisingly, ". . . the term 'debt' is indefinite and variable in its meaning, and . . . the meaning to be attached thereto in a given case is largely dependent on its context. In other words, the term 'debt', as used in the homestead statute, may vary in its meaning from that given to it in other contexts."[3] In accord with this statement the Iowa court has propounded several definitions of the term for purposes of the homestead statute alone. It has been said that the debt which the statute authorizes to be satisfied by execution sale of a homestead is ". . . a fixed obligation, subject to enforcement by the processes of the law. . . ."[4] In a later decision, *Hunt, Hill & Betts v. Moore,* the court declared that a debt contracted prior to the acquisition of the homestead, within the meaning of the statute, is a debt which is ". . . certain and in all events payable."[5] In a still later case — the most recent on the subject — the court, in an attempt to harmonize its prior holdings and language, repudiated the language quoted above from the *Hunt* case as too broad; "Insofar as the . . . Hunt case states the debt . . . must be one that is 'in all events payable,' it will be considered dictum."[6]

The court can scarcely be blamed. The problem is not an easy one and the cases are too few to provide a basis for certain prediction. Some semblance of reconciliation is possible, however, and an attempt will be made to harmonize the cases.

A common form of obligation is tort liability. When does it become a "debt"? There seems to be no Iowa case where a judgment rendered in an action *ex delicto* was enforced against a subsequently acquired homestead. The reason no reported cases

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[1] IOWA CODE § 561.21 (1950).

[2] The converse problem of time of acquisition of the homestead is not treated in this article.

[3] Smith v. Andrew, 209 Iowa 99, 101, 227 N.W. 587, 588 (1929).

[4] Anderson v. Kyle, 126 Iowa 666, 668, 102 N.W. 527, 528 (1905). See also Hallam v. Finch, 197 Iowa 224, 226-227, 195 N.W. 352, 353 (1923).

[5] 219 Iowa 451, 453, 258 N.W. 114, 115 (1934).

[6] *In re* Estate of Galvin, 238 Iowa 894, 897-898, 29 N.W.2d 230, 232 (1947).

appear may be that appeal from an order permitting sale under such circumstances seems futile. It appears to be the general rule that a right of action which sounds in tort alone becomes a debt at the time it is reduced to judgment but not before. In the early case of *Johnson and Stevens v. Butler*[7] it was held that the obligation of a judgment defendant is a debt, and that an action brought upon a judgment is *ex contractu* without regard to the original cause of action on which the judgment was recovered. Under this rule it would seem that tort liability must be reduced to judgment prior to acquisition of the homestead in order to resort to the statute.[8]

There is, however, an area of tort law wherein a contract is implied in law and suit may be brought on either theory, *i.e.*, tort or waiving the tort and suing in assumpsit.[9] A case in point under the homestead statute is *Warner v. Cammack*,[10] in which *A* sold *B* an exclusive franchise to sell a patented mop wringer. *A* took *B's* note and mortgage for the purchase price, and the mortgage was foreclosed on the property. *A* acquired a homestead and thereafter *B* got a judgment against *A* for the amount paid for the franchise on the ground of fraudulent misrepresentations. The court permitted enforcement of the judgment against *A's* homestead, saying:

> "We hold that it was a debt. And this, because the plaintiff in that action might have waived the tort and brought his action for money paid to the use of the defendant therein. Wherever a party has derived a pecuniary advantage from a wrong done by him, and it is competent for the person suing thereon to waive the tort and maintain his action upon the promise implied by the law, there the obligation to pay is a debt, and this, regardless of the form of action in which that obligation is sought to be enforced."[11]

Thus it seems that certain tort obligations may be "debts" prior to reduction to judgment because they are said to partake of the nature of contracts. When, then, do contract obligations become "debts"? An early dictum indicated that a debt barred by the statute of limitations remains a debt; when the limitation is

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[7] 2 Iowa 438 (Cole 1856); *cf.* Ohio Casualty Ins. Co. v. Galvin, 222 Iowa 670, 676, 269 N.W. 254, 257 (1936), 108 A.L.R. 1036 and note (1937); Spilde v. Johnson, 132 Iowa 484, 486, 109 N.W. 1023, 1024 (1906).

