Our constitution is the basic contract between the people of Texas and their government; it is essential that we all understand the terms of that contract.

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understanding due process, therefore, it is necessary to review briefly what the Fourteenth Amendment's Due Process Clause requires of Texas. To this will be added whatever the Texas courts appear to require beyond the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment is many things. First, as discussed earlier in the *Introductory Comment*, it is a vehicle used by the United States Supreme Court to impose on the states some of the specific restrictions imposed on the United States by the Bill of Rights of the United States Constitution. But there is a Texas equivalent for each of these specific restrictions. Thus, whatever the Fourteenth Amendment requires in a specific area-free speech, freedom of religion, double jeopardy, for example-overrides the Texas equivalent but leaves the Texas courts free to go beyond what the Fourteenth Amendment requires. If the United States Supreme Court had said that the Fourteenth Amendment incorporates the Bill of Rights as such, one could dismiss the Due Process Clause from further consideration, for it would have served its limited purpose as a vehicle for incorporation. (Since "due process of law" is covered in the Fifth Amendment, that amendment, if incorporated, would have governed true due process issues.) But the court has not gone that route. Technically, therefore, most traditional Bill of Rights protections are matters of due process of law. (Or equal protection. See the *Explanation* of Sec. 3.) Nevertheless, the Fourteenth Amendment requirements of free speech, freedom of religion, and the like are di cussed as part of the applicable Texas section. Obviously, those are the sections controlling Texas government; Section 19 is limited to traditional issues of due process.

In American constitutional law two kinds of due process evolved: procedural and substantive. Procedural due process is the direct descendant of the Magna Carta provision quoted earlier. Originally, this meant only that individuals could not exercise the power of government arbitrarily; there had to be a basis in law for the action taken. Procedural due process originally concerned only how the government exercised-its power: due process did not concern what power the government had. For example. the Bill of Rights provisions concerning fair criminal trials are specific definitions of elements of procedural due process. In this procedural sense, a due process clause is a catch-all to secure fair procedure in situations not otherwise specified.

There is an important distinction between the traditional procedural due process flowing from Magna Carta and procedural due process as it developed in American constitutional law. Since our written constitutions impose limitations on the power of government, courts do not hesitate to invalidate statutes which the courts find to be procedurally unfair. (In England an Act of Parliament is "the law of the land" in the words of the Magna Carta.)

The principal procedural requirement of due process is that a person have recourse to the courts for the protection of his life, liberty, or property. (Sec. 13 in effect duplicates this aspect of procedural due process.) This is a logical imperative, for if the purpose of procedural due process is to require the agents of government to follow the law of the land, only the courts can enforce the requirement. (For a recent statement of this requirement, see *Board of Firemen's Relief and Retirement Fund Trustees of Texarkana v. Hamilton,* 386 S.W.2d 754, 755 (Tex. 1965).)

Closely allied to the right to recourse to the courts are the right to a full day in court and the right to due notice. A "full day in court" simply means that once inside, a party to a lawsuit mut be given the opportunity to present his case. (See *Turcotte v. Trevino,* 499 S. W.2d 705. 723 (Tex. Civ. App.-Corpus Christi 1973, *writ ref d n. r.e.*).) "Due notice" means that one must receive adequate

notice that he has been sued or otherwise has an interest in the litigation. Normally the .law requires personal service: constitutional issues arise when something is substituted for personal service. The rules are technical and can only be summarized. Generally. substituted service is permissible only when personal service is not possible. Common examples are unclaimed bank deposits and actions to clear up a title to land. (For a recent example see *City of Houston* r. *Fore,* 401 S.W.2d 921 (Tex. Civ App.-Waco 1966). *ajj"d.* -112 S.W.2d .35 (Tex. 1967).)

