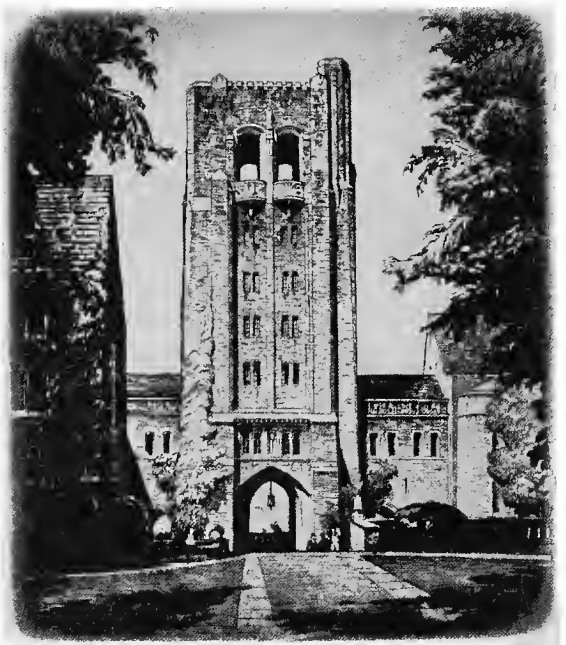

A TREATISE

ON

HOMESTEAD AND EXEMPTION

BY

RUFUS WAPLES, LL. D.,

AUTHOR OF A TREATISE ON ATTACHMENT AND GARNISHMENT, A TREATISE ON PROCEEDINGS IN REM, A MANUAL ON PARLIAMENTARY PRACTICE, ETC.

"The family, oldest of institutions, perpetually reproduces the ethical history of man, and continually reconstructs the constitution of society. All students of sociology should grasp this radical truth." *Prof. Henry B. Adams, of Johns Hopkins University.*

"Family homes are the cells that compose the body politic."

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PREFACE.

When planning the treatment of my threefold subject, I did not design so bulky a volume as this. In following the plan of the principal topic, as shown in the accompanying diagram, I have treated settled questions with brevity by stating the points and citing the authorities; but in dealing with the numerous new questions arising in the last fifteen years, especially those out of the ordinary, I have found it necessary to present positions more elaborately, to give the statutes with the constructive decisions, and sometimes to follow them with a running commentary. The purpose has been to reduce this *very* statutory subject to a degree of system, so far as the several state statutes approach uniformity. To effect this, and yet to present the law as it is (and not as one may conceive that it should be), has been a task so difficult that it could not be accomplished without room to work in. If I have partially accomplished it so as to meet the approval of those of the profession who are best informed as to the complexity of the subject, I shall not regret the years spent upon it, or further apologize for the length of this branch of the subject.

Chattel exemption, as well as homestead, has given the books a great accumulation of cases. Both topics are well treated in the extensive work of Judge Thompson, following the pioneer treatise of Mr. Smyth; and as they are kindred subjects, I have given the exemption of personalty such space as it seemed to require. The chapter on the homestead laws of the United States completes the treatise.

By having the statutes cited in connection with decisions turning upon them the profession will readily see the bearing of judicial constructions, and will understand that many of the seeming conflicts are attributable to legislation rather than to the courts. There are differences, however, which are not chargeable to the statutes, for which the author is not responsible. What further I have to say, of an explanatory character, is relegated to the Introduction.

Homestead is a growing subject, of great importance to the whole country, and especially to the states and territories which have statutes upon it — and nearly all have them. Not only debtors and creditors, wives and widows and children, but whole communities are vitally interested in the conservation of family homes. The vast litigation on the general subject forces itself upon the attention of the Bench and Bar of the whole country, to whom this treatise is now respectfully dedicated and submitted.

R. W.

Ann Arbor, Mich.

ANALYTICAL DIAGRAM.*

- **HOMESTEAD.**
  - **CONDITIONS.**
    - *Family Headship*
      - of husband.
      - of wife under some circumstances.
      - of widow with children.
      - of other householder supporting dependents.
    - *Ownership*
      - by leasehold.
      - by freehold
        - in fee simple.
        - by less estate.
          - for years.
          - for life.
      - by equitable title.
    - *Dedication*
      - by declaration.
      - by recording deed.
      - by inscribing "Homestead" on the margin of the deed.
    - *Occupancy*
      - actual.
      - intentional, with preparations, in some states.
      - with temporary absence.
  - **LIMITATIONS**
    - *Quantitative*
      - Rural — varies in acres from 40 to 200.
      - Urban
        - varies from one lot to one acre.
        - (five acres in small towns of one state.)
    - *Monetary* — varies from $500 to $5,000.
  - **RESTRAINTS.**
    - *of Alienation*
      - by deed of sale
      - by mortgage
        - by married owner alone.
        - by husband and wife without her acknowledgment.
        - during the widow's estate and the children's minority.
    - *of Testamentary Disposition*
      - by express inhibition
        - by constitution.
        - by statute.
      - by implication.
        - by provisions continuing homestead to the marital survivor.
        - by provisions continuing homestead to the minor children.
        - by any absolute disposition of the homestead by law.
  - **LIABILITIES.**
    - *for Purchase Money*
      - with vendor's lien.
      - without vendor's lien.
      - borrowed, in some states.
    - *for Improvements*
      - to mechanics
        - with recorded lien, in some states.
        - without recorded lien, in some states.
      - to laborers.
      - for materials.
    - *for Debts Antecedent*
      - to the homestead law.
      - to some designated date.
      - to purchase.
      - to recording declaration.
      - to occupancy.
    - *for Liens*
      - conventional
        - by husband and wife jointly.
        - by owner alone for certain classes of debts.
        - by unmarried beneficiary.
      - by operation of law.
      - dormant, but ultimately enforceable.
    - *for Fiduciary Obligation*
      - of public officer.
      - of guardian or other trustee.
      - of attorney at law.
    - *for Tort*
      - by the owner.
      - by his wife, in some states.
    - *for Taxes*
      - of the state.
      - of the county or city.
      - for school purposes.
  - **EXEMPTIONS**
    - *from forced sale.*
      - by attachment.
      - by execution.
      - by other process.
    - *from foreclosure* — till the exhaustion of other property mortgaged with it.

* Subject to exceptions in several states.

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INTRODUCTION.

The family historically precedes the state. It is the germ from which all social, industrial and political institutions have grown, and it continues to be the basis on which they all rest. It is the primal source of property right and distribution, yet the family is not represented in state government. The head of it does not personate it at the ballot-box; does not cast any vote for his wife and children; for he has no greater voice than that of his bachelor neighbor. He exercises his right of suffrage as a citizen: not as a husband and father. The family, as such, has no voice whatever in the government.

The state, governed by individuals, bears directly upon individuals. In some important respects, the tendency to elevate each citizen, as such, is in the right direction. Its degree of accomplishment thus far, especially in the recognition of the individual's liberty of contract, has been accounted the most distinct and valuable result of modern society. But this has been at the expense of the family, as shown by Sir Henry Maine. The influence of the home and the family has diminished as individualism and the liberty of personal contract have increased in importance.

No legislation in modern times has done more for the recognition of homes and families than that for the fostering of homesteads in this country, for the past fifty years. It has been done somewhat at the expense of individualism and the personal liberty of contract; yet not avowedly or designedly so; it has antagonized some principles that had gained firm ground, and has somewhat diverted their tendencies.

Homestead law lies within the general legal system as a wheel within a wheel; as a machine designed to run harmoniously within a greater organism but touching it at various points and sometimes disturbing its usual action. The clashing

does not represent what is properly termed a conflict of laws, but it is the friction of innovations upon previously established jurisprudence, meant to be adapted to it, but affecting its operation upon the home and the family, and the individual's right of contract and property disposition, under prescribed conditions. On the other hand, this legislation tends to promote the individualism of the wife in her rights of contract and property disposition in the face of previously established jurisprudence.

Among the innovations of homestead legislation may be briefly mentioned the recognition of the family institution as an essential element of the governmental and social organism; the admission of its claims upon the state for protection and conservation; the distinction of home property from other realty, with special provisions in its favor; the coupling of these provisions with conditions upon the married owner of such property that he, upon its dedication, shall relinquish his individual *jus disponendi* and admit his wife to share in its alienation or incumbrance; the giving to her and the minor children the semblance of an estate in home property which they do not own under any species of title; the delay in the partition and settlement of homestead estates till minor heirs reach their majority; the taking of property out of commerce to a degree, or hindering its free sale or exchange; the limitation of the notified creditor's security for debt due him; and the modifications of the law of estoppel, mortgage foreclosure, the vindication of liens generally as to the favored property, and the encroachment upon the jurisdiction of courts.

If there were a uniform homestead system for all the states, its adjustment to the general legal organism would be not free from difficulty; yet the subject could be treated with a degree of unity and perspicacity which is impossible when there are many different systems. Some forty states and territories have homestead statutes. Those which so far accord with each other as to present a family likeness may be said to constitute the prevalent system outlined in the diagram placed at the beginning of this treatise. Those which are exceptional make a large minority of the whole. Indeed, the former are not wholly free from exceptions to the prevalent system, while the latter are not wholly incongruous with it.

Scarcely any two statutes agree in all particulars. There is such variety of provisions that even the brief summary of innovations upon previously established law, above given, is not applicable to every state. The difficulty of treating the general subject is therefore greatly enhanced; so that, instead of simple and positive statements of law, it is frequently necessary that they be qualified as applicable to particular states only.

Some statutory provisions, which are substantially uniform in several states, take on differences when sifted through the judicial sieve. Whether the variances are attributable to legislation or construction, the effect upon the task of the commentator is to render it more difficult than that of treating a uniform system would be. So, if the following pages be found sometimes incumbered with exceptions to general statements in decisions as well as in statutes; if the treatment of questions be found sometimes apparently circuitous rather than direct, it may be pleaded in extenuation that the subject itself is wanting in unity, the statutes variant and the decisions therefore often diverse. It is hoped that those who ride with me over the extended road before us will attribute some of the jolting to the hills and hollows of the way.

Those who look for dogmatic statements, applicable to the whole country, on every point, will be disappointed. The restriction of every statutory provision to its own province, and of every decision to its own local bearing when not of general application, could not be neglected to save the text from being tedious. To effect this restriction, two methods suggested themselves: one, to name the states to which a principle was applicable; the other, to let the cited authority fix the limitation. The former would have been awkward, cumbersome, and hardly practicable without extending the treatise to two or three volumes. The latter method has been adopted. The notes qualify and confine the statements of the text, and relieve them in places from apparent contradictions.

It has been frequently necessary, however, to discuss decisions in the text, and to inquire whether their reasons are such as to commend them to general acceptance. The principle of *stare decisis* has been religiously regarded, even to the recog-

nition of the legal apothegm: *Res judicata facet exalbo nigrum, ex nigro album; excurvo rectum, ex recto curvum.* But a thing adjudged does not make white black and black white, etc., outside of the state where the adjudication is made, when the deliverance is based on a local statute; nor does a decision on any principle have *authority* beyond the jurisdiction within which it is rendered. The reasons are open to discussion in every other jurisdiction. It is the applicability of judicial reasons, rendered in one state, to questions arising in another that I have had occasion to review. Especially when decisions of different states conflict on the same point or principle, inquiry into the relative weight of the counter arguments adduced has been found necessary to the proper treatment of the subject. To give decisions only, without any attempt to reconcile divergences, or to discuss principles, is to make a digest — not a *treatise.*

The criticisms (if they may be so called) are not meant to be captious, or wanting in respect for any court. I certainly entertain the highest regard for the judiciary of the country — not excelled for learning and probity by any in the world. But two conflicting decisions cannot both be right. The treatise-writer is no umpire to decide between them, but he should *treat* them when they cross his path, or he should not write at all. Not merely conflicts but erroneous tendencies give occasion for review and suggestion. If there is a trend towards the extension of homestead statutes without due regard to the rules applicable to all construction; if there is not sufficient prominence given to the law of notice to creditors relative to exemption; if the true policy of legislation favoring homes is anywhere misunderstood; or if there is anything of a general character inviting suggestion, may not such matters come under review without offense? For instance, it has been gravely said, in view of the beneficence extended to debtors, that homestead laws are not meant to be just to creditors. Were this true, they would not be worthy to be called laws; but its falsity may be exposed, without harshness, by calling attention to the law of notice under which the creditor knows, when he trusts the debtor, that he cannot look to the latter's homestead as security.

Advance in the settlement of legal questions (not determined

by authority) is made precisely as in all other mooted points of science — not by *dogma* but demonstration; not by the opinion of one writer or many but by the acquiescence of thinkers generally. It is therefore to the legal profession — on benches and off — that open questions look for solution, until finally settled by the courts.

The subject has grown upon me as its features have become familiar. Its importance has been realized more and more, so that home conservation now appears to me as one of the greatest advances in civilization during the present century. It ought to have recognition, in some appropriate way, this year at the World's Columbian Fair.

So much by way of introduction, which in the parlance of the old books may be fitly called *The Author's Apology.*

HOMESTEAD AND EXEMPTION.

CHAPTER I.

LEADING PRINCIPLES.

§ 1. The Qualified Family Residence.
2. Policy — To Conserve Homes.
3. The Property Exempted.
(1) Property habitable.
(2) Property occupied by a family.
4. Exemption from Ordinary Debts.
§ 5. Notice to Creditors Essential.
6. States, as Creditors.
7. Liability for Liens.
8. Prevention of Property-Indebtedness.
9. The Governing Law.
10. Summary of Leading Principles.

§ 1. The Qualified Family Residence.

A homestead is ordinarily a family residence, but the word has both a common and a technical meaning; the latter is employed in the title and text of this treatise. As a law term, it may be thus defined: *Homestead* is a family residence owned, occupied, dedicated, limited, exempted, and restrained in alienability, as the statute prescribes.

In this sense, courts and the profession generally are in the constant habit of using the word. In legal arguments, decisions, reports, digests, statutes and constitutions, this is the usual significance. The word is rarely used in its ordinary sense and then qualified to show that an exempt, restricted, statutory, family residence is meant.

The use of the term has been judicially reprobated, when the property meant to be indicated was not exempt, in the following words, quoted as italicised by the court: "In considering the claims of anterior creditors and the creditor to whom purchase-money is due, it is a wrong use of language to call the estate a *homestead. No homestead exists against such claims.*"[1] Even in pleading, the word, employed without qualification, has been taken by the court in its technical sense.

[1] Lamb v. Mason, 50 Vt. 350.

An averment, in a bill of complaint, that the land on which the complainants lived was their homestead, was held to be a sufficient allegation that its value did not exceed the statutory limitation.[1] The word occurring in a will was construed to express the legal sense, so that the devisee to whom the testator had bequeathed his *homestead* could take only what was within the limitation of the homestead statute.[2] The word is not always thus construed in testamentary dispositions.[3] And, in pleading, greater particularity than that above indicated would be required by many courts.[4] The safe rule to ascertain whether the word is used as in common parlance or in its technical sense — not only in wills and pleas but in judicial opinions and any legal writing — is to gather the meaning from the context.

It is curious to note that while courts usually employ the word as above defined, or at least as meaning an exempt family residence, they frequently follow the dictionaries when they give a definition of it, as though it were without other signification than that in common parlance.[5] Even in opinions containing such definition, the technical term may be found, employed to represent the qualified family residence. To give instances of the technical use would be superfluous, since almost every case cited in this treatise affords an example of such use.

The word ought never to be employed, in either of its senses, to express mere exempt realty when the debtor's home is not meant. Statutes, exempting a stated amount of real or personal property or both, without reference to home or family, are not homestead statutes, though sometimes so miscalled.

It is hoped that the definition above given will be found generally accurate; but all of the qualifications of the family residence therein stated are not universally pertinent. Some of the statutes impose no restraint of alienation upon the

[1] Evans v. Grand Rapids R. Co., 68 Mich. 602.

[2] Backus v. Chapman, 111 Mass. 386.

[3] Ford v. Ford, 70 Wis. 52.

[4] See ch. XXIII, § 7.

[5] Jaffrey v. McGough, 88 Ala. 648, 650. In Bebb v. Crowe, 39 Kas. 342, it is said: "The word 'homestead' is used in the constitution in its popular sense." But it is immediately added: "It represents the dwelling-house where the family resides. Its tests are use and quantity." The application of these tests shows that the technical homestead is meant.

householder; the conditions of the homestead are not uniform in all the states; the *widow's homestead*, and that under federal law, are not strictly within the definition. These exceptions will be noted in their proper place.

Since exemption is one of the characteristics of homestead, why is it made a separate subject in the title of this treatise? Why "Homestead *and* Exemption?" Were the treatment confined to the first topic, there would have been no need of the second word; but as it extends to the the protection of chattels and of other realty than homesteads from forced sale for debt, the second subject is not superfluously or tautologically inserted in the title.

§ 2. Policy — To Conserve Homes.

The conservation of family homes is the purpose of homestead legislation. The policy of the state is to foster families as the factors of society, and thus promote the general welfare. To save them from disintegration and secure their permanency, the legislator seeks to protect their homes from forced sales so far as it can be done without injustice to others.

The reader will note the important difference between the policy to conserve homes for the good of society and the state, and the policy to save the property of poor debtors from execution for their own good. As elsewhere remarked herein, homestead statutes are not poor laws made for the benefit of the impecunious only. They protect the family homes of all classes. Any head of a family, however solvent and affluent, may dedicate his home under the statutory conditions, and feel sure that, whatever ordinary debts he may afterwards incur; whatever embarrassments he may encounter incident to such debts,— the home of his family is safe. It is evident, therefore, that under the prevalent homestead system (leaving now out of view the exceptional statutes which provide exemption for poor debtors and needy widows and orphans only), the policy is not to secure to the householder a certain money-worth of realty; not to subserve the interests of immediate beneficiaries only — but to protect *homes* as the pillars of the state edifice. The charitable effects of homestead laws are merely incidental.

The reasons which support this broad policy are cogent and

readily apparent. Families are the units of society, indispensable factors of civilization, the bases of the commonwealth. Upon their permanency, in any community, depends the success of schools, churches, public libraries, and good institutions of every kind. The sentiments of patriotism and independence, the spirit of free citizenship, the feeling of interest in public affairs, are cultivated and fostered more readily when the citizen lives permanently in his own castle with a sense of its protection and durability.

The state is concerned in the conjugal and parental relations; in the promotion of marriages and the rearing of children; in the morality, refinement and religion of families and communities; and, on the other hand, it is injured, and its prosperity endangered, by the prevalence of divorces and by everything which tends towards the disintegration of families and the breaking up of homes. The proverb: "When poverty comes in at the door, love flies out at the window," is not invariably true; the beautiful picture, in Irving's Sketch Book, of the wife consoling and encouraging her husband upon the loss of his fortune, is not an exceptional one; but is it not true that, when the home itself has been taken away, the tendency is against the healthy growth of the sentiments above mentioned as conducive to the welfare of the state?

These reasons would lead us, *a priori*, to look for such a policy in statutes relating to the home; especially when we reflect that the legislature is free to follow such reasons but not to make donations, or indulge in class legislation merely to benefit the proprietors of homes to the neglect of citizens and others who have none.

Turning to those statutes, we find the policy clearly indicated by their provisions making the heads of families and their households, in actual occupancy of homes constituted as required, the only beneficiaries.[1]

The exceptional statutes, before mentioned, indicate a dif-

[1] The statutes abound in such expressions as these, describing the homestead and the beneficiaries: "The homestead of the head of a family;" "Every householder having a family;" "The homestead of every family, whether owned by husband or wife;" "A homestead occupied as a residence by the family of the owner," etc. They will be cited freely in future chapters.

ferent policy when they accord the exemption of a certain value of realty to poor debtors, much on the principle of chattel exemption.

The decisions of the courts, in which the policy of homestead legislation is touched upon, do not invariably hold that it is to conserve homes.[1] Those which do are fairly represented by an early one, in which it is said: "The leading idea upon which the constitution and statutes are predicated is the protection of the family, and not the exemption of a certain amount of real estate."[2] Expressions, in other cases, favoring a different policy, when unnecessary to the decree, may be passed as *obiter dicta.* Those which avow the charity theory, as a reason for *extending* the statute, will hereafter come under review. No one opinion is now called to mind in which that theory, or the benevolence of the legislator to the poor, has been distinctly stated in the construction (and not the extension) of a homestead law, and made a reason for judgment.

§ 3. The Property Exempted.

(1) *Property habitable:* The purpose of the legislator is effected by exemption and by restraint upon the *jus disponendi* by sale or will. The former is the method now to be noticed.

It is property — not merely a privilege respecting it, or an indisposable right in it, or a *quasi*-estate not proprietary or transferable — which the law exempts. It is property which, in the absence of exemption, would be liable to execution. Personal rights and privileges not disposable would not be liable to execution under any circumstances. They would be lost by the execution of that on which they rest, if not re-

[1] Mr. Kneeland, in his work on Attachments, in the following passage, shows family homes to be the purpose of homestead legislation: "The first requisite of a homestead is the fact that it is essentially the home of the person claiming it. Three facts are necessary to constitute a homestead: First, its actual occupancy as a residence by the family of the householder; second, the intention on his part to make it a permanent home: third, the subsequent performance of the requirements, if any, provided by statute as a prerequisite for the creation of such a right." *Page 323.* See Chs. III and VI, *post.*

[2] Lies v. De Diablar, 12 Cal. 328. Similar statements of the true policy are found in many other cases; but it is not contended that those which assume the charity policy are less numerous.

served; and, under some circumstances, they have been reserved in sales of homesteads.[1] They are benefits inseparably connected with the homestead, but they do not constitute it.

It is home property which the law exempts. It must be something habitable as a family dwelling-house — whatever the appurtenances and the extent of land exempt with it. This leading characteristic is essential to the statutory homestead.[2] There are statutes and decisions which call the exemption of interests in realty by the name *homestead;* — even undivided and partnership interests and property held in co-tenancy. These statutes and rulings will be treated hereafter.[3] Such interests are proper subjects of exemption; and that they are exempted in certain states, in the interest of families or whomever the legislator has made beneficiaries, is all that he and the courts have meant when classifying such interests with homesteads. In the absence of exemption, such interests would be liable to execution for the debts of their owners: so their protection from it may be conducive to the welfare of the debtor's family; but there can be no home in a mere interest, as there are no atoms in ideas.

(2) *Property occupied by a family:* There must not only be habitable property, but property inhabited by its owner's family, to constitute a homestead according to nearly all the statutes. The protection endures while the family endures; ceases when it ceases. The death of the parents and the termination of the children's minority end the homestead. The property remains, but all that made it a legally exempted family residence would be gone upon the happening of those events; for, though the children might still constitute a family and still occupy the premises, they would not be such a family as the legislator contemplated.[4]

[1] Lear v. Totten, 14 Bush, 104; McTaggert v. Smith, 14 Bush, 414; Evans v. Evans, 13 Bush, 587; Wyche v. Wyche, 85 N. C. 96; Long v. Walker, 105 N. C. 90, 108; Hanby v. Henritze, 85 Va. 177, *185;* Const. of Virginia, art. II, §§ 1, 5; Va. Code (1873), c. 183, § 8; *post,* ch. XV, §§ 8–12.

[2] The J. I. Case Co. v. Joyce, 89 Tenn. 337; Kitchell v. Burgwin, 21 Ill. 40; Jarvais v. Moe, 38 Wis. 440; McDannell v. Ragsdale, 71 Tex. 23; Jacoby v. Distilling Co., 41 Minn. 227, *230;* Bebb v. Crowe, 39 Kas. 342; Lubbock v. McMann, 82 Cal. 228; Spalding v. Crane, 46 Vt. 292; First N. Bank v. Hollinsworth, 78 Ia. 575; *post,* ch. VI, §§ 3, 4.

[3] *Post,* ch. IV, §§ 10, 11, 12, 14.

[4] For authorities on the subject of occupancy, see ch. VI.

The rule is that the required occupancy must be actual and continuous, though temporary absence is allowable while the home is maintained.[1] Constructive occupancy is exceptional. It is extensively favored when there is ownership with intent to occupy; especially when there are preparations for making a home. The intention and preparation consummated, the owner is accorded protection from the date of purchase, and held to have complied with the requirement of occupancy, under this exceptional view.[2] It would seem that retroaction by the law of relation would not give the creditor notice from the date of purchase; but under some statutes and their construction, the public may be said to have notice, when the title is filed, that homestead may be claimed.

The rule is that to constitute such family as the homestead law contemplates, the members must be bound lawfully together by blood or affinity; their relation must be that of *status*, not contract: such as that of parents and children. Husband and wife, or either and a minor child or more, constitute a family. The head with dependent members other than wife or children, whom he is obligated to support, has a family.[3] But when we find a single person recognized as a family,[4] or a household unlawfully constituted accorded homestead rights as such,[5] we must note the case as exceptional.

Without controverting such unusual ruling, it may be said confidently that the legislator when providing for a *family* did not mean an *individual;* and that he contemplated a lawfully constituted family. How can the public welfare be promoted by the conservation of a family immorally organized? How can the policy of the law to preserve families by saving them from the mischief of disintegration — from being knocked to pieces with the official auctioneer's hammer — be advanced by the exemption of the homes of associated persons living in

[1] Hotchkiss v. Brooks, 93 Ill. 386; Givans v. Dewey, 47 Ia. 414; Weisbrod v. Daenicke, 36 Wis. 73; Hiatt v. Bullene, 20 Kas. 557; Currier v. Sutherland, 54 N. H. 475, *487; post,* ch. VI, *Occupancy.*

[2] Ch. VI, §§ 7-10.

[3] Murdock v. Dalby, 13 Mo. App. 41, 47; Galliger v. Payne, 34 La. Ann. 1057; Wilkinson v. Merrill, 87 Va. 513; *post,* ch. III, § 1.

[4] Stults v. Sale, 17 N. W. (Ky.), 148; Kessler v. Draub, 52 Tex. 575; ch. III, § 9.

[5] Gay v. Halton, 75 Tex. 203; Lane v. Philips, 69 Tex. 240; *Ex parte* Brien, 2 Tenn. Ch. 33.

habitual violation of law? True, such immorally associated persons may form a family, in a sense; but the statutes employ the word *family*, as well as the word *homestead*, in a technical sense. Not even every lawful household is contemplated: only married parents and growing children (or such parents without children, or one parent with a child or more), or a family head, and members dependent upon him for support, and whom he is legally bound to support, constitute such a household as is favored by homestead laws, as a general rule.

Not every homestead, in the ordinary sense of the word, is exempt: only the technical homestead, as defined in the first section of this chapter, is protected from forced sale, according to most of the statutes. There is exemption of realty, as well as personalty, to insolvent and other debtors, not based on family protection; and there is exemption of business establishments in one state; both may conduce to the welfare of the family. The "business homestead" may be a means of family support — just as an exempt chattel may be — but that is no warrant for the use of the term.[1]

The homestead, habitable and inhabited as above described, is subjected to quantitative or monetary limitations; and, in some states, to both.[2] Distinction is drawn between urban and rural homesteads as to the extent of realty exempted, but the monetary restriction is applicable to both classes.[3]

§ 4. Exemption from Ordinary Debts.

Exemption is only from *ordinary debts* contracted after the date of its beginning. It protects the homestead property from such debts, but does not relieve the debtor, either directly or by operation of law, from any indebtedness he may have incurred. He continues liable for all his debts; and they may be prosecuted to judgment as though he were not a householder with a family, and as though no homestead law had ever been enacted.

No state attempts by homestead legislation to exonerate the debtor from the duty of meeting his obligations. Homestead exemption statutes are not bankrupt laws. They offer no discharge. Everywhere the debtor may be sued for his ordinary debts as well as for any others, contracted at any

[1] *Post*, ch. VIII.
[2] Ch. VII.
[3] *Id.*, §§ 1, 2, 4.

time, and judgment recorded against him will create a general lien bearing upon all his real estate — except his homestead.

In most of the states, *it is simply by excepting the homestead from general judgment liens for ordinary debts, contracted after notice, that its protection is effected.* The law does not inhibit the rendition of the judgment, but saves the homestead from any property liability resultant. No valid writ can be issued or executed against the favored property. The family cannot be disturbed or deprived of the home.

In some states, a lien upon the homestead is created by a general judgment for personal debt, but lies dormant during the family occupancy. When the homestead beneficiaries have ceased to be such, it wakes to life and may be enforced against the property which *was* homestead.[1] By this method the family enjoyment of the home is secured. Even in the exceptional instances where the fee may be sold in the vindication of such a general judgment lien, the family use is reserved.

Exemption of homesteads from forced sale for any *debt contracted* does not exonerate them from judgments in cases *ex delicto*. They have no immunity against fines imposed by the state upon their owners, prosecuted to judgment and execution. "Surely it would be contrary to the theory and design of the homestead laws, which are said to be founded upon considerations of sound public policy and for the public welfare, if they were so construed as to interfere with the administration of public justice, and take away the potent means of punishing crime. The public welfare is best promoted by the enforcement of the laws, and one of the most potent means of their enforcement is by fines imposed for their violation. It never could have been within the purview of the constitution [framers] in enacting a homestead law, to deprive the state of the means of punishing offenders against its laws by permitting such offenders to claim exemption against punishment for a violation of the penal laws of the commonwealth."[2]

[1] Kellerman v. Aultman, 30 Fed. 888; McHugh v. Smiley, 17 Neb. 620, *624;* Hayden v. Slaughter, 43 La. Ann. 385; 8 So. 919; Herbert v. Mayor, 42 La. Ann. 839; Dennis v. Gayle, 40 La. Ann. 286; Brandon v. Moore, 50 Ark. 247; Jones v. Britton, 102 N. C. 167; Rogers v. Kimsey, 101 N. C. 559; *post,* ch. X, § 6.

[2] Whiteacre v. Rector, 29 Gratt.

The general rule is that judgments, rendered for torts and the like, fasten a lien on the homestead as on all the other property of the wrong-doing defendants.[1] And ordinary debts contracted by borrowing money to pay for the homestead, or for its improvement, are generally collectible from that property by the enforcement of the general judgment lien. This is not universally the case — some states allowing no execution of judgment unless there be a pre-existing vendor's lien or other specific property indebtedness.

However, where the statute excepts from exemption when debts have been incurred in the purchase or improvement of the homestead, whether there was a specific lien created or not, a personal debt so incurred may be prosecuted to judgment bearing a lien on the homestead enforceable by execution.[2]

§ 5. Notice to Creditors Essential.

The justice of homestead laws could not be vindicated, were creditors deprived of their remedy against the property of their debtors without notice. Trusting to that property as a common pledge when giving credit, they cannot be afterwards deprived of their remedy against it without a serious impairment of their contract. While the remedy may be modified by the law-making power, it cannot be so shorn as virtually to deprive the creditor of his vested rights. It was on this principle that the state constitutions and statutes which formerly exempted homesteads from liability to judgment and execution on debts antedating their adoption or enactment, were declared to be in contravention of the constitution of the United States. Not only the divesting of existing liens, but the withdrawal of the remedy for collecting ordinary debts from property liable at the date of the contract, was held un-

714, *717;* McClure v. Braniff, 75 Ia. 38.

[1] McLaren v. Anderson (Ala.), 8 So. 188; Williams v. Bowden, 69 Ala. 433; Vincent v. State, 74 Ala. 274; Tate v. Laforest, 25 La. Ann. 187; Donaldson v. Banta (Ind.), 29 N. E. 362; Thompson v. Ross, 87 Ind. 156; Nowling v. McIntosh, 89 Ind. 593; Smith v. Ragsdale, 36 Ark. 297; Davis v. Henson, 29 Ga. 345: Parker v. Savage, 6 Lea, 406; Kenyon v. Gould, 61 Pa. St. 292; Wade v. Kalbfleisch, 58 N. Y. 282; Burton v. Mill, 78 Va. 468. *Compare* Gill v. Edwards, 87 N. C. 77; Conroy v. Sullivan, 44 Ill. 451; Smith v. Omans, 17 Wis. 395; *post,* ch. X, § 8.

[2] *Post,* ch. XI, §§ 2, 3, 4.

constitutional, because the creditors were not then affected with notice.[1]

Thus, not only the justice but the constitutionality of homestead exemption depends upon notice given anterior to the creation of the debt. Good faith is not violated by statutory protection of the family home from execution, if the creditor is notified before trusting his debtor that he cannot look to it for his pay. The effect of the notice is to except the homestead from the rest of the debtor's property so that it does not become a part of the common pledge.

Notice is absolutely essential in all the states. It is given in different ways. The promulgation of the homestead law is essential everywhere. The recording of the title is required in some states as notice. The inscription of the word *homestead* on the margin of the recorded title is further required in two or three states. The filing of a "Declaration of Homestead" in a designated public office is another method. Actual occupancy by the householder and his family is notice in several states, and it is usually required as additional to the record notices in the states prescribing them.[2]

While the legislature may adopt any proper form of advertising to the public that those who trust cannot look to homesteads for pay, it cannot dispense with notification and yet divest the creditor of his remedy. All the reasons adduced by the federal supreme court, to show that that remedy was so far denied as to impair contract when debts anterior to the adoption of the state constitution or the enactment of the statute granting exemption were declared non-collectible from the homestead, apply perfectly to all cases of exemption without notice.

Everybody is presumed to take cognizance of the legal

[1] Edwards v. Kearzey, 96 U. S. 595; Gunn v. Barry, 15 Wall. 610; Lamb v. Chamness, 84 N. C. 379; Russell v. Randolph, 26 Gratt. 705; Fowler v. Wood, 31 S. C. 398; Clark v. Trawick, 56 Ga. 359; Pennington v. Seal, 49 Miss. 528; First N. Bank v. Hollinsworth, 78 Ia. 575; Squire v. Mudgett, 61 N. H. 149; *post*, ch. X, §§ 1–4.

[2] Goodwin v. Colo. Mort. Co., 110 U. S. 1; Boreham v. Byrne, 83 Cal. 23; Lachman v. Walker, 15 Nev. 422; Murphy v. Hunt, 75 Ala. 438, *441;* Linsey v. McGannon, 9 W. Va. 154; Taylor v. Saloy, 38 La. Ann. 62; Tennent v. Pruitt, 94 Mo. 145; Griswold v. Johnson, 22 Mo. App. 466; Cheney v. Rodgers, 54 Ga. 168; Mills v. Spaulding, 50 Me. 57; *post*, ch. V, §§ 7, 8.

notice, and therefore he who gives credit is held to have done so knowing that the homestead is inviolable. The presumption of knowledge, like many other legal presumptions, is violent in many cases; the creditor may not surely know whether his debtor's family residence has been validly made a homestead, or whether certain acts or omissions have amounted to abandonment; but what better way of informing the public can be devised than those above mentioned? What absolutely perfect plan can be invented to guard against fraud, double-dealing and uncertainty? The notice necessarily is general, and particular cases of wrong cannot all be anticipated by the legislator. The presumption is that notice reaches and informs all. And the justice of homestead exemption is vindicated by showing that the protected property never becomes liable to notified creditors — never susceptible of lien-bearing under judgments for ordinary debts contracted with notice.

§ 6. States, as Creditors.

The states and the general government stand on the same footing with private persons when they are simply creditors. Justice Matthews, as organ of the federal supreme court, after showing that the state courts had been "practically unanimous" in holding that exemption bars the state as creditor, put the federal government in the same position. It was decided that it, on a judgment for an ordinary debt, cannot seize and sell a homestead which is exempt by the law of the state where it is situated; "that the exemptions from levy and sale under executions of one class [of judgments] apply equally to all, including those on judgments recovered by the United States."[1] And there are prior decisions substantially in accord.[2]

In the case first above cited, Justice Matthews suggested, in the opinion, that the exemption laws of the states are not laws of the United States unless made such by congress; and he then entered into the inquiry whether the United States had adopted the homestead act under consideration so as to

[1] Fink v. O'Neil, 106 U. S. 272.