[8] *See* Warner v. Cammack, 37 Iowa 642, 644 (1873). For a discussion of the difference between "debt" and tort liability see McElfresh v. Kirkendall, 36 Iowa 224, 226-227 (1873).

[9] Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L. J. 221 (1910).

[10] 37 Iowa 642 (1873).

[11] *Id.* at 644. Iowa cases involving the doctrine but not in relation to the homestead exemption are Devin v. Walsh, 108 Iowa 428, 79 N.W. 133 (1899) (conversion of coal); Stanhope v. Swafford, 77 Iowa 594, 42 N.W. 450 (1889) (misrepresentation).

avoided by a new promise in writing the debt dates from the original promise rather than from the time the new promise was given.[12] The dictum is persuasive because it is consistent with the Iowa view that the new promise but waives the statute of limitations and is not a new contract supported by moral or past consideration.[13] It is, however, a departure from avowed policy to define "debt" for homestead purposes by reference to concepts created for other purposes.[14] Another promissory note case is *Christensen v. Esbeck*,[15] which held that a note given a year before the acquisition of the homestead was a debt prior to acquisition.

In an interesting case[16] a son received money from his mother under a power of attorney to invest and manage the fund for her. Some years later he acquired a homestead and thereafter gave his note for $5000 to adjust a claim of mismanagement of the fund. The court held that the note established a prima facie case that the debt existed only from execution of the note; the judgment creditor had the burden of proving that mismanagement occurred prior to the acquisition of the son's homestead.

A surety on a note is a debtor from the inception of the suretyship and not merely from the time the principal debtor defaults.[17] A subsequent case analyzed the character of the obligation of a holder of double-liability bank stock and found him to be in the nature of a surety.[18] The court, putting two and two together, could see no escape from holding that the stock-owner's debt existed from the time the stock was purchased and was therefore realizable out of a subsequently acquired homestead despite the fact that the bank was a solvent, going concern at the time the homestead was acquired.[19] Some doubt has been cast on the holding of that case, if not on the logic, since that time.[20]

Anderson v. Kyle[21] involved a grantor in a warranty deed who acquired a homestead in other realty after executing the conveyance. Still later the grantee in the warranty deed had to purchase a paramount title and obtained a judgment against the warrantor for breach of covenant. The court held the homestead immune

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[12] *See* Sloan v. Waugh, 18 Iowa 224, 227 (1865).

[13] *Accord*, Spilde v. Johnson, 132 Iowa 484, 109 N.W. 1023 (1906); see Frisbee v. Seaman, 49 Iowa 95, 98 (1878); *but cf.* Penley v. Waterhouse, 3 Iowa 419 (Cole 1856).

[14] See text at note 2 *supra*.

[15] 167 Iowa 130, 149 N.W. 76 (1914). Hallam v. Finch, 197 Iowa 224, 195 N.W. 352 (1923) holds that obligations arising out of dissolution of a partnership were debts before the decree in accounting was entered.

[16] Walker v. Walker, 117 Iowa 609, 91 N.W. 908 (1902).

[17] Merchants Nat. Bank v. Eyre, 107 Iowa 13, 77 N.W. 498 (1898). The holding preserved the homestead by making the debt "antecedent" to the descent of the homestead to issue within the meaning of Iowa Code § 561.19 (1950).

[18] Smith v. Andrew, 209 Iowa 99, 227 N.W. 587 (1929).

[19] *Id.* at 103, 227 N.W. at 588-589.

[20] See *In re* Estate of Galvin, 238 Iowa 894, 896, 29 N.W.2d 230, 231 (1947).

