

KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1935

PART 2—NINTH ANNUAL REPORT

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For the improvement of our Judicial System and its more
 efficient functioning.

FOREWORD

We print in this issue a treatise on the Kansas Law of Homestead. This has been prepared by James W. Taylor, under the direction of the Judicial Council. Mr. Taylor is a junior in the Washburn law school, whose work as a law student and whose prelaw training have specially qualified him for this class of work. We were able to give him half-time employment sufficient for him to compile this treatise. We believe it timely and hope it may be helpful.

We are collecting data from clerks of the district court, similar to that previously collected. Blanks for that purpose have been sent out, and letters received indicate the work is going forward. Summaries and tables compiled from these reports will appear in our December BULLETIN.

As rapidly as we can find time to work at it we are going forward with the writing of a code of procedure for probate courts and a redrafting of the law of estates. We have progressed far enough in this work to appreciate its need and to be convinced that all of this may be simplified, made more definite and greatly improved. When completed it will be published in our BULLETIN.

At the special session of the legislature, likely to be called this fall, we plan to present for its consideration most, if not all, the measures which we presented at the last session, but which for one reason or another were not enacted. These were published in our April BULLETIN.

Our proposed redraft of article III of our constitution, relating to the judiciary, has received a great deal of attention since the legislature adjourned. A committee of nine members from the State Bar Association met with the Judicial Council for a day's study of the amendment. Later subcommittees of those bodies worked it over with a view of shortening it, and succeeded in reducing it to about 950 words in eleven sections. (The present article has about 1,250 words in twenty sections.) Copies of this redraft were sent to each member of the Judicial Council, the committee of the State Bar Association and to each member of the judiciary committees of the Senate and the House of Representatives. The State Bar Association invited all those persons to a dinner and discussion of the proposal the evening of the first day of the meeting of the State Bar Association. About forty were present. The next day the district judges discussed it in a meeting of their association. In all these discussions frank statements of views were encouraged. The main provisions of the proposal met with almost universal approval. The need of rewriting the article along the lines suggested and the improvement of our judicial system thereby were generally recognized. There were divergent views as to some of the details. No doubt these can be worked out satisfactorily. We plan to present the proposal at the special session of the legislature, if one is called, so it may be submitted to a vote of the people at the general election in 1936.

THE KANSAS LAW OF HOMESTEAD

Our constitution (Art. 15, § 9) reads: "A homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: *Provided*, The provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." (See, also, R. S. 22-102, 60-3501.)

I. Introduction

The word *homestead*, as applied to homestead-exemption law, has been defined as the dwelling house constituting the family residence, together with the land upon which it is situated, and the appurtenances thereto.¹ The word is used in its popular sense in the constitution,² meaning the family residence, etc., and for our purposes it shall mean just that. But inasmuch as we are dealing with homestead-exemption rights, we shall endeavor to maintain the distinction between the usual property rights in the homestead property and the special exemption privileges attached thereto,³ for one person may have some right of ownership in property as to which others, but not he, have the rights of exemption.

1. See *Morrissey v. Donohue*, 32 Kan. 646, 5 Pac. 27; *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223; *Linn City Bank v. Hopkins*, 47 Kan. 580, 28 Pac. 606, 27 A. S. R. 309.

2. *Bebb v. Crowe*, supra.

3. This is especially important in considering the property and exemption rights of heirs and devisees of homestead property.

It has been stated that the homestead interest is an estate in land.⁵ If so, it is admittedly⁶ a very difficult one to define. The most logical view is that "the homestead interest is not an estate in land . . . It is an exemption of land under stated conditions. If the conditions do not exist, or having once existed, are at an end, the exemption ceases."⁷

5. *Helm v. Helm*, 11 Kan. 19; *Coughlin v. Coughlin*, 26 Kan. 116; *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529; *Postlethwaite v. Edson*, 102 Kan. 619, 171 Pac. 769.

6. *Coughlin v. Coughlin*, supra.

7. *Ellinger v. Thomas*, supra; quoted in *Postlethwaite v. Edson*, supra, p. 624. While the former case has been overruled, that does not have a bearing here.

Whether the homestead interest is an estate or not, it is, unlike the inchoate right of inheritance, a present interest. There are rights which the spouse of the owner of a homestead has which *presently* make void an attempt by the one to dispose of the property without the consent of the other.

The constitution⁸ gives the homestead-exemption right, and although there was no such right at the common law, such provisions in constitutional and statutory law as create this right are generally deemed not in derogation of common law right,⁹ which makes it legally logical to construe such provisions liberally in favor of the debtor, and this has been the aim of Kansas courts.¹⁰

8. Article 15, sec. 9; cf. 29 C. J. 783, 787; *Howell v. McCrie*, 36 Kan. 636, 14 Pac. 257; 59 A. R. 584; *Dean v. Evans*, 106 Kan. 389, 188 Pac. 436.

9. Cf. C. J. 783, 787; R. S. 77-109.

10. *Howell v. McCrie*, 36 Kan. 636, 14 Pac. 257, 59 A. R. 584; *Dean v. Evans*, 106 Kan. 389, 188 Pac. 436; *McLain v. Barr*, 125 Kan. 286, 264 Pac. 75.

The purpose of the homestead-exemption laws was well expressed by Justice Valentine in *Morris v. Ward*:¹¹

"It was not established for the benefit of the husband alone, but for the benefit of the family and of society—to protect the family from destitution, and society from the danger of her citizens being paupers. The homestead was not intended for the play and sport of capricious husbands merely, nor can it be made liable for his weaknesses or misfortunes."

11. 5 Kan. 239, 244. See, also, *Farlin v. Sook*, 26 Kan. 397; *Howell v. McCrie*, 36 Kan. 636, 14 Pac. 259, 59 A. R. 584; *LaRue v. Gilbert*, 18 Kan. 220; *Birch v. Solomon National Bank*, 121 Kan. 333, 246 Pac. 688, 121 Kan. 334, 246 Pac. 1007.

II. Aquisition of Homestead Rights

One can acquire the benefits of the homestead provisions of the constitution and the statutes either by establishing a home for his family, or by being a surviving member of the family of one establishing the homestead.¹²

12. In section VII the rights of heirs and devisees of a homestead owner are discussed in detail.

A. WHO ARE ENTITLED

Since, as indicated above, the purpose of the homestead laws is for the protection of the debtor's family, rather than the debtor alone, one cannot establish a residence impressed with the homestead exemptions unless he has a family. Insofar as the original establishment of a homestead is concerned, it has generally been required that one have "dependents," although the degree of actual dependency is not so important.¹³ The question of what constitutes a family has most commonly arisen in the consideration of the rights of survivors, and in this respect the law increasingly has been interpreted for the benefit of the *sole survivor, or sole occupant*. Thus, in *Ellinger v. Thomas*¹⁴ it was held that a widower, unmarried, whose children have moved away and are no longer dependent upon him, cannot continue to retain the homestead exemptions. In *Batley v. Barker*¹⁵ it was held that an unmarried daughter 27 years old who had lived with her father on the homestead, could not, after his death, occupy the premises alone free from the debts of her father. This accounts for the fact that in *Cross v. Benson*,¹⁶ after holding that a widow alone may continue to occupy the homestead free from the debts of her husband (thus in effect overruling *Ellinger v. Thomas*, if not *Batley v. Barker*, but denying the necessity of "overturning any prior decision"), the court held that a minor child who resides with her grandparents and is in fact dependent on them and they are morally responsible for her nurture, is a member of their family within the meaning of the homestead provision, without formal adoption, even though her divorced father has a decree of court awarding her custody to him. This provides a plurality of persons, "if . . . a plurality of persons were required to form the family."¹⁷

13. *First National Bank v. Warner*, 22 Kan. 537.

14. 64 Kan. 180; 67 Pac. 529 (overr. in *Weaver v. Bank*, infra, note—).

15. 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33 (overr. in *Koehler v. Gray*, infra, note—).

16. 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560. See, also, *Aultman v. Price*, 68 Kan. 640, 75 Pac. 1019, holding that a widow as sole occupier of homestead could maintain the exemption, even though the children were all living in homes of their own.

17. *Cross v. Benson*, supra, p. 509. That it was at one time taken for granted that a plurality of persons was a prerequisite to having exemption rights is indicated in the case of *Fish v. Street*, 27 Kan. 270. There the wife, in fact a resident of Kansas, was married to a man not a resident here. In allowing her exemption rights the court said: "She was, however, the head of a family, she and her youngster sister . . . living together as a family." Here it was personalty, not realty, involved. See, also, *Chambers v. Cox*, 23 Kan. 393.

At any event, *Ellinger v. Thomas* was expressly overruled in *Weaver v. Bank*,¹⁸ and *Batley v. Barker* met with the same fate in *Koehler v. Gray*.¹⁹ The Weaver case held that there need not be surviving children in order to give the widow homestead-exemption rights as to her husband's creditors,²⁰ and her own creditors as well, whether the obligations were incurred prior or subsequent to the death of the former spouse, and without regard to who owned the legal title to the property during the marriage; yet it was expressly stated that it requires a plurality of persons to establish a homestead.²¹

18. 76 Kan. 540, 94 Pac. 273, 16 L. R. A., n. s., 110, 123 A. S. R. 155.

19. 102 Kan. 878, 172 Pac. 25; L. R. A. 1918D 1088. *Held*, that an unmarried adult daughter, sole survivor of her mother and father, could maintain the homestead free from her father's debts.

20. *Accord.*, *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074, Ann. Cas. 1914 A 647. See, also, *Schloss v. Unsell*, 114 Kan. 69, 216 Pac. 1091, where it was stated that "if" one in such situation the husband had homestead rights, etc.

21. Perhaps as to the widow's debts accruing after her spouse's death, this permitted a single person to create a homestead.

B. RESIDENCE OF FAMILY REQUIREMENT

A further prerequisite to the acquisition and maintenance of homestead-exemption rights in property is occupancy by the family as a residence.²² Since the family is meant to be the primary beneficiary of the homestead laws,²³ the family must occupy the premises.²⁴ Thus, where the owner of the property resides upon it, but his wife and children have never been in Kansas, and it is not and never has been the intention of the owner to bring them to Kansas to live on the premises, the owner is not entitled to the benefit of the homestead-exemption laws of this state.²⁵ The same is true if the family's coming to this state to reside on the premises is wholly uncertain.²⁶ But the presence of both husband and wife is not essential to the existence of a homestead. "Though one may have abandoned the other, yet either may have the children to care for and be the head of a family, and occupy a homestead."²⁷

22. Constitution, art. 15, § 9; R. S. 22-102, R. S. 60-3501; *Gapen v. Stephenson*, 18 Kan. 140; *Koons v. Rittenhouse*, 28 Kan. 359; *Stratton v. McCandliss*, 32 Kan. 512, 4 Pac. 1018; *Postlethwaite v. Edson*, 102 Kan. 104, 171 Pac. 769, L. R. A. 1918 D, 983 n.; *Rose v. Bank*, 95 Kan. 331, 148 Pac. 745; *Bank v. Bird*, 121 Kan. 617, 249 Pac. 593.

23. See note 11, *supra*.

24. *Osborn v. Strachan*, 32 Kan. 52, 3 Pac. 767; *Farlin v. Sook*, 26 Kan. 397; *Dobson v. Shoup*, 3 K. A. 468, 43 Pac. 817. In *Koons v. Rittenhouse*, 28 Kan. 359, it was held that where husband resided in Kansas for four years on land now claimed as homestead, and sold it, representing himself as single when in fact his wife was living in New York, and intended to and did, one year after the conveyance by the husband, come to Kansas, the deed of the husband alone was valid on the grounds that at the time of the conveyance the property was not a homestead.

25. *Farlin v. Sook*, 26 Kan. 397.

26. *Dodson v. Shoup*, 3 K. A. 468, 43 Pac. 817;

27. *Chambers v. Cox*, 23 Kan. 393. *Accord.*, *Thompson v. Millikin*, 102 Kan. 117, 172 Pac. 534.

C. WHEN HOMESTEAD RIGHTS ATTACH

While the mere intent to occupy the premises at some future time does not impress them with homestead character,²⁸ a clear intention to do so, within a reasonable time, with preparations toward that end, followed by actual occupancy within a reasonable time, renders the land exempt as a homestead from the time of forming the intention.²⁹ A reasonable time after the purchase of property is allowed for actual occupancy.³⁰ Occupancy under a contract of purchase gives one homestead-exemption rights,³¹ as when the deed is

in escrow awaiting completion of payments.³² It is, therefore, clear that actual or constructive occupancy by the family will suffice for the attachment of homestead rights.

28. *Gapen v. Stephenson*, 18 Kan. 618, 44 Pac. 22; *Swenson v. Kiehl*, 21 Kan. 533; *Koons v. Rittenhause*, 28 Kan. 359; *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223; *Ingels v. Ingels*, 50 Kan. 755, 32 Pac. 387; *Hay v. Whitney*, (K. A.) 51 Pac. 806; *Bush v. Adams*, 72 Kan. 556, 84 Pac. 122; *Postlethwaite v. Edson*, 102 Kan. 104, 171 Pac. 769, L. R. A. 1918 D 983 n.; *Rose v. Bank*, 95 Kan. 331, 148 Pac. 745.

29. *Edwards v. Fry*, 9 Kan. 417; *Monroe v. May*, 9 Kan. 466; *Swenson v. Kiehl*, 21 Kan. 533; *Gilworth v. Cody*, 21 Kan. 702; *Ingels v. Ingels*, 50 Kan. 755, 32 Pac. 387; *Upton v. Cozen*, 60 Kan. 1, 55 Pac. 284, 72 A. S. R. 341; *Moore v. Sandford*, 2 K. A. 243, 41 Pac. 1064; *Evans v. Carson*, 9 K. A. 714, 59 Pac. 1091; *Lenora State Bank v. Peak*, 3 K. A. 698, 44 Pac. 900 (overr. on other grounds); *Randolph v. Wilhite*, 78 Kan. 355, 96 Pac. 492; *Stowell v. Kerr*, 72 Kan. 330, 83 Pac. 827; *Randolph v. Sprague*, 10 K. A. 583, 63 Pac. 446; *Angola State Bank v. Fry*, 130 Kan. 641, 287 Pac. 245; *Hammond v. Neely*, 138 Kan. 885, 22 Pac. 2d 726.

30. *Edwards v. Fry*, 9 Kan. 417; *Stowell v. Kerr*, 72 Kan. 330, 83 Pac. 827; *Monroe v. May*, 9 Kan. 466; *Dobson v. Shoup*, 3 K. A. 468, 43 Pac. 817; *Ingels v. Ingels*, 50 Kan. 755, 32 Pac. 387; *Edgerton v. Connelly*, 3 K. A. 618, 44 Pac. 22, *Angola State Bank v. Fry*, supra.

31. *Moore v. Reaves*, 15 Kan. 150; *Walz v. Keller*, 102 Kan. 124, 169 Pac. 196; *South-ern v. Linville*, 139 Kan. 850, 23 P. 2d 6.

32. *Southern v. Linville*, supra.

D. FUNDS USED TO ACQUIRE HOMESTEAD PROPERTY

The rule that one cannot acquire homestead rights in fraud of creditors was determined in *Long v. Murphy*.³³ The debtor, engaged in the grocery business, traded the stock of groceries, purchased on credit, for land he claimed as a homestead. The court said:

"We do not think that a debtor, being absolutely insolvent, and having his creditors pressing him for payment of their claims, and fully cognizant of his inability to pay such debts, can, to defraud his creditors, transfer possession of goods purchased by him on credit and take in exchange therefor lands, either in his own name or in the name of his wife, and then claim the same as exempt as a homestead against such existing creditors."³⁴

33. 27 Kan. 375 (see Bulk Sales Law, R. S. 58-101, 102, 103, 104; L. 1915, 369, §§ 1-4).
34. *Id.*, p. 380.