[2] United States v. Railroad Co., 105 U. S. 263; United States v. Thompson, 93 U. S. 586; Green v. United States, 9 Wall. 655; United States v. Knight, 14 Pet. 301; Beers v. Haughton, 9 Pet. 329. *Compare* United States v. Howell, 4 Hughes C. C. 483.

be bound by it. The conclusion, however, was the broad one first above stated.

Distinction must be drawn between the government's position as an ordinary creditor, and that as a suitor enforcing governmental powers. "Statutes which derogate from the powers and prerogatives of the government, or tend to diminish or restrain any of its rights or interests [as a government], do not apply to it unless it is expressly named."[1] And it is manifestly true that the express mention of the general government in a state statute would not enable a state legislature to "derogate from the powers and prerogatives" of that government, unless congress should adopt the law; — and not then unless the matter is within the authority of congress.

States cannot pass exemption laws that cripple the federal government in the exercise of its police powers or any other of like character. In other words, it has been very well settled (by decisions not on homestead exemption), that the states have no authority to control the laws of congress to carry into effect the powers vested in the general government.[2]

The ancient rule, that general statutes do not bear upon the king in the absence of express or irresistibly implied words to include him, was not applicable to those enacted for the public good, like our family-protecting statutes. That rule recognized statutes as made for subjects and not for the sovereign. Our general government exercises sovereign powers, but its position is very different from that of a monarch ruling by an assumed divine right over subjects held to obedience. To a degree it is true here that our government cannot be deprived of a right, privilege or interest by the implications of a statute; certainly not, by even express statutory provisions, when its rights and privileges are under the police power. The rule has been learnedly treated by the courts.[3]

[1] United States v. Herron, 20 Wall. 251; Savings Bank v. United States, 19 Wall. 228, 239; Dwarris, p. 523; Sedgw. Stat. & Const. L., pp. 105, 395; Boyle v. Zacharie, 6 Pet. 659; Wayman v. Southard, 10 Wheat. 1.

[2] McCulloch v. Maryland, 4 Wheat. 316; Weston v. Charleston, 2 Pet. 449; Crandall v. Nevada, 6 Wall. 35; Dobbins v. Commissioners, 16 Pet. 435; The Collector v. Day, 11 Wall. 113; United States v. Railroad Co., 17 Wall. 322; Bank of U. S. v. Halstead, 10 Wheat. 51; Beers v. Haughton, 9 Pet. 329.

[3] Commonwealth v. Ford, 29 Gratt. 683, *687*, *citing* Broom's Legal Maxims, 76, 77; United States v. Herron,

The governmental prerogatives of a state are as sacred as those of the United States; but, like the latter, when a state is a creditor it stands with other creditors and is cut off by exemption when not excepted from the general provisions.[1]

There seems to be no good reason against this proposition. The state is presumed to have notice of the homestead law, to know when exemption begins, to trust the debtor afterwards with full knowledge that the homestead stands as no common pledge for the debt. All corporations are affected by the notice. Why should not artificial persons be cut off with other creditors? The state is no sovereign in such a sense as described in some of the above quoted decisions; the federal government is no such sovereign; American citizens do not derive their rights from any government: so the reasons given to sustain the theory that the government is not affected by a statute unless expressly named, are not manifestly applicable. It is only when some governmental power or right is molested that the rule requiring expression applies. As a mere creditor upon contract, a state or the national government is on the same footing as any other creditor. This doctrine is now generally conceded.

§ 7. Liability for Liens.

The homestead is not released from any debt which *it* owes; from any obligation which it has incurred and which rests upon it as a *thing indebted* by fiction of law. A lien, mortgage, or any liability, conventional or created by operation of law, which has been attached to it, remains upon it unaffected by homestead exemption. Whether such lien or property indebtedness existed before the homestead character was acquired, or was put upon the property afterwards, the result is the same.

20 Wall. 251, *263;* Saunders v. Commonwealth, 10 Gratt. 494, *496;* Levasser v. Washburn, 11 Gratt. 572, *577;* Commonwealth v. Cook, 8 Bush, 220; Whitacre v. Rector, 29 Gratt. 714; Bacon's Ab., Prerogative E. p. 92; State v. Kinne, 41 N. H. 238; United States v. Hoar, 2 Mason, 311; United States v. Hewes, Crabbe, 307; People v. Rossiter, 4 Cow. 143; Commonwealth v. Baldwin, 1 Watts, 54; Lott v. Brewer, 64 Ala. 287; Brooks v. State, 54 Ga. 36.

[1] State v. Pitts, 51 Mo. 133; Wildes v. Vanvoorhis, 15 Gray, 139; Richards v. Chace, 2 Gray, 383. *See* Commonwealth v. Cook, 8 Bush, 225; Hume v. Gossett, 43 Ill. 297.

The creditor certainly has a vested right to his mortgage or other form of lien which no legislature can divest by the passage of a homestead statute. His remedy may be qualified so as to require him to exhaust other property first when the mortgage covers other property, but his right in the homestead, his *jus ad rem*, cannot be denied.[1]

To this rule of property-indebtedness there is little exception. It has been held, however, in a state where the homestead system is declared by its highest court to be "unlike that in most of the other states," that the lien of a general judgment, which is attached to realty before homestead has been declared or created, cannot be enforced till the homestead right shall have been terminated; that the lien exists in full force and validity all the while, and will take precedence over a trust deed of later date when it comes to be vindicated after the homestead has been abandoned or otherwise has ceased to exist.[2]

This doctrine is out of harmony with the general rule, and it seems manifestly prejudicial to the lien holder, so crippling his remedy as to seriously impair his right. His judgment lien is thus postponed for an indefinite number of years, possibly for the period of his whole life. His property in the judgment is so diminished that he could not sell it for half its original worth. His remedy is so seriously impaired that there is good ground for doubting the constitutionality of any legislative provision that thus affects his lien after it has fastened upon the land.

There would be as much reason for allowing homestead to thus affect a mortgage or any conventional lien resting on land before it becomes a homestead. Such specific liens are no more property rights than general judgment liens.

The exceptional doctrine above noticed has not uniformly

[1] Bunn v. Lindsay, 95 Mo. 250, *258;* McCauley's Estate, 50 Cal. 544; Roupe v. Carradine, 20 La. Ann. 244; Ely v. Eastwood. 26 Ill. 108; Burnside v. Terry, 51 Ga. 186; Tuttle v. Howe, 14 Minn. 145, 152.

[2] Blose v. Bear, 87 Va. 177; Scott v. Cheatham, 78 Va. 83; Lindsay v. Murphy, 76 Va. 428; Richardson v. Butler, 1 Va. L. J. 120. *See* Va. Code (1887), § 3649, of which the court, in *Blose v. Bear*, said that whatever may be its effect on future cases, its provision was not in existence when this case arose. It is to be hoped, therefore, that future cases will be brought into line with the prevalent system respecting things indebted.

been recognized in the state of the cited decisions. It has been held in a case more recent than any of those above cited except the very latest, that when a judgment has become a lien upon land before the owner is entitled to a homestead, it is paramount to a claim of homestead subsequently made.[1]

§ 8. Prevention of Property-Indebtedness.

Prevention — not cure — is the legislator's purpose as to homestead property-indebtedness. He cannot cure; but he has remedies at his command to prevent the plague or hinder it. As already shown, general judgments for ordinary debts are prevented from bearing any lien upon the homestead, so that property-indebtedness cannot be created by them in favor of notified creditors personal or governmental.

Conventional liens cannot be prevented readily without a shock to public interests, and the states generally do not forbid their being fastened upon the homestead. But they are hindered; impediments are thrust in the way. The married owner is restrained, by most of the statutes, from either mortgaging or selling his homestead property by his sole deed. His wife has the *veto* power.[2]

Almost as generally, the husband may prevent the wife from selling or mortgaging by refusing to join in the alienation when she is the owner. These provisions guard against the improvidence of either spouse by making the one a check upon the other;[3] and, as it is many times more difficult for two to act together than for one to act alone, the chances of keeping the home for the children are greatly enhanced by these impediments.

How is it that the legislator can invade private rights and create such restraint upon alienation? He does not invade them — does not create the restraint. He grants exemption on conditions; and one of the conditions is that the owner shall consent to this restraint. There is consent implied when the owner makes declaration of homestead, or in any prescribed legal way accepts the benefit of exemption.

The "homestead right," or "privilege," or "incumbrance," or "estate," bestowed on the wife (or the wife and children),

[1] Kennerly v. Swartz, 83 Va. 704, *citing* Const. of Va., art. IX, § 3.

[2] *Post*, ch. XII, § 5.

[3] *Id.*, §§ 2, 9.

when the declaration is filed, or the exempt character of the home property created, is bestowed by the husband and not by the state. It is done by the acceptance of the conditions of the exemption grant. He thus voluntarily relinquishes his lordship over his castle so far as the wife has come to share its disposition with him. Now she may keep a roof over her children's heads despite his speculative turn and despite the sheriff's hammer. She is not obliged actively to resist either, for she effects the purpose simply by withholding her hand.

The end sought by the law-makers is the keeping of the home in the family — the meeting of the mischief of household disintegration. The means are not commendable in every instance, but doubtless this restraint upon alienation and incumbrance is almost as effective to promote the conservation of family homes as the positive inhibition of general judgment liens in personal suits for debt.

In states where the acceptance of the exemption grant is upon the condition that the owning marital partner shall give an equal interest to the other, so that they become joint tenants, the effect upon the family permanency is the same as that above discussed. There is no denial of the right to sell (except in one state), if both husband and wife agree to do so.[1] Their conveyance needs the court's approval under an unusual statute requiring a judicial proceeding to dedicate the homestead in the first instance.[2] Husband and wife may mortgage or otherwise incumber their homestead, by joining together to do so;[3] but where there are restrictions upon sale, they usually apply also to the creation of liens by married persons.

The reason why homesteads are allowed to be saddled with property debts and allowed to be sold or abandoned, by the joint action of husband and wife, is that if parents agree upon any such disposition of the homestead, they may be presumed to act for the best interests of their children, or for their own best good if they are childless. Were prevention carried so far as to preclude such joint action, the homestead

[1] Woolcut v. Lerdell, 78 Ia. 668; Weigeman v. Marsot, 13 Mo. App. 576; Dudley v. Shaw, 44 Kas. 683; 24 P. 1114; Witherington v. Mason, 86 Ala. 345; *post*, ch. XII, §§ 1–3.

[2] Linch v. McIntyre, 78 Ga. 209.

[3] Ch. XII, § 4.

protection would become a detriment rather than a benefit to the family, in many instances; and the property would be so far taken out of commerce that the state would not have its welfare promoted by the homestead system without a serious drawback.

Restraint of testamentary disposition is another means of preventing the family's deprival of the homestead.[1]

Prevention, as a means of saving the home, has been carried so far as to exempt "from all liability," so that a judgment for tort has been held not enforceable against the homestead.[2] And even the interdiction of "any process whatever" has been attempted. No doubt a legislature may regulate the jurisdiction of courts, but there must be a limit to its right to curtail it — else all process might be taken from the courts. It is certain that the legislative department cannot obliterate the judicial altogether without violation of the constitutional distribution of governmental powers.

If the denial of any process against homesteads means that the state or general government cannot reach such property in executing a general judgment against the owner for fines, or under a judgment for forfeiture or confiscation, or in vindication of any right that may give rise to a proceeding *in rem*, it would seem that the police and other governmental powers (noticed in a former section) would be seriously impaired.

May not assessments, for street improvements, sewers, etc. (which are not taxes but forced contributions), be collected from the homestead property? May not federal remedies directly against property be enforced? May not nuisances be abated? Think of a householder having his property improved at the expense of his neighbor! Suppose the general government powerless to pronounce the condemnation of an illicit distillery upon a homestead! Imagine the case of a homestead holder who, with impunity, indulges the fancy of cultivating malaria on his exempt city lot by maintaining a putrid pond to breed *bacteria!*

[1] *See* ch. XIV.

[2] Conroy v. Sullivan, 44 Ill. 451; Smith v. Omans, 17 Wis. *395; Gill v. Edwards, 87 N. C. 77; Dellinger v. Tweed, 66 N. C. 206.

§ 9. The Governing Law.

The rights and relations of creditor and debtor, with respect to homestead exemption, are governed by the law in force at the date of the contract. "After a debt is contracted, the legislature cannot diminish the rights of the creditor, nor take from the debtor property previously exempt to apply on that particular debt." [1] This is true as to every remedy that is essential to the value of any stipulation to be enforced. The contract between principal and surety forms no exception to the rule. If there be a breach of the contract so as to give cause of action, the question of exemption, after judgment, with reference to execution, would be determined by the law existing when the contract was made — not when the breach occurred.[2]

The amount of exemption is governed by the law existing when the debt was contracted.[3] If a lien has attached before residency acquired, it holds good where exemption begins with occupancy.[4]

Not only the amount exempted in quantity and value, but the right of exemption itself, as against creditors, is governed by the law existing at the time the debt was contracted; as against sureties, by the law existing when the liability was assumed. The novation of the debt at a subsequent date does not affect the exemption. A new liability, succeeding the discharge of the original obligation, is governed by the law existing when it was assumed.[5]

Whatever of land or value was liable at the time the debt

[1] Dewitt v. Sewing Machine Co., 17 Neb. 533 (*citing* Dorrington v. Myers, 11 Neb. 388; Bills v. Mason, 42 Ia. 329; Warner v. Cummock, 37 Ia. 642); McHugh v. Smiley, 17 Neb. 620; Mooney v. Moriarity, 36 Ill. App. 175; Henson v. Moore, 104 Ill. 403.

[2] Bryant v. Woods, 11 Lea, 327; Drinkwater v. Moreman, 61 Ga. 395.

[3] Powe v. McLeod, 76 Ala. 418. Thus, eighty acres were exempt under the Alabama constitution of 1868 up to the act of April 23, 1873. Cochran v. Miller, 74 Ala. 50; Randolph v. Little, 62 Ala. 397; Giddens v. Williamson, 65 Ala. 439; Keel v. Larkin, 72 Ala. 493; Kelly v. Garrett, 67 Ala. 304; Blackwood v. Van Vleet, 11 Mich. 252; Aycock v. Martin, 37 Ga. 124.

[4] Murphy v. Hunt, 75 Ala. 438 (lien attached while the owner of the homestead was a non-resident); McCrary v. Chase, 71 Ala. 540 (to the same effect: overruling Watson v. Simpson, 5 Ala. 233).

[5] Keel v. Larkin, 72 Ala. 493; Fearn v. Ward, 65 Ala. 33; Munchus v. Harris, 69 Ala. 506; Slaughter v. McBride, 69 Ala. 510; Carlisle v. Godwin, 68 Ala. 137.

was contracted remains so when the debt is sought to be collected. A subsequent law enlarging the quantity of realty, measured by acres or money, which constituted the homestead when the debt was contracted, would not curtail the creditor's remedy in proportion to the addition.[1]

Upon a change of constitution, the homestead rights of debtors and the vested rights of creditors, existing under the old, are not displaced by the new constitution.[2] But a right to claim homestead under a constitution or statute is lost by repeal of the law, if not claimed before.[3]

The rule is that the homestead law in force at the time of the making of a contract governs in subsequent proceedings concerning the contract.[4] If, however, a new law has been passed, providing for a method of procedure different from the old, there is no apparent reason why the later should not be employed if no rights, remedial or other, are infringed so as to lessen the value of rights acquired under the contract.

Where the limitation of homesteads had been different when a widow's right to one arose on the death of her husband, from what it was under a new statute repealing the former, her allotment was according to the old law, but the proceedings under the new.[5]

The widow's right to homestead depends upon the law granting it at the time of the death of her husband. If such law made the declaration of homestead essential, and the husband declared none, it was held that the widow cannot claim, though a later law authorize her to do so.[6] On the other

[1] Cochran v. Miller, 74 Ala. 50; Keel v. Larkin, 72 Ala. 493; Wright v. Straub, 64 Tex. 64; Lowdermilk v. Corpening, 92 N. C. 333. See ch. VII, § 7, and the authorities there cited.

[2] Gerding v. Beall, 63 Ga. 561.

[3] Clark v. Snodgrass, 66 Ala. 233.

[4] Spitley v. Frost, 15 Fed. 299; Dorrington v. Myers, 11 Neb. 388.

[5] Dossey v. Pitman, 81 Ala. 381; Clark v. Spencer, 75 Ala. 49; Rottenberry v. Pipes, 53 Ala. 447; Taylor v. Taylor, 53 Ala. 135; Taylor v. Pettus, 52 Ala. 287; Alabama Code of 1876, §§ 2827, 2841; Skinner v. Chapman, 78 Ala. 376; Bolling v. Jones, 67 Ala. 508.

[6] The Tennessee code of 1858 said: "The homestead exemption in the hands of a husband shall, upon his death, go to his widow during her natural life or widowhood." Later acts, 1870 (2d ses.), ch. 80; 1879, ch. 171, give homestead to the widow. Threat v. Moody, 87 Tenn. 143. *Distinguished:* Vincent v. Vincent, 1 Heisk. 343; Merriman v. Lacefield, 4 Heisk. 209. See Langford v. Lewis, 9 Bax. 127.

hand, a change of statute cannot affect a widow's vested homestead right.[1]

The rights of minors are governed by the law existing when the parent died, from whom the rights are derived.[2] The tutor of a minor, appointed and qualified in 1877, filed his final account, in which he was shown to be indebted to the minor in 1888. There was judgment against him; but he sought to enjoin the execution of the judgment against his homestead, under the exemption act in force at the time of his appointment. The constitution that was adopted two years later excepted debts contracted or liabilities incurred in a fiduciary capacity, from exemption. As the tutor's indebtedness to his ward was not ascertained till the filing of the account, and did not arise from contract with the minor but from legal obligation; and as the homestead had not been previously set apart and registered as required by law;[3] and as the debt was contracted in a fiduciary capacity, the injunction was denied, as the later law governed.[4]

Statutory exemptions and privileges are granted subject to modification and repeal. All agreements between debtors and creditors are presumed to have been made with knowledge of the controlling power of the legislature. In contemplation of law, every beneficiary of exemption knows that the power which conferred the privilege he enjoys may recall it at will. By the amendment or repeal of an act, no vested right is divested, and no obligation of contract is impaired; the legislature violates no constitutional provision.[5]

§ 10. Summary of Leading Principles.

1. The family is the object of homestead legislation in the interest of society and the state.

2. The mischief which the law meets is family disintegration; the remedy is home protection: so, in the application of the remedy to the mischief, doubtful statutory provisions should be liberally construed.

[1] Register v. Hensley, 70 Mo. 189.

[2] Quinn v. Kinyon, 100 Mo. 551.

[3] La. Const. of 1879, arts. 219, 220; Act 14 of 1880.

[4] Platt v. Sheriff, 41 La. Ann. 856.

[5] Bolton v. Johns, 5 Pa. St. 145; Bleakney v. Bank, 17 S. & R. 64; Bull v. Conroe, 13 Wis. *233; Harris v. Glenn, 56 Ga. 94; Sparger v. Compton, 54 Ga. 185; Dobbins v. First N. Bank, 112 Ill. 560; Moore v. Litchford, 35 Tex. 185; Leak v. Gay, 107 N. C. 468; Cooley's Const. Lim., p. 383, § 479; *post*, ch. VII, § 7.

3. The remedy is threefold: exemption from forced sale for ordinary debts contracted after notice, restraint upon alienation by the owner's sole act, and inhibition of testamentary disposition.

4. The head of the family, owning the homestead, is presumed to assent to the imposed restrictions in consideration of the benefits conferred.

5. The law neither gives nor takes away title from the owner, nor affects it except by the owner's consent evinced by his dedication of his property as homestead, or by his becoming the head of a family occupying it — thus voluntarily placing himself under the law.

6. The title may be either freehold or leasehold or merely equitable, but there must be the right of exclusive possession. The fee may be voluntarily sold by the owner with the concurrence of his wife, while life estate or estate for years may be retained—either which estate will support the homestead right.

7. The wife's and the minor children's present interest in the homestead (assented to by the husband-father when he accepted the homestead conditions) is a *quasi*-estate which they enjoy but cannot convey, and which cannot be separated from the owner's title.

8. The spirit of the homestead laws favors marriage and opposes divorce; favors the rearing of children and opposes their disinheritance; favors the widow and orphan and postpones the partition of the homestead among heirs while any of them are minors.

9. The benefits may be surrendered by the husband and wife, who may sell or incumber or abandon the home; and, acting together, they may obliterate the *quasi*-estate of their minor children by any of those means.

10. The benefits are accorded on conditions, the principal of which are: family-headship, ownership, occupancy and dedication. The condition of occupancy is not slavish but allows temporary absence with intent to return.

11. The state may modify or withdraw the benefits which, though accepted by the beneficiary upon conditions, are not vested rights of contract.

12. The rights of the beneficiary are governed by the law in force when they were acquired, as to exemptions and limitations.

13. The limitations of homestead are quantitative or monetary, or both, varied in quantity between urban and rural homesteads; and there is no exemption of any excess.

14. Creditors, giving credit after notice that the home occupied by the debtor's family forms no part of the security for the debt when prosecuted to judgment, are not wronged by the exemption.

15. Political, public and private corporations, and all artificial persons, when in the capacity of creditors, are affected by homestead laws precisely as other creditors.

16. Creditors may look to the homestead for its purchase-money, or for the price of improvements thereon; for, exemption is not accorded to the beneficiary at the expense of others.

17. Creditors may enforce against the homestead any lien bearing upon it — any property-debt of the homestead itself — since exemption has reference to personal debts only.

18. Property held in partnership, joint-tenancy, or tenancy in common, and any undivided interest, may be the subject of exemption though not susceptible of being homestead.

19. Indivisible home property, exceeding the maximum of homestead in extent or value, may be sold by order of court, and the proceeds of the exempt portion may be invested in a new homestead, while the rest of the proceeds go to creditors.

20. Statutes which exempt in favor of poor debtors only, and provide for impecunious widows and orphans only; which, though called homestead laws, merely save from execution a prescribed value of realty and personalty, are not all in accordance with the foregoing principles. The mischief which they seek to meet is poverty; the remedy is the reservation of a part of the property from forced sale, or a part of its proceeds.

21. Federal homesteads, donated to settlers on the public domain, are governed by principles peculiar to themselves, and require separate treatment.

22. State homestead statutes are not uniform; there are exceptional provisions to which some of the above stated principles are inapplicable.

23. Chattel exemption differs, in many respects, from homestead exemption, as to its leading principles.

CHAPTER II.

CONSTRUCTION.

§ 1. Plain Statutes.
2. Words — How Construed.
3. Uniform Operation,
4. Liberal Interpretation.
5. Policy — How Far to be Considered.
6. Charitable Grounds.
7. Common right.
§ 8. Ruling to Prevent Fraud.
9. Restraint Upon Alienation.
10. Law of Wife's Property.
11. Statutes Not Extended by Construction.
12. Rival "Equities."
13. Conflicting Interpretations.
14. Constitutional Directions.

§ 1. Plain Statutes.

Homestead statutes are subject to the established rules of construction applicable to all statutes. There is no room for construction when the intention of the legislature is so expressed as to raise no question of the meaning. The rule is that courts must not interpret what has no need of interpretation.[1]

So it is held that where a provision of a statute is expressed in clear, precise and consistent terms, it does not need to be expounded, and courts are not permitted to go beyond it in order to restrain, elude or extinguish it.[2] It is not to be construed either strictly or liberally; not to be construed at all, whether it be in a homestead statute or any other. Its meaning is upon its face, presenting no problem to be solved, no obscurity to be relieved, no difficulty to be removed, nothing

[1] Arthur v. Morrison, 96 U. S. 108; Schooner Paulina, 7 Cr. 52; Benton v. Wickwire, 54 N. Y. 226–8; McClusky v. Cromwell, 11 N. Y. 601; People v. Schoonmaker, 63 Barb. 44; Schlegel v. Beer Co., 64 How. (N. Y.) 196; People v. Supervisors, 13 Abb. New Cas. 421; Clark v. Mayor, 29 Md. 283; Bonds v. Greer, 56 Miss. 710; Fitzpatrick v. Gebhart, 7 Kas. 35; Bosley v. Mattingly, 14 B. Mon. 72; Bartlett v. Morris, 9 Porter, 266; Logan v. Courtown, 13 Beav. 22; Kinderley v. Jarvis, 25 L. J. Ch. 541: Rex v. Commissioner, 6 Ad. & El. 17; Notley v. Buck, 8 B. & C. 164.

[2] Mallard v. Lawrence, 16 How. (U. S.) 251; Douglass v. Freeholders, 38 N. J. L. 214; Howard Ass'n Appeal, 70 Pa. St. 344; United States v. Fisher, 2 Cr. 358; People v. New York Ry. Co., 13 N. Y. 78; Canal Co. v. Railroad Co., 4 Gill & J. 152.

to be interpreted: so a bare reading of the statute is sufficient.[1]

Courts are not to be influenced by their own views of expediency or the wisdom of the legislature, or even by their own opinions of the justice of an enactment, when the language of the statute is plain and the intention of the legislature is free from doubt. They have no right to have any judicial policy relative to any law.[2]

Of the rule that statutes should be so construed as to give meaning to every provision, it has been judicially said: "We recognize the rule as valuable in aiding the court to discover the legislative purpose, which is the paramount end of construction; but it is not permissible to absorb the statute in the rule, nor to overturn the legislative will, that the rule may live. It is our duty to look at the statute from its four corners; to change the collocation of words and sentences if necessary; to consider the general purpose, if that be clear; to look to the history of legislation on the subject, and if, within the words of the statute so considered, the intent can be discovered, to give it effect."[3]

§ 2. Words — How Construed.

It is a settled rule that words are to be understood in a statute in their ordinary sense, unless a different shade of meaning is thrown upon them by the context. Technical terms are taken in their technical sense. When the import of words, either ordinary or technical, is obvious, there is no occasion for interpretation.[4]

[1] Ruggles v. Illinois, 108 U. S. 526; United States v. Hartwell, 6 Wall. 395; United States v. Wiltberger, 5 Wheat. 76; Coffin v. Rich, 45 Me. 507; Water Com'rs v. Brewster, 42 N. J. L. 125; Rudderow v. State, 31 N. J. L. 512; Pillow v. Bushnell, 5 Barb. 156; Sneed v. Commonwealth, 6 Dana, 339; Cearfoss v. State, 42 Md. 406; Denton v. Reading, 22 La. Ann. 607; Ogden v. Strong, 2 Paine, 584; Learned v. Corley, 43 Miss. 687.

[2] Hadden v. Collector, 5 Wall. 107; Reithmiller v. People, 44 Mich. 280; Sheley v. Detroit, 45 Mich. 431; State v. Clark, 54 Mo. 17, *36;* State v. Heman, 70 Mo. 441; Waller v. Harris, 20 Wend. 562; Jewell v. Weed, 18 Minn. 272; Douglass v. Freeholders, 38 N. J. L. 212; York Ry. Co. v. The Queen, 1 E. & B. 858; Munic. B. Society v. Kent, L. R. 9 App. Cas. 273.

[3] Fitzgerald v. Rees, 67 Miss. 473, *477.*

[4] United States v. Hartwell, 6 Wall. 395; United States v. Jones, 3 Wash. 209; Parkinson v. State, 14 Md. 184;

The words "owned" and "occupied" have clearly defined meaning. If we hear a man say, "That house is *owned* by me, and *occupied* as a residence by myself and my family," there would be no room for misunderstanding him. There are many other words and phrases of frequent occurrence in the various homestead statutes which are entirely free from ambiguity and are therefore to be received as they stand, without any construction strict or liberal, if the established rules of statutory construction are applicable to the legislation under consideration. "Owned" cannot mean to be owned in future; "occupied" cannot be understood as intention to occupy; "wife" is not a term applicable to a divorced woman; and other words, frequently occurring in homestead statutes, are equally free from ambiguity.

An example of an obscure word, as distinguished from the plain ones "owned" and "occupied" used in illustrating above, may be found in a homestead statute which provides that a dwelling-house, to be exempt from forced sale for debt, must be used or *kept* by the householder. The italicised word is obscure; for it may mean *preserved*, so that this condition of homestead privilege would be that the householder shall preserve the dwelling-house — not that he shall live in it necessarily; or, it may mean that he shall "keep house" therein, making the word in accord with the preceding one, "used," rather than an alternate condition.

Interpretation became necessary. It was held that there was alternation; that one of two conditions are necessary to the right of homestead under the statute: either "an actual personal use" of a dwelling-house, as a family home, or "an actual *keeping* of it," for a family home with the present right and purpose of so using it.[1]

A word of very familiar use, and ordinarily free from obscurity, may need interpretation when employed in a sentence. What is more generally understood than the word *family?*

Allen's Appeal, 99 Pa. St. 196; Green v. Weller, 32 Miss. 650; Vincent, *Ex parte*, 26 Ala. 145; Wetumpka v. Winter, 29 Ala. 651; Waller v. Harris, 20 Wend. 561; Newell v. People, 7 N. Y. 99; Clark v. Utica, 18 Barb. 451; Supervisors v. People, 7 Hill, 513; Engelking v. Von Wamel, 26 Tex. 469.

[1] Keyes v. Bump, 59 Vt. 395. *See* Bugbee v. Bemis, 50 Vt. 216; Spaulding v. Crane, 46 Vt. 292; Beebe v. Griffing, 14 N. Y. 244.

Yet, as found in the different homestead statutes, it may mean the householder and his wife and children, in one connection, while, in another, it may be applied to a household group not united by ties of kindred. It has had the first meaning assigned it for the most part, but there are decisions which recognize the other; the former under one form of statute — the latter under another, so that there is not necessarily a conflict of construction. The head of the latter kind of family may convey his homestead.[1]

The word *homestead* is frequently employed in exemption statutes as in common parlance, and more frequently in its technical sense as defined in the first section of this work. Which is intended by the legislator, in any case, may readily be ascertained by the context; and what he intended the courts are bound to accept, if there be no ambiguity.

§ 3. Uniform Operation.

A statute must operate uniformly and equally upon all who are subjected to it, under the circumstances which it embraces.[2] It may not be applicable to all persons, but only to all persons who are in the situation or circumstances contemplated by the act.[3]

The uniformity required is not dependent upon the number of persons within the operation of the statute, when it is broad enough to include all who may come within it.[4]

Applying the principles to homestead exemption, it will be seen that while the privilege is extended to heads of families only, in most of the statutes on the subject, it is not objectionable on that account as a matter of legislation. The provision is uniform as to all within the class; and no one is inhibited from coming within it. Manifestly, the judiciary cannot defeat by construction what the legislature is bound to

[1] McLean v. Ellis, 79 Tex. 398.

[2] People v. Cooper, 83 Ill. 585; People v. Wright, 70 Ill. 398; State v. Reitz, 62 Ind. 159; Hanlon v. Com'rs, 53 Ind. 123; Clem v. State, 33 Ind. 418.

[3] Ragio v. State, 86 Tenn. 272; McKinney v. Hotel Co., 12 Heisk. 104; Taylor v. Chandler, 9 Heisk. 349; State v. Burnett, 6 Heisk. 186; McAunich v. Miss. etc. R. Co., 20 Ia. 338; Thomason v. Ashworth, 73 Cal. 73.

[4] Phillips v. Mo. etc. R. Co., 86 Mo. 540; State v. Wilcox, 45 Mo. 458; U. S. Express Co. v. Ellyson, 28 Ia. 370; Bannon v. State, 49 Ark. 167; State v. Spaude, 37 Minn. 322.

follow as a principle. Courts cannot accord homestead rights to one man and deny them to another, both being in like circumstances; both complying with the conditions.

What are we to understand when it is said of courts, relative to homestead cases, that they "have endeavored, as best they could, to decide some of the questions presented, not upon general rules founded upon known and fixed principles which should govern all cases, but simply to determine the particular case by such rules of construction and analogy as were considered most applicable"[1] — what are we to understand from this? Certainly the full import of the words could not have been meant. The meagerness of legislation is mentioned as a reason for this course. But the enlightened tribunal which made the deliverance has shown, in other decisions, that departure from the fixed rule of uniformity is not countenanced.[2]

The rule of uniformity is so well established that the citation of authorities to sustain it seems superfluous; but the following extract is so apt that its insertion needs no apology. It is with reference to a homestead law.

"The statute is indeed to be liberally construed to insure the beneficial purpose of the provision; but the courts are not to constitute themselves the almoners of such beneficent purpose, and distribute bounties in their discretion, but rather to give such construction as shall establish a general rule applicable to all cases."[3]

§ 4. Liberal Interpretation.

When a word, a phrase, a sentence, a section or a whole statute does not express the intention of the legislature upon its face, free from ambiguity, the office of the interpreter is called into exercise. Only in such a case is a homestead law construable. The question raised is: What did the law-giver mean by the word phrase, sentence, section or statute? That meaning must be declared by the court, whether it be favor-

[1] Roco v. Green, 50 Tex. 489.

[2] Pool v. Wedemeyer, 56 Tex. 289; Baird v. Trice, 51 Tex. 559.

[3] Judge Redfield in Bugbee v. Bemis, 50 Vt. 219, quoted approvingly in Currier v. Woodward, 62 N. H. 66, in which it was said: "We can only interpret the statute according to its terms."

able or unfavorable to the judges' opinion of what homestead laws should be. The meaning is to be impartially ascertained without necessarily resorting to the rule of liberal construction.

If the matter to be construed may have two different renderings, either apparently expressive of the legislative intent, it becomes necessary to elect between the two. If the statute is remedial, and one rendering tends to meet the mischief and advance the remedy while the other does not, the former construction must prevail. The scales being balanced equally in other respects, preponderance must be given to one side by the touch of the court. Liberal construction is the rule. It is to be applied to homestead laws in such a case. They are remedial. They seek to meet the mischief of unhousing families by exempting homes from forced sales. The mischief to be met is not poverty in general, for the remedy is given only to holders of real estate who are heads of families, by most of the homestead statutes; it is not debt-paying, for the law favors the payment of debts, and the exemption provided is accorded to solvent as well as insolvent owners. The policy of the homestead laws is the conservation of homes for the good of the state; the mischief to be prevented by those laws is the breaking up of families and homes to the general injury of society and of the state; the remedy provided is the exemption of occupied family homes from the hammer of the executioner. Whether the exemption be only for the period of occupancy by the head of a family, or be extended during the life of his widow and the minority of his children, it is a remedy to be liberally accorded whenever the intent of the legislature is doubtful and the necessity of favoring or disfavoring a remedial provision is thus thrust upon the court.

The "mischief" and "remedy," as above set forth, have been not always clearly kept in view. It has been said that the debtor's benefit is the only design of the legislator in enacting a homestead law, and that there should be liberal construction to effect that design since the statute is remedial in nature and effect.[1] This seems to mistake both the mischief and the remedy. Many like deliverances might be collected,

[1] Felds v. Duncan, 30 Ill. App. 469, *474*.

but courts cannot always explain their declarations minutely, and one must understand that there was no thought of holding all debtors beneficiaries of the exemption privilege, or of denying that family conservation is really the object of homestead legislation. Apart from that object, there should not be liberal construction to screen a debtor from paying his just debts.