In recent years the United States Supreme Court has broadened procedural due process in a substantive sense, so to speak. This has taken the form of rulings that it is a denial of procedural due process to permit a creditor in effect to collect his money before he wins his suit. In *Sniadach v. Family Finance Corp.* (395 U.S. 337 (1969)), the court struck down a statute that permitted garnishment of wages without notice or hearing and prior to judgment. This was soon followed by *Fuentes v. Shevin* (407 U.S. 67 (1972)), in which the court struck down statutes that allow the seller to repossess goods sold under an installment contract, again without notice or hearing and prior to judgment. Although these new rules are not limited to poor people (see *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975)). there is no doubt that the court has been influenced by the normal inequality in bargaining power between the seller and buyer. This is especially the case when the contract of sale itself requires the buyer to agree to summary repossession. See. for example, *Gonzales* 1·. *County of Hidalgo* (4 9 F.2d 1043 (5th Cir. 1973)), which involved seizure of household goods for nonpayment of rent, again without notice or hearing. The lease provided that the landlord could do this, but the court was not satisfied that the tenant understood that he was signing away a constitutional right.

There is another area in which the distinction between procedural and substantive due process is blurred. This concerns statutory presumptions. For many years the courts have held that due process is denied if a statute creates an unreasonable presumption or a presumption that unreasonably shifts the burden of proof in litigation. The leading case is *Western & Atlantic R.R. v. Henderson* (279 U.S. 639 (1929)), which struck down a statute creating a presumption of railroad negligence in a fatal grade-crossing accident. The crucial vice in the presumption was that a jury could weigh the presumed fact against evidence of due care by the railroad employees. Generally, there is no objection to a presumption that operates only in the absence of evidence because the presumption disappears as soon as the party against whom the presumption runs introduces evidence contrary to the presumption. The Texas courts have construed Section 19 to provide the same protection against unreasonable presumptions. (See *Prideaux v. Roark,* 291 S.W. 868 (Tex. Comm'n App. 1927, *jdgmt adopted)* and *Rawdon v. Garvie,* 227 S.W.2d 261 (Tex. Civ. App.-Dallas 1950, *no writ).)*

A recent United States Supreme Court case demonstrates how easy it is to rely on the procedural rule of presumptions to reach what is a matter of substantive due process. Connecticut, like Texas, charges nonresidents higher tuition at state universities than is charged residents. Connecticut defined a nonresident as one who was not a resident when he applied for admission. Thus, once a nonresident always a nonresident until educatioH was completed. This, the court held, was an unconstitutional presumption under the Fourteenth Amendment because a student was not permitted to show that after admission he became a bona fide resident *(Vlandis v. Kline,* 412 U.S. 441 (1973)). A dissenting opinion convincingly demonstrated that the court was simply making a substantive decision that a state could not exercise control over the ease with which young out-of-state college students could turn themselves into "residents" in order to save money. A

concurring opinion objected to this characterization but really confirmed it by analogizing the situation to the equal protection cases that forbade discrimination between residents and nonresidents. It has already been noted that the Supreme Court began sometime ago to use the Equal Protection Clause in a manner reminiscent of substantive due process. (See the *Explanation* of Sec. 3.)

There is good reason for the Supreme Court's hemming and hawing about whether it has revived substantive due process under other guises. For the first third of this century the court waroundly and consistently criticized for acting as a superlegislature in striking down legislation in the name of the Due Process Clause. (There is a story, possibly apocryphal, that Chief Justice Taft once returned from conference, tossed the record and briefs in a case on his law clerk's desk, and said: ""We just decided this is a denial of due process. Figure out why.") In almost all instances the invalidatyd legislation represented efforts by legislatures to regulate economic behavior, normally for the benefit of the small businessman, the employee, or the consumer. In the middle of the 1930s the court began to retreat from this substantive use of due process. By 1963 Justice Black could assert for the court that substantive due process was dead. (See *Ferguson v. Skrupa,* 372 U.S. 726, 730-31. Justice Harlan carefully concurred in the result on the grounds that the legislation in question bore "a rational relation to a constitutionally permissible objective" (p. 733). This is "due process" language.)