In *Tootle, Hanna & Co. v. Stine*³⁵ the wife owned the stock of groceries, and permitted her husband to run the business in his own name, and buy goods on credit to the amount of \$500. Three months after beginning the business the goods then on hand were traded for a homestead, taken in the wife's name. In distinguishing this case from *Long v. Murphy* the court, after stating that "all reasonable inferences are to be indulged in to sustain the judgment of the trial court," held that it had not been shown that the goods purchased on credit had not been sold, and were a part of the consideration given for the homestead. While practically admitting that the entire stock might have been sold on execution to meet the demands of the husband's creditors (where, as here, his apparent ownership of the entire stock enabled him to obtain credit), the court nevertheless held:

"A party may have property subject to execution, but if before there is any levy or lien upon it, such property is exchanged for real estate and actually occupied as a homestead, the homestead is exempt unless existing creditors have rights therein as settled in *Long v. Murphy*."³⁶

35. 31 Kan. 66, 1 Pac. 279.

36. *Id.*, p. 69.

The doctrine above stated, that homestead rights can be acquired in property purchased with nonexempt property, if there are no liens or special claims against the latter, brings us to a consideration of the case of *Loan Association*

v. Watson.³⁷ Land not a homestead was exchanged October 14 for a lot occupied the same day as a homestead. Watson, on October 26, got judgment against the debtors, which judgment related back to October 4. It was held that the lots were not subject to a judgment lien.³⁸

37. 45 Kan. 132, 25 Pac. 586. See, also, *Monroe v. May*, 9 Kan. 476; *Hixon v. George*, 18 Kan. 254: "Generally, the expenditure of money in purchasing a homestead, or in subsequently paying therefor, or in making improvements thereon, can never be charged as a fraud upon the rights of the creditors, or others, unless the complaining party had at the time of such expenditure some special interest or claim upon the funds used for such purpose" (p. 257). Also, *McComell v. Wolcott*, 70 Kan. 375, 78 Pac. 848, 3 L. R. A., n. s., 122, 109 A. S. R. 454: "One may sell homestead, use proceeds, and later acquire other property with nonexempt funds, which property can be impressed with homestead exemption rights."

38. It is to be deduced that the nonexempt land traded for the lots was not situate in Lyon county, for the court says that when the judgment was rendered, "by relation back it became a lien on all real estate owned by Cupp in Lyon county, not exempt . . . on October 4, 1886." (p. 134.)

E. ONE HOMESTEAD PER FAMILY

It is definitely settled that a family cannot have two homesteads at once,³⁹ for one family, as a family, cannot have two residences simultaneously (and still be in such circumstances as to be morally entitled to the homestead exemption). But the fact of a husband leaving his family and going into another state, where he represented himself as a single person and took out a homestead there, was held⁴⁰ not to preclude the wife, who during her husband's absence, had deeded the property but continued to reside thereon, from setting up the lack of joint consent of her husband in order to show the deed of the homestead was void. The court remarked that "it would certainly be a lamentable result if we were compelled to hold that this peripatetic husband could by such absence destroy the homestead character of the family residence."

39. *Sarahas v. Fenlon*, 5 Kan. 592; *Atchison Sav. Bank v. Wheeler's Adm'r*, 20 Kan. 625; *Swenson v. Kiehl*, 21 Kan. 538.

40. *Thompson v. Millikin*, 102 Kan. 717, 172 Pac. 534.

III. What Property May Be Impressed With Homestead-Exemption Character

A. EXTENT, VALUE, LOCATION, SELECTION, NATURE, USE

Extent. The extent of the land which can be held exempt as a homestead is limited by the constitution, article 15, section 9, and R. S. 22-102 and R. S. 60-3501, to "one hundred and sixty acres of farming land, or . . . one acre within the limits of an incorporated town or city." This led to dispute in the case of *Sarahas v. Fenlon*,⁴¹ where the debtor owned about 100 acres of land, all in one tract, but about 17 acres were situated within the limits of an incorporated town. The family residence was located outside the town. The part of the tract within the city was held to be liable for the debts of the owner, even though it was a tract of farming land. One cannot have a homestead in all of one tract partially within and partially without the limits of an incorporated town.

41. 5 Kan. 592.

Location. In *Topeka Water-Supply Co. v. Root*⁴² the tract was greater than one acre, and by ordinance it had been included within the boundaries of an incorporated city, but it had never been plotted into lots, and the owner never consented to the tract becoming a part of the city. The homestead exemption

was allowed for the entire tract, for it was deemed not to be a *part of the city*, even though surrounded by city property.⁴³

42. 56 Kan. 187, 42 Pac. 715.

43. Thus we conclude from the two cases that there can be farming land within city limits, but if part of the tract claimed is outside the city, that within the city shall not be exempt as farm property.

The statement⁴⁴ in *Hixon v. George*⁴⁵ is interesting. The plaintiff claimed that the property was not exempt because it was not farming land, and was situate in an *unincorporated town*. The court stated that "even within the limits of an unincorporated town or village . . . a homestead might be so taken and held."⁴⁶

44. The case was appealed on the pleadings, which alleged the town was incorporated.

45. 18 Kan. 253.

46. *Id.*, p. 258.

Value. In Kansas there is no limitation as to the *value* of property which can be made exempt.⁴⁷

47. *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223. For a discussion of the reasons for this, see *Cusic v. Douglass*, 3 Kan. 123.

Contiguity. It is a strict requirement that all the land selected for exemption constitute but one tract, adjoining or contiguous to that upon which the family resides.⁴⁸ Tracts which corner with the land on which the debtor resides are not regarded as contiguous or adjoining,⁴⁹ and the rule still holds where the owner has a parol license to cross another's land to get to the cornering tract.⁵⁰

48. *Randal v. Elder*, 12 Kan. 257; *Mouriquand v. Hart*, 22 Kan. 594, 31 A. R. 200; *Allen v. Dodson*, 39 Kan. 220, 17 Pac. 667; *Griswold v. Huffaker*, 47 Kan. 690, 28 Pac. 696; *Id.*, 48 Kan. 374, 29 Pac. 693; *Linn County Bank v. Hopkins*, 47 Kan. 580, 28 Pac. 606, 27 A. S. R. 309; *Commercial Nat'l Bank v. Carnahan*, 128 Kan. 87, 276 Pac. 57, 73 A. L. R. 110 n.; *Hoffman v. Hull*, 47 Kan. 611, 28 Pac. 623.

49. *Linn City Bank v. Hopkins*, *supra*; *Commercial National Bank v. Carnahan*, *supra*.

50. *Bank v. Carnahan*, *supra*.

There is probable cause for confusion⁵¹ over the apparent inconsistency between the holdings in *Randal v. Elder*⁵² and *Griswold v. Huffaker*.⁵³ In the former case, the debtor was claiming as exempt lots on both sides of an alley, which he was using, though he had at most a parol license to do, and he had no "right, title or interest" therein. It was held that the lots were not adjoining, as there intervened the alley owned by the city.⁵⁴ In the *Griswold* case the land claimed as exempt was separated by a public highway. The vital homestead question was whether it was a highway or a street. Since adjoining owners have a right to repossess abandoned highways, they have enough interest therein to make lands on both sides of such a strip contiguous for homestead purposes.⁵⁵

51. See 29 C. J. 832, n. 48.

52. 12 Kan. 257.

53. *Griswold v. Huffaker*, 47 Kan. 690, 28 Pac. 696; *Id.* 48 Kan. 374, 29 Pac. 693.

54. *Smith v. Leavenworth*, 15 Kan. 85.

55. But there is no present possessory interest therein, which has been deemed to preclude a homestead right in a remainder, etc.

A similar question arose in *Allen v. Dodson*,⁵⁶ in which case it was held that land through which a railroad right of way had been granted is yet contiguous for the purpose of homestead exemptions, even though in part given in terms of an absolute grant, the rest as an easement.⁵⁷

56. 39 Kan. 220, 17 Pac. 667.

57. Syllabus: But even "with the deeded part (one section of the right of way) detached, the residue is connected and contiguous, and can all be claimed and held as a homestead."

Selection. If the homesteader owns land more than is permitted to be exempt as a homestead, he may select (if it is farming land) any 160 acres which is contiguous to and includes the land upon which he resides.⁵⁸ It was held in *Bank v. Peak*⁵⁹ that the selection must be reasonable with regard to recognized legal subdivisions, which rule was adhered to on appeal.⁶⁰ Where one owns a tract of farm land situate part within and part without the limits of an incorporated town he must select the one part upon which he and his family reside. The homestead must be either farm land wholly outside the city, or one acre or less (resided upon) within the city.⁶¹

58. *Bank v. Peak*, 3 K. A. 698, 44 Pac. 900; *Peak v. Bank*, 58 Kan. 485, 49 Pac. 613; *Willis v. Whitehead*, 59 Kan. 221, 52 Pac. 445; *Ard v. Platt*, 61 Kan. 775, 60 Pac. 1048; *First Nat'l Bank v. Tyler*, 130 Kan. 308, 286 Pac. 400. See *Dean v. Evans*, 106 Kan. 389, 188 Pac. 436. House not technically on claimants' land, but was so by agreement.

59. 3 K. A. 698, 44 Pac. 400.

60. *Peak v. Bank*, 58 Kan. 485, 49 Pac. 613. The decision of the lower court was reversed, the Supreme Court holding that an attempted illegal selection should not deprive the debtor to select in the legal manner. In *First Nat'l Bank v. Tyler*, 130 Kan. 308, 286 Pac. 400, it was held that the sale on execution of a tract of land including an *unselected* homestead was void. On selection, see R. S. 60-3502.

61. *Sarahas v. Fenlon*, 5 Kan. 592.

Reality-Personalty. The constitutional and statutory provision creating homestead-exemption rights, might be thought to refer only to real property. However, where the mortgagor built a movable house on leased premises,⁶² reserving the right to remove it at the termination of the lease, it was held that although the house was taxed as personalty, as long as it was situated on the leased premises and was the residence of the family, an attempted chattel mortgage thereon, without the wife's consent, was void.⁶³ However, when⁶⁴ in selling a windmill and grinder, to be attached to the soil, the ownership was reserved to the vendor, the property remained personalty, did not constitute improvements, and therefore the homestead property was exempt from forced sale to pay for the machinery.

62. A lease will support a homestead right.

63. *Hogan v. Manners*, 23 Kan. 551, 33 Am. R. 199.

64. *Marshall v. Bachelidor*, 47 Kan. 442, 28 Pac. 168.

Crops growing on homestead property are a part thereof, and are exempt from the owner's debts, the same as is the land itself.⁶⁵

65. *Isley Lumber Co. v. Kitch*, 123 Kan. 441, 256 Pac. 133.

Appurtenances. The homestead property includes the dwelling house constituting the family residence, together with the land upon which it is situated, and the appurtenances connected therewith.⁶⁶ This includes ordinary out-buildings, and sometimes buildings used partially for business purposes.⁶⁷ As expressed in *Hixon v. George*,⁶⁸ "In order that anything shall be a part of the homestead it must not only be connected therewith as one piece of land is connected to another to which it adjoins, but it must also be used in connection therewith, as a part thereof. In legal phrase, it must be appurtenant thereto."⁶⁹

66. *Morrissey v. Donohue*, 32 Kan. 646, 5 Pac. 27; *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223; *Linn City Bank v. Hopkins*, 47 Kan. 580, 28 Pac. 606, 27 A. S. R. 309; *Dean v. Evans*, 106 Kan. 389, 188 Pac. 436.

67. *Iola Grocery Co. v. Johnson*, 114 Kan. 89, 216 Pac. 828.

68. 18 Kan. 258.

69. Where the debtor had a public grist mill situated on land not contiguous with the land upon which he resided, and the running of the mill was an independent business, the mill was not appurtenant to the farm, so not exempt. (*Mouriquand v. Hart*, 22 Kan. 594, 31 Am. R. 200.)

Use. While it is requisite that there be a dwelling house on the land,⁷⁰ and that it be occupied (actually or constructively) in order for homestead-

exemption rights to attach, it is not the style of the structure, but the use to which it is put, which determines its residential character.⁷¹ As to use, it was held in *Hoffman v. Hill*⁷² that "it makes no difference that the homestead or a part thereof may be used for some other purpose than as a homestead, where the whole of it constitutes only one tract of land not exceeding the amount permitted to be exempted under the homestead exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof by making it, for instance, another person's homestead or a part thereof, or by using it in some manner inconsistent with the homestead interest of the husband and wife."⁷³ Perhaps the furthest degree to which this liberal construction has been carried was in the recent case of *Barten v. Martin*,⁷⁴ where a separate building on a lot was rented to a dentist, and the debtor-owner was permitted to hold the entire premises as a homestead "occupied as a residence." Obviously this is going much further than do the cases holding a part of a building may be used for business purposes by the owner,⁷⁵ or a part of a building rented to others.⁷⁶ In the Barten case the tenant was, we infer, regarded as not being in *exclusive possession* of any part of the premises, any more than he would have been had he rented a room in the house. Thus this case is distinguishable from those⁷⁷ holding that adjoining leased premises are not a part of the homestead. This latter rule does not apply to the leasing of premises during temporary absence,⁷⁸ or where the rights of the tenant are subordinate to the homestead occupancy of the owner.⁷⁹

70. Or in the process of construction, as in *Upton v. Cozen*, 60 Kan. 1, 72 A. S. R. 341; or at least preparation for living be made as instructed by trial court in *Rose v. Bank*, 95 Kan. 331, 148 Pac. 745.

71. *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223.

72. 47 Kan. 611, 28 Pac. 623.

73. *Id.* pp. 603-614. In the instant case the premises were also used as a hotel and boarding house. *Held*, not inconsistent use. *Accord.*, *Hogan v. Manners*, 23 Kan. 551, 33 Am. R. 199; *Rush v. Gordon*, 38 Kan. 535, 16 Pac. 700; *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223; *Iola Groc. Co. v. Johnson*, 114 Kan. 89, 216 Pac. 828.

74. 133 Kan. 329, 299 Pac. 614.

75. See cases, note 73.

76. *Bebb v. Crowe*, 39 Kan. 342, 18 Pac. 223; *Layson v. Grange*, 48 Kan. 440, 29 Pac. 585; *Milford Sav. Bank v. Ayers*, 48 Kan. 602, 29 Pac. 1149.

77. *Edwards v. Fry*, 9 Kan. 417, *Ashton v. Ingle*, 20 Kan. 670; *Poncelor v. Campbell*, 10 K. A. 581, 63 Pac. 606.

78. *Hixon v. George*, 18 Kan. 253; *Upton v. Cozen*, 60 Kan. 1, 55 Pac. 284; *Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649.

79. *Upton v. Cozen*, 60 Kan. 1, 55 Pac. 284, 72 A. S. R. 341; *Evans v. Carson*, 9 K. A. 714, 59 Pac. 1091; *Bank v. Warner*, 22 Kan. 537.

It is not necessary that all the premises be actually used or occupied by the family,⁸⁰ if they are not used by others inconsistent to residential use by the owner.⁸¹ In such cases the owner is regarded as constructive user of the premises.

80. *Morrissey v. Donohue*, 32 Kan. 646, 5 Pac. 27; *Kerr v. Lawrence*, 130 Kan. 552, 287 Pac. 621.

81. See note 73.

B. TITLE AND ESTATE NECESSARY

An equitable title to property is sufficient to establish and maintain a homestead exemption therein, when coupled with actual or constructive occupancy;⁸² and equitable ownership, with possession, is notice to all of homestead rights.⁸³ This includes occupation of the premises by purchaser under an executory contract.⁸⁴

82. *Tarrant v. Swain*, 15 Kan. 146; *Moore v. Reaves*, 15 Kan. 150; *Stowell v. Kerr*, 72 Kan. 330, 83 Pac. 827; *Walz v. Keller*, 102 Kan. 124, 169 Pac. 196; *Southern v. Linville*, 139 Kan. 850, 33 Pac. 2d 6.

83. *Moore v. Reaves*, 15 Kan. 150.

84. *Walz v. Keller*, *supra*; *Southern v. Linville*, *supra*.

