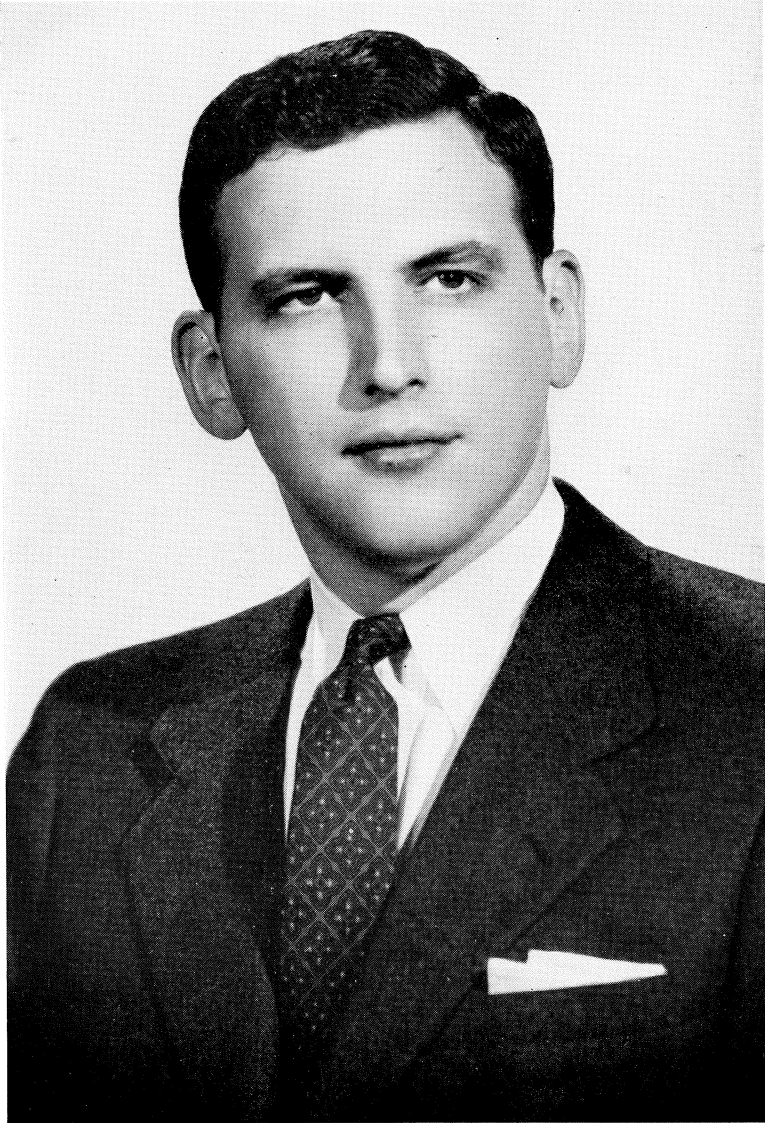


KANSAS JUDICIAL COUNCIL BULLETIN

APRIL, 1951

PART I—TWENTY-FIFTH ANNUAL REPORT



WILLIAM PORTER
of the Wichita, Kansas Bar

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FOREWORD

HOMESTEAD LAW IN KANSAS

In our BULLETIN of July, 1935, we published an article on the above subject by James W. Taylor, later admitted to the Kansas Bar and now a member of the Missouri Bar. Owing to the many requests therefor, that edition became exhausted and at the request of the Council a completely new article on the same subject has been prepared by William Porter, a member of the Kansas Bar now in practice at Wichita, and is published in this issue.

Mr. Porter, whose photograph is reproduced as our frontispiece is a native of Wichita. He took his pre-legal work and received his A. B. degree at the University of Kansas where his scholastic ability was recognized by his election to Phi Beta Kappa. After his service in the United States army, from which he retired as a captain, he enrolled in the Law School of Michigan University from which he was graduated in 1949 with a J. D. degree. While in Law School he was honored by being elected as a member of Phi Delta Phi, of the Barristers and of Order of the Coif. Mr. Porter's article merits the careful reading and attention of bench and bar.

REVIEW OF LEGISLATION PASSED BY THE 1951 LEGISLATURE

Following the custom of past years, our secretary, Mr. Randal C. Harvey, has prepared a review of those acts passed by the 1951 legislature deemed of special interest to the bench and bar and that review, with the full text of certain acts, is printed in this issue.

CHANGES IN THE JUDICIAL COUNCIL MEMBERSHIP

There have been two changes in the personnel of the Judicial Council since the publication of our last BULLETIN.

The Honorable A. K. Stavely, Judge of the Thirty-fifth Judicial District, was appointed by Chief Justice Harvey to succeed the Honorable Edgar C. Bennett, whose term as Judge of the Twenty-first District expired and who, therefore, resigned as a member of the Council.

The Honorable Dale M. Bryant, Chairman of the Judiciary Committee of the House of Representatives in the present legislature, succeeded the Honorable Richard L. Becker, Chairman in the preceding session.

Homestead Law In Kansas

WILLIAM PORTER

(3)

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HOMESTEAD LAW IN KANSAS

WILLIAM PORTER ¹

INTRODUCTORY

A treatise, "The Kansas Law of Homestead," written by James W. Taylor, then a student in the Washburn law school, appeared in the KANSAS JUDICIAL COUNCIL BULLETIN for July, 1935. This excellent article has guided the Kansas bench and bar since its publication. But the law will not lie sleeping, and since 1935 the homestead clause of our constitution has been amended, new statutes pertaining to homestead rights have appeared, and over a score of decisions discussing the homestead have been handed down by our supreme court.

The present article, covering the same subject, has been prepared at the suggestion of the Hon. Walter G. Thiele, chairman of the Judicial Council. The writer wishes to express his gratitude to Judge Thiele and the other members of the Council for their help and assistance in the preparation of the article, and to Mr. William Tinker of the Wichita bar who read the drafts and offered many valuable suggestions. The writer accepts responsibility for the inevitable inaccuracies which may be found.

SCOPE

"The law is a seamless web," and in writing a paper upon any legal subject one must set his boundaries. The present article is concerned with the substantive law as announced in decisions of our supreme court and court of appeals which construe our constitutional homestead clause. Procedural matters, including probate proceedings, rules of pleading and practice, foreclosure of mortgages and other liens, and similar subjects are not within its scope. This article does not dwell upon statutory law, even where the statutes have a close connection with homestead rights, except as is incidental to a discussion of the homestead clause and the decisions construing it. Federal homestead statutes are not discussed.

I. GENERAL

In this section are discussed the broad purposes of the homestead clause, as construed by our supreme court, and the general nature of homestead rights as distinguished from legal or equitable title and estate.

A. PURPOSE AND INTERPRETATION OF THE HOMESTEAD CLAUSE

The homestead clause ² of our constitution now reads as follows:

"HOMESTEAD EXEMPTION. A homestead to the extent of one hundred and sixty acres of farming land, or 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

1. A. B., J. D.; associate, *McDonald, Tinker & Skaer*, Wichita.

2. Const., art. 15, sec. 9.

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: *And provided further*, That the legislature by an appropriate act or acts, clearly framed to avoid abuses, may provide that when it is shown the husband or wife while occupying a homestead is adjudged to be insane, the duly appointed guardian of the insane spouse may be authorized to join with the sane spouse in executing a mortgage upon the homestead, renewing or refinancing an encumbrance thereon which is likely to cause its loss, or in executing a lease thereon authorizing the lessee to explore and produce therefrom oil, gas, coal, lead, zinc, or other minerals."

The second *proviso* was adopted in 1944. The remainder of the clause was a part of the original constitution of Kansas. It did not violate the federal constitution as impairing the obligation of contracts,³ as it pertains to the remedy and not the obligation.

"The homestead feature of the laws has been regarded with peculiar favor by the courts of those states by which it has been enacted. It has been the theme of both forensic and judicial eloquence. It has been repeatedly declared in legislative halls and from the bench, that the policy of these laws' is 'liberal' and 'benevolent,' 'their object a noble one'; that 'they are an enlightened public policy,' and 'their provisions the most beneficent.' In the convention that framed the constitution of this state there was no one subject that was more carefully considered and more thoroughly discussed than the homestead provision. . . . In the various stages and phases of that discussion, among the many opinions and comments made on the subject, as it was being perfected, and as finally adopted, the following expressions are selected as guides to the intentions of its authors, to wit: . . .

"The guarantee of a home to every member of the family."

"A reckless or drunken husband should not have the power to alienate the home of his family.' . . .

"A home for the family, that Shylocks cannot reach.' . . .

"Neither the hand of the law nor all the uncertainties of life can eject the family from the possession of it."

"Gives every mother and child in the state a home to which they may retire and find shelter from the storms of life,"⁴

Although the word "exempt" appears in the constitutional clause and in many of the decisions interpreting it, the homestead right is said to be something more than a mere "exemption" which can be waived at will;⁵ it creates rights "so that every man or woman, if he plants a tree or she cultivates a rose—that both may beautify and adorn their homes as they may choose, and have the benefit of the protection of the law."⁶ As a result, "the dominant feature of our many pertinent decisions has invariably been that of liberality of construction."⁷

3. *Cusic v. Douglass*, 3 Kan. 123, 87 Am. Dec. 458.

4. *Jewett v. McCrie*, 36 Kan. 636, 14 P. 257, 59 Am. Rep. 584.

5. See "Waiver," below.

6. *West v. Grove*, 139 Kan. 361 at page 365, 31 P. 2d 10, citing proceedings of the Wyandotte Constitutional Convention.

7. *Estate of Dittmore*, 152 Kan. 574 at page 576, 106 P. 2d 1056. In some instances, the court has perhaps gone further than the constitutional language would require. See "Improvements" and "Antenuptial Contract" below.

B. HOMESTEAD RIGHTS DISTINGUISHED FROM LEGAL OR EQUITABLE TITLE

In analyzing homestead law, one cannot keep too closely in mind the concept that *homestead rights* and *ownership* are entirely different things. In ascertaining whether anyone has homestead rights as to a certain piece of realty, the observer should first determine who *owns* it, disregarding homestead rights completely for the purposes of this inquiry. If one who owns⁸ some interest⁹ in realty¹⁰ is found to be occupying it as a residence¹¹ with his family,¹² then homestead rights accrue to the members of that family as to that realty.

Although in one early case the homestead right of the wife, where the husband owns the land, is flatly called an "estate,"¹³ and this term is used loosely in some subsequent decisions, it is "technically no estate at all."¹⁴ In a later case¹⁵ the nonowning spouse's interest is characterized as a "mere right of occupancy" and a restriction on the power of alienation of the other spouse; "It is no estate."¹⁶ Members of the family do not "own" the homestead; the constitutional clause distinguishes between the "owner" and his "family."¹⁷ "The homestead right grows out of a condition and is not an estate."¹⁸ Members of the family not owning the homestead can defend the homestead from invasion by third parties, however; thus where the homestead is owned by the wife, but the husband customarily pays for repairs thereto, he can bring an action in his own name against a third party who has caused damage to the homestead.¹⁹

An illustration of this distinction between homestead rights and legal title is *Hartman v. Armstrong*.²⁰ There, the testatrix, a widow, leaving no minor children, devised her home to a son. Prior to her death, she had been residing in the home with her daughter. The daughter claimed homestead rights to the property. It was held that the daughter had no homestead rights because she had "no interest in the land to which the homestead right could attach."²¹ In *Morrell v. Ingle*²² the wife and children had resided continuously on the homestead for several years, but the husband had been out of the state. The husband held title under a sheriff's deed which had been of record more than five years. It was held that the possession by the wife was not sufficient to prevent the husband's absence from tolling the statute of limitations. "She

8. The situation where a surviving spouse, having given up her right to the realty by antenuptial contract, is allowed to remain in possession of the homestead might be considered an exception to this statement. But at least the decedent spouse "owned" some interest in the land. See "Antenuptial Contract" and "Time for Partition" below.

9. See "Requisite Title or Estate," below.

10. See "Property Which Can Be Impressed with Homestead Rights," below.

11. See "Residence," below.

12. See "Family," below.

13. *Helm v. Helm*, 11 Kan. 19.

14. *Jeness v. Cutler*, 12 Kan. 500 at page 516.

15. *Leavenworth v. Stille*, 13 Kan. 539.

16. *Ibid.* at page 548. And see *Matney v. Linn*, 59 Kan. 613, 54 P. 668.

17. *Vining v. Willis*, 40 Kan. 609, 20 P. 232. And see *Mathewson v. Skinner*, 66 Kan. 309 at page 311. 71 P. 580.

18. *Hollinger v. Bank*, 69 Kan. 519 at page 521, 77 P. 263.

19. *Schoen v. Gas Co.*, 125 Kan. 206, 263 P. 1079.

20. 59 Kan. 696, 54 P. 1046.

21. *Ibid.*, syllabus.

22. 23 Kan. 32.

does not hold under the sheriff's deed, but simply as the wife of him who does. Although the homestead exists, and she may assert and defend her homestead rights, yet, when she does, she asserts her own rights, and not his." 23 Where the decedent owned an undivided interest in the homestead land only, after her death the other owners can cause the land to be partitioned regardless of the statute 24 which provides that the homestead shall not be partitioned until the surviving spouse remarries nor the children reach majority; the homestead rights attach only to such title or estate as is owned by someone in the family. 25

Our present statute 26 provides that title to homestead property passes at death the same as title to any other property of the decedent. This was the rule in absence of statute. 27 Thus, where the owner dies intestate, title to the homestead descends to the widow and all the children, not just to the widow and those children who are occupying it. 28

II. PROPERTY WHICH CAN BE IMPRESSED WITH HOMESTEAD RIGHTS

Our constitution provides that "A homestead to the extent of one hundred and sixty 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. . . ." 29

This portion of the present article discusses the physical characteristics of the property which may enjoy this exemption, the title or estate necessary in order that homestead rights can accrue, and the extension of these rights to other property into which the homestead has been converted.

A. PHYSICAL CHARACTERISTICS OF THE HOMESTEAD

1. EXTENT

The constitution limits the homestead to 160 acres of farming land, or to one acre if located within an incorporated place. 30 Under proper circumstances, several tracts may be included in the same homestead.

In an incorporated place, the homestead may embrace lots adjacent to that upon which the dwelling-place stands, at least if they are enclosed within the same fence 31 or are all used in connection with the dwelling-place for the family of the owner. 32 A similar rule applies to farming land. It is clear from *Watson v. Watson* 33 that adjoining eight- and fifteen-acre tracts, separated

23. *Ibid.* at page 38.

24. G. S. (1949) 59-402.

25. However, see note 8, above, and *Estate of Place*, 166 Kan. 528, 203 P. 2d 132.

26. G. S. (1949) 59-401.

27. *Dayton v. Donart*, 22 Kan. 256; *Cross v. Benson*, 68 Kan. 495, 75 P. 558, 64 L. R. A. 560; *Hollinger v. Bank*, 69 Kan. 519, 77 P. 263; *Bank v. Carter*, 81 Kan. 694, 107 P. 234; *Newby v. Anderson*, 106 Kan. 477, 188 P. 438.

28. *Mitchell v. Mitchell*, 69 Kan. 441, 77 P. 98, and see "Descent and Devise of the Homestead," below.

29. Const., art. 15, sec. 9. And see G. S. (1949) 59-401 and 60-3501.

30. *Ibid.*

31. *Morrissey v. Donohue*, 32 Kan. 646, 5 P. 27.

32. *Karr v. Lawrence*, 130 Kan. 552, 287 P. 621.

33. 110 Kan. 326 at page 330, 203 P. 714.

only by a fence through which there are gates, could be claimed as parts of the same homestead.

The homestead is limited to 160 acres (or one acre) regardless of the nature of the owner's title or estate. In *Nelson v. Stocking*,³⁴ the owner, after showing that he owned only an undivided fractional interest in some farming land, claimed that the homestead exemption should apply to an area greater than 160 acres. This theory did not prevail.

2. LOCATION

Homestead rights could accrue in land located anywhere in Kansas.

The constitution sets limits to the extent of a homestead in "farming land," and for one located within an incorporated place.³⁵ Can one have a homestead in an *unincorporated* village? This question arose in an early case³⁶ in which the court stated that ". . . we would think that no spot in Kansas could be found where a homestead right might not be taken and held under the homestead-exemption laws. . . ." ³⁷ The 160-acre limitation applies in an unincorporated village.

The question as to whether or not the land lies within an incorporated place is frequently important, as it determines what the maximum extent of the homestead can be. It is presumed that the claimed homestead lies outside an incorporated place,³⁸ with the party attempting to defeat the claim having the burden of showing otherwise. Even though a city surrounds a claimed homestead, where the tract has never formally been taken into the city it is "farming land" under the portion of the constitution under discussion.³⁹ If the owner of a large tract causes his land to be taken into a town, his homestead thereafter includes only the one acre surrounding his dwelling.⁴⁰ Where he owns contiguous tracts, some inside the city limits and some outside, the extent of his homestead is determined by the nature of the land upon which his dwelling is located; the homestead does not extend across the city limits.⁴¹

3. CONTIGUITY

In order to be parts of the same homestead, separate lots or tracts must be contiguous. The constitutional exemption does not include isolated parcels not touching one another.

The "contiguity" requirement means that neighboring tracts, which it is claimed constitute one homestead, must have at least *some* common boundary. The mere fact that the corners of the parcels of land touch is not sufficient,⁴² even though the owner has a license to pass from one tract to another through the property of an adjacent landowner.⁴³

34. 154 Kan. 676, 121 P. 2d 215.

35. Note 29, above.

36. *Hixon v. George*, 18 Kan. 253.

37. *Ibid.* at page 258. The statement is *dictum*, under the pleadings.

38. *Water-Supply Co. v. Root*, 56 Kan. 187, 42 P. 715.

39. *Ibid.*

40. *Fletcher v. Weigel*, 152 Kan. 104, 102 P. 2d 1055.

41. *Sahasas v. Fenlon*, 5 Kan. 592; and see *Eskridge v. Emporia*, 63 Kan. 368, 65 P. 694.

42. *Bank v. Hopkins*, 47 Kan. 580, 28 P. 606, 27 Am. S. R. 309.

43. *Bank v. Carnahan*, 128 Kan. 87, 276 P. 57, 73 A. L. R. 110. At page 89 it is explained that two separate parcels cannot be "occupied as a residence of the family." The constitution requires that the homestead be occupied as a residence, and a given family resides on one tract or another.

If two tracts are in fact contiguous, it is likely that they can be parts of the same homestead even though the owner holds each under a different type of title or estate.⁴⁴

Where a street or alley, the fee title to which is in the general public, passes through a tract, the resulting parcels are not contiguous.⁴⁵ But the fact that an easement exists across the land does not cause the adjacent tracts to be separate for want of contiguity, where the fee remains in the owner.⁴⁶ Thus, where a public highway crosses the owner's land, the highway being subject to use by the general public but the title remaining in him, his homestead may include tracts on both sides of the highway.⁴⁷

*Allen v. Dodson*⁴⁸ might upon first reading seem *contra* to the above. But there, according to the findings, the landowner granted a right of way in fee simple to a railroad through most of his tract, but as to a certain portion of the right of way granted an easement only. Thus he reserved the fee in a small section of the boundary between the two resulting parcels, and the homestead included them both. The case is in accord with the line of decisions discussed above.

4. OCCUPIED AS A RESIDENCE

The constitution requires that the homestead land be occupied as a residence.⁴⁹ It follows that there must be some *dwelling* located on the parcel claimed as a homestead.⁵⁰

"There can be no homestead without a place of family-dwelling. . . ." ⁵¹ After one has conveyed away his dwelling place, he has no homestead rights in the remainder of his tract, even though it was all homestead prior to the conveyance.⁵² In *Dean v. Evans*,⁵³ however, where the house was actually located a short distance away from the family's land but they had believed it to be on their tract, the court held their land exempt as homestead nevertheless.

Some of the decisions and problems which might logically fall under this subdivision are discussed in subdivision 7, "Improvements," below.

5. FAMILY OF THE OWNER

The question as to what constitutes the "family of the owner" is discussed at length elsewhere herein.⁵⁴

44. *Randal v. Elder*, 12 Kan. 257 at page 261. This part of the opinion is *dictum*, but there is no reason to suppose that it will not be followed in an actual decision. It is in accord with the cases cited in the section on "Requisite Title or Estate," below.

45. *Randal v. Elder*, 12 Kan. 257; *Griswold v. Huffaker*, 47 Kan. 690, 28 P. 696; *Meech v. Grigsby*, 153 Kan. 784, 113 P. 2d 1091; *Estate of Meech*, 155 Kan. 792, 130 P. 2d 571. And see *Edwards v. Fry*, 9 Kan. 417.

46. *Griswold v. Huffaker*, 47 Kan. 690, 28 P. 696; *Randal v. Elder*, 12 Kan. 257 (*dictum*).

47. *Griswold v. Huffaker*, above.

48. 39 Kan. 220, 17 P. 667.

49. Note 29, above.

50. The questions as to when a dwelling becomes occupied and when abandoned are discussed elsewhere in this article.

51. *Peak v. Bank*, 58 Kan. 485, 49 P. 613.

52. *Matney v. Linn*, 59 Kan. 613, 54 P. 668.

53. 106 Kan. 389, 188 P. 436.

54. See "Family," below.

6. SELECTION

Where the homestead claimant owns land of greater area than is exempt under the terms of the constitution, he has the right to select which of his acreage he considers to be his homestead.⁵⁵

The land selected as the homestead must include the dwelling place⁵⁶ and, if more than one tract is claimed, they must be contiguous.⁵⁷ The selection need not be according to any prescribed formality; institution of a suit for injunction against forced sale of a certain portion of the land is sufficient "selection."⁵⁸ After selection has been made, the court upon application will enjoin sale of the land selected as a homestead.⁵⁹ The supreme court has been quite lenient in affording the debtor an opportunity to make his selection; it has been held that an execution sale of the homestead, along with other land, was absolutely void, even though the debtor through his own inactivity failed to make a selection.⁶⁰

7. IMPROVEMENTS

Although the constitution sets maximum limits to the extent of the homestead (160 acres of farming land or one acre located within an incorporated place), it does not follow that one can in any event enjoy a homestead of such size, even though he owns a much larger tract of land. *A fortiori*, the plot of ground immediately under the dwelling-house is homestead, and the constitution extends the exemption to "all the improvements." But, as has been noted in subdivision 4, above, the exempted homestead must be "occupied as a residence." Where one owns, for example, one acre in a town and lives on it with his family, how much of the one acre is exempt as containing "improvements"? When do portions of the acre plot cease to be "occupied as a residence" by the family of the owner? It is in this connection that some of the most perplexing questions in the field of homestead law arise.