It has already been noted that the justices were able to find substitutes for substantive due process by relying upon specific rights in the Bill of Rights, by expanding the concept of equal protection, and by stretching procedural due process. Yet two years after *Ferf?uson,* the court found itself unable to rely upon substitutes and had to revive substantive due process. This was the case of *Griswold v. Connecticut* (381 US. 479 (1965)), in which the court struck down a law prohibiting the use of contraceptives. Although there were only two dissenting justices, the court erupted with six opinions, all arguing over whether the right to be protected was a matter of substantive due process. The landmark abortion decision *(Roe v. Wade,* 410 U.S 113 (1973)), fairly well settled the issue. Today, the Due Process Clause of the Fourteenth Amendment torhids some -.uhstanlt\ e -.tate action that is not cmered han} ot the specific protectiom else\\ here enumerated in a Bill of Rights.

Part of this judicial thrashing around is a matter of semantics. ""Substantive" due process, as noted above, is the term used to describe the judicial gloss that many people argued was designed to impose a laissez-faire economic system. In that sense, substantive due process is still dead. What the court appears to be doing now is to abandon efforts to invalidate legislation by stretching other concepts such as equal protection, freedom of speech, and the like. Instead, the court accepts some rights as ""fundamental" and requires the state to justify interfering with them. What these rights are is no easier to describe than it was to describe what a state could do in the days of substantive due process. Now, as then, there is a general philosophical base upon which the court relies. In some respects the fundamental right protected by the court is that of privacy, but this is an over-simplification. A more sophisticated guess is that the court tries to preserve the essence of a *free* society against the encroachments that seem to flow from an increasingly complex society.

There is no indication that the Texas courts are engaged in such complicated philosophical considerations of the constitutional limitations imposed by the Texas Bill of Rights. This is probably a result of the relative scarcity of significant constitutional issues compared with the volume reaching the United States Supreme Court. In any event, Section 19 appears to be construed in the traditional manner discussed earlier in the *Explanation* of Section 3.

article where it did not belong either. (The "tax" was transferred; the old words remained in Sec. 51 until1968.)

Things really began getting complicated in 1954 when Section 51-b was added to Article III. It created another special fund and moved the 2¢ tax thus:

> (d) The State ad valorem tax on property of Two (2¢) Cents on the One Hundred ($100.00) Dollars valuation now levied under Section 51 of Article III of the Constitution as amended by Section 17, of Article VII (adopted in 1947) is hereby specifically levied for the purposes of continuing the payment of Confederate pensions as provided under Article III, Section 51, and for the establishment and continued maintenance of the State Building Fund hereby created.

Although the foregoing provision carefully but inaccurately describes the peregrinations of the 2¢ levy, people soon forgot that they had moved the tax back to Article III. In 1958, Section 66 was added to Article XVI. It provided for payment of pensions to certain Texas Rangers or their widows but "only from the special fund created by Section 17, Article VII."

With the adoption of Section 1-e in 1968, the peripatetic confederate pension tax finally found a resting place in the article on taxation. Even so, people still forgot where the tax provision actually was. Section 1-e of Article V.III states:

> The State ad valorem tax of Two Cents ($.02) on the One Hundred Dollars valuation levied by Article VII, Section 17, of this Constitution shall not be levied after December 31, 1976.

Even in 1875, the convention delegates were not watching each other's left and right hands carefully. Section 1 states that the legislature may impose a poll tax; the original Section 3 of Article VII directly levied a poll tax of one dollar. The original Section 2 of Article VIII granted the legislature power to exempt from taxation "public property used for public purpose"; Section 9 of Article XI directly exempts from taxation such public property of counties, cities, and towns.

Basic constitutional principles of taxation. In a state constitution there is no need to mention any power to tax; the legislature has all the taxing power anybody can dream up. It follows that any affirmative statements about the power to tax are redundant. This is so even if the purpose is to introduce a limitation. It is not necessary, for example, to say that occupation taxes may be imposed as a hook upon which to hang a prohibition against taxing agricultural and mechanical pursuits; it is sufficient to provide that no occupation tax may be imposed on mechanical and agricultural pursuits. ("Mechanics and farmers" would be less ambiguous, of course, but that is another matter.)