The title may be in either the husband or wife.⁸⁵ The claimant must have a possessory interest in the property in order to have a residence and thus avail himself of the homestead exemption,⁸⁶ so a remainder, vested or contingent, is not protected by the homestead laws.⁸⁷ Occupancy by parol license does not give one the necessary interest to maintain homestead rights.⁸⁸ Neither the holder of the bare legal title,⁸⁹ nor the gratuitous grantee of an alienation to defraud creditors,⁹⁰ has sufficient interest to entitle him to homestead exemption rights.

85. *Monroe v. May*, 9 Kan. 466; *Hixon v. George*, 18 Kan. 253; *Tootle, Hanna Co. v. Stine*, 31 Kan. 66; *Thompson v. Millikin*, 102 Kan. 717, 172 Pac. 534.

86. *Randal v. Elder*, 12 Kan. 257; *Cagle v. Warburton*, 125 Kan. 290, 264 Pac. 47; *Bank v. Carnahan*, 128 Kan. 87, 276 Pac. 57, 73 A. L. R. 110, n. But Cf. note 55.

87. *Bank v. Carnahan*, supra. (Cf., also, *Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802.)

88. *Randal v. Elder*, supra; *Bank v. Carnahan*, supra.

89. *Osborn v. Strachan*, 32 Kan. 52, 3 Pac. 767.

90. *Kline v. Cowan*, 84 Kan. 772, 115 Pac. 587.

A leasehold is sufficient to support a homestead for the lessee,⁹¹ but the lessor may retain homestead rights in property occupied in part by other.⁹² This led to the bitter disappointment of the lessee whose homestead rights were involved in *Hay v. Whitney*.⁹³ There the lessee owned and was in possession of one 80-acre tract which adjoined another 80-acre tract which he leased and resided upon. Relying upon the theory (expressed in *Randal v. Elder*⁹⁴) that one need not have equal estates or interest in adjoining premises in order to establish contiguity with the residence, nor need he derive title from a common source, by residing upon the leased tract, he hoped to hold the adjoining 80 acres which he owned exempt as a homestead. His failure to establish a case resulted from the fact that the lessor reserved homestead rights in the leased premises, and also resided thereupon. Since no two distinct families can have overlapping homesteads for exemption purposes the said lessee was without a homestead residence, so the adjoining 80 acres which he owned was not exempt.

91. *Hogan v. Manners*, 23 Kan. 551, 33 Am. R. 199.

92. See notes 76, 79, ante.

93. 59 Kan. 771, 51 Pac. 896.

94. 12 Kan. 257.

A life estate in possession can be impressed with homestead character,⁹⁵ but never an estate in remainder, since it is not possessory while a remainder. A tenant in common in possession is entitled to homestead exemption,⁹⁶ which right is not precluded by his paying rent to the other cotenant.⁹⁷ But one of the cotenants cannot, as against the other, establish a homestead upon the whole estate.⁹⁸

95. *Goodman v. Malcolm*, 5 K. A. 285, 48 Pac. 439.

96. *Wheat v. Burgess*, 21 Kan. 407; *Tarrant v. Swain*, 15 Kan. 146; *Merchants Nat'l*

Bank v. Kopplin, 1 K. A. 599, 42 Pac. 263; *Banner v. Welch*, 115 Kan. 868, 225 Pac. 98;

Blitz v. Metzger, 119 Kan. 760, 241 Pac. 259; see, also, *infra*, "Rights of Survivors, etc."

97. *Blitz v. Metzger*, supra.

98. *Banner v. Welch*, supra.

C. PROCEEDS FROM SALE, MORTGAGE, INSURANCE

The law as to when the proceeds from the sale of a mortgage of a homestead are exempt is probably best stated in *Smith v. Gore*,⁹⁹ where the insolvent debtor had taken a note and mortgage as part payment when he sold his homestead, and in the three years since had done nothing in the way of investing the proceeds in a new homestead. The court said:¹⁰⁰

"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 exemption laws, and adopted for the purpose of enabling persons to change their homesteads when they desire. But we think the intention to use the proceeds in procuring another homestead should be formed at or before the time of the sale, and the intention should be to procure another homestead with the proceeds immediately."

99. 23 Kan. 488, 33 Am. R. 188. Accord., *Milberger v. Veselsky*, 97 Kan. 433, 155 Pac. 957.

100. *Id.*, pp. 490, 491.

It was held in *First Nat'l Bank v. Dempsey*¹⁰¹ that money due a debtor from the sale of his homestead which he at all times intended to invest in another homestead was exempt from garnishment, and the question of his intent to acquire a new homestead with the proceeds was the deciding fact in the case.¹⁰²

101. 133 Kan. 608, 11 P. 2d 735. See, also, *Winter v. Ritchie*, 57 Kan. 212, where proceeds were temporarily put in other property. Held, exempt. Also, *Hoefer v. Fronkier*, 97 Kan. 400, 151 Pac. 1112, as to proceeds from joint mortgage.

102. But in *Roberts v. First Nat'l Bank*, 126 Kan. 503, 268 Pac. 799, where the widow was entitled to \$250 of the proceeds from the sale of a homestead, her share was held exempt from a lien of her judgment creditor. There seemed to be no finding as to the intended use of the proceeds. Perhaps this was unnecessary, as the proceeds had been placed in escrow "to await the outcome of the issue as to whether or not Mrs. Roberts and the children had abandoned the homestead." "*Under all the circumstances (italics ours)* the bank was entitled to no part of the proceeds," perhaps does not mean that after the proceeds were paid over they would not be liable to be subjected to the payment of the creditor's judgment.

As to surplus proceeds from a sale on mortgage foreclosure, it was early held¹⁰³ that such surplus was exempt from general creditors' claims if the homestead owners intended to use the surplus to redeem the property or to establish a new homestead. But no such conditions were expressed in the decision in *Brenneke v. Duigenan*.¹⁰⁴ Where an insolvent husband and his wife mortgaged the homestead and put the proceeds in the bank in the wife's name on the theory that the right to the proceeds was her consideration¹⁰⁵ for executing the mortgage, the proceeds were held exempt from the husband's debts.¹⁰⁶

103. *Mitchell v. Milhoan*, 11 Kan. 617.

104. 6 K. A. 229, 49 Pac. 684.

105. No consideration is necessary, however. *Jamison v. Bancroft*, 20 Kan. 169.

106. *Citizens Bank of Garnett v. Bowen*, 25 Kan. 117. See, also, *Hoefer v. Fronkier*, 96 Kan. 400, 151 Pac. 1112.

Where insurance is taken upon homestead property in pursuance of an agreement with the mortgagee, the mortgagee has an equitable lien on the proceeds to the amount of his mortgage.¹⁰⁷ However, the surplus is exempt,¹⁰⁸ but such exemption may be waived by the husband and wife.¹⁰⁹

107. *Chipman v. Carroll*, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305.

108. *Potter v. Northrup Baking Co.*, 59 Kan. 455, 53 Pac. 520. See, also, *Continental Ins. Co. v. Daly*, 33 Kan. 601, 7 Pac. 158, where there was no mortgage.

109. *Potter v. Northrup Baking Co.*, *supra*.

IV. Liabilities Enforceable Against Homestead

A. PRIOR LIENS

An ordinary judgment against a homestead claimant, rendered prior to the adoption of the constitution, was not excepted from the operation of the homestead exemption provision, if it had not attached to the claimed property before the adoption (which made the exemption legally possible), or before

the exemption provision was taken advantage of by occupying the premises as a homestead.¹¹⁰ A similar or analogous rule applies to such situations today. An ordinary judgment against the homestead claimant will *not* be enforceable against property later purchased for a homestead if such property is occupied as such immediately¹¹¹ or within a reasonable time thereafter,¹¹² for as long as it is so occupied. This is true regardless of the homestead having been purchased with nonexempt property,¹¹³ unless the property so used was at the time subject to a special claim or lien.¹¹⁴ However, upon abandonment of the homestead before sale, an ordinary judgment against the present owner, or the decedent owner, will constitute a lien against the property.¹¹⁵ But if the property is sold while occupied by the judgment debtor or surviving members of his family, the purchaser takes the property free from such judgments.¹¹⁶ However, if the lien attaches to the property before it becomes actually or constructively occupied as a homestead, such lien takes priority over the after-acquired homestead rights.¹¹⁷ In determining priority between judgment and attachment liens and homestead rights, the date the lien attaches controls, not the date of levy of execution.¹¹⁸

110. *Cusic v. Douglass*, 3 Kan. 123, 87 Am. D. 458; *Root v. McGrew*, 3 Kan. 215.

111. *Cusic v. Douglass*, *supra*; *Loan Assn. v. Watson*, 45 Kan. 132, 25 Pac. 586; *Stowell v. Kerr*, 72 Kan. 380, 83 Pac. 827.

112. See cases cited, note 29, *ante*.

113. *Monroe v. May*, 9 Kan. 476; *Hixon v. George*, 18 Kan. 253; *Tootle, Hanna & Co. v. Stine*, 81 Kan. 66, 1 Pac. 279; *Loan Assn. v. Watson*, 45 Kan. 132, 25 Pac. 586; *McConnell v. Wolcott*, 70 Kan. 375, 78 Pac. 848, 3 L. R. A., n. s., 122, 109 Am. S. R. 454.

114. As in *Long v. Murphy*, 27 Kan. 375.

115. *Morris v. Brown*, 5 K. A. 102, 48 Pac. 750; *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694; *Stratton v. McCandliss*, 32 Kan. 512, 4 Pac. 1018; *Postlethwaite v. Edson*, 102 Kan. 104, 171 Pac. 769, L. R. A. 1918 D 983; *id.*, 106 Kan. 354, 187 Pac. 688.

116. *Morris v. Ward*, 5 Kan. 239; *Moore v. Reaves*, 15 Kan. 150; *Dayton v. Donart*, 22 Kan. 256; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622; *Elwell v. Hitchcock*, 41 Kan. 130, 21 Pac. 109; *Robert v. First Nat'l Bank*, 126 Kan. 503, 268 Pac. 799; *First Nat'l Bank v. Tyler*, 130 Kan. 308, 286 Pac. 400; *Sage v. Ijames*, 118 Kan. 11, 233 Pac. 1013; *Randolph v. Sprague*, 10 K. A. 446, 63 Pac. 446. See other cases, note *infra*.

117. *Bullene v. Hiatt*, 12 Kan. 98; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. R. 272; *Hiatt v. Bullene*, 20 Kan. 557; *Osborne v. Schoonmaker*, 47 Kan. 667, 23 Pac. 711; *Ingels v. Ingels*, 50 Kan. 755, 32 Pac. 387; *Aldrich v. Boice*, 56 Kan. 170, 42 Pac. 695; *Osborn v. Magee*, 8 K. A. 824, 57 Pac. 551; *Dobson v. Shoup*, 3 K. A. 468, 43 Pac. 817; *Edgerton v. Connelly*, 3 K. A. 618, 44 Pac. 22; *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529 (overt. on other grounds); *Ashton v. Ingle*, 20 Kan. 670, 27 Am. R. 197; *Arn v. Hoerseman*, 27 Kan. 489.

118. See cases *supra*, note 117, and *Caple v. Warburton*, 125 Kan. 290, 264 Pac. 47.

B. TAXES, PURCHASE PRICE, IMPROVEMENTS, MORTGAGES

In addition to valid prior existing liens the homestead is liable for taxes,¹¹⁹ the purchase price, improvements, and valid mortgages.¹²⁰ These are express exceptions to the homestead exemption. The homestead is liable for the purchase price to the vendor or to one advancing money therefor, whether any valid mortgage is given therefor or not.¹²¹ The same rule applies to debts for improvements,¹²² whether owed the one furnishing the materials, or one lending money therefor.¹²³ A mortgage on a homestead jointly consented to by both spouses is always a valid lien against the homestead, as is provided for in the constitutional and statutory provisions concerning homestead-exemption rights.^{123a} If the money is borrowed *with the agreement and understanding*¹²⁴ that it is to be used for paying for the homestead or making improvements thereon, even though the mortgage is executed only by one of the spouses, the mortgage is a valid lien against the homestead.

119. Special assessments for paving, etc., are taxes, for the payment of which the homestead is liable. *Todd v. Atchison*, 9 K. A. 798, 48 Pac. 992.

120. See *Ayres v. Probasco*, 14 Kan. 175, as to equitable lien for money advanced to remove prior existing lien.

121. *Nichols v. Overacher*, 16 Kan. 54; *Greeno v. Barnard*, 18 Kan. 518; *Foster Lumber Co. v. Bank*, 71 Kan. 158, 80 Pac. 110; *Farmers' State Bank v. Pickering*, 111 Kan. 132, 205 Pac. 1110.

122. But the materials must not only be sold for use on homestead, but must be used thereon, in order to come within this sale. *Wichita Acetylene Mfg. Co. v. Haughton*, 97 Kan. 528, 155 Pac. 1078.

123. *Hurd v. Hixon*, 27 Kan. 722; *Beckenheuser v. Ferrell*, 8 K. A. 365, 55 Pac. 499; *Dean v. McAdams*, 22 Kan. 544; *Carter v. Des Moines Silo Co.*, 103 Kan. 342, 187 Pac. 656; *Botello v. Tharp*, 121 Kan. 229, 246 Pac. 521. But if one does not comply with the mechanic's lien law, he does not have a lien on the homestead until judgment has been rendered on the debt. *Dean v. McAdams*, 22 Kan. 544.

123a. See *Prudential Ins. Co. v. Clark*, 122 Kan. 109, 216 Pac. 1091. Joint mortgage "waives" homestead right to that extent.

124. See *Dreese v. Myers*, 52 Kan. 126, 34 Pac. 349, 39 A. S. R. 336, distinguishing between "a liability for purchase money or improvements and money borrowed upon other security, which is subsequently used to pay the purchase money on the improvements." (p. 131.)

C. ALIMONY

Although it has been held¹²⁵ that courts may not declare any indebtedness a lien on a homestead, because the constitution prescribes what shall constitute liens thereon, in *Johnson v. Johnson*¹²⁶ the court not only decreed alimony as a lien against the homestead,¹²⁷ but required the wife to pay out of the alimony an unsecured judgment against the husband and wife. The husband protested that this was impairing his constitutional homestead-exemption rights, but on the ground that the judgment creditor could not compel payment by the wife, and more especially, since the husband did not object that the amount awarded as alimony was excessive, the decree was affirmed.¹²⁸

125. *Jenkins v. Simmons*, 37 Kan. 496, 15 Pac. 522.

126. 66 Kan. 546, 72 Pac. 267.

127. Following *Blankenship v. Blankenship*, 19 Kan. 159, which relied upon the decision in *Brandon v. Brandon*, 14 Kan. 342, awarding exclusive possession of the homestead to the wife as alimony.

128. Cf., also, *Hamm v. Hamm*, 93 Kan. 360, 158 Pac. 22. In a divorce decree, the homestead was awarded as alimony to the wife, subject to a lien in favor of the husband. *Held*, a sale by order of court to satisfy the husband's lien is not a violation of the wife's homestead rights.

The homestead, no less than any other property, is subject to the right of eminent domain.¹²⁹

129. *Jockheck v. Comm'rs of Shawnee Co.*, 53 Kan. 780, 37 Pac. 621.

V. Transfer or Encumbrance

A. NECESSITY OF JOINT CONSENT

A homestead may be sold or encumbered the same as other property, with the joint consent of the husband and wife.^{129a} The question, "What is joint consent?" is one of the most troublesome in homestead law. The word "joint" implies that the *consent* must concur—it must be simultaneous.¹³⁰ This does not require that both spouses be present when signing, however,¹³¹ but only that they both *consent* at the same time.

B. WHAT IS JOINT CONSENT?

On this question there are three decisions which, on superficial examination, appear contradictory. In *Durand v. Higgins*,¹³² there were findings that the wife offered to sign the deed *before* it was executed by the husband alone, and that *afterward* she expressed satisfaction with the deed. The court, after holding that the consent need not be in writing,¹³³ continued:

" . . . But, while this is so, the consent must be a joint one. The husband and the wife at the time the conveyance takes effect must both consent thereto, [the finding] lacks much of finding that at the time of the delivery, that

being the only time the husband is shown to have consented, the wife was so consenting."