Respecting homestead statutes, liberal construction is the rule so far as concerns exemption. Both the letter and meaning of those statutes justify and require such interpretation. The protection of the family home from forced sale should be accorded by the courts in the same generous spirit which actuated the legislator in ordaining it. Within the true bounds of construction, they are bound to expound the law as written and designed, and cause it to be enforced so as to effectuate the public-spirited motive of the law-giver when providing for the conservation of homes for the general welfare of all the people of the state.

Courts have very frequently laid down that liberal construction is the rule. It is very well settled that it is the rule with respect to the exemption feature of homestead statutes. The decisions do not always qualify the application of it, but that is generally what is meant when general terms are employed. The professional reader will readily see that such unqualified statements have not been meant to go so far as to say that all the provisions of a homestead statute — such as restraint upon alienation, for instance — must be liberally construed.

Courts have not been lax in according to the homestead beneficiary all his rights and privileges. The cases holding liberal construction are so numerous that all cannot be conveniently given; and those here cited (though several of them are not discriminating) are presented with reference to the liberal construction of the *exemption provision* of homestead statutes.[1]

[1] Mitchelson v. Smith, 28 Neb. 586; Chopin v. Runte, 75 Wis. 361; Zimmer v. Pauley, 51 Wis. 282; Dunn v. Buckley, 56 Wis. 192; Kuntz v. Kinney, 33 Wis. 510; Connaughton v. Sands, 32 Wis. 387; Jarvis v. Moe, 38 Wis. 440; Weisbrod v. Daemicke, 36 Wis. 73; Swearingen v. Bassett, 65 Tex. 273–4; Roco v. Green, 50 Tex. 489; White v. Fulghum, 87 Tenn. 281;

Doubtless liberal construction is the rule relative to exemption, when there is something *construable*. Courts mean that, though they do not always particularize. In many of the cases just cited, and numerous others, it is broadly stated that homestead statutes are to be liberally construed, but they must be understood that it is so only when there is something needing interpretation, and only for the purpose of ascertaining the intention of the legislature that the mischief may be met and the remedy advanced. What a court has said broadly in one place is often limited and elucidated in another, so that the true doctrine appears. For instance, it was said by a supreme court that the exemption of a homestead from levy and sale for debt should be construed so as to suppress the mischief and advance the remedy;[1] but afterwards said, in another homestead case: "Where the terms of the statute are not plain, but admit of more than one construction — one of which leads to great inconvenience and injustice, and possibly to the defeat or obstruction of the legislative intent — then the court may, with a view to avoid such results, adopt some other construction more in accordance with the legislative intent."[2] Here the true doctrine is fully vindicated. Evidently the court had not meant, in the first case, that there should be liberal construction, or any construction at all, of a homestead statute when its terms are plain; nor had it meant that such a statute, when requiring construction, should be subjected to any other when it admits of but one.

Jackson v. Shelton, 89 Tenn. 82; Dickinson v. Mayer, 11 Heisk. 515, 520–1; Ren v. Driskell, 11 Lea, 649; Arnold v. Jones, 9 Lea, 548; Barber v. Rorabeck, 36 Mich. 399; Bouchard v. Bourassa, 57 Mich. 8; Campbell v. Adair, 45 Miss. 178, *182;* Wassell v. Tunnah. 25 Ark. 103; Roff v. Johnson, 40 Ga. 555; Norton v. Bradham, 21 S. C. 375, *381;* Robinson v. Wiley, 15 N. Y. 494; Bradshaw v. Hurst, 57 Ia. 745; Johnson v. Gaylord, 41 Ia. 362; Bevan v. Hayden, 13 Ia. 122; Montague v. Richardson, 24 Ct. 338; Peverly v. Sayles, 10 N. H. 358; Buxton v. Dearborn, 46 N. H. 44; Howe v. Adams, 28 Vt. 541; True v. Morrell, 28 Vt. 674; Mills v. Grant, 36 Vt. 271; Tipton v. Martin, 71 Cal. 325; Southwick v. Davis, 78 Cal. 504; Moss v. Warner, 10 Cal. 296; Graham v. Stewart, 68 Cal. 374; Schadt v. Heppe, 45 Cal. 433; Estate of Busse, 35 Cal. 310; Estate of Orr, 29 Cal. 101; Loeb v. McMahon, 89 Ill. 487; Deere v. Chapman, 25 Ill. 498.

[1] Norton v. Bradham, 21 S. C. 375, *381.*

[2] Savings Bank v. Evans, 28 S. C. 521, *citing* The King v. Beeston, 3 Term R. 594–5.

Where choice must be made between two renderings of equal plausibility, resort may be had to the general tenor of the statute. The established rule is applicable: "The spirit of a law may be referred to in order to interpret words admitting of two meanings; but not to extend a law to a case not within its fair meaning."[1] And the rule may be fairly applied when phrases, sentences or paragraphs are susceptible of two meanings. The cardinal purpose of the whole act has then a controlling influence, and all the parts must be made to harmonize if possible.[2]

"It is a fundamental rule of statutory construction that, if possible, effect shall be given to all the language of an act rather than that any part should perish by ascribing a greater and conflicting force to another part. The homestead law should be liberally construed to effect the objects in view in its adoption; but it cannot properly be enlarged by construction to create greater exempt estates than the legislature described in the language used."[3]

Courts cannot supply what is wanting in a plain law. It has been aptly said: "The right to a homestead exemption is purely statutory, and if not found in the letter and spirit of the law, it cannot be raised by implication, through the rule of liberal construction, which is applied to facilitate the object of the statute where the subjects of its bounty are made manifest."[4] And it may be added that the rule is applied to facilitate that object only when there is occasion to resort to it in the interpretation of something needing to be interpreted.

"We are not at liberty to disregard the statute; its provisions are binding upon us; and, in the absence of a compli-

[1] Beebe v. Griffing, 14 N. Y. 244.

[2] Commonwealth v. Liquors, 108 Mass. 19; Gates v. Salmon, 35 Cal. 576; Potter v. Safford, 50 Mich. 46; Reithmiller v. People, 44 Mich. 280; Whipple v. Judge, 26 Mich. 343; Kelly v. McGuire, 15 Ark. 555; Wilson v. Biscoe, 11 Ark. 44; Martin v. O'Brien, 34 Miss. 21; State v. Turnpike Co., 16 Ohio St. 308; City Bank v. Huie, 1 Rob. (La.) 236; Brooks v. School Com'rs, 31 Ala. 227; Dunlap, *Ex parte*, 71 Ala. 73; Clearfoss v. State, 42 Md. 406; Green v. Cheek, 5 Ind. 105; Aldridge v. Mardoff, 32 Tex. 204; Brooks v. Hicks, 20 Tex. 666; State v. Commissioners, 34 Wis. 162; Howard v. Mansfield, 30 Wis. 75.

[3] Quinn v. Kinyon, 100 Mo. 551, *554*.

[4] Little's Guardian v. Woodward, 14 Bush, 587.

ance with them, we can only declare the result flowing therefrom."[1]

Homestead is a strictly legal and statutory right, and equitable principles not recognized by the statute cannot be invoked to extend it, by a claimant of the right.[2] The legislative intent is all that the courts have to ascertain, and they must find it in the statute itself. They are not at liberty to limit or modify it by inferences from statutes on other subjects, when the intent is not clearly declared.[3]

§ 5. Policy — How Far to be Considered.

The policy of the state is so frequently adverted to in the construction of homestead statutes that it may be necessary to notice it briefly. The Supreme Court of the United States has said that the policy of the government with reference to any particular legislation is generally very uncertain; that "it is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."[4] Courts have little to do with the policy of the law when construing an act. Having ascertained the intention of the enactors according to the established rules of interpretation, they must give it effect whether the policy of the law be good or bad.[5]

If arguments, drawn from the policy of the law, or of the state, or of the legislature (all meaning practically the same thing), are to influence construction when the meaning of a provision cannot be ascertained from the provision itself, or from the context, or from the debates, or from any of the sources which must first be resorted to, they should be received with great caution, and with care on the part of the expounder lest unwittingly his own predisposition influence his conclusion.

The policy of the law is often given as a reason for construction in decisions upon homestead statutes. It is a very

[1] Schuyler v. Broughton, 76 Cal. 524.

[2] Casebolt v. Donaldson, 67 Mo. 308.

[3] Barber v. Rorabeck, 36 Mich. 399; Bouchard v. Bourassa, 57 Mich. 8.

[4] Hadden v. The Collector, 5 Wall. 111. To the same effect: Municipal Society v. Kent, 4 L. R. 9 App. Cas. 273.

[5] Pool v. Wedemeyer, 56 Tex. 287; Bosley v. Mattingly, 14 B. Mon. 73; Coffin v. Rich, 45 Me. 507; Lindenmuller v. People, 21 How. (N. Y.) 156; People v. Hoym, 20 How. (N. Y.) 76; Baxter v. Tripp, 12 R. I. 310; Roberts v. Cannon, 4 Dev. & Bat. L. 267.

vague and uncertain reason for judgment. There is danger that the judge unconsciously will substitute his own opinion of the policy for that of the legislator; so it has been held that courts, when interpreting a statute, have no right to judge of its policy.[1] Certainly they are not at liberty to pass upon its merits, its expediency or its utility.[2] They have the right, coupled often with the duty, of determining the character of the law as to its tendency to promote virtue, liberty and humanity, since, in its construction, they are required to be liberal for the promotion of such ends. But they must ascertain the character from the act itself as therein expressed or clearly implied — not from their own preconceived opinion of the policy of the act. "All sorts of opinions, each variant from the other, may be formed by different persons," on the policy of the government, as was said in the federal case above cited.

Policy, as consistent or harmonious with the intention of the law-giver, declared by him or inferred from the law under consideration, or from that and acts *in pari materia* altogether establishing a continuous purpose, must be recognized by courts; and they should not readily deem it abandoned by the legislator, in any particular case, because the language of the statute is ambiguous, or too general to express the policy in a particular instance. If the sense is consistent with settled policy, general expressions are not to be taken as authorizing a departure from that policy.[3]

If the policy of the law is not to be relied upon, as the highest court has said, what shall we say of the *policy of the court?* What of the enlargement of state policy avowedly in conformity to the latter? Take the following excerpt:

"It has come to be the settled policy of judicial rulings in this state, to construe our humane system of exemption laws with an enlarged liberality, that the remedy and benefaction

[1] Roberts v. Cannon, 4 Dev. & Bat. L. 267.

[2] Sheley v. Detroit, 45 Mich. 431; Reithmiller v. People, 44 Mich. 280; People v. Lawrence, 36 Barb. 177; Lindenmuller v. People, 21 How. (N. Y.) 156; People v. Hoym, 20 How. (N. Y.) 76.

[3] Minet v. Leman, 20 Beav. 269; Greenhow v. James, 80 Va. 636; Grenada Co. v. Brogden, 112 U. S. 261; Fort v. Burch, 6 Barb. 60; Baxter v. Tripp, 12 R. I. 310; Rowley v. Stray, 32 Mich. 70; Attorney-General v. Smith, 31 Mich. 359; Blackwood v. Van Vliet, 30 Mich. 118.

intended for the protection of the poor may be advanced rather than embarrassed by construction. And the spirit rather than the letter of these beneficent laws is to be looked to as the just criterion of interpretation."[1]

May we look beyond the letter for the meaning when there is no obscurity or ambiguity and therefore "no room for construction," on the plea that it is the policy of the courts to do so? The sense before grammatical nonsense — always; but no seeking of intent when the intent is not hidden. No *judicial policy* of "enlarged liberality" is known in the established rules of statutory construction.

In the case last cited, such liberality resulted in according to a claimant a homestead which neither he nor his family had ever occupied as a home; and it also resulted in the promulgation of this extra-statutory rule: that if a man "is compelled by his poverty to occupy rented premises, *the usufruct of the soil* by which his family is maintained must be *held to fix the homestead* intended to be protected."

This construction of the law, on ostensibly humanitarian grounds, is unwarrantable from the spirit of the homestead legislation, which is not for the poor alone but protects the mansion of the millionaire where there is no monetary limit, and cannot protect the abject poor who own no home. The man who owns soil from which he receives usufruct entitling him to homestead exemption (according to this deliverance) is likely to be less an object of charity than those around him who own no soil, and who may chance to be his creditors.

If the rule announced is to prevail in any case, it ought to be of universal application; yet it did not control a case, on similar facts, which soon followed it; usufruct did not fix homestead in the latter.[2] But in a later case, the decision declaring this rule was cited without qualification.[3] The doctrine, however, does not seem to have any root in the governing statute.[4]

[1] Dickinson v. Mayer, 11 Heisk. 515, *520*, Sneed, J. Approved, White v. Fulghum, 87 Tenn. 281.

[2] Wade v. Wade, 9 Bax. 612, approved in Collins v. Bozett, 87 Tenn. 334.

[3] White v. Fulghum, 87 Tenn. 281. *See* Arnold v. Jones, 9 Lea, 548.

[4] Acts of Tenn. (1870–1), p. 98; Code Tenn., § 2114*a*.

In the case last cited, it was said: "The homestead exemption is a favorite in this country, and all laws concerning it are by the courts to be liberally construed in favor of the claimant." But it is not true that favoritism among statutes should influence their construction, however liberally any remedial one may be entitled to be construed when construable. The policy of courts, to make any remedy a favorite, seems unwarrantable.

With respect to homestead policy and interpretation, in a comparatively recent decision, it was said: "Right or wrong, wise or unwise, from the beginning, neither the people in convention, nor the legislature, nor the courts have taken any backward step. Every change has extended the protection, and these have been sufficiently frequent to make the progress of expansion a steady march. When the courts have hesitated or halted, they have been brought forward into line by the law-making power.

"In the absence of definitive legislation to guide us, and *in obedience to the progressive tendency adverted to*, we hold against the preponderance of authority, but with the preponderance of reason, that a partner in a solvent firm may destinate his interest in partnership realty as a part of his homestead, and thus secure it from forced sale."[1]

The probability that legislation would advance so as to cover the question decided was no reason for its anticipation by the court.

§ 6. Charitable Grounds.

Doubtless charity, liberty, justice and morality demand liberal construction in their favor when the statute is dubious and therefore construable; but to hold homestead laws to have been made for the impecunious debtor only, and to make invidious distinctions between different classes of real estate owners (all must be such owners who claim homestead), is to go beyond the statutes of most of the states.

The legislative policy of conserving homes, though embracing the dwellings of wealthy householders as well as those of the poor, is incidentally humane and charitable. But, even if the prime design of the legislator were charity to the impe-

[1] Swearingen v. Bassett, 65 Tex. 273-4.

cunious, his enactments must be just as well as charitable. It goes without the saying that all laws must be just to commend themselves to a court of justice.

A homestead law, providing that the right of creditors to make their money out of property upon which they have given credit to the owner, without notice to them prior to the giving of the credit, would be unjust, however charitable to the debtor and his family. In the language of Lord Holt: "Let a statute be ever so charitable, if it gives away the property of the subject it ought not to be countenanced."[1] This principle has been pointedly applied to exemptions from forced sale under execution.[2]

It has been said: "The purpose and policy of the law is to provide a home and shelter for the surviving husband or wife and for the minor children."[3] But the state confers no home. Instead of "provide," it would be better to insert "protect." The policy is to conserve the home already owned and possessed: not to bestow one upon the houseless. This was evidently the meaning of the court which had previously said: "The estate of homestead is given to every householder having a family, in the farm or lot of land, and buildings thereon, *owned or rightly possessed*, by lease or otherwise, and occupied by him or her as a residence."[4]

If the object of homestead laws is the protection of families from want and dependence, as has been said,[5] the legislator ought to have compassion on the abject poor families of his state, instead of confining his charity to those who own houses. To favor the freeholder, and withhold from the landless, the homeless and the penniless, is queer charity.

No doubt homestead statutes are remedial, and therefore the intention of the legislature, evidenced by them, is to be liberally construed when construction becomes necessary; and the statutes are to be fully enforced — no vested rights being molested. But the idea of their being thus construed as laws

[1] Calladay v. Pilkington, 12 Mod. 513.

[2] Danforth v. Woodward, 10 Pick. 423; Buckingham v. Billings, 13 Mass. 82.

[3] Capek v. Kropik, 129 Ill. 509, *519*.

[4] *Ib.*, p. 518.

[5] Tumlinson v. Swinney, 22 Ark. 400; McKenzie v. Murphy, 24 Ark. 157; Greenwood v. Maddox, 27 Ark. 655.

whose principal aim is charity has been too prevalent in decisions.

What right has any court to assume, in the absence of evidence on the subject in the case at bar, that the creditor is rich and the debtor poor? Especially, in a homestead case, when there is this known of the debtor: *that he is a freeholder* or leaseholder — has a home — while the creditor may be homeless. If the homestead holder "is in debt it is because some one has trusted him, and he has received an equal value in money or other property to that which can be taken. The creditor is not to be treated as an enemy who is robbing him. He too may want a home, and often would have had one could he have received his due. He may have a wife and children likewise in need. He but demands a fair show before the law to collect his debt and enable himself to acquire home comforts, but no sentiment is wasted on him. . . . But they are nevertheless as dear to him, and should be as sacred to the courts." [1]

The prevalent system does not regard homestead as charity. But there are exceptional ones which do. The charity idea prevails where the homestead right is accorded only in case there are minors in the family who have no property in their own right sufficient for their support,[2] and wherever it is accorded only in case of poverty.

§ 7. Common Right.

A statute derogatory to common right is subjected to strict construction. This rule is as well supported by decisions relative to different classes of cases as any other, though but a few need be cited.[3]

Homestead exemption is not in derogation of the rights of creditors, in the common-law states; but in the one state

[1] Judge Snodgrass, for the court, the J. I. Case Company v. Joyce, 89 Tenn. 337, *347*.

[2] Woods v. Perkins (La.), 9 So. 48.

[3] Marsh v. Nelson, 101 Pa. St. 51; Mayor v. Hartridge, 8 Ga. 23; Flint, etc. Steamboat Co. v. Foster, 5 Ga. 194; Monson v. Chester, 22 Pick. 385; Danvers v. Boston, 10 Pick. 513; Pinkham v. Dorothy, 55 Me. 135; Mitchell v. Rockland, 45 Me. 496; Sprague v. Birdsall, 2 Cow. 419; Webb v. Baird, 6 Ind. 13; Rothgerber v. Dupuy, 64 Ill. 452; Walker v. Chicago, 56 Ill. 277; Sutherland on Statutory Construction, § 366, citing above cases.

governed by the civil law, it is so held, and the rule of strict construction is applied. The debtor's property is the common pledge to all creditors; it is that to which credit is given, though no conventional lien be created; and hence any statutory inhibition of its forced sale to make the debtor pay his debts is deemed inimical to the creditor's right and interest, and therefore to be strictly construed. For this reason, and under the operation of this rule, homestead laws are, in that state, strictly construed as being in derogation of common rights, and beneficiaries are required to bring themselves within both their spirit and letter.[1]

It would be derogatory to common right, if the creditor should be cut off from making his money out of the debtor's property to which he had looked for security when giving credit. In other words, if the world were not notified that the homestead is exempt, any creditor might look to it for his security. But the world is notified by the statute, by the recording when required, by occupancy, or in some way, in every state (not excepting the one just singled out as holding the strict construction theory), that creditors need not look to the homestead for pay. After such notice, there is nothing derogatory to common right in the law's withholding the exempt property from the creditor.

While the common-law states generally hold that the exemption of homesteads is not derogatory to the common right, yet there are decisions in those states which treat it as thwarting a means long accorded to creditors in this country, as well as in others, and therefore not to be extended by construction. Without denying the doctrine of liberal interpretation for the purpose of conserving family homes, they keep in view the other side of the question when the privileges of debtors and the rights of creditors come in conflict. The following excerpts may present this view:

"It is quite true that the homestead act is to have a liberal

[1] Kinder v. Lyons, 38 La. Ann. 713; Galligar v. Payne, 34 La. Ann. 1057; Bossier v. Sheriff, 37 La. Ann. 263; Tilton v. Vignes, 33 La. Ann. 240; Coyle v. Succession of Creevy, 34 La. Ann. 539; Succession of Furniss, 34 La. Ann. 1013; Poole v. Cook, 34 La. Ann. 331; Gilmer v. O'Neal, 32 La. Ann. 979; Thomas v. Guilbeau, 35 La. Ann. 927; Bridewell v. Halliday, 37 La. Ann. 410; State v. The Judges, etc., 37 La. Ann. 109.

construction to effectuate its purpose to provide homes for the families of debtors; but, at the same time, it is to be remembered that it is in derogation of the general policy of the law which subjects the property of debtors to the just claims of their creditors; and it is to have operation and effect so far, and so far only, as the legislature has determined."[1]

"While we are disposed to uphold a very liberal construction of the homestead exemption, which, with proper limitations, we think is consistent with the wisest public policy, yet we cannot assent to such a construction as would infringe upon the just rights of others, which also demand protection from the courts of the country. "The sound principle of morality and equity, that we should be just before we are generous, should apply to the departments of government which represent the sovereignty of the people, as well as to the individual members who compose this sovereignty."[2]

It is said that the exemption of a homestead from levy and sale for debt should be construed so as to "suppress the mischief and advance the remedy:" it is not in derogation of the common law.[3]

The fact that real estate was not liable to execution, for the ordinary debts of its owners, at common law, has nothing to do with the question whether the creditor now has a right to look to such property for his money. That right is universally recognized, and therefore notice to him is necessary if the legislator would take the right away either wholly or in part. Hence the constitutional necessity of limiting the operation of exemption to debts subsequent to the passage of a law exempting homesteads from execution for debt.

Some states fix a future day after which exemption shall be operative; others provide that debts, contracted after the adoption of the constitution or statute authorizing the homestead, shall not be enforceable by its execution, with certain exceptions. There is nothing novel; for all statutes are to be construed to operate prospectively, unless a retrospective effect be clearly intended.[4]

The qualification is inapplicable to homestead statutes, so

[1] Lamb v. Mason, 50 Vt. 350.
[2] Baird v. Trice, 51 Tex. 559.
[3] Norton v. Bradham, 21 S. C. 375, 381. *Contra:* Garaty v. Du Bose, 5 S. C. 500.
[4] Harvey v. Tyler, 2 Wall. 347;

far as the accrued rights of creditors are concerned. It may be said without any reference to retrospective intent on the part of the legislator, that any law which exempts property from forced sale for debt must be prospective.[1]

Though it is now well settled that the exemption granted in homestead statutes cannot apply to debt antecedent to their passage, and that such application would so seriously affect the creditor's remedy as to impair his contract and therefore be violative of the federal constitution,[2] yet there have been numerous decisions holding or favoring such retroaction.[3]

"Statutes, by the authority of which a citizen may be deprived of his estate, must have the strictest construction; and the power conferred must be executed precisely as it is given, and any departure from it will vitiate the proceedings; and this is so whether it be in the exercise of a public or private authority, whether it be ministerial or judicial."[4]

Palmer v. Conly, 4 Denio, 374; Jackson v. Van Zandt, 12 Johns. 176; Hackley v. Sprague, 10 Wend. 116; People v. Supervisors, 10 Wend. 365; Snyder v. Snyder, 3 Barb. 621; Blanchard v. Sprague, 3 Sum. 535; Wheedon v. Gorham, 38 Ct. 412; Perrin v. Sargeant, 33 Vt. 84; Simonds v. Estate of Powers, 28 Vt. 554; Seamans v. Carter, 15 Wis. 548; Paddon v. Bartlett, 3 Adolph. & E. 884; Hitchcock v. Way, 6 Adolph. & E. 943; College v. Harrison, 9 B. & C. 524; Chambliss v. Jordan, 50 Ga. 81; Larence v. Evans, 50 Ga. 216; Smith v. Whittle, 50 Ga. 626.

[1] Ely v. Eastwood, 26 Ill. 107; Smith v. Marc, 26 Ill. 150; Dopp v. Albee, 17 Wis. 590; Estate of Phelan, 16 Wis. 76; Succession of Taylor, 10 La. Ann. 509; Milne v. Schmidt, 12 La. Ann. 553; Succession of Foulkes, 12 La. Ann. 537; Roupe v. Carradine, 20 La. Ann. 244; Shelor v. Mason, 2 S. C. 233; McKeithan v. Terry, 64 N. C. 25; The Homestead Cases, 22 Gratt. 266; Tillotson v. Millard, 7 Minn. 513.

[2] Louisiana v. New Orleans, 102 U. S. 203; Edwards v. Kearsey, 96 U. S. 595; Gunn v. Barry, 15 Wall. 610; Von Hoffman v. Quincy, 4 Wall. 552.

[3] Morse v. Goold, 11 N. Y. 281; Cook v. McChristian, 4 Cal. 23; Cusic v. Douglas, 3 Kas. 123; Root v. McGrew, 3 Kas. 215; Sneider v. Heidelberger, 45 Ala. 126; Gunn v. Barry, 44 Ga. 353; Pulliam v. Sewell, 40 Ga. 73; Chambliss v. Phelps, 39 Ga. 386; Hardeman v. Downer, 39 Ga. 425; *Re* Kennedy, 2 S. C. 216; Hill v. Kessler, 63 N. C. 437; Grimes v. Bryne, 2 Minn. 89; Rockwell v. Hubbell, 2 Doug. (Mich.) 198; Stevenson v. Osborne, 41 Miss. 119; Baylor v. Bank, 38 Tex. 448; Bigelow v. Pritchard, 21 Pick. 174; Hill v. Hill, 42 Pa. St. 198; Baldy's Appeal, 40 Pa. St. 328; Neff's Appeal, 21 Pa. St. 243.

[4] Sharp v. Spier, 4 Hill, 76; Sherwood v. Reade, 7 Hill, 431; Striker v. Kelly, 2 Denio, 323; Power v. Tuttle, 3 N. Y. 396; Downing v. Ruger, 21 Wend. 178.

§ 8. Ruling to Prevent Fraud.

Courts cannot be too careful to construe the homestead statutes so as to discountenance fraud. The statutes themselves may almost be said to open the door to fraud, in some respects. Certainly a great deal of moral fraud finds its way into transactions which the statutes allow. Creditors not being concerned in transactions in which exempt property changes hands are not defrauded by them in a legal and technical sense. Courts, however, should always disfavor morally fraudulent transactions, though they can give creditors no relief where the statute gives no power to do so. It was well said: "We believe that the provisions of the homestead laws should be carried out in the liberal and beneficent spirit in which they were enacted, but care should be taken at the same time to prevent them from becoming the instruments of fraud."[1]

The rule that statutes against fraud should be liberally interpreted is a very ancient one, and is universally honored. Under liberal interpretation, it was long ago held that cases of fraud may be within the spirit of the statute when not within the letter; that "all such statutes are in the advancement of justice, and beneficial to the public weal, and therefore shall be extended by equity."[2]

But, as Mr. Bigelow remarks, such extension by the courts is "so unusual and dangerous a proceeding as not to be applied to new cases without the strongest reason."[3] The liberal construction of doubtful provisions written in the statute, however, is not a proceeding either dangerous or unusual, when made in the interest of justice and against its opposite.

And statutes not expressly aimed against fraud are to be liberally construed to save them from giving countenance to it, when ambiguous expressions are liable to be understood either as favoring or as disfavoring injustice. The scales hanging equally so far as linguistic adjustment is possible, courts are to make the right outweigh the wrong when bound to decide one way or the other. It is presumed that the legislator meant to be just. There is never presumption that he meant

[1] Drucker v. Rosenstein, 19 Fla. 191, 199.

[2] Wimbish v. Tailbois, Plowd. 38, 59.

[3] 2 Big. on Fraud, p. 60.

to be unjust: so, before courts can hold that, they must find unmistakable warrant in the statute.

Homestead laws form no exception to this rule. That they should be construed so as to carry out the intention of the law-giver is true: so of all statutes. That they, specially, should be so construed because of their beneficence, does not render them exceptional to the rule against fraud. Who would say, that because statutes favoring liberty against slavery, morality against vice, religion against sin, and the like, are to be interpreted liberally to effect their intent, therefore fraud may be protected under the cover of their wings? How paradoxical to say that a law to promote justice may have one of its provisions of ambiguous import explained so as to defeat the object of the law!

§ 9. Restraint Upon Alienation.

The general rule is that any owner may sell. A law forbidding the sale of property, real or personal, would be against commerce and against right. The restraint put upon the free alienation of homesteads is, however, with the assent of the property owner. When he complies with the conditions and claims exemption, he has assented to the curtailment of his freedom to vend at pleasure, and has agreed to comply with the law. The proffer on the part of the state, and the acceptance on the part of the property-holder, do not constitute a contract. The state is free to alter the law at pleasure, and the property-holder may abandon exemption at will, if he injure no one by doing so. There is no contract, yet there are mutual obligations. And so long as the householder claims the exemption privilege accorded him by a statute which inhibits his sole alienation of the thing exempted, he is in the position of one assenting to the restraint.

The general rule, without special reference to homestead statutes, is that laws in restraint of the alienation of property must be strictly construed.[1] And, with special reference to those statutes, the liberal construction generally accorded them is held to be so tempered that constitutional and statutory restrictions upon alienation should be construed no more liber-

[1] Richardson v. Emswiler, 14 La. Ann. 658; Gunter v. Leckey, 30 Ala. 591; Sewall v. Jones, 9 Pick. 412.

ally than may be necessary to effect the object of the legislator; that the *jus disponendi* is a vested right, protected by the constitution of the United States.[1]

And it has been so frequently held that there can be no conveyance of the homestead, so as to bar or defeat the exemption right, without strict compliance with the terms of the governing statute, that the rule may be considered as established.[2]

In the conveyance of homesteads, strict construction is the rule in the interpretation of statutes with respect to the execution of deeds and mortgages, and their acknowledgment.[3] The official certificate of the acknowledgment must be in full compliance with the statutory requirement.[4]

But the rule of strict construction is not so rigid as to prevent the correction of a manifest omission in the mortgage of a homestead given by both husband and wife. A word or figure supplied with their consent after signing, duly made to appear to the court, will not render the instrument nugatory.[5]

"The homestead right can be barred only by complying strictly with the laws prescribing the mode of alienation."[6]

§ 10. Law of Wife's Property.

Statutes which enlarge the wife's power over her separate property are generally construed strictly, because they are

[1] Hughes v. Hodges, 102 N. C. 236, *citing* Bruce v. Strickland, 81 N. C. 267; U. S. Const., art. 1, § 31; and holding that a solvent owner may deed his land without his wife's joinder, except (1) when it has been allotted to him as a homestead; (2) when there are judgment liens on it which may render allotment necessary; (3) when an undefined homestead has been reserved in a mortgage given; (4) when the conveyance is fraudulent and no homestead has been allotted in other lands. A revaluation is not allowable, after allotment. Gulley v. Cole, 102 N. C. 333.

[2] Connor v. McMurray, 2 Allen, 202; Dickinson v. McLane, 57 N. H. 31; Hoge v. Hollister, 2 Tenn. Ch. 606; Black v. Lusk, 69 Ill. 70; Ives v. Mills, 37 Ill. 73; Fisher v. Meister, 24 Mich. 447; Cross v. Everts, 28 Tex. 532; Barnett v. Mendenhall, 42 Ia. 296; Lanahan v. Sears, 102 U. S. 318.

[3] Wheeler v. Gage, 28 Ill. App. 427.

[4] *Ib.;* Warner v. Crosby, 89 Ill. 320; Best v. Gholson, 89 Ill. 465; Smith v. Miller, 31 Ill. 157; Boyd v. Cudderback, 31 Ill. 113; Vanzant v. Vanzant, 23 Ill. 485.

[5] Casler v. Byers, 29 Ill. App. 128, and 129 Ill. 657.

[6] Greenough v. Turner, 77 Mass. 332; Connor v. McMurry, 84 Mass. 202; Moore v. Titman, 33 Ill. 360; Kitchell v. Burgwin, 21 Ill. 45; Hoge v. Hollister, 2 Tenn. Ch. 606; Dickinson v. McLane, 57 N. H. 31; Howell v. McCrie, 36 Kas. 636.

innovations upon the common law, and are considered derogatory to her husband's rights. Courts construe them as not increasing her right to hold and administer property, or to make contracts, further than the natural import of the words declare and authorize; that is, that the law increasing her power over her separate property is not to be liberally construed.[1]

When new rights are conferred upon a married woman relative to the management or disposition of her property, or to her power to contract, the methods prescribed for her exercise of such rights must be observed substantially in letter and spirit.[2]

Since laws restraining the *jus disponendi* must be strictly construed (as shown in another section of this chapter), the provisions of constitutions and statutes which forbid the husband from alienating the homestead without the consent of his wife[3] are inapplicable to the alienation of it by her when she is the sole owner. She may convey her own separate property without the consent of her husband, though it constitute the family homestead, notwithstanding the provisions mentioned. For the inhibition cannot be extended by implication, so as to include her under the applicable rule of construction.[4]

It has been unwarrantably inferred, under the constitution above cited, from her right to alienate her separate property used as a family homestead, that she may abandon it, desert her husband, give him notice to quit, and then remove him by

[1] Sutherland on Stat. Constr., § 400, *citing* Compton v. Pierson, 28 N. J. Eq. 229; Cook v. Meyer, 73 Ala. 580, 583; Gibson v. Marquis, 29 Ala. 668; Canty v. Sanderford, 37 Ala. 91 (and other Alabama cases); Cunningham v. Hanney, 12 Ill. App. 437; Triplett v. Graham, 58 Iowa, 135; Quick v. Miller, 103 Pa. St. 67; Dorris v. Erwin, 101 Pa. St. 239; Pettit v. Fretz, 33 Pa. St. 118; Morgan v. Bolles, 36 Ct. 175; Weber v. Weber, 47 Mich. 569; Longey v. Leach, 57 Vt. 377; Reynolds v. Robinson, 64 N. Y. 589. *Contra:* Billings v. Baker, 28 Barb. 343; Goss v. Cahill, 42 Barb. 310; De Vries v. Conklin, 22 Mich. 255.

[2] Mattox v. Hightshue, 39 Ind. 95; Shumaker v. Johnson, 35 Ind. 33; Bagby v. Emberson, 79 Mo. 139; Hoskinson v. Adkins, 77 Mo. 537; Bartlett v. O'Donoghue, 72 Mo. 563; McCallum v. Petigrew, 10 Heisk. 394; Leggate v. Clark, 111 Mass. 308; Beckman v. Stanley, 8 Nev. 257; Armstrong v. Ross, 20 N. J. Eq. 109; Montoursville Overseers v. Fairfield, 112 Pa. St. 99; Miller v. Ruble, 107 Pa. St. 395; Innis v. Templeton, 95 Pa. St. 262.

[3] Const. of Mich., art. 16, §§ 1–4; Stat. of Wis., §§ 2225–6.

[4] Price v. Osborn, 34 Wis. 34.

action of ejectment.[1] This construction is at variance with the law of domicile, of the wifely duties and of the letter and spirit of the law of marriage, and is not likely to be followed in states other than that in which the decision was rendered. Evidently, upon her own return to the homestead, she would have no right to enjoin him from returning. She could not treat him as a common trespasser. By deserting her husband she acquired no greater right over her property than she would have had if she had remained at their common domicile. She could have conveyed it without deserting him, and the grantee could then have ejected both, so that they would go out together, and the mutual conjugal duties would not have been violated. Considered as a construction of the constitutional provision restraining the husband only from alienating the domicile without his wife's consent, the inference drawn, from her right to sell when she is sole owner, that she may therefore solely abandon it and then force him to do so, seems extreme.