The dwelling house is an "improvement,"⁶¹ even though it is mortgaged as a chattel and taxable as such.⁶² The homestead rights extend to crops growing on the land.⁶³ The ordinary appurtenances, used in connection with the dwelling house, are included.⁶⁴

55. C. S. (1949) 60-3502. The court would probably have announced a similar rule in the absence of statute.

56. *Bank v. Peak*, 3 Kan. App. 698; *Peak v. Bank*, 58 Kan. 485, 49 P. 613; *Ard v. Pratt*, 61 Kan. 775, 60 P. 1048.

57. *Ibid.*

58. *Ard v. Pratt*, 61 Kan. 775, 60 P. 1048.

59. *Willis v. Whitehead*, 59 Kan. 221, 52 P. 445.

60. *Bank v. Tyler*, 130 Kan. 308, 286 P. 400. It is to be noted that these cases involve debts which were *not* liens on the homestead. In *Peak v. Bank*, 58 Kan. 485, 49 P. 613, the debtor, having made one erroneous selection, was held to be entitled to make another. But see *Ard v. Pratt*, 10 Kan. App. 335, in which the debtor, in another lawsuit, had admitted that other land, not involved in the present controversy, was his homestead. And see *Meech v. Grigsby*, 153 Kan. 784, 113 P. 2d 1091, as to selection by the widow after death of the owner.

61. *Beckenhueser v. Ferrell*, 8 Kan. App. 365.

62. *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199. Compare *Marshall v. Bachelder*, 47 Kan. 442, 28 P. 168.

63. *Lumber Co. v. Kitch*, 123 Kan. 441, 256 P. 133.

64. See, among others, *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197. "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 which it adjoins, but it must also be used in connection therewith, as a part thereof. In legal phrase, it must be appurtenant thereto." *Ibid.* at page 681.

In fact, it would seem from many of the decisions⁶⁵ that the owner can claim as homestead an area of land up to the limits set by the constitution, so long as none of the tract is being used for a purpose *inconsistent* with the homestead interests. "It is often the case that the owner of a tract of land, which he occupied and claims as his homestead, does not actually use every part and portion thereof; but so long as the whole tract is devoted to the purposes of a homestead, and not to any other purpose inconsistent with the owner's homestead interests, the whole of the tract, up to 160 acres of farming land, or one acre within the limits of an incorporated town or city, will be considered as a part of the owner's homestead, whether he actually uses every part and portion thereof, or not."⁶⁶

It should be recalled⁶⁷ that the motive for incorporating the homestead provision in the constitution was to make sure of a roof over the spouse and children of the owner, safe from the consequences of improvident conduct on the part of the head of the family. It is not surprising, then, that where one or more rooms of the dwelling house are used for commercial purposes the house is still the homestead and exempt.⁶⁸ This, even though the rooms are rented out to another who conducts a business in them.⁶⁹ A small addition, built onto the house and rented out to a third party as a business shop is also exempt.⁷⁰ And where there is more than one building on the lot, but all are being used as living quarters for the family of the owner, they are all included in the homestead.⁷¹

Where, however, separate buildings on the home lot are being used for commercial purposes, it is difficult to see how they remain part of the homestead of the owner. In the early cases, such buildings were generally held not to be exempt.

In *Ashton v. Ingle*,⁷² defendant owned an "L" shaped plot of ground, of less than one acre in area, located in a town. The house in which he and his family lived was located on one end of the "L," facing a street. On the other end of the "L," facing another street, were two small houses which he leased to tenants. All families used the same clothesline and walks, and sometimes the same cistern. A judgment creditor levied on the portion of the plot occupied by the two smaller houses. It was held that these were not part of the owner's homestead, hence not exempt. The court quoted with approval the following passage from a Wisconsin decision:⁷³ "We cannot believe the legislature ever intended that a person should hold all the buildings which might be erected upon a quarter of an acre⁷⁴ of ground in a city or village, whatever might be their character, or for whatever purposes they were designed, under the homestead exemption law, merely because he might live in

65. See *Morrissey v. Donohue*, 32 Kan. 646, 5 P. 27, and many of the decisions cited below in this section.

66. *Morrissey v. Donohue*, above, at page 648.

67. See the first section of this article, above.

68. *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199; *Rush v. Gordon*, 38 Kan. 535, 16 P. 700.

69. *Bebb v. Crowe*, 39 Kan. 342, 18 P. 223.

70. *Ibid.*

71. *Insurance Co. v. Osborn*, 1 Kan. App. 197; *Karr v. Lawrence*, 130 Kan. 552, 287 P. 621.

72. 20 Kan. 670, 27 Am. Rep. 197.

73. *Casselman v. Packard*, 16 Wis. 120.

74. Apparently the homestead exemption applied to one-quarter acre in Wisconsin.

one of them. Such a construction seems to us most unreasonable.”⁷⁵ The view contended for by the defendant would “allow an owner of real estate in a city to own hundreds of thousands of dollars’ worth of property exempt from his just and legal debts.”⁷⁶

In another early case⁷⁷ a farmer built a gristmill on a farm upon which his dwelling was located, and operated it as a business enterprise. He claimed that it was exempt from execution, as part of his homestead. This contention was dismissed in an opinion by Brewer, J. It was true, as claimant’s counsel argued, that the farmer “occupied” the gristmill.⁷⁸ But the mill was not used so as to connect it with the homestead. “The fact that it is adjacent, and that the ground covered by it, together with the farm, does not exceed 160 acres, does not change the character of the use. ‘Homestead’ and ‘residence’ are the words of primary significance in that section of the constitution granting and defining the exemption. Area is subordinate, and a mere limitation.”⁷⁹

Since these decisions, however, the court, in its efforts to construe the homestead clause liberally, has tended to extend the homestead-exemption cloak to cover commercial buildings.⁸⁰ A grocery store, located on the home lot, has been held to be exempt.⁸¹ So also have a carpenter shop,⁸² a dentist’s office,⁸³ and a nursery,⁸⁴ all of which were being operated by tenants. In the last case cited, the nursery was separated from the remainder of the lot by a fence, and the tenant held under a ten-year lease with renewal rights. In *Layson v. Grange*,⁸⁵ the owner’s lot contained a second building which he rented to another family for living quarters. A judgment creditor of the owner sought to levy upon that portion of the lot upon which the rented building was located, relying upon *Ashton v. Ingle*.⁸⁶ The court distinguished the latter case, on the ground that there the *land* had been leased,, while in the present case the owner had rented the building only, not leasing or “totally abandoning” the land. One has difficulty perceiving how this distinction causes the rented building to be “occupied as a residence by the family of the owner,” or an “improvement,” that is, an “ordinary appurtenance” to a house and lot. And the occupancy of the rented house by another family is certainly “inconsistent” with its uses as a homestead by the owner.

Where an owner lives in his own small hotel,⁸⁷ or lives in one of two rooming houses which are on his lot,⁸⁸ his homestead rights embrace the buildings in their entirety. In the latter case both buildings were held to be exempt.

75. *Ashton v. Ingle*, above, at page 679.

76. *Ibid.* at page 682.

77. *Mouriquand v. Hart*, 22 Kan. 594, 31 Am. Rep. 200.

78. Counsel had attempted to distinguish this situation from the *Ashton* case, above, in that there the owner had not “occupied” the tenant houses.

79. *Mouriquand v. Hart*, above, at page 597.

80. While one can sympathize with the court when it requires, for example, that the joint consent of the spouses to a deed to the homestead be clearly shown, there is no language in the constitutional clause which would move one to feel that a landowner should be permitted to rent out one of his buildings to a dentist for an office, enjoying the rental income while keeping the building free from his creditors’ claims.

81. *Grocery Co. v. Johnson*, 114 Kan. 89, 216 P. 828.

82. *Bank v. Ayers*, 48 Kan. 602, 29 P. 1149.

83. *Barten v. Martin*, 133 Kan. 329, 299 P. 614.

84. *Pitney v. Eldridge*, 58 Kan. 215, 48 P. 854.

85. 48 Kan. 440, 29 P. 585.

86. Cited above.

87. *Bank v. Kopplin*, 1 Kan. App. 599.

88. *Hoffman v. Hill*, 47 Kan. 611, 28 P. 623.

One wonders what the result will be when a judgment creditor seeks to levy execution upon a duplex, assuming that the debtor-owner lives in one side with his family and rents out the other side to tenants. If the entire structure is held to be exempt, what about the "triplexes," "fourplexes," and even "eightplexes" which are becoming common in our cities? If all are includible in the homestead of the owner, the situation anticipated in the *Ashton* case⁸⁹ will have become a reality. One will be able to hold a small fortune in revenue-producing assets safe from the claims of his creditors; and this under a constitutional provision which had as its aim the keeping of a room over the family's head.

In the recent case of *Anderson v. Shannon*⁹⁰ the court hints that it may be less inclined in the future to hold revenue-producing city property exempt. In the *Anderson* case, the debtor's widow moved out of the decedent's house and into a small apartment in a theater building which her husband had owned, and then claimed that building to be exempt from execution on a judgment rendered on notes signed by herself and the decedent. It was held that the theater building was not her homestead. The case was different from many of those cited above, in which the question was "simply whether the renting of a portion of the premises to which the homestead character had previously attached was so inconsistent with its homestead character as to cause it to lose that character."⁹¹ Here, the building was clearly a commercial one *before* its occupancy as a dwellingplace. But some of the language in the decision⁹² points the way to a return to the more strict view expressed in the *Ashton*⁹³ and the gristmill⁹⁴ cases.

B. REQUISITE TITLE OR ESTATE

For the homestead claim to be successful, it is necessary that someone in the family own *some* possessory title or estate in the premises.⁹⁵ The important distinction between homestead rights and legal or equitable estate has already been emphasized.⁹⁶

Even though the family resides on land before they own it, homestead rights do not accrue until some title is acquired.⁹⁷ Where the owner dies, leaving adult children only, and devises his home to one of the children, the others can assert no homestead rights because they have no title or estate.⁹⁸ The family of the grantee in a deed executed to defraud the creditors of the grantor cannot invoke the homestead clause, at least as against the defrauded creditors, because the grantee has, in the eyes of Equity, no interest in the property.⁹⁹ Where the owners convey away their land by absolute deed they

89. Cited above.

90. 146 Kan. 704, 73 P. 2d 5, 114 A. L. R. 200.

91. *Ibid.* at page 710.

92. *Ibid.* at pages 712 and following.

93. 20 Kan. 670, 27 Am. Rep. 197.

94. 22 Kan. 594, 31 Am. Rep. 200.

95. But see "Which Survivors Entitled to Homestead Rights," below.

96. See Section I of this article.

97. *Nichols v. Overacker*, 16 Kan. 54. And see *Clark v. Axley*, 162 Kan. 339, 176 P. 2d 256.

98. *Hartman v. Armstrong*, 59 Kan. 696, 54 P. 1046. Devise and descent of the homestead are discussed in the section on "The Homestead and Survivors," below.

99. *Kline v. Cowan*, 84 Kan. 772, 115 P. 587.

have no further homestead rights, even though they continue to dwell upon the land.¹⁰⁰

Where the legal and equitable estates are in different persons, the family of the owner of a bare legal interest, such as a trustee, holding for equitable owners who have immediate possessory rights, have no homestead interest.¹⁰¹ And, to support a homestead claim, the title or estate must be a present one; a future interest, such as a remainder,¹⁰² is not enough.

A life estate will support a homestead claim¹⁰³ but the claim, of course, cannot be extended beyond the death of the person by whose life the estate is measured.¹⁰⁴ Homestead rights can accrue in land in which one has an equitable interest only, such as the vendee in a contract of sale,¹⁰⁵ an assignee of the vendee,¹⁰⁶ or one who has entered and added improvements to land under an oral promise to convey to him.¹⁰⁷ One owning an undivided fractional interest in land can assert homestead rights therein against strangers,¹⁰⁸ though he cannot set up any interest which would conflict with the rights of the other owners.¹⁰⁹ One can have a homestead in a leasehold estate.¹¹⁰

C. PROCEEDS FOR WHICH HOMESTEAD EXCHANGED

In general, when the value of the owner's interest in the homestead has been converted into money, homestead rights attach to the money for a reasonable time, provided the owner intends to purchase another homestead with it.¹¹¹ The owner can dispose of the proceeds for which his homestead has been exchanged as he sees fit; and the fact that he disposes of them prior to the time his creditors attach them or otherwise obtain some special interest in them does not work any fraud upon the creditors.¹¹²

100. *Sellers v. Crossan*, 52 Kan. 570, 35 P. 205; *Sellers v. Gay*, 53 Kan. 354, 36 P. 744, demonstrating that when the owners convey away their land by absolute deed and later try to show that the deed was intended as a mortgage, the fact that the land was their homestead does not add to their equities. See *Randolph v. Wilhite*, 78 Kan. 355, 96 P. 492, a case in which the owner, changing homesteads, owned two dwellings for a short period of time.

101. *Osborn v. Strachan*, 32 Kan. 52, 3 P. 767; *Vanek v. Vanek*, 105 Kan. 388, 184 P. 731.

102. *Caple v. Warburton*, 125 Kan. 290, 264 P. 47.

103. *Weaver v. Bank*, 76 Kan. 540, 94 P. 273, 123 Am. S. R. 155, 16 L. R. A. (N. S.) 787.

104. *Goodwin v. Malcolm*, 5 Kan. App. 285.

105. *Tarrant v. Swain*, 15 Kan. 146; *Stowell v. Kerr*, 72 Kan. 330, 83 P. 827; *Southern v. Linville*, 139 Kan. 850, 33 P. 2d 123. The vendee cannot modify the contract, so as to add a provision which may result in his having to give up possession, without joint consent of his spouse. *Walz v. Keller*, 102 Kan. 124, 169 P. 196.

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

107. *Holland v. Holland*, 89 Kan. 730, 132 P. 989.

108. *Bank v. Kopplin*, 1 Kan. App. 599; *Wheat v. Burgess*, 21 Kan. 407; *Banner v. Welch*, 115 Kan. 868, 225 P. 119; *Blitz v. Metzger*, 119 Kan. 760, 241 P. 259, 120 Kan. 555.

109. *Tarrant v. Swain*, 15 Kan. 146 (*dictum*), *Banner v. Welch*, 115 Kan. 868, 225 P. 119; *Blitz v. Metzger*, 119 Kan. 760, 241 P. 259; *Cole v. Coons*, 162 Kan. 624, 178 P. 2d 997.

110. *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199.

111. It will be noted in the cases cited below that the law pertaining to mortgage proceeds is not very clear, and that pertaining to insurance proceeds is not fully developed. This general statement is believed to be a fair summary of the decisions. In these cases, the proceeds are still in the possession of the seller or mortgagor, available for attachment by his creditors. The situation is different from that in which the owner, having sold the homestead, has also disposed of the proceeds. Then, the question as to whether he has practiced any fraud upon his creditors arises. Pertinent cases are referred to in note 112, below. Also, in connection with this section of the article, see "Eminent Domain," below.

112. *Bank v. Bowen*, 25 Kan. 117; *McConnell v. Wolcott*, 70 Kan. 375, 78 P. 848, 109 Am. S. R. 454, 3 L. R. A. (N. S.) 122; *Bank v. Moore*, 111 Kan. 344, 206 P. 907.

1. SALE

In *Smith v. Gore*¹¹³ the court says the rule should be that proceeds of sale of the homestead are "exempt from the payment of all debts which are not liens on the homestead, so long as the debtor expects and intends to use such proceeds in procuring another homestead."¹¹⁴ "They are exempted only by a sort of equitable fiction drawn from the spirit of the homestead exemption laws, and adopted for the purpose of enabling persons to change their homesteads when they desire."¹¹⁵ The owner has a reasonable time in which to find another homestead, but his intention to buy another one must exist at the time of sale and constantly thereafter if the funds are to remain exempt.¹¹⁶ Such an intention, formed hastily when a creditor begins pressing his claim almost two years after the sale, is not sufficient.¹¹⁷ In one case,¹¹⁸ it is said that the burden of proof on showing the requisite intention is upon the party claiming the exemption, but this statement is *dictum* and, in view of the court's policy of interpreting the homestead clause liberally, might not be followed if the point were actually being decided.

2. MORTGAGE

When one borrows money, it would appear that the mere fact that his loan is secured by a mortgage on his homestead should not cause the money borrowed to be exempt from the claims of his creditors, though this point may be said to be uncertain.¹¹⁹ It has been held that the joint consent of the borrower's wife to the mortgage is sufficient consideration from her for an agreement that the proceeds are to be hers absolutely; thereafter the husband's creditors cannot reach them.¹²⁰ And it is clear that if the debtor intends to use the proceeds of the mortgage to pay for improvements that have already been placed on the homestead, they are exempt.¹²¹

After a mortgage on the homestead has been *foreclosed* and there are surplus funds which are paid over to the mortgagor, these funds enjoy the

113. 23 Kan. 488, 33 Am. Rep. 188.

114. *Ibid.* at page 490.

115. *Ibid.*

116. *Bank v. Dempsey*, 135 Kan. 608, 11 P. 2d 735. But see *Roberts v. Bank*, 126 Kan. 503, 268 P. 799, in which this point was not brought to the attention of the court. Funds are exempt while "in custodia legis"; *DePriest v. Ransom*, 165 Kan. 147, 193 P. 2d 191.

117. *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188.

118. *Milberger v. Veselsky*, 97 Kan. 433, 155 P. 957.

119. *Bank v. Bowen*, 21 Kan. 354. The law is not clear on this point, but this case announces what is probably the best rule. The family of the owner who has mortgaged his homestead still have a roof over their heads, and there is little reason for holding that the proceeds are exempt from attachment by creditors. *Brennecke v. Duigenan*, 6 Kan. App. 229, is *contra*, but the opinion is quite short and may not be well-considered. The decision cites as authority cases in which it is held that the mortgagor can *dispose* of the mortgage proceeds without practicing a fraud upon his creditors. This would be a different situation. In the present case, the funds were still held by the mortgagor and a creditor had attached them.

120. *Sproul v. Bank*, 22 Kan. 336; *Bank v. Bowen*, 25 Kan. 117; no consideration should be required, as the mortgagor ought to be able to *dispose* of the proceeds without working a fraud upon anyone. It has been said, in other situations, that the consent of the nonowning spouse to alienations of the homestead is consideration for other acts. *Hoard v. Jones*, 119 Kan. 138, 237 P. 888. Where the land belongs to the husband, the money borrowed upon it belongs to him, *Bank v. Bowen*, 21 Kan. 354; and the wife cannot complain that all the consideration went to the husband. *Jamison v. Bancroft*, 20 Kan. 169 at page 187. The spouses can consent that rents and profits go to the mortgagee during the terms of the mortgage. *Loan Co. v. Benner*, 150 Kan. 109, 91 P. 2d 9.

121. *Kessler v. Frost*, 103 Kan. 711, 175 P. 967.

same exemption as do the proceeds of a sale.¹²² Of course, the holder of a junior lien on the homestead can reach the surplus funds.¹²³

3. INSURANCE

Where the homestead burns, and the owner collects under a fire insurance policy, homestead rights attach to the insurance proceeds.¹²⁴ It is reasonable to suppose that these rights attach only for a reasonable period of time, and while the owner intends to put them into another homestead, though no decision on this point has been found. Creditors having valid liens on the homestead can reach the insurance money, even though the policy was issued in the name of the owner, at least where he promised the lien-holder to keep the premises insured for the latter's benefit.¹²⁵ If the homestead burns after the death of the owner, the insurance proceeds vest in the widow and children and do not become subject to the claims of the decedant's creditors as part of his estate.¹²⁶

III. ACQUISITION OF HOMESTEAD RIGHTS

Our constitution directs that certain rights shall spring into being when a homestead is "occupied as a residence by the family of the owner."¹²⁷ This section of the present article discusses what is the "family of the owner," when and how the homestead becomes "occupied as a residence," and what funds may be used to acquire the homestead property.

A. FAMILY

In discussing what is the "family of the owner," two distinct situations must be kept in mind. On the one hand, there is the question as to what "family" is requisite for the original acquisition of a homestead. On the other hand, once a homestead has been acquired, there is the problem as to how far the family group may be depleted before the homestead rights terminate.¹²⁸ For convenience, both of these aspects of the "family" are discussed in this section.¹²⁹

1. REQUISITE FAMILY FOR ORIGINAL ACQUISITION OF HOMESTEAD

A homestead cannot be acquired originally by one person alone.

"The right to the exemption cannot originate without the existence of a family—of a household consisting of more than one person."¹³⁰ But, "the term 'family,' as used in the Kansas homestead law, is also interpreted most liberally. It extends not only to the group comprised of father, mother and

122. See the section on "Sale," above. The mortgagor must intend to use the proceeds to acquire a new homestead, or redeem the old one. *Mitchell v. Milhoan*, 11 Kan. 617.

123. *Hoffman v. Meyer*, 6 Kan. 398.

124. *Potter v. Banking Co.*, 59 Kan. 455, 53 P. 520.

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

126. *Insurance Co. v. Daly*, 33 Kan. 601, 7 P. 158 (*dictum*).

127. Const., art. 15, sec. 9.

128. See the discussion in *Weaver v. Bank*, 76 Kan. 540, 94 P. 273, 123 Am. S. R. 155, 16 L. R. A. (N. S.) 110.

129. The latter might just as logically have been discussed in the section on "The Homestead and Survivors," below.

130. *Weaver v. Bank*, 76 Kan. 540 at page 553, 94 P. 273, 123 Am. S. R. 155, 16 L. R. A. (N. S.) 110.

children, but to various groups bound together by ties of consanguinity living together as a household."¹³¹ The uncle-nephew relationship is sufficient;¹³² grandchildren of the owner may make up his family, even though not formally adopted.¹³³ It is not necessary that members of the family be dependent upon its head for financial support.¹³⁴

On the other hand, the constitutional exemption will not be extended to cover groups of persons, even though closely related, who are obviously not within its scope and intent. Thus an adult woman, occupying her own land with her father, who supports himself, acquires no homestead rights which would cause the land to be exempt from her debts.¹³⁵

2. REQUISITE FAMILY FOR CONTINUATION OF HOMESTEAD ONCE ACQUIRED

Where homestead rights have accrued to an owner and his family, they may continue after his death, and can in some instances be invoked by sole survivor of the family.¹³⁶ Also, the survivor of the owner's family may find the homestead exempt from his *own* debts, as well as the debts of the decedent.

Our statute¹³⁷ provides that the homestead shall continue to be exempt from the debts of the decedent so long as his family continues to dwell upon it. The exemption can be maintained whether the survivors take by will or by descent.¹³⁸ The homestead remains exempt from the decedent's debts even though the widow remarries, so long as she continues to reside upon the land.¹³⁹ And it has been held consistently that where the widow is the only member of the family who continues to dwell upon the homestead,¹⁴⁰ or indeed is the only surviving member of the family, she yet constitutes the "family" of the deceased owner under the constitutional clause and the homestead enjoys exemption from the debts of the decedent.¹⁴¹

Where there is no widow, the surviving children of the owner constitute his family after his death, even though they take unequal shares by will.¹⁴² If the surviving children are minors, they need not continue to occupy the premises to enjoy the exemption.¹⁴³ But where adult children are the only survivors of the family, the homestead rights do not continue unless they dwell upon the land.¹⁴⁴

In one early case, it was held that a widower who continued to live on

131. *Estate of Dittmore*, 152 Kan. 574, 106 P. 2d 1056.