129a. A conveyance of a homestead cannot defraud general creditors, as they do not have a claim thereon. *Null v. Jones*, 33 Kan. 112, 5 Pac. 388; *Cross v. Benson*, 68 Kan. 495, 75 Pac. 588; *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273; *Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649; *Freeman v. Funk*, 85 Kan. 473, 117 Pac. 1024.

130. *Ott v. Sprague*, 27 Kan. 620; *Howell v. McCrie*, 36 Kan. 636, 14 Pac. 257; *Wallace v. Ins. Co.*, 54 Kan. 442, 38 Pac. 489, 45 A. S. R. 288, 26 L. R. A. 806; *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567; *Johnson v. Samuelson*, 69 Kan. 263, 76 Pac. 867; *Bank v. Duncan*, 87 Kan. 610, 125 Pac. 76.

131. *Johnson v. Samuelson*, 69 Kan. 263, 76 Pac. 867; *Gas Co. v. Ralston*, 81 Kan. 86, 105 Pac. 430; *Ferguson v. Nuttleman*, 110 Kan. 718, 205 Pac. 365; *Mid-West Lumber Co. v. Wagner*, 133 Kan. 405, 300 Pac. 1067; *Bell v. Slasor*, 8 K. A. 669, 57 Pac. 139.

132. 67 Kan. 110, 72 Pac. 567.

133. The joint consent need not be in writing. See: *Dudley v. Shaw*, 44 Kan. 683, 24 Pac. 1114; *Pücher v. A. T. & S. F. Rld. Co.*, 38 Kan. 516, 16 Pac. 945, 5 A. S. R. 770; *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668; *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567; *Johnson v. Samuelson*, 69 Kan. 263, 76 Pac. 867; *Eakin v. Wycoff*, 118 Kan. 167, 234 Pac. 63; *Haas v. Nemeth*, 139 Kan. 252, 31 P. 2d 6. But cf. *Morris v. Ward*, 5 Kan. 239; *Dollman v. Harris*, 5 Kan. 597; *Ayres v. Probasco*, 14 Kan. 175.

In *Johnson v. Samuelson*¹³⁴ there was a demurrer to the evidence, which was sustained by the trial court. In reversing this decision the supreme court held that although the lease was signed by the husband alone, when the wife was several miles distant, the fact that the wife acquiesced in the possession by the tenant may be used to show joint consent; that is, there might have been a finding that there was joint consent.¹³⁵

134. 69 Kan. 263, 76 Pac. 867.

135. It should be noted that in *Durand v. Higgins* the court did not say that there might not have been a finding of joint consent in that case, but only said there was no such finding. Perhaps there was no request for such a finding, which if so, was perhaps a fatal error, for from the facts in the two cases there might have been a finding of joint consent in one as in the other.

The third case to be considered in this connection is *Wichita Natural Gas Co. v. Ralston*.¹³⁶ The husband and wife owned and occupied a farm as a homestead, and each of them consented that the gas company lay its pipe lines across the land. Relying on such consent the gas company completed its line, and commenced an action to enjoin the landowners from destroying the pipe line. The court held that the question as to whether such consent was joint or not was not material, as this was not an action of ejectment or an action to prevent entry. Here the validity of the grant was not being tested, so this case is distinguishable from *Pilcher v. A. T. & S. F. Rld. Co.*¹³⁷ and *Withers v. Love*.¹³⁸

136. 81 Kan. 86, 105 Pac. 430.

137. 38 Kan. 516, 16 Pac. 945.

138. 72 Kan. 140, 83 Pac. 204.

Thus far in the discussion of joint consent only the "joint" phase has been considered. In order that there be consent there must be voluntary acquiescence in what is being done, which necessitates that the consenting party not be under fraud¹³⁹ or duress.¹⁴⁰ But there must actually be fraud or duress in order to show lack of joint consent. Thus the statement of the wife at the time of signing to the effect that she was not signing of her own free will does not, of itself, preclude a finding supported by other evidence, that she was not coerced.¹⁴¹ Where the wife can read and write, and signs a mortgage at her husband's request, there is no fraud or duress just because she does not know what the legal effect of her act is.¹⁴² But where the mortgagee intentionally did not disclose that the mortgage was on the homestead, the wife was permitted to avail herself of the defense of lack of joint consent.¹⁴³

139. *Helm v. Helm*, 11 Kan. 19; *Bird v. Logan*, 35 Kan. 228, 10 Pac. 564 (constructive fraud); *Warden v. Reser*, 38 Kan. 86, 16 Pac. 60; *Watts v. Myers*, 93 Kan. 824, 145 Pac.

827, L. R. A. 1918 C, 920 n. See, also, *Spencer v. Iowa Mtg. Co.*, 6 K. A. 378, 50 Pac. 1094; Where wife signed mortgage to procure funds to improve homestead, mortgagee could not apply them to antecedent debts of husband.

140. *Helm v. Helm*, 11 Kan. 19; *Berry v. Berry*, 57 Kan. 691, 47 Pac. 837, 57 A. S. R. 351; *Watts v. Myers*, supra; *Tucker v. Finch*, 106 Kan. 419, 188 Pac. 235; *Anderson v. Anderson*, 9 Kan. 112 (even though grantee is innocent); *Gabbey v. Forgeus*, 38 Kan. 62, 15 Pac. 866 (held, not duress).

141. *Mid-West Lumber Co. v. Wagner*, 133 Kan. 405, 300 Pac. 1067.

142. *Ferguson v. Nuttleman*, 110 Kan. 200, 203 Pac. 925. Also, *Roach v. Karr*, 18 Kan. 529; *Buchanan v. Gibbs*, 26 Kan. 277.

143. *Larrick v. Jacobson*, 139 Kan. 522, 32 P. 2d 204.

The constitutional provision as to the necessity of joint consent is strictly adhered to in cases where one spouse is insane.¹⁴⁴ The spouse of an insane person, even with the joinder of the guardian of the insane person (and the sanction of the probate court),¹⁴⁵ cannot execute a valid deed,¹⁴⁶ mortgage,¹⁴⁷ or even an oil and gas lease¹⁴⁸ to the homestead property. But a judgment involving an erroneous decision to the effect that there was joint consent in such a case is not open to collateral attack.^{148a}

144. L. 1927, ch. 228, § 1, amending R. S. 39-221, was intended to change the situation in this respect, by the omission of the phrase "except the homestead." The provision as to homestead property was declared unconstitutional in *In re Barnell Estate*, 141 Kan. 842.

145. *Locke v. Richmond*, 59 Kan. 773, 52 Pac. 97 (aff'g. 6 K. A. 76); *Iles v. Benedict*, 110 Kan. 200, 203 Pac. 925.

146. *Adams v. Gilbert*, 67 Kan. 273, 72 Pac. 769, 100 A. S. R. 456; *Withers v. Love*, 72 Kan. 140, 83 Pac. 204; *Trust Co. v. Spitler*, 54 Kan. 560, 38 Pac. 799; *Iles v. Benedict*, supra.

147. *Locke v. Richmond*, supra; *Trust Co. v. Spitler*, supra.

148. *Peterson v. Skidmore*, 108 Kan. 339, 195 Pac. 600.

148a. *Clevenger v. Figley*, 68 Kan. 699, 75 Pac. 1001.

Further, there is not the necessary joint consent to mortgage the homestead by the exercise of a general power of attorney "to sign deeds, mortgages," etc., vested in the husband by the wife, combined with the exercise of his own right.¹⁴⁹

149. *Wallace v. Ins. Co.*, 54 Kan. 442, 38 Pac. 489, 45 Am. S. R. 288, 26 L. R. A. 806.

In order to have joint consent it is not necessary that the consenting spouse receive consideration,¹⁵⁰ but the giving of such consent is sufficient consideration for the consenting spouse to keep the proceeds of a mortgage free from the debts of the other.¹⁵¹

150. *Jamison v. Bancroft*, 20 Kan. 619.

151. *Citizens' Bank of Garnett v. Bowen*, 25 Kan. 117.

Conditional consent to a mortgage, if the conditions are not complied with, is not joint consent.¹⁵²

152. *Norton Nat'l Bank v. Duncan*, 87 Kan. 610, 125 Pac. 76.

C. WHEN JOINT CONSENT NECESSARY

The requirement of joint consent applies generally to all cases of sale or mortgage,¹⁵³ to contracts for the sale of the homestead,¹⁵⁴ to the abandonment of a contract of purchase of a homestead after occupancy has begun,¹⁵⁵ to an agreement to adopt a fraudulent contract to sell a homestead,¹⁵⁶ and, as was generally stated in *Coughlin v. Coughlin*,¹⁵⁷ to any lease^{157a} or transfer of possession which affects the enjoyment of the homestead. This includes oil and gas leases,¹⁵⁸ and to extensions thereof,¹⁵⁹ and also to the grant of a railroad right of way.¹⁶⁰ It also applies to agreements concerning boundaries.¹⁶¹ The requirement applies even though the homestead interest is impressed on an equitable estate,¹⁶² or on a leasehold,¹⁶³ and it is just as requisite that the husband join with the wife as *vice versa*.¹⁶⁴

Joint consent is necessary even though the spouses are separated,¹⁶⁵ and an action for alimony is pending between them.¹⁶⁶

153. *Morris v. Ward*, 5 Kan. 239; *Dollman v. Harris*, 5 Kan. 597; *Helm v. Helm*, 11 Kan. 19; *Ayres v. Probasco*, 14 Kan. 175; *Moore v. Reaves*, 15 Kan. 150; *Jamison v. Bancroft*, 20 Kan. 169; *Chambers v. Cox*, 23 Kan. 393; *Hogan v. Manners*, 23 Kan. 551, 33 A. S. R. 199; *Ott v. Sprague*, 27 Kan. 620; *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537; *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 199 (deed of July 15, 1858, under Laws of 1858, ch. 32, §§ 1, 2); *Bird v. Logan*, 35 Kan. 228; *Howell v. McCrie*, 36 Kan. 636, 14 Pac. 257; *Jenkins v. Simmons*, 37 Kan. 496, 15 Pac. 522; *Dudley v. Shaw*, 44 Kan. 683, 24 Pac. 1114; *Hoffman v. Hill*, 47 Kan. 611, 28 Pac. 623; *Wallace v. Ins. Co.*, 54 Kan. 442, 38 Pac. 489; *New England Trust Co. v. Spittler*, 54 Kan. 560, 38 Pac. 799; *Matney v. Linn*, 59 Kan. 773, 52 Pac. 97; *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567; *Johnson v. Samuelson*, 69 Kan. 263, 76 Pac. 867; *Sullivan v. City of Wichita*, 64 Kan. 539, 68 Pac. 55; *Adams v. Gilbert*, 67 Kan. 273, 72 Pac. 769, 100 A. S. R. 456; *Norton Nat'l Bank v. Duncan*, 87 Kan. 610, 125 Pac. 76; *Withers v. Love*, 72 Kan. 140, 83 Pac. 204; *Cropper v. Goodrich*, 89 Kan. 589, 132 Pac. 163; *Walz v. Keller*, 102 Kan. 124, 169 Pac. 196; *Thompson v. Millikin*, 102 Kan. 717, 177 Pac. 534; *Tucker v. Finch*, 106 Kan. 419, 188 Pac. 235; *Iles v. Benedict*, 110 Kan. 200, 203 Pac. 925; *Hughes v. Cressler*, 130 Kan. 533, 287 Pac. 271; *Lumber Co. v. Wagner*, 133 Kan. 405, 300 Pac. 1067; *Larriek v. Jacobson*, 139 Kan. 522, 32 P. 2d 204; *New England Trust Co. v. Nash*, 5 K. A. 739, 46 Pac. 987; *Eakin v. Wycoff*, 118 Kan. 167, 234 Pac. 63.
154. *Thimes v. Stumpff*, 33 Kan. 53, 5 Pac. 431; *Hodges v. Farnham*, 49 Kan. 777, 31 Pac. 606; *Martin v. Hush*, 91 Kan. 833, 139 Pac. 401; *Smith v. Kibbe*, 104 Kan. 159, 123 Pac. 427, 5 A. L. R. 483 (joint deed in pursuance of contract by only one cures the defect); *Tucker v. Finch*, 106 Kan. 419, 188 Pac. 235 (but involuntary joinder in deed does not cure defect in nonjoint contract). Cf. *Perrine v. Mayberry*, 37 Kan. 258: Where both sign contract, specific performance will be enforced to make wife join in the execution of the deed.
155. *Southern v. Linville*, 139 Kan. 850, 33 P. 2d 123.
156. *Wicks v. Smith*, 21 Kan. 412, 30 Am. R. 433.
157. 26 Kan. 116.
- 157a. *Holland v. Holland*, 89 Kan. 730, 132 Pac. 989.
158. *Franklin Land Co. v. Wea Gas, etc., Co.*, 43 Kan. 518, 22 Pac. 630; *Palmer Oil Co. v. Parish*, 61 Kan. 311, 59 Pac. 640; *Lavery v. Larned Oil Co.*, 107 Kan. 104, 190 Pac. 596; *Peterson v. Skidmore*, 108 Kan. 339, 195 Pac. 600.
159. *Lavery v. Larned Oil Co.*, 107 Kan. 104, 190 Pac. 596. But where the subsequent agreement does not affect the homestead rights of the wife, the original lease is not invalidated thereby. *Wilson v. Gas Co.*, 75 Kan. 499, 89 Pac. 897; *Ray v. Brush*, 112 Kan. 110, 210 Pac. 660.
160. *Pilcher v. A. T. & S. F. Rld. Co.*, 38 Kan. 516, 16 Pac. 945, 5 A. S. R. 170.
161. *Kastner v. Baker*, 92 Kan. 26, 139 Pac. 1189.
162. *Moore v. Reaves*, 15 Kan. 150; *Holland v. Holland*, 89 Kan. 730, 132 Pac. 989.
163. *Hogan v. Manners*, 23 Kan. 551, 33 Am. R. 199.
164. *Dollman v. Harris*, 5 Kan. 597; *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668; *Bank v. Duncan*, 87 Kan. 610, 125 Pac. 76; *Cropper v. Goodrich*, 89 Kan. 589, 132 Pac. 163; *Thompson v. Millikin*, 102 Kan. 717, 177 Pac. 534.
165. *Helm v. Helm*, 11 Kan. 19; *Chambers v. Cox*, 23 Kan. 393; *Ott v. Sprague*, 27 Kan. 620; *Thompson v. Millikin*, 102 Kan. 717, 177 Pac. 534. But cf. *Jenkins v. Henry*, 52 Kan. 606, 35 Pac. 616.
166. *Ott v. Sprague*, 27 Kan. 620.

Since the requirement of joint consent is so general, we can perhaps best ascertain its extent by considering some cases in which it was held not necessary.

It was early laid down in *Chambers v. Cox*¹⁶⁷ that joint consent of the two spouses is necessary, and the husband's deed to the homestead of the family without the consent of the wife is void, even though the wife has never been a resident of the state, as the *proviso* in (now) R. S. 22-108 does not have any effect upon the constitutional requirement of the joint consent of the husband and wife in the alienation of a homestead. But in *Jenkins v. Henry*,¹⁶⁸ where the husband, with the children, had established a homestead in Kansas, and later, when he alone was residing on the premises, conveyed them without being joined with by his wife, and thereafter moved, and the wife later came to Kansas and brought suit to set aside the deed, the conveyance was held valid. The court said: "At the time he signed the deed, there is evidence tending to show that he alone dwelt upon the land. He alone might therefore abandon it." This would indicate that the land was a homestead at the time of the conveyance, but that the *subsequent* abandon-

ment by the husband estopped the nonresident wife from thereafter setting up lack of joint consent.¹⁶⁹

167. 23 Kan. 393.

168. 52 Kan. 606, 35 Pac. 216.