[21] 126 Iowa 666, 102 N.W. 527 (1905).

from the judgment. There was breach of covenant on delivery of the deed, it is true, but it was a merely "technical" breach; "substantial" breach did not occur until attack was made on the title conveyed.[22] This is consistent with Iowa cases on breach of warranty,[23] but it might be pointed out that the nature of the warrantor's liability is not so very different from that of a surety. Further, the surety has not committed so much as a technical breach until the principal obligation is due.

One of the really troublesome cases[24] involved one who was a passenger aboard the *Lusitania* on its final run. A law firm representing a Survivors Committee obtained our passenger's agreement that the firm could pursue his claim for damages against the German government for a fee not to exceed twenty per cent of the amount recovered. He acquired a homestead four years before the claim against Germany was allowed and eight years before payment was realized. Although he had authorized the attorneys to represent him long before he acquired the homestead it was held exempt from execution on a judgment for their fee. The court said, "While the sum of money may be payable upon a contingency, yet in such a case it becomes a debt only when the contingency has happened."[25] The debt must be ". . . certain and in all events payable."[26]

This brings us back to the latest case, which, we have seen, repudiated the last quotation above.[27] The court held that a promise by a prospective husband to pay his prospective bride a sum of money in lieu of dower if she both married him and survived him was a debt contracted at the time of the marriage. "It is immaterial that it did not exist as a collectible debt until the death of James A. Galvin."[28]

Here we attempt the promised reconciliation. A "debt" is "contracted" within the meaning of the statute at the time:

1. Any money judgment is obtained.[29]

2. Any tort obligation arises upon which judgment may later be secured on a theory of waiver of tort and suit in assumpsit, *i.e.*, promise implied in law.[30] Apparently the pleadings need not elect between tort and contract; the test is whether the judgment could have been obtained on that theory, not whether it was in fact so obtained.[31] This provides a happy opportunity for afterthought.

3. The act requested in an offer for a unilateral contract — a promise for an act—is performed, although there may remain

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[22] *Id.* at 668, 102 N.W. at 528.
[23] *E.g.*, Campbell v. Hagerty, 191 Iowa 1265, 184 N.W. 328 (1921).
[24] Hunt, Hill & Betts v. Moore, 219 Iowa 451, 258 N.W. 114 (1935).
[25] *Id.* at 453, 258 N.W. at 115.
[26] *Ibid.*
[27] *In re* Estate of Galvin, 238 Iowa 894, 29 N.W.2d 230 (1947); see note 6 *supra.*
[28] *In re* Estate of Galvin, 238 Iowa 894, 895, 29 N.W.2d 230, 231 (1947).
[29] Warner v. Cammack, 37 Iowa 642 (1873).
[30] *Ibid.*
[31] *Id.* at 644.

conditions precedent to the promisor's duty to perform.[32] Where, however, the act requested is not performed until after the acquisition of the homestead, a judgment later obtained may not be enforced against that homestead.[33] An intermediate position, with the requested act partially completed at the time the homestead comes into existence, is possible.[34]

4. The creditor has rendered complete preformance under a bilateral contract. All Iowa cases except the one involving the technically-breaching grantor[35] sustain this view. The difficulty is that they are consistent with a broader rule that a debt is contracted at the time of the making of a bilateral contract, *i.e.*, at the time of offer and acceptance. In ordinary contemplation a debt exists at that time, notwithstanding the fact that the contract is completely executory. In re *Estate of Galvin*[36] refers to the following language in a Colorado case:[37] ". . . a debt, no matter when it matures, is 'contracted' whenever the agreement respecting it is made." The court then said, "This is the force of our holdings in Smith v. Andrew . . . and Merchants Nat. Bank v. Eyre. . . ."[38] The fact situations in the Colorado case and *Merchants Bank*[39] are identical, but the emphasis on time of agreement loses some of its force in light of the fact that in each case the creditor had fully performed before the exempt property was acquired. Further, the effect of the holding in each case was to preserve the property to the debtor rather than subject it to execution.[40]

The possibilities under (4) above may be illustrated by the following hypothetical: *A* agrees to sell his automobile to *B* in return for *B*'s promise to pay *A* $1000 one year from date. *A* delivers the car immediately; after the due date he sues out a money judgment against *B* for failure to pay the purchase price. There seems to be no doubt that *A* may enforce his judgment against a homestead of *B* acquired between the making and the breaking

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[32] *In re* Estate of Galvin, 238 Iowa 894, 29 N.W.2d 230 (1947).