132. *Ibid.*

133. *Cross v. Benson*, 68 Kan. 495, 75 P. 558, 64 L. R. A. 560.

134. *Estate of Dittmore*, cited above, at page 578.

135. *Bank v. Baker*, 143 Kan. 201, 53 P. 2d 469.

136. See "The Homestead and Survivors," below.

137. G. S. (1949) 59-401.

138. *Pilcher v. Railroad*, 38 Kan. 516, 16 P. 945, 5 Am. S. R. 770; *Cross v. Benson*, 68 Kan. 495, 75 P. 558, 64 L. R. A. 560.

139. *Brady v. Banta*, 46 Kan. 131, 26 P. 441. The land may be subject to partition, but this is a different matter. See "Partition," below.

140. *Aultman v. Price*, 68 Kan. 640, 75 P. 1019.

141. *Cross v. Benson*, cited above; *Sawin v. Osborn*, 87 Kan. 828, 126 P. 1074; *Postlethwaite v. Edson*, 102 Kan. 619, 171 P. 769, L. R. A. 1918D 989; *Campbell v. Durant*, 110 Kan. 30, 202 P. 841; *Harclerode v. Green*, 8 Kan. App. 477.

142. *Hicks v. Sage*, 104 Kan. 723, 180 P. 780.

143. *Shirack v. Shirack*, 44 Kan. 653, 24 P. 1107; *Deering v. Beard*, 48 Kan. 16, 28 P. 981.

144. *Stratton v. McCandliss*, 32 Kan. 512, 4 P. 1018; *Northrup v. Horville*, 62 Kan. 767, 64 P. 622.

land formerly occupied by himself and his family did not hold the land exempt from debts contracted by him *after* the death of his wife and the moving away of his (adult) children.¹⁴⁵ This was expressly overruled in *Weaver v. Bank*,¹⁴⁶ which lays down the rule that a surviving widow holds the family homestead free not only from her husband's debts, but also free from her own.¹⁴⁷ It is now clear that a single survivor, such as a child, whether an infant¹⁴⁸ or adult,¹⁴⁹ constitutes the "family" of the decedent and as such holds the homestead free from the latter's debts; and it is probable that any such survivor holds the homestead free from his own debts as well.¹⁵⁰

Where, by divorce decree, the homestead is set aside to one spouse, who thereafter occupies it alone, whether or not it continues to be his homestead has not been decided.¹⁵¹

3. ONE HOMESTEAD PER FAMILY

As the family of the owner can "occupy as a residence" only one given piece of land, the family cannot have two homesteads at the same time.¹⁵² On the other hand, while there is some comment in the cases to the effect that a given piece of land can be the homestead of only one family,¹⁵³ the same tract may enjoy exemption from the debts of two or more families, as owner and tenant of the same farm¹⁵⁴ or several owners of undivided interests in the same tract.¹⁵⁵ And it appears¹⁵⁶ that the legal and the equitable owners of the same land might both have homestead interests in it, where both interests are possessory.

B. RESIDENCE

Homestead rights attach to land "occupied as a residence" by the owner's family. In general, this requirement is met by the family's occupying land with the intent that it be their homestead.

1. INTENT

No homestead rights attach to land unless there is a positive intent to occupy it as a homestead.¹⁵⁷ In those situations where the head of the family owns two or more houses, and he and his family have lived part of the time in various ones, and the question as to which of them is his homestead is in issue, this

145. *Ellinger v. Thomas*, 64 Kan. 180, 67 P. 529.

146. 76 Kan. 540, 94 P. 273, 123 Am. S. R. 155, 16 L. R. A. (N. S.) 110.

147. It might appear that this is original "acquisition" of a homestead by one person; that is, the widow may take title to the land which becomes exempt from liability for her own debts. But the court regards the exemption as arising because she is the survivor of the former owner's family.

148. *Shirack v. Shirack*, 44 Kan. 653, 24 P. 1107.

149. *Koehler v. Gray*, 102 Kan. 878, 172 P. 25, L. R. A. 1918D 1088, overruling *Batthey v. Barker*, 62 Kan. 517, 64 P. 79, 56 L. R. A. 33.

150. *Brooks v. Marquess*, 157 Kan. 244, 139 P. 2d 395. But see *Bank v. Birch*, 121 Kan. 334, 246 P. 1007, where the rule was not followed as to one of the survivors.

151. *Waltz v. Sheetz*, 144 Kan. 595, 61 P. 2d 883.

152. *Bank v. Wheeler*, 20 Kan. 625. As to the problem which arises when the family moves from one homestead to another, see, among others, *Randolph v. Wilhite*, 78 Kan. 355, 96 P. 492.

153. See, among others, *Linn v. Ziegler*, 68 Kan. 528, 75 P. 489.

154. *Bank v. Warner*, 22 Kan. 537; *Upton v. Coxen*, 60 Kan. 1, 55 P. 284, 72 Am. S. R. 341.

155. This is the implication from the cases cited in note 108, above.

156. From *dictum* in *Smith v. Smith*, 109 Kan. 584 at page 588, 201 P. 75.

157. *Dobson v. Shoup*, 3 Kan. App. 468; *Farlin v. Sook*, 26 Kan. 397; and see the section on "Time of Acquisition," below.

issue is determined largely by the intent of the owner and his family.¹⁵⁸ "The intent of the claimant enters largely into the creation and acquiring of a homestead. . . . A mere representation of a purpose to occupy is not enough to establish a homestead right. There must be *bona fide* intent and an actual occupancy. Representations may be proven to show intent, likewise the physical acts of the claimant in the matter of occupancy may be shown, to prove that the acts concur with the declared intent."¹⁵⁹ This intent is a question of fact, depending upon the circumstances of each case, and no general rule can be laid down.¹⁶⁰ The finding of the trial court on this question ordinarily will not be disturbed upon appeal.¹⁶¹

2. OCCUPANCY

"No person can hold property under our homestead exemption laws, unless the property is 'occupied as a residence by the family of the owner.' . . . It is the *family* of the owner and not merely the owner, who must *occupy* the homestead; and it is the *family* of the owner, and not merely the owner, who must occupy same as a *residence*."¹⁶² Thus, where the wife of the owner is out of the state at the time of acquisition of the land, homestead rights do not attach to it even though the owner lives on it.¹⁶³ Some occupancy by the family, "actual" or "constructive," is required, and there must be "actual" occupancy within a reasonable time after acquisition.¹⁶⁴

Once the family has begun to reside upon a tract, it is not necessary for them to continue to occupy it every day; so long as they have no other homestead or do not "abandon" it, it remains their homestead.¹⁶⁵ As the homestead is for the benefit of the owner's family, the fact that one of the spouses deserts the family does not cause "occupancy" to cease,¹⁶⁶ even though the deserting spouse be dwelling on his "homestead" in another state.¹⁶⁷

C. TIME OF ACQUISITION

As has been seen above, homestead rights exist when the family of the owner occupy his land, intending that it be their residence. Where, however, the owner acquires land which he proposes to occupy as a homestead, and his family actually occupy it within a reasonable time, the homestead rights may relate back to the time of acquisition of the property.

158. *Swenson v. Kiehl*, 21 Kan. 533; *Quinton v. Adams*, 83 Kan. 484, 112 P. 95; *Smith v. McClintick*, 108 Kan. 833, 196 P. 1089; *Bank v. Diamond*, 119 Kan. 294, 239 P. 970; *Bank v. Weeks*, 138 Kan. 376, 26 P. 2d 262; *Hammond v. Neely*, 138 Kan. 885, 28 P. 2d 726.

159. *Bank v. Weeks*, cited above, at page 378.

160. As will be seen from the cases here cited, the test as to where the owner votes, often relied upon by counsel, is not very important. On the other hand, the fact that the owner is selling a dwelling is strong evidence that he does not intend it to be his homestead; *Gapen v. Stephenson*, 18 Kan. 140. The facts of each case vary, and one cannot devise a test applicable to all.

161. *Smith v. McClintick*, cited above.

162. *Koons v. Rittenhause*, 28 Kan. 359 at page 362 (court's italics).

163. *Ibid.* But see *Chambers v. Cox*, 23 Kan. 393, where this point was not considered, and where the court discusses the question of joint consent without ever having determined whether the land in question became a homestead.

164. *Dobson v. Shoup*, 3 Kan. App. 468; *Edgerton v. Connelly*, 3 Kan. App. 618; *McCrie v. Lumber Co.*, 7 Kan. App. 39, and the discussion in *Postlethwaite v. Edson*, 102 Kan. 104, 171 P. 769, L. R. A. 1918D 983. See the section on "Time of Acquisition," below.

165. *McDowell v. Diefendorf*, 1 Kan. 648; *Rose v. Bank*, 95 Kan. 331, 148 P. 745. See the section on "Abandonment," below.

166. *Ott v. Sprague*, 27 Kan. 620; *Thompson v. Millikin*, 93 Kan. 72, 143 P. 430.

167. *Thompson v. Millikin*, 102 Kan. 717, 172 P. 534.

"Occupation of a homestead succeeds, in point of time, its purchase. This is true except in a few instances; as where one buys a house he had theretofore occupied as a tenant. To give a fair and reasonable interpretation to the homestead law, this fact must be recognized. . . . Though he does not actually occupy until after he has completed his purchase and secured his title, still, if he purchases it for a homestead, and enters into occupation within a reasonable time thereafter, no lien of existing judgments will attach."¹⁶⁸ The same rule applies where the owner takes the land by devise.¹⁶⁹ Where the owner and his family are residing in one homestead, and he purchases a new one, homestead rights in the new home may relate back to the time of purchase, even though physical movement of the family takes place later.¹⁷⁰ But where the head of the family owns two dwelling-places, a "mere mental process unaccompanied by any physical act whatever" will not suffice to shift the homestead rights to the unoccupied building.¹⁷¹

The "reasonable time" in which the family has to occupy the homestead after its purchase will vary with each case, and no general rule can be laid down.¹⁷²

Unless it is clear that the owner intended all along to make the new dwelling-place his homestead and was moving his family into it with reasonable dispatch, the rights of his creditors will not be affected by his acts subsequent to the time their rights arose.¹⁷³ Hasty occupancy of land after suit is filed,¹⁷⁴ or after levy of execution,¹⁷⁵ ordinarily will not cause it to be exempt.

D. FUNDS USED TO ACQUIRE HOMESTEAD

Our homestead clause provides ". . . 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. . . ." ¹⁷⁶ Thus, the constitution specifically enumerates those claims to which the homestead may be subjected. Can other creditors, having peculiar equities in the funds used to acquire the homestead, reach the homestead to satisfy the debts owed them?

As has been seen above,¹⁷⁷ creditors cannot object that the proceeds of sale of one homestead were invested in another.¹⁷⁸ The original homestead was

168. *Monroe v. May-Weil*, 9 Kan. 466 at page 475. See, also, *Edwards v. Fry*, 9 Kan. 417 (*dictum*); *Swenson v. Kiehl*, 21 Kan. 533; *Gilworth v. Cody*, 21 Kan. 702; *Loan Co. v. Watson*, 45 Kan. 132, 25 P. 586; *Ingels v. Ingels*, 50 Kan. 755, 32 P. 387; *Upton v. Coxen*, 60 Kan. 1, 55 P. 284, 72 Am. S. R. 341; *Randolph v. Wilhite*, 78 Kan. 355, 96 P. 492; *Stowell v. Kerr*, 72 Kan. 330, 83 P. 827; *Bank v. Fry*, 130 Kan. 641, 287 P. 245; *Hammond v. Neely*, 138 Kan. 885, 28 P. 2d 726; *Dobson v. Shoup*, 3 Kan. App. 468.

169. *Bank v. Fry*, cited above.

170. *Randolph v. Wilhite*, cited above.

171. *Bush v. Adams*, 72 Kan. 556, 84 P. 122.

172. See, among others, *Evans v. Carson*, 9 Kan. App. 714; *Gilworth v. Cody*, 21 Kan. 702; *Ingels v. Ingels*, 50 Kan. 755, 32 P. 387.

173. *Bank v. Peak*, 3 Kan. App. 698 (reversed on other grounds, 58 Kan. 485, 49 P. 613).

174. *Edgerton v. Connelly*, 3 Kan. App. 618.

175. *Osburn v. Magee*, 8 Kan. App. 824.

176. Const., art. 15, sec. 9.

177. In the section on "Sale."

178. Among others, *Bank v. Dempsey*, 135 Kan. 608, 11 P. 2d 735. And see *Winter v. Ritchie*, 57 Kan. 212, 45 P. 595, 57 Am. S. R. 331.

exempt, and the creditor is in no worse position when it is exchanged for another. But where *nonexempt* funds, to which the creditor might have looked for payment of his claim, are spent in acquiring a homestead, he might well feel that the transaction is so fraudulent as to him as to entitle him to attack it and subject the homestead to his claim.

He will find, however, that a debtor, even though he be insolvent, can invest his nonexempt assets in a homestead and hold it free from creditor's claims,¹⁷⁹ even though this transaction was effected for the very purpose of putting the debtor's property beyond the reach of his creditors.¹⁸⁰ An exception is where "the complaining party had at the time of such expenditure some special interest or claim upon the funds used for such purpose."¹⁸¹ Thus where an insolvent debtor, to defraud his creditors, traded a stock of goods he had bought on credit for real estate which he and his family immediately occupied as a homestead, it was held that the homestead claim was inferior to that of the defrauded creditors who had supplied the stock of goods.¹⁸² The court in this case did not deliberately expand the categories of exceptions to the homestead exemption as listed in the constitution, but apparently held that a homestead was "not acquired."¹⁸³

IV. LIABILITIES ENFORCEABLE AGAINST THE HOMESTEAD

Our constitution provides that no homestead "shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erections of improvements thereon; . . ." ¹⁸⁵ This section of the present article discusses these liabilities which are enforceable against homestead property, including prior liens, and the enforceability of other obligations, not excepted by the constitution, after the property has ceased to be a homestead. The validity of mortgages created by the joint consent of the spouses ¹⁸⁶ and the effect of divorce decrees ¹⁸⁷ have been treated elsewhere.

A. GENERAL

In view of the "liberality" with which the court views the homestead clause, the rule is that obligations cannot be enforced against the homestead unless they fall into one of the exceptions outlined in the constitution. It has been said ¹⁸⁸ that "It is not within the equitable power of courts in this state to declare any indebtedness a lien on the homestead. The constitution

179. *Tootle v. Stine*, 31 Kan. 66, 1 P. 279; *McConnell v. Wolcott*, 70 Kan. 375, 78 P. 848, 109 Am. S. R. 454, 3 L. R. A. (N. S.) 122. Putting nonexempt assets into a homestead can work no fraud on subsequent creditors. *Hixon v. George*, 18 Kan. 253.

180. *Metz v. Williams*, 149 Kan. 647, 88 P. 2d 1093.

181. *Hixon v. George*, 18 Kan. 253 at page 257 (*dictum*).

182. *Long v. Murphy*, 27 Kan. 375. Compare *Tootle v. Stine*, 31 Kan. 66, 1 P. 279. In the latter case, the creditors could not trace the assets which they had advanced into the new homestead.

183. One may speculate whether the owner had "acquired" a new homestead which would have been exempt from the claims of third parties. Although it is said in several cases that creditors having "equities" in nonexempt funds can trace them into a homestead, this is the only decision discovered where they prevailed.

185. Const., art. 15, sec. 9.

186. See "The Requirement of Joint Consent," below.

187. See "Conveyance and Encumbrance of the Homestead," below.

188. *Jenkins v. Simmons*, 37 Kan. 496, 15 P. 522, syllabus 3. See, also, *Morris v. Ward*, 5 Kan. 239 at page 244.

of the state prescribes the manner of its creation, and this must be strictly followed." Hence, a decree for support-money rendered in a divorce action is not enforceable against a homestead subsequently acquired by the defendant spouse.¹⁸⁹ In certain decisions which, at first glance, seem to recognize a lien not mentioned in the constitution, the court has been careful to show that the constitutional benefits were not infringed. Thus, where a debtor, to defraud his creditors, traded a stock of goods he had obtained on credit for a homestead, the court allowed the creditors to proceed against the real property on the ground that no homestead had been "acquired."¹⁹⁰ A statutory "poor law" lien, which gave the state a lien on realty owned by persons receiving old-age assistance, was upheld as constitutional on the ground that a *proviso* in the statute that the lien would not be enforceable as to homestead property while it was being occupied by the recipient of the assistance or his surviving spouse caused the statute not to conflict with the homestead clause.¹⁹¹ The grantee in an invalid conveyance of the homestead, who has disencumbered the property from valid liens, may be subrogated to the rights of the lienholders when the conveyance to him is found to be void;¹⁹² this, however, is not the creation of a new lien, but it is the enforcement of an existing valid one by a new party.

Although there is some language in *Morris v. Ward*¹⁹³ which might be interpreted to mean that creditors not falling into one of the constitution exceptions can *never* enforce their claim against the homestead property, the rule is, as summarized in *Estate of Casey*,¹⁹⁴ that the general creditor's "interest, if it can be called such, is an inchoate one which does not vest during occupancy of the homestead and is a mere expectancy or possibility, depending upon conditions and circumstances, which may, or may not, materialize in the future." A judgment creditor can levy execution upon homestead property after it has been abandoned,¹⁹⁵ whether abandoned by the occupants while living or by the death of the survivor of the family.¹⁹⁶ If abandoned by the survivors, or upon the death of the survivors, the homestead property can be applied to the debts of their ancestor.¹⁹⁷ Where title to the homestead is in the wife, abandonment does not necessarily subject it to debts of the husband, even though it was originally purchased with his funds.¹⁹⁸ While land is being occupied as a homestead, the owners can convey it to a third person free and clear of all liabilities and encumbrances except those recognized by the constitution as valid liens;¹⁹⁹ the latter, how-

189. *Anderson v. Anderson*, 155 Kan. 69, 123 P. 2d 315.

190. *Long v. Murphy*, 27 Kan. 375. See "Funds Used to Acquire Homestead," above.

191. *Hawkins v. Welfare Board*, 148 Kan. 760, 84 P. 2d 930. One wonders what the result would have been had the statute been attacked by a surviving *child* who was occupying the homestead. See "The Homestead and Survivors," below.

192. *Moore v. Reaves*, 15 Kan. 150; *Tillotson v. Goodman*, 154 Kan. 31, 114 P. 2d 845. See note 359, below.

193. 5 Kan. 239 at pages 243 and following.

194. 156 Kan. 590 at page 599; 134 P. 2d 665.

195. *Osborne v. Schoonmaker*, 47 Kan. 667, 28 P. 711; *McLain v. Barr*, 125 Kan. 286, 264 P. 75; *Morris v. Brown*, 5 Kan. App. 102. See "Abandonment," below.

196. *Stratton v. McCandliss*, 32 Kan. 512, 4 P. 1018; *Barbe v. Hyatt*, 50 Kan. 86, 31 P. 694. See "The Homestead and Survivors," below.

197. *Ibid.* And see *Estate of Casey*, 156 Kan. 590, 134 P. 2d 665 (*dictum*).

198. *Hixon v. George*, 18 Kan. 253 (*dictum*).

199. *Morris v. Ward*, 5 Kan. 239. See "Effect of Valid Conveyance," below.

ever, "follow the land" and can be enforced by the claimant against the purchaser even though a judgment upon which the claim is based does not show on its face that it falls into one of the exceptions in the constitutional clause.²⁰⁰ It appears that claims, otherwise enforceable against the homestead, but which have not been reduced to judgment and for which no lien exists, may be discharged by bankruptcy.²⁰¹

B. PRIOR LIENS

Occupation of land as a homestead will not render the land exempt from liens which had attached prior to such occupancy.

Where, at the time of purchase of the homestead premises, there is a mortgage outstanding, and the purchaser expressly assumes the mortgage, it is clear that he cannot later claim that the land is exempt from foreclosure because it is his homestead.²⁰² Where the owner has a remainder interest only, which will not support a homestead claim,²⁰³ his interest is not exempt from liens which attach thereto even though he subsequently acquires a possessory interest and occupies the land as his homestead.²⁰⁴ Liens which attached while title to the land was in the federal government were not enforceable against the land,²⁰⁵ but this was due to a federal statute which so provided.²⁰⁶

An ordinary judgment becomes a lien on the real property of the judgment debtor as of the first day of the term during which it is rendered, except for a judgment rendered during the same term in which action is commenced.²⁰⁷ Hence, in determining whether a claim against the homestead is a prior "lien," "it is not the time of the sale under execution that controls as to a homestead right, but the time when the judgment became a lien."²⁰⁸ Where, however, the judgment debtor acquires title to the land between the first day of the term and the day upon which judgment is rendered, and immediately occupies it as a homestead, the land may yet be exempt from execution under the judgment.²⁰⁹

As has been noticed above,²¹⁰ the owner and his family have a reasonable time after acquisition of title to land to move in and occupy it; if they occupy it within that time, their homestead rights relate back to the time of acquisition and existing judgments against the owner do not become liens against the land.²¹¹ But where the lien has attached to land, the mere fact that the owner and his family subsequently occupy it as their homestead, nothing else appearing, does not affect the validity of the lien.²¹²

200. *Hurd v. Hixon*, 27 Kan. 722; lien for improvements. *DePriest v. Ransom*, 165 Kan. 147, 193 P. 2d 191, is not *contra*. And see *Chapman v. Lester*, 12 Kan. 592.

201. *Zimmerman v. Ketchum*, 66 Kan. 98, 71 P. 264.

202. *Shelden v. Pruessner*, 52 Kan. 579, 35 P. 201, 22 L. R. A. 709. Prior agreement to convey away upon certain conditions; *Clark v. Axley*, 162 Kan. 339, 176 P. 2d 256.

203. Note 102, above.

204. Implied in *Caple v. Warburton*, 125 Kan. 290, 264 P. 47.

205. *Lumber Co. v. Jones*, 32 Kan. 195, 4 P. 74.

206. Cited in the above opinion.

207. G. S. (1949) 60-3126.

208. *Caple v. Warburton*, 125 Kan. 290 at page 295, 264 P. 47.

209. See the fact situation in *Loan Co. v. Watson*, 45 Kan. 132, 25 P. 586.

210. See "Acquisition of Homestead Rights," above.

211. *Stowell v. Kerr*, 72 Kan. 330, 83 P. 827.

212. *Bullene v. Hiatt*, 12 Kan. 98; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272; *Hiatt v. Bullene*, 20 Kan. 557; *Ashton v. Ingle*, 20 Kan. 670, 27 Am. Rep. 197; *Aldrich v. Boice*, 56 Kan. 170, 42 P. 695; *Dobson v. Shoup*, 3 Kan. App. 698.