169. It may be noted, however, that at this stage in the history of Kansas homestead law, it was deemed that *one* occupant of land could not make it a homestead, which would mean that in the Jenkins case there was not a homestead when the husband signed the deed. This would (at that time) have afforded a sufficient distinction between the two cases, but it does not appear that this is the basis of the decision.

*Jenkins v. Simmons*¹⁷⁰ was a close case involving the necessity of joint consent. The husband, whose homestead was encumbered with a mortgage lien, made an agreement with the mortgagee to execute another mortgage to a third party, pay the proceeds to the original mortgagee, who was to discharge his mortgage (which he did) so that the new mortgage would become a first lien. The difference between the old mortgage and the proceeds of the new mortgage was to be secured by the execution of another mortgage to the original mortgagee. The wife did not know of the agreement, but did sign the new mortgage to the third party, and then refused to execute the new mortgage to the original mortgagee. In an action brought by the latter party to cancel the discharge by him and to declare the original mortgage a lien on the land, it was held that a court of equity had no such power, and that the husband's agreement did not bind the wife.

170. 37 Kan. 496, 15 Pac. 522.

This decision is somewhat disconcerting. It is to be noted that had the agreement of the husband been performed by the wife, the only effect would have been to change the priority of the mortgages, not to increase them. It had earlier been held, in *Jenness v. Cutler*,¹⁷¹ that a valid mortgage is not invalidated by a subsequent agreement between the husband and creditor for an extension thereof.¹⁷² It is true that in a later case, *Portsmouth Sav. Bank v. Hardman*,¹⁷³ it was decided that the husband alone could not extend the duration of a mortgage lien on the homestead, but this case was soon expressly overruled in *Securities Co. v. Manwarren*,¹⁷⁴ wherein it was held that where a note secured by a valid mortgage on the homestead was no longer actionable, if the husband *alone* makes an agreement making the note actionable as to him, the mortgage might be foreclosed.

171. 12 Kan. 500.

172. It had also been stated, probably as dictum, in *Ayres v. Probasco*, 14 Kan. 175, that whenever a person advances money with the consent of the owner of a homestead to extinguish some liens thereupon with the understanding between the parties that the person so advancing the money will acquire a lien, such person "will in equity acquire such lien to the extent of the money so advanced and so used to extinguish the first-mentioned lien, notwithstanding the instrument intended by the parties to create the lien in favor of the party advancing the money, or to the evidence of such lien, may be void." (p. 198.) This principle seems thoroughly applicable to *Jenkins v. Simmons*.

173. 62 Kan. 242, 61 Pac. 1131, 84 A. S. R. 381.

174. 64 Kan. 636, 68 Pac. 68.

It is well established that notes, or mortgages given on the homestead, as part of the purchase price, or to secure money with the agreement that it is to be used to purchase a homestead, and the money is so used, constitute valid liens thereon even though not executed by joint consent,¹⁷⁵ and this includes the assumption of a prior mortgage as a part of the purchase price.¹⁷⁶ The same rule applies to mortgages given to secure money for improvements.¹⁷⁷ Of course joint consent is not necessary to sell or encumber the property after it has been abandoned as a homestead.¹⁷⁸

175. *Andrews v. Alcorn*, 13 Kan. 351; *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201. 22 L. R. A. 709; *Dreese v. Myers*, 52 Kan. 126, 34 Pac. 349; *Nichols v. Overacker*, 16 Kan. 54; *Hoffman v. Hill*, 47 Kan. 611, 28 Pac. 623; *Pratt v. Topeka Bank*, 12 Kan. 570.
 176. *Sheldon v. Pruessner*, supra.
 177. *Hoffman v. Hill*, supra, (implicity); *U. S. Invest. Co. v. Phelps*, 54 Kan. 144, 37 Pac. 982.
 178. *Anderson v. Kent*, 14 Kan. 207; *Brandford v. Loan Co.*, 47 Kan. 587, 28 Pac. 702; *Cf. Jenkins v. Henry*, 52 Kan. 606, 35 Pac. 216, and note 169, ante.

There is no necessity for joint consent in order to devise a homestead, beyond that required in order to devise any other property.¹⁷⁹

179. See *infra*, VII, B, as to devise of homesteads.

D. EFFECT OF LACK OF JOINT CONSENT—ESTOPPEL TO ASSERT INVALIDITY

It may be stated as a general proposition that the failure to have joint consent of both spouses in the alienation or encumbrancing or lease of homestead property renders such attempted act void.¹⁸⁰ It would seem, therefore, that this would preclude subsequent *ratification* by the nonconsenting spouse, for that which is void cannot be ratified. The writer has discovered no Kansas case to the contrary. *Howell v. McCrie*¹⁸¹ held such ratification impossible where the original acts were fraudulent. *Ott v. Sprague*¹⁸² held that a deed by the wife alone, eight years after the original void deed was executed by her husband, did not make a valid conveyance. Cases which might be interpreted as holding to the contrary are really not so, but only hold that subsequent acts may show joint consent *at the time*,¹⁸³ but do not ratify what was void at its inception. *Smith v. Kibbe*¹⁸⁴ might possibly be thought to be contrary, but that case only holds that when a contract to convey land is signed by only one spouse, but is followed by a deed joined in by both, the two instruments will be treated as one valid conveyance.¹⁸⁵ *Ferguson v. Nuttleman*¹⁸⁶ holds that a mortgage on a homestead is valid even though signed by the husband and wife at different times, if one signs at the request of the other and the mortgage purports to be the act of both. This decides only that there may be joint consent under the circumstances, making the mortgage valid *ab initio*, rather than deciding that ratification makes a void mortgage valid.

180. *Morris v. Ward*, 5 Kan. 239; *Dollman v. Harris*, 5 Kan. 597; *Ayers v. Probasco*, 14 Kan. 175; *Ott v. Sprague*, 27 Kan. 620; *Bird v. Logan*, 35 Kan. 228; *Howell v. McCrie*, 36 Kan. 636, 15 Pac. 527, 59 Am. R. 584; *Jenkins v. Simmons*, 37 Kan. 496, 15 Pac. 522; *Warden v. Reser*, 38 Kan. 96; *Pilcher v. A. T. & S. F. Rld. Co.*, 38 Kan. 516; *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 199; *Thimes v. Stumpff*, 33 Kan. 53 (and vendee under contract may not recover payments he has made); *Wea Gas Co. v. Franklin Land Co.*, 54 Kan. 538, 45 A. S. R. 297; *Hoefer v. Frankier*, 96 Kan. 400, 151 Pac. 1112; *Pratt v. Bank*, 12 Kan. 570 (except for purchase money); *Peterson v. Skidmore*, 108 Kan. 339, 195 Pac. 600 (even if lessee has paid rent); *Thompson v. Millikin*, 102 Kan. 717, 172 Pac. 534.
 181. 36 Kan. 636, 14 Pac. 257, 59 A. R. 584.
 182. 27 Kan. 620.
 183. *Dudley v. Shaw*, 44 Kan. 683, 24 Pac. 1114; *Sullivan v. Wichita*, 64 Kan. 539, 68 Pac. 55; *Johnson v. Samuelson*, 69 Kan. 263, 76 Pac. 867.
 184. 104 Kan. 159, 128 Pac. 427, 5 A. L. R. 483.
 185. But where the joinder in the subsequent deed is involuntary, this will not validate a prior contract signed by only one. *Tucker v. Finch*, 106 Kan. 419, 188 Pac. 235.
 186. 110 Kan. 718, 205 Pac. 365.

It has also been held that such void instrument will not become effective against the homestead property if it is sold while a homestead and then "abandoned."¹⁸⁷ But the effect of abandonment *before* a valid conveyance upon a prior void alienation or encumbrance is another matter. It does not seem possible that such an act could constitute ratification, although it might amount to an estoppel.¹⁸⁸ The two should be kept distinct.

187. *Morris v. Ward*, 5 Kan. 239; *Franklin Land Co. v. Wea Gas Co.*, 43 Kan. 518, 23 Pac. 630; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622 (to the extent of the interest of one occupying it as a homestead); *Hill v. Alexander*, 2 K. A. 251, 41 Pac. 1066.

188. (a) Cf. *Jenkins v. Henry*, 52 Kan. 606, 35 Pac. 216, *supra*, V. C. Was this estoppel due to subsequent abandonment, or was joint consent unnecessary, because already abandoned? (b) In *Shay v. Bevis*, 72 Kan. 208, 83 Pac. 202, the acts constituting the estoppel relied upon in arriving at the decision were those occurring subsequent to the abandonment.

There are several cases holding that one or both spouses may be estopped from asserting the invalidity of a deed, mortgage, or lease, by virtue of his, her, or their conduct. Thus, in *McAlpine v. Powell*,¹⁸⁹ the owner of one homestead attempted to exchange it for another. The wife did not join in the agreement, but she knew of its terms, acted upon it, expressed satisfaction with it, and occupied the new homestead and enjoyed the benefits of the exchange. It was held that she was equitably estopped from claiming the former homestead.^{190, 191}

189. 44 Kan. 411, 24 Pac. 353.

190. Since consent to alienation need not be in writing, these facts might have constituted sufficient evidence for a finding that she did in fact consent to the deed at the time, thus eliminating the need for invoking the doctrine of estoppel.

191. Essentially the same facts were involved in the two cases, *Sellers v. Crossan*, 52 Kan. 570, 35 Pac. 205, and *Sellers v. Gay*, 53 Kan. 354, 36 Pac. 744. The spouses executed a deed purporting to convey a fee, and subsequently endeavored to show that the deed was in fact only a mortgage given to secure the payment of money they owed. They retained possession, but disavowed ownership in the land, and acted as if they had no interest therein. It was held that they were estopped, as between them and an innocent mortgagee of their ostensible grantee, to assert homestead rights in the property. Although no question of joint consent is involved, these cases clearly show that the doctrine of equitable estoppel applies even against homestead claimants.

In *Adams v. Gilbert*¹⁹² the deed to the homestead was void because the wife was insane at the time, wherefore the instrument conveyed nothing as long as the property remained a homestead. While the insane wife was yet alive the husband and children abandoned the premises, which, *before* the death of the wife, were acquired by an innocent purchaser for value, who made extensive improvements thereon. The action was *begun* by the husband *after* the death of the wife to recover the premises. The court said:

"While the marriage relation continued and the property was occupied as a homestead, no act of the husband could be efficient to ratify or confirm such deed. The husband might by his actions, words, or silence, when he should have spoken, confirm a deed to the homestead executed by himself alone, or estop himself from denying its validity, so as to make it convey title, after the homestead character had ceased, or after the death of the wife."¹⁹³

"He surrendered possession to one holding under a deed which he had executed. . . . Having executed the deed which, *had he continued to occupy the premises as a homestead* (italics ours), would have conveyed nothing, he did more, he abandoned the homestead, surrendered the premises, put his grantee into possession, gave effect to a deed which while the premises remained a homestead had no effect, but when they ceased to be a homestead might and did operate."¹⁹⁴

192. 67 Kan. 273, 72 Pac. 769.

193. Pg. 275. The implication here is that a homestead may be abandoned during the life of an insane wife. This appears to be the interpretation given the case by Johnston, C. J., in *Shay v. Bevis*, 72 Kan. 208, 213, 83 Pac. 202. But Cf. the majority opinion in *Withers v. Love*, 72 Kan. 140, 155, 83 Pac. 204.

194. Pg. 246. It is also implied that the acts occurring during the life of the wife, acts consisting primarily of "abandonment" constitute estoppel to assert the invalidity of the deed after the death of the wife. The real question is: Did the homestead right terminate upon the removal from the homestead or not until the death of the wife? That is, did removal from the premises only constitute an act of estoppel, or did it also preclude the assertion of the invalidity of the deed between that time and the wife's death? Cf. *Withers v. Love*, *supra*.

Consider in this connection the case of *Withers v. Love*.¹⁹⁵ The wife was insane and confined to a state institution. The husband was sentenced to the penitentiary, and the children were cared for by relatives. The land was sold by an authorized attorney of the husband. Eleven years after the sale,

and seven years after the husband's return from the penitentiary (during all of which time the husband knew of the transfers of and improvements upon the land) but *before* the insane wife died, the husband brought ejectment for the recovery of the land. It was held that no act of the husband during the life of his insane wife could be held to constitute abandonment, and that he was not estopped to assert the invalidity of his deed. In considering *Adams v. Gilbert*¹⁹⁶ the court held that statements in the opinion suggesting that there was complete abandonment before the wife's death "were not necessary to the decision and are not controlling," on the basis that in the *Adams* case there were sufficient acts of estoppel after the death of the wife.¹⁹⁷ The main basis of distinction between the two cases appears to be that in the *Withers* case the action was begun before the death of the insane wife.¹⁹⁸

195. 72 Kan. 140, 83 Pac. 204 (dissenting opinion given by Johnston, C. J.).

196. 67 Kan. 273, 72 Pac. 769, 100 A. S. R. 456.

197. Pg. 155, quoting from pg. 277 of the opinion in the *Adams* case.

198. In *Shay v. Bevis*, 72 Kan. 208, 83 Pac. 202, there had been a lease giving the lessee the right to mine salt from land occupied as a homestead. The lease was by the husband alone, but was acquiesced in before and after a subsequent abandonment of the farm as a homestead, and also after a return to the farm, which was later sold while occupied as a homestead. The grantee knew of the lease. The salt company had made valuable improvements, etc. *Held*, the grantors and their grantee were estopped to assert the invalidity of the lease. The principal acts of estoppel relied upon were those *after* abandonment.

Another case in point is *Thompson v. Millikin*.¹⁹⁹ Property owned by the wife was occupied by her and her children as a homestead. The husband had gone to Oregon, where, representing himself as single, he took out a homestead, the law giving that right to one member of a family. After nine or ten years' absence of her husband, the wife, informing her grantee of the facts of her husband's absence, quitclaimed a part of the land, but continued to occupy it as a homestead. Her grantee leased it for oil and gas, and the lessee was sued for an owner's share of the proceeds from the oil, on the theory the deed to the lessor of said lessee was void for want of joint consent. It was held that the wife's acquiescence in the deed and her grantee's lease did not estop her from asserting the invalidity of the deed. In distinguishing *Shay v. Bevis*²⁰⁰ it was emphasized that in the instant case the property never was abandoned as a homestead.

199. 102 Kan. 717, 172 Pac. 534.

200. *Supra*, note 198.

*Miners' Sav. Bank v. Sandy*²⁰¹ presents a clear case of estoppel. The husband had induced his wife, who was of unsound mind, to execute a mortgage on homestead property which he owned. The mortgagee was innocent. It was held that the husband was estopped from setting up lack of joint consent in a mortgage foreclosure suit brought after the wife's death, the court saying: "When Mary H. Sandy, the wife, no longer needs the protection of the law in order to secure to her her homestead, shall Edwin Sandy be allowed to reap the benefit of his own wrong?"

201. 71 Fed. 840 (1896).

E. RIGHTS OF PURCHASERS AND MORTGAGEES

In preceding sections of this paper we have observed that the grantee, mortgagee or lessee of a homestead property, when the agreement is not joined in by the husband and wife, takes nothing (even though he acts in good faith and is without knowledge of duress or fraud),²⁰² unless there are acts of

estoppel on the part of the grantors, for such agreements are void.²⁰³ It follows, therefore, that the purchaser, mortgagee, or lessee by a subsequent valid agreement, takes free from such prior "void transfers or encumbrances,"²⁰⁴ even though he knows of them.²⁰⁵

202. *Anderson v. Anderson*, 9 Kan. 112.

203. See note 180, *supra*.

204. *Morris v. Ward*, 5 Kan. 239; *Franklin Land Co. v. Wea Gas, etc., Co.*, 43 Kan. 518, 23 Pac. 630; *Hill v. Alexander*, 2 K. A. 251, 41 Pac. 1066.

205. *Franklin Land Co. v. Wea Gas, etc., Co.*, *supra*.