Under prior decisions, the husband had a possessory interest jointly with her, and her desertion of him and the family and the home did not deprive him of it.[2]

The statute of another state which gives a married woman absolute control of her separate property is construed not to enable her to forbid her husband from entering upon the premises.[3]

A wife cannot oust her husband from the homestead while she remains his wife, though living apart from him, unless his conduct would justify separation or divorce, it has been held;[4] and the exception seems groundless.

The restraint, in most of the states, applies to both husband and wife, whichever may own the homestead. Where dedication and recordation, of the property set apart as exempt, are required, the wife alone cannot alienate or mortgage her own separate property thus voluntarily dedicated, as a general rule;

[1] Buckingham v. Buckingham, 81 Mich. 89.

[2] *See* Rowe v. Kellogg, 54 Mich. 209; Griffin v. Nichols, 51 Mich. 579; Pardo v. Bittorf, 48 Mich. 275; Henry v. Gregory, 29 Mich. 68; Snyder v. People, 26 Mich. 110; Hodson v. Van Fossen, 26 Mich. 69.

[3] Cole v. Van Riper, 44 Ill. 63-4.

[4] Manning v. Manning, 79 N. C. 293.

never, when the constitution or statute forbids conveyance unless made by both spouses. The construction is strict, and is not relaxed in favor of the wife.[1] Even if she makes her separate deed accordant with a separate one given by her husband, it has been held that it would be inoperative.[2]

She cannot renounce homestead in a separate act by her, though she might relinquish dower.[3]

And even where formal dedication is not required, the right to sell her own homestead has been qualified. It was held that when abandoned by her husband she may sell it.[4] This was held under a constitution which forbids the alienation of the homestead without the joint consent of husband and wife when the owner is married.[5]

§ 11. Statutes Not Extended by Construction.

When a statute does not reveal the intention of its framers, and the proper resorts to ascertain the meaning (such as reference to the debates and to laws *in pari materia*) fail to cast any light, it cannot be rewritten by the courts under their power of construction. Sense must be made of it, when that can be done legitimately. The interpreter must bring the sense out of the statute and not put a sense into it.[6] That the legislature intended to express something is a manifestly rightful presumption; yet, if nothing is found to be expressed, after all rules of interpretation have been exhausted, it is plain that the legislature has failed to effectuate the intent.

No consideration or argument drawn from the rule of liberal construction will justify a court in adding to a statute what the legislature has not put into it.[7]

[1] Larson v. Butts, 22 Neb. 370; Swift v. Dewey, 20 Neb. 107; Aultman v. Jenkins, 19 Neb. 209.

[2] Cowgell v. Warrington, 66 Ia. 666; Clark v. Evarts, 46 Ia. 248; Barnett v. Mendenhall, 42 Ia. 296.

[3] Eisenstadt v. Cramer, 55 Ia. 753; Wilson v. Christopherson, 53 Ia. 481.

[4] Hector v. Knox, 63 Tex. 613.

[5] Const. of Texas, §§ 50–2.

[6] Lieber's Hermeneutics, 87; McCluskey v. Cromwell, 11 N. Y. 601.

[7] Wright v. Westheimer (Idaho), 28 P. 430. Sullivan, C. J., said for the court: "It is contended that the homestead and exemption statutes should be liberally construed. We concede this proposition. Section 4 of the Revised Statutes declares, among other things: 'The statutes of this state, and all proceedings under them, must be liberally construed, with a view to effect their objects and to promote justice.' Aside from this provision, we can hardly conceive the necessity or pro-

A court, usually conservative, has said: "By reason of our meagre legislation, the courts, from necessity, by liberal construction and intendment, *have been forced to infringe upon that domain which more properly belongs to another department of the government*, and have endeavored as best they could to decide some of the questions presented, *not upon general rules founded upon known and fixed principles which should govern all cases*, but simply to determine the particular case by such rules of construction and analogy as were considered most applicable."[1]

There are parts of this extract which indicate that rules of construction and reasons drawn from analogy were employed by the court, though there is the frank avowal that "general rules founded upon known and fixed principles which should govern all cases" were not thought indispensable. Neither "meagre legislation," nor any plea whatever, can justify a court's encroachment upon the legislative domain. Nothing will justify the extension of a statute by construction, so as to make it express what was not meant by the framers. There is a case (which will be cited when chattel exemption comes to be treated) in which the court said that the statute exempted only three hundred dollars but by construction the amount had been increased to four hundred. By such con-

priety of strictly construing a statute of mercy or benevolence. But, as our statutes are silent upon the question under consideration, this court will not undertake to supply omissions made by the law-making power. This court must distinguish between enacting laws and construing them. Through motives of humanity towards the debtor and his family, exemption and homestead laws have been enacted. Prior to their enactment the law was as cruel as Shylock to the unfortunate debtor, and his wife and children had to suffer. It may be truthfully urged that they sometimes assist unprincipled men to consummate the most cruel frauds. However, in the vast majority of cases, their operation is beneficial and humane. They assure to the family a home. 'They mitigate the harshness of the cruel, grasping creditor, and give to the unfortunate debtor a place of refuge and a gleam of hope.' We are of the opinion that an amendment of our homestead laws, exempting the proceeds from a voluntary sale for a reasonable time, would be in the interest of humanity. For, however much such an amendment may be desired, this court will not assume the power to amend the statutes, and thus usurp the legislative functions of a co-ordinate branch of our state government."

[1] Roco v. Green, 50 Tex. 489.

structions of a statute as those above mentioned, it may be lost in its clothes.

It is not common for courts to admit that they go beyond the law, but there are many instances of such lapses without acknowledgment. And the poverty of the homestead claimant, or the humanitarian spirit of the law, is made the reason for the judicial enlargement of the statute in many a particular case, when the fact of such extension is not stated in the opinion. Not only has homestead without occupancy been awarded: homestead without either occupancy or family-headship has been recognized from the date of ownership — subsequent compliance with the occupancy-condition being held to retroact, by the law of relation, to the wedding-day, and to the prior day of the purchase of vacant land.[1] A young freeholder's destitution of other land was adduced as a reason for granting him exemption in this, and his attitude as one looking for his bride to come was seriously mentioned, though the statute made no partial provisions for such situations, and though many of his creditors probably — and all, possibly — were poorer than himself.

Unless the principle, on which the decision was founded, has warrant in the statute as interpreted by a fixed rule applicable to all like cases, the court has here trenched on legislative ground.

When a statute operates on conditions, confers a benefit upon the performance of some act by the beneficiary, and makes no provision for the retroaction of the performance so as to make the benefit anterior by the law of relation, the courts cannot render the condition retroactive. The homestead privilege is conferred on the conditions of ownership, family occupancy, family headship, and sometimes the further one of dedication. It seems very clear that the act of occupying a home cannot render it exempt back to the date of the purchase of the property now used as a family dwelling for the first time, unless such retroaction is expressed or implied in the statute.

There are numerous decisions, however, which hold such retroaction, if the land-holder has meant to occupy, though a year or more may have intervened between the purchase and

[1] Reske v. Reske, 51 Mich. 541.

his occupancy of the property. They can be sustained only on the ground that from the date when exemption was allowed by law or constitutional provision the creditor had notice. It is not designed to adduce the cases now, as they will be presented hereafter, especially in the chapter on Occupancy.

It has even been held that the performance of this condition may not only relate back to the date of the purchase, but also to that other requirement — family headship: so that an unmarried man may become a land-holder, get married, settle on the land with his wife at his leisure, and then defeat a judgment rendered when he had neither wife nor home.[1]

§ 12. Rival "Equities."

It was said by an able judge: "The preservation of the homestead is, under the policy of our law, considered of more importance than the payment of debts. That is what a homestead means — exemption from debts. It is not so much for the debtor as for the debtor's family. And the family of the debtor have, in this respect, equities superior to the creditor."[2] Is it so? Are we seriously to compare the value of home preservation with the duty of debt-paying? Are there any "equities" to be marshaled to ascertain which is "superior?" Is the family to be housed by denying a creditor what is due him? Would its members be more benefited by roof-shelter than by having an honest husband and father?

The case is wrongly put. The homestead is not exempt from debts antecedent to the passage of the exemption law, and all subsequent ones were contracted with knowledge on the part of the creditor that they could not be enforced against the homestead. No debt that exists against it (such as a mortgage debt contracted by husband and wife) is put in competition with any homestead "equity," by the policy of the law. On the contrary, the homestead holder must pay it, as an honest man, bound to benefit his family by setting good example.

There is, therefore, no creditor of the homestead (outside of the exceptions made by the statute), to come into rivalship with the beneficiaries, to be denied a just claim because they have "equities superior."

[1] Reske v. Reske, *supra*.

[2] La Rue v. Gilbert, 18 Kas. 220.

The constitution and laws whence the policy stated was inferred [1] do go very far towards suggesting the denial of rights, when it is ordained in the former that the homestead of given limits "shall be exempted from forced sale under any process of law," except for taxes, purchase-money or improvements. But it does not mean that a creditor's right to make his money out of a homestead, vested in him before the debtor and his family had acquired the exemption right, may be brought into competition with the latter and deferred to it. And no such right (unless under one of the three exceptions) can be subsequently vested in him. What is his due, the law accords. He can get judgment against his debtor, the head of the homestead family, but not against his dwelling-house.

The learned judge doubtless did not mean that the creditor should be wronged that the debtor and his family may be benefited. The writer objects merely to the comparison, as though these were claims to be ranked according to their privilege.

§ 13. Conflicting Interpretations.

It has already appeared, and will appear more palpably further on, that there is not perfect agreement in the construction of similar statute provisions by courts of different states. What is the profession to do under the circumstances? Let each practitioner respect the decisions of his own state as law within its borders, when they are settled, yet let him remember that if they are demonstrably wrong they will be entitled to no respect, as law, in other states. So, when he finds in the reports of other states deliverances which are not supported by good reason, and especially those which fail to follow the statute ostensibly expounded, let him discard them as authority in his state.

"If different interpretations are given in different states to a similar law, that law, in effect, becomes by interpretation, so far as it is a rule for action by the federal courts, a different law in one state from what it is in another." [2]

It is true that interpretations of statutes which have been long acted upon cannot be suddenly changed without public inconvenience and liability to injury. Lord Mansfield said:

[1] Const. Kansas, art. 15, sec. 9; Gen. Stat. (1889), § 235.

[2] Christy v. Pridgeon, 4 Wall. 196.

"When solemn determinations, acquiesced under, have settled precise cases and become a rule of property, they ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute."[1]

§ 14. Constitutional Directions.

The legislature of a state, within the bounds of governmental legislation and the limitations imposed by the federal constitution, may do whatever is not forbidden by the state constitution, provided it do not trench upon rights reserved to the people. The inalienable personal rights to life, liberty and happiness cannot be wantonly disregarded; in other words, tyranny cannot be exercised by the legislator.

Within the bounds mentioned, the legislature may do what is not constitutionally forbidden, and therefore may enact homestead laws without express authorization by the constitution. But, as it is not obliged to do so when the organic law is silent on the subject, it may be required to do so by that law. It is ordained in several state constitutions that the legislature shall enact a homestead law; in several others, homestead ordinances are incorporated which are self-operative; in some, directions are imposed. Where monetary or chattel exemption is ordained by the constitution, homestead of realty may yet be left subject to the legislative will, or it may be expressly required that a statute authorizing it shall be passed, or restrictions upon the power (existing without such requirement) may be put upon the legislature by the constitution.

Take the following for illustration: "Every householder or head of a family shall be entitled . . . to hold exempt from levy . . . issued on any demand for any debt heretofore or hereafter contracted, his *real and personal* property, or either, including money and debts due him, whether here tofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him."[2] This is neither a homestead ordinance, nor a requirement that the

[1] Wyndham v. Chetwynd, 1 Burrow, 419; Gilpelke v. Dubuque, 1 Wall. 175; State v. Thompson, 10 La. Ann. 122; Long v. Walker, 105 N. C. 90; Scott v. Kenan, 94 N. C. 296; Grantham v. Kennedy, 91 N. C. 148; Sedgwick on Stat. & Const Law, 254.

[2] Const. Va., art. 11, § 1.

legislature shall enact a homestead law: it is exemption of two thousand dollars from execution. But, following this, there is direction to the legislature: "The general assembly shall . . . prescribe in what manner and on what conditions the said householder or head of a family shall thereafter set apart and hold, for himself and family, a homestead out of any property hereby exempted, and may, in its discretion, determine in what manner and on what conditions he may thereafter hold for the benefit of himself and family such personal property as he may have, and coming within the exemption hereby made."[1] The distinction apparent here between "a homestead out of any property," and "personal property," indicates that realty may be set apart as a homestead while there yet may be personal property exempt, provided both do not exceed the monetary limitation. The provision relative to the realty is mandatory while that respecting personalty is directory. The mandate is confined to the regulating of the homestead if the householder should elect to take part or all of his constitutional exemption in that form.

Pursuant to the mandate, the legislature enacted, among other things: "The homestead provided in this act shall continue after his [the householder's] death, for the benefit of the widow and children of the deceased, until her death or marriage, and after her death or marriage for the exclusive benefit of his minor children, until the youngest child becomes twenty-one years of age, after which period it shall pass, according to the law of descents, as other real estate, or as may be devised by said householder, not being subject to dower, yet subject to all debts of the said householder or head of a family."[2]

This exemption was held constitutional, as being in harmony with the above mandate and direction, and as containing nothing inhibited; so, upon the expiration of the homestead privilege, the property saved by it may be subjected to forced sale to pay any or all of the householder's debts accrued either before or after the homestead was set apart.[3]

The exemption may not continue after the death of the householder, though he leave a widow and children. For the

[1] *Ib.*, § 5.

[2] Code of Va. (1873), ch. 183, § 8.

[3] Hanby v. Henritze, 85 Va. 177.

exemption is from debts: how, if there be none? "It is clear," said the court in exposition of the above-quoted provisions of constitution and statute, "that if the householder dies intestate, and there are no debts as against which the homestead can be held exempt, the exemption ceases altogether, and the land therefore set apart as a homestead goes, if the intestate died seized of an estate of inheritance, according to the statute of descents, to the heirs at law, subject to the widow's right of dower, if the intestate leaves a widow."[1]

On the other hand, though the householder may not have exercised his privilege of claiming homestead, his widow may claim it for herself and the children, if he left debts.[2] If both forego claiming, and the debts equal the estate in amount, the whole property must be distributed ratably among the creditors unless some of them are entitled to priority.[3] If either have claimed homestead yet waived it in favor of certain creditors, all of the creditors share alike the excess above exemption, and the homestead is last touched by those favored by the waiver.[4] If the householder has made a general waiver of homestead, his widow cannot disregard it, and claim after his death.[5]

The exemption affects creditors — not heirs. No "estate of homestead" is created so as to affect title by descent. The householder is entitled to a real estate exemption and not a mere right to claim homestead. This was held in a case in which an insolvent claimed it, after having fraudulently conveyed the most of his realty to his wife, then made an assignment in bankruptcy and claimed the full monetary exemption out of the property surrendered. Not getting his claim allowed in the bankrupt court, he set it up against the realty which he had conveyed to his wife, after his conveyance was set aside for fraud. Homestead exemption was awarded to him out of this property.[6] It was so done on the above cited articles of the constitution, and on prior decisions holding that "where a conveyance is set aside for fraud, at the suit of the

[1] Barker v. Jenkins, 84 Va. 895; Helm v. Helm, 30 Gratt. 404.

[2] Scott v. Cheatham, 78 Va. 82; Hatorff v. Wellford, 27 Gratt. 356.

[3] *Ib.;* Code of Va., ch. 126, § 25.

[4] *Ib.;* Strange v. Strange, 76 Va. 240.

[5] Reed v. Union Bank, 29 Gratt. 719.

[6] Hatcher v. Crew's Adm., 83 Va. 371.

grantor's creditors, he is not estopped as against them to assert his claim of homestead in the property embraced in the deed."[1] A small sum had been allowed the insolvent by the bankrupt court — less than a hundred dollars — so he was allowed to eke it out to the full limit of two thousand, out of the land which he had sworn was not his — not being estopped by his oath.[2] It had previously been held that a debtor may supplement his original homestead to make the aggregate equal the maximum allowance.[3]

Ordination in a constitution that homestead exemption "shall be construed liberally to the end that all intents thereof may be fully and properly carried out,"[4] is nothing more than an insertion of the well known rule of interpretation that the intention of the legislature must be respected. Courts would have been bound to do this in the absence of the mandate quoted. No greater obligation rests upon them by reason of the application of the rule to a particular subject by the constitution framers.

Constitutional provisions relative to homesteads cannot be departed from by the judiciary, in the exercise of equitable jurisdiction, to declare any indebtedness a lien on such favored property, unless the debt be such as is excepted from the exemption.[5]

By some state constitutions, the homestead is declared "exempt from attachment, levy or sale, on any mesne or final process issued from any court."[6] In construing such a provision, the court says that it must take effect in one of two modes: either by creating remedial rights, in certain persons, enforceable by action or defense, or by limiting the jurisdiction of the court. If the constitution prohibits judicial process, the levy of an execution on the exempt property would be absolutely void. The defendant may do nothing yet be secure. The statutory requirement that the debtor must assert his right of

[1] Shipe v. Repass, 28 Gratt. 734; Boynton v. McNeal, 31 Gratt. 459; Marshall v. Sears, 79 Va. 49.

[2] Hatcher v. Crews' Adm., *supra*.

[3] Oppenheimer v. Howell, 76 Va. 218. Hatcher's fraudulent conveyance set aside in Hatcher v. Crews, 78 Va. 460.

[4] Const. Va., art. XI, sec. 7.

[5] Jenkins v. Simmons, 37 Kas. 496: "The constitution of the state prescribes the manner of its [the lien's] creation, and this must be strictly followed."

[6] Const. S. C., art. II, § 32. *See* Const. of Ga. (1877), art. IX, §§ 1, 2, 4.

exemption if he would avail himself of it would be nugatory, and even derogatory to the constitution, under this construction. A sale on mortgage foreclosure, except for purchase-money, would be invalid. A valid lien might be defeated by a subsequently arising right of homestead exemption. The court concluded: "That such consequences do not flow from the constitution is evident, not only from the consideration of the principles of construction, but from the opposite conclusions reached by this court, in general harmony with the views that have prevailed wherever the system of homestead exemptions has been adopted. On the other hand, the conclusion that the constitution intended, as its proper effect, the investing of the debtor with a right of exemption that must be asserted, . . . is clear."[1]

[1] Pender v. Lancaster, 14 S. C. 25.

CHAPTER III.

FAMILY HEADSHIP.

§ 1. The Constitution of the Family.
2. The Headship of the Husband.
3. United Headship of Husband and Wife.
4. Desertion by the Wife.
5. Divorce; Effect on Homestead.
6. Divorce; Forfeiture by Divorced Party.
7. Acquisition by Widower or Widow.
8. Unmarried Beneficiary.
9. Lack or Loss of Family.
10. Claiming after Loss of Family.
11. Comment.

§ 1. The Constitution of the Family.

Family headship is as important a condition as ownership and occupancy, and more generally required than dedication, when the privilege of home exemption is to be accepted under the statutory offer. It is not a condition universally requisite but is very general. The legislator, to secure the stability of family homes already established on real estate owned and occupied by the housekeeper with his wife and children, or with either, or with other dependents where they are recognized by statute as members of the family, has provided that his homestead, as defined or limited by law, shall be free from liability to forced sale by ordinary creditors, while his own right to incumber or alienate it is partially restrained.

Not his own benefit only, but that of his family; not the benefit of both only, but that of the public, is the purpose of the legislature in thus favoring homes to secure their stability. Homes are the units which, summed up, compose the state; they are the factors which make up political society.

The head of a family, usually the owner of the residence occupied by himself and his wife and children (or by other dependents where the statute includes them as members of the legal family), is not only himself a beneficiary, but the representative and trustee of the other beneficiaries under his charge.[1]

[1] Moore v. Parker, 13 S. C. 490.

The conjugal and parental relations are the family elements which the legislator has in view when providing immunity for homes. It is not likely that any homestead law would ever have been passed, had all families been mere aggregations of persons without bonds of kinship and affection. It is the father's and mother's fireside, with their children around it, which such laws have primarily in view when guarding the home against forced sale and against private sale by one parent alone. It is their home and their family which the state is most interested in protecting and fostering and encouraging. But, in the absence of the conjugal and parental relations, there are groups of persons which appeal to the legislator for protection: a son supporting his aged parents; a brother maintaining a dependent sister, and the like. Some statutes expressly name the classes of persons, outside of such relatives, who may be homestead beneficiaries.

The word "family," as commonly employed, carries the idea of members related to each other by blood or affinity. It is a relation of *status;* not one of mere agreement or contract. In this sense, servants or employees are not members; and a man or woman is not the head of a family who has only such persons living with him or her.[1]

The householder, claiming homestead immunity, must be under legal obligation to support the members of his household who are dependent upon him. Dependence alone is not sufficient — the obligation, on his part, seems to be the test.[2] In a broad sense, not only parents and their children, but domestics and others composing the household are bound together by mutual relations — one of the group being the protector and provider while the others are his dependents or subalterns;[3] but obligation to support them may be wanting. The relation of master and servant, being one of contract and

[1] Murdock v. Dalby, 13 Mo. App. 41, 47; Cahoun v. McLendon, 42 Ga. 406; Garaty v. Du Bose, 5 S. C. 498. *See* Wade v. Jones, 20 Mo. 75; *Re* Lambson, 2 Hughes, 233; Whitehead v. Nickelson, 48 Tex. 530; Howard v. Marshall, 48 Tex. 471; Seaton v. Marshall, 6 Bush, 429; Sallee v. Walters, 17 Ala. 488.

[2] Galligar v. Payne, 34 La. Ann. 1057; Dendy v. Gamble, 64 Ga. 528; Lathrop v. Ass'n, 45 Ga. 483; Roco v. Green, 50 Tex. 490; Hill v. Franklin, 54 Miss. 632.

[3] Wilson v. Cochran, 31 Tex. 680; Taylor v. Boulware, 17 Tex. 74.

not of social *status*, is not the family relation. All such relations, when there is no duty on the part of the householder to support those living with him, are beyond the contemplation of the homestead laws in their provision for exemption, as a general rule.[1]

The statutory inclusion of "persons dependent for support" on the householder, as members of the family, so as to entitle him to homestead exemption, has been declared not to embrace orphans voluntarily housed, brought up and supported by the claimant who was under no legal or natural obligation to foster them. "However praiseworthy" . . . the charity "may be, the law, in its justice and wisdom, will not permit him to impose, on his honest creditors, the burden of his bounty."[2]

"Dependent for support" means actual and necessary dependence by persons unable to earn a livelihood, who have some natural claim.[3]

It is argued that if one could obtain a homestead as the head of a family of members whom he is not bound in law to support, he might refuse to support them after obtaining it and become sole beneficiary.[4]

The moral obligation to support dependents has been thought sufficient to render the obligor entitled to the homestead privileges when such dependents compose his family.[5] There can

[1] Wilson v. Cochran, 31 Tex. 680; Calhoun v. McLendon, 42 Ga. 406; Marsh v. Lazenby, 41 Ga. 153; Sears v. Hanks, 14 O. St. 298; Barney v. Leeds, 51 N. H. 253; Whalen v. Cadman, 11 Ia. 226; Garaty v. Du Bose, 5 S. C. 498; Sanderlin v. Sanderlin, 1 Swan, 441.

[2] Galligar v. Payne, 34 La. Ann. 1057. (See dissenting opinion.) Taylor v. Elvin, 31 La. Ann. 283.

[3] Decuir v. Benker, 33 La. Ann. 320; Cox v. Stafford, 14 How. (N. Y.) 521; Whalen v. Cadman, 11 Ia. 226; *In re* Lambson, 2 Hughes, 233.

[4] In Georgia, a householder's dependent sister and her children, living with him, did not constitute his family in such a sense as to entitle him to a homestead as the head, nor did it render them beneficiaries, under Ga. Const. of 1868. Dendy v. Gamble, 64 Ga. 528; Blackwell v. Broughton, 56 Ga. 392. And in Mississippi, the shelter of an adopted daughter and her husband, who supported themselves, did not render the householder a head of family so as to entitle him to the exemption of his residence from sale under execution. Hill v. Franklin, 54 Miss. 632.

[5] Cox v. Stafford, 14 How. (N. Y.) 521; Blackwell v. Broughton, 56 Ga. 390; Greenwood v. Maddox, 27 Ark. 658; Wade v. Jones, 20 Mo. 75; Parsons v. Livingston, 11 Ia. 104; Allen v. Manasse, 4 Ala. 554; Connoughton v. Sands, 32 Wis. 387; State v. Kane, 42 Ill. App. 42.

be no such moral duty when there are no lawful means of performing it: therefore, to hold that the duty of paying honest debts must give way to this (as has been held or intimated),[1] seems untenable.

When there is legal obligation to support persons who are not the children of the family head, the right to acquire a homestead exists in the householder.[2] It is not such legal obligation as arises from a contract to support persons, for a consideration, who have no claim otherwise on the householder, but it is where he is bound to maintain them as members of his family without any corresponding compensation contributed on their part.

§ 2. The Headship of the Husband.

The declaration or dedication of the homestead is usually by the husband and father, as the representative of the family. The statutes generally require that the owner and occupant of the property to be set apart shall be a householder over a family; and the husband and father usually answers that description. It is his household especially which the legislator means to protect in their home, though the benefits of the homestead provisions are not limited to families in which the conjugal and parental relations exist.

The husband, in dedicating his own property to family purposes under the homestead law of his state, and recording it as thus set apart, voluntarily gives certain rights, present and prospective, to his wife and children, beyond those which they had before. Or, if he lives in a state where formal declaration and recording are not required, he is presumed to have consented to the conferring of such rights upon his family by marrying, becoming a father, and occupying his home. As the representative of his family, he controls the home, makes the selection of the property they are to live upon, and may change his domicile at will, though he is not free to alienate it by his own, separate act. In acquiring homestead, the action of the family head concludes the members composed of his wife and children.[3]

[1] McMurray v. Shuck, 6 Bush, 111; La Rue v. Gilbert, 18 Kas. 220.

[2] Marsh v. Lazenby, 41 Ga. 153.

[3] Neal v. Sawyer, 62 Ga. 352; Morrill v. Hopkins, 36 Tex. 686; Hartman v. Thomas, 37 Tex. 90 (*see*

The wife and children are bound in duty to live wherever the husband and father makes his home. His domicile is theirs. His right of homestead immunity, and theirs, depends upon their keeping together. He cannot make their residence apart from his, and cut off their right to occupy the homestead with himself, without forfeiting it. But his temporary absence, while the right to return to the hearth-stone remains, and while his home continues to be theirs, does not affect his family headship.

A father who has his children at school away from home, or temporarily separated from him, in any way, while his relation to them as his family continues, is still the head of it, and may become the declarant of a homestead in his and their behalf.[1] It is necessary, however, that he should retain the position of householder.[2] Though living temporarily alone, he controls the children who are under his charge, is responsible for them, keeps a home for them, and answers the purpose which the law has in view in making him the beneficiary of the homestead provisions.

The subordinate beneficiaries are not affected by every act of their head. What would expose the home place to forced sale under ordinary circumstances would not necessarily do so after the rights of such beneficiaries have been conferred. What might work forfeiture, if he stood alone, will not always affect their vested rights. A judgment rendered against him for tort, which could be enforced by execution against any other real estate of his, cannot be executed against his homestead, in some states, because of the rights and interests of the wife and children in that particular property, and because of the policy of the state to conserve it for the family.[3]

The parental relation is tenderly cherished by the state. The right of the father to have a home for them protected from the hammer of the official auctioneer is recognized and secured in all the homestead states. The natural relation is

Walker v. Young, 37 Tex. 519); Dawson v. Holt, 44 Tex. 174; Nevins' Appeal, 47 Pa. St. 230; Hand v. Winn, 52 Miss. 788; Camp v. Smith, 61 Ga. 449; Howze v. Howze, 2 S. C. 232; Richards v. Green, 73 Ill. 54; Shepard v. Brewer, 65 Ill. 383; Burson v. Fowler, 65 Ill. 146; Clubb v. Wise, 64 Ill. 157; Buck v. Conlogue, 49 Ill. 391; Wright v. Dunning, 46 Ill. 271; Brown v. Coon, 36 Ill. 243.

[1] Seaton v. Marshall, 6 Bush, 429.

[2] Veile v. Koch, 27 Ill. 129.

[3] Conroy v. Sullivan, 44 Ill. 451.

everywhere regarded as a sacred one which the law must respect. But there is not quite the same consideration paid to the artificial relation existing between persons and their adopted children. Ordinarily, when the adoption is by some legally required act, the parental relation is deemed to have been established by compliance with the requirement, and the law extends its recognition and protection as though the relation were natural. So far as homestead protection to artificial families is concerned, the governing statute of each state must be consulted. One may stand *in loco parentis* to children whom he has adopted; or those whom he has brought into his family by marriage with their mother, so as to become their representative, capable of bestowing homestead rights and protection upon them by selecting such property for the purpose as the law allows to be dedicated.[1] The interests of the state may be subserved; the good of society may be promoted, and therefore the policy of homestead legislation carried out, by the recognition of his family headship.

The family head must be domiciliated in the state where he seeks to acquire homestead, according to most of the statutes. Were the rule otherwise, he might have several protected properties; indeed, he might have one in each homestead state, and thus turn what the legislators meant as beneficial to the state into a great abuse.

Some of the statutes confine the privilege of acquiring homestead immunity to citizens. The word *citizen* is used in different senses Whether the word, as employed in any of those statutes, exclusively means a person either native born or naturalized, is open to judicial construction.

Where the right of acquiring homestead immunity is confined to citizens of the state, it has been held that a resident or inhabitant may acquire, though he is not a citizen in the political sense.[2]

Actual residence, without reference to citizenship, will en-

[1] Chamberlain v. Brown, 33 S. C. 597; 11 S. E. 439; Sanderlin v. Sanderlin, 1 Swan, 441; Moyer v. Drummond, 32 S. C. 165; 10 S. E. 952; Capek v. Kropik, 129 Ill. 509. *Compare Re* Lambson, 2 Hughes, 233; *post*, § 7.

[2] McKenzie v. Murphy, 24 Ark. 155; Cobbs v. Coleman, 14 Tex. 594; People v. McClay, 2 Neb. 7; Hawkins v. Pearce, 11 Humph. 44.

able a head of a family to declare upon his property, when citizenship is not made indispensable.[1]

There is difference between the head of a family who is married, and one who is single, with reference to the conveyance of the homestead. So, if a deed absolutely conveying the homestead of the grantor, upon its face, be offered in evidence, the fact that he is a married man may be proved by parol; and the effect will be to strike the deed with nullity if he only has signed it, when the law requires that his wife shall sign also, to make the conveyance valid.[2]

The terms "married man" and "head of a family" are not synonymous.[3]

When the statute provides that the head of a family may have a homestead exempted in land owned by him, the husband, as such head, cannot have the homestead carved upon his wife's land, nor is she entitled to have one upon her own land. Both together cannot assert the homestead right in her land as against a judgment on their joint debt.[4]

He is the head, and to him and his property the statute refers. But, were she the head, there would be no reason for denying her homestead on her own land (no judgment now considered); for the use of masculine pronouns in the statute would be of no consequence.

§ 3. United Headship of Husband and Wife.

The law recognizes husband and wife as the united head of their family for homestead purposes. It allows either to own the property upon which the homestead privilege of both is based. It allows either to claim the benefit when the other does not; and the plaintiff may ask immunity from debt on his or her own separate property, or on that of the other spouse, or on community property, as the title and the governing law may be.

Both the marital partners constitute one head of the family, in some sense; the husband alone is usually named in the

[1] Dawley v. Ayers, 23 Cal. 108; Williams v. Young, 17 Cal. 403; Lowe v. Stringham, 14 Wis. 222.

[2] McLean v. Ellis (Tex.), 15 S. W. 394; Howard v. Zimpelman (Tex.), 14 S. W. 62.

[3] *Id.;* Thompson v. King (Ark.), 14 S. W. 925; Railway Co. v. Adams, 46 Ark. 159.

[4] Turner v. Argo, 89 Tenn. 443.

books as *the* head, as in common parlance. It is the home of parents and children which the legislator especially seeks to conserve. Though there be no children, the husband and wife compose such a family as the homestead provision seeks to favor.[1] The law favors the marital relation. Especially do the homestead laws favor it. Two persons bound by no ties, such as two partners in business, living together, would not constitute a family, while a married pair are accorded family privileges, under those laws.

The wife may represent the united head in applying for homestead, at his request, or upon his neglect to apply in behalf of the family.[2] If the title is owned by the husband in fee, it has been held that he only can declare homestead, or have it accorded upon application.[3]

The wife need not state in her declaration that she makes it because her husband has not done so. She should aver the fact that he has not done so, and that she makes it for the joint benefit of both.[5] The assignment of reasons would be advisable even where not required. If he has assented to her application, it would be better to aver it; but the circumstances may be such that his assent would be presumed when she applies in behalf of the family.[5]

If he is away upon business, or is an invalid, or has habitually intrusted to her the conduct of his business, the presumption would be the more readily recognized.

If the wife owns the fee, she is the proper person to have it made the family reservation or exempt home.[6] She has thus the dedication of her own separate property. Her degree of competency, however, varies in different states.[7]

But if she is childless, and the wife of a non-resident, she is incompetent to claim homestead.[8] In such case, she would

[1] Kitchell v. Burgwin, 21 Ill. 40; Trotter v. Dobbs, 38 Miss. 198; Partee v. Stewart, 50 Miss. 721; Cox v. Stafford, 14 How. (N. Y.) 521.

[2] McPhee v. O'Rourke, 10 Colo. 301: Bowen v. Bowen, 55 Ga. 182; Cheney v. Rogers, 54 Ga. 168; Smith v. Ezell, 51 Ga. 570; Page v. Page, 50 Ga. 597; Larence v. Evans, 50 Ga. 216; Connally v. Hardwick, 61 Ga. 501; Farley v. Hopkins, 79 Cal. 203.

[3] Richards v. Greene, 73 Ill. 54.

[4] Farley v. Hopkins, 79 Cal. 203; Booth v. Galt, 58 Cal. 254.

[5] Connally v. Hardwick, 61 Ga. 501.

[6] Partee v. Stewart, 50 Miss. 720.

[7] Fusilier v. Buckner, 28 La. Ann. 594.

[8] Keiffer v. Barney, 31 Ala. 196.

represent no family within the state. She would stand alone, and therefore would not be entitled to a privilege accorded to families. The state's interest is in family homes, so far as homestead laws subserve it.

A husband having had all his separate property set apart as a homestead, his wife cannot have another one set apart out of her property for the benefit of herself and her children — two of whom are by a former husband and one by the present head of the family — though all three of the children are minors.[1] She is not *the* head of a family while she has a husband, and any proceeding to give her alone a homestead, as such, would be a nullity.[2]

Where homestead privileges are accorded by law to "every resident" of the state,[3] may the husband and the wife each claim, so that the united head of the family can have two homesteads? Each is a "resident of the state." It is held that though they are two residents in the ordinary acceptation of the word, they are one for homestead purposes, so that, living together, they cannot have two exempt residences. If, for instance, the wife is the legal owner, so that the homestead could not be sold for his debts even in the absence of an exemption law, he cannot have another tract, which belongs to him, saved from execution for his debts.[4]

The object of the legislator is to conserve the home occupied by the family; not to protect two homes of one married pair from the claims of creditors.[5]

It is of little importance whether the homestead be owned

[1] Neal v. Sawyer, 62 Ga. 352.