C. PURCHASE MONEY

It will be seen below ²¹³ that one spouse can execute a valid mortgage on the homestead to secure money advanced to purchase the homestead property,²¹⁴ even though the premises were occupied by the spouses prior to their acquisition of title.²¹⁵ Where the spouses both signed the original purchase-money mortgage, and began occupying the land, after which the mortgagee surrendered the old mortgage, one spouse alone can give a valid mortgage for the remainder of the unpaid purchase price ²¹⁶ though not for an additional sum.²¹⁷

Where a spouse borrows money with which to buy the homestead, and promises to execute a mortgage thereon in favor of the lender, this creates an equitable mortgage on the homestead.²¹⁸ An ordinary judgment on money lent to a borrower with which to buy a homestead, if the money is actually used to buy the homestead, is a lien against the homestead as well as against other real property of the judgment debtor.²¹⁹ Such a judgment, however, is of no higher or greater rank than any other judgment, except that the homestead property may be levied upon to enforce it.²²⁰ Where the holder of a purchase-money note has filed his claim in probate court after the death of the obligor, and the other assets of the estate are insufficient to pay the claim, the probate court will order the homestead sold to satisfy the debt.²²¹

A creditor can, by positive, voluntary action, waive his right to any claim against the homestead on account of purchase-money indebtedness, after which he cannot subject the homestead property to his claim.²²²

D. IMPROVEMENTS

A valid lien for improvements to the homestead can be enforced against the homestead property, and the purchaser of such property takes subject to such liens.²²³ The lien, however, does not attach until judgment has been rendered or a mechanic's lien perfected; before that, the owner can convey the homestead to a third party free from the claims of his creditors who have furnished improvements thereon.²²⁴

While the owner retains his title, it is clear that obligations incurred for improvements to the homestead are enforceable against the homestead,²²⁵ there being no requirement of "joint consent," to the obligation.²²⁶ The

213. See "Transactions for Which Joint Consent Required," below.

214. *Andrews v. Alcorn*, 13 Kan. 351.

215. *Nichols v. Overacker*, 16 Kan. 54.

216. *Pratt v. Bank*, 12 Kan. 570.

217. *Jenkins v. Simmons*, 37 Kan. 496, 15 P. 522.

218. *Foster v. Bank*, 71 Kan. 158, 80 P. 49, 114 Am. S. R. 470.

219. *Bank v. Pickering*, 111 Kan. 132, 205 P. 1110. *Dotson-Murray Co. v. Liebrand*, 143 Kan. 72, 53 P. 2d 487, is not in point on the facts, but may have modified this principle.

220. *Greeno v. Barnard*, 18 Kan. 518.

221. *Fudge v. Fudge*, 23 Kan. 416.

222. *Wagner v. Downey*, 151 Kan. 505, 99 P. 2d 761.

223. *Hurd v. Hixon*, 27 Kan. 722. *DePriest v. Ranson*, 165 Kan. 147, 193 P. 2d 191, is not *contra*; there, the lien was not satisfactorily proved.

224. *Dean v. McAdams*, 22 Kan. 544.

225. *Tyler v. Johnson*, 47 Kan. 410, 28 P. 198.

226. *U. S. Investment v. Phelps-Bigelow*, 54 Kan. 144, 37 P. 982. See "Transactions for Which Joint Consent Required," below.

probate court can order sale of the homestead to satisfy claims for improvements.²²⁷

Where, however, the homestead owner and his creditor agree that the addition to the homestead is to be considered personal property, the creditor cannot, after judgment, levy upon the homestead because as between the parties there never was an "improvement" to the homestead.²²⁸ Where money is lent for no specific purpose, the fact that some of it may have been used to pay off existing debts for improvements to the homestead does not give the lender any right to levy upon the homestead.²²⁹ Similarly, where credit is advanced for construction of improvements to the homestead, but the funds are not actually so used, the homestead is exempt from the debt.²³⁰

The fairly recent case of *Dotson-Murray v. Liebrand*²³¹ holds that a person who extends credit for the erection of improvements to the homestead, even though the funds are actually so used, cannot enforce his debt against the homestead unless he is the party who actually furnished the labor and materials for the improvements. In theory, this is *contra* to *Farmer's State Bank v. Pickering*²³² and other decisions cited in the subsection on "Purchase Money," above. Although the court in the *Dotson-Murray* case, in its effort to construe the homestead clause with "liberality," appears to have gone further than the language of the constitution would require, that decision is unequivocal and must be regarded as a clear statement of the law, at least as applies to obligations incurred for improvements to the homestead.

E. TAXES

Tax liens attach to homestead property just as to any other land, and the homestead can be sold for taxes.²³³ This applies to special assessments as well as to ordinary real property taxes.²³⁴ A third party who has paid the tax may be subrogated to the rights of the taxing authority and as a result have an enforceable lien against the homestead.²³⁵

V. TRANSFER AND ENCUMBRANCE OF THE HOMESTEAD

In this section are discussed transfers and encumbrances of the homestead by the persons enjoying the exemption. The effect of divorce decrees upon the homestead, and loss of the homestead through eminent domain, are included, although they might just as logically be treated elsewhere.

A. EFFECT OF VALID CONVEYANCE

In general, the grantee of a properly executed conveyance of the homestead takes free and clear of all the grantor's debts, except those that were liens recognized by the constitution.²³⁶

227. *Botello v. Tharp*, 121 Kan. 229, 246 P. 521.

228. *Marshall v. Bachelidor*, 47 Kan. 442, 28 P. 168. Compare *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199, as to the rights of third parties.

229. *Dreese v. Myers*, 52 Kan. 126, 34 P. 349, 39 Am. S. R. 336.

230. *Manufacturing Co. v. Haughton*, 97 Kan. 528, 155 P. 1078.

231. 143 Kan. 72, 53 P. 2d 487.

232. 111 Kan. 132, 205 P. 1110.

233. *County Commissioners v. Abbey*, 151 Kan. 710, 100 P. 2d 720.

234. *Canine v. Finnup*, 5 Kan. App. 798.

235. *Ibid.*

236. That is, obligations for purchase money or improvements, tax claims, and encumbrances created by the joint consent of the spouses.

In the early case of *Morris v. Ward*,²³⁷ where the husband alone had executed a mortgage on the homestead, it was held that a subsequent grantee, holding a deed executed by both husband and wife, took free and clear of the mortgage. The homestead "remains absolutely free from all liens and encumbrances except those mentioned in the constitution"²³⁸ and can be conveyed free from all but the constitutionally-recognized liens.²³⁹ It has been said frequently that a conveyance of the homestead "cannot" defraud creditors²⁴⁰ because "a debtor in the disposition of his property can commit a fraud upon his creditor only by disposing of such of his property as the creditor has a legal right to look to for his pay."²⁴¹ It is often pointed out in decisions that the homestead is property "toward which the eye of the creditor need never be turned."²⁴² The grantee has a right to show that his property was the homestead of his grantor, to avoid invalid liens against it.²⁴³

The grantee takes free and clear of liens and encumbrances not recognized by the constitutional clause even though the grantor made the conveyance specifically intending to defraud his creditors,²⁴⁴ as the purchaser's title is not affected by his grantor's motives.²⁴⁵ Nor is the grantee's title affected by the fact that there was no consideration for the deed, at least where grantor and grantee are close relatives. The grantor's creditors cannot complain that the homestead was given away;²⁴⁶ where the land is deeded to the owner's wife, the court will not inquire whether or not there was consideration.²⁴⁷ Where the owner conveys to his daughter for "love and affection" his creditors cannot complain.²⁴⁸

Where the husband holds title to the homestead, and the spouses mortgage it, agreeing that the proceeds shall become the property of the wife, creditors of the husband cannot reach the proceeds.²⁴⁹

The survivor of a family, occupying the homestead, can convey it free from those debts which were incurred by his ancestors while they dwelt upon the homestead, as well as from his own;²⁵⁰ and the fact that creditors of a decedent have filed their claims in probate court does not prevent the homestead from being sold by a survivor free from the decedent's debts.²⁵¹

237. 5 Kan. 239.

238. *Ibid.* at page 244.

239. *Dean v. McAdams*, 22 Kan. 544; *Sage v. Ijames*, 118 Kan. 11 at page 13, 233 P. 1015.

240. *Roser v. Bank*, 56 Kan. 129, 42 P. 341; *Winter v. Ritchie*, 57 Kan. 212, 45 P. 595, 57 Am. S. R. 331; *Hopper v. Arnold*, 74 Kan. 250 at page 252, 86 P. 469; *Freeman v. Funk*, 85 Kan. 473 at page 477, 117 P. 1024, 46 L. R. A. (N. S.) 487.

241. *Hixon v. George*, 18 Kan. 253 at page 260.

242. This may have originated in *Monroe v. May-Weil*, 9 Kan. 466 at page 476. See generally the cases cited in this section.

243. *Elwell v. Hitchcock*, 41 Kan. 130, 21 P. 109; *Insurance Co. v. Nichols*, 41 Kan. 133, 21 P. 111; *Bank v. Tyler*, 130 Kan. 308, 286 P. 400.

244. *Wilson v. Taylor*, 49 Kan. 774, 31 P. 697.

245. *Roser v. Bank*, 56 Kan. 129, 42 P. 341.

246. *Scott v. Rodgers*, 97 Kan. 438 at page 440, 155 P. 961 (*dictum*). (Mother conveyed homestead to daughter.)

247. *Bank v. Tomlinson*, 112 Kan. 274, 213 P. 830; 1 Kan. App. 599.

248. *Mathewson v. Richards*, 114 Kan. 500, 220 P. 185.

249. *Bank v. Bowen*, 21 Kan. 354; 25 Kan. 117. See note 120, above.

250. *Dayton v. Donart*, 22 Kan. 256.

251. *Estate of Casey*, 156 Kan. 590, 134 P. 2d 665. See, generally, "The Homestead and Survivors," below.

As to the power of disposition of proceeds of sale of the homestead, and their immunity from the grantor's debts, see "Proceeds for Which Homestead Exchanged," above.

B. THE REQUIREMENT OF JOINT CONSENT

Our constitution provides that the homestead "shall not be alienated without the joint consent of husband and wife, when that relation exists," and that the provisions of the homestead clause shall not apply "to any process of law obtained by virtue of a lien given by consent of both husband and wife."²⁵² Although it might appear from these clauses that the "joint consent" required for an "alienation" is something more than the "consent" required for a "lien," the court has never made any such distinction. In the cases involving mortgages, "joint consent" is required.²⁵³

Although the point is somewhat academic, it might be argued that the phrase "joint consent" involves redundancy, as the Latin prefix "con-"²⁵⁴ means about the same as our word "joint."²⁵⁵ The word "consent" means "voluntary . . . concurrence in what is done or proposed by another."²⁵⁶ Little, if anything, is added by the adjective "joint," and, as will be observed in some of the opinions cited below,²⁵⁷ the court is at times perplexed when attempting to explain the word "joint." At any rate, more ink has been shed over the requirement of joint consent than over any other phase of homestead law, there being several dozen decisions authoritatively discussing that requirement which are cited in this section of the present article.²⁵⁸

1. PERSONS WHOSE JOINT CONSENT IS REQUIRED

As was noted above, the constitution requires the "joint consent of husband and wife, when that relation exists," or "consent of both husband and wife." In the typical situation, in which title to the homestead is in the husband, this clause of course means that the wife must consent to an alienation or to the creation of a lien.²⁵⁹ Similarly, where the wife holds title to the homestead, the husband must so consent.²⁶⁰ Where the survivor of the family holds title to the homestead, there being no minor children, he can effectively convey it without anyone's consent.²⁶¹; and where the surviving spouse holds title to the homestead and resides thereon with minor children, he can convey or encumber the homestead as he sees fit,²⁶² the consent of the minor children not being required.²⁶³ But where title is in the surviving spouse and one or more

252. Const., art. 15, sec. 9.

253. See, for example, the discussion of joint consent in *Jewett v. McCrie*, 36 Kan. 636, 14 P. 257, 59 Am. Rep. 564.

254. This prefix is derived from *com*, old form of *cum*.

255. Classical Latin-English Dictionary; Cassell's Latin-English Dictionary.

256. Webster's New International Dictionary.

257. Among others, *Jewett v. McCrie*, cited above.

258. And joint consent is discussed incidentally in many of the other opinions cited elsewhere in this article.

259. *Morris v. Ward*, 5 Kan. 239; *Ayres v. Probasco*, 14 Kan. 175; *Coughlin v. Coughlin*, 26 Kan. 116; *Schermerhorn v. Mahaffie*, 34 Kan. 103, 8 P. 199; *Insurance Co. v. York*, 48 Kan. 488, 29 P. 586, 30 Am. S. R. 313; and many other decisions cited herein.

260. *Dollman v. Harris*, 5 Kan. 397; *Bank v. Duncan*, 87 Kan. 610, 125 P. 76.

261. *Estate of Casey*, 156 Kan. 590, 134 P. 2d 665; and see *Hawkins v. Welfare Board*, 148 Kan. 760, 84 P. 2d 930 (lien under a "poor law" statute).

262. *Vining v. Willis*, 40 Kan. 609, 20 P. 232.

263. *Allen v. Holtzman*, 63 Kan. 40, 64 P. 966.

other survivors, a conveyance or encumbrance by the former does not affect the homestead rights, if any, or the title of the latter.²⁶⁴ A mortgage consented to by husband and wife is valid, after divorce, as to the husband's second wife.²⁶⁵

The creation of liens on a homestead where one spouse is insane is discussed below in the subsection on "What Constitutes Joint Consent."

2. TRANSACTIONS FOR WHICH JOINT CONSENT REQUIRED

The spouses must give joint consent to the granting of any interest in the homestead property which would interfere with the use and enjoyment thereof by the family, to any contract which might result in such interference in the future, and to any lien or encumbrance other than those specifically excepted by the constitution.²⁶⁶

It must be kept in mind that the constitution does except certain liens and encumbrances from the requirement of joint consent. Thus, while the homestead clearly cannot be deeded away outright without joint consent, one spouse can incur a lien for improvements without the consent of the other.²⁶⁷ And where one spouse, borrowing money with which to buy the homestead, promises to execute a mortgage thereon in favor of the lender, this creates a valid equitable mortgage against the homestead.²⁶⁸ A mortgage executed by the husband alone, for the purchase money with which to buy the homestead, constitutes a valid lien, even though the spouses were occupying the premises prior to their purchase of the land.²⁶⁹ Where one spouse has executed a note for the purchase money, the promisee can, after judgment, levy execution against the homestead.²⁷⁰ And, testamentary disposition of the homestead is not such an alienation as requires joint consent.²⁷¹

Joint consent is necessary for any lease which would give the lessee the right to occupy any of the homestead premises; lacking joint consent, the lease is void.²⁷² This applies to an oil and gas lease, as the rights of the lessee thereunder interfere to some extent with the use and enjoyment of the homestead by the owners' family.²⁷³ Once the spouses have jointly consented to an oil and gas lease, one spouse alone cannot extend the period of time which it covers.²⁷⁴ But joint consent is not required for minor modifications, such as the manner of making the rental payments,²⁷⁵ as these do not affect the use and enjoyment of the homestead premises.²⁷⁶

264. *Gatton v. Tolley*, 22 Kan. 678 (*dictum*); *Compton v. Gas Co.*, 75 Kan. 572, 89 P. 1039, 10 L. R. A. (N. S.) 787; *Hannon v. Sommer*, 10 Fed. 601.

265. *Insurance Co. v. Mays*, 152 Kan. 46, 102 P. 2d 984.

266. That is, obligations for purchase money or improvements, and taxes.

267. *Andrews v. Alcorn*, 13 Kan. 351; *U. S. Investment v. Phelps-Bigelow*, 54 Kan. 144 at page 147, 37 P. 982.

268. *Foster v. Bank*, 71 Kan. 158, 80 P. 49, 114 Am. S. R. 470.

269. *Nichols v. Overacker*, 16 Kan. 54.

270. *DeBolt v. Sharp*, 148 Kan. 298, 80 P. 2d 1054 (*dictum*).

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

272. *Coughlin v. Coughlin*, 26 Kan. 116; *Wea v. Franklin*, 54 Kan. 533, 38 P. 790, 45 Am. S. R. 297; *Bennett v. Glazier*, 145 Kan. 571, 66 P. 2d 370.

273. *Franklin v. Wea*, 43 Kan. 518, 23 P. 580; *Palmer v. Parish*, 61 Kan. 311, 59 P. 640; *Thompson v. Millikin*, 93 Kan. 72, 143 P. 430; *same*, 102 Kan. 717, 172 P. 534; *Lavery v. Oil Co.*, 107 Kan. 104 at page 106, 190 P. 596; *Peterson v. Skidmore*, 108 Kan. 339, 195 P. 600; *Ray v. Brush*, 112 Kan. 110, 210 P. 660; *Starke v. Starke*, 155 Kan. 331, 125 P. 2d 738.

274. *Lavery v. Oil Co.*, cited above.

275. *Wilson v. Gas Co.*, 75 Kan. 499, 89 P. 897.

276. *Ray v. Brush*, 112 Kan. 110, 210 P. 660.

Joint consent of the spouses is required for the granting of a railroad right of way across the homestead,²⁷⁷ and for the laying of a pipe line thereon.²⁷⁸ The location of a disputed boundary to a homestead cannot be settled, or an existing boundary modified, without joint consent.²⁷⁹ One spouse cannot create a lien on the homestead for an annuity to his parents without the consent of the other spouse.²⁸⁰

As is mentioned elsewhere herein,²⁸¹ the proceeds of a fire insurance policy which are collected after the burning of the homestead, and the proceeds of a mortgage given on the homestead property, may enjoy the homestead exemption. If so, joint consent of the spouses apparently is required to transfer the insurance proceeds²⁸² or the money received for the mortgage.²⁸³

The spouses must both consent to a contract to sell the homestead,²⁸⁴ or to exchange it for other property.²⁸⁵ Where the spouses have equitable title to the homestead only, the requirements of joint consent apply the same as though they held legal title.²⁸⁶ Where the spouses are purchasing the homestead under a contract, no modification of the contract which might interfere with their possession can be made without joint consent.²⁸⁷ Where the homestead tract is held under a lease, joint consent is required to a mortgage on the dwelling place, even though it is a chattel and is mortgaged as such.²⁸⁸ The purpose of the homestead clause "is not so much to give a man property as to secure his family a home. And if the home be secured, what matters it whether that home be temporary or permanent, or by what tenure or title it is held?"²⁸⁹

Where the wife has jointly consented to a deed or to a mortgage, her consent does not extend to a new transaction, entered into by the husband alone, which might adversely affect her homestead rights in the property involved. Thus where a deed to the homestead was jointly executed and placed in escrow as security for an obligation, the wife did not, by her signing the deed and authorizing its being placed in escrow, consent that it be security for another, different obligation.²⁹⁰ Where the mortgagee releases a valid

277. *Pilcher v. Santa Fe*, 38 Kan. 516, 16 P. 945, 5 Am. S. R. 770.

278. *Gas Co. v. Ralston*, 81 Kan. 86, 105 P. 430. The court probably found joint consent here (at page 89) although the decision might be partly grounded on "estoppel." There was considerable expenditure of funds before any objection was made.

279. *Kastner v. Baker*, 92 Kan. 26, 139 P. 1189.

280. *Kalivoda v. Kalivoda*, 148 Kan. 238, 80 P. 2d 1054. This was not a purchase money lien; see at page 244.

281. See "Proceeds for Which Homestead Exchanged," above.

282. *Potter v. Banking Co.*, 59 Kan. 455 at page 460, 53 P. 520. There is some talk of "waiver" in the opinion.

283. *Hoefer v. Fronkier*, 96 Kan. 400, 151 P. 1112; not a clear decision on this point. It is doubtful whether such funds should be exempt, anyway; see note 119, above.

284. *Perrine v. Mayberry*, 37 Kan. 258, 15 P. 172; *Fleming v. Hattan*, 92 Kan. 948, 142 P. 971; *Tucker v. Finch*, 106 Kan. 419, 188 P. 235; *Hughes v. Kressler*, 130 Kan. 533, 287 P. 271. As to whether the vendee can recover damages from the spouse who did consent, see "Effect of Lack of Joint Consent," below.

285. *Hodges v. Farnham*, 49 Kan. 777, 31 P. 694; *Dennis v. Kuster*, 57 Kan. 215, 45 P. 602.

286. *Moore v. Reaves*, 15 Kan. 150; *Holland v. Holland*, 89 Kan. 730, 132 P. 989.

287. *Walz v. Keeler*, 102 Kan. 124, 169 P. 196.

288. *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199.

289. *Ibid.* at page 558. This would probably apply to a trailer home.

290. *Braly v. McKenna*, 148 Kan. 547, 83 P. 2d 631. But the wife can make the husband her agent to pledge papers pertaining to the homestead as security for various obligations; *Elliott v. Faulkner*, 131 Kan. 528, 292 P. 918 (*dictum*).

mortgage on the homestead, upon the promise of the husband alone to execute a new one, he can neither enforce such promise against the non-consenting spouse nor reinstate the old mortgage without her consent.²⁹¹ But one spouse can keep a mortgage note alive beyond the period of the statute of limitations or can extend the term of a mortgage on the homestead without the consent of the other, so long as there was joint consent to the mortgage in the first place; the other spouse cannot later complain when the mortgage is foreclosed, as he gave consent to it.²⁹²

3. WHAT CONSTITUTES JOINT CONSENT

Joint consent exists when there is *simultaneous, voluntary* concurrence in a *specific* conveyance or encumbrance.

"The usual and legal signification of the word 'consent, implies assent to some proposition submitted. In cases of contract it means the 'concurrence of wills.' Consent supposes a physical power to act, a moral power of acting, and a serious, determined and free use of these powers."²⁹³

Time of consent. The constitution requires "joint" consent to certain alienations, and the prefix "con-" in the word "consent" implies a simultaneity of agreement. Hence, the requirement is not met by the execution of a power of attorney by the wife to the husband, he later mortgaging the homestead on behalf of both spouses.²⁹⁴ Where the spouses execute a mortgage on the homestead in blank, and later the husband fills in the name of a mortgagee, there is no joint consent to the mortgage.²⁹⁵ Where the husband deeds away the homestead, a quitclaim deed executed by the wife eight years later does not show her joint consent to the conveyance;²⁹⁶ nor can the wife cure a mortgage on the homestead, to which the husband has forged her signature, by ratifying it later.²⁹⁷ The spouses can, however, execute the instrument evidencing the alienation at different times²⁹⁸ or in the absence of each other²⁹⁹ or even in different towns³⁰⁰ so long as it appears that there was voluntary, concurrent assent. Where the wife knows that the husband is going to lease the homestead upon certain terms, and says "All right; have a lease written," she has consented to the execution of that particular lease;³⁰¹ but the wife's knowledge of the lease at the time it is executed by her husband, coupled with mere silence on her part, does not demonstrate her consent.³⁰² A statement in writing by a spouse that he

291. *Jenkins v. Simmons*, 37 Kan. 496, 15 P. 522. Compare *Pratt v. Bank*, 12 Kan. 570, involving a purchase money mortgage.