Similarly, the grantee of property, while it is a homestead, takes it free from ordinary judgments and debts against the owner,²⁰⁶ and may assert the homestead character of the property, when conveyed or mortgaged to him, to prove the invalidity of such claims.²⁰⁷ But any valid liens on the homestead at the time of the conveyance or mortgage remain encumbrances thereon as to the grantee or mortgagee.²⁰⁸ Of course, if the premises have been abandoned before sale, the judgment would be a lien thereon as to a subsequent purchaser.²⁰⁹

206. *Morris v. Ward*, 5 Kan. 239; *Moore v. Reaves*, 15 Kan. 150; *Monroe v. May*, 9 Kan. 466; *Dayton v. Donart*, 22 Kan. 256; *Ins. Co. v. Nichols*, 41 Kan. 136, 21 Pac. 111; *Ellwell v. Hitchcock*, 41 Kan. 130, 21 Pac. 109; *Wilson v. Taylor*, 49 Kan. 774, 31 Pac. 697; *Osborne v. Schoonmaker*, 47 Kan. 667, 28 Pac. 711; *Roser v. Bank*, 56 Kan. 129, 45 Pac. 595; *Winter v. Ritchie*, 57 Kan. 264; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622 (to extent of share conveyed while so occupied); *Cropper v. Goodrich*, 89 Kan. 589, 132 Pac. 163; *Fredenhagen v. Nichols, etc., Co.*, 99 Kan. 113, 160 Pac. 997; *Sage v. James*, 118 Kan. 11, 233 Pac. 1013; *Bank v. Hill*, 125 Kan. 308, 263 Pac. 1045; *Roberts v. Bank*, 126 Kan. 503, 268 Pac. 799; *Bank v. Tyler*, 130 Kan. 308, 286 Pac. 400; *Randolph v. Sprague*, 10 K. A. 583, 63 Pac. 446.

207. *Ellwell v. Hitchcock*, 41 Kan. 130, 21 Pac. 109; *Ins. Co. v. Nichols*, 41 Kan. 136, 21 Pac. 111; *Bank v. Tyler*, 130 Kan. 308, 286 Pac. 400.

208. *Hurd v. Hizon*, 27 Kan. 722; *Tyler v. Johnson*, 47 Kan. 470, 28 Pac. 198.

209. *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622; *Morris v. Brown and Baker*, 5 K. A. 102, 48 Pac. 750.

Contracts by one spouse for the sale of the homestead are unenforceable,²¹⁰ but if the contract calls for the conveyance of more than the homestead property, the vendee in the contract is entitled to damages against the contracting party for the failure to convey that which is not the homestead.²¹¹ An early case²¹² held that a purchaser who occupies under a parol agreement by the husband to sell, and makes improvements on the land, is entitled to the value thereof when the wife refuses to convey; but *Thimes v. Stumpff*²¹³ later held that one who makes a payment under a contract to purchase a homestead with full knowledge that the wife has not consented to the sale, does so voluntarily, and cannot recover the amount so paid. One cannot recover damages for the nonperformance of a contract to sell the homestead if it is not executed with the joint consent of both spouses,²¹⁴ nor can specific performance be enforced.

210. *Martin v. Hush*, 91 Kan. 833, 139 Pac. 401; *Tucker v. Finch*, 106 Kan. 419, 188 Pac. 235; *Iles v. Benedict*, 110 Kan. 200, 203 Pac. 925.

211. *Hughes v. Cressler*, 130 Kan. 533, 287 Pac. 271.

212. *Lister v. Batson*, 6 Kan. 420.

213. 33 Kan. 53, 5 Pac. 431.

214. *Hodges v. Farnham*, 49 Kan. 777, 31 Pac. 606. See R. S. 60-3503.

VI. Termination of Homestead Rights

A. ABANDONMENT

1. *What constitutes.* The most common way in which homestead exemption rights terminate is by abandonment. This may be defined as the cessation of the use of the premises as a family residence,²¹⁵ which indicates how closely related the question of abandonment is to that of the acquisition of homestead rights. One is practically the opposite of the other.

215. *Anderson v. Kent*, 14 Kan. 207; *Bank v. Diamond*, 119 Kan. 294, 239 Pac. 970; *Morris v. Brown*, 9 K. A. 102, 48 Pac. 750; *Thomas v. Smith*, 8 K. A. 855, 54 Pac. 695.

Just as there can be acquisition of homestead rights before actual occupancy, analogously, such rights do not necessarily cease upon temporary absence, if there is then and continues to be an intent to return,²¹⁶ and this is true even though the premises are leased,²¹⁷ or if there never is an actual return to the premises before sale.²¹⁸ This allows for absence for business purposes,²¹⁹ on account of health,²²⁰ or to educate oneself or one's children,²²¹ or for a minor to reside elsewhere with a guardian.^{221a}

216. (a) *McDowell v. Diefdorf*, 1 Kan. 648; *Garlinghouse v. Mulvane*, 40 Kan. 428; *Hizon v. George*, 18 Kan. 253; *Osborne v. Schoonmaker*, 47 Kan. 667, 28 Pac. 711; *Deering v. Beard*, 48 Kan. 16, 28 Pac. 981; *Upton v. Cozen*, 60 Kan. 1; *Sloss v. Sullard*, 63 Kan. 884, 65 Pac. 658; *Oil Co. v. Parish*, 61 Kan. 311, 59 Pac. 640; *Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649; *Kiehler v. Gray*, 102 Kan. 878, 172 Pac. 25, L. R. A. 1918 D, 1088; *Fredenhagen v. Nichols*, 99 Kan. 113, 160 Pac. 997; *Rose v. Bank*, 95 Kan. 331, 148 Pac. 745; *Carlson v. Ritchie*, 115 Kan. 722, 224 Pac. 895; *Volger v. Volger*, 110 Kan. 208, 203 Pac. 704; *Schlandt v. Hartman*, 105 Kan. 112, 181 Pac. 547; *Bank v. Weeks*, 138 Kan. 376, 26 P. 2d 262; *Strackeljohn v. Campbell*, 136 Kan. 145, 12 P. 2d 812; *McGill v. Sutton*, 67 Kan. 234, 72 Pac. 853; *Moses v. White*, 6 K. A. 558, 51 Pac. 622; *Kansas Coal Co. v. Judd*, 6 K. A. 487, 50 Pac. 943; *Drury v. Smith*, 8 K. A. 52, 53 Pac. 74. (b) But within a reasonable time under the circumstances there must be reoccupancy. *Rose v. Bank*, 95 Kan. 331, 148 Pac. 745.

217. *Hizon v. George*, 18 Kan. 253; *Upton v. Cozen*, 60 Kan. 1, 55 Pac. 284; *Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649.

218. *Fredenhagen v. Nichols*, 99 Kan. 113, 160 Pac. 997.

219. *McDowell v. Diefdorf*, 1 Kan. 648; *Palmer Gas Co. v. Parish*, 61 Kan. 311, 59 Pac. 640.

220. *Sloss v. Sullard*, 63 Kan. 884, 65 Pac. 658; *McGill v. Sutton*, 67 Kan. 234, 72 Pac. 853; *Schlandt v. Hartman*, 105 Kan. 112, 181 Pac. 547; *Vogler v. Vogler*, 110 Kan. 208, 203 Pac. 704; *Carlson v. Ritchie*, supra; *Williams v. Roberts*, 139 Kan. 460, 32 P. 2d 229.

221. *Fredenhagen v. Nichols*, 99 Kan. 113, 160 Pac. 997; *Koehler v. Gray*, 102 Kan. 878, 172 Pac. 25, L. R. A. 1918 D, 1088; *Strackeljohn v. Campbell*, 136 Kan. 145, 12 P. 2d 812; *Bank v. Weeks*, 138 Kan. 376, 26 P. 2d 262.

221a. See Notes 270, 271, *infra*.

Parts of a building,²²² or parts of the premises,²²³ may be used by others than members of the family without destroying the homestead character of the premises, if such use is not inconsistent with occupancy as a homestead. The exemption continues even though the premises are used for other than residential purposes.²²⁴

222. *Layson v. Grange*, 48 Kan. 440, 29 Pac. 585; *Milford Sav. Bank v. Ayers*, 48 Kan. 602, 29 Pac. 1149.

223. *Pitney v. Eldridge*, 58 Kan. 215, 48 Pac. 854; *Barten v. Martin*, 133 Kan. 329, 299 Pac. 614.

224. See notes 72, 73, *supra*.

The absence of one spouse will not destroy the homestead rights of the other members of the family;²²⁵ but when the family establishes a new domicile the homestead rights in the old one cease.²²⁶ The absence of the wife in an institution for the insane, coupled with the confinement of the husband in the penitentiary and the removal of the children to homes of relatives, does not constitute abandonment.²²⁷ In fact, this case emphatically held that no act of the husband of an insane wife during her lifetime can be deemed

abandonment. However, the husband, evidently, can abandon the homestead without the consent of his wife who has never been a resident of this state.²²⁸

225. *New Eng. Trust Co. v. Nash*, 5 K. A. 739, 46 Pac. 987; *Thompson v. Millikin*, 102 Kan. 717, 172 Pac. 534.

226. *Fessler v. Haas*, 19 Kan. 216; *Atchison Sav. Bank v. Wheeler's Adm'r*, 20 Kan. 625; *Quinton v. Adams*, 83 Kan. 484, 112 Pac. 95; *Bank v. Diamond*, 119 Kan. 294, 239 Pac. 970; *Morris v. Brown*, 5 K. A. 102, 48 Pac. 750; *Mosteller v. Readhead*, 6 K. A. 512, 50 Pac. 948; *Thomas v. Smith*, 8 K. A. 855, 54 Pac. 695. But Cf. *Thompson v. Millikin*, supra.

227. *Withers v. Love*, 72 Kan. 140, 83 Pac. 204, 3 L. R. A., n. s., 514.

228. *Jenkins v. Henry*, 52 Kan. 606, 35 Pac. 216.

2. *Proof*. Whether the homestead has been abandoned or not is a question of fact,²²⁹ or a mixed question of law and fact,²³⁰ having to do largely with the intention of the parties, and is to be determined from all the circumstances.²³¹ The fact that the head of the family has voted elsewhere is to be taken into account,²³² but does not prove abandonment.²³³ Declarations of intent are admissible,²³⁴ but evidence of attempted sale of the property while occupied is not.²³⁵ However, evidence of a contract of sale, and receipt of payments thereon, while the claimant is not occupying the premises, is admissible.²³⁶ It has been held that one seeking to attach property claimed as a homestead must prove it has been abandoned.²³⁷

229. *Blitz v. Merger*, 119 Kan. 760, 241 Pac. 259; *Bank v. Bird*, 121 Kan. 617, 249 Pac. 593; *Bank v. Weeks*, 138 Kan. 376, 26 P. 2d 262.

230. *Moors v. Sanford*, 2 K. A. 243, 41 Pac. 1064.

231. *Blitz v. Merger*, 119 Kan. 760, 241 Pac. 259; see, also, *Smith v. McClintock*, 108 Kan. 833, 196 Pac. 1089; *Kline v. Graff*, 8 K. A. 855, 54 Pac. 328, findings of fact in favor of homestead not disturbed. Cf. *In re Carlson's Estate*, 115 Kan. 722, 224 Pac. 895, finding of abandonment; evidence held insufficient; reversed.

232. *Atchison Sav. Bank v. Wheeler's Adm'r*, 20 Kan. 625; *Mosteller v. Readhead*, 6 K. A. 512, 50 Pac. 948.

233. *McGill v. Sutton*, 67 Kan. 234, 72 Pac. 853; *Osage Merc. Co. v. Blanc*, 79 Kan. 356, 99 Pac. 601; *Bank v. Weeks*, 138 Kan. 376, 26 P. 2d 262.

234. *Bank v. Hill*, 125 Kan. 308, 263 Pac. 1045.

235. *Id.*

236. *Gapen v. Stephenson*, 18 Kan. 140.

237. *Elliott v. Parlin*, 71 Kan. 665, 81 Pac. 500.

3. *Effect*. The effect of abandonment of a homestead before sale is to make it liable for the debts of the owner, or, if it is abandoned by the heirs or survivors before sale, it is also liable for the debts of the decedent.²³⁸ But "relinquishment or abandonment of homestead rights by minors cannot be lightly imputed to them."²³⁹

238. *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622; *Morris v. Brown*, 5 K. A. 102, 48 Pac. 750; *Müller v. Baker*, 9 K. A. 583, 58 Pac. 1002.

239. *Sage v. Ijames*, 118 Kan. 11, 233 Pac. 1013. See also, *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. 1107.

B. ESTOPPEL

As has been indicated above (section V, D), parties having homestead rights may "lose" them, in the sense of being precluded from asserting the invalidity of a deed or mortgage because of lack of joint consent, as a result of their acts.²⁴⁰

240. In *Catlin v. Wm. Deering Co.*, 102 Kan. 256, 170 Pac. 396, it was held that where a sheriff's sale of land under an order of sale based on a mortgage foreclosure, and also under an execution, has been confirmed, and after the expiration of the period of redemption a deed has been executed, the title of the grantee is not open to attack on the ground that the land sold was occupied as a homestead and was therefore exempt from sale on a general execution. But "the question whether the land was exempt from sale on execution . . . could only affect the proceeds of the sale over and above the amount of the mortgage debt, a matter which cannot be inquired into in this proceeding." (pg. 258.)

C. WAIVER—VOLUNTARY RELINQUISHMENT

(1) *Antenuptial contracts.* A consideration of the effect of antenuptial agreements upon homestead rights impresses one of the imperative necessity of distinguishing between the ownership of homestead property, *i. e.*, property impressed with homestead rights, and the homestead exemption-occupancy rights, which may or may not be coupled with ownership of the property. It is firmly established that while an antenuptial contract will be enforced as to limiting inheritance of the property of the decedent spouse, such a contract will have no effect upon the homestead rights of the surviving spouse.

This distinction is clearly indicated in an early case, *Hafer v. Hafer*.²⁴¹ In an antenuptial contract the wife-to-be agreed that if she survived her husband-to-be she would receive only a child's share of his property. When the husband died the widow and a minor child were living on the homestead. It was held that in compliance with the agreement the widow should inherit only a child's share, but that until she remarried, or until the child became of age, the homestead was not subject to partition, and until such time she was entitled to the possession and use of the homestead.²⁴²

241. 33 Kan. 449, 6 Pac. 537; *Id.*, 36 Kan. 524, 13 Pac. 821.

242. Accord.: An antenuptial agreement does not abrogate homestead rights of occupancy and exemption: *Matney v. Linn*, 59 Kan. 613, 54 Pac. 688 (dictum); *Watson v. Watson*, 106 Kan. 693, 189 Pac. 949; *Hoard v. Jones*, 119 Kan. 138, 237 Pac. 895; *Boulls v. Boulls*, 137 Kan. 880, 22 P. 2d 896.

2. *Postnuptial agreement.* On the basis that an antenuptial agreement is one looking forward to the establishment and maintenance of a family home, while a postnuptial separation agreement is made with the view of family dissolution, it was held in *Hewett v. Gott*²⁴³ that by a contract of the latter type the husband could and did divest himself of any homestead right in property which his wife resided upon at the time of her death. Also, where a wife consents to writing to her husband's devise of all his property to other persons, she has no homestead rights therein by surviving him.²⁴⁴ An election to take under a will precludes the consenting spouse from inheriting more than such will provides, as such election constitutes a consent to devise the remaining property to others.²⁴⁵

243. 132 Kan. 168, 294 Pac. 897. See, also, *Dutton v. Dutton*, 113 Kan. 146, 213 Pac. 326.

244. *Burns v. Spiker*, 109 Kan. 22, 202 Pac. 370.

245. 59 Kan. 455, 53 Pac. 520.

3. *Ordinary contract of waiver.* Homestead rights may be waived by agreements with creditors. Thus, in *Potter v. Northrup Baking Co.*,²⁴⁶ the mortgagee had an interest in the insurance proceeds on a homestead property. The owner and his wife directed the mortgagee to pay the proceeds to a creditor whose claim was unsecured. The mortgagee paid to the creditor the surplus remaining after the satisfaction of his mortgage lien. It was held that the homestead exemption rights in the proceeds of the insurance had been waived as to the creditor.²⁴⁷

246. 59 Kan. 455, 53 Pac. 520.