Keeping power and limitations on power straight can get complicated. For example, the straightforward proposition "All property shall be taxed in proportion to its value" is not a grant of power to tax. (If it is a command to tax property, it is no more effective than any other affirmative command to the legislature.) The proposition is both a limitation on the power of the legislature to exempt property from any taxation and on either the power to set different rates for different kinds of property or to tax property by any method other than ad valorem. (See *Explanation* of Sec. 1 concerning this ambiguity.) It follows that a grant of power to exempt property from taxation is an exception to the limitation rather than a true grant of power.

Thrust of the Texas limitations. A glance at the table at the end of this *Introductory Comment* reveals that most of the restrictions, limitations, exemptions, and exceptions involve ad valorem property taxes. The state is free to levy and

Great Depression. Although raising revenue was a prime purpose of the tax, it was also a regulatory measure designed to decrease the competitive advantage enjoyed by large corporations. The Texas tax was an annual occupation tax graduated according to the number of stores in the state, the graduation running from $1 for a single store to $750 for each store over 50. (Louisiana went further and graduated the tax according to the number of stores both in and out of the state. That tax was upheld in *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1936).) The Supreme Court of Texas disposed of the classification argument by using the *Stephens* case quotations set out above and several United States Supreme Court cases that had upheld chain store taxes.

The State charges no ad valorem tax - under this principal how can a political subdivision?

******* Section 1limits local occupation taxes to one-half of any occupation tax levied by the state. This means: "no state tax, no local tax." It does not mean: "state tax, local tax." This second proposition is not obvious from the proviso itself. The effect comes from the rule that no local government, except a home-rule city, has any taxing power except that granted directly by the constitution or by statute. Home-rule cities may levy a piggy-back occupation tax unless the legislature has withdrawn the power. As noted above, the legislature has done just that in a manner that puts home-rule cities in the same position as other local governments. (Nobody appears to have strained to read the proviso of Sec. 1 as a direct grant of taxing power.)

Local governments, particularly home-rule cities, frequently exercise their police power to regulate a business by requiring a license. Since this is a license to engage in an occupation, a question arises if there is a license fee high enough to generate revenue, thus arguably turning the fee into an "occupation" tax. An early case is *Brown v. City of Galveston* (97 Tex. 1, 75 S.W. 488 (1903)). Galveston enacted an ordinance requiring a license and a fee for all vehicles kept for public use or hire. It was argued that the size of the fee demonstrated that it was in part a revenue measure and therefore unconstitutional under Section 1 since there was no equivalent state occupation tax. The court conceded "that the police power cannot used for the purpose alone of raising revenue, and, where exercised by a city for purpose of raising revenue, it will be held to be by virtue of taxing power, and not of the police. But the fact that the assessment under the police power results in producing revenue ... does not deprive the assessment of the character of a police regulation." (97 Tex., at 75; S.W., at 496.) The court concluded that the fees were levied in the exercise of the police power and that the incidental revenue did not invalidate the ordinance.

Prop tax is clearly to raise revenue and by using police power to evict someone for being unable to pay is the equivalent of a license fee.

The rule-a license fee is not an occupation tax if any revenue above the cost of regulation is incidental-seems clear enough; but as frequently happens when the judiciary applies a clear rule, the results seem a little strange. Consider *Mims v. City of Fort Worth* (61S.W.2d 539 (Tex. Civ. App.-Fort Worth 1933, *no writ)*) and Ex parte *Dreibelbis* (109 S.W.2d 476 (Tex. Crim. App. 1937)). In the *Mims* case, an annual license fee of $100 for selling fruits and vegetables at wholesale was held a valid police power regulation and not an occupation tax; in the *Dreibelbis* case, a license fee of $10 on a "temporary merchant" was held to be an occupation tax because the fee was "not levied for the purpose of regulating the enumerated businesses, but to raise revenue." (p. 477.)