292. *Securities Co. v. Manwarren*, 64 Kan. 636, 58 P. 68, overruling *Bank v. Hardman*, 62 Kan. 242, 61 P. 1131, 84 Am. S. R. 381, 10 Kan. App. 327.

293. *Jewett v. McCrie*, 36 Kan. 636 at pages 644 and following, 14 P. 257, 59 Am. Rep. 584.

294. *Wallace v. Insurance Co.*, 54 Kan. 442, 38 P. 489, 45 Am. S. R. 288, 26 L. R. A. 806.

295. *Ayres v. Probasco*, 14 Kan. 175.

296. *Ott v. Sprague*, 27 Kan. 620.

297. *Jewett v. McCrie*, 36 Kan. 636, 14 P. 257, 59 Am. Rep. 584. The opinion dwells upon "ratifying a criminal act," however.

298. *Ferguson v. Nuttleman*, 110 Kan. 718, 205 P. 365; *Lumber Co. v. Wagner*, 133 Kan. 405, 300 P. 1067.

299. *Ferguson v. Nuttleman*, cited above.

300. *Bell v. Slasor*, 8 Kan. App. 669.

301. *Johnson v. Samuelson*, 69 Kan. 263, 76 P. 867.

302. *Franklin v. Wea*, 43 Kan. 518 at page 523, 23 P. 630, 54 Kan. 533. See the sections on "Fraud" and "Estoppel, waiver, etc.," below.

will join in a mortgage on certain conditions, if such is joint consent at all, certainly is not joint consent if the conditions are not met.³⁰³

Specific transaction. One does not consent to a transaction unless he is aware of the transaction involved. As was noted above, where the spouses have executed a mortgage in blank, and later the husband alone fills in the name of the mortgagee and the terms of the mortgage, the wife cannot be said to have consented thereto.³⁰⁴ However, where the husband signs a contract to sell the homestead, and at the same time both spouses execute a deed thereto to be deposited with a third party, the wife's signature on the deed evidences her consent to the contract, both being part of the same transaction.³⁰⁵

Voluntary nature of consent—fraud. A spouse cannot be said to have given "consent" to an alienation or encumbrance of the homestead when he was induced to execute the papers evidencing the transaction through deceit or trickery. Thus, where the wife is induced to sign a mortgage on the homestead by representations that it is a chattel mortgage³⁰⁶ or that it covers some other tract of land only³⁰⁷ she has not given her joint consent. Where the signature of both spouses was obtained through fraud, a subsequent ratification by the husband alone does not cure the fraud or prevent rescission.³⁰⁸ Where the spouse is illiterate, and she fails to have the instrument read to her, it has been held that she is so "negligent" she cannot later complain to lack of joint consent.³⁰⁹ But where the illiterate spouse makes inquiry as to the contents of the instrument, and is given false answers upon which she relies, there is no joint consent.³¹⁰ It is said that it is easier to find lack of joint consent where the grantee or mortgagee, or his agent, has made the misrepresentations.³¹¹ Where the wife can read and write, but she signs the instrument without reading it, the failure of other persons present to advise her of its contents does not constitute fraud, as there was no misrepresentation.³¹²

Voluntary nature of consent—duress. A spouse does not give the requisite joint consent when he has been forced to execute the necessary papers through duress.³¹³ The duress may consist of direct, immediate threats to inflict bodily injury,³¹⁴ or may be found in promises as to future conduct, such as statements of the husband that he will desert the wife if she does not sign.³¹⁵ Where the husband relates to his wife threats which have been made against *him* by third parties, and the wife is influenced to sign as a result of hearing those threats, there is no joint consent.³¹⁶ But mere shouting, or angry commands,

303. *Bank v. Duncan*, 87 Kan. 610, 125 P. 76.

304. *Ayres v. Probasco*, 14 Kan. 175.

305. *Smith v. Kibbe*, 104 Kan. 159, 178 P. 427, 5 A. L. R. 483. See notes 290-292, above, and the section on "Fraud" immediately below.

306. *Warden v. Reser*, 38 Kan. 86, 16 P. 60.

307. Implied in *Larrick v. Jacobson*, 139 Kan. 522, 32 P. 2d 204.

308. *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433.

309. *Roach v. Karr*, 18 Kan. 529, 26 Am. Rep. 788.

310. *Bird v. Logan*, 35 Kan. 228, 10 P. 564.

311. *Larrick v. Jacobson*, 139 Kan. 522, 32 P. 2d 204; and see *Warden v. Reser*, 38 Kan. 86, 16 P. 60, and the other cases cited in this subsection.

312. *Ferguson v. Nuttleman*, 110 Kan. 718, 205 P. 365. *Larrick v. Jacobson*, cited above, may be *contra*; but there the court speaks of "intentional concealment."

313. *Hofman v. Demple*, 52 Kan. 756, 35 P. 803.

314. *Helm v. Helm*, 11 Kan. 19.

315. *Tucker v. Finch*, 106 Kan. 419, 188 P. 235.

316. *Bank v. Hutchinson*, 62 Kan. 9, 61 P. 443.

unaccompanied by any threat, do not constitute duress.³¹⁷ The spouse claiming that he was forced to enter a transaction through duress has the burden of showing the lack of joint consent, as his signature on an instrument raises a presumption that joint consent existed.³¹⁸ In this connection, it appears that the complaining spouse may be unable to testify as to the threats, because they were confidential communications between husband and wife.³¹⁹ The spouse has been allowed to state the conclusion that he was threatened and signed an instrument as a result of threats where no objection was made to the testimony;³²⁰ but such testimony cannot be received over objection.³²¹ A third party, who overheard the conversation, can testify that threats were made.³²²

Evidence of joint consent—writing. “The fact of joint consent is best evidenced by a writing to that effect, but the constitution does not in express terms require that it shall be so shown, and hence it can be established by such facts and circumstances as the necessity of particular cases require.”³²³ Joint consent “may be given orally and evidenced by acts *in pais*.”³²⁴ Probably no more strict proof is required than is necessary to establish any other material fact.³²⁵ Validity of a deed³²⁶ or mortgage³²⁷ on the homestead is not affected by the fact that the non-owning spouse has not signed. Nor is a writing necessary to show joint consent to a contract to sell the homestead³²⁸ or a lease thereof³²⁹ or the granting of an easement thereon.³³⁰ The same rule applies where the wife is the owner of the homestead; consent of the husband need not be in writing.³³¹

Consent of insane spouse. It has long been held that an insane spouse is incapable of giving the requisite “joint consent” to a deed,³³² mortgage,³³³ lease,³³⁴ or other alienation or encumbrance; this whether the insane spouse himself executes the instrument involved,³³⁵ or his guardian attempts to con-

317. *Gabbey v. Forgeus*, 38 Kan. 62, 15 P. 866.

318. *Ibid*.

319. *Anderson v. Anderson*, 9 Kan. 112; *Tucker v. Finch*, 106 Kan. 419, 188 P. 235.

320. *Tucker v. Finch*, cited above.

321. *Gabbey v. Forgeus*, cited above.

322. *Bank v. Hutchinson*, 62 Kan. 9, 61 P. 443.

323. *Pilcher v. Santa Fe*, 38 Kan. 516 at page 525, 16 P. 945, 5 Am. S. R. 770.

324. *Sullivan v. Wichita*, 64 Kan. 539 at page 543, 68 P. 55.

325. *Eakin v. Wycoff*, 118 Kan. 167 at page 173, 234 P. 63.

326. *Matney v. Linn*, 59 Kan. 613, 54 P. 668. *Dudley v. Shaw*, 44 Kan. 683, 24 P. 1114 (two writings, however, from which joint consent might have been found); *Durand v. Higgins*, 67 Kan. 110 at pages 125 and following, 72 P. 567 (*dictum*); *Haas v. Nemeth*, 139 Kan. 252, 31 P. 2d 6 (*dictum*).

327. *Bank v. Duncan*, 87 Kan. 610, 125 P. 76 (*dictum*).

328. *Perrine v. Mayberry*, 37 Kan. 258, 15 P. 172; *Eakin v. Wycoff*, 118 Kan. 167, 234 P. 63.

329. *Johnson v. Samuelson*, 69 Kan. 263, 76 P. 867, expressing this rule; but see some of the language in *Wea v. Franklin*, 54 Kan. 533, 38 P. 790, 45 Am. S. R. 297.

330. *Pilcher v. Santa Fe*, 38 Kan. 516, 16 P. 945, 5 Am. S. R. 770; *Sullivan v. Wichita*, 64 Kan. 539, 68 P. 55.

331. *Matney v. Linn*, 59 Kan. 613, 54 P. 668; *Bank v. Duncan*, 87 Kan. 610, 125 P. 76 (*dictum*).

332. *Loan Co. v. Spittler*, 54 Kan. 560, 38 P. 799; *Adams v. Gilbert*, 67 Kan. 273, 72 P. 769, 100 Am. S. R. 456; *Iles v. Benedict*, 110 Kan. 200, 203 P. 925.

333. *Loan Co. v. Spittler*, cited above; *Estate of Barnell*, 141 Kan. 842, 44 P. 2d 214; *Locke v. Redmond*, 6 Kan. App. 76. But where the court erroneously found joint consent, the finding may not be subject to collateral attack; *Clevenger v. Figley*, 68 Kan. 699, 75 P. 1001.

334. *Peterson v. Skidmore*, 108 Kan. 339, 195 P. 600.

335. *Loan Co. v. Spittler*, cited above.

sent for him.³³⁶ Statutes³³⁷ authorizing the guardian of an insane spouse to join in the alienation or encumbrance of the homestead have been held to be unconstitutional.³³⁸ Where the spouses have jointly consented to a contract to sell the homestead, after which one of them is adjudged insane, there can be no consent to a deed in conformity with the contract.³³⁹ The rule that an insane spouse cannot give joint consent to a transaction proved to be a hardship in some situations in which there existed pressing and legitimate reasons for mortgaging the homestead, or where the homestead land was found to contain valuable mineral deposits. Consequently, the people of Kansas in 1944 amended the homestead clause of the constitution by adding the following proviso:

"And provided further, That the legislature by an appropriate act or acts, clearly framed to avoid abuses, may provide that when it is shown the husband or wife while occupying a homestead is adjudged to be insane, the duly appointed guardian of the insane spouse may be authorized to join with the sane spouse in executing a mortgage upon the homestead, renewing or refinancing an encumbrance thereon which is likely to cause its loss, or in executing a lease thereon authorizing the lessee to explore and produce therefrom oil, gas, coal, lead, zinc, or other minerals."

The legislature has provided enabling statutes.³⁴⁰ It is to be noted that the amendment does not indicate that the insane person's guardian can give "joint consent"; on the contrary, it removes the necessity for joint consent so far as mortgages and mineral leases are concerned. Joint consent is still required for other alienations of the homestead, and the rule discussed above, that an insane spouse cannot give joint consent, still applies.³⁴¹ It should be noted also that the enabling statute³⁴² requires that a guardian *ad litem* be appointed for the insane person, to investigate the contemplated transaction.³⁴³

Estoppel, waiver, negligence and laches. As will be mentioned in a later section,³⁴⁴ parties enjoying homestead rights may, under some conditions, waive those rights or find themselves estopped from asserting them. In some of the cases, these features appear where the court might have found "joint consent" in the first place. Thus, in *Roach v. Karr*³⁴⁵ the illiterate wife signed a mortgage on the homestead, not knowing what it was. The court apparently concluded that there was no joint consent, but held that the wife was guilty of "gross negligence"³⁴⁶ and hence could not raise the question of lack of consent. Another case, in which the spouses traded one homestead for another, and the wife later brought an action in ejectment against the occupants of the first homestead, seems to be treated as one involving "equi-

336. *Loan Co. v. Spüler; Adams v. Gilbert*, 67 Kan. 273, 72 P. 769, 100 Am. S. R. 456; *Iles v. Benedict*, 110 Kan. 200, 203 P. 925. *Clevenger v. Figley*, 68 Kan. 699, 75 P. 1001, is not *contra*.

337. G. S. (1933 Supp.) 39-211 and 39-221.

338. *Estate of Barnell*, 141 Kan. 842, 44 P. 2d 214.

339. *Iles v. Benedict*, 110 Kan. 200, 203 P. 925.

340. G. S. (1949) 59-2314 through 59-2322.

341. *Steinkirchner v. Linscheid*, 165 Kan. 390, 195 P. 2d 592; 164 Kan. 179, 188 P. 2d 960; *Bradley v. Hall*, 165 Kan. 358, 194 P. 2d 943.

342. G. S. (1949) 59-2317.

343. And see note 341, above.

344. See "Estoppel" and "Waiver," below.

345. 18 Kan. 529, 26 Am. Rep. 788.

346. *Ibid.* at page 534.

table estoppel," although the evidence probably established that the wife consented to the trade.³⁴⁷ On the other hand, in some cases involving leases of the homestead, where the wife fails to join in the lease, but acquiesces in the tenant's possession over a period of time, the court apparently regards her acquiescence as evidence of joint consent,³⁴⁸ even though she questioned the husband's right to grant the lease at the time it was executed.³⁴⁹ Such decisions might just as well have been decided on the ground of "estoppel."³⁵⁰ Where the husband, while his wife is insane, conveys away the homestead, which he owns, he may be estopped, after the death of the insane spouse, to attack the validity of the conveyance.³⁵¹ And it is suggested in *Braly v. McKenna*³⁵² that one might be barred by laches from asserting homestead rights,³⁵³ although this language is *dictum*.³⁵⁴

4. EFFECT OF LACK OF JOINT CONSENT

As to a transaction for which joint consent is required,³⁵⁵ lack of joint consent renders it utterly void. That which is void cannot be later ratified,³⁵⁶ although one may find himself estopped from asserting the validity of the transaction.³⁵⁷ A conveyance of the homestead by one spouse alone is void,³⁵⁸ although where the grantee has paid off a valid mortgage thereon he may be subrogated to the rights of the mortgagee when the deed to him is set aside.³⁵⁹ There is no "bona fide purchaser" rule,³⁶⁰ as occupancy of land as a homestead imparts knowledge to all the world; similarly, where the grantee in a valid grant has knowledge of a previous invalid alienation, this does not effect his title.³⁶¹ A mortgage executed without joint consent is void,³⁶² but the mortgagee is entitled to a personal judgment on the mortgage-note against the spouse executing it.³⁶³ And where there was joint consent to the mortgage, but the husband alone keeps the mortgage-note alive beyond the period of the statute of limitations, the mortgagee can still foreclose even though action against the wife would be barred.³⁶⁴ Lack of joint consent to the

347. *McAlpine v. Powell*, 44 Kan. 411, 24 P. 353. But this was a reversal for trying the case upon the wrong theory in the lower court, and the ruling is not decisive.

348. *Johnson v. Samuelson*, 69 Kan. 263, 76 P. 867.

349. *Shay v. Bevis*, 72 Kan. 208, 83 P. 202.

350. *Shay v. Bevis*, cited above, rather clearly went off on this ground; but at pages 211 and 213 there is language pointing out that "consent" or "assent" appeared.

351. *Adams v. Gilbert*, 67 Kan. 273, 72 P. 769, 100 Am. S. R. 456.

352. 148 Kan. 547, 83 P. 2d 631.

353. *Ibid.* at page 554.

354. See, also, *Thompson v. Millikin*, 93 Kan. 72, 143 P. 430; *Iliff v. Arnott*, 31 Kan. 672, 3 P. 525.

355. See "Transactions for Which Joint Consent Required," above.

356. See notes 296 and 297, above.

357. See "Estoppel, waiver, etc.," above, and "Waiver" and "Estoppel," below.

358. *Chambers v. Cox*, 23 Kan. 393; *Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 P. 199; *Insurance Co. v. York*, 48 Kan. 488, 29 P. 586, 30 Am. S. R. 313; *Hill v. Alexander*, 2 Kan. App. 251.

359. *Hofman v. Demple*, 52 Kan. 756, 35 P. 803.

360. *Moore v. Reaves*, 15 Kan. 150; *Cropper v. Goodrich*, 89 Kan. 589, 132 P. 163.

361. Implied in *Franklin v. Wea*, 43 Kan. 518, 23 P. 630.

362. *Morris v. Ward*, 5 Kan. 239; *Dollman v. Harris*, 5 Kan. 397; *Ayres v. Probasco*, 14 Kan. 175; *Loan Co. v. Spitzer*, 54 Kan. 560, 38 P. 799.

363. *Jenkins v. Simmons*, 37 Kan. 496, 15 P. 522; *DeBolt v. Sharp*, 148 Kan. 298, 80 P. 2d 1054.

364. *Securities Co. v. Manwarren*, 64 Kan. 636, 68 P. 68.

mortgage-note is available to the non-consenting spouse as a defense even against a holder in due course.³⁶⁵

Failure to obtain joint consent to a lease on the homestead renders the lease void.³⁶⁶ The same rule applies to a contract to exchange the homestead for other property,³⁶⁷ and to an agreement modifying the contract under which the spouses are purchasing the homestead.³⁶⁸ Lack of joint consent to a contract to sell the homestead renders the contract void. It has been held that where the vendee has made some payments under such void contract, he cannot recover his payments.³⁶⁹ Prior to our present statute,³⁷⁰ which provides that there shall be no specific performance of a contract to sell the homestead, or damages for breach thereof, unless the contract was signed by both spouses, there was a conflict in the decisions as to whether the vendee could recover damages against the spouse who executed the contract to sell the homestead.³⁷¹ It is now clear that lack of joint consent to a contract to convey the homestead prevents the vendee from getting either specified performance or damages,³⁷² although the spouse who executed the contract may be liable for a broker's commission.³⁷³ Where the contract includes the homestead and other lands, the vendee can get specific performance as to the latter.³⁷⁴

Where some transaction is void because of lack of joint consent, the non-consenting spouse is, of course, a proper party to object.³⁷⁵ The spouse who *did* consent to the transaction can also point out its invalidity,³⁷⁶ unless he is relying upon it himself³⁷⁷ or there is some equitable principle which prevents his doing so.³⁷⁸

C. TRANSFER OR ENCUMBRANCE BY DIVORCE DECREE

The decree in a divorce action, or an action for alimony only, may operate to convey the homestead from one spouse to another or charge it with a valid lien.

The court can, in connection with granting a divorce, award the homestead, title to which was in the husband, to the wife for her life,³⁷⁹ or in fee simple.³⁸⁰ This even though the divorce was granted to the husband for the

365. *Berry v. Berry*, 57 Kan. 691, 47 P. 837, 57 Am. S. R. 351.

366. See notes 272 and 273, above.

367. *Dennis v. Kuster*, 57 Kan. 215, 45 P. 602.

368. *Walz v. Keller*, 102 Kan. 124, 169 P. 196.

369. *Thimes v. Stumpff*, 33 Kan. 53, 5 P. 431.

370. C. S. (1949) 60-3503.

371. *Lister v. Batson*, 6 Kan. 420, stating that the vendee should be reimbursed for his expenditures; *Hodges v. Farnham*, 49 Kan. 777, 31 P. 606, denying recovery.

372. *Martin v. Hush*, 91 Kan. 833, 139 P. 401; *Tucker v. Finch*, 106 Kan. 419, 188 P. 235; *Iles v. Benedict*, 110 Kan. 200, 203 P. 925; *Hughes v. Kressler*, 130 Kan. 533, 287 P. 271; *Clark v. Axley*, 162 Kan. 339, 176 P. 2d 256. Of course, it must be kept in mind that the appearance of the signatures of both spouses does not necessarily indicate that both consented to the contract; see the subsection on "Evidence of Joint Consent—Writing," "Fraud" and "Duress" above.

373. *Fleming v. Hattan*, 92 Kan. 948, 142 P. 971.

374. *Herman v. Sawyer*, 112 Kan. 6, 209 P. 663.

375. Among others, see *Hill v. Lewis*, 45 Kan. 162. This observation is implicit in many of the decisions cited in this article.

376. *Peterson v. Skidmore*, 108 Kan. 339, 195 P. 600.

377. *McNutt v. Nellans*, 82 Kan. 424, 108 P. 834.

378. See "Estoppel, waiver, etc.," above, and the other sections cited therein.

379. *Brandon v. Brandon*, 14 Kan. 342.

380. *Hamm v. Hamm*, 98 Kan. 360, 158 P. 22.

fault of the wife.³⁸¹ "And if it be said that the protection of the constitution is placed around a homestead, it may also be said that the power to grant divorces is also by the constitution expressly given to the district courts. Const., art. 2, § 18. And the constitutional grant of power to divorce is broad enough to include the power to determine the subordinate and dependent questions of the family property, and the care and custody of the children."³⁸² Where the homestead is set aside to one of the parties, the court may, in adjusting their property rights, create a lien thereon in favor of the other;³⁸³ or the wife may be given a lien on the husband's homestead to secure her judgment for alimony.³⁸⁴

D. TRANSFER BY EMINENT DOMAIN

Under the sovereign power of eminent domain, the homestead may be taken, without the consent of the owner, just as any other land.³⁸⁵ Persons occupying the homestead are entitled to be compensated for their share of the value thereof; and where one owns less than all of the homestead, but has a right to occupy it all, he should be compensated for this right of occupancy as well as for his share of the title.³⁸⁶ It is probable that compensation awarded in eminent domain proceedings enjoys the homestead exemption from debts of the owner of the land, at least for a reasonable period of time.³⁸⁷

VI. TERMINATION OF HOMESTEAD RIGHTS

This section discusses termination of homestead rights by voluntary action of the parties enjoying them.³⁸⁸ It includes abandonment of the homestead, waiver of homestead rights, and conduct of the parties which may estop them from asserting those rights.

A. ABANDONMENT

In general, a family abandons the homestead by ceasing to occupy it, intending that it no longer be their homestead.³⁸⁹ Thus, the process of "abandonment" is practically the opposite of "acquisition."³⁹⁰

1. CESSATION OF OCCUPANCY

To be effective to cut off the homestead rights, the abandonment must be by the entire family. As was noticed above,³⁹¹ the mere fact that one of the spouses has deserted the family does not cause the homestead rights to cease. It has been said³⁹² that the abandonment must be "mutual"; actions of one spouse alone do not result in abandonment of the homestead by the other.

381. See the two notes immediately above, and *Harris v. Harris*, 169 Kan. 339, 219 P. 2d 454.

382. *Brandon v. Brandon*, 14 Kan. 342 at page 346.

383. *Hamm v. Hamm*, 98 Kan. 360, 158 P. 22.

384. *Blankenship v. Blankenship*, 19 Kan. 159; *Johnson v. Johnson*, 66 Kan. 546, 72 P. 267.