247. (a) Accord., *Schloss v. Unsell*, 114 Kan. 69, 216 Pac. 1091. A widower, without dependents or minor children, engaged with another in business, may waive his homestead rights in favor of a wholesale house in a written application to that house for the purchase of goods on credit. (b) But where a lease provided that the tenant, "to secure the payment of said rental, hereby waives the benefit of the exemption laws of the state of Kansas," such provision is construed as not to waive the homestead exemption in other property thereafter acquired, so as to make it liable for rent under the lease. (*West v. Groves*, 139 Kan. 361, 31 P. 2d 10.)

4. *Valid conveyance or mortgage.* A valid conveyance of the part of the homestead on which the improvements are situated has been called an "abandonment" as to the remaining part,²⁴⁸ which is in accord with the requirement of residence, actual or constructive, to maintain a homestead. A valid mortgage has been termed a "waiver" of homestead rights as to such mortgage,^{248a} which is a manner of expressing what is explicitly provided in the constitutional and statutory provisions relating to homesteads.

248. *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668.

248a. *Prudential Ins. Co. v. Clark*, 122 Kan. 109, 251 Pac. 199.

VII. Homestead Rights of Survivors: Heirs and Devisees

The most complex phase of homestead exemption law is that relating to the homestead rights of those succeeding to the ownership of the homestead property of a decedent, as well as the homestead rights of those of the decedent's family not succeeding to ownership.

A. DESCENT OF HOMESTEAD PROPERTY

Homestead property descends in the same shares as any other real estate,^{248b} but the shares of some heirs may be subject to homestead exemption—occupancy rights in others.²⁴⁹ This is also true of the transmission of the decedent's property under the terms of an antenuptial agreement.²⁵⁰ It may descend in some instances subject to the debts of the decedent, and under other circumstances free from such liabilities, depending primarily upon whether or not the heir resides upon the premises and thus prolongs their homestead character.²⁵¹ As stated in *Hollinger v. Bank*,²⁵² "The homestead right grows out of a condition and is not an estate."

248b. *Vandiver v. Vandiver*, 20 Kan. 501; *Ott v. Sprague*, 27 Kan. 620; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622; *Mitchell v. Mitchell*, 69 Kan. 441, 77 Pac. 98; *Hollinger v. Bank*, 69 Kan. 519, 77 Pac. 263; *Newby v. Anderson*, 106 Kan. 477, 188 Pac. 438; *Solomon Nat'l Bank v. Birch*, 121 Kan. 334, 336, 246 Pac. 1007; the rule of advancements applies to inheritance of homestead property (*White v. White*, 41 Kan. 556, 21 Pac. 604).

249. *Dayton v. Donart*, 22 Kan. 256; *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694; *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537, 36 Kan. 524, 13 Pac. 821; *Mitchell v. Mitchell*, supra; *Northrup v. Horville*, supra; *Smith v. Landis*, 93 Kan. 453, 144 Pac. 998.

250. Notes 241, 242, supra.

251. *Stratton v. McCandless*, 32 Kan. 512, 4 Pac. 1018; *Postlethwaite v. Edson*, 102 Kan. 104, 171 Pac. 769, L. R. A. 1918 D 983.

252. 69 Kan. 519, 521, 77 Pac. 263.

B. DEVISE OF HOMESTEAD PROPERTY

A devise has been construed as not amounting to an "alienation" of homestead property,²⁵³ with two important consequences. (a) No joint consent of husband and wife is required to devise homestead property beyond that required (R. S. 22-108, 238, 239) for the devise of other property.²⁵⁴ (b) A will does not *ipso facto* pass the property to the devisee free from the debts of the testator,²⁵⁵ as does an alienation during the lifetime of the homestead owner.²⁵⁶ "When the ownership vests in a member of the family in virtue of the provisions of a will, the homestead exemption survives to the same extent as though title had passed to the same person by inheritance."²⁵⁷ Thus, taking under a will neither adds to nor subtracts from the exemption rights of a member of a family of the decedent.²⁵⁸

253. See notes, 254, 255; also, section V, C. 2, supra.

254. *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569; *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232; *Allen v. Holtzman*, 63 Kan. 40, 64 Pac. 66.

255. *Postlethwaite v. Edson*, 102 Kan. 104, 171 Pac. 769, L. R. A. 1918 D, 983.

256. See note 206, supra.

257. *Hicks v. Sage*, 104 Kan. 723, 727, 180 Pac. 780.

258. *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; *Hicks v. Sage*, supra; *Postlethwaite v. Edson*, supra.

One who is entitled to homestead exemptions does not waive such rights by taking under a will wherein the testator directs the payment of his debts out of the property devised, if the direction is general.²⁵⁹ "To have that effect the language employed must be unequivocal and imperative."²⁶⁰

259. *Cross v. Benson*, supra; *Hicks v. Sage*, supra; *Homeward v. Eggers*, 132 Kan. 256, 295 Pac. 681.

260. *Hicks v. Sage*, supra, pg. 727.

C. WHO ARE ENTITLED TO HOMESTEAD RIGHTS

1. *Generally.* The right of *surviving members of the family* of a homestead owner to inherit the property impressed with homestead exemption rights is not explicitly stated in the constitution, but, as has been expressed in *Cross v. Benson*,²⁶¹ it would indeed be inconsistent with the purpose of the homestead exemption laws "to engraft upon the words of the constitution, 'shall be exempted from forced sale under any process of law,' the alien phrase 'during the lifetime of the owner whose family occupies it.' The constitution itself forbears to express any such limitation. Such an interpretation can scarcely be made in a document which enumerates its own exceptions and prescribes its own limitations."²⁶² Such exemption rights continue, therefore, until the homestead is abandoned or conveyed, or "the family itself is dissolved until there is no one left to invoke the constitutional protection."²⁶³ Thus was R. S. 22-102 (G. S. 1868, ch. 33, § 2; Oct. 31) declared constitutional.

261. 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560.

262. *Id.*, p. 503.

263. *Id.*

2. The questions presented, then, are: Who are members of the family? How much of a family is necessary "to invoke constitutional protection?" What protection is given such persons? The first two questions have been discussed somewhat in a preceding section.²⁶⁴

264. See, supra, section II, A.

(a) *Exemption from decedents' debts.* A widow, though the sole occupant (or even the sole surviving member of the family) is entitled to occupy the homestead free from the debts of the deceased owner.²⁶⁵ An unmarried adult daughter, sole occupant of the homestead property, holds it free from her father's debts.²⁶⁶ It will thus be seen that the homestead exemption from decedent's debts continues in favor of adults as well as minors; and such exemption survives to occupying or nonoccupying members of the family as long as it is occupied as a homestead by the widow or widower,²⁶⁷ or by any of the children,²⁶⁸ but upon ceasing to be occupied as a homestead by any members of the family, the share of one not occupying it, if it has not been conveyed while yet a homestead, becomes liable for the debts of the decedent.²⁶⁹

265. *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; *Aultman v. Price*, 68 Kan. 640, 75 Pac. 1019; *Weaver v. Bank*, 76 Kan. 540, 94 Pac. 273, 123 A. S. R. 155, 16 L. R. A., n. s., 110; *Sawin v. Osborn*, 87 Kan. 878, 126 Pac. 1074, Ann. Cas. 1914 A, 647; *Breen v. Breen*, 102 Kan. 766, 173 Pac. 2, L. R. A. 1918 F, 394; *Watson v. Watson*, 106 Kan. 693, 189 Pac. 949; *Boulls v. Boulls*, 137 Kan. 880, 22 P. 2d 465.

266. *Koehler v. Gray*, 102 Kan. 878, 172 Pac. 25, L. R. A. 1918 D, 1088 (overruling *Battey v. Barker*, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33).

267. *Barbe v. Hyatt*, 50 Kan. 80, 31 Pac. 694; *Northrup v. Horville*, 62 Kan. 767, 64 Pac. 622 (p. 769, ¶ 2, impliedly); *Postlethwaite v. Edson*, 102 Kan. 104, 171 Pac. 769, L. R. A. 1918 D, 983 (impliedly); *Haclerode v. Green*, 8 K. A. 477, 54 Pac. 505.

268. *Hicks v. Sage*, 104 Kan. 723, 180 Pac. 780; *Deering v. Beard*, 48 Kan. 16, 28 Pac. 981.

269. *Barbe v. Hyatt*, supra; *Northrup v. Horville*, supra; *Stratton v. McCandliss*, 32 Kan. 512, 4 Pac. 1018; *Postlethwaite v. Edson*, supra; *Miller v. Baker*, 9 K. A. 883, 58 Pac. 1002.

A minor child, or minor children, may own the property exempt as a homestead, even though not actually occupied by them, as when they are living with a guardian,²⁷⁰ or where a minor son farms the land, but lives in town with his mother.²⁷¹ Stepchildren, evidently, do not have any homestead right in the decedent's property.²⁷²

270. *Shirack v. Shirack*, 44 Kan. 653, 24 Pac. 1107; *Smith v. Landis*, 93 Kan. 453, 144 Pac. 998; *Hicks v. Sage*, 104 Kan. 723, 180 Pac. 780.

271. *Deering v. Beard*, 48 Kan. 16, 28 Pac. 981.

272. *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074.

(b) *Exemption from survivor's own debts.* Owning property exempt from the decedent's debts, and owning it exempt from one's own debts, are two different matters. This accounts for the holding in *Cross v. Benson*²⁷³ that a widow, sole occupant of the homestead, could maintain it free from her husband's debts, without having to overrule *Ellinger v. Thomas*,²⁷⁴ which had previously held that a widower, without any dependents, could not occupy the property, which had been the family homestead, free from his own debts. However, the distinction, as applied to *surviving spouses*, was obliterated in *Weaver v. Bank*,²⁷⁵ which held that the surviving spouse, sole occupant, could alone occupy it free from the debts of the decedent spouse and free from his or her own debts, whether the latter were contracted prior to the death of the decedent spouse, and regardless of who owned the legal title to the property during the marriage.²⁷⁶

273. 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560.

274. 64 Kan. 180, 67 Pac. 529.

275. 76 Kan. 540, 94 Pac. 273, 123 A. S. R. 155, 16 L. R. A., n. s., 110.

276. (a) *Accord., Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074 (but here the widow had minor children by a former marriage). See, also, *Schloss v. Unsell*, 114 Kan. 69, 216 Pac. 1091: "If O. E. Unsell had any homestead interest . . ." He was a widower without minors or dependents. The question whether he had a homestead interest or not was not important; if he had, it was waived. (b) In *Roberts v. Bank*, 126 Kan. 503, 268 Pac. 799, it was held that the widow and minor children could convey a homestead (in part inherited) free from a judgment against the widow.

However, the distinction between liability of a homestead for decedent's debts and the survivor's own debts is very important with respect to the share of an adult son. We have observed that the share of a "nonoccupying" adult is exempt from the decedent's debts as long as the property is occupied by some member of the family having homestead rights.²⁷⁷ But as to his own debts, the share of an adult son not occupying the premises is liable, and a conveyance in fraud of creditors will be set aside.²⁷⁸ It has been held²⁷⁹ that the share of an adult married son who occupies the homestead is liable for his debts. In the decision, distinguishing the situation here from that in *Weaver v. Bank*, the court said:

"The exemption has been applied to the debts of the spouse of a deceased homesteader as well as to his debts . . . There is a reason, however, for this extension of benefits because of the oneness of husband and wife, and that each of them share in the control and management of the children of the family, but the exemption has never been extended to the property of adult children from sale for the payment of their own debts."²⁸⁰

277. See *supra*, VII, B, 2, (a), and notes 267, 268, *supra*.

278. *Hollinger v. Bank*, 69 Kan. 519, 77 Pac. 263. See, also, *Bank v. Carter*, 81 Kan. 694, 107 Pac. 234, but here the sale of the adult son's share was not contested by him.

279. *Bank v. Birch*, 121 Kan. 333, 246 Pac. 1007.

280. *Id.*, pp. 337-338. Here the farm descended to the widow and three children (all of whom were adults, and one of whom had married and lived elsewhere). *Lester*, one of the claimants, had always lived on the farm. He was married (before judgment was rendered against him) and continued to occupy a part of the residence. After the judgment he conveyed to his mother. (We do not consider the matter of the liability of the share of Dallas,

as he had been absent.) We have observed (note 96, *supra*) that tenants in common may have homestead rights in their respective shares. Lester and his wife were occupying the farm when judgment was procured. Why did he not have a homestead right in one sixth of the property, in his own right (as a tenant in common) as the *head of a family*, if not as a member of the decedent's family? This would make his conveyance to his mother free from the judgment. (See V, E, and note 206, *supra*.)

C. LIENS AGAINST HOMESTEAD RESIDED ON BY SURVIVORS

The survivors have practically the same exemption rights as the decedent owner had,²⁸¹ so what was a valid lien against the decedent's homestead is such against the homestead of the survivors. A judgment of foreclosure on a mortgage executed by the decedent and his wife "should be against the widow and children in proportion to their interests therein."²⁸² It is liable for the improvements, even while occupied,²⁸³ and for ordinary debts of the estate and of the surviving owners when abandoned before sale.

281. *Fudge v. Fudge*, 23 Kan. 416; *Dayton v. Donart*, 22 Kan. 256; *Brady v. Banta*, 46 Kan. 131, 26 Pac. 441; *Hicks v. Sage*, 104 Kan. 723, 180 Pac. 780.

282. *Brady v. Banta*, *supra*.

283. *Hicks v. Sage*, *supra*.

D. PARTITION OF HOMESTEAD AMONG SURVIVING HEIRS AND DEVISEES

As provided in R. S. 22-105 (G. S. 1868, ch. 33, § 5), "If the intestate left a widow and children, and the widow again marry, or when all of said children arrive at the age of majority, said homestead shall be divided, one half in value to the widow, and the other one half to the children."

That the homestead may not be partitioned as long as the widow remains unmarried and there is a minor child is of course obvious.²⁸⁴ If there are minor children, and no widow or widower, there may not be partition until the minors all become of age.²⁸⁵ If there are children and a widow, but all the children are adults, the children may have partition. It was so held in *Vandiver v. Vandiver*,²⁸⁶ and there was a statement to this effect in *Hafer v. Hafer*,²⁸⁷ *Towle v. Towle*²⁸⁸ so held, and also held that such a sale is not a "forced sale" prohibited by the constitution. It was held in *Newby v. Anderson*²⁸⁹ that where a homestead owner leaves a widow and a married adult daughter surviving him, and the daughter died leaving surviving her a husband and grandchildren, the heirs of the daughter can maintain partition against the widow, who continues to reside on the homestead. *Jehu v. Jehu*²⁹⁰ went further in holding that where the surviving heirs of the decedent were his widow and a son by a former marriage, the son may have partition against his stepmother.

284. *Dayton v. Donart*, 22 Kan. 256; *Gasston v. Tolley*, 22 Kan. 678; *Hafer v. Hafer*, 33 Kan. 449, 36 Kan. 324; *Rowe v. Rowe*, 61 Kan. 862, 60 Pac. 1049.

285. *Trumbly v. Martell*, 61 Kan. 703, 60 Pac. 741 (overr. *Martell v. Trumbly*, 9 K. A. 364).

286. 20 Kan. 501.

287. 36 Kan. 524, 13 Pac. 821.

288. 81 Kan. 675, 107 Pac. 228.

289. 106 Kan. 477, 88 Pac. 438.

290. 110 Kan. 210, 203 Pac. 712. See, also, *Volger v. Volger*, 110 Kan. 208, 203 Pac. 704.

*Bank v. Carter*²⁹¹ went so far as to hold that the purchaser of an adult son's share at a forced sale (against which the son did not protest) may have partition when all the children become of age. (*Hollinger v. Bank*²⁹² did not decide whether or not one in such a position could maintain partition.)

291. 81 Kan. 694, 107 Pac. 234.

292. 69 Kan. 519, 77 Pac. 263 (see note 278, *supra*).