There is no "revenue" above the cost of the fee to live.

Since the "fee" is solely to raise revenue then the fee must be an occupation tax. There is no occupation here. Should the "fee" be considered a license, I don't recall applying for one.

In all fairness, it should be noted that the supreme court said in the *Hurt* case discussed earlier that it "is sometimes difficult to determine whether a given statute should be classed as a regulatory measure or as a tax measure." (130 Tex., at 438; 110 S.W.2d, at 899.) The court continued by stating that if the primary purpose of the fee appears to be to raise revenue, the fee is an occupation tax; if the primary purpose appears to be regulation, the fee is a license. Difficult to apply or not, the rule remains clear.

If a license fee is a license fee and not an occupation tax, it makes no difference

constitutionally for some kind of homestead exemption. Most of these states specify the same exceptions-purchase money, improvements, and taxes-as Texas does. A few specify additional exceptions. For example, Arkansas and Virginia permit forced sale of the homestead to pay judgments against persons such as guardians, attorneys, and public officers for moneys collected by them. (See Ark. Const. art. IX, sec. 3; Va. Const. art. XIV, sec. 90.)

About half of the states that have homestead exemptions also have a constitutional provision prohibiting the husband from selling or encumbering the homestead without the wife's consent. A few states-Kansas, Nevada, Tennessee, and Wyoming, for example-apply this prohibition to both spouses. The scope of the homestead protection in other states is discussed in the *Comparative Analysis* of Section 51.

Author's Comment

Inclusion of homestead provisions in the Texas Constitution has been under attack for over 50 years. (See Cole, "The Homestead Provisions in the Texas Constitution," 3 *Texas L. Rev.* 217 (1925).) Critics of the present constitutional provision point out that about half of the states apparently have found it possible to protect the family home without benefit of any constitutional provision on the subject, while half a dozen others include only a directive to the legislature to provide for such an exemption.

These critics assert that in addition to being unnecessary, the present homestead provisions are undesirable from the standpoint of both debtors and creditors. As pointed out earlier, the section inhibits a homeowner's financing options and makes it difficult for him to be his own home improvement contractor. The provision creates uncertainty for lenders, who risk losing their security if they err in determining whether the property is homestead, whether it is within one of the three exceptions, or whether both spouses have effectively consented to the encumbrance. Defining the type and extent of the homestead exemption creates additional difficulties and inequities.

It has been suggested that homestead claimants in some circumstances might be better protected without any homestead exemption at all. For example, the present provision effectively prevents mortgaging the homestead to meet a financial emergency; the only source of funds thus may be outright sale of the homestead-a result that certainly does not accomplish the goal of preserving the family home. The section's efficacy in protecting the wife from her husband's improvidence also has been questioned. (Comment, "The Wife's Illusory Homestead Rights," 22 *Baylor L. Rev.* 178 (1970).)

As noted above, some state constitutions treat the matter of homesteads by simply directing the legislature to provide for them. It has been pointed out that Texas could accomplish this merely by amending present Section 49 of Article XVI. That section gives the legislature the power and duty "to protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female." This section could be amended to speak to "personal and real property." The efficacy of such a provision may be doubted, however, since there is no sure way to enforce such a command if the legislature chooses not to comply with it.

Sec. 51. AMOUNT AND VALUE OF HOMESTEAD; USES. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars, at the time of their designation as the homestead, without reference to the value of any

Today the city lot is 10 acres.

improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

History

The nature of the homestead was defined in the section creating the exemption until 1875, when the definition was moved to its own separate section, this Section 51. (See the *History* of Sec. 50.) The rural homestead acreage limit was increased from 50 to 200 acres, the present figure, by the Constitution of 1845.