[2] *Ib.;* Camp v. Smith, 61 Ga. 449, 451.

[3] Ala. Code, 1886, § 2507.

[4] Beard v. Johnson, 87 Ala. 729: in which Tyler v. Jewett, 82 Ala. 93, and Discus v. Hall, 83 Ala. 159, are *distinguished* from it. *See* Partee v. Stewart, 50 Miss. 717.

[5] *See* Weiner v. Sterling, 61 Ala. 98; Bender v. Meyer, 55 Ala. 576, rendered under the former code of Alabama, § 2820. In North Carolina, every resident of the state has the right of homestead in his land allotted to him, exempt from sale on any final process obtained on any debt, with specified exceptions. The homestead right and exemption continue during the life of the beneficiary and the minority of his children, and during the widowhood of his widow if she has no homestead in her own right. Const., art. 10, §§ 2, 3, 5. When, by allotment, the wife's right to homestead has arisen, it cannot be diverted without her consent given by signing the deed for conveyance. Gilmore v. Bright, 101 N. C. 382; Ganson v. Baldwin (Mich.), 53 N. W. 171.

by the head of the family occupying it, or by one of the other members. If the family would be rendered homeless by its sale, the result would be what the legislator designed to prevent. Sale by creditors of the husband-father, or by those of another member owning the property, would be the same in result.[1]

§ 4. Desertion by the Wife.

A husband does not cease to be the head of a family, in the eye of the law, by reason of his desertion by his wife. As the head, he keeps his home to which she may return. While the marriage relation exists, he is what the homestead law means by the term "head of a family," though he has no family but his wife, and she has left the home.[2] Should he die, she would become a widow; and her desertion of her husband is not everywhere treated as an abandonment of the homestead, so as to cut her off from her rights as survivor.[3]

The relation of marriage is so sacred, and the sanctity of the family home so reverenced by the law, that so long as there is hope of such a deserter's return to the domestic hearth, her legal right to do so is respected. Her bonds of wedlock, not severed by judicial decree, hold fast till death.

A wife who left her husband because of his ill-treatment of her, and resided away from his home, but visited it frequently to nurse him in sickness, was held not to have abandoned her home, nor to have forfeited her rights as a wife under the homestead law.[4]

But there are several cases which hold that a wife, by deserting her husband without cause, and living apart from him till his death, forfeits all right to the homestead held by him when he died.[5]

[1] Carolina N. Bank v. Senn, 25 S. C. 572, 581. *See* Norton v. Bradham, 21 S. C. 381; Bachman v. Crawford, 3 Humph. 213.

[2] Gates v. Steele, 48 Ark. 539; Brown v. Brown's Adm'r, 68 Mo. 388; Whitehead v. Tapp, 69 Mo. 415; Pardo v. Bittorf, 48 Mich. 275. *See* Stanley v. Snyder, 43 Ark. 429, which holds that even the death of the wife, and the arrival of the children at their majority, and their removal, does not affect the right of the husband as "head of the family," under the laws of Arkansas.

[3] Lindsey v. Brewer, 60 Vt. 627; Lamb v. Wogan, 27 Neb. 236; Meader v. Place, 43 N. H. 308; Atkinson v. Atkinson, 37 N. H. 435; 40 N. H. 249; Wood v. Lord, 51 N. H. 448.

[4] Lamb v. Wogan, 27 Neb. 236.

[5] Cockrell v. Curtis (Tex.), 18 S. W.

Such penalty for causeless neglect of wifely duties seems just, and one that all legislatures well might adopt. The policy of the homestead provision is defeated by illegal separations of spouses, so that the reasons for exemption cease to apply.

The wife's voluntary desertion of both husband and hearthstone has been held an abandonment of the homestead, and to be equivalent to voluntary failure of occupancy by a widow. Where occupancy is an essential condition, required of all beneficiaries, including widows,[1] the deserting wife was treated as though she had voluntarily left the exempt premises after ceasing to be a wife. It is intimated that the decision might have been different, had she been driven from home by her husband, and been kept out of it by a tenant after her husband's death.[2] Intentional leaving, in ignorance of her rights, may forfeit her homestead.[3]

A wife deserted her husband, avowed her intention never to return, wrote urgently for him to sell the farm, and finally sold it herself to one who reconveyed to him. She was held to have abandoned the homestead.[4] Certainly, she had given up all idea of using it as the legislator designed. The beneficent purpose to promote the welfare of the state by encouraging happy, thrifty, children-rearing homes, is not very well furthered by the reckless separations of married parties, now so common, which evince contempt for that purpose.

§ 5. Divorce; Effect on Homestead.

It is held that when granting a divorce, whether because of the fault of the husband or the wife, the court may assign the possession of the homestead to her, though the title be in him.[5]

It would seem, at first view, that the court could not oust the husband from the homestead and award sole custody to the wife. She, not having title, derived her sole right to

436; Duke v. Reed, 64 Tex. 705; Sears v. Sears, 45 Tex. 557; Earle v. Earle, 9 Tex. 630; Trawick v. Harris, 8 Tex. 312. *See* Blessing v. Edmondson, 49 Tex. 333; Newland v. Holland, 45 Tex. 588; Farwell, etc. Co. v. McKenna (Mich.), 48 N. W. 959.

[1] Abbott v. Abbott, 97 Mass. 136.

[2] Foster v. Leland, 141 Mass. 187.

[3] Paul v. Paul, 136 Mass. 286.

[4] Farwell, etc. Co. v. McKenna (Mich.), 48 N. W. 959.

[5] Brandon v. Brandon, 14 Kas. 342; Blankenship v. Blankenship, 19 Kas. 159.

the benefit of the homestead protection by her union with her husband, and therefore it would seem reasonable that her right would cease upon the dissolution of the marriage relation. Being at liberty to contract a second marriage, she would apparently be acting beyond the spirit of the law by taking another man to share her homestead privilege on property belonging to her first husband. Her only interest is by operation of law, and she should be kept within the purview of the legislator when he made the beneficent provisions for married women under the homestead laws. Especially, when divorce is granted to the husband, against the wife, for violation of marriage duties in any way, would it seem unconscionable for the court to take his property and give it to her in possession; to take his home, sacred from creditors, and give it to her who has proved unworthy to share the roof-tree and hearth-stone with him and their children. Was not her right to the occupancy of the home dependent upon his right? Had she any claim upon it but what came from her union with him?

On the other hand, the husband who has obtained a divorce from his wife might marry another: he would be denied the right of taking her to his own property because his former wife is in occupancy, under the rule laid down. At his death, his widow and children would be kept out of the property till the divorced woman's death, if indeed the inheritance would not be impaired under some statutes. And would the possession of the divorced wife preclude creditors from making their money out of this property of his from the time it ceased to be his homestead?

However plausible these considerations and queries may be, there is another side to the argument, which has judicial favor. The granting of the divorce and the adjustment of property interests are cotemporaneous. The homestead is that of both husband and wife, though he owns it; both have the right of possession before the divorce; one must have it afterwards, and the court may decree that she shall be the one. Neither had the sole right of incumbering, alienating or enjoying it, before they were legally parted from each other; their homestead rights were equal. Where there is statutory authorization given to the court to give to the wife

such share of her husband's real and personal property as shall be just and reasonable, when divorce is granted for the fault of either the husband or the wife,[1] the court may award her the homestead.[2]

And the court may, though the wife be at fault, and the divorce be granted against her, give her a judgment for alimony with lien on the homestead owned by the husband, under the same statutory authorization.[3]

Whether by exposure to sale under a lien, or by transfer to the wife in making division of property, the husband loses his homestead — loses his possession of it or his property in it — he becomes entitled to select a new homestead. He and his divorced partner, being now no longer one, may each have a homestead. To his newly-dedicated exempt residence, he may take his new bride — the supposititious one before mentioned. To the old place, the divorced woman may welcome her new husband, and over his head will be cast the protecting shield of the law preventing forced sale.

It was held that, upon divorce granted a husband against his wife for wrongs done him by her, consisting, in part at least, of excluding him from their home after wrongfully inducing him to convey the title of it, and of other property, to her, there should be equitable division of the property between them.[4]

A divorced woman, occupying her homestead acquired in her late husband's lands before the decree, and having her children with her, has been held entitled to retain it.[5] When all the children are assigned to her in the divorce decree, she and they continue the family — not the isolated husband. Homestead being for the family and not for a single person, there would seem to be reason for giving her and the children the use of one acquired when the husband was a member of the family. The fact that it was carved out of his separate property ought not to deter, for its dedication as the family homestead was done by himself, or with his consent.

[1] Kansas Laws of 1870, p. 180.

[2] Brandon v. Brandon, 14 Kas. 342, *345*.

[3] Blankenship v. Blankenship, 19 Kas. 159.

[4] Snodgrass v. Snodgrass, 40 Kas. 494.

[5] Blandy v. Asher, 72 Mo. 27. *See* Stamm v. Stamm, 11 Mo. App. 598.

After a husband and wife had permanently separated, even by agreement and without divorce or judicial separation from bed and board, she was awarded the right of acquiring and holding property as if she had been legally divorced, and of having homestead protection in the property she occupied as a home.[1]

If it be conceded that he had the same right, and if he availed himself of it, the result would have been two homesteads for the undivorced couple. The statute contemplated one for each family. The domicile of the wife is that of her husband. Homestead laws favor marriage and home: not lawless separation and half-homes.

Though the husband obtain a divorce against his wife, the property that was their homestead may be awarded to her.[2] He obtains the divorce for cause. She, being in the wrong, does not have the award as of right, with reference to the divorce. But, with reference to the estate to be divided, it may be better for all concerned that she should have the home place — he having his rights in other property. Especially, where there is an infant, or young children, may it be better for her and them to remain undisturbed in the family home. The circumstances of each case may determine the disposition of the children and the assignment of the homestead property to either spouse. When the wife obtains divorce from her husband, if the terms of the decree award the homestead to her "in trust for her support and for that of the children," no trust is created but an absolute estate is transferred to her, it is held.[3]

Community property deeded by a husband to his wife, after their divorce, gives her title; and, the homestead being thereon, she alone may incumber it thereafter.[4] It is not still a homestead, however, where the property loses that character on the dissolution of the marriage, so that either spouse may convey whatever belongs to him or her.[5] The reason, upon which rests the requirement that both must join in alienating the prop-

[1] Kenley v. Hudelson, 99 Ill. 493; S. C., 39 Am. Rep. 31.

[2] Stockton v. Knock, 73 Cal. 425.

[3] Simpson v. Simpson, 80 Cal. 237.

[4] Grupe v. Byers, 73 Cal. 271.

[5] *Ib.*; Gimmy v. Doane, 22 Cal. 638; Shoemake v. Chalfant, 47 Cal. 432. *See* Stockton v. Knock, 73 Cal. 425; Lowell v. Lowell, 55 Cal. 316.

erty, disappears when both cease to be one. No family, no homestead.

Under the provision that "a homestead or real estate in the possession of, or belonging to, each head of a family," to the extent of one thousand dollars of value, shall be exempt during his life and shall inure to his widow and children at his death,[1] it is held that the right of homestead exists in land held by the husband and wife as tenants by entireties; and that a wife, on obtaining a divorce with a decree vesting the homestead in her, may assert her right against her husband's creditors. If she has joined with her husband in a mortgage to secure certain of his debts, she is not thereby precluded from holding the homestead as exempt against his other debts.[2]

A homestead, which was community property, was occupied by the wife and children after her divorce from her husband. There had been no division of the estate, when the divorce was pronounced, as the statute directed to be done.[3] In a suit brought for partition, it was held that the divorced parties held the property as tenants in common, just as though they had never been married; that it should be partitioned, and the husband's part rendered liable to forced sale, while the wife's part continued exempt because she still occupied the homestead with the children.[4]

[1] Tenn. Code, § 2935.

[2] Jackson v. Shelton (Tenn.), 16 S. W. 142, *overruling* Cullam v. Cooper (Tenn.), Dec. Term, 1888, and *distinguishing* Avans v. Everett, 3 Lea, 76. Judges Snodgrass and Lurton dissented.

[3] Texas Rev. Stat., art. 2864.

[4] Kirkwood v. Domnan (Tex.), 16 S. W. 428. Henry, J.: This suit was brought by the defendants in error for partition of a house and lot in the city of Waco. Bettie Kirkwood was once the wife of G. W. Allen. The property in controversy was purchased during the existence of her marriage with Allen, and was their community property. They had some minor children, and resided upon the property as their homestead. In the year 1882, they were divorced, without any mention or disposition of their property. The divorced wife continued to reside upon the property, and maintain their minor children, without assistance from her former husband. In the year 1885, Allen, the divorced husband, executed a deed of trust upon the property to secure a debt that he owed the defendants in error, under which the property was sold and conveyed to defendants in error. The divorced wife was still residing upon the property at the date of these transactions. Shortly after the execution of the deed of trust she married Kirkwood, and continued to

§ 6. Divorce; Forfeiture by Divorced Party.

Forfeiture of interest in the homestead estate may be made a penalty for the violation of marital vows, or for any wrongdoing in the marriage relation for which divorce is granted

reside on the land. It was agreed that the land could not be equitably partitioned, and that, if the court found in favor of the plaintiffs, it should be sold without the intervention of commissioners for the purpose of partition. The cause was tried without a jury, and a decree was rendered directing a sale of the land, and a division of the proceeds of sale equally between plaintiffs and the defendant Bettie Kirkwood; "and that each party pay the costs by him incurred, to be deducted from the share in said proceeds belonging to such party." It is contended for plaintiffs in error that the homestead privilege of the wife survived the divorce, and consequently that the deed of trust executed by her former husband, and all of the proceedings thereunder, were prohibited by our constitution and laws. It is provided by our statutes that "the court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to the court shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to real estate." Rev. St., art. 2864. Allen and his wife, while their marriage subsisted, each owned an undivided one-half interest in the property in controversy. It was in the power of the court that decreed the divorce, under the statute, not only to make such a decree with regard to the use of the homestead as would properly protect the wife in its use, but it might also have provided for its protection and use by the minor children of the marriage, subject only to the prohibiting clause that the decree should not have the effect, in form or in substance, of divesting the husband of his title to one-half. We think, however, that the husband's interest in the property can be so charged only in the divorce suit, and as a part of the decree of divorce. It not having been then done, the former husband and wife stood towards each other, after the decree of divorce, as if they had never borne that relation to each other. They then owned the property as tenants in common, and subject to all the rules and regulations of strangers bearing to each other that relation. Whetstone v. Coffey, 48 Tex. 269. Bettie Kirkwood, having a family, had a homestead interest in the one undivided half of the property that was owned by her; and that interest was protected from forced sale. But she had, no more than any other tenant in common, the right to hold or occupy her cotenant's share, or to prevent its being partitioned. As it could not be partitioned without being sold, it was not within the meaning of the provision of the constitution that forbids a forced sale of a homestead. To so hold would require that the constitution should be construed to forbid a partition of land owned by tenants in common when it is resided upon by one of the co-tenants, who happens to be entitled to the homestead exemption, and it is incapable of being equitably partitioned with-

against the party at fault.[1] Even if the wife obtain the divorce, she may lose her homestead right as a consequence of thus ceasing to be a member of the family, though she would not lose her dower.[2]

Pursuant to statute, it is held that a mortgage given by the husband only is valid as to the homestead, if the wife subsequently forfeits her right in the premises by obtaining a divorce. Though she should survive him, and have the custody of the children given her by order of court, neither she nor they have any right of homestead as against the mortgagee. They are not deemed members of his family from the time of the divorce and the judicial decree therein giving her the custody of the children.[3]

A divorce, with the custody of the children, being granted to the wife, does not divest the husband's homestead of its exempt character.[4]

out being sold. Clements v. Lacy, 51 Tex. 150. In such a case, the exempt interest in the land must be converted into money, and the exemption will then attach to that. The constitution exempts the homestead from forced sale, "except for the purchase-money thereof, or a part of such purchase-money, the taxes due thereon, or for work and material used in constructing improvements thereon." If, when the land is sold for partition, the costs of the suit are deducted from the purchase-money, it is equivalent to a forced sale for the payment of the costs of a partition suit, a purpose not found among those enumerated in the constitution. The fact that the costs are incident to the suit for partition does not necessarily control the question; they may be adjudged and collected as a personal demand and as costs usually are. We do not think that there was any error in the proceedings, except in directing that the costs adjudged against the defendants be deducted from Betty Kirkwood's share of the money proceeding from the sale of the land. We think that there was error in that part of the decree, and it will therefore be reversed, and here rendered, corresponding in all respects with the decree appealed from, except that the costs adjudged against the defendants shall be a personal charge against them, and not against the proceeds of the sale of the land.

[1] In Illinois, there is such provision. Both dower and homestead right are lost by having divorce granted against the one otherwise entitled thereto. Section 2 of the Exemption Act, and section 14 of the Dower Act, are construed together. Rendleman v. Rendleman, 118 Ill. 257. For general effect of divorce, see Barrett v. Failing, 111 U. S. 523.

[2] Stahl v. Stahl, 114 Ill. 375.

[3] Rev. L. of Vt., § 1894; Heaton v. Sawyer, 60 Vt. 495; Whiteman v. Field, 53 Vt. 554; Gen. Stat. of N. H., ch. 124; Wiggin v. Buzzell, 58 N. H. 329.

[4] Woods v. Davis, 34 Ia. 264.

There are circumstances under which the judicial deliverance, expressed in the last sentence, would be of wide if not general application. The divorced husband may have children by his first wife, who are still minors living with him. He may have children by the second wife who obtains a divorce from him. The breaking of the bonds of wedlock separates the family into two. Why may not he, still the head of the family, be accorded the homestead, while she has other property assigned to her which she may dedicate as the homestead of her family, composed of herself and her children?

While the husband may retain his homestead, under the statute of his state, after having acquired it as the head of a family, though his wife may have obtained a divorce against him, and she may have been awarded the custody of the children,[1] and he literally may have no family left him, he has been allowed to retain his homestead; but he could not now declare upon an original homestead, as he is not the head of a family.[2]

The wife being divorced, and the minor heirs being devisees of the deceased husband and father (with their interest subsequent to the mortgage), a foreclosure against the property which had been the homestead was allowed — there being no probate homestead designated out of the mortgaged property.[3]

Even after judgment for alimony has been given the wife, her divorced husband may hold the homestead exempt from her judgment, since it creates no lien against it.[4] But the husband alone is not a family; the divorce may result in breaking up the household, and there may be circumstances in which a court may have the homestead attached as his property, in an action for alimony.[5]

A divorced man is not a husband; a divorced woman is not a wife: on the death of the man who was her husband before

[1] Woods v. Davis, 34 Ia. 264; Byers v. Byers, 21 Ia. 268; Whitcomb v. Whitcomb, 52 Ia. 715.

[2] Heaton v. Sawyer, 60 Vt. 495; Wiggin v. Buzzell, 58 N. H. 329.

[3] Bunnel v. Stockton, 83 Cal. 319; Heaton v. Sawyer, 60 Vt. 495 (on Rev. L. of Vt., § 1894); Whiteman v. Field, 53 Vt. 554; Wiggin v. Buzzell, 58 N. H. 329 (on Gen. St., ch. 124).

[4] Byers v. Byers, 21 Ia. 268; Whitcomb v. Whitcomb, 52 Ia. 715.

[5] Daniels v. Morris, 54 Ia. 369.

the divorce, the woman divorced from him does not become his widow.[1]

§ 7. Acquisition by a Widower or Widow.

The head of a family who has a wife but no children; or children remaining, after having lost his wife; or even one child,— may acquire the homestead right. A widower, with children, who may not have acquired while his wife was living, may do so after her death. But if he is alone, he cannot now declare homestead, or avail himself of such means of avoiding creditors, in any way. With no wife nor children left to him, and no family of any sort recognized by law, he cannot take the original steps for acquiring homestead as the head of a family. Under the laws of several states, he could retain his homestead right without a family, if he had acquired it with a family.

A widower, whose children were married and lived apart from him, was held not to have lost his exemption right,[2] but ordinarily he could not then have acquired it.

But with a widowed daughter and her child — his grandchild — living with him, and dependent upon him, a widower, with no other family, was judicially recognized as a housekeeper with a family, and therefore entitled to a homestead.[3]

A widower without family, if a housekeeper owning and occupying his dwelling-house with no more than the statutory *maximum*, holds it exempt under a statute which provides that "the homestead of a housekeeper or head of a family . . . shall be exempt."[4] The terms *householder* and *head of a family* have been held not synonymous, so that a housekeeper, without wife or children or other dependents, was held not entitled to homestead, under a statute employing both terms.[5]

All that has been said of the widower is true of the widow. She may acquire a homestead in behalf of herself and her children, by complying with the statutory requirements of

[1] Moore v. Hegeman, 27 Hun, 68; Chenowith v. Chenowith, 14 Ind. 2; Whitsell v. Mills, 6 Ind. 229.

[2] Myers v. Ford, 22 Wis. 134.

[3] Sweeny v. Ross (Ky.), 15 S. W. 357.

[4] Pierce v. Kusic, 56 Vt. 418.

[5] Calhoun v. Williams, 32 Gratt. 18; *post*, § 8.

ownership, of occupancy, and (wherever the law requires) of dedication and recording, provided she has not already become the beneficiary of the technical *widow's homestead* by surviving her husband.

He may have been poor, without the necessary property to declare upon; and she may have come into possession of means after his death. In such case, she may originally acquire the immunity right for herself and hers, just as a man may do who has the necessary real estate by some title.

It more commonly happens that a widow, with her children, moves into a homestead state, buys a home, and avails herself of the homestead law. Under such circumstances, her position is precisely that of a widower who does so. She acquires as the head of her family: not as the survivor of the marital community. She holds under conditions altogether different from those which attend that kind of homestead which is likened to dower, which does not depend upon occupancy as a general rule, which is deemed an estate under several state statutes, and which has little like the usual homestead, except the name.

A widow, as the head of a family, may be entitled to have a homestead accorded to her.[1] And it was held that, in such case, it does not terminate because of the children's reaching their majority.[2] But a homestead of minor children, in their portion of the estate, is terminated by their majority. Then their respective shares are accorded.[3] The widow herself seems to have been regarded in the case next to the last cited, as though she had taken homestead from her deceased husband's estate, as an allowance, like dower. When a widow, with a family of children, comes into a homestead state, settles with them in a dwelling, in behalf of herself and her children, why is her case different from that of a widower with children who should do so? And if he would cease to be protected when his children come to majority, why not she?[4]

[1] Fountain v. Hendley, 82 Ga. 616, 623; Deyton v. Bell, 81 Ga. 370; Lee v. Hale, 77 Ga. 1; Bridwell v. Bridwell, 76 Ga. 627; Groover v. Brown, 69 Ga. 60; Hodges v. Hightower, 68 Ga. 281; Gerding v. Beall, 63 Ga. 561; Raley v. Ross, 59 Ga. 862; Faircloth v. St. Johns, 44 Ga. 603; Hodo v. Johnson, 40 Ga. 439.

[2] Groover v. Brown, 69 Ga. 60.

[3] Fountain v. Hendley, 82 Ga. 616.

[4] Minor children could have home-

A widow may have a homestead carved out of estate of her own and that of her minor child.[1] But if she have no children, and no household, she cannot, *as the head of a family*, claim homestead out of her deceased husband's property.[2] Nor out of any other property, even her own by her own right *in that capacity*, it may be said.[3]

A widow, residing with her children, in her father's house, is the head of her own family and may become the declarant, when she is the owner, manager or controller of the farm or property declared upon.[4] Leasehold as well as freehold is sufficient basis for her to build upon, as in case of a male declarant.

There is no reason why she may not stand *in loco parentis* to adopted children, and thus be the head of a family capable of acquiring homestead; especially when she is legally bound for their support. Family headship is a condition, in her case, as well as in that of any other, when originally availing herself of the exemption benefit — not merely succeeding to the right as surviving spouse. In some states such headship is required in the latter case. The widow's homestead from the property of her deceased husband was denied on the ground that she had no family dependent upon her,[5] though this was not according to the general rule relative to that kind of homestead.[6] Widows are accorded homestead, in many states, much as they are accorded dower; and the having of children or family of any sort does not signify. Indeed, the term *widow's homestead* does not come within the definition of *homestead*. Occupancy, family headship and other conditions are not necessary to the widow's homestead, in many states; that is, the portion assigned her as her homestead from her deceased husband's estate.

A step-mother who took care of the children of her hus-

stead set off to them on a separate application made for them in Georgia. Const. of 1868. Roff v. Johnson, 40 Ga. 555; Fountain v. Hendley, 82 Ga. 616.

[1] Akin v. Geiger, 52 Ga. 407.

[2] Kidd v. Lester, 46 Ga. 231.

[3] In Georgia a widow took her homestead from her undivided share of her husband's estate, and also a homestead for the minor children in their undivided shares: she being their guardian. Her husband died after the constitution of 1868 was adopted, but before the present one. Fountain v. Hendley, 82 Ga. 616.

[4] Bachman v. Crawford, 3 Humph. 213.

[5] Kidd v. Lester, 46 Ga. 231.

[6] Estate of Walley, 11 Nev. 260.

band — the family keeping together — stood in parental relation to them. Having voluntarily taken upon herself the obligation, she was under such moral duty as to entitle her to have a homestead set apart for the benefit of herself and them. She was the head of the family, within contemplation of law. The rule may sometimes work hardship to creditors, but in some states it is well recognized.[1]

A childless widower or widow, supporting an aged parent or other dependent having moral claims upon him or her for support, may be deemed the head of a family, and entitled to exemption on that ground;[2] but, if entirely alone, some other statutory foundation must sustain the claim for the privilege if it can be sustained at all. So it is held pointedly that a widower without children living with him, and having no family, is not entitled to exemption of estate as the head of a family.[3] After one's exemption right has ceased with the loss of his wife and children, he may have a second family and be entitled again to claim homestead.[4]

If, while he is still the head, having minor children living though his wife be dead, he marry again, his second wife becomes a beneficiary in the homestead.[5] But if he have no children, and the exemption right be lost, it cannot be regained by a second marriage.[6] Then he may again apply for a homestead. But it has been held that he cannot, if he have indigent adult daughters: the old homestead being held still good in such case.[7]

Though the debtor may not have been the head of a family at the time judgment was rendered against him, it is held that he may become such before or at the time of the levy under the judgment and then successfully claim homestead free from the lien. By marriage, between the time of the judgment and that of the levy, the debtor may save his home.[8] But it

[1] Holloway v. Holloway (Ga.), 12 S. E. 943; Capek v. Kropik, 129 Ill. 509; Riley v. Smith (Ky.), 5 S. W. 869; Moyer v. Drummond (S. C.), 10 S. E. 952; Chamberlain v. Brown (S. C.), 11 S. E. 439; Lathrop v. Association, 45 Ga. 483, *distinguished.*

[2] Parsons v. Livingston, 11 Ia. 104.

[3] Walker v. Thomason, 77 Ga. 682.

[4] Shore v. Gastley, 75 Ga. 813.

[5] Barfield v. Barfield, 72 Ga. 668; Gresham v. Johnson, 70 Ga. 631; Hall v. Mathews, 68 Ga. 490; Bank v. Shelton, 87 Tenn. 393.

[6] Wright v. James, 64 Ga. 533.

[7] Torrance v. Boyd, 63 Ga. 22.

[8] Chafee v. Rainey, 21 S. C. 11 (*distinguished* from Jones v. Miller, 17

has also been decided that a mortgagor cannot remove or affect the lien he has put upon his property by getting married and clothing the lien-bearing premises with homestead inviolability.[1]

Debtors are usually held more stringently to their conventional obligations than to others.[2]

§ 8. Unmarried Beneficiary.

Family headship is not limited to married persons. A maiden aunt, protecting and providing for her dependent nieces, has been recognized as the head of a family entitled to homestead exemption.[3] So also a single woman who supported an invalid sister living with her.[4] She may need it as much as her married sister, but her recognition as one entitled to it, as above mentioned, is exceptional. She would not generally be accorded the right; only where the statutory provision plainly expresses or implies her inclusion among beneficiaries, will she be allowed to claim homestead as the head of a family. Why not? Because the homestead policy is not to bestow charity but to conserve homes; mostly, those of parents and their children.

An unmarried, childless woman does not answer the usual statutory requirement that one must be a householder at the head of a family to become a homestead beneficiary.[5] In some of the states, the family relation may exist between her and those whom she has assumed to support, even though there be no moral or legal obligation on her part to do so; but the general rule is to the contrary. And the general rule applies, of course, to a person of either sex.

S. C. 380, and Pender v. Lancaster, 14 S. C. 25).

[1] Wilson v. Scott, 29 O. St. 636.

[2] A husband, in North Carolina, cannot have his land taken from him by sale for debt without his consent, if it was acquired before the constitution of 1868 was adopted, if he was married before that date. He may have homestead allotted out of it and leave the rest of it exposed. His rights and those of his creditors are not impaired by that constitution, except as he voluntarily surrenders his own. Gilmore v. Bright, 101 U. S. 382; Fortune v. Watkins, 94 N. C. 304; Reeves v. Haynes, 88 N. C. 310; Murphy v. McNeil, 82 N. C. 221; Bruce v. Strickland, 81 N. C. 267; Sutton v. Askew, 66 N. C. 172.

[3] Arnold v. Waltz, 53 Ia. 706.

[4] Chamberlain v. Brown, 33 S. C. 597.

[5] Woodworth v. Comstock, 10 Allen, 425.

An unmarried man may have a family living with him, and he may be its head.[1] He may be the guardian of minors living with him, and be entitled to exemption; in that capacity he has been recognized as the head of a family.[2] Indeed, he may be as important a factor of state citizenship as any married man could be. His wards need rearing, need a home, need a fatherly director: so his homestead protection comes within the policy of the legislator.

An unmarried son has been recognized as the head of a family when his mother lived with him and was supported by him. In his case it was declared to be not essential to family headship that the head be legally bound to support the members — moral obligation being sufficient.[3]

Distinction has been made between the head of a family and the head of a household. The former has the relation of *status*, while the latter that of *contract*, it is said. The former may be illustrated by a father with reference to his children; the latter by a master with reference to employees living in his dwelling.[4]

Householder has been held synonymous with *head of a family*, in construing a constitutional provision granting the homestead privilege to either: so an unmarried man, keeping house, with no children or dependents living with him, was denied the privilege.[5] He was a householder, but not such a one as the statute contemplated, according to the construction.

An unmarried man, with a family constituted in derogation of law, has been held entitled to hold his homestead free from liability to forced sale by creditors.[6] So, an unmarried woman who supported her infant child.[7]

[1] Moore v. Parker, 13 S. C. 487; Greenwood v. Maddox, 27 Ark. 658; Wade v. Jones, 20 Mo. 75; Parsons v. Livingston, 11 Ia. 104.

[2] Rountree v. Dennard, 59 Ga. 629.

[3] State v. Kane, 42 Ill. App. 42; Wade v. Jones, 20 Mo. 75; Connaughton v. Sands, 32 Wis. 391; Parsons v. Livingston, 11 Ia. 226.

[4] Murdock v. Dalby, 13 Mo. App. 47. *Compare* State v. Finn, 8 Mo. App. 264.

[5] Calhoun v. Williams, 32 Gratt. 18. Servants and employees do not compose a family. Garaty v. Du Bose, 5 S. C. 493; Calhoun v. McLinden, 42 Ga. 405.

[6] Gay v. Halton, 75 Tex. 203; Lane v. Philips, 69 Tex. 240; *Ex parte* Brien, 2 Tenn. Ch. 33.

[7] Cantrell v. Conner, 51 How. (N. Y.) 45; Ellis v. White, 47 Cal. 73.

The word family, as used in the homestead laws, ought to be understood to mean a legally constituted household. It seems improbable that courts generally will recognize a man as the head of a family who lives in immoral relations with its members, and who is not bound by the ties of wedlock. When the term family occurs it usually means a legally constituted family. Always in homestead statutes it means this. What sort of state policy would be promoted by the conservation of illegally constituted households?

Accordingly it is held that an illegal relation between a man and a woman will not render them a family, though they together occupy a dwelling; but that the relation of marriage makes the two a family.[1]

Were no distinction to be made between the good homes which constitute, in the aggregate, the state itself, on the one hand — and the bad ones where law is set at defiance and the sacred names of marriage, family and parental relation insulted, the effect of homestead laws would not always be salutary.

An unmarried head of a family is not subject to all the restraints upon the alienation of his homestead that a married beneficiary would be. If he wishes to mortgage his homestead, there is no wife to join in the deed, and he may legally act alone.[2] Nor is the exemption accorded him so endurable, on the other hand, as that of a married man, who can transmit his home to his widow and children with the immunity stamp still upon it. The bachelor's death lets in the creditors.

A bachelor may donate his homestead, despite his creditors, under the law that exempts such property for the benefit of every "resident" who may claim exemption. But they can seize what he leaves at his death. Leaving no wife nor children, he leaves his property free from exemption, and his creditors free to get their rights. "No one ever supposed that, on the death of a landholder, having a homestead, leaving neither minor child nor widow, the descent of the homestead is governed by rules different from those which govern

[1] Rock v. Haas, 110 Ill. 528; Ryhiner v. Frank, 105 Ill. 326; Aaron v. The State, 37 Ala. 106; Gunn v. Gudehus, 15 B. Mon. 447; Griffin v. Sutherland, 14 Barb. 456; Stanton v. Hitchcock, 64 Mich. 316.

[2] Smith v. Von Hutton, 75 Tex. 625; Lacy v. Rollins, 74 Tex. 566.

in the descent of other landed estate. All go to the devisee, or heir, subject to a prime and paramount liability for the debts of the ancestor."[1]

Where the statute did not require family headship, but secured homestead exemption to the owner when the prescribed quantity was "owned and occupied by any resident of the state," the court said of it: "It does not restrict the privilege of the homestead exemption to the case where the 'owner' is a 'married man.' The statute speaks of the 'owner,' 'resident,' 'householder,' as descriptive of the persons who are entitled to the benefit of the exemption. A man may be an 'owner,' 'resident' and 'householder' without being married. A single man may own property, reside upon it, and have a family occupying the house with him. The next section shows most clearly that the legislature did not intend to confine the privileges of the homestead exemption to married men. For it declares that a mortgage or other alienation of the homestead by the owner thereof, *if a married man*, shall not be valid without the signature of the wife. This clearly and obviously recognizes the case where the owner of a homestead is not a married man. In that case, the disability does not apply.

"In this case, the plaintiff was a widower; his children were all married and away from home. But he was actually occupying the premises in dispute. It appears that he had rented them, but boarded with his tenant, and had his bed in the house, and slept there." So the court accorded him homestead.[2]

The statute was exceptional, and the decision is therefore not of general authority. Is it in accord with prior decisions of the same court?[3]

§ 9. Lack or Loss of Family.

Family protection and conservation, for the good of the state, being the general policy of the homestead legislation, isolated persons and groups of persons not bound by the house-

[1] Fellows v. Lewis, 65 Ala. 343, 356–7.

[2] Myers v. Ford, 22 Wis. 134, *citing* R. S. of Wis., ch. 134, § 23.