385. *Jockheck v. Commissioners*, 53 Kan. 780, 37 P. 621.

386. *Koehler v. Gray*, 102 Kan. 878, 172 P. 25, L. R. A. 1918D 1088.

387. *DePriest v. Ranson*, 165 Kan. 147, 193 P. 2d 191. See "Proceeds for Which Homestead Exchanged," above.

388. Other than by conveyance or encumbrance by joint consent of the spouses, which has been discussed above.

389. See the discussion in *Palmer v. Parish*, 61 Kan. 311 at page 313, 59 P. 640.

390. See "Acquisition of Homestead Rights," above.

391. See notes 166 and 167, above.

392. In *Southern v. Linville*, 139 Kan. 850 at pages 857 and following. The case involved abandoning a purchase money contract, and is not precisely in point.

Where the wife, without fault on her part, is driven away from the homestead by an abusive husband, her absence does not constitute an abandonment of her homestead rights.³⁹³ The confinement of a spouse in a mental institution³⁹⁴ or in a penitentiary³⁹⁵ does not result in his abandonment of the homestead, even though both spouses are so confined concurrently.³⁹⁶ The recent *Steinkirchner v. Linscheid* decision³⁹⁷ demonstrates the strict proof required of abandonment by an insane spouse, and may cast doubt upon whether there can be any such abandonment at all.

Also, temporary absence, even of the entire family, may not amount to abandonment of the homestead.³⁹⁸ Absence to obtain medical treatment or recuperate in a more suitable climate,³⁹⁹ to study in another state,⁴⁰⁰ so that repairs can be made upon a homestead,⁴⁰¹ to take advantage of superior educational facilities for the children,⁴⁰² or to make a better living in another locality,⁴⁰³ have been held not to constitute abandonment. The homestead may be rented or leased to another during the temporary absence.⁴⁰⁴

Where minor children are the only survivors of the owner's family, their extended absence from the land may not amount to an abandonment. "Relinquishment or abandonment of homestead rights by infants cannot be lightly imputed to them."⁴⁰⁵ The infant survivor may be cared for at another place for a long period of time without abandoning his homestead.⁴⁰⁶ But where the survivors are adult children they can abandon the homestead by non-occupancy just as readily as could the original owner or his spouse;⁴⁰⁷ or, after partition, any adult child can so abandon his own share of the homestead.⁴⁰⁸

2. INTENT TO ABANDON

To effect abandonment, not only must the family cease to occupy the land, but they must intend that it no longer be their homestead. So long as they regard the homestead as their home and intend to return to it, there is no abandonment.⁴⁰⁹

393. *Meech v. Grigsby*, 153 Kan. 784 at page 787, 113 P. 2d 1091.

394. *Smith v. Landis*, 93 Kan. 453, 144 P. 998.

395. *Withers v. Love*, 72 Kan. 140, 83 P. 204, 3 L. R. A. (N. S.) 514.

396. *Ibid.*

397. 164 Kan. 179, 188 P. 2d 960.

398. *McDowell v. Diefendorf*, 1 Kan. 648; *Shattuck v. Weaver*, 80 Kan. 82, 101 P. 649; *Coal Co. v. Judd*, 6 Kan. App. 487.

399. *Carlson v. Ritchie*, 115 Kan. 722, 224 P. 895; *Williams v. Roberts*, 139 Kan. 460, 32 P. 2d 10.

400. *Koehler v. Gray*, 102 Kan. 878, 172 P. 25, L. R. A. 1918D 1088.

401. *Blitz v. Metzger*, 119 Kan. 760, 241 P. 259.

402. *Bank v. Weeks*, 138 Kan. 376, 26 P. 2d 262.

403. *Deering v. Beard*, 48 Kan. 16, 28 P. 981.

404. *Pitney v. Eldridge*, 58 Kan. 215, 48 P. 854, and others cited herein. The question of the intent of members of the family is always involved; it is discussed in the subsection below.

405. *Sage v. Ijames*, 118 Kan. 11 at page 12, 233 P. 1015; and see *Deering v. Beard*, 48 Kan. 16, 28 P. 981.

406. *Shirack v. Shirack*, 44 Kan. 653, 24 P. 1107; *Hicks v. Sage*, 104 Kan. 723, 180 P. 780.

407. *Stratton v. McCandliss*, 32 Kan. 512, 4 P. 1018.

408. *Barbe v. Hyatt*, 50 Kan. 86, 31 P. 694.

409. *Osborne v. Schoonmaker*, 47 Kan. 667 at page 670, 28 P. 711; *Palmer v. Parish*, 61 Kan. 311, 59 P. 640; *Fredenhagen v. Nichols-Shepard Co.*, 99 Kan. 113, 160 P. 997; *Roberts v. Bank*, 126 Kan. 503, 268 P. 799; *Brury v. Smith*, 8 Kan. App. 52; *Coal Co. v. Judd*, 6 Kan. App. 487; *Moses v. White*, 6 Kan. App. 558; *Bank v. Wheeler*, 20 Kan. 625; *Hixon v. George*, 18 Kan. 253; *Garlinghouse v. Mulvane*, 40 Kan. 428, 19 P. 798; *Barten v. Martin*, 133 Kan. 329, 299 P. 614.

Whether or not the family intends to abandon the homestead is a question of fact.⁴¹⁰ The determination of the trial court on this issue ordinarily will not be disturbed upon appeal.⁴¹¹ Burden of proof of abandonment is upon the party attempting to defeat the homestead claim,⁴¹² as the homestead laws are liberally construed.

The facts in each "abandonment" case vary, and no general test to show the intent to abandon the homestead has been devised. While it may appear from some decisions⁴¹³ that voting in a new place is strong evidence of an intent to abandon, this fact must be considered along with many others, and it does not carry much weight where other evidence tends to show that abandonment was not intended.⁴¹⁴

Extra-judicial declarations of the parties claiming the homestead are admissible to show that there was no intent to abandon.⁴¹⁵

3. EXAMPLES OF ABANDONMENT

Most of the cases cited above are those in which the court held that the homestead had not been abandoned. In this subdivision will be mentioned some of the situations in which abandonment has been found.

The homestead is abandoned where the wife moves away, intending never to return, and the husband subsequently conveys it and surrenders possession;⁴¹⁶ where the husband deserts his family, and the wife and children later move away;⁴¹⁷ where the wife has never been in Kansas, and the husband conveys the land and moves away;⁴¹⁸ where the parties move to another state and try to sell their Kansas homestead;⁴¹⁹ where the house is destroyed, and the spouses move away making no attempt to replace it;⁴²⁰ where the spouses move from the homestead into an apartment and continue to dwell there.⁴²¹

4. EFFECT OF ABANDONMENT

Our constitution sets forth those debts to which the homestead can be subjected, and the owner holds it free from all others. As is pointed out elsewhere herein,⁴²² the owner can convey the homestead to a third party free and clear from the latter debts. But where the homestead has been

410. *Blitz v. Metzger*, 119 Kan. 760, 241 P. 259; *Bank v. Weeks*, 138 Kan. 376, 26 P. 262; *Waltz v. Sheetz*, 144 Kan. 595, 61 P. 2d 370; *Bennett v. Glazier*, 145 Kan. 571, 66 P. 2d 370; *Brigham v. Pfister*, 151 Kan. 991, 101 P. 2d 869; *Killough v. Swift Co.*, 154 Kan. 113, 114 P. 2d 831. Mixed question of law and fact: *Moors v. Sanford*, 2 Kan. App. 243. The court may, of course, have the advice of a jury upon this question: *McGill v. Sutton*, 67 Kan. 234, 72 P. 853.

411. *McGill v. Sutton*, cited above; *Machine Co. v. Roach*, 91 Kan. 840, 139 P. 430; *Schlaudt v. Hartman*, 105 Kan. 112, 181 P. 547; *Bradford v. Central Loan*, 47 Kan. 587, 28 P. 702; *Bank v. Bird*, 121 Kan. 617, 249 P. 608; *Bank v. Diamond*, 119 Kan. 294, 239 P. 970.

412. *Elliott v. Parlin*, 71 Kan. 665 at page 668, 81 P. 500.

413. Among others, *Bank v. Wheeler*, 20 Kan. 625.

414. *McGill v. Sutton*, cited above; *Mercantile Co. v. Blanc*, 79 Kan. 356, 99 P. 601; *Bank v. Weeks*, 138 Kan. 376, 26 P. 2d 262.

415. *Bank v. Hill*, 125 Kan. 308, 263 P. 1045.

416. *Anderson v. Kent*, 14 Kan. 207.

417. *Fessler v. Haas*, 19 Kan. 216.

418. *Jenkins v. Henry*, 52 Kan. 606, 35 P. 216. A homestead had been "acquired" here because the children had lived on it with the husband for a time.

419. *Mosteller v. Readhead*, 6 Kan. App. 512.

420. *Rose v. Bank*, 95 Kan. 331, 148 P. 745.

421. *Waltz v. Sheetz*, 144 Kan. 595, 61 P. 2d 883. Of course, intent of the parties is always an important consideration in situations such as this.

422. See "Effect of Valid Conveyance," above.

abandoned, creditors of the owner can proceed against it just as against any other real property of the owner.⁴²³ A judgment, which would have been a lien upon the judgment debtor's land except for the fact that the land was his homestead, becomes a lien as soon as the homestead is abandoned.⁴²⁴ After the owner's death, abandonment of the homestead by his survivors causes it to be liable for his debts.⁴²⁵

Where title is in the wife, however, abandonment of the homestead does not cause it to be subject to the husband's debts, even though it was originally purchased with the latter's funds.⁴²⁶

B. WAIVER

In some instances an individual can, by his deliberate, voluntary act, waive his homestead rights just as he may waive many other legal rights which he enjoys. But the homestead rights do not hang on a "precarious thread," and for the waiver to be effective it must be clear that a waiver of the homestead rights was intended; the signing of a lease in which the lessee "waives the benefit of the exemption laws of the state of Kansas"⁴²⁷ does not amount to a waiver of homestead rights.⁴²⁸

In general, one can waive his homestead rights by postnuptial contract, or by consenting to or electing to take under his spouse's will; but such rights cannot be waived by antenuptial contract. The ability of the individual to waive his homestead rights in many other instances is limited by the constitutional requirements of "joint consent" to alienations of the homestead.

1. ANTENUPTIAL CONTRACTS

The important distinction between legal title or estate and homestead rights has been emphasized before,⁴²⁹ and must be kept in mind when considering the effect of antenuptial contracts upon the homestead. For, while it is familiar doctrine that a prospective bride can, by antenuptial contract, limit her right to take the real property of her husband after his death,⁴³⁰ our court has consistently held that she cannot so waive her homestead rights.

In an early case⁴³¹ the wife had agreed, by antenuptial contract, to take only a child's share of her husband's realty upon his death. He died, leaving the widow and a minor child. The provisions of the contract relating to distribution of title to the real property were held to be valid, but it was held that the widow was entitled to occupy the entire homestead until her remarriage or the attaining of majority by the minor child. ". . . The homestead is not made alone for the husband and wife, or either one, but is also designed as a protection for the family who may be dependent upon them

423. *McLain v. Barr*, 125 Kan. 286, 264 P. 75.

424. *Osborne v. Schoonmaker*, 47 Kan. 667, 28 P. 711; *Morris v. Brown*, 5 Kan. App. 102.

425. *Barbe v. Hyatt*, 50 Kan. 86, 31 P. 694; *Northrup v. Horville*, 62 Kan. 767, 64 P. 622.

426. *Hixon v. George*, 18 Kan. 253.

427. As authorized by G. S. (1949) 67-530.

428. *West v. Grove*, 139 Kan. 361, 31 P. 2d 10.

429. See section I of this article.

430. Among others, see *Estate of Place*, 166 Kan. 528, 203 P. 2d 132; *Estate of Greenleaf*, 169 Kan. 22, 217 P. 2d 275; *Estate of Welch*, 170 Kan. 107; *Estate of Neis*, 170 Kan. 254.

431. *Hafer v. Hafer*, 33 Kan. 449, 6 P. 537.

for maintenance.”⁴³² The constitutional homestead rights, designed for the entire family, cannot be waived by antenuptial contract. When the time for partition arrives, however, the provisions of the antenuptial contract control, if otherwise fair and reasonable.⁴³³

The doctrine of the *Hafer* case⁴³⁴ has been followed in later decisions.⁴³⁵ Even though the terms of the antenuptial contract be particularly favorable for the widow, she is nevertheless entitled to enjoy its provisions and her homestead rights as well.⁴³⁶

2. POSTNUPTIAL CONTRACTS

Antenuptial contracts are made in contemplation of marriage. Postnuptial contracts are ordinarily entered into in contemplation of separation or divorce. A spouse, can, by postnuptial contract, relinquish property free and clear to the other spouse and divest himself of all homestead rights therein.⁴³⁷ Usually, the “postnuptial agreement dispenses with all thought of home.”⁴³⁸ The parties deliberately agree as to the distribution of their property, presumably with the financial needs of their children in mind, and the concept of a family “homestead” is no longer appropriate.⁴³⁹ Even though the postnuptial agreement contains provisions somewhat similar to those of the homestead constitutional clause and statutes, the agreement, and not the latter will control.⁴⁴⁰

3. CONSENT TO, OR ELECTION TO TAKE UNDER WILL

At one time in our state, where the wife had executed an effective consent to her husband's will she was no longer entitled to homestead rights in his property after his death.⁴⁴¹ And it was said that a will which in general terms bequeathed and devised all the testator's property was to be construed as intended to have the effect of cutting off his spouse's homestead rights.⁴⁴²

Our present statute,⁴⁴³ passed in 1939, provides that consent to the decedent's will by the surviving spouse, or election to take under it, does not amount to a waiver of homestead rights “unless it clearly appears from the will that the provision therein made for such spouse was intended to be in lieu of such rights.” This statute cannot be invoked where a valid postnuptial contract also exists, along the lines of the will.⁴⁴⁴ Also, where the wife has consented to the will, our court has said that the rule regarding her homestead rights after her husband's death is “substantially the same”⁴⁴⁵ as before the

432. *Ibid.* at page 464.

433. *Hafer v. Hafer*, 36 Kan. 524, 13 P. 821.

434. The two decisions are cited above.

435. *Watson v. Watson*, 106 Kan. 693, 189 P. 949 (rehearing denied 107 Kan. 193, 191 P. 482); *Estate of Garden*, 158 Kan. 554, 148 P. 2d 745; *Estate of Place*, 166 Kan. 528, 203 P. 2d 132; *Estate of Neis*, 170 Kan. 254.

436. *Boulls v. Boulls*, 137 Kan. 880, 22 P. 2d 465.

437. *Dutton v. Dutton*, 113 Kan. 146, 213 P. 326; *Hewett v. Gott*, 132 Kan. 168, 294 P. 897; *Porter v. Axline*, 154 Kan. 87, 114 P. 2d 849; *Estate of Winter*, 164 Kan. 615, 192 P. 2d 186.

438. *Hewett v. Gott*, cited above, at page 175.

439. The situation may be thought of as providing “joint consent” to disposition of a homestead once acquired.

440. *Porter v. Axline*, 154 Kan. 87, 114 P. 2d 849.

441. *Burns v. Spiker*, 109 Kan. 22, 202 P. 370.

442. *Ibid.*

443. G. S. (1949) 59-404.

444. *Porter v. Axline*, cited above.

445. *Estate of Fawcett*, 163 Kan. 448 at page 453, 183 P. 2d 403.

passage of the above statute;⁴⁴⁶ where the provisions of the will in favor of the widow are fair under the circumstances, her consent to the will cuts off her homestead rights.⁴⁴⁷ It is probable that the same principle applies where the wife elects to take under the will.⁴⁴⁸

4. OTHER WAIVER

It is difficult to deduce a general rule concerning waiver of homestead rights in situations other than those discussed above, for the term "waiver" is sometimes used in the cases where "estoppel" is seemingly being discussed, and at other times the attention of court and counsel has been occupied with the question of "joint consent."

The spouses can waive their rights in the proceeds of a fire insurance policy on the homestead,⁴⁴⁹ or a single survivor of a family can waive his homestead rights by statements made in application to purchase goods on credit.⁴⁵⁰ In both cases the waiver was in writing, and was found to be supported by a consideration. In one decision⁴⁵¹ the court quotes with approval a passage from a legal textbook making writing and consideration essential elements of waiver of homestead rights.

On the other hand, where a widow remains silent while the administrator of her husband's estate applies for authority to sell real property, completes the sale, receives part of the purchase price, and the vendee enters and makes improvements, it has been said that she "waives" her homestead rights in such real property.⁴⁵²

Where the husband conveys away the homestead by his own deed, and several years later his wife quitclaims her interest therein,⁴⁵³ or where the husband executes a mortgage to the homestead, forging his wife's name thereto, and six weeks later she executes an instrument attempting to ratify the mortgage,⁴⁵⁴ in either case the absence of joint consent nullifies the attempted alienation of the homestead. So positive is the constitutional requirement of "joint consent" for alienation of the homestead,⁴⁵⁵ and so liberal is the court in protecting the family homestead, it may be concluded that, unless the elements of "estoppel" are present, it is difficult to "waive" the homestead rights except through one of the well-recognized methods mentioned above.⁴⁵⁶

C. ESTOPPEL

A party may, through silence alone, or by some act inconsistent with his homestead rights followed by silence or nonactivity, find himself estopped from asserting those rights. In one attempt to distinguish estoppel from

446. Note 443, above.

447. *Estate of Wenzel*, 161 Kan. 545, 170 P. 2d 618; *Estate of Fawcett*, cited above.

448. See the discussion in *Estate of Place*, 166 Kan. 528, 203 P. 2d 132.

449. *Potter v. Banking Co.*, 59 Kan. 455, 53 P. 520. As was noted above, proceeds of a fire insurance policy on the homestead may enjoy the same exemption as did the homestead, so long as the owner intends to invest them in another homestead for his family.

450. *Schloss v. Unsell*, 114 Kan. 69, 216 P. 1091.

451. *Ibid.* at page 71.

452. *Estate of Meech*, 155 Kan. 792, 130 P. 2d 571. It probably should be said that she is "estopped" from asserting her homestead rights, rather than that she has "waived" them.

453. *Ott v. Sprague*, 27 Kan. 620.

454. *Jewett v. McCrie*, 36 Kan. 636, 14 P. 257, 59 Am. Rep. 584.

455. See, generally, "The Requirement of Joint Consent," above.

456. That is, by postnuptial agreement, or consent to the spouse's will, etc.

"ratification" (that is, a positive waiver of the homestead rights, or joint consent to alienation of the homestead) our court, speaking through Simpson, C., said "The character of estoppel is given to what would otherwise be a mere matter of evidence. Estoppel may be created by silence or nonaction; while ratification requires some positive, assertive act; . . ." ⁴⁵⁷ Discussing a prior case in which estoppel had been a feature, the court remarked, "She kept silent when she ought to have spoken. I do not understand that these acts of hers, or rather absence of protest, complaint, or action, ratify her conveyance; I can understand how by these things she can be estopped from setting up or claiming any interest in the property." ⁴⁵⁸

Although, as will be seen presently, there are situations in which mere silence or inactivity cause estoppel, nevertheless in most of the estoppel cases the estopped party has committed some positive act upon which others have relied to their detriment or has been, it might be said, so "conspicuously present" that the third party has been justified in relying upon the former's failure to voice objection.

Where an illiterate wife signs a mortgage on the homestead, not knowing what it is, but making little effort to find out, she is estopped from asserting her homestead rights against the mortgagee who took the mortgage in good faith and surrendered an old note in return for it. ⁴⁵⁹ Where the wife consents to a sale of part of the homestead to a third person, sees her husband receive part of the purchase price and sees the vendee take possession and make improvements, but later refuses to join in a deed, the court will order specific performance of the contract. ⁴⁶⁰ Where the spouses execute and record an absolute deed to the homestead, upon which a mortgagee of the grantee relies, they are estopped from asserting later that the deed was in fact a mortgage. ⁴⁶¹ A deed to the homestead given by the husband alone, though ineffectual because not joined in by his wife, has been held valid after the death of the wife where the husband for several years permitted the grantee to retain possession and make improvements, making no claim to the premises. ⁴⁶² Likewise, a surviving adult child may be estopped from asserting the invalidity of a lease on the homestead, given by his deceased father without the consent of his deceased mother, where the surviving child has been present and failed to raise the homestead issue over a period of time. ⁴⁶³

And one may be estopped from claiming homestead rights simply by failing to assert them, even though he has not been guilty of any conduct upon which others have relied. In a garnishment case, where defendant did not point out that the funds involved were exempt as being the proceeds of the sale of his homestead ⁴⁶⁴ until several weeks after the court ordered them paid over to the plaintiff, it was held that he was estopped by laches from asserting

457. *Jewett v. McCrie*, 36 Kan. 636 at page 651, 14 P. 257, 59 Am. Rep. 584.

458. *Ibid.* at page 650.

459. *Roach v. Karr*, 18 Kan. 529, 26 Am. Rep. 788.

460. *Perrine v. Mayberry*, 37 Kan. 258, 15 P. 172. This was looked upon as involving the question of "joint consent," and the estoppel feature was not discussed.

461. *Sellers v. Crossan*, 52 Kan. 570, 35 P. 205; *Sellers v. Gay*, 53 Kan. 354, 36 P. 744.

462. *Adams v. Gilbert*, 67 Kan. 273, 72 P. 769, 100 Am. S. R. 456. And see *Thompson v. Millikin*, 93 Kan. 72, 143 P. 430.

463. *Association v. Doman*, 159 Kan. 439, 155 P. 2d 438.

464. Which would be, as has been noticed above herein, exempt from the claims of his general creditors.

their exempt nature.⁴⁶⁵ A similar result was reached where defendant first asserted his homestead rights after a sheriff's sale of real property was made and confirmed and the period of redemption had passed.⁴⁶⁶ Homestead rights in real property will not be considered by the supreme court where the complaining party did not assert them in the trial court.⁴⁶⁷

VII. THE HOMESTEAD AND SURVIVORS

When a person dies who owned some interest in realty and was occupying it with his family, the survivors of the family may continue to enjoy homestead rights in that realty. This section discusses descent and devise of the homestead property, which survivors are entitled to homestead rights and the extent of those rights, partition of the homestead, and sale or encumbrance of the homestead by the survivors.