The limit on urban homesteads has undergone qualitative as well as quantitative change. The 1839 statute placed no limit on the overall value of the urban homestead but protected improvements on the homestead only up to $500. The 1845 Constitution eliminated this limitation on the value of improvements and instead imposed a $2,000 limit on the value of the lot or lots claimed as the urban homestead. This figure was increased to $5,000 in the 1869 Constitution and was raised to $10,000 by an amendment adopted in 1970.

The requirement that city lots be valued "at the time of their designation as the homestead, without reference to the value of any improvements thereon" was added in 1869. This was a response to a decision holding that urban homesteads were to be measured at current value, including value of improvements, and that any excess over the constitutional limit could be subjected to forced sale. *(Wood v. Wheeler,* 7 Tex. 13 (1851).)

There was an attempt in the 1875 Constitutional Convention to limit the exemption in any event to $10,000, but it was defeated. *(Journal,* pp. 711-12.)

The 1973 amendment described in the annotation of Section 50 also amended this section to make a business homestead available to single adults as well as heads of families.

Explanation

What part of this lot is over 10 acres?

What is or is not homestead property under this section is a rather intricate question. The basic rule is that the debtor's property is subject to forced sale to the extent that it exceeds the stated acreage or value limits. In the case of a rural homestead, the excess acreage over 200 is severed from the rest and sold. The homestead claimant, however, has the right to decide which 200 acres to retain as his homestead. He is permitted to carve out a 200-acre tract of any shape, or even several separate tracts, and thus may select only the most valuable portions of his land as the homestead. (See *Cotten v. Friedman,* 158 S.W. 780 (Tex. Civ. App.-Galveston 1913, *no writ).)* And there is no limit on the value of the rural homestead.

When the property claimed as the homestead is located in a town or city, the limitations are entirely different. There is no limit on the size of an urban homestead, but to the extent that its value exceeds $10,000 (at the time of designation), it is not exempt. The value of improvements is excluded from this calculation of value. If the value exceeds $10,000, the excess can be reached in one of two ways. If the property is subject to partition (for example, if it consists of two lots, one of which is within the value limit), it will be divided and only part of it will be sold, just as in the case of a rural homestead. But if it is incapable of partition (for example, a single lot occupied by a residence), the entire property will be sold. A portion of the proceeds goes to the debtor as a sort of allowance in lieu of his homestead. That portion is a fraction whose numerator is the maximum exemption

and whose denominator is the value of the lot (less improvements) at the time of designation. For example, if the value of the lot without improvements was $15,000 at the time of designation, and if the maximum exemption at that time was $10,000, the exempt portion is two-thirds. *(Hoffman v. Love,* 494 S.W.2d 591 (Tex. Civ. App.-Dallas), *writ refd n.r.e. per curiam,* 499 S.W.2d 295 (Tex. 1973).) The nonexempt portion of the proceeds is applied to the debt, and if there are still proceeds left after that, they go to the debtor. If the property does not bring at least $10,000 plus the present value of the improvements, the sale is nullified and the debtor retains title. The reasoning is that in such a case there is no excess over the constitutional limit-*i.e.,* $10,000 excluding the value of improvements. *(Whiteman v. Burkey,* 115 Tex. 400, 282 S.W. 788 (1926).)

The value of urban lots is determined "at the time of their designation as the homestead." Although there is no authoritative decision on the point, the general rule seems to be that this means the time at which the property first takes on the character of a homestead. This in turn means the time at which the claimant begins to occupy it as a homestead, or take some action indicating his intent to do so. (See *Boerner v. Cicero Smith Lumber Co.,* 298 S.W. 545 (Tex. Comm'n App. 1927, *jdgmt adopted).)*

The statutes provide a procedure for formally designating the homestead. By this means, a claimant may choose whether to select as his homestead his rural property or his city lots and may decide which 200 acres of his rural property he wants to make exempt. (Tex. Rev. Civ. Stat. Ann. arts. 3841-3843.) No formal designation of the homestead is required, however. Property is exempt if it is in fact a homestead, and if the claimant owns more than 200 acres of rural land, or both rural and urban land, he is free at any time to select the land he wants to protect or change a designation already made. *(Green v. West Texas Coal Mining & Development Co.,* 225 S.W. 548 (Tex. Civ. App.-Austin 1920, *writ refd).)*