[3] *See* Bunker v. Locke, 15 Wis. 635; Platto v. Cady, 12 Wis. 465; Phelps v. Rooney, 9 Wis. 80.

hold tie are excluded from the benefits. While all the members of a legally constituted family are beneficiaries, the law looks to their representative as the one to whom the privilege of accepting the conditions is accorded. And, since family headship is an indispensable condition in most of the states, the owner and occupant of a dwelling cannot have it set apart as inviolable from the date of dedication, or claim exemption from execution after judgment, when that condition has not been observed. A person without family cannot become a beneficiary under the prevailing system of homestead.[1]

If more than one family reside together, each retains the homestead character, and the head of one cannot be the head of all as declarant of a homestead for all. It would be absurd for several indebted householders to be protected from their respective creditors by virtue of the homestead declaration of one of them.

Some of the statutes expressly provide that dependent relatives within a specified degree may be considered as members of the family of one who supports them, though he have no wife nor child. An adult sister, aged grand-parents, orphan grand-children and others may thus become beneficiaries of of homestead under the headship of their supporter who would not be in lack of family. There must be a family of some sort, legally recognized as such, under the prevalent system. It is superfluous to say that one having no family cannot have the headship of one.[2] Thus a widower, with no household but his housekeeper, is not the head of a family.[3]

When the family, constituting all the beneficiaries required by the homestead provisions, has ceased to exist, the late homestead has been held open to creditors.[4]

[1] Ellis v. Davis (Ky.), 14 S. W. 74; Woodworth v. Comstock, 10 Allen, 425; Lynch v. Pace, 40 Ga. 173; Keiffer v. Barney, 31 Ala. 196; Abercrombie v. Alderson, 9 Ala. 981; Whalen v. Cadman, 11 Ia. 226; Wilson v. Cochran, 31 Tex. 677. The same rule was applied to chattel exemption. Bowne v. Witt, 19 Wend. 475; Gunn v. Gudehus, 15 B. Mon. 452.

[2] Abercrombie v. Alderson, 9 Ala. 981; Lynch v. Pace, 40 Ga. 173; Calhoun v. McLendon, 42 Ga. 406; Gunn v. Gudehus, 15 B. Mon. 452; Bowne v. Witt, 19 Wend. 475; Wilson v. Cochran, 31 Tex. 677; Barnes v. Rogers, 23 Ill. 350; Woodworth v. Comstock, 10 Allen, 425; Whalen v. Cadman, 11 Ia. 226.

[3] Ellis v. Davis (Ky.), 14 S. W. 74.

[4] Givens v. Hudson, 64 Tex. 471;

Homestead privileges and immunities cannot be *acquired* by one who has no family, under a statute according them to the head of a family; but when once acquired, they may be continued after the loss of all the members of the household, by the liberal provisions of some of the states. Such provisions are found, not in the sections conferring the benefit originally, but in those of the states relative to survivorship, the descent of homestead estates, the disposition of the exempt property after divorce, and the like; or, the continuance of the benefit in a single person may be found in the construction given by the courts to the statutory enactments on those subjects.

If there is no provision, either expressed or implied, that a homestead once legally dedicated shall be lost to the owner by the loss of his family, the courts do not invariably hold it thus lost.

It can never be proper to speak of one as the head of a family who has no member of it left to him. Manifestly it is a contradiction of terms to say that one person, living habitually alone, is the head of a family. So, when we find the courts saying that he is, we should take their meaning rather than their literal statement; and we shall find that the holding is that one who acquired homestead while he was a veritable head of a family does not necessarily lose it when bereft of all its members.

For instance, when it is said that the childless widow of a householder,[1] or a childless widower,[2] or a divorced husband without the care of his children,[3] is each the head of a family, entitled to exemption, we must take the meaning rather than the literal declaration.

A husband, divorced at the suit of his wife, with no children residing habitually with him, was still considered as the head of a family entitled to homestead. Whether he or she had

Burns v. Jones, 37 Tex. 50; Petty v. Barrett, 37 Tex. 84; Duke v. Reed, 64 Tex. 705; Inge v. Cain, 65 Tex. 75; Stewart v. Mackey, 16 Tex. 56; Lee v. Kingsbury, 13 Tex. 68. Community property is open to creditors when all holding homestead right in it have died or become of age or lost the right. Davis v. McCartney, 64 Tex. 584.

[1] Bradley v. Rodelsperger, 3 S. C. 226; Leake v. King, 85 Mo. 413; Floyd v. Mosier, 1 Ia. 512.

[2] Parsons v. Livingston, 11 Ia. 104.

[3] Woods v. Davis, 34 Ia. 264.

been at fault was treated as immaterial, and the homestead right was thought to be the same as it would have been, had the marriage relation been dissolved by death.[1] And when it has been dissolved by death, the surviving husband has been deemed the head of a family, though living alone.[2]

To the same effect, it has been held that the *status* of head of a family, such as that of a husband and father, is not lost by the loss of all the members.[3]

The theory, that homestead is not meant for the family but "for the householder and his family," has been understood to recognize him as a sole beneficiary when he has ceased to have a family — just as though the benefit were expressly granted to him independently of the family relation. This theory, though contrary to the general policy of homestead legislation, which is to conserve families for the good of the state (a purpose which cannot be repeated too often), finds color of warrant in a state constitution which ordains that the general assembly shall prescribe how the householding head of a family shall set apart a homestead "for himself and family."[4] This has been construed to mean that the householder, after the loss of his family, has yet the right to retain the homestead.[5]

While the family continues, the homestead is not lost by a change of state constitution.[6] That is, if homestead is authorized, or not inhibited, by the new organic law, and the statutes are continued in force, the old homestead remains unaffected. All homestead laws are repealable, however, as the privilege granted is not a vested right; that is, there is no contract between the beneficiary and the state arising upon his compliance with the required conditions.

[1] Zapp v. Strohmeyer, 75 Tex. 638.

[2] Taylor v. Boulware, 17 Tex. 77; Kessler v. Draub, 52 Tex. 579; Blum v. Gaines, 57 Tex. 119.

[3] Rollings v. Evans, 23 S. C. 316; Kessler v. Draub, 52 Tex. 575; Taylor v. Boulware, 17 Tex. 74; Silloway v. Brown, 12 Allen, 34; Doyle v. Coburn, 6 Allen, 71; Parsons v. Livingston, 11 Ia. 104; Stewart v. Brand, 23 Ia. 477; Woods v. Davis, 34 Ia. 264; Wilkinson v. Merrill, 87 Va. 513; Blackwell v. Broughton, 56 Ga. 392.

[4] Va. Const., art. XI, § 5.

[5] Wilkinson v. Merrill, 87 Va. 513, *overruling* Calhoun v. Williams, 32 Gratt. 18.

[6] First N. Bank v. Massengill, 80 Ga. 333; Van Horn v. McNeill, 79 Ga. 121; Stephenson v. Eberhart, 79 Ga. 117, *distinguishing* Skinner v. Moye, 69 Ga. 476, and City Bank v. Smisson, 73 Ga. 423.

A widower, who had a family when his homestead right was created, was held to have that right unimpaired by the loss of his wife and children by death and marriages, while he continues to occupy the premises. This, though previously held elsewhere as has been shown, was recently decided for the first time in a state whose statutes provide that every *bona fide* housekeeper *with a family* resident in the commonwealth shall hold land, etc., exempt from execution to the amount of one thousand dollars, and that the exemption shall continue after the death of the debtor for the benefit of his widow and children, or for the use of the surviving husband and children, when the deceased wife was the owner.[1] The court said: "Considering the entire act, and the spirit which led to its enactment, it seems to us its only reasonable construction is that, while the having of a family is necessary to the creation of the homestead right, it is not necessary to its continuance." And previously: "Can it well be supposed that the legislature intended that, in the event of the death of the wife, owning the homestead, the benefit of it should continue to the husband during his occupancy, although he has no family, and yet that if he be the owner of it, and his wife and children die, or the latter marry and leave him, his right to the exemption ceases?" Then, calling attention to the survivor's right of homestead, the court inquires, "Why should not the original owner have a right equal to the survivor, and why should not the law favor the latter equally at least with the former? Is the party to be worsted because he owns the property? Can any reason be given why the same right should not exist as to his own property as is given to him in his wife's property after her death? Ought not a claim to a homestead in his own property, as against his own creditors, to be as much regarded as his claim to one in her property after her death? The construction here contended for by the creditor should not be given to a statute which was enacted from a spirit of liberality toward the debtor."[2]

It will be noticed that this construction was based on the prevalent idea that homestead laws are to favor the debtor for his own sake — not to conserve family homes for the welfare

[1] Gen. Stat. Ky., ch. 38, art. 13, §§ 9, 13, 15.

[2] Stults v. Sale (Ky.), 17 N. W. 148.

of the state. The better idea seems to be that expressed by the court in another part of the opinion: "It is no doubt also true that *the primary object of the statute was the protection of families from want and the giving of them a shelter.*" This must be for their conservation for the good of the state, else there is an invidious distinction in a charity against those who have no families. This matter was noticed when considering the policy of the homestead laws, in the first chapter herein. The decision follows older ones in other states, and there is no purpose to controvert it in this place.[1]

It is a very different case when a husband has been divorced and he yet has minor children living, and yet occupies his homestead to which they may return though now living with their mother who has been granted the custody of them. He *still has a family* and he is the head of it, though literally living alone. The policy of the state favors family life and its perpetuity: so it comports with the genius of homestead legislation to protect the home that is awaiting its inmates under the present care of the household head. The judicial awarding of the minor children to the wife and mother, on the granting of the divorce, is not necessarily a breaking up of the family forever. It is likely to prove such, but the decree does not, in letter or spirit, inhibit the return of the children to the hearth-stone of the father, with the mother's consent. The divorce does not interfere with the descent of the father's homestead to his minor children, in case of his death, when he has occupied the premises and preserved its exempt character till that event. The divorced wife, as guardian of the minors, may petition to have the father's homestead accorded them upon his death. And this is so, though the wife may have had life-estate in land assigned her at the time of the divorce as well as the custody of the children.

The foregoing paragraph will not be received as law everywhere, but it briefly presents the points of the case now cited.[2]

[1] The court cited the case of Silloway v. Brown, 12 Allen, 30; Kimbrel v. Willis, 97 Ill. 494; Kessler v. Draub, 52 Tex. 575, and others, on this point; and relative to the cessation of family headship, with respect to homestead, Brooks v. Collins, 11 Bush, 622; Ellis v. Davis (Ky.), 14 S. W. 74.

[2] Hall v. Fields (Tex.), 17 S. W. 82. In this case the divorced mother of minors prayed, as their guardian, to have the deceased father's homestead

§ 10. Claiming After Loss of Family.

One who never claimed homestead while he had a family, nor ever had homestead right vested in him by operation of law as the head of a family, is unable to comply with all the con-

set apart for their use. After a long statement of the facts, the court said:

"Mrs. Hall, by reason of the divorce from her husband, could not assert and did not assert any claim for herself to the homestead of her late husband, E. C. Hall. Duke v. Reed, 64 Tex. 713; Trawick v. Harris, 8 Tex. 312; Earle v. Earle, 9 Tex. 630; Sears v. Sears, 45 Tex. 557. She was the duly-constituted guardian of the minors, R. E. Lee Hall and Elma Hall, the children of herself and her said husband, and in this capacity made the application to the county court in the estate of said E. C. Hall, administration of which was therein pending, to have the homestead which he was occupying at his death set apart for the use and occupation of said minors. This proceeding was proper. The minors could have asserted no right to the homestead except through a guardian.

"The land was the homestead of E. C. Hall, not only by use and occupation thereof as such, but he was protected therein by exemption from forced sale. A divorced husband living upon land occupied and used by him as a homestead at the time of the divorce, and set apart to him in the division of the property between himself and his wife when the marriage was dissolved, may claim its exemption from forced sale as the head of a family, although the children do not reside with him, and no matter whose fault occasioned the divorce. Zapp v. Strohmeyer, 75 Tex. 638; 13 S. W. Rep. 9. Cases have arisen for determination as to who are constituents of a family when persons are found living together not bound by near ties of relationship, and rules have been prescribed for determining whether or not a particular aggregation of individuals constitutes a family. In Roco v. Green, 50 Tex. 488, the general rules deduced from the authorities are enunciated. From the relationship of minor children to their father we can have no doubt, under our present constitution and laws, that it is not necessary that the children should reside with the father at the time of his death to entitle them to a right in his homestead. It is not so required by the constitution. Const., art. 16, § 52.[1] By the Revised Statutes (art. 1993), the exempt property must be set apart 'for the use and benefit of the widow and minor children, and unmarried daughters remaining with the family of the deceased.' Adult children, including unmarried daughters who do not remain with the family of the deceased, do not share in the exemptions; but the widow and minor children do, although they may not be with the deceased. That the children were awarded by the court, in the divorce proceeding, to the custody of their mother, can and ought to make no difference. Their father was still legally bound for their sup-

[1] Const. Tex., art. 16, § 52: "On the death of the husband or wife, or both, the homestead shall descend and vest . . . as other real property of the deceased, . . . but it shall not be partitioned among the heirs . . . so long as the guardian of the minor children . . . may be permitted under order of . . . court . . . to use and occupy the same."

ditions to acquisition after he has ceased to have a family. The conditions of property ownership and occupancy he may still be able to satisfy, but family headship would be wanting.

There has been a good deal of doubt and misunderstand-

port, and it would be a double misfortune to them to be deprived, on account of the unhappy termination of the marriage of their father and mother, both of their right to the society and protection of the father. The home of the mother may be of little value, and poverty may compel her to sell or incumber it; then where could the children go more properly for relief than to their father's home? It has been held not necessary to the existence of the homestead right that the family should remain on the land. To use and occupy the homestead within the meaning of the constitution does not require a residence upon it. Foreman v. Meroney, 62 Tex. 723.

"There was no provision in this case, in the division of the property between Hall and his wife, for the support and maintenance of the children; on the contrary, the division was agreed on and expressly made without reference to it, for their custody was left to the decision of the court. It was given to the mother, no doubt, because of their tender age, which required the care that only a mother can give. They had no homestead rights as such in the home of either their father or their mother. At any time before his death the father may have abandoned or sold his homestead without affecting the legal rights of his minor children, and so the mother could sell her life-interest in the eighty acres set apart to her and the homestead which she had bought in Sherman. It cannot be said that, living with their mother on a homestead belonging to her, the children have a homestead, and consequently cannot look to their father's estate for one, when at any time the mother may sell. Had she died prior to her husband, and her home had been set apart to the children, then it might be urged with propriety that they could not claim two homesteads. But, their father being dead, they will not be required to depend on the contingency of homestead rights in their mother's estate. They have no home; they are the minor children of a father, the head of a family, who has died leaving a homestead. The constitution is imperative in its command that it shall not be taken from them so long as their guardian 'may be permitted, under the order of the proper court having jurisdiction, to use and occupy the same.' The guardian will be required to report annually to the county court the condition of the estate of the minors, showing their income and cost of support and education, and, whenever it may appear that the use and occupation of the homestead is no longer necessary, an order will be entered requiring it to be surrendered to the owners of the fee. There is no limitation on the right of the minors to the use and occupation of the homestead with their guardian, except the discretion of the county judge, subject, of course, to revision on appeal. No issue as to the necessity of setting the land apart to them has been made, either by the pleadings or the evidence, and the decision of the case is rested squarely on the proposition which we have stated as deduced from the conclusions of the judge who tried the cause below. We are

ing upon this subject, and decisions bearing upon it are seemingly at variance with each other. All shades of view are presented; from the deepest to the most delicate.

The differences may be somewhat reconciled by noting, in

of the opinion that the minor children of E. C. Hall have the right to have the homestead set apart to them for their use and occupation, although their legal custody and residence may have been with their mother on a homestead belonging to her at the death of their father; and that the court below erred in denying the application of Mrs. Hall as the guardian of said minors, unless E. C. Hall had the right to dispose of the property by will in such a manner as to defeat the minors' right of homestead. 'Every person competent to make a last will and testament may thereby devise and bequeath all the estate, right, title and interest in possession, reversion or remainder which he has, or at the time of his death shall have, of, in or to any lands, tenements, hereditaments or rents charged upon or issuing out of them, or shall have of, in or to any personal property, or any other property whatever, subject to the limitations prescribed by law.' Rev. St., art. 4858. Such is our statute which authorizes a person to dispose of his property by will. A will, it will be observed, must be made 'subject to the limitations prescribed by law.' We are aware that the supreme court has heretofore declined to pass on this question. In Hudgins v. Sansom, 72 Tex. 231; 10 S. W. Rep. 104, there was a will devising a large estate. Mrs. Hudgins, the guardian of the minor children, had been permitted under order of the court to occupy the homestead with her wards. When the estate was ready for partition, the court refused to make partition of the homestead, and on appeal to the district court the same judgment was entered. There was no specific disposition of the homestead made by the will, but it was embraced in the general words, 'all my real estate, wherever the same may be situated.' It was held 'unnecessary in this case to consider whether a testator could by will so dispose of property used as homestead as to prevent the occupation of it by a surviving wife or by guardian with the minor children, under permission of the proper court.' And in Little v. Birdwell, 27 Tex. 690, Judge Moore said: 'We are not called upon in this case to decide whether a party can, by a testamentary disposition of his property, prevent an appropriation of it being made by the chief justice, as an allowance to the widow and children,' etc. The widow had made her application when it was too late. More than a year had elapsed, and the estate had proved solvent and was ready for partition. But in the case of O'Docherty v. McGloin, 25 Tex. 72, while perhaps not necessary to the disposition of the case, it was said by Chief Justice Wheeler that the order setting apart the homestead for the use of the widow and children was certainly proper, irrespective of the disposition of the fee by the will. And in the case of Runnels v. Runnels, 27 Tex. 518, where the widow applied for her homestead exemptions in an estate where the deceased had died testate, this language is used: 'And since the right of a devisee is certainly inferior to that of a creditor, and only equal to that of the heirs of an intestate, it is an obvious consequence

each case, whether any right was vested while the family existed. After the loss of family, the late householder is allowed to hold his homestead exempt, in states where he takes as surviving spouse, or as the owner of an estate of homestead,

that the testator can, by will, impose no insuperable barrier to the assertion of the widow's claim to the property, in lieu of which the appellant in this case is seeking an allowance.'

"Under the act of 1848 concerning estates of deceased persons, it has been uniformly held that in case of an insolvent estate the fee to the homestead vested, on the death of husband or wife or both, in the remaining constituents of the family, to the exclusion of the adult heirs, and when the estate was solvent it descended and was subject to partition as other property. Section 52 of article 16 of the constitution of 1876 was doubtless intended for the benefit of the heirs, and shall we say the devisees and legatees of a decedent, by preventing the title from vesting in the constituents only of the family at the time of the death of the head. But it also goes further, and protects the survivor and the minor children in the occupation and use of the homestead, although the estate may be solvent. The hardship of making partition of an estate against the interests of the widow and minor children when the estate is barely solvent is apparent. Is there anything in the language of the constitution that would imply that the rule would be different where there is a will? There can be no reason for it, unless it might be said that the law means to leave the surviving husband or wife free to dispose of all property at pleasure. This, however, is not the case, for, although the survivor, as the owner of the fee, may convey or incumber the homestead without regard to the minor children living thereon with him, yet, if he should incumber it and die, the law would interpose and set apart the homestead to the children, notwithstanding the incumbrance. All contracts are made with regard to the law existing at the time, and the law becomes a part thereof; and a creditor takes his chances on collecting his debt during the life-time of the incumbrancer. A surviving parent may sell or incumber the homestead, and the children have no right thereto as such, that will prevent it; but, if he dies possessed of the legal title, it becomes charged with all the statutory exemptions even to the entire defeat of the incumbrance. And it can make no difference, so far as public policy is concerned, whether he died testate or intestate. Every will executed by a testator is subject to the law in force at the time of his death affecting the property which is devised by him. At common law the right of the wife to dower could not be defeated by the will of her husband, and, if she was provided for in the will in a manner inconsistent with her right of dower, she could elect whether she would take her dower, or surrender that right and take under the will as devisee. The spirit of our laws from the earliest days of the republic has been to make provision for the family on the death of the head thereof. At first the widow took the one-fourth, as under the Spanish law, and, after this right had been abrogated by the adoption of the common law, subsequent laws were enacted from time to time, each extending and perfecting the principle, which has steadily grown.

or (in some states) as one who acquired while he was the head of a family by declaring, marking, recording or doing whatever the governing statute required.

But where nothing is required to distinguish the homestead

There has been no limitation of the right except that in favor of the owners of the fee made in the present constitution, which, while limiting the rule in that respect, has extended it with respect to the use of the homestead to the survivor and minor children in solvent estates, as well as in those which are insolvent.

"As said by Judge Gaines in the case of Zwernemann v. Von Rosenberg, 76 Tex. 525; 13 S. W. Rep. 485: 'The language "shall descend and vest as other property of the deceased" was employed, we think, to determine the persons who should take, and their respective interests, but not the conditions which were to be imposed upon the inheritance.' And we think, also, that it was not intended to determine the manner in which the homestead should descend and vest in order to be preserved to the family, whether by will or under the statute of descent and distribution The terms used will apply, whether the deceased dies testate or intestate. Though the language 'shall be governed by the same laws of descent and distribution' may apply to an inheritance where there is no will, yet the language of the entire section, taken together, does not exclude the idea that it may apply both where the property descends, in the absence of a will, and where it vests under a will. In the present case there is no direct or absolute alienation by devise of the land. It is, by the terms of the will, to be sold under the direction of the court, and the executor is made a trustee for the application of the proceeds of the sale in the manner directed therein. The devisees, however, took vested interests, subject only to the use and occupation of the homestead, and the administration of the estate in the county court. All of the estate of a deceased person, whether devised or bequeathed or not, except such as may be exempted by law from the payment of debts, is liable in the hands of the devisees or legatees or heirs to the payment of the debts of the testator or intestate. The rights of heirs and devisees or legatees are equal; those of devisees can be no greater than those of heirs; and, whether the decedent died testate or intestate, the rights of creditors are not affected in all property not exempt from execution. A will can no more defeat the rights of creditors than the course of descent cast at the death of the intestate can. Nor can a will affect the rights of the surviving husband or wife or the minor children in property exempt from execution, any more than it can affect the rights of creditors in property not so exempt.

"The right of the minor children to use and occupy the homestead through their guardian is superior to the right of the executor or the devisees under the will, or the adult heirs of an intestate, who take the fee in the land, or an interest therein, subject to the burden placed thereon by the constitution and the laws. It is not the policy of our law to make any distinction in favor of one who takes land by devise as against one who takes as an heir. Statutes govern in both cases. A person may devise his property by will to the exclusion of his heirs, but

from the realty, except occupancy; and an occupant has not manifested any design to hold his residence subject to the restraint which the homestead laws impose, while he had a family — can he, upon losing his family, now for the first time, claim exemption to defeat execution?

The decisions, which at first view seem to answer this question in the affirmative, will be found to turn upon particular statutes; or to follow the erroneous assumption that the policy of homestead laws is to bestow charity upon impecunious debtors; or to uphold the novel rule that all homestead questions must be solved liberally in favor of the debtor regardless of the conditions on which the benefit is conferred; or — which is perhaps the most common — to turn upon the question whether homestead is necessarily lost by the loss of family, after having been once legally acquired.[1]

it must be done 'subject to the imitations prescribed by law.' We conclude that E. C. Hall, the father of the minors, R. E. Lee Hall and Elma Hall, did not have the right to dispose of his homestead by will so as to prevent its occupation and use by the guardian of said minors with them under permission of the proper court. Counsel for appellee ask, in the event the court should hold that this cause was improperly decided by the court below, and an erroneous judgment rendered, that judgment be not here rendered, giving the guardian permission to occupy the entire homestead during the minority of the children, but to remand the cause for trial as to how much of the homestead the guardian should be permitted to occupy. There is nothing left for the court below to determine. Under the facts of this case, it was the duty of the court to set apart the homestead in its entirety to the minors for their use and occupation with their guardian. We know of no law which would authorize the setting apart of a portion of the homestead, and do not so construe the constitution. It is treated as an entirety, and is not subject to partition 'so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court, having jurisdiction, to use and occupy the same.' How long she may be permitted to do this is a question for determination hereafter by the court, on proper application made to it, showing that the reason for such use and occupation no longer exists, and whenever a proper case may arise. We are of the opinion that the judgment of the court below should be reversed, and judgment here rendered in favor of the appellants, with direction to the district court to enter the same as its judgment, and to certify it to the county court for observance."

Adopted by supreme court, June 23, 1891.

[1] Bank v. Shelton, 87 Tenn. 393 (*see* Tenn. Code, § 2940, M. & V.); Webb v. Cowley, 5 Lea, 722; Meader v. Place, 43 N. H. 307; Atkinson v. Atkinson, 40 N. H. 249; Myers v. Ford, 22 Wis. 139; Beckman v. Meyer, 75 Mo. 333; Bradley v. Rodelsperger, 3

When the law protects from creditors the home of the head of a family, and not the home of a single individual, it would seem to be a very liberal interpretation indeed which would give the protection to one living alone, having no family whatever, present or absent. Yet it has been held that when homestead right has been acquired by a head of a family, under a statute which limited the acquisition to "a householder having a family," the right is not divested by the loss of every inmate of the household except him who had been its head. This construction was supported by the remark: "Any other construction would render a husband who had been deprived of his family by accident or disease, or by their desertion without fault of his, liable to be instantly turned out of his homestead by his creditors." [1] Otherwise stated, a different construction would hold the lone widower to be not a "householder having a family," and therefore liable to be made to pay his honest debts by the forced sale of property not exempted by law.

"The reason assigned is not very satisfactory, or, at most, is one to be addressed to the political departments of the government: so the decision seems to savor of what Jeremy Bentham calls judge-made law," was said by a court that adopted the interpretation.[2]

S. C. 226; Kimbrel v. Willis, 97 Ill. 494; Redfern v. Redfern, 38 Ill. 509; Woods v. Davis, 34 Ia. 264; Byers v. Byers, 21 Ia. 268; Floyd v. Mosier, 1 Ia. 512; Greenwood v. Maddox, 27 Ark. 659; Zapp v. Strohmeyer, 75 Tex. 638; Lacy v. Rollins, 74 Tex. 566; Reeves v. Petty, 44 Tex. 251; Burns v. Jones, 37 Tex. 50; Petty v. Barrett, 37 Tex. 84; Kessler v. Draub, 52 Tex. 575. The Iowa statute declares that the surviving spouse, though childless, continuing to reside in the house used as a homestead prior to the death of the other marital partner, shall be deemed the head of the family and entitled to exemption. McClain's Code, § 3163 *et seq.* The decisions, cited from Massachusetts, New Hampshire, Illinois, Tennessee and Texas, turn on particular provisions of the statutes governing when they were rendered.

[1] Silloway v. Brown, 12 Allen, 34; Doyle v. Coburn, 6 Allen, 71.

[2] Stanley v. Snyder, 43 Ark. 429. And the following are cited as following the Massachusetts cases: Barney v. Leeds, 51 N. H. 253; Webb v. Cowley, 5 Lea (Tenn.), 722; Beckman v. Meyer, 75 Mo. 333; Taylor v. Boulware, 17 Tex. 74; Kessler v. Draub, 52 Tex. 575; Blum v. Gaines, 57 Tex. 119; Kimbrel v. Willis, 97 Ill. 494. And the court adds: "A contrary view was taken in Cooper v. Cooper, 24 O. St. 488; Santa Cruz v. Cooper, 56 Cal. 339, and Gallighan v. Payne, 34 La. An. 1057, upon the maxim that *cessante ratione, cessat et ipsa lex.* Compare also Calhoun v. Williams, 32 Gratt. 18."

The court thus following the decision first cited by it, not only characterized it as judicial legislation, but also pointed out, as explanatory of it, that "estate of homestead" was recognized where it was rendered. That it should have been followed, after these concessions, seems singular: especially so, in view of the vigorous dissent of the Chief Justice. He showed that, by the settled policy of his own state, "the primary policy of the homestead laws" had "always been to provide for the family, and that the protection which inures to the benefit of the debtor himself" was "merely incidental."[1]

Wherever the legislator has created homestead exemption for the benefit and protection of families, and has made real estate inviolable by execution when owned by the head of a family, with restrictions as to the extent and value of the favored home, and yet has not expressly or impliedly extended the benefit to solitary housekeepers, it is not for the courts to interpose between the debtor and creditor, to extend the legislation. "The leading idea upon which the constitution and statute are both predicated is the protection of the family. To carry out this intent, the homestead of the head of the family is protected from forced sale. . . . But unless the person is the head of a family, the right of homestead cannot exist. And cannot the same person at one time be the head of a family, and not at another? And if the privilege is an incident to a certain state, and that state itself ceases, why should not the incident fall with it? As the primary object of the law was the protection of the family, when the family ceases to exist the reason for the privilege is gone; and why should not the privilege itself also cease? As the end contemplated by the law can no longer be attained, why should the means be preserved when they are no longer wanted? As the law will not allow an individual the right of homestead before he becomes the head of a family, why should it allow him the right after he ceases to be such? The only reason why the law will not allow it in the one case is equally applicable to the other. When an individual has not been, or has ceased to be, the head of a family, the law cannot anticipate that he will thereafter become such in either

[1] Stanley v. Snyder, *supra*, p. 435.

case. When he does in fact become the head of a family the law protects him for their benefit. He is the representative of the family. But where there is no family to protect, will the law defeat the just claims of creditors for the purpose of accomplishing no beneficial end?

"It is true that he once had a family, and he also once had protection for that family, but since the family has ceased to exist the protection is not needed. . . . The privilege and responsibility must go together. . . . The law does not look to his past or future, but to his present condition."[1]

The position of the dissenting Chief Justice is well supported, if it be conceded that the claimant of a homestead was seeking to acquire the exemption right now, for the first time, after the loss of his family — not merely asserting a previously vested "estate of homestead," or a previously vested "privilege" upon his own property. Many decisions sustain the principle that without existing family headship, the owner and occupant of a home cannot acquire the homestead immunity.[2]

[1] Quoted from Revalk v. Kramer, 8 Cal. 66, in dissenting opinion of Cockrill, C. J., in Stanley v. Snyder, 43 Ark. 435. He maintained that the rule in Arkansas had been different from that followed in the case from which he dissented. He said: "As long ago as McKenzie v. Murphy, 24 Ark. 155, Mr. Justice Fairchild, for the court, said of a statute not materially varying from our present constitutional provision in this respect, that it intended an individual benefit for the head of the family, that 'disconnected from the family, the head of it was [is] entitled to no consideration.' As late as Harbison v. Vaughan, 42 Ark. 539, the policy was re-affirmed in almost the same language. Without awaiting a change in the law, the court now awards the debtor a homestead, not to protect his family against the vicissitudes of fortune, as was said in Ward v. Mayfield, 41 Ark. 94."

[2] Hill v. Franklin, 54 Miss. 632; Taylor v. Smith, 54 Miss. 50; Meacham v. Edmondson, 54 Miss. 746; Blackwell v. Broughton, 56 Ga. 392; Heard v. Downer, 47 Ga. 631; Hart v. Evans, 80 Ga. 330; Nelson v. Commercial Bank, 80 Ga. 328; Barrett v. Durham, 80 Ga. 336; Van Horn v. McNeill, 79 Ga. 121; Calhoun v. McLendon, 42 Ga. 406; Gallighar v. Payne, 34 La. Ann. 1057; Dobson v. Butler, 17 Mo. 87; Santa Cruz v. Cooper, 56 Cal. 339; Revalk v. Kramer, 8 Cal. 66; Cooper v. Cooper, 24 O. St. 488; Inge v. Cain, 65 Tex. 75; Duke v. Reed, 64 Tex. 705; Givens v. Hudson, 64 Tex. 471; Davis v. McCartney, 64 Tex. 584; Newland v. Holland, 45 Tex. 588; Sears v. Sears, 45 Tex. 557; Wilson v. Cochran, 31 Tex. 677; Stewart v. Mackey, 16 Tex. 56; Earle v. Earle, 9 Tex. 630; Trawick v. Harris, 8 Tex. 312; Lee v. Kingsbury, 13 Tex. 68; Green v. Marks, 25 Ill. 204; Barnes v. Rogers, 23 Ill. 290; McKenzie v. Mur-

The following case arose under a statute which provided that "every citizen of this state, male or female, being a householder and having a family," shall be entitled to homestead exemption:[1] A widower, without children, having a married adopted daughter and her husband residing with him, but no other family, claimed that his dwelling was exempt. The court said: "There are authorities which hold that a man who has acquired a homestead exemption by reason of the fact that he has a wife or minor children will not lose it by the death of the wife and the attainment of majority and removal of the children. They rest upon the assumption that the homestead exemption is an estate which, once acquired, is not forfeited by the act of God, or by circumstances over which the owner has no control. We cannot assent to either the reasoning or the result of these cases.

"The homestead exemption is a privilege rather than an estate. For the benefit of the family, the law exempts the home of the family from the burden, which rests upon all the other property, of being appropriated to the debts of the owner. This immunity depends upon two contingencies: first, occupancy as a home; second, that the owner shall have a family. When either ceases, the exemption is at an end."[2]

A householder supported his aged parents, who, with himself, constituted the family of which he was the head. They died, leaving him the sole occupant of the dwelling. Sued by a creditor, he claimed exemption for his home; but it was denied him, for the reason, assigned by the court, that the homestead statute was for the benefit of the family — not to screen a man from his creditors when he has no wife nor child nor other dependent leaning on him for support.[3]

When a homestead has been set apart to the head of a family, it continues inviolable while the family endures. The

phy, 24 Ark. 155; Ward v. Mayfield, 41 Ark. 94; Harbison v. Vaughan, 42 Ark. 539; Abercrombie v. Alderson, 9 Ala. 981; Keiffer v. Barney, 31 Ala. 196; Calhoun v. Williams, 32 Gratt. 18; Gunn v. Gudehus, 15 B. Mon. 452; Heaton v. Sawyer, 60 Vt. 495; Woodworth v. Comstock, 10 Allen, 425; Wiggin v. Buzzell, 58 N. H. 329; Bowne v. Witt, 19 Wend. 475; Whalen v. Cadman, 11 Iowa, 226.

[1] Miss. Code of 1871, § 2135. (Same: Code 1880, § 1248.)

[2] Hill v. Franklin, 54 Miss. 632–5; Taylor v. Smith, 54 Miss. 50; Meacham v. Edmonson, 54 Miss. 746.

[3] Calhoun v. Williams, 32 Gratt. 18.

family exists, though the children may have reached majority, if the parents remain.[1] Though the mother be dead, the father with a second wife is still the head of the family and the homestead secure. "All that a man has to do after securing homestead . . . is to keep on being the head of a family without break or interval."[2]

The second wife, coming into the family while the first set of children, or some of them, are yet minors, becomes its head on the death of her husband, so that the exemption right continues without intermission, as there is no lack of family or family headship.[3]

§ 11. Comment.

The true rule is, follow the statute. When a privilege is granted upon conditions, most assuredly it is not granted nakedly, with the terms disregarded. If the legislature has granted nothing more than a conditional privilege, the courts should not construe the plain grant of it into the creation of an estate. If homestead is secured against the hammer in favor of the owner provided he is its occupant with a family, that is not to be expounded so as to protect a widower or bachelor, without an inmate of his dwelling except himself, from the ordinary course of law. And a wrongful exposition, to the effect that one man is a family, cannot be strengthened by repetitions. For a family necessarily embraces more than one person. A legislature cannot make one person to be two or more by any enactment nominally to that effect. It has no jurisdiction to change the law of numbers — no power to vary the multiplication table which must be ever the same throughout the universe.