A. DESCENT AND DEVISE OF THE HOMESTEAD

The distinction between homestead rights and legal or equitable title or estate has been mentioned repeatedly in this article.⁴⁶⁸ Title to the homestead of an intestate person descends the same as title to any other realty.⁴⁶⁹

The owner can devise the homestead to anyone, just as is the case with any other land he owns, subject always to the surviving spouse's right to elect to take under the laws of descent.⁴⁷⁰ A devise of the homestead is not such an alienation or conveyance as requires the consent of anyone.⁴⁷¹ The owner can devise all of the homestead to his widow⁴⁷² even though he leaves surviving children⁴⁷³ and so long as she continues to dwell on the land it is her homestead, free from the debts of the decedent.⁴⁷⁴ If the owner leaves surviving children but no spouse, the fact that the children take the homestead land by devise rather than by descent has no effect upon their homestead rights.⁴⁷⁵

B. WHICH SURVIVORS ENTITLED TO HOMESTEAD RIGHTS

Survivors continue to enjoy homestead rights because the land is "occupied as a residence by the family of the owner." In the section entitled "Family," above, it is pointed out that while a family consisting of more than one person is required for original acquisition of a homestead, after it is once acquired the homestead rights continue even though but one of the family is surviving. Such a person holds the homestead exempt from his own debts, as well as

465. *Iliff v. Arnott*, 31 Kan. 672, 3 P. 767. And see *Estate of Meech*, 155 Kan. 792, 130 P. 2d 571, a "waiver" case.

466. *Catlin v. Deering Co.*, 102 Kan. 256, 170 P. 396.

467. *Williams v. Anderson*, 122 Kan. 373, 251 P. 1084. Compare *Brury v. Smith*, 8 Kan. App. 52.

468. See, particularly, section I of this article.

469. *Bank v. Carter*, 81 Kan. 694, 107 P. 234; *Newby v. Anderson*, 106 Kan. 477, 188 P. 438; and see G. S. (1949) 59-401.

470. *Vining v. Willis*, 40 Kan. 609, 20 P. 232.

471. *Postlethwaite v. Edson*, 102 Kan. 104, 171 P. 769, L. R. A. 1918D 983; same, 102 Kan. 619, 171 P. 769, L. R. A. 1918D 989.

472. *Estate of Casey*, 156 Kan. 590, 134 P. 2d 665.

473. *Martindale v. Smith*, 31 Kan. 270, 1 P. 569; *Cross v. Benson*, 68 Kan. 495, 75 P. 558, 64 L. R. A. 560.

474. See the two notes immediately above. *Pilcher v. Santa Fe*, 38 Kan. 516, 16 P. 945, 5 Am. S. R. 770. And see G. S. (1949) 59-404.

475. *Hicks v. Sage*, 104 Kan. 723, 180 P. 780.

those of the decedent.⁴⁷⁶ Homestead rights remain in the survivors until the land is abandoned.⁴⁷⁷ As will be discussed in the section on "Partition," below, the surviving spouse and minor children ordinarily have a right to occupy the entire homestead until partition, even though they own something less than all the title therein. Thus an adult child who does not live on the homestead but owns some interest therein has "abandoned" his share of the homestead, and his share is liable for his own debts as well as for those of the decedent, subject to the possessory homestead rights of the widow and minor children prior to partition. In short, a surviving adult child, not residing upon the homestead, even though by descent or devise he takes a share in the title to the homestead, has no homestead rights of his own therein.

A surviving adult child has no homestead rights whatever if he does not own some interest in the homestead, even though he lived on the homestead prior to the decedent's death and desires to continue to dwell there.⁴⁷⁸ Similarly, where the surviving spouse, by postnuptial agreement or by a consent to the decedent's will or by election to take thereunder, has clearly divested himself of title to the homestead and other rights therein after the decedent's death, he has no homestead rights after that occurrence.⁴⁷⁹ Recalling the fact that one cannot originally acquire a homestead unless he owns some interest in the land⁴⁸⁰ one might conclude the rule to be that homestead rights do not continue in the survivors of the family, after the death of the owner, unless the survivors making claim to the rights have some legal or equitable title or estate. Some doubt upon this conclusion is furnished, however, by the cases involving antenuptial contracts.⁴⁸¹ Although the validity of the antenuptial contract, so far as it divests one spouse of any interest in the property of the other spouse, before or after the death of the latter, has been upheld many times by our court, yet it is clear that the surviving spouse can occupy the homestead after the decedent's death until partition, regardless of the provisions of the antenuptial contract. In at least two of the decisions, the surviving spouse had no legal or equitable title or estate in the homestead property after the death of the decedent.⁴⁸² Thus we have at least one situation in which a person can occupy land, as his homestead, without owning it.

The writer has found no case in which the only survivors of the family were minor children, none of whom had any legal or equitable interest in the homestead. In one decision⁴⁸³ the court, discussing the right of the owner to dispose of the homestead by will, states that "We think the devise would also be subject to the homestead interests of any person who might have a homestead interest in the property; but with reference to who might have a homestead interest in the property, we do not think it is necessary in this case to express any opinion. . . ." There, the person objecting to the devise was an adult son who did not reside on the homestead. Whether minor

476. See notes 146-150, above.

477. See "Abandonment," above. After partition, one or more of the survivors may continue to enjoy the exemption as to the land set apart for him, even though other survivors have abandoned their shares. See "Partition," below.

478. *Hartman v. Armstrong*, 59 Kan. 696, 54 P. 1046.

479. See "Waiver," above.

480. See "Acquisition of Homestead Rights," above.

481. See "Antenuptial Contracts," above.

482. *Watson v. Watson*, 106 Kan. 693, 189 P. 949; *Estate of Neis*, 170 Kan. 254.

483. *Martindale v. Smith*, 31 Kan. 270 at page 273, 1 P. 569.

children, being the only survivors of the family of the owner, but not having any ownership in the homestead land, are entitled to occupy the homestead until they reach majority, is uncertain.

C. EXTENT OF HOMESTEAD RIGHTS AFTER DEATH OF OWNER

Our statute⁴⁸⁴ provides how the homestead shall be selected by the survivors after the death of the owner. Though the statute does not require, it appears that notice of the hearing upon an application to set aside the homestead should be given to creditors, at least where there is a chance that the estate will be insolvent.⁴⁸⁵

As will be apparent from the section on "Partition," below, the surviving spouse and minor children are entitled to occupy the entire homestead until partition.⁴⁸⁶ Meanwhile, neither creditors of the decedent, of the occupants, nor of other persons owning an interest in the realty, can proceed against the land.⁴⁸⁷ Mere formal language in the decedent's will, to the effect that he directs his debts be first paid, does not subject the homestead to his creditor's claims.⁴⁸⁸ The surviving spouse and minor children are entitled to the rents and profits of the homestead,⁴⁸⁹ even though some of the title to the homestead property is in other children of the decedent⁴⁹⁰ or collateral heirs.⁴⁹¹

D. PARTITION

I. TIME FOR PARTITION

The homestead clause of our constitution does not in express terms provide any homestead rights after the death of the owner, but the court considers the homestead to be "occupied as a residence by the family of the owner," and thus retaining its exempt nature, so long as members of the decedent's family⁴⁹² continue to dwell there after his death.⁴⁹³ Our partition statute⁴⁹⁴ provides that the homestead is not subject to forced partition until certain contingencies occur; the result is that the surviving spouse and minor children may for a time be entitled to occupy premises owned in part by other persons, and which but for such right of occupancy would be subject to sale for debts of the decedent or of other persons. Partition is not a "forced sale"; hence statutory provisions

484. G. S. (1949) 59-2235.

485. *Estate of Schroeder*, 158 Kan. 783, 150 P. 2d 173. As was stated above, such procedural matters are not within the scope of this article.

486. See also *Gatton v. Tolley*, 22 Kan. 678; *Trumbly v. Martell*, 61 Kan. 703, 60 P. 741.

487. But creditors may be able to force the sale of the interest in the homestead land owned by survivors who have abandoned it; such sale would be subject to the possessory interests of the surviving spouse and minor children. See *Bank v. Carter*, 81 Kan. 694, 107 P. 234.

488. *Cross v. Benson*, 68 Kan. 495, 75 P. 558, 64 L. R. A. 560; *Hicks v. Sage*, 104 Kan. 723, 180 P. 780; *Homewood v. Eggers*, 132 Kan. 256, 295 P. 681; *Estate of Casey*, 156 Kan. 590.

489. *Gatton v. Tolley*, 22 Kan. 678; *Smith v. Landis*, 93 Kan. 453, 144 P. 998; *Campbell v. Durant*, 110 Kan. 30, 202 P. 841.

490. *Smith v. Landis*, cited above.

491. *Campbell v. Durant*, cited above.

492. See "Family," above.

493. This was clearly decided in *Cross v. Benson*, 68 Kan. 495, 75 P. 558, 64 L. R. A. 560.

494. G. S. (1949) 59-402.

for partition of the homestead are not unconstitutional as violating the homestead clause.⁴⁹⁵

Prior to the enactment of our new probate code⁴⁹⁶ our partition statute provided that partition shall take place when the surviving spouse remarries or all of the children reach majority.⁴⁹⁷ Our present statute⁴⁹⁸ provides that there can be no forced partition "unless the surviving spouse remarries, nor until all the children arrive at the age of majority." This states in rather plain language that there can now be no partition until both contingencies have occurred, and our court does not disagree with this interpretation in its discussion of this new statute in *Cole v. Coons*,⁴⁹⁹ although the point is not there decided. Consequently, it must be kept in mind in the following discussion that the cases mentioned in this article which were decided prior to our present probate code will not necessarily be followed in all respects under the new statute.

Thus, under the old statute, when the children all reached majority either they⁵⁰⁰ or the surviving spouse⁵⁰¹ could cause the homestead to be partitioned. Likewise, the homestead was subject to partition when the surviving spouse remarried,⁵⁰² even though there were minor children.⁵⁰³ While the surviving spouse remained unmarried, the minor children could not have partition even though they desired it.⁵⁰⁴ Where minor children were the only survivors, there could be no partition until they all reached majority.⁵⁰⁵

As noted above, the children could have partition against the surviving spouse when they all had reached majority. This was extended to permit the husband of a deceased adult daughter of the decedent⁵⁰⁶ or an adult child of the decedent by a former spouse⁵⁰⁷ to partition the homestead as against the surviving spouse; and in *Bank v. Carter*⁵⁰⁸ the purchaser of an adult son's share at a forced sale was held entitled to partition. In *Sawin v. Osborn*⁵⁰⁹ the court gave tacit approval to a partition action which apparently was brought by adult children of the decedent against the surviving spouse and her minor children by a former marriage.

Devises having no connection with the immediate family of the owner were not very successful in their partition actions as against the surviving spouse. Although in one early case⁵¹⁰ it was held that where the decedent, leaving no minor children, devised one-half of her property, including the homestead, to strangers, the latter could have partition, it subsequently became established that, at least where the surviving spouse elected to take under the law, col-

495. *Towle v. Towle*, 81 Kan. 675, 107 P. 228, 27 L. R. A. (N. S.) 550.

496. In 1939.

497. G. S. (1935) 22-105.

498. G. S. (1949) 59-402.

499. 162 Kan. 624, 178 P. 2d 997.

500. *Vandiver v. Vandiver*, 20 Kan. 501; *Jehu v. Jehu*, 110 Kan. 210, 203 P. 712; and see *Towle v. Towle*, 81 Kan. 675, 107 P. 228, 27 L. R. A. (N. S.) 550.

501. *Vogler v. Vogler*, 110 Kan. 208, 203 P. 704.

502. *Oliver v. Sample*, 72 Kan. 582, 84 P. 138.

503. *Brady v. Banta*, 46 Kan. 131, 26 P. 441 (*dictum*).

504. *Hafer v. Hafer*, 33 Kan. 449, 6 P. 537; *same*, 36 Kan. 524, 13 P. 821.

505. *Trumbly v. Martell*, 61 Kan. 703, 60 P. 741, reversing 9 Kan. App. 364.

506. *Newby v. Anderson*, 106 Kan. 477, 188 P. 438.

507. *Jehu v. Jehu*, 110 Kan. 210, 203 P. 712.

508. 81 Kan. 694, 107 P. 234. And see *Hollinger v. Bank*, 69 Kan. 519, 77 P. 263.

509. 87 Kan. 828, 126 P. 1074.

510. *Vining v. Willis*, 40 Kan. 609, 20 P. 232.

lateral heirs or other devisees who were never members of the decedent's immediate family could not have partition as against the surviving spouse.⁵¹¹

There is nothing in the homestead clause or the statutes pertaining thereto which prevents one who was a tenant in common with the deceased owner from causing the land to be partitioned after the death of the latter.⁵¹² The fact that the decedent, during his lifetime, had given advances to the child seeking partition may properly be used by the surviving spouse as a defense in an action for partition brought by such child.⁵¹³

2. EFFECT OF PARTITION

It is clear that, prior to partition, the surviving spouse and minor children hold the homestead free from the debts of the decedent and from their own debts.⁵¹⁴ After partition, that part set aside to the surviving spouse as her property continues to enjoy this exemption so long as she continues to dwell thereon.⁵¹⁵ This apparently holds true even though the surviving spouse remarries, at least where she and children of the decedent continue in occupancy.⁵¹⁶ The surviving spouse may abandon her share of the realty,⁵¹⁷ after which it is subject to her own and the decedent's debts.⁵¹⁸ Those portions of the homestead set apart to adult children who do not live there, or to other owners, are "abandoned" and no longer enjoy the homestead exemption.⁵¹⁹

Under its equitable powers, the court may permit the surviving spouse to occupy the entire homestead for a reasonable time after partition pending provision of suitable living quarters upon the tract set aside for her.⁵²⁰

E. SALE OR ENCUMBRANCE BY SURVIVORS

Where several persons hold interests in the homestead property after the death of the owner, a mortgage,⁵²¹ lease⁵²² or other alienation by one or more of the survivors will not affect the homestead rights of the other owners not joining therein.⁵²³ Subject to this qualification, however, a survivor can encumber or convey his interest in the homestead just as freely as any other land he owns.⁵²⁴ Thus, a widow, to whom the homestead has been devised, can execute a valid mortgage upon it even though she resides there with minor children.⁵²⁵ The guardian of an insane surviving spouse can lease or otherwise alienate the homestead,⁵²⁶ as the homestead clause does not require the "con-

511. *Breen v. Breen*, 102 Kan. 766, 173 P. 2, L. R. A. 1918F 394; *Campbell v. Durant*, 110 Kan. 30, 202 P. 841; *Parks v. Tufft*, 148 Kan. 221, 80 P. 2d 1062.

512. *Cole v. Coons*, 161 Kan. 332, 167 P. 2d 295; *same*, 162 Kan. 624, 178 P. 2d 997.

513. *White v. White*, 41 Kan. 556, 21 P. 604.

514. *Dayton v. Donart*, 22 Kan. 256. See "Family," above.

515. *Savin v. Osborn*, 87 Kan. 828, 126 P. 1074; *Cross v. Benson*, 68 Kan. 495 at page 505, 75 P. 558, 64 L. R. A. 560 (*dictum*).

516. *Brady v. Banta*, 46 Kan. 131, 26 P. 441.

517. See "Abandonment," above.

518. *Barbe v. Hyatt*, 50 Kan. 86, 31 P. 694 (*dictum*).

519. *Barbe v. Hyatt*, cited above; *Brigham v. Pfister*, 151 Kan. 991, 101 P. 2d 869.

520. *Savin v. Osborn*, 87 Kan. 828, 126 P. 1074.

521. *Hannon v. Sommer*, 10 Fed. 601.

522. *Compton v. Gas Co.*, 75 Kan. 572, 89 P. 1039, 10 L. R. A. (N. S.) 787.

523. *Gatton v. Tolley*, 22 Kan. 678; *Bank v. Carter*, 81 Kan. 694, 107 P. 234.

524. *Barbe v. Hyatt*, 50 Kan. 86, 31 P. 694; *Estate of Casey*, 156 Kan. 590, 134 P. 2d 665.

525. *Allen v. Holtzman*, 63 Kan. 40, 64 P. 966.

526. *Smith v. Landis*, 93 Kan. 453, 144 P. 998.

sent" of anyone when there are not two spouses.⁵²⁷ The guardian of minor survivors can likewise alienate their homestead.⁵²⁸

Before the homestead has been abandoned by the survivors, they can convey it to third persons free and clear of the claims of their own creditors and of those of the decedent,⁵²⁹ even though the latter have had their claims allowed in probate court.⁵³⁰ This rule is not followed, however, in cases of extreme injustice, as where an adult son not occupying the homestead conveys his share to his mother, who is in possession, to defraud his own creditors.⁵³¹ If the homestead is abandoned before alienation, it becomes subject to the debts of the decedent owner and of the survivors.⁵³²

VIII. ENFORCEMENT OF HOMESTEAD RIGHTS AND CLAIMS AGAINST THE HOMESTEAD

As was stated above, this article is principally concerned with substantive law pertaining to homestead rights, and not with matters of procedure. In the present section, however, brief reference is made to decisions discussing the procedural aspects of enforcing homestead rights and claims against the homestead.

In general, in an action to foreclose against the homestead both spouses must be made parties defendant; otherwise, the homestead rights of the spouse not a party are not adjudicated.⁵³³ Thus, to foreclose a valid mortgage on the homestead given by the husband and his former wife, his present wife must be made a party to the action.⁵³⁴ A personal judgment can properly be rendered against one spouse, however.⁵³⁵ The non-party spouse can get an injunction against any step of the foreclosure proceedings,⁵³⁶ even though he owns no interest in the land;⁵³⁷ it appears, however, that the injunction must be sought prior to the expiration of the period of redemption.⁵³⁸ A spouse objecting to the sale of the homestead for an ordinary judgment does not have to allege that the judgment was not for purchase money or improvements,⁵³⁹ although a creditor holding such a judgment must allege and prove that fact if his right to proceed against the homestead is challenged.⁵⁴⁰

527. *Lockridge v. Glace*, 158 Kan. 431, 147 P. 2d 726.

528. *Smith v. Landis*, cited above; *Roberts v. Bank*, 126 Kan. 503, 268 P. 799; implied in *Charles v. Witt*, 88 Kan. 484, 129 P. 140.

529. *Dayton v. Donart*, 22 Kan. 256; *Roberts v. Bank*, cited above; *Estate of Casey*, 156 Kan. 590, 134 P. 2d 665.

530. *Estate of Casey*, cited above.

531. *Hollinger v. Bank*, 69 Kan. 519, 77 P. 263.

532. *Barbe v. Hyatt*, 50 Kan. 86, 31 P. 694; *Northrup v. Horville*, 62 Kan. 767, 64 P. 622; *Postlethwaite v. Edson*, 102 Kan. 104, 171 P. 769, L. R. A. 1918D 983; *Brigham v. Pfister*, 151 Kan. 991, 101 P. 2d 869.

533. *Morris v. Ward*, 5 Kan. 239; *Hofman v. Demple*, 53 Kan. 792, 37 P. 976; *Willis v. Whitehead*, 59 Kan. 221, 52 P. 445; and see *Carter v. Silo Co.*, 106 Kan. 342, 187 P. 656. Same, in partition action by third-party tenant in common: *Wheat v. Burgess*, 21 Kan. 407. *Contra*, foreclosure of mechanic's lien: *Newman v. Windmill Co.*, 7 Kan. App. 469.

534. *Insurance Co. v. Mays*, 152 Kan. 46, 102 P. 2d 984.

535. *Witt v. Boothe*, 98 Kan. 554, 158 P. 851.

536. *Owens v. Wagers*, 118 Kan. 517, 235 P. 589.

537. *Root v. McCrew*, 3 Kan. 215; *Dollman v. Harris*, 5 Kan. 597.

538. *Dean v. Evans*, 106 Kan. 389, 188 P. 436.

539. *King v. Wilson*, 95 Kan. 390, 148 P. 752.

540. *Carter v. Silo Co.*, 106 Kan. 342, 187 P. 656.

When a valid mortgage or other lien against the homestead is foreclosed, general judgment creditors of the owner have no rights to surplus proceeds,⁵⁴¹ at least until the owner has an opportunity to try to show that he intends to use the funds to buy a new homestead.⁵⁴² The holder of a valid junior mortgage on the homestead can reach the surplus.⁵⁴³ Where the mortgagee holds a mortgage on the homestead and other real property of the owner, upon foreclosure he need not look to the homestead first; and if he satisfies his mortgage out of the nonexempt property, other creditors of the mortgagor cannot complain.⁵⁴⁴ In such cases the equities of the general creditors are inferior to the homestead rights of the owner's family,⁵⁴⁵ and upon application of the mortgagor the court will order that the non-homestead property be sold first.⁵⁴⁶ An agreement between the mortgagor and mortgagee to the effect that the non-exempt property will be first sold is valid, as public policy favors protecting the homestead against claims of general creditors.⁵⁴⁷ The mortgagor cannot object that the nonexempt tracts sold for too low a price, however, as he can redeem them, convert them into money, and use the proceeds to redeem his homestead.⁵⁴⁸ In a foreclosure proceeding, where several parties claim liens upon the land, one of them can show that the land is the homestead of the owner, hence not subject to some of the other liens.⁵⁴⁹ The mortgagee can, in absence of any order to the contrary, look to the homestead first, and even release his mortgage as to the other tracts;⁵⁵⁰ as the mortgage on homestead property is not released by the discharge in bankruptcy of the mortgagor,⁵⁵¹ his grantee, after bankruptcy, takes subject to the mortgage.⁵⁵²

541. *Helm v. Helm*, 11 Kan. 617.

542. See "Proceeds for Which Homestead Exchanged," above.

543. *Hoffman v. Meyer*, 6 Kan. 398; *Insurance Co. v. Clark*, 122 Kan. 109, 251 P. 199.

544. *LaRue v. Gilbert*, 18 Kan. 220. Where all the land is sold at once, and not as separate tracts, the return of the sheriff is presumed to be regular and valid: *Cronkrite v. Buchanan*, 59 Kan. 541, 53 P. 863, 68 Am. S. R. 379.

545. *Colby v. Crocker*, 17 Kan. 527.

546. *Frick v. Ketels*, 42 Kan. 527, 22 P. 580, 16 Am. S. R. 507.

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

548. *Fraser v. Seeley*, 71 Kan. 169, 79 P. 1081.

549. *Insurance Co. v. Nichols*, 41 Kan. 133, 21 P. 111.

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

551. See *Insurance Co. v. Clark*, 122 Kan. 109, 251 P. 199.

552. *Chapman v. Lester*, cited above.

STATUTES ENACTED BY THE 1951 LEGISLATURE

We print in this issue a number of the statutes enacted by the 1951 legislature, relating principally to changes in court procedure and other matters of particular interest to the bench and bar. Attention is also directed to other newly enacted laws which are not printed in full, but are mentioned in the following summary. Except where otherwise indicated, these enactments will take effect upon their publication in the statute book.

PROBATE CODE

G. S. 59-603 and G. S. 59-2233 were amended by House bill No. 120 (printed herein) which changes the rule where a widow fails to elect under a will, so as to provide for a presumptive election to take under the will, instead of under the law.

G. S. 59-1413 was amended by House bill No. 123 (printed herein) authorizing the executor to sell any property without order of court, when so authorized by will.

G. S. 59-2102 and G. S. 59-2278 relating to adoptions were amended by House bill No. 174 (printed herein) and by Senate bill No. 13 (printed herein), the principal change being the elimination of the interlocutory decree.