[33] Hunt, Hill & Betts v. Moore, 219 Iowa 451, 258 N.W. 114 (1935).

[34] "If . . . part of the consideration requested . . . is given . . . in response . . . [to the offer], the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given. . . . " RESTATEMENT, CONTRACTS § 45 (1932). No opinion is expressed as to when a debt arises under application of this section.

[35] Anderson v. Kyle, 126 Iowa 666, 102 N.W. 527 (1905). The case is another example of determining the meaning of debt out of "context"; see text at note 14 *supra*.

[36] 238 Iowa 894, 896, 29 N.W.2d 230, 231 (1947).

[37] Jackson v. McKeown, 79 Colo. 447, 449, 246 Pac. 277 (1926).

[38] *In re* Estate of Galvin, 238 Iowa 894, 896, 29 N.W.2d 230, 231 (1947). The cases referred to seem to be unilateral contracts, however.

[39] 107 Iowa 13, 77 N.W. 498 (1898).

[40] See note 17 *supra*. Each case involved a suretyship entered into before the land was acquired; both statutes exempted the property involved from debts contracted prior to the time the land was acquired. But each case involves a unilateral contract: the promise of the surety is given for the extension of credit or advancement of money by the creditor to the principal debtor. The creditor has completed performance at the time the contract comes into existence.

of the contract; the obligation was a debt for a year before it became due and payable.[41]

If the facts are altered by making delivery of the car and payment of the purchase price concurrent conditions to be performed a year from the date of making the contract the second possibility is presented. There the duty of *B* to perform will not arise until *A* has tendered delivery of the car, and may therefore never arise. Is it then proper to say that the debt existed at the time the consideration — the promise to deliver the car — passed?[42]

Should the court ultimately adopt the view that the promised performance must be rendered to create a debt within the meaning of the statute even in bilateral contract situations some serious problems may be encountered in connection with promises to be performed in installments. Perhaps a satisfactory solution would be that only so much of the debtor's obligation as can be attributed to the performance rendered before acquisition of the homestead may be enforced against it. This might do violence to accepted ideas of entire and divisible contracts, however.[43]

None of the cases suggest a policy reason for the statutory exception, perhaps because one is difficult to detect. It usually cannot be argued that money was advanced in reliance on the land as an asset of the debtor since in the bulk of cases the property was not owned by the debtor at the time the advance was made. In those few cases where the land was owned as non-homestead property at the time the debt arose and was later converted into homestead the creditor protected is the one who needs and deserves protection least. Contract obligees become such of their own volition and could have refused to advance credit or loan money unless secured by a mortgage on the land or other device. Conversely, the tort creditor is virtually unprotected by the statute and has but small opportunity to protect himself since his right of action is, by definition, conferred on him against his will.

What little policy effect is thus achieved might better be reversed.

A slight justification may be thought to exist in that obligees of small amounts — ordinary family charge accounts, for example — seldom ask or can afford to ask for security, yet might be reluctant to advance such credit if they knew that their rights could be defeated by debtors converting other property into homesteads. Sufficient answer is that they know nothing of the matter either way. So remote a consideration should not be allowed to invade the general policy of homestead exemption.

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[41] *E.g.*, Christensen v. Esbeck, 167 Iowa 130, 149 N.W. 76 (1914).

[42] See text at note 37 *supra*.

[43] 3 CORBIN, CONTRACTS § 687 (1951). The principal dispute over divisibility concerns the right to partial payment where less than all of the promised performance is rendered. It seems that once that hurdle is crossed and a judgment obtained the question is no longer one of divisible promises or performance but one of accrual of the debt.