<--- NOTE and this is a home-stead

A debtor may be entitled to homestead protection even if he owns no realty in fee simple. The exemption applies not only to ownership in fee simple, but to any possessory interest in land. A tenant, therefore, can claim a homestead in his leasehold interest. *(Cullers & Henry v. James,* 66 Tex. 494, 1 S.W. 314 (1886).) This is significant primarily in the case of business and agricultural leases, since a residential leasehold rarely has enough value to interest a creditor in seizing it.

Texas is unique in permitting a "homestead" exemption for business property. A single adult or head of a family who owns a lot or lots in a city or town, upon which he operates a business, may claim a homestead exemption for those lots. If the combined value of his business lots and residential lots does not exceed $10,000 (again, calculated at time of designation and without regard to value of improvements), he may also claim an exemption for his residential property. *(Rock Island Plow Co. v. A/ten,* 102 Tex. 366, 116 S.W. 1144 (1909).) The owner of a rural homestead, however, cannot also claim a business homestead. *(Rockett v. Williams,* 78 S.W.2d 1077 (Tex. Civ. App.-Dallas 1935, *writ dism'd).)* The business homestead is a form of urban homestead, and the courts have held that the homestead may consist of either rural property or lots in a city or town, but not both. (See *Keith v. Hyndman,* 57 Tex. 425 (1882).)

The owner of an urban homestead may rent a portion of it temporarily without losing his exemption, but if the property takes on a permanent rental character, inconsistent with its use as a homestead, it loses its exempt status. *(Scottish American Mortgage Co. Ltd. v. Milner,* 30 S.W.2d 582 (Tex. Civ. App.-Texarkana 1930, *writ ref* d); *Blair v. Park Bank & Trust Co.,* 130 S.W. 718 (Tex. Civ. App. 1910, *writ ref* d).) The owner of a rural homestead or an urban business homestead apparently also may lease it for a term of years without losing the homestead exemption, provided he intends to reoccupy it as a homestead. *(E.g., Alexander v.*

Lovitt, 56 S.W. 685 (Tex. Civ. App. 1900, *no writ);* In re *Buie,* 287 F. 896 (N.D. Tex. 1923).)

Comparative Analysis

The constitutions of California, Washington, Nevada, Wyoming, North Dakota, and South Dakota permit the legislature to determine how much property is eligible for homestead protection. Most of the states that provide constitutionally for a homestead exemption, however, also prescribe a maximum homestead size or value. The constitutional homestead limits in Texas are more generous than those of any other state. Eight states have monetary limits of $2,500 or less, and six have acreage limits of 160 acres or less. No other state prescribes an urban homestead maximum as great as $10,000 or a rural homestead as large as 200 acres.

Oklahoma is the only other state whose constitutional homestead provision mentions business, but it does not create a business homestead in the sense that the Texas Constitution does; it refers rather to property used as a combination business and residence. (See Okla. Const. art. XII, sees. 1, 3).

Author's Comment

The present constitutional definition of the homestead creates a number of difficulties and inequities. These are elaborated in Cole, "The Homestead Provisions in the Texas Constitution," 3 *Texas L. Rev.* 217 (1925), and Woodward, "The Homestead Exemption: A Continuing Need for Constitutional Revision," 35 *Texas L. Rev.* 1047 (1957).) One inequity arises from the absence of any limit on the value of the 200-acre rural homestead. As a result, the exemption of rural property bears no relation to the claimant's needs. The owner of a rural homestead may be judgment-proof even though he occupies an elaborate country estate worth hundreds of thousands of dollars. To a lesser extent, the same problem arises in the case of an urban homestead because its value is fixed at the time the homestead is designated and does not include the value of improvements. Thus a $100,000 home on a city lot now worth $30,000 maybe totally exempt from forced sale if the lot was worth less than $10,000 at the time of designation as a homestead.