G. S. 59-2238 relating to pending actions against estates was amended by Senate bill No. 65 (printed herein).

G. S. 59-2205 relating to guardians *ad litem* in the probate court was amended by Senate bill No. 78 (printed herein).

G. S. 59-2402a relating to certification of probate proceedings to the district court was amended by Senate bill No. 83 (printed herein).

A new procedure for the termination of life estates and estates in joint tenancy is provided in House bill No. 492 (printed herein).

G. S. 59-1201 and G. S. 59-1202 were slightly amended by Senate bills No. 143 and 144 which will appear in the statute book.

G. S. 59-201 was amended by House bill No. 210 which will appear in the statute book, to provide that in counties having a population of more than 24,000 the probate judge must be admitted to practice law in Kansas, with certain exceptions.

DISTRICT COURTS

G. S. 60-2113 relating to costs in partition suits was amended by House bill No. 333 (printed herein).

G. S. 60-3403 relating to executions against property was amended by House bill No. 405 (printed herein).

G. S. 60-1501 relating to grounds for divorce was amended by House bill No. 456 (printed herein).

G. S. 60-2525, 60-2526 and 60-2527, relating to constructive service, were amended by Senate bill No. 59 (printed herein).

G. S. 60-3314a relating to appeals was amended by Senate bill No. 122 (printed herein).

G. S. 8-402 relating to service on nonresidents using Kansas highways was amended by Senate bill No. 173 which will appear in the statute book.

G. S. 75-3120b was amended by Senate bill No. 171 to increase salaries of district judges to \$7,000 per year, effective January 12, 1953; and G. S. 20-904 was amended to increase the pay of court reporters by House bill No. 507.

Procedure for securing the attendance of witnesses from without the state in criminal cases is provided in Senate bill No. 8 which will appear in the statute book.

Procedure to enforce the legal duties of persons to support others by interstate extradition and reciprocal legislation is provided in Senate bill No. 9 which will appear in the statute book.

G. S. 20-301 was amended to provide jury trials in prosecutions for violations of municipal ordinances, by House bill No. 32, which will appear in the statute book.

OTHER LEGISLATION

G. S. 44-510, 44-525, 44-555 and 74-710, which are part of the workmen's compensation law, were amended by Senate bill No. 207 which became effective upon publication in the official state paper. Copies of these amendments may be obtained from the Commissioner of Workmen's Compensation, 801 Harrison Street, Topeka, Kan.

Senate bill No. 182, which will appear in the statute book, grants the right of eminent domain for the underground storage of natural gas.

G. S. 73-512 of the veterans' guardianship statute is amended by Senate bill No. 256, relating to investments by guardians, which will appear in the statute book.

G. S. 17-5004, establishing the so-called "prudent man" rule for investments of fiduciaries, was amended by House bill No. 71, which will appear in the statute book, authorizing trustees to purchase securities of investment trusts, subject to the other provisions of the law.

Other provisions concerning trust investments are set out in House bill No. 80 (principal and income), House bill No. 81 (appointment of nominees), House bill No. 82 (transfer of securities by fiduciaries or their nominees), and House bill No. 83 (common trust funds), which will appear in the statute book.

G. S. 17-5002, relating to investments in shares of savings and loan associations, was amended by Senate bill No. 35 which took effect on its publication in the official state paper and is printed herein.

G. S. 67-510, relating to notice of termination of tenancy, was amended by Senate bill No. 21 (printed herein).

G. S. 79-2804f, relating to resale of property purchased by the county in tax foreclosures, was amended by Senate bill No. 80 which will appear in the statute book, providing that such resale may be made "at any time after the end of six months from and after the confirmation of said sale to the county," etc.

Mortgages recorded prior to January 1, 1919, will be barred after July 1, 1952, unless renewed by affidavit, with certain exceptions, under House bill No. 341 which will appear in the statute book.

A proposed constitutional amendment to give persons eighteen years of age the right to vote was defeated, but such persons were permitted to become notaries public by Senate bill No. 110, amending G. S. 53-101, which became effective upon its publication in the official state paper.

HOUSE BILL No. 120

AN ACT relating to the probate code, amending sections 59-603 and 59-2233 of the General Statutes of 1949, and repealing said original sections.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 59-603 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-603. The surviving spouse, who shall not have consented in the lifetime of the testator to the testator's will as provided by law, may make an election whether he will take under the will or take what he is entitled to by the laws of intestate succession; but he shall not be entitled to both. If the survivor consents to the will or fails to make an election, as provided by law, he shall take under the testator's will.

SEC. 2. Section 59-2233 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-2233. When a will is admitted to probate the court shall forthwith transmit to the surviving spouse a certified copy thereof, together with a copy of sections 59-603 and 59-2233 of the General Statutes of Kansas 1949 as amended and certify to such transmittal. If such spouse has consented to the will, as provided by law, such consent shall control; otherwise such spouse shall be deemed to have elected to take under the testator's will unless he shall have filed in the probate court, within six months after the probate of the will, an instrument in writing to take by the laws of intestate succession. If said spouse files an election before the appraisal of the estate is filed, the said election shall be set aside upon application of the spouse made within thirty (30) days after the filing of the appraisal. For good cause shown, the court may permit an election within such further time as the court may determine, if an application therefor is made within said period of six months.

SEC. 3. The provisions of this act shall govern in proceedings on wills admitted to probate after the effective date of this act, and the provisions of sections 59-603 and 59-2233 of the General Statutes of 1949 as existing prior to amendment by this act, shall govern in proceedings on wills admitted to probate before the effective date of this act.

SEC. 4. Sections 59-603 and 59-2233 of the General Statutes of 1949 are hereby repealed.

SEC. 5. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL No. 123

AN ACT relating to the probate code, amending section 59-1413 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 59-1413 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-1413. If a will authorizes the executor to sell any property, he, or an administrator with the will annexed, may exercise such power without any order of the probate court, unless the will provides otherwise.

SEC. 2. Section 59-1413 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL No. 174

AN ACT relating to adoption proceedings under the probate code; providing for consent to be given by district courts in certain cases; amending section 59-2102 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 59-2102 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-2102. Before any minor child is adopted, consent must be given to such adoption: (1) By the living parents of such child except as otherwise provided herein. (2) By the mother of an illegiti-

mate child. (3) By one of the parents if the other has failed or refused to assume the duties of a parent for two consecutive years or is incapable of giving such consent. (4) By the legal guardian of the person of the child if both parents are dead or if they have failed or refused to assume the duties of parents for two consecutive years. (5) By the proper authority of any charitable institution or child welfare agency authorized by the laws of this state to place children for adoption when such institution or agency has acquired custody and legal control of the child for the period of minority. In all cases where the child sought to be adopted is over fourteen years of age and of sound intellect, the consent of such child must be given. Consent in all cases shall be in writing, acknowledged before an officer authorized by law to take acknowledgment. Minority of a parent shall not invalidate his consent.

SEC. 2. Section 59-2102 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL No. 333

AN ACT relating to the code of civil procedure and actions for partition, amending section 60-2113 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 60-2113 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 60-2113. The court making partition shall tax the costs, attorney fees and expenses, including an allowance for preparation or bringing up to date of an abstract of title to the real estate involved in the action, which may accrue in the action, and apportion the same among the parties according to their respective interests, and may award execution therefor, as in other cases.

SEC. 2. Section 60-2113 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL No. 405

AN ACT relating to civil procedure and pertaining to executions against property of judgment debtors, amending section 60-3403 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 60-3403 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 60-3403. Lands, tenements, goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution and sold, as hereinafter provided: *Provided*, That oil and gas leasehold estates and oil and gas leaseholds may be taken on execution and sold in the same manner as hereinafter provided for the taking and sale of lands on execution.

SEC. 2. Section 60-3403 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL No. 456

AN ACT relating to divorce and alimony and prescribing the grounds for divorce, amending section 60-1501 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 60-1501 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 60-1501. The district court may grant a divorce for any of the following causes: First, when either of the parties had a former husband or wife living at the time of the subsequent marriage. Second, abandonment for one year. Third, adultery. Fourth, impotency. Fifth, when the wife at the time of marriage was pregnant by another than her hus-

band. Sixth, extreme cruelty. Seventh, fraudulent contract. Eighth, habitual drunkenness. Ninth, gross neglect of duty. Tenth, the conviction of a felony and imprisonment therefor subsequent to the marriage. Eleventh, insanity for a period of five (5) years, the insane person having been an inmate of any state or federal institution for the insane, or of a private sanitarium, and affected with any incurable type of insanity: *Provided*, That no divorce shall be granted because of insanity until after a thorough examination of such insane person by three (3) physicians to be appointed by the court before which such action is pending, all of whom shall agree that such insane person is incurable: *Provided further, however*, That no divorce shall be granted on this ground to any person whose husband or wife is an inmate of a state institution in any other than the state of Kansas, unless the person applying for such divorce shall have been a resident of the state of Kansas for at least five (5) years, prior to the commencement of an action: *And provided further*, That a decree granted on this ground shall not relieve the successful party from contributing to the support and maintenance of the defendant.

SEC. 2. Section 60-1501 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL No. 492

AN ACT relating to probate procedure; providing procedure for the termination of certain life estates and estates in joint tenancy, and providing for the devolution of title to such estates.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Hereafter in all cases where any person being a life tenant or joint tenant in real property shall die either testate or intestate, leaving no property or estate on which administration proceedings have been had or commenced, any of the remaindermen having an interest in the real estate subject to such life estate, or any survivor of such joint tenancy, or any person claiming any right, title or interest in said real estate by, through or under such remainderman or survivor may have the fact of the death of said life tenant or joint tenant and the fact of devolution of title to said real estate judicially determined by filing a petition in the probate court of the county in which said real estate or some part thereof is situated, or of the county of the residence of said decedent, alleging the facts of such life estate or joint tenancy, describing such real estate alleging the death of such life tenant or joint tenant as the case may be, and setting forth the names and addresses, if known, of all of the heirs of said decedent, if intestate, and of his heirs, devisees and legatees, if testate, and of all other persons by him known to claim any interest in said real estate, which petition shall be sworn to by petitioner, his agent or attorney.

Upon the filing of such petition the court shall enter an order fixing the date and hour for hearing same, which date shall be not less than ten (10) days from the date of entry of said order. The court clerk shall thereupon issue a notice under his hand and seal, which notice shall be in substantially the following form:

In the Probate Court of _____, County, Kansas.
 In the matter of the joint tenancy of _____ and _____
 (or life estate of _____)

NOTICE OF HEARING

Notice is hereby given to the heirs, devisees, legatees and assigns of _____ the deceased joint tenant (or life tenant), that a petition has been filed in the above entitled court as provided by law, pertaining to the devolution of title to the following-described real estate, to wit: And you are hereby required to file your written defenses thereto on or before the _____ day of _____, 19____, at _____ a. m. of said day, in said court, at which time and place said cause will be heard. Should you fail therein, judgment and decree will be entered in due course upon said petition.

 Petitioner.

Said notice shall be published in one (1) issue of a newspaper of general circulation in said county, the date of such publication to be at least ten (10) days prior to the date set for said hearing, and at least ten (10) days prior to

the date set for said hearing a copy thereof shall be mailed to each of the heirs, devisees, legatees and other persons interested in said real estate as named in said petition, at their respective addresses shown thereon, unless there be filed an affidavit of the petitioner, or his attorney, showing that the postoffice addresses of any such persons are unknown to the petitioner or his attorney. Proofs of such publication and of mailing shall be filed in the county court prior to the entry of any order or decree upon said petition.

Upon hearing of such petition being had, the court shall hear the evidence and proof of the death, and upon proof that any and all state inheritance taxes owing and due have been paid, shall make and enter an order and decree determining the following facts: (a) The death of such life tenant or joint tenant, as the case may be; (b) the termination of the life estate or joint tenancy in said real property, as the case may be; and (c) the fact of devolution of title to said real estate to the remaindermen having an interest in said real estate, or the survivor or survivors of such joint tenancy, as the case may be. A certified copy of said decree shall be filed in the office of the register of deeds of the county in which said real property or any part thereof is situated. Such order or decree unless appealed to the district court within thirty (30) days from the date issued shall, upon entry, be conclusive of the facts therein found as to all purchasers, encumbrances or lienors of said real estate acquiring their titles, encumbrances or liens in good faith, relying upon said decree.

SEC. 2. This act shall take effect and be in force from and after its publication in the statute book.

SENATE BILL No. 13

AN ACT relating to the adoption of children, amending section 59-2278 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 59-2278 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-2278. The written consents required shall be filed with the petition. Upon the filing of the petition the court shall fix the time and place for the hearing thereon, which shall not be less than thirty days nor more than sixty days from the filing of the petition, which time may be extended by the court for cause. Notice shall be given to all interested parties, including the state department of social welfare. Pending the hearing the court may make an appropriate order for the care and custody of the child. Promptly upon the filing of the petition the court shall send to the state department of social welfare, a copy thereof and of the consents. The state department of social welfare, without cost to the natural parents or to the petitioner, shall make an investigation of the advisability of the adoption and report its findings and recommendations to the court as much as ten days before the hearing on the petition. In making its investigation the state department of social welfare is authorized to make an appropriate examination of the child as to its mental development and physical condition so as to determine whether there are obvious or latent conditions which should be known to the adopting parents, and shall also make such investigation of the adopting parents and their home and their ability to care for the child as would tend to show its suitability as a home for the child, and if requested to do so by the court, may inquire whether the consents to the adoption were freely and voluntarily made. Upon the hearing of the petition the court shall consider the report of the state department of social welfare, together with all other evidence offered by any interested party, and if the court is of the opinion the adoption should be made it shall make a final order of adoption, and shall deliver the child to the petitioner, if that has not already been done. In any event the costs of the adoption proceedings, other than those caused by the state department of social welfare, shall be paid by the petitioner.

SEC. 2. Section 59-2278 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

SENATE BILL No. 21

AN ACT relating to service of notice of termination of tenancy and amending section 67-510 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 67-510 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 67-510. Notice as required in the preceding sections may be served on the tenant, or, if he cannot be found, by leaving a copy thereof at his usual place of residence, or by delivering a copy thereof to some person over twelve years of age residing on the premises, or, if no person is found upon said premises, by posting a copy of said notice in a conspicuous place thereon, or by registered mail addressed to the tenant at his usual place of residence. Proof of service by registered mail may be by the affidavit of the person mailing such notice or by the return receipt.

SEC. 2. Section 67-510 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

SENATE BILL No. 35

AN ACT authorizing guardians, trustees, insurance companies, financial institutions and charitable, educational and eleemosynary corporations and organizations to invest certain funds in shares of savings and loan associations, amending section 17-5002 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 17-5002 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 17-5002. Guardians, trustees, insurance companies and other financial institutions, charitable, educational, eleemosynary corporations and organizations are authorized in addition to investments now authorized by law, to invest funds which they are authorized by law to invest, in shares of savings and loan associations which are under state supervision, and of federal savings and loan associations organized under the laws of the United States and under federal supervision and such investment shall be deemed and held to be legal investments for such funds: *Provided*, That a guardian or trustee shall not so invest funds under their control and management except upon the entry of an order of a court of competent jurisdiction, after hearing on a verified petition; and before authorizing any such investment, the court shall require evidence of value and advisability of such purchase and no such investment shall hereafter be made when it would cause the investor to have a total investment in one institution of more than ten thousand dollars (\$10,000).

SEC. 2. Section 17-5002 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the official state paper.

SENATE BILL No. 59

AN ACT to simplify and clarify the provisions of the code of civil procedure concerning constructive service; providing for such procedure; amending sections 60-2525, 60-2526 and 60-2527 of the General Statutes of 1949, and repealing said original sections.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 60-2525 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 60-2525. Service may be made by publication in any of the following cases:

(1) In actions brought under sections 60-501, 60-502, and 60-510 of the General Statutes of 1949 where any or all of the defendants reside out of the state, or where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the state; in actions brought to establish or set aside a will where any or all of the defendants reside out of the state.

(2) In actions to obtain a divorce or alimony or annulment of the contract of marriage where the defendant resides out of the state.

(3) In actions brought against a nonresident of the state or a foreign corporation having in this state property or debts owing to him sought to be taken by any of the provisional remedies or to be appropriated in any way.

(4) In actions which relate to or the subject which is real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation.

(5) In all actions where the defendant, being a resident of this state, has departed therefrom, or from the county of his residence, with the intent to delay or defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or in an action against a domestic corporation which has not been legally dissolved, where the officers thereof have departed from the state or cannot be found.

(6) In any of the actions mentioned in this section publication service may be had on the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased; the unknown spouses of the defendants; the unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved or dormant corporations; the unknown executors, administrators, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership; and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disability.

SEC. 2. Section 60-2526 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 60-2526. Before service as provided in section 1 of this act can be made, one of the parties or his attorney shall make and file an affidavit stating, in substance:

1. The residences of all named defendants sought to be served, if known, and the names of all such whose residences are unknown.

2. That the affiant does not know and with reasonable diligence is unable to ascertain the names or residences of any of those classes of unknown persons mentioned in subdivision 6 of section 1 of this act.

3. That the party seeking it is unable to procure personal service of summons on such defendants in this state.

4. That the case is one of those mentioned in subdivisions 1 to 5, inclusive, of section 1 of this act.

Such affidavit shall be in substantially the following form:

(Name of Court)

Plaintiff

vs.

(Name of first defendant), et al., Defendants.

Affidavit.

State of Kansas, _____ County, ss:

_____ of lawful age, being first duly sworn, states:

1. That he is (a plaintiff or defendant, or an attorney for such) in the above action.

2. That the names and residences of all defendants known to affiant, on whom constructive service is desired, are as follows: (Names and addresses.)

3. That the names of all known defendants whose residences are unknown to affiant, are as follows: (Names.)

4. That affiant does not know and with reasonable diligence is unable to ascertain the names or residences of any of those classes of unknown persons who are or may be concerned in the subject of this litigation, as mentioned in subdivision 6 of section 60-2525 of the General Statutes of 1949 as amended, but that he desires to include all such in his constructive service.

5. That the said (plaintiff or defendant) is unable to procure personal service of summons on all such defendants within this state.

6. That this action is one of those mentioned in section 60-2525 of the General Statutes of 1949, as amended.

(jurat)

(Signature)

When such affidavit is filed the party may proceed to make service by publication.

SEC. 3. Section 60-2527 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 60-2527. The notice shall be published once a week for three consecutive weeks in some newspaper printed and published in the county where the petition is filed and which newspaper is authorized by law to publish legal notices. It must name the known defendants thus to be served and notify them and all other persons who are or may be concerned that he or they have been sued in a named court and must answer or plead otherwise to the petition, or other pleading, filed therein, on or before a date to be stated, which date shall be not less than forty-one (41) days from the date the notice is first published, or the petition or other pleading so filed will be taken as true, and judgment, the nature of which shall be stated, will be rendered accordingly.

Such notice shall be in substantially the following form:

NOTICE OF SUIT

The State of Kansas to (names of known defendants to whom notice is given) and all other persons who are or may be concerned:

You are hereby notified that a (petition or other pleading) has been filed in (name of court) by (name of pleader) praying for (state briefly the nature of the pleading and the judgment or other relief sought), and you are hereby required to plead to said (petition or other pleading) on or before 19 in said court at _____, Kansas. Should you fail therein judgment and decree will be entered in due course upon said (petition or other pleading).

(Name of Plaintiff or other party.)

Where the action affects property, such notice need not expressly describe the property, unless such description is otherwise specifically required by law, but the same may be identified by reference to the pleading.

SEC. 4. Sections 60-2525, 60-2526 and 60-2527 of the General Statutes of 1949 are hereby repealed.

SEC. 5. This act shall take effect and be in force from and after July 1, 1951, and its publication in the statute book.

SENATE BILL No. 65

AN ACT relating to the probate code providing that certain actions and revivors of actions shall be a demand legally exhibited against an estate, amending section 59-2238 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 59-2238 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-2238. (1) Any action pending against any person at the time of his death, which by law survives against the executor or administrator, shall be considered a demand legally exhibited against such estate from the time such action shall be revived. Such action shall be revived in the court in which it was pending and such court shall retain jurisdiction to try and determine said action. (2) Any action commenced against any executor or administrator after the death of the decedent shall be considered a demand legally exhibited against such estate from the time of serving the original process on such executor or administrator. (3) The judgment creditor shall file a certified copy of the judgment obtained in an action such as described in subsection (1) or (2) of this section in the proper probate court within thirty days after said judgment becomes final.

SEC. 2. Section 59-2238 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the official state paper.

SENATE BILL No. 78

AN ACT relating to the probate code, amending section 59-2205 of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 59-2205 of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-2205. The petition of a person under legal disability shall be by his guardian or next friend. When it is by his next friend the court may substitute the guardian, or any person, as the next friend. The court may appoint a guardian *ad litem* in any probate proceeding to represent and defend a party thereto under legal disability. All possible unborn or unascertained beneficiaries may be represented by living competent members of the class to which they do or would belong, or by guardian *ad litem*, as the court deems best.

SEC. 2. Section 59-2205 of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

SENATE BILL No. 83

AN ACT relating to the probate code, amending section 59-2402a of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 59-2402a of the General Statutes of 1949 is hereby amended to read as follows: Sec. 59-2402a. When a petition shall be filed in the probate court, (1) to admit a will to probate; (2) to determine venue or a transfer of venue; (3) to allow any claim exceeding \$500 in value; (4) for the sale, lease, or mortgage of real estate; (5) for conveyance of real estate under contract; (6) for payment of a legacy or distributive share; (7) for partial or final distribution; (8) for an order compelling a legatee or distributee to refund; (9) for an order to determine heirs, devisees or legatees; or (10) for an order which involves construction of a will or other instrument; any interested party may request the transfer of such matter to the district court. When a request for such transfer is filed less than three days prior to the commencement of the hearing, the court shall assess the costs occasioned by the subpoena and attendance of witnesses against the party seeking the transfer. Such request may be included in any petition, answer, or other pleading, or may be filed as a separate petition, and shall include an allegation that a bona fide controversy exists and that the transfer is not sought for the purpose of vexation of delay. Notice of such request shall be given as ordered by the probate court.

SEC. 2. Section 59-2402a of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its publication in the statute book.

SENATE BILL No. 122

AN ACT relating to the code of civil procedure, amending section 60-3314a of the General Statutes of 1949, and repealing said original section.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Section 60-3314a of the General Statutes of 1949 is hereby amended to read as follows: Sec. 60-3314a. When an appeal or cross-appeal has been timely perfected the fact that some ruling of which the appealing or cross-appealing party complains was made more than two months before he perfected his appeal shall not prevent a review of the ruling.

SEC. 2. Section 60-3314a of the General Statutes of 1949 is hereby repealed.

SEC. 3. This act shall take effect and be in force from and after July 1, 1951, and its publication in the statute book.

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