The statute does not provide for partition of the homestead when there is a widow but no children. But in *Vining v. Willis*,²⁹³ where the decedent devised the property to a stranger, and left her husband but no children surviving, it was held that the devise was valid for half the property, and the devisee was allowed partition. In *Sawin v. Osborn*,²⁹⁴ where the decedent left a widow and minor stepchildren, and children of his own by a former marriage, the decedent's children were granted partition.

293. 40 Kan. 609, 20 Pac. 232.

294. 87 Kan. 828, 126 Pac. 1074.

However, in *Breen v. Breen*,²⁹⁵ where the widow took against the will, and there were no children by the marriage of the decedent and the widow, collateral heirs (who were devisee) were denied partition as long as the widow remained on the homestead and unmarried.²⁹⁶

295. 102 Kan. 766, 173 Pac. 2, L. R. A. 1918 F, 394.

296. Accord., *Campbell v. Durant*, 110 Kan. 30, 202 Pac. 841.

*Watson v. Watson*²⁹⁷ went even further. The widow had made an antenuptial contract giving up the right to inherit decedent's property. There were no children of the marriage of the decedent and the widow, but the decedent left children of his own by a former marriage, who were denied partition against the widow.²⁹⁸ While the rule seems clear that an antenuptial agreement should not deprive the widow of her usual homestead rights,²⁹⁹ in this respect she receives added protection in being able to withstand partition of the homestead by the children of the decedent (not her children), *Jehu v. Jehu* to the contrary notwithstanding.

297. 106 Kan. 693, 189 Pac. 949.

298. Accord., *Boulls v. Boulls*, 137 Kan. 880, 22 P. 2d 465, where children of decedent sought one half of the homestead upon the death of the decedent.

299. See notes 241, 242, *supra*.

Of course, when the surviving spouse remarries there may be partition at the instance of the grandchildren of the decedent (children of her daughter by a former marriage);³⁰⁰ of children of the marriage of decedent and survivor, even though there be minor children,³⁰¹ or of children of the decedent.³⁰²

300. *Oliver v. Sample*, 72 Kan. 582, 84 Pac. 138.

301. *Brady v. Banta*, 46 Kan. 131, 26 Pac. 441.

302. *Hafer v. Hafer*, 36 Kan. 524, 13 Pac. 821 (dictum).

2. *Effect of partition.* Partition of a homestead does not destroy its character of exemption from the decedent's debts if the premises continue to be occupied as a residence by the remarried spouse and the children of the marriage of the decedent and his widow,³⁰³ or by the surviving spouse (who is the sole surviving member of the decedent's family) and her minor children by a former marriage.³⁰⁴ In the latter instance the homestead was held exempt from the surviving spouse's debts, which, following *Weaver v. Bank*,³⁰⁵ would be true even though she had no children. The fact that partition does not destroy homestead rights of exemption from debts was a factor in the decision in *Towle v. Towle*,³⁰⁶ allowing partition against the widow by her children.

303. *Brady v. Banta*, *supra*.

304. *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074, Ann. Cas. 1914 A. 647.

305. 76 Kan. 540, 94 Pac. 273, 123 A. S. R. 155, 16 L. R. A., n. s., 110.

306. 81 Kan. 675, 107 Pac. 228.

E. SALE OR ENCUMBRANCE BY HEIRS AND DEVISEES

1. *Rights and limitations thereon.* There is no prohibition on the sale or mortgage of the homestead by the survivors.³⁰⁷ If the ownership is in several persons, the sale or encumbrance by a part of them will be subject to the homestead rights of those not joining therein.³⁰⁸ Thus an oil and gas lease by the widow, who owns one half of the homestead, is subject to the homestead rights of the other owners,³⁰⁹ and *Hannon v. Sommer*³¹⁰ held that a mortgage by a widower is good to the extent of his interest, but subject to the rights of the minor children to occupy the *entire* premises as a homestead.

307. *Dayton v. Donart*, 22 Kan. 256; *Gatton v. Tolley*, 22 Kan. 678; *Bank v. Carter*, 81 Kan. 694, 107 Pac. 234; *Roberts v. Bank*, 126 Kan. 503, 268 Pac. 799; *Hannon v. Sommer* (Kan., 1881), 10 Fed. 601.

308. *Gatton v. Tolley*, *supra* (dictum); *Compton v. Gas Co.*, *supra*; *Hannon v. Sommer*, *supra*.

309. *Compton v. Gas Co.*, *supra*.

310. *Supra*, note 307.

However, where *all* the property has been *devised* to the widow, she alone can execute a mortgage thereon to secure a personal debt, and such mortgage will be prior to homestead rights of minor children, according to *Allen v. Holtzman*.³¹¹ Thus *Hannon v. Sommer* and *Allen v. Holtzman* appear theoretically inconsistent. In regard to the former it may be said that minor children who own a share of the property are entitled to greater protection by the law than in such a case as *Allen v. Holtzman*. In the latter case the decedent parent, by devising all the property to his wife, depended on her, rather than the law, to guard the interests of his children.

311. 63 Kan. 40, 64 Pac. 966.

The right of one who shares in the ownership of the homestead property of the decedent, but who does not reside thereon, does not extend so far as to give such person the right to make a voluntary conveyance in fraud of his own creditors.³¹²

312. *Hollinger v. Bank*, 69 Kan. 519, 77 Pac. 263.

2. *Rights of purchasers and mortgagees.* A valid *bona fide* conveyance of an interest in the homestead while occupied as such by the survivors will give the grantee title to that share free from the debts of the decedent,³¹³ or the debts of the survivor³¹⁴; but any share of a homestead abandoned before sale is subject to both classes of debts,³¹⁵ as in *Northrup v. Horville*,³¹⁶ where the surviving husband, owning one half the homestead, conveyed his share (although he tried to convey all) free from the debts of his deceased wife, and abandoned the homestead before the other heirs made a conveyance of their one half, thus making the latter shares liable for the debts of the decedent owner.

313. See *ante*, notes 267, 268, 269.

314. *Roberts v. Bank*, 126 Kan. 503, 268 Pac. 799.

315. See notes 269, 278, *supra*.

316. 62 Kan. 767, 64 Pac. 622.

3. *Guardian's deeds, leases, mortgages.* As we have earlier observed,³¹⁷ the guardian of an insane married person cannot give the necessary *joint consent* required by the constitution to sell, encumber or lease the homestead. This incapacity, however, ceases upon the termination of the marriage relation, so does not apply to an insane widow's guardian.³¹⁸ The guardian of a minor can convey a good title to such child's share in the homestead estate,³¹⁹ but

all sales, leases, or encumbrances upon a minor's property (homestead or otherwise) must be approved by the probate court.³²⁰

317. See section V, A, and notes 144, 145, 146, 147, 148, *supra*.

318. See R. S. 39-211, 221, as amended (1933 Supp.); see, also, note 144, *supra*. In *Smith v. Landis*, 93 Kan. 453, 144 Pac. 998, the validity of a lease to homestead by the guardian of an insane widow and her children was not questioned.

319. (a) R. S. 38-211 does not make any distinction between homestead and other property of minor. (b) *Guy v. Hanson*, 86 Kan. 933, 122 Pac. 879, guardian can give marketable title; specific performance enforced. In *Roberts v. Bank*, 136 Kan. 503, 268 Pac. 799, the grantee's title was not questioned on this point.

320. R. S. 38-211; *Charles v. Witt*, 88 Kan. 484, 129 Pac. 173; *Ladd v. Foster Investment Co.*, 26 Fed. 2d 700.

F. WHO ARE ENTITLED TO OCCUPY AND RECEIVE PROFITS BEFORE PARTITION

Whether an adult child is entitled to reside on the homestead before it is subject to partition is an interesting question. The decision in *Smith v. Landis*,³²¹ would probably not *per se* preclude such right, for in that case the adult son agreed to pay the guardian of the insane widow and her minor children a stipulated amount of rent. Although it was held that such rent should enure exclusively to the minors and the widow, that could be reconciled with a holding that the adult son had a right to reside thereon upon the theory that he agreed to pay the stipulated amount for the use of the shares of the guardian's wards. Whether he would be additionally indebted to the other adult child who had abandoned the homestead was not an issue in the case. The decision in *Boulls v. Boulls*³²² is probably decisive on this point, however. It held that the widow of a decedent homestead owner was entitled, notwithstanding an antenuptial contract, to the exclusive possession of the homestead, as against the children of the decedent, even though there were no children of the marriage between the decedent owner and the widow.³²³

321. 93 Kan. 453, 144 Pac. 998.

322. 137 Kan. 880, 22 P. 2d 465.

323. In *Hartman v. Armstrong*, 59 Kan. 696, 54 Pac. 1046, testatrix devised the homestead to a son absolutely, which son lived elsewhere and claimed no homestead rights in the property. A daughter and granddaughter of the testatrix, who had lived on the homestead with her, were *denied* a homestead right of occupancy even though there was a clause in the will recommending the son to keep the home so that it would afford a refuge to any of her children who might become homeless. (There were no minor children of testatrix surviving her.)

G. PROCEEDS FROM SALE, MORTGAGE OR LEASE BY SURVIVORS

When an original homesteader abandons the property as a residence, it becomes liable for his debts; the proceeds of a sale by him of the homestead, unless they are intended to be and are used in acquiring a new homestead, are also liable for his debts. When the survivors abandon a homestead before sale, the former homestead becomes liable for the debts of the decedent as well as the survivors; but the cases do not show that the rule as to proceeds applies to the sale by the survivors while occupied as a homestead. No case has been found deciding this point. Logically, if actual abandonment of the homestead by the survivors (before sale) makes it liable for the decedent's debts,³²⁴ the same as abandonment by the decedent would have done, why should not the survivors have to reinvest the proceeds in a new homestead in order to exempt them from the decedent's debts?³²⁵ To make this the rule would indeed be a hardship on minors and a widow, but there would seem to be no social or logical reason forbidding such a rule being applied to the shares of adults.

324. See note 269, *supra*.

325. However, an examination of the cases show that it is practically impossible for minors, or a widow with minor children, to abandon a homestead except by sale. The same leniency is shown toward a widow in distress. See, *e. g.*, in *re Carlson's Estate*, 115 Kan. 722, 224 Pac. 895.

Proceeds from the sale of an inherited homestead are probably liable for the survivor's own debts, unless reinvested in a new homestead, although *Roberts v. Bank*³²⁶ tends to the contrary.

326. 126 Kan. 503, 268 Pac. 799. See note 102, *supra*.

VIII. Enforcement of Claims Against Homestead Protection and Enforcement of Homestead Rights

In this section we shall briefly note some of the matters of procedure in enforcing claims against a homestead and in asserting homestead rights.

A. MORTGAGE FORECLOSURE AND SALE

1. *Parties.* Both husband and wife are necessary parties in an action to foreclose a mortgage on property including their homestead,^{326a} and if the wife is not made a party to the proceeding the judgment of foreclosure is a nullity as to the homestead.³²⁷

326a. Or to become subrogated to rights of mortgagee of homestead. (*Hofman v. Dimple*, 53 Kan. 792, 37 Pac. 976.)

327. *Willis v. Whitead*, 59 Kan. 221, 52 Pac. 445.

2. *Exhaustion of other property before resort to homestead.* Where the mortgage covers the homestead and other property, and the mortgagor becomes bankrupt, it has been held that the mortgagee can release his claim against the other property and enforce it against the homestead.³²⁸ However, the court in a decree of mortgage foreclosure may order that other property than the homestead be first sold,³²⁹ or the mortgagee may make an agreement compelling him to do so.³³⁰ Even without such an agreement the mortgagor may enforce such right as against all but holders of liens prior to the mortgage.³³¹ However, when two tracts, one of which is mortgagor's homestead, are sold on a single bid the presumption is that the sheriff proceeded regularly.³³² Where the tracts are sold separately, and the non-homestead property brings a price much less than its true value, the homesteader may redeem this, convert it into its actual money value, and use the surplus to redeem the homestead.³³³

328. *Chapman v. Lester*, 12 Kan. 592.

329. *LaRue v. Gilbert*, 18 Kan. 220.

330. *Sproul v. Bank*, 22 Kan. 336.

331. *Frick v. Ketels*, 42 Kan. 527, 22 Pac. 280, 16 A. S. R. 507, distinguishing *Chapman v. Lester*, *supra*.

332. *Cronkhite v. Buchanan*, 59 Kan. 541, 53 Pac. 863, 68 A. S. R. 379.

333. *Fraser v. Seelcy*, 71 Kan. 169, 79 Pac. 1081.

B. OTHER LIENS

Other liens than mortgages may be satisfied by selling the homestead,³³⁴ but the burden is upon the creditor to prove his claim comes within the exceptions to the homestead exemptions.³³⁵

334. See section IV, B.

335. *King v. Wilson*, 95 Kan. 390, 148 Pac. 752; *Carter v. Silo Co.*, 106 Kan. 342, 187 Pac. 656.

C. ASSERTING HOMESTEAD EXEMPTION

The most common way of asserting homestead exemption rights is by bringing an action to enjoin the sale of the homestead for satisfaction of ordinary debts.³³⁶ A motion to set aside judgment for sale is also proper procedure,³³⁷ but must be made within a reasonable time under the circumstances.³³⁸ As-

section of exemption rights must be made at the time execution is levied,³³⁹ but confirmation of a void sale does not make it valid, nor estop the claimant from asserting his right to the exemption.³⁴⁰ In bringing an action to enjoin the sale of the homestead, the homestead claimants need not allege or prove that the judgment does not come within the exceptions to the exemptions.³⁴¹

336. *Ward v. Callahan*, 49 Kan. 149, 30 Pac. 176; *Owen v. Wagers*, 118 Kan. 517, 235 Pac. 589; *Zimmerman v. Clark*, 9 K. A. 889, 68 Pac. 277; *Carter v. Silo Co.*, supra.
 337. *White-Crow v. White-Wing*, 3 Kan. 276; *Iliff v. Arnott*, 31 Kan. 672, 3 Pac. 525.
 338. *Iliff v. Arnott*, supra.
 339. *Ard v. Platt*, 61 Kan. 775, 60 Pac. 1048.
 340. *Bank v. Tyler*, 130 Kan. 308, 286 Pac. 400. *Catlin v. Deering*, 102 Kan. 256, 170 Pac. 396, is not contra, as this point was not before the court. See note 240 *supra*.
 341. *King v. Wilson*, 95 Kan. 390, 148 Pac. 752.

IX. Federal Homestead Laws

The rights of one who seeks to acquire title to part of the public domain under the homestead or other federal laws, are governed primarily by the acts of Congress, which prescribe the extent it shall be liable for debts, and to whom title passes.³⁴²

342. *Rogers v. Clemmans*, 26 Kan. 522; *Crimmins v. Morrissey*, 36 Kan. 447; *Watkins v. Muller*, 62 Kan. 1, 61 Pac. 385; *Nelson v. Oberg*, 88 Kan. 14, 127 Pac. 767; *Leslie v. Bank*, 97 Kan. 22, 154 Pac. 219.

Homestead laws are an American institution, unknown in other lands. Kansas may be regarded as a pioneer in this field of constitutional homestead provisions,³⁴³ although Texas was the first state to write such a provision in its constitution.³⁴⁴ Its main purpose is to stabilize the home, as the debates in our constitutional convention disclose.³⁴⁵ Under it the members of the family may have a home, free from creditors, unless they choose to bind it to them, and free from the folly or connivance of the husband or wife alone. The practical application of the comparatively simple wording of the homestead clause of our constitution has given rise to many important questions, as shown by the cases reviewed in this article. We hope the review of these decisions will be of interest, perhaps of importance, to the bar throughout the state.

Although care has been taken in the preparation of this treatise, inaccuracies in it may be found. Its usefulness will be informative, rather than controlling.

343. Stone: Sources of Constitution, p. 699, Wyandotte Constitutional Convention.

344. Texas Const., 1845, Art. VII, Sec. 22.

345. For these see index "Homestead Clause" in Wyandotte Constitutional Convention.