The weight of authority is decidedly against the right of claiming homestead or acquiring the privilege of exemption by any one who does not comply with the condition of family headship. Putting aside the subject of the continuance of the right, after the loss of family, when it has already been acquired, the right by survivorship, the widow and orphan's

[1] Hart v. Evans, 80 Ga. 330; Van Horn v. McNeill, 79 Ga. 121.

[2] Nelson v. Commercial Bank, 80 Ga. 328; Barrett v. Durham, 80 Ga. 336 (explaining Newsom v. Carlton, 59 Ga. 516).

[3] Dismuke v. Eady, 80 Ga. 289.

homestead, and all the exceptional provisions of statutes which do not require family headship, it may be considered settled that the condition is indispensable when homestead is to be acquired.

And the authorities so holding are well supported by reason.

1st. Unless the legislator can thrust the homestead obligations upon a property holder without his consent, there is nothing to show that a householder has accepted the conditions, under which the privilege of exemption is granted, during the time he had a family, if he appears in court to claim them after his family has ceased to exist. This applies in states where no dedication is required. How can the court know that the claimant has ever been under any restraint as to the alienation or testamentary disposition of the real estate on which he lived with his family and now lives alone? Is he to have the privilege without the burdens? Leaving out of view the exceptional states which impose no onerous conditions, we may confidently conclude that one who did not put his home under the restraints of the homestead law while he had a family cannot assume that his exemption right was acquired during that time and may be asserted for the first time after being left alone, that he may defeat his creditors.

2d. Where dedication and recording are required but have not been observed, and the family has ceased, he who was once the head of it cannot set up homestead to defeat creditors, because they have trusted him without notice. Creditors, looking upon the "Homestead Book," or the margin of the recorded deed, or the deed itself where that must show the existence of the exemption, may well conclude that the man they propose to trust has not placed his property under the restraints, and secured for it the immunity, which the homestead law authorizes. It would therefore be unjust to allow the debtor to claim exemption after judgment,— not to shield his family of which he is bereft but merely — himself.

3d. The homestead immunity is not to protect single persons, but families. It is not to protect the head of a family in his individual capacity but as a member of the household which he represents. It is secondarily for the family's stability — primarily for the good of the state. So, when the

family is gone, the reason for allowing its late head to acquire this immunity is gone.

The statutes generally accord the right of acquiring the immunity, by compliance with conditions, to every owner of a residence who is the head of a family. Some of them offer it to every debtor and his family, though they hardly mean to include him without it. But homestead laws generally offer their conditional benefits without reference to the monetary condition of the acceptor. Rich and poor are alike included, though not the homeless poor.

The property qualification must exist, but the benefit of these laws are offered to the non-indebted as well as to the indebted, whose families might be unhoused by reason of future indiscretions, misfortunes or losses of the husbands and fathers but for the restraints which are imposed on alienation, testamentary disposition and execution. Take the family away, and what motive is left the state for interfering between debtor and creditor? If any, it certainly is not family conservation.

4th. There is no more reason for assigning lost family as a ground for acquiring, than in assigning discontinued occupancy, forfeited title, or any formerly existing qualification of which the claimant might once have availed himself, but did not. The aged widower, left alone in the world, needs to be sheltered — not more than the aged woman who has never had a family. Both may be proper objects of charity, but homestead laws are not charitable enactments — their beneficence being incidental. So, the argument that the ex-householder needs charity may be as plausibly applied to the impecunious spinster. Because he has had a wife and children, is his need necessarily greater than hers?

No one would contend that because a man has kept house with his family in a given dwelling, he can subsequently claim homestead there when not occupying it. If he did not acquire the immunity right during occupancy, he cannot after abandonment. As a general rule, if he did acquire, he lost by abandonment. So, by parity of reasoning, if he did not acquire while he had a household, he cannot after he has lost it.

Though a divorced husband may retain the homestead, or a divorced wife may do so, under the judgment divorcing them;

and though a deserted spouse may still continue to enjoy the privilege, yet a homestead cannot be *originally acquired* by a divorced person who is without a family; nor by a deserted or deserting spouse unless family headship is legally in such person claiming homestead originally.

Judgment was obtained against an unmarried man (who was not a householder or head of a family within the sense of the term as employed in the homestead law),[1] who some eight years afterwards, when he had become married, claimed by recorded deed a homestead in a tract of land subject to the lien of the judgment. The court held the lien a vested right of the judgment creditor, not subject to divestment by the owner's change of *status*. The constitution excepted mortgages, deeds of trust, pledges and other securities, bearing on the property when the exemption attached, from the operation of the exemption.[2]

It has been seriously questioned elsewhere, however, whether a debtor may not have homestead despite the lien fixed before his marriage on the realty which he selects;—homestead that will stand good against those holding liens upon it validly acquired when it was not a homestead.[3] And it has been decided that a debtor, on becoming married, may select his homestead free from ordinary debts existing before his marriage. The reasoning of the court to support the position is that the law giving the creditor his remedy and the law giving the debtor his exemption may be deemed as entering into the contract creating the debt. The creditor knew that the debtor might wed and thus avail himself of the exemption provision.[4]

[1] Calhoun v. Williams, 32 Gratt. 18.

[2] Kennerly v. Swartz, 83 Va. 704 (Hutcheson v. Grubbs, 80 Va. 251, *distinguished*); Code of Va. (1873), ch. 183, § 5.

[3] Dye v. Cook, 88 Tenn. 275; Pender v. Lancaster, 14 S. C. 25; S. C., 37 Am. Rep. 720.

[4] *Ib.;* North v. Shearn, 15 Tex. 175; Trotter v. Dobbs, 38 Miss. 198.

CHAPTER IV.

OWNERSHIP.

§ 1. Title Not Conferred by Law.
2. Property Qualification of the Claimant.
3. Character of the Title.
4. Leasehold and Various Titles to Parcels.
5. Life Estate.
6. Equitable Title.
7. Titles of Husband and Wife.
8. Mutual Interest of Husband and Wife.
§ 9. Title Void or Fraudulent.
10. Joint Tenancy and Tenancy in Common.
11. Undivided Interest — Co-tenancy.
12. Exemption of Undivided Interest.
13. Co-tenancy of Husband and Wife.
14. Partnership Property.

§ 1. Title Not Conferred by Law.

The state bestows no homestead property on anybody. It interferes with no man's title. It protects what he already owns, under conditions and with limitations. It does not create the homestead system as a charity. It does not confer shelter and hearth-stone upon the houseless poor. It does not distinguish between the poor and the rich in its policy for the conservation of existing homes. It does not confine itself to the shielding of the debtor from the creditor, as is popularly supposed, except in a few states.

The homestead right has been called an incumbrance upon land. The term is doubtless misapplied, but the right operates something like an incumbrance *quoad* creditors.

So it is held that, by the carving of homestead out of land, the incumbrance is thus put upon it, but the title remains as before. The owner (or the husband and wife, when one is the owner, under statutory provision) may mortgage or sell the property; but the creditor cannot, while the homestead right exists, for he encounters the incumbrance or obstacle which the law puts in his way by creating exemption.[1]

The homestead estate terminating when the beneficiaries die or complete their minority or cease to compose a family,

[1] Rutledge v. McFarland, 75 Ga. 774.

the property on which it was established reverts to its owner,[1] it is held. Rather, it is relieved of restraint; for the establishing of a homestead does not give the owner a greater or different title from what he had before. His clear, unincumbered title remains clear. His title, burdened with property debts, remains burdened. And, after the establishment, the property continues liable to forced sale for debts of that character.[2] "There is no magic by which superior liens are thrown off, or deficient titles made perfect."[3] When homestead has been assigned to an occupant, he must still stand upon the merits of his right of ownership and possession. If he had no title before, he has no color of title after such assignment. There is no conveyance of land or land title in the dedication, allotment or setting apart of homestead.[4]

What the law does is to qualify the owner's rights under his title so as to give present protection to his wife and children, and insure future protection to them after his death, while they continue to need it. It confers no title upon him; it gives them protection rather than interest in his title.[5]

§ 2. Property Qualification of the Claimant.

It has been contended that the condition of ownership may be disregarded in the acquisition of the exemption right. But it is imperative. Non-compliance with this requirement is as fatal as non-occupancy, the having of no family, or the neglect of dedication, where all these conditions are required by

[1] Stephens v. Montgomery, 74 Ga. 832.

[2] Newton v. Summey, 59 Ga. 397.

[3] Bleckley, J., in deciding above cited case.

[4] Keener v. Goodson, 89 N. C. 273, Grant v. Edwards, 86 N. C. 513; Gheen v. Summey, 80 N. C. 187; Littlejohn v. Egerton, 77 N. C. 379.

[5] The constitution of West Virginia does not confer a right to a homestead. Speidel v. Schlosser, 13 W. Va. 686. Const. 1872, art. 6, § 48, construed. It authorizes a homestead law exempting $1,000 of property, in favor of a husband or parent or orphan minor children, free from forced sale for debts, etc. *Ib.;* Holt v. Williams, 13 W. Va., 704. Rents not affected. Donaldson v. Voltz, 19 W. Va. 156, *construing* Code 1872–3, ch. 193, § 6, and Const., art. 6, § 48. *See* Keble v. Mitchell, 9 W. Va. 492; Hilleary v. Thompson, 11 W. Va. 113; Hartley v. Roffe, 12 W. Va. 401; Beaty v. Vrom, 18 W. Va. 291; Tremble v. Herold, 20 W. Va. 602; Stewart v. Stewart, 27 W. Va. 177, all reviewed in Maran v. Clarke, 30 W. Va. 358, on judicial sales of homesteads, etc.

statute. The last named is less generally required than the others; the family condition, and even occupancy, are not universal requisites; but ownership by some title is an essential everywhere, required by every statute. And the absurdity of allowing a claimant in another man's real estate where the latter is privileged to claim it himself, the same moment, is repulsive to common sense. Yet it has been argued that if one claims homestead in another man's land, no one but the owner has any ground of complaint; that the claimant may thus secure an exemption right which attaches to the land he does not own, so that, if he should buy it afterwards, it would be free from judgments entered against him between the date of his claiming exemption and that of the purchase. It is said: "By filing the declaration, the party indicates his intention to make the land his homestead, and, if he afterwards acquires an outstanding title, it attaches itself to the homestead already acquired, and perfects the homestead right. If it were otherwise, a homestead could not be secured which would be safe against forced sales, unless there were at the time a perfect fee-simple in the party who seeks the homestead right. In case of a title in any respect imperfect, the claimant could not perfect his title to the homestead except at the risk of losing it altogether, through the intervention of a creditor, and by the very means adopted to render it more secure; and, under such a construction of the statute, it would not be available to the greater portion of the class in this state who need it most." Under this line of reasoning, it was really held that a claimant may secure the homestead exemption right in land that he does not own by any species of title.[1]

Putting aside what is said about "a perfect title in fee," "a title in any respect imperfect," and similar phrases; and merely saying, in passing, that homestead laws do not designate the character of the ownership but merely require ownership of some kind, one cannot help noticing the concluding remark of the quotation. It is virtually this: "If the landless cannot secure present exemption in land to be hereafter acquired, the greater portion of the poor would have no homesteads." The

[1] Spencer v. Geissman, 37 Cal. 99; Brooks v. Hyde, 37 Cal. 373.

idea is that the government should paternally confer homesteads on all who need them most, whether they comply with the condition of ownership or not. Subsequent compliance is to retroact, by the law of relation, from purchase to the time of the declaration, according to the gist of this decision. The statute governing the court authorized no such retroaction.

Fallacy follows from the wrongful assumption that the policy of the homestead legislation is not merely to protect homes but to provide them; or, in some way, help the poor to homes. The following statement of the policy was made in a state which requires ownership as a homestead condition (as is done everywhere, *ex necessitate*, since the state cannot protect property when there is none to be protected): "The policy of the constitution and statutes is not restricted to the mere preservation of homesteads already acquired, but extends to encouraging their acquisition, in order to prevent and avoid the unmixed evil and misfortune of a homeless population; 'and if we look beyond the essential characteristics of a homestead — actual occupancy as a home, a dwelling place — and enter upon an inquiry as to the tenure upon which the right of occupancy depends, we are sure to contravene this policy.'"[1] From this statement of policy as a premise, the court making it infers, not that a man unable to purchase a homestead, from want of means, will be helped paternally by the government (as some decisions go the length of virtually holding by their application of the law of relation to purchases), but that one living in a rented house may have his homestead there while improving purchased land adjoining as an addition to his homestead. No doubt. But this conclusion does not follow from the statement of the homestead policy. It is unfortunate that that *dictum* was inserted into so good an opinion.

Can real estate, occupied as a homestead, but not paid for, be subjected to the payment of a debt created after the contract of purchase, to the extent of the purchase-money paid after the creation of the debt?

The question is asked with reference to the common statu-

[1] Tyler v. Jewett, 82 Ala. 93, 99, quoting from Watts v. Gordon, 65 Ala. 546.

tory exemption of homesteads with debts antecedent to the purchase excepted therefrom.[1]

"It seems to us," the court said in answering the question, "considering the rights of creditors, the moral obligations of debtors, and the reason for adopting the section [cited], the word *purchase* was intended to be understood and applied in the sense of acquisition of a homestead by fully paying for it; for ownership of land cannot be absolute, but is conditional and held in trust for the vendor until the purchase price is paid.[2] . . . The underlying principle . . . is that the homestead of a debtor shall not be exempt from the payment of any just debt or liability, except when he has paid, or to the extent he has paid, therefor prior to the creation of such debt or liability. For there is no difference in principle or effect between purchasing and paying for a homestead with means that ought to have been applied to payment of a pre-existing debt, and paying wholly or partially after creation of the debt, the purchase price of a homestead, even if it was bargained for prior to the existence of the debt. In one case as well as in the other the means used by the debtor to pay for the homestead may have been obtained directly from the creditor when the debt was created."[3]

A home place, occupied by a man and wife for twenty years, was conveyed to him six months after her death. The long occupancy created no presumption of ownership in the face of the deed coming from one whom the surviving husband recognized as the true owner by the very act of accepting it.[4]

A husband contracted to purchase ground, partly on credit. The deed was to be given on his making the final payment. He built a dwelling-house on the land, and occupied it, with his family, as their home. His wife made and filed a declaration of homestead on the property. The payments had been made from the joint earnings of both, so far as made at all:

[1] Gen. Stat. of Ky., ch. 38, art. 13, § 16, under which the question arose.

[2] *Citing* Ins. Co. v. Curry, 13 Bush, 312.

[3] Mosely v. Bevins (Ky.), 15 S. W. 527. *Compare* Griffin v. Proctor, 14 Bush, 571.

[4] Holloway v. McIlhenny Co. (Tex.), 14 S. W. 240.

so whatever property right had been acquired belonged to the community. The husband sold the house and assigned the contract of purchase, without his wife's joinder — the vendee making the final payment and receiving the title deed.

An action of ejectment was brought by this vendee to recover possession of the house and lot. The wife claimed it as homestead. The question was whether her husband had transferred any legal right of property, without her consent and signature; in other words, whether the property was homestead.

Not having been paid for, the property was never owned by the husband and wife; so she had declared homestead upon property when she was wanting one of the necessary conditions: ownership. Her husband had not the legal title — only a contract to have it on payment of the price. This contract he assigned to another, who complied with the essential and received the title-deed. The ownership passed, by the title, from him who had promised to convey to the husband and wife on receipt of the price, to the assignee who did pay it: so no homestead was ever owned by the occupants of the property.

The husband, as head of the community, had the disposition of the property-right in the contract, just as though it had been his separate property.[1] The equitable interest of the community was at his disposal, since no homestead restraint of alienation forbade.

The ejectment suit was successful, on the view above presented of the facts stated. The transactions are declared fair and free from fraud. The law imposes no obligation, on a husband to his wife, to complete such a contract of purchase. The imperfect obligation, if any, was not enforceable by her against him in a court of justice. Only *in foro conscientiæ*, could there have been any obligation, by him to her, so far as the facts show; and they do not show that there was any in that — the highest court. "The husband had lawful right to refuse to complete his purchase."[2] The wife had no legal ground of complaint. The legal title was in the person who had made the executory agreement to sell, who was not bound

[1] Cal. Civ. Code, § 172.

[2] Alexander v. Jackson (Cal.), 25 Pac. 415; Snodgrass v. Parks, 79 Cal. 55; Hicks v. Lovell, 64 Cal. 14.

to convey the land till payment. He could not have been compelled to do so, at the time the wife of the occupant made the homestead declaration, which was therefore a nullity.[1] He had not parted with the legal title till he gave it to the plaintiff in the ejectment suit. The court was clearly right in holding that the homestead claimed was fatally wanting in the essential condition of ownership.[2] Where there is no ownership, it follows most assuredly that the widow of the occupant cannot have homestead assigned to her out of the land.[3]

It has been denied that there can be homestead in a building, when the site is not owned. If the owner of it does not own the ground on which it stands, he may move it off but cannot hold it exempt from his debts, according to this view.[4]

§ 3. Character of the Title.

The statutes, which all require that the property shall be owned by him who claims it as exempt from forced sale, do not declare whether the title shall be absolute or qualified, whether in fee or for life or a term of years, whether a freehold or a leasehold. There might be conflicting claims between owners under differently charactered titles to the same land, were it not for that other condition: occupancy. He who actually occupies the premises, with his family, and makes it his

[1] Snodgrass v. Parks, *supra*.

[2] Alexander v. Jackson, *supra*.

[3] Berry v. Dobson (Miss.), 10 So. 45. Campbell, J.: The appellant had no right as to the land derivative from her deceased husband, for he had no interest in the land which was transmissible. He was not owner of any estate in it. He was but tenant at will, and this tenancy terminated at his death. Homestead right is founded on ownership of some assignable interest in the land. It must be "owned and occupied." It may be the lowest kind of estate, but it must be an interest in the land. Code, § 1248; 9 Amer. & Eng. Enc. Law, tit. "Homestead." The husband had no interest whatever in this land, but had conveyed it and was a mere occupant. It would be a strange doctrine that an owner of land could put a family on each quarter-section of his land, and thereby place it beyond the reach of creditors,— his own and the occupant's,— which would result if the occupant could claim it as exempt. The appellant had no right, by virtue of of the conveyance of the land to her, for her grantors had nothing to convey. They had been adjudged against by the decree of the chancery court, and the appellant, as their grantee, was in privity with them, and bound by the decree. Affirmed.

[4] Kuttner v. Haines, 35 Ill. Ap. 307; Brown v. Keller, 32 Ill. 151.

and their home, under a legal right of possession, can find no successful competitor for the homestead privilege in one who holds a title different from his in kind, even though it be in fee, which is not supported by occupancy.

The owner for life, occupying the premises lawfully, is the lord of the manor while he lives, and the owner in fee-simple cannot displace him. He can maintain it against all trespassers. In the absence of exemption immunity, his estate is liable to creditors for his debts, and therefore a proper subject for the protection vouchsafed by the legislator to homesteads.

So, the owner for years, with legal right of possession, actually occupying with his family, is an owner within the statutory meaning of the requirement that the homestead shall be "owned and occupied." These terms are frequently coupled together in the homestead laws. When not, equivalent expressions are usually employed. But the character of the title is never specified.

The law governing homestead ownership under the prevailing system is stated very clearly, and with a near approach to perfect accuracy, in the following excerpt from a judicial opinion: "It was not contemplated, nor intended, by the term 'owned,' as employed in the constitution, that absolute ownership, or an estate in fee, should be essential to the valid exemption of real property from the payment of debts. There is no limitation to any particular estate, either as to duration, quantity or extent. It is the land on which the dwelling place of the family is located, used and occupied as a home, which the constitution and statutes protect, however inferior may be the title, or limited the estate or interest; not because there is an estate or interest in the land, but because it is the homestead, the dwelling place and its appurtenances. Protection of the estate or interest, of whatever dignity or inferiority, is incidental to the preservation of the homestead. The statute, adopting this construction of the constitution, expressly declares: 'Such homestead exemption shall be operative to the extent of the owner's interest therein, whether it be a fee or a less estate.' An absolute or qualified ownership — a fee simple or equitable estate, or for life, or for years — meets the requirements of the constitution and statutes, and

effectuates their policy and purposes. Whatever right or claim the debtor may have, which may be subjected to the payment of debts, or is capable of alienation, falls within their operation, and the homestead exemption may be successfully claimed, except as against the true owner, or a superior title. The uses to which the land is devoted, and not the quality and quantity of the estate, impress the characteristics of a homestead. The lot leased by the complainant was his homestead at the time he contracted to purchase the lot in controversy, and continued such so long as he continued to lease, use and occupy it as the dwelling place of himself and family."[1]

The expression in the third sentence of this extract, that it is "not because there is an estate or interest in the land," ought to have been qualified so as to read, "not *only* because —," since occupancy alone is not enough. Something must be *owned* by some sort of title to render it susceptible of exemption and protection from execution. The condition of ownership cannot be overlooked, without error; and from a reading of the expression needing qualification in connection with the context, it will appear that the learned judge did not overlook it. There are remarks further on, in his opinion respecting the policy of homestead legislation, which, it must be noticed, are not fully in accord with the recognition of present ownership by some kind of title as one of the conditions upon which homestead protection is offered.

There may be the case of one who has parted with his title yet retains possession in such a way as to be protected as owner *quoad* the creditors. Such a one was allowed to claim exemption. He had donated his land after judgment for debt had been rendered against him but had retained possession and had continued to occupy it as his homestead. He interposed his exemption claim to prevent sale under the judgment, and the court allowed it — holding that no interest in realty, beyond that which possession implies, is necessary to sustain such plea against a lien inferior to the exemption right. This would seem to recognize the validity of the general lien but to rank it below exemption considered as a lien or incumbrance. It will strike the reader at once that

[1] Tyler v. Jewett, 82 Ala. 93, 98; Watts v. Gordon, 65 Ala. 546.

the claimant could have held no lien or incumbrance on his own land. The implication of ownership from the fact of occupancy is a position which appears to be better grounded. If homestead right existed in the claimant and had not been given up by the donation, the general judgment would not have fastened any sort of lien upon the land under the law of most of the states.[1]

[1] Pendleton v. Hooper (Ga.), 13 S. E. 313. Bleckley, C. J.: "The premises in controversy consist of six acres, and are of the estimated value of $400. Hooper was in possession when the judgment against him was rendered, and has remained in possession ever since. He parted with the paper title by a voluntary conveyance made to several persons, some of them minors, on the day the judgment was rendered, and at an hour subsequent to its rendition. The lien of the judgment was made neither better nor worse by this conveyance. Had he parted also with possession, and never reserved the same, his ownership of the property would have been at an end; but, as he retained possession, he is still the owner against all the world except his donees. They may choose never to disturb him, or assert any title against him. That possession of land imports ownership is familiar law. 2 Bl. Comm. 196; English v. Register, 7 Ga. 391. Naked possession is the lowest and most imperfect degree of title, but it is nevertheless enough to hold off creditors, where exemption is claimed under section 2040 of the code, and where the terms prescribed in section 2041 are complied with. Here there was a compliance with these terms pending the levy, and while Hooper was in possession. It is not disputed that he was the head of a family, or that he would be entitled to the exemption, if he had not divested himself of all title except possession. But he retained the very thing which the law of exemption is solicitous to protect. It cares not how little interest the debtor may have, so long as he remains in its actual enjoyment. The exempt land is "for the use and benefit of the family of the debtor;" so says the code. The exemption does not depend on the quality or duration of the estate which the debtor has in the land. A tenancy at will or at sufferance will protect it from levy and sale as his property, equally with an estate in fee-simple. The exemption attaches to the land, not merely to his estate in it. Our exemption laws do not cut up exempt property into divers estates, but protect the physical thing as a whole from the levy and sale, so long as the exemption continues. Van Horn v. McNeill, 79 Ga. 122, 123; 4 S. E. Rep. 111. Of course, it is not meant to say that, if others have an interest in the property as well as the debtor who has claimed the exemption, the property would not be subject to sale, so far as their interest is concerned. But a forced sale of an exempt thing, whether it be land or personalty, cannot be made as the property of the debtor against his claim of exemption, while he is the head of a family, and holds possession, unless the debt be one which for some reason overrides the exemption. The law devotes the thing to the use and benefit of the family, as against the ordinary rights of his creditors.

Briefly stated, the law in most states seems to be that interest in land, with possession and exclusive right of possession, held under lease or any other title, gives the family occupants the right to claim the benefit of homestead exemption.[1]

Manifestly, exemption relates to something which could be sold under execution in the absence of it.[2]

If the claimant has any interest whatever in land, with the right of possession, he may have it protected; that is, it may be exempted. If he has none, what is there for the state to protect? What can the creditor get?

The possessor without right can be ousted only by the true owner or some one having a right to possess;[3] but there must be some estate upon which to build a homestead exemption right.[4]

Though a building on rented ground, owned by the occu-

Some debts are superior to the exemption right, but the one involved in this case is not of that class. How, then, can the land be consistently treated as the property of the debtor for the purpose of subjecting it to sale, and not so treated for the purpose of exempting it? The creditor's lien being inferior to the debtor's right to have the enforcement of the lien suspended, of what concern to the creditor is it that the debtor has no title to the land, as against third persons to whom he has conveyed it by a deed of gift? Even were he a trespasser relatively to his donees, he would, while in possession, be owner relatively to his creditors. The court below decided the case correctly. Judgment affirmed."

[1] Feldes v. Duncan, 30 Ill. App. 469, 475; Watson v. Saxer, 102 Ill. 585; Deere v. Chapman, 25 Ill. 498. The Act of 1872 gives an "estate of homestead" in Illinois: the former act gave mere exemption. Raber v. Gund, 110 Ill. 581; Conklin v. Foster, 57 Ill. 107; Bartholomew v. West, 2 Dill. 293; Sears v. Hanks, 14 O. St. 301; Vogler v. Montgomery, 54 Mo. 584; Randal v. Elder, 12 Kas. 261.

[2] Conklin v. Foster, 57 Ill. 107; Randal v. Elder, 12 Kas. 261; Deere v. Chapman, 25 Ill. 498; Sears v. Hanks, 14 O. St. 301; Vogler v. Montgomery, 54 Mo. 584; Bartholomew v. West, 2 Dill. 293.

[3] Foss v. Strachn, 42 N. H. 40; Davenport v. Alston, 14 Ga. 271; McClurken v. McClurken, 46 Ill. 327; Brown v. Keller, 32 Ill. 151; Brooks v. Hyde, 37 Cal. 367; Spencer v. Geissman, 37 Cal. 96; Mann v. Rogers, 35 Cal. 316; Smith v. Smith, 12 Cal. 223; Calderwood v. Tevis, 23 Cal. 336.

[4] In Myrick v. Bill, 3 Dak. 284, *292*, it is said: "The rule seems to be well settled that while a very limited estate in the land, perhaps a mere leasehold interest, may be sufficient to support a claim of homestead, some estate in the land is essential. There can be no homestead right in a building alone, apart from the land on which it stands. . . . Brown v. Keller, 32 Ill. 152; . . . Davenport v. Austin, 14 Ga. 271." The

pant, is personal property; and he, as lessee of the ground, has the right to remove his house at the end of the lease, and even though he should mortgage it as a chattel, it is his and his wife's homestead while they keep their family home in it, and therefore he cannot subject it to chattel mortgage without her consent.[1]

An easement, such as a railroad or common road, gas or water mains, may be upon a homestead without affecting its character as exempt property. The ownership is not affected.[2]

§ 4. Leasehold, and Various Titles to Parcels.

So far as leased property is susceptible of being conserved as a home, by the protection afforded to dedicated homes in general under the homestead laws, it is governed by the same rules that apply to homesteads based upon property held by more enduring titles.

The lease may have but a year to run, but the wife and children of the lessee are interested in the preservation of their temporary home, and therefore the general rules governing it are the same as those relative to a home held in fee, so far as they are applicable.

As homestead may exist in an estate held by leasehold, crops growing upon a leased plantation held and worked as a rural homestead are exempt. If such a crop has been taken and sold under execution, the lessee may maintain an action for conversion; and the title to the land on which the crop was grown is not drawn in question.[3]

last sentence quoted does not state a universal rule. A house on leased ground may be that to which homestead exemption can cling, under some statutes; and why not anywhere unless real estate is made the only nucleus of the right? A family may live in a house on leased ground, may need protection, and if the head of the family owns the dwelling, why may not homestead protection be extended to it?

[1] Hogan v. Manners, 23 Kas. 551.

[2] Randal v. Elder, 12 Kas. 257.

[3] Phillips v. Warner (Tex.), 16 S. W. 423. In this case, damages for converting a growing cotton crop were claimed. The plaintiff and appellant alleged that his homestead consisted of sixty-five acres planted in cotton; that he had a wife and seven children living with him on this sixty-five acres of land, and that they had no other home. That on 14th September, 1887, his growing crop of cotton on this sixty-five acres of land, and about a bale of seed cotton, which had been picked therefrom, and was lying in the field, were levied on by a constable by virtue of an *alias* writ of

A leasehold title, to a homestead enjoyed by husband and wife, may be such as to require the signature of both to its

execution in favor of J. M. Warner, appellee herein, against the appellant, for the sum of $141.25, by said Warner's express direction, and on the 26th September, 1887, were sold at a sum greatly less than their value, which appellee received the benefit of. That appellant claimed his cotton as exempt, both at the time of the levy and sale. Appellee answered by a general demurrer, and specially that the question of homestead was raised, which the county court had no jurisdiction to hear and determine; and that a growing crop of cotton on a homestead is not, under the law, exempt from forced sale. He further answered by a general denial, and that on the 28th January, 1886, in the justice court, appellee recovered a judgment against appellant for $173.20, and on 14th September, 1887, under an *alias* execution, the property mentioned in plaintiff's petition was levied on and sold as charged by plaintiff. Appellee further pleaded that the question of homestead title and right was raised, and the county court had no jurisdiction to determine the case. On March 17, 1888, there was a trial resulting in a verdict and judgment in appellee's favor. A motion for a new trial being overruled, appellant brings his case to this court. The appellee's plea to the jurisdiction was not maintainable. The title to land was not involved in the issue to be tried, as presented in plaintiff's petition. The question was the exemption of the property seized, taken, and converted. Appellant (plaintiff below) did not own the land, but had it leased. The court below appears to have held that a leasehold would not support a homestead and exemption claim, under our constitution and laws. In Wheatley v. Griffin, our supreme court says: "The great current of authority is to the effect that the homestead right will attach to an equitable estate, an estate for life, or even a leasehold interest. The authorities bearing upon this subject are given in sections 170–172, 174, 176, Thomp. Homest. & Ex., and these authorities and the reasons given therein are deemed conclusive of this question." 60 Tex. 209. "Crops growing on a rural homestead are exempt from forced sale. The exemption from sale of the homestead itself was to enable the owner to support himself and family, and this object would be defeated if the creditor were permitted to seize and sell the growing crop." Alexander v. Holt, 59 Tex. 205; Cobbs v. Coleman, 14 Tex. 598; 1 Civil Cas. Ct. App., § 951; 2 Civil Cas. Ct. App., § 423. The court erred in not submitting to the jury as the law of this case the special charge asked by plaintiff, which is as follows, viz.: "You are charged, gentlemen of the jury, that a homestead may exist in a leasehold interest in land whether that interest be for twelve months or more; and, if you believe from the evidence that the plaintiff therein rented, for the year 1887, the land on which the growing cotton which was sold under defendant's execution was raised, and was only a tenant on said land, and that said land was the homestead of himself and family for that year, and occupied as such, though for only one year, then the said growing crop, under the law, would be exempt as a growing crop on his homestead, not subject to sale under defendant's execution." Judgment is reversed, and cause remanded.

transfer.[1] As the home of the family, the leased property is subjected to the restraints put upon homesteads in general, with respect to incumbrance or alienation, for leasehold title is a species of ownership recognized by the homestead statutes, as interpreted.[2]

The right of a lessee cannot be disturbed by the widow of the deceased lessor in claiming to have homestead assigned her out of the property held by him, when his lease has not expired, and when she had filed no claim to homestead before the death of her husband, the lessor.[3] But she may become entitled so far as to have the rents.[4]

It seems needless to say that a tenant has no homestead, as against the landlord, after his lease has expired.[5]

The ownership of a homestead may be partly under one kind of title and partly under another. The beneficiary may hold his dwelling-house by leasehold and a garden appurtenant by freehold. His home farm may be half held in fee and half under life tenure — the whole not exceeding the monetary or qualitative limit, where there is either restriction or both. Indeed, every species of title may exist, each in relation to a different part of the homestead, provided the owner has the exclusive right of possession as to the whole, under the various titles to the parts.

If the beneficiary has his family home on a leased lot, he may acquire an abutting lot by purchase, and use both as his homestead, within the prescribed limitation.[6]

Homestead under different titles is explained in the following extract: "We have therefore, as postulates, that the right to homestead exemption does not depend on the nature of the title, or the degree or character of the estate, but will be determined by occupancy and uses" [*coupled with the title*, it should be said]; "and that a homestead may consist of two

[1] Pelan v. De Bevard, 13 Ia. 53; Morris v. Sargent, 18 Ia. 90.

[2] Hogan v. Manners, 23 Kas. 551; Conklin v. Foster, 57 Ill. 104; Shores v. Shores, 34 Mo. App. 208; Johnson v. Richardson, 33 Miss. 462; Pelan v. De Bevard, 13 Ia. 53. *Compare* Colwell v. Carper, 15 O. St. 279, and Ellis v. Welch, 6 Mass. 251.

[3] Shores v. Shores, 34 Mo. App. 208.

[4] *Ib.*

[5] Kuttner v. Haines, 35 Ill. App. 307.

[6] Walters v. People, 18 Ill. 194; S. C., 65 Am. Dec. 730; Englebrecht v. Shade, 47 Cal. 627; Tyler v. Jewett, 82 Ala. 93, 99; Wassell v. Tunnah, 25 Ark. 101.

or more adjoining pieces of land so connected, occupied and used as to constitute, in contemplation of law, one tract. The logical and obvious consequence is that it is not essential that the several lots or pieces shall be held by the same title or the same kind of title."[1]

The dwelling-house may be separately described in a deed, yet constitute a part of the homestead belonging to the freehold.[2]

§ 5. Life Estate.

The holder of a life estate may have a homestead carved out of it. It would not affect the case if the life title were in a woman while the remainder is in the children. She would be entitled to claim homestead as against her creditors, if the occupant of the property while thus claiming.[3] Her claim, in such case, would be to an original homestead, against her own creditors; not for the technical widow's homestead. She would claim precisely as a man would, under similar circumstances.

The homestead right is a fee-simple interest, where an estate in fee supports it;[4] but it is a life interest when supported by a life estate, and there is no inconsistency.[5]

The "estate" is the same after the acquisition of the homestead character as it was before. The beneficiary of the protection accorded does not obtain any additional property right from the state. The term "estate of homestead" is misleading if it induces the public to think that additional property-title of any sort is meant.

As already remarked, the homestead is irrespective of the character of the title or tenure by which the beneficiary holds it. Yet upon appraisement for division or any purpose, the property-value is estimated — not his mere interest. For instance, one who has life estate in property worth five thousand dollars, where that is the monetary *maximum* of a homestead, cannot demand that sum from property sold as an entirety.

[1] Tyler v. Jewett, *supra;* King v. Sturges, 56 Miss. 606; Partee v. Stewart, 50 Miss. 717; Campbell v. Adair, 45 Miss. 170; Mosely v. Anderson, 40 Miss. 54.