The definitions of business and rural homesteads go far beyond the original intent of preserving the family home. The rural homestead may include not only the home site and surrounding land, but also separate parcels of land many miles away, so long as the total does not exceed 200 acres. The business exemption bears little relation to the goal of preserving the home. Rather, it seems more nearly akin to such provisions as the prohibition against garnishment of wages. (Sec. 28, Art. XVI.) Like the garnishment prohibition, its goal is protection of one's means of livelihood rather than protection of the family home. No other state exempts a "business homestead," and exempting a business in addition to a residence is hard to justify. As interpreted, the provision discriminates against a person who lives in the country but operates a business in the city: He cannot have both a rural and an urban homestead even though a city dweller can.

These difficulties could be alleviated, if not eliminated, by removing from the constitution all language describing and limiting the homestead, leaving its nature and the extent of the exemption to be defined by the legislature. At least six state constitutions now do so. The major objection to this approach is that it permits the legislature to effectively abolish the homestead exemption by narrowing its definition or creating additional exceptions. Distrust of the legislature may be more understandable here than in other contexts. The economic interests that would benefit from restriction of the homestead exemption are a fairly well-defined and influential group and might be in a better position to secure passage of legislation

than the more diffuse and disparate interests that benefit from the exemption.

The 1963 Michigan Constitution illustrates a compromise that insures some homestead protection without preventing the legislature from adjusting the extent of protection. Instead of fixing a maximum homestead amount, as Texas and most other states do, the Michigan Constitution fixes a minimum ("of not less than $3,500") and permits the legislature to define the kinds of liens excepted from homestead protection. (See Mich. Const. art. X, sec. 3.)

Sec. 52. DESCENT AND DISTRIBUTION OF HOMESTEAD; RESTRICTIONS ON PARTITION. On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.

History

The 1845 Constitution contained a general provision exempting the hqmestead of a family from forced sale to pay debts (see also the *History* of Sec. 50 of Art. XVI), but it did not mention the fate of the homestead after the claimant's death. The supreme court held that the homestead exemption created by the 1845 Constitution expired on the death of the person claiming it and did not apply to his heirs. *(Tadlock v. Eccles,* 20 Tex. 782 (1858).) The legislature, however, created a statutory exemption for widows and minor children. (Tex. Laws 1848, Ch. 157, 3 *Gammel's Laws,* p. 249.) The supreme court held that under this statute, the homestead property of an insolvent husband passed to his widow and children rather than to other heirs to whom the property otherwise would have passed. *(Green v. Crow,* 17 Tex. 180 (1856).)

A tax is a debt!

Section 52 was added by the 1875 Convention, apparently in an attempt to abrogate this statute and ensure that homestead property would pass to the heirs in the same manner as other property. (See *Ford v. Sims,* 93 Tex. 586, 57 S.W. 20 (1900).) The second clause apparently was added to give the surviving spouse and minor children some protection in lieu of that previously available to them by statute. After adoption of the 1876 Constitution, the statute giving the widow and minor children the homestead to the exclusion of other heirs was held unconstitutional on grounds thaUt violated Section 52. *(Zwernemann v. von Rosenburg,* 76 Tex. 522, 13 S.W. 485 (1890).)

Explanation

Section 52 does three things. First, it prevents the legislature from prescribing rules of inheritance for homestead property different from those that govern other property. This means that title to homestead property ultimately passes by will or by the rules of descent and distribution to whomever would have taken it had it not been a homestead. For example, if a man dies leaving a will that gives his home to a church, the church eventually will get the property, even though it is homestead property. Although this section prevents the legislature from treating homestead property differently from other property for purposes of inheritance, it does not prevent the legislature from treating homestead property differently with respect to creditors. The legislature has done so; it has provided that if the owner of a homestead dies survived by a widow, minor children, or an unmarried daughter who lives with the decedent's family, the homestead property passes free of the decedent's debts. (Probate Code sees. 271, 179.) This is true even if the heir who