[2] Lyle v. Palmer, 42 Mich. 314.

[3] Robinson v. Smithey, 80 Ky. 636.

[4] Murdock v. Dalby, 13 Mo. App. 41; Skonten v. Wood, 57 Mo. 380.

[5] *Ib.;* Deere v. Chapman, 25 Ill. 498; Potts v. Davenport, 79 Ill. 456; State v. Diveling, 66 Mo. 375.

He, holding life estate in land of that value, had not an interest worth that sum. The simple value is estimated.[1]

This rule works well where there is limitation of quantity. But it may not be applicable when the limitation is in value only. Where the measure of homestead exemption is value — not quantity — the beneficiary has been held entitled to the full amount though his title be a life estate; not limited to the value estimated as though the title were in fee.[2] "A homestead right in an estate less than a fee is not as valuable as a homestead right in a fee, and it must therefore be of a correspondingly greater extent territorially in order to effect an equality in the rights of the respective owners."[3] This view seems to be exceptional to the general rule.

§ 6. Equitable Title.

A possessor of land under an equitable title may claim homestead thereon, acquire the usual immunities and subject himself to the same disabilities as though he held under a legal title. He may have mortgaged it before dedication, and have nothing left in him but the right of redemption; he may have conveyed by trust deed; he may never have acquired the property except under a title bond or a contract to purchase, and yet have exclusive right of possession and the privilege of dedicating the property to homestead purposes with the accompanying exemption and restraints — subject only to the paramount right of the mortgagee or vendor, as the case may be. The general doctrine, that there may be homestead under an equitable title with exclusive right of possession is established.[4]

[1] Brown v. Starr, 79 Cal. 608; Spencer v. Geissman, 37 Cal. 99; Brooks v. Hyde, 37 Cal. 366; Arnold v. Jones, 9 Lea, 545; Franks v. Lucas, 14 Bush, 395.

[2] Squire v. Mudgett, 63 N. H. 71; N. H. Gen. L., ch. 138, §§ 1, 5.

[3] *Ib.*

[4] Canfield v. Hard, 58 Vt. 217; Doane v. Doane, 46 Vt. 485; Fellows v. Dow, 58 N. H. 21; Norris v. Morrison, 45 N. H. 490; Searle v. Chapman, 121 Mass. 19; Rockafellow v. Peay, 40 Ark. 69; Blue v. Blue, 38 Ill. 9; Tomlin v. Hilyard, 43 Ill. 300; Hartman v. Schultz, 101 Ill. 437; Kingman v. Higgins, 100 Ill. 319; McClure v. Braniff, 75 Ia. 38; Hewitt v. Rankin, 41 Ia. 35; Stinson v. Richardson, 44 Ia. 373–5; Caroon v. Cooper, 63 N. C. 386; Burton v. Spiers, 87 N. C. 87; Murchison v. Plyler, 87 N. C. 79; Creecy v. Pierce, 69 N. C. 67; Munro v. Jeter, 24 S. C. 29; Kirby v. Reese, 69 Ga. 452; King v. Gotz, 70 Cal. 236; Kennedy v. Nu-

Equitable title to land, used as a homestead, is protected from forced sale, but there must be the right of possession, and ownership by some title.[1] There must be such ownership as to render the property susceptible of becoming the basis of the homestead right; and this may be by purchase under bond, with possession.[2] This will support the claim, and will subject the property to that restraint upon alienation which attends homestead, though payment has not been fully made.[3] The rule, with respect to such restraint, is the same, whether the title be equitable or legal.[4]

A verbal contract to purchase, accompanied by possession, has been deemed sufficient ownership to enable the possessor to claim the right of homestead, and held to impose disability to convey without joinder by his wife.[5] And a *contract to purchase*, written but not executed, has been held sufficient basis for the homestead right,[6] though this is not universally admitted.[7]

Where there is actual occupancy by a family, though the premises be not owned by the head of it under any perfected title whatever, it is held that it will be respected as a homestead if there be a contract to purchase. The reasoning is that as equity sometimes considers as done what parties have agreed to do; as it treats the contemplated vendor as trustee of the title for the vendee; as it treats the contemplated vendee as trustee of the purchase-money for the vendor; as it gives the same effect to the equitable estate thus erected that the law gives to the legal estate, and such estate goes to the vendee's heirs or devisees at his death,— so it will protect an occupied homestead, under contract to purchase, against alienation by the husband without his wife's consent. And the

nan, 52 Cal. 326; Smith v. Chenault, 48 Tex. 455; McManus v. Campbell, 37 Tex. 269; Wilder v. Haughey, 21 Minn. 101; Threshing Machine Co. v. Mitchell, 74 Mich. 679; Orr v. Shraft, 22 Mich. 260; Schreiber v. Carey, 48 Wis. 215.

[1] Smith v. Chenault, 48 Tex. 455; McClure v. Braniff, 75 Ia. 38.

[2] Stinson v. Richardson, 44 Ia. 373–375.

[3] *Id.*

[4] Wilder v. Haughey, 21 Minn. 101; Hartman v. Munch, 21 Minn. 107.

[5] McKee v. Wilcox, 11 Mich. 358; Fyfee v. Beers, 18 Ia. 11.

[6] Bartholomew v. West, 2 Dill. 293; Moore v. Reaves, 15 Kas. 150; McCabe v. Mazzuchelli, 13 Wis. 534; Allen v. Hawley, 66 Ill. 164.

[7] Garity v. Du Bose, 5 S. C. 493. *See* Jenkins v. Harrison, 66 Ala. 345.

wife may perform the contract, on the husband's neglect to do it, just as she may redeem a mortgage to save her right of dower.[1]

But a contract purchaser cannot claim homestead rights in land which he has deeded to another purchaser on completing his own payments.[2]

Equity of redemption is held sufficient. The mortgagor, in possession, holds his property exempt from other debts than that secured by the mortgage. He has the right of redeeming it from that incumbrance, not necessarily by means of the homestead (which is primarily bound for the mortgage debt), but by any other. His homestead right is in the land, therefore, rather than in his redemption right; but it is held that the homestead right may be supported by an equity of redemption.[3] This is true as to the general creditor, after mortgage by himself and wife with release of the homestead right.[4] If he remains in possession as trustee of the mortgagee,[5] no one can complain that the debtor holds no title beyond the right to redeem. The mortgagee is secured, and other creditors cannot disturb the household for the personal debts of its head, under the circumstances, when the debts were contracted subsequent to the acquisition of the homestead immunity.

A mortgage deed duly executed to secure a debt, conveying the land on which the homestead rests, leaves no right in the grantor or grantors but that of redemption; and if they never redeem there is nothing to which the homestead right can attach.[6] If homestead is taken after the giving of such deed, there would be no defense to an action of ejectment brought on the deed.[7] But if the grantors remain in possession, cred-

[1] McKee v. Wilcox, 11 Mich. 358.

[2] Fairbairn v. Middlemiss, 47 Mich. 372. Under a partly paid certificate of purchase of school land in Michigan, homestead right was successfully claimed. Allen v. Caldwell, 55 Mich. 8.

[3] Fellows v. Dow, 58 N. H. 21; Creecy v. Pierce, 69 N. C. 67; Cheatham v. Jones, 68 N. C. 153; Doane v. Doane, 46 Vt. 485; Morgan v. Stearns, 41 Vt. 398; 88 Mo. 222; *distinguishing* Casebolt v. Donaldson, 67 Mo. 308; and *overruling* State v. Mason, 15 Mo. Ap. 141.

[4] Fellows v. Dow, 58 N. H. 21; Norris v. Morrison, 45 N. H. 490.

[5] Threshing Machine Co. v. Mitchell, 74 Mich. 679.

[6] Kirby v. Reese, 69 Ga. 452. See Moore v. Frost, 63 Ga. 296.

[7] Thaxton v. Roberts, 66 Ga. 704.

itors other than the grantee cannot disturb him. They cannot execute their judgment by selling the right of redemption while the homestead right exists.

This is from the doctrine, already enunciated, that equity of redemption is title sufficient to support homestead. Though property may be heavily burdened with trust debts, the equitable estate is not destroyed.[1] Homestead is analogous to dower which may be given in an equity of redemption or other trust estate;[2] or rather, in land held under such right. One cannot live in a mere equity; the home cannot be in any right; it is in realty which may be supported by equitable title only.

After one has given a trust deed upon community land to secure a debt, he has enough interest remaining to enable him to make a valid claim of homestead,[3] because he yet has an interest susceptible of being sold under execution,[4] in the absence of homestead protection. That is, if he is in possession of the tangible property. If his interest is intangible — a mere right of some sort subject to execution but not susceptible of habitation, he may have exemption accorded him, but homestead in it would be impossible.

Exemption applies to the equitable interest which the family have in the homestead, but homestead exemption to real property on which that interest is based, so that the legal owner's merely personal obligations cannot be enforced against the property. This exemption, after his death, continues in favor of those who remain as beneficiaries of the equitable estate: that is, his widow and minor children. If the property is within the monetary exemption limit, there is nothing for the administrator to sell on the death of the legal owner.[5]

§ 7. Titles of Husband and Wife.

The husband and wife are as one in the holding of the homestead. Neither can have title in it adversely to the other.

[1] Burton v. Spiers, 87 N. C. 87; Murchison v. Plyler, 87 N. C. 79, 82; Cheatham v. Jones, 68 N. C. 153; Crummen v. Bennett, 68 N. C. 494.

[2] Creecy v. Pearce, 69 N. C. 67; Caroon v. Cooper, 63 N. C. 386.

[3] King v. Gotz, 70 Cal. 236.

[4] Kennedy v. Nunan, 52 Cal. 326.

[5] Hartman v. Schultz, 101 Ill. 437; Conklin v. Foster, 57 Ill. 104; Bursen v. Goodspeed, 60 Ill. 277; Wolf v. Ogden, 66 Ill. 224; Hartwell v. McDonald, 69 Ill. 293; Kingman v. Higgins, 100 Ill. 319.

Thus, if the husband lease it without her concurrence, the tenant cannot set up possession against her.[1]

The equitable interest may be in the husband; the legal, in the wife: yet the homestead may satisfy all the requirements necessary to exempt it from forced sale;[2] and the titles are not adverse.

When the husband makes a declaration of homestead upon his separate property, he creates a joint title thereto in himself and wife. And, to convey or incumber it thereafter, both must join.[3]

There seems to be no obstacle to the holding of a homestead in joint tenancy when the husband and wife are the only joint tenants; and some of the courts go even farther.[4]

The joint-title, created by the husband's declaration of homestead upon his separate property, is merely a title to estate of homestead — not to the realty itself, as a general rule. The husband conveys no land to his wife by declaring homestead; he lets her in to equal control as to alienation, and equal right to enjoyment, and to that protection which the law gives to all homestead holders. But when the state's purpose, relative to homestead conservation, has been accomplished, the land title is as before. Wherever a different result obtains, there is exception to the general rule.

The family head may have homestead right in property belonging to his wife; or, at her death, upon becoming tenant by curtesy, he may hold his home exempt under that title. And it is held that he may then convey his interest free from creditors' claims.[5]

[1] Mauldin v. Cox, 67 Cal. 387; First N. Bank v. De la Guerra, 61 Cal. 109; Frink v. Alsip, 49 Cal. 102.

[2] Orr v. Shraft, 22 Mich. 260; Murray v. Sells, 53 Ga. 257; Crane v. Waggoner, 33 Ind. 83; Dwinell v. Edwards, 23 O. St. 603.

[3] Burkett v. Burkett, 78 Cal. 310; Barber v. Babel, 36 Cal. 14; Tipton v. Martin, 71 Cal. 325; Graves v. Baker, 68 Cal. 133; Porter v. Chapman, 65 Cal. 365; Gagliardo v. Dumont, 54 Cal. 498; Flege v. Garvey, 47 Cal. 375.

[4] Cleaver v. Bigelow, 61 Mich. 47; Tharp v. Allen, 46 Mich. 389; Sherrid v. Southwick, 43 Mich. 515; Lozo v. Sutherland, 38 Mich. 168.

[5] Kendall v. Powers, 96 Mo. 142; Davis v. Land, 88 Mo. 436; Moore v. Ivers, 83 Mo. 29; Stephens v. Hume, 25 Mo. 349; Keyte v. Peery, 25 Mo. App. 394; Reaume v. Chambers, 22 Mo. 36; 1 Wash. Real Prop., 129.

As a general rule, homestead, granted on application of either spouse, will avail the other. But it has been held that a homestead granted on application of a married woman, without stating out of whose property it is to be carved, will not avail her husband against his creditors. However, if both spouses occupy the premises sought to be dedicated, and he is the owner and knows of her application and makes no objection, he and his heirs will be bound by the granting of her application.[1] It would secure a life estate to her in her husband's separate property, but would have ultimately no effect on the title of his heirs.[2] She should make it appear whether the property to be dedicated is separate or community property. Especially is this necessary where the law does not allow her to declare upon her separate property.[3]

The homestead may be upon land one part owned by the husband and another part by the wife, yet be exempt as a whole. It is a matter of indifference whether it be owned by the one or the other, or by both together, or by each in parcels.[4] But if the wife holds the title, and the husband an interest, that will not prevent creditors from executing the husband's interest in collecting their claims against him, antedating the acquisition of the homestead — his interest being considered an equitable asset.[5] And even the wife's separate contribution may be liable.[6]

[1] Linch v. McIntyre, 78 Ga. 209; Coffee v. Adams, 65 Ga. 347. Grounds of application should be set forth, under the Georgia constitution of 1877; ownership of the property should be stated if married woman is applicant. Wilder v. Frederick, 67 Ga. 669; Clark v. Bell, 67 Ga. 728; Jones v. Crumley, 61 Ga. 105.

[2] Gruwell v. Seybolt, 82 Cal. 7.

[3] In Georgia, where a married woman cannot take homestead from her separate property while she lives with her husband, it is necessary for her to state from whose property the homestead is to be set apart when she makes application for homestead. The husband need not so state when he applies: the property being presumably his. Bechtoldt v. Fain, 71 Ga. 495; Langford v. Driver, 70 Ga. 588; McWilliams v. McWilliams, 68 Ga. 459. The wife was allowed homestead when she had averred that her husband refused to make application. Long v. Bullard, 59 Ga. 355. But when granted on her application, it will not be in the way of a prior deed given by her husband to secure debt. West v. Bennett, 59 Ga. 507.

[4] Lowell v. Shannon, 60 Ia. 713; Wilson v. Cochran, 31 Tex. 680; Willis v. Matthews, 46 Tex. 478.

[5] Croup v. Morton, 49 Ia. 16, and 53 Ia. 599.

[6] Hamill v. Henry, 69 Ia. 752.

The home is rightfully to be enjoyed equally by husband and wife, though the title be in one of them.[1]

The legal title of property may be conveyed from husband to wife, though the homestead right is in it. Both together have the estate of homestead, before and after the conveyance. The transfer of the legal title, from one to the other, does not affect it. It is not as though both should join in conveying it to a stranger, which would destroy the homestead estate. In transferring to each other, their children's home is not molested; in joining to transfer to a stranger, the children's home is lost.[2]

Creditors are not affected by the conveyance of the homestead from the debtor to his wife. It is not the conveyance which prevents them from collecting the debts due them from the property: it is the statute.[3]

One who has declared a homestead on his own property may convey it to his wife without her signature. The object of requiring both to join, in abandoning or conveying to others, is to protect her.[4] Such conveyance does not affect the family right of security: husband, wife and children have the same protection as before. But the title is in her: so, in case of divorce, she becomes sole owner with exclusive possession, as to him.[5]

The husband cannot convey his wife's title in their homestead; his illegal attempt to do so cannot affect her interest, if the homestead is upon community property, for instance.[6] For, though the civil law rule is that the husband, as head of the community, may convey it, as representing the rights and

[1] Sanford v. Finkle, 112 Ill. 146.

[2] Milwaukee Ins. Co. v. Ketterlin, 24 Ill. App. 188; Green v. Farrar, 53 Ia. 426; Riehl v. Bingenheimer, 28 Wis. 84; Irion v. Mills, 41 Tex. 310; Shepard v. Brewer, 65 Ill. 383; Clubb v. Wise, 64 Ill. 157.

[3] Boyd v. Barnett, 24 Ill. App. 199. It is said in this case: "Even if we had found that the sale . . . was made with the intent to defraud the complainant as alleged in the bill, still the conveyance would be good, as the property did not exceed $1,000 in value, under the case of Leupold v. Krause, 95 Ill. 440."

[4] Burkett v. Burkett, 78 Cal. 310; Riehl v. Bingenheimer, 28 Wis. 86; Baines v. Baker, 60 Tex. 140; Spoon v. Van Fossen, 53 Ia. 494; Green v. Farrar, 53 Ia. 426; Harsh v. Griffin, 72 Ia. 608; Ruohs v. Hooke, 3 Lea (Tenn.), 302; Platt's Rights of Married Women, § 70.

[5] Burkett v. Burkett, 78 Cal. 310.

[6] Whetstone v. Coffey, 48 Tex. 269.

interests of both, there is an exception when homestead has been declared upon it — a state of things which the civilians never contemplated.

A constitutional provision which secures to a married woman the property she owns at the time of her marriage, or which she subsequently acquires, and exempts it from liability for her husband's debts, and gives her sole disposition of it free from her husband's control, is not so much to declare affirmatively her rights as to negative those of her husband and his creditors. Her legal *status* as a wife is not changed.[1] Her personal earnings belong to her husband still, according to the rule of the common law,[2] and therefore land bought with them is considered as purchased with the husband's money, and given to the wife by him in disregard of the rights of creditors to the money. In such case, there is no resulting trust to him, for he intended a gift to his wife. He has no estate in the property — not even an equitable one — and therefore cannot claim homestead in it.[3]

The ownership of a homestead must be by such title as to give the proprietor an assignable interest, if his widow is to take it at his death as *the homestead.* If, before his marriage, the owner conveys title to his lands and then lives upon them as a tenant during his married life, his widow has no claim to the widow's homestead therein.[4] She may live on the home place under the leasehold title, till the lease expire, if it has some time to run at his death, unless the rights of others intervene.

The heirs of a wife who had died before her husband offered to prove that her estate was insolvent, to support their claim to two hundred acres of land as her homestead. As it had not been shown that either she or her husband had title to the land at the time of her death, the testimony was excluded. Though the husband and his family had occupied it, he had accepted a conveyance of it subsequent to her death,

[1] Bridges v. Howell, 27 S. C. 425; Townsend v. Brown, 16 S. C. 96; Pelzer v. Campbell, 15 S. C. 596.

[2] Syme v. Riddle, 88 N. C. 463.

[3] *Ib.; citing* Hill on Trustees, 91; 2 Story Eq. Jur., §§ 1202, 1204. And on homestead in equitable estate. Munro v. Jeter, 24 S. C. 29.

[4] Berry v. Dobson (Miss.), 10 So. 45; Miss. Code 1880, § 1248.

thus raising the presumption that title was in the grantor at the date of the deed.[1]

§ 8. Mutual Interest of Husband and Wife.

A dwelling-house and the ground on which it stands may each be worth the amount of the statutory exemption, and one may be owned by the husband and the other by the wife. Where no formal selection and recordation are required, and the two estates are enjoyed together by the married couple, are they in condition to defeat a forced sale of either property? If the husband is the owner of the house, may he claim it as exempt in case a judgment be rendered against him and execution be directed against it? At the same time, in case a judgment be rendered against her and the land be levied upon, may she claim that as exempt and defeat the execution?

Certainly this family cannot be entitled to two homesteads, nor can it play the double part suggested. Either he alone, as the head of the family, may claim homestead right for both in the house which he owns and in which both live, and which is worth the whole amount of the exemption, or she alone may claim it in her land. If he neglects or refuses to claim till the house be levied upon, but retains his right to claim at any time, will this preclude the wife from setting up exemption right in the land to defeat an execution already laid?

It would seem that, under the circumstances, the husband would be the "householder" and "occupant" within the meaning of those words as used in the constitutions and statutes according the homestead right; and that the wife has no right to claim except what she derives from him, for the benefit of the family of which he is the head. But it has been held, under circumstances such as above suggested, that she may resist execution against the land by claiming homestead in it.[2]

[1] Holloway v. McIlhenny, 77 Tex. 657.

[2] Kruger v. Le Blanc, 75 Mich. 424. The value of the building owned by the husband was not ascertained. The court said: "It is of no concern to these defendants, what he [the husband] might do if his property were levied upon by some one else for his debt." Was it not pertinent for them to inquire whether his right to claim the family homestead protection existed at the very moment when his wife was seeking to defeat their levy by setting up her right to do so? Since it is certain that the husband

If this husband and wife had been joint owners of both the house and the land, they could not have had two homes protected; and it is as irregular to have two properties, either susceptible of being claimed when danger comes. The law is generous towards families but does not contemplate a game of hide-and-seek when the sheriff comes. Being separate owners, the case is clearer — they could not have a homestead apiece.

There is, however, as much reason in allowing marital joint-owners to have two homesteads as in permitting unmarried ones to have them; and it has been decided that joint-owners who have not the relation of man and wife, if each has a separate house on the joint premises, and occupies it as the home of himself and his family, will be entitled to homestead exemption — each to the full maximum.[1] The general rule is that there must be exclusive right of possession; and this cannot be by unmarried owners in joint tenancy. The decision last cited, and similar ones, are to be understood with reference to exemption. The interest of each joint tenant doubtless may be exempted to the amount of the homestead *maximum* of value, under the governing statute.

§ 9. Title Void or Fraudulent.

The ownership required must be valid in law. There is no public policy in favor of conserving fraudulent homes. True, the statutes make no distinction between honest men and rogues when providing who may be beneficiaries of exemption; but the thing exempted must be honestly owned by the beneficiary in whose name the privilege is granted — that is, the head of the family who represents the other beneficiaries of his household.

The existence of liens does not affect the ownership so far as the requirement of the condition is concerned. An incum-

and wife could not claim two homesteads for their one family, was it not pertinent for the defendants to show that her claim was inconsistent with his right? Husband and wife cannot have a homestead apiece. Gambette v. Brock, 41 Cal. 84. The homestead of the Michigan case was the husband's house, occupied by both himself and his wife as their home, according to the rule prevailing in other states. If it was worth less than $1,500, the wife's land may have been exempt in such quantity as to make up the *maximum*.

[1] Meguiar v. Burr, 81 Ky. 32.

brance may be as great as the value of the property incumbered, yet the ownership remain all that is required. The owner may not have paid for the property. Ownership does not depend upon the price having been paid. The grantor has his lien; but other creditors are powerless to proceed against the property — just as they would be if the debtor did not owe a dollar upon it.[1]

The purchase, however, must have been an honest and honorable one, not made to defraud creditors, if the condition of ownership is to be considered accordant to law.

Certain merchants bought goods on credit, exchanged them for a house and lot, and then sought to hold such real estate as a homestead against the creditors of whom they had purchased the goods. They had nothing else to which the creditors could look for payment.

The statute, under which the homestead was claimed by one of the merchants who occupied the house and lot with his family, contained the inhibition: "A homestead shall not be subject to forced sale on execution or any other final process from a court." It had been contended by counsel that this inhibition covered such a case as the one at bar; but the court said: "If such a construction of the law as is contended for in this case should prevail, its title should read, 'An act for preventing the payment of honest debts, and for the promotion of frauds upon creditors by debtors.' . . . The defendants were merchants, in possession of a stock of goods, and in that character, and under those circumstances, replenished their stock by the purchase of goods of the plaintiffs upon credit. After acquiring possession of the goods so purchased, they transferred their whole stock in fraud of their creditors, and took in exchange therefor these premises. The mere statement of the facts decides this case in the conscience of every honest man: that neither in law nor justice the exemption should be allowed. The defendants cannot expect the court to assist them in consummating the intended fraud. A party cannot turn that which is granted him for the comfort of himself and family into an instrument of fraud. . . . A defendant cannot expect this court to consent that he may

[1] Lee v. Welborne. 71 Tex. 500.

use the law as an instrument of fraud by claiming a homestead which he has *fraudulently acquired* in the manner presented in this case. . . ."[1]

This view of a fraudulently acquired homestead is also taken in another case. The strong language of the court above given is approvingly quoted in the latter: "The mere statement of the facts decides the case in the conscience of every honest man. The defendants cannot expect the court to assist them in consummating the intended fraud." But distinction was drawn between "intended fraud," and the transfer of goods for a farm (under almost precisely similar circumstances to those above related), from which the court, in the case now under consideration, did not infer fraud. Though the goods had been bought upon credit, and were exchanged for forty acres of land, and the land then claimed as a homestead against the creditors who had furnished the goods; and though the debtor was insolvent and knew himself to be so when he made the exchange; and though his homestead exemption could be allowed only at the expense of his creditors, the court deemed its acquisition not fraudulent on the following reasoning: "We know of no rule of law in this state that deprives a person, whose indebtedness may be equal to or exceed his resources, from taking a part of his property to purchase a homestead. This is not fraud upon creditors. It is not a concealment of his property. He merely puts the property into a shape in which it will be the subject of beneficial provision for himself and his family, which the law recognizes and allows; and such property having all the requisites of a homestead as to ownership, value and occupancy, it will be held exempt from levy and sale on execution by his creditors."[2]

This decision is not that a fraudulently acquired homestead has the essential condition of ownership to support it, but that the homestead in question was not thus acquired. The opinion seeks to distinguish the facts of this case from those of the one preceding, by finding a different intention on the part of the debtor. The reader of the two recitals in the reports may not discover this difference, but since it was drawn, he cannot understand this decision as contrary to the former.

[1] Pratt v. Burr, 5 Biss. 36.

[2] Meigs v. Dibble, 73 Mich. 101, 113.

It is said, indeed, in the latter: "This is a very different case from one where the party obtains property on credit with the intention at once to place it beyond the reach of creditors by exchange of the whole for a homestead. Such a proceeding would be evidence of a fraudulent intent in the purchase of the property at the outset, and the case would fall within the ruling of the court in "— the case first cited on this point.[1]

That the debtor knew, when he bought the forty acres for a homestead, that he did so by exchanging the goods therefor at the expense of his creditors, is plain enough; and that the transaction was fraudulent seems clear enough; but the court, while holding that the fraudulent acquisition of a homestead is not a compliance with the condition of ownership, inferred from the facts that the exchange, in this case, was not in fraud. If the debtor did not have a fraudulent intention when he bought the goods, but did have it when he exchanged them for the land, there would seem to have been a fraudulent acquisition of the homestead.

Putting property not exempt into property exempt is not technically a concealment of it, but it is the placing of it beyond the reach of creditors, which is virtually the same.

The cases cited to sustain the position that there was no fraud do not seem in point. The first, containing some observations on the subject which were not necessary to the decision, is that an insolvent debtor may exchange notes antedating the dedication of his homestead (and therefore bearing upon it), for notes post-dating it (and therefore not bearing upon it), *with the consent of the creditors holding the notes* which have not gone into third hands.[2] No fraud in that, surely. The second case is one of chattel exemption. The court thought it no fraud in an insolvent debtor to exchange property not exempt for a yoke of oxen exempt, "with the intent to defeat the claims of creditors."[3] This would seem to overlook the distinction as to the fraudulent intent made by the court when citing this authority from the reports of its own state.

[1] That is, in Pratt v. Burr, *supra*, cited by the court in this connection, in Meigs v. Dibble, 73 Mich. 112.

[2] Tucker v. Drake, 11 Allen, 145. (*See* Adams v. Jenkins, 16 Gray, 146.)

[3] O'Donnell v. Segar, 25 Mich. 367, 376.

Often there is question whether property has been acquired honestly or fraudulently; and the subject, so far as it concerns homesteads, is relegated to a future chapter on fraud. The proposition now is that the ownership, required as one of the conditions to homestead privileges, must be real, legal, free from fraud in its acquisition.[1] Certainly, property claimed as a homestead cannot be treated as such against one from whom it was acquired by defrauding him. Under such circumstances, its conveyance does not require the signature of the wife of the wrong-doer, since the homestead character *never attached to the property*.[2]

A wife claimed title by deed from her husband through a third person, and also claimed homestead against his creditors. The court said: "If the plaintiff can recover at all it must be by virtue of her title derived from her husband's conveyance in *fee-simple;* and if that conveyance was in fraud of his creditors, her title fails without regard to the value of the land, and notwithstanding her homestead right. . . . If fraudulent (though the question would then arise whether, in spite of that fact, she would be entitled to a homestead on appropriate proceedings to assign and set it out), she could not recover in this action." The action was trespass *quare clausum*.[3]

Where a disclosure of all his property is required of an applicant for *a homestead in realty and personalty*, the withholding of a part is fraud, and it debars him from right of exemption; no homestead can be awarded him.[4] Such a result, authorized by statute, is held not unconstitutional when the constitution itself declares that "the legislature can pass such laws as they think proper to ferret out and punish fraud."[5]

A "homestead in realty and personalty" is merely exemption to a given amount, allowed the debtor, from execution. It is not *homestead* in the general acceptation of the term, but its unlawful claiming seems to illustrate the fraud condemned in the cited case.

[1] Muir v. Bozarth, 44 Ia. 499; Burnside v. Terry, 51 Ga. 190; Babb v. Babb, 61 N. H. 142. *See* Edmunson v. Meacham, 50 Miss. 34.

[2] Muir v. Bozarth, 44 Ia. 499.

[3] Babb v. Babb, 61 N. H. 142.

[4] McNally v. Mulherin, 79 Ga. 614.

[5] *Ib.*

§ 10. Joint Tenancy and Tenancy in Common.

To acquire homestead rights and privileges, with the compensating restraints, the claimant or his wife must not only have exclusive ownership under some species of title, but also exclusive right of possession. Nothing seems clearer than this. Without such exclusion, he could not rightfully occupy, nor make the requisite declaration under statutes prescribing it, nor record his homestead as required in many states, nor transmit to his widow and minor children the rights and possession usually accorded them under the homestead laws. Without exclusive title and right of possession, he could not comply with any of the four conditions of the prevalent system of homestead except that of having a family.

There could be no occupancy of a dwelling as a whole, unless with the consent of the other joint-tenants or tenants in common. They might agree to sole occupancy by one for a stated time, for a consideration or without one; but if so, he would hold as their lessee or by sufferance, and not because he is one of the joint or common tenants.

Each has the right of possession; the legal right is in each for all — not for himself exclusively. He holds *per my et per tout.* It is not such a possession as the homestead laws contemplate; not such as they build upon. Merely as a joint-tenant, he has no occupancy which the legislator can protect; no such home as can be conserved for the benefit of the family.

Dedication, as a condition to the acquisition of homestead, required in many states, is impossible without exclusive ownership of some sort, and exclusive right of possession. A residence owned and possessed jointly with others, or in common with others, cannot be wholly set apart by one. It cannot partially be set apart by one, for that would not be a dedication of the dwelling but only of an undivided interest in it, which the law does not recognize, since that interest alone cannot be the home of his family. Nor could it be set apart by all the joint-tenants, or tenants in common as the case may be; for the law offers homestead protection to separate families and not to a community of them. Husband and wife, indeed, might be such tenants and yet become homestead beneficiaries, since their home is one and their interests are one. But no other two joint-tenants or tenants in common could unite in the dedica-

tion of the property held by them so as to have the protection of it as one homestead for both. The impracticability of it will appear when we reflect that the liabilities of each may be different from those of the other. The interest of one might become liable to forced sale while that of the other might not. The sale of such interest would render the home no longer protectable. So, one might abandon his homestead right: what then would become of the other's right? It would not save the dwelling-house for his family.

No statute authorizes the dedication of an undivided interest in a family residence, as a homestead. Without such authorization (since the right is solely statutory), there can be no such homestead.

Notice of homestead holding is impracticable without sole ownership and exclusive right of possession. Such notice as homestead statutes require cannot be given to the public, if there be nothing more than joint-tenancy or tenancy in common. It is prescribed in some statutes that the word *Homestead* shall be written in the margin of the recorded title. That is meant as notice to the public that the property here recorded by title is a family residence free from liability for the ordinary debts of the owner; and it is a warning to all persons not to trust the owner with reliance on that property to secure the loan, or rather with the idea that the property could be subject to execution upon a judgment for the debt. If the word should be inscribed in the margin of a title in joint-tenancy or tenancy in common, it would not be true. The whole property is not exempt, and the notice therefore would be misleading.

So any other inscription of record, prescribed by statute as notice to the world that the registered property is exempt, would be a deception and a fraud where the property is not really exempt as a house used by the household (or a farm, with appurtenances in either case), but is really liable so far as concerns the interests of all the joint-tenants or tenants in common except the one who lives with his family in the house; and not even exempt as to him, since he does not wholly own by any sort of title nor have the right of exclusive occupancy: so there is indeed no exception, with respect

to the homestead itself, and the notice would be altogether misleading, false and fraudulent.

No notice except occupancy is required by several statutes. The use of a dwelling and appurtenances as a family home is held sufficient to put those upon inquiry who may be about to loan money to the owner and occupant of the property and to trust him thinking the real estate liable to execution. But occupancy, as notice, would be misleading if the occupant is only a joint tenant or tenant in common. Having no exclusive right of possession, such notice would give a wrong impression. It would not be true that all the real estate occupied, or indeed any of it, is a homestead as understood in the prevalent system. If the interest of the occupant is exempt, under the statutes and their construction in some states, it is yet untrue that the family dwelling itself is exempt and inviolable as a homestead. The right of survivorship in joint-tenancy is inconsistent with homestead in joint-tenancy. The object of the prevalent system of homestead, so far as its purposes of benevolence are affected, and indeed so far as its broader purpose of home conservation is concerned, is rather to benefit the wife, the widow and the children than the head of the family himself, as courts have frequently said. But how is the widow to be protected, or the orphan minors, when the dwelling-house they occupy passes to the survivor of the husband and father? She can no more have the widow's homestead in it than she can have dower. They can have nothing, for they inherit nothing.

Here stands this law of survivorship, an insurmountable barrier to the transmission of homestead estate to the widow and children. Wherever homestead is recognized by the courts as existing in realty held by joint-tenancy or tenancy in common, this distinction should be kept in view: such homestead differs from the ordinary one in the circumstance that the tenant in possession occupies solely by reason of the sufferance of those who each have an equal right to occupy. If they permit him to claim homestead, the rest of the world have no right to complain. His possession could not be disturbed by his creditors on the ground that the sole ownership is not in him.

It may be said, with this distinction in view, that the states

which award homestead to such an owner do not materially depart from the general rule governing the subject. Several of them, however, merely award exemption to the interest.

There may be exemption. The interest of a joint-tenant or a tenant in common may be protected by law, so that his share of the proceeds of the property may be reserved for him when the whole has been sold; or, his interest may be exempted from liability to forced sale for his ordinary, personal debts. This is exemption — not homestead protection. It is like chattel exemption. It is more like the reservation to him of a stated sum in case of the sale of his property, real or personal, under execution for his debts.

Such exemption of the interest of a co-tenant or tenant in common is allowed in several states. It is allowed in some of them under their homestead laws. If not authorized by those laws, it is held so by the courts in administering them, and must be received, therefore, as law in those states.

Such exemption is very different from homestead protection, although the terms may be confounded. It does not necessarily interfere with rights of the other joint-tenants or tenants in common. Indeed, the legislature cannot rightfully affect the rights of the others.

§ 11. Undivided Interest — Co-tenancy.

The authorities will be found fully in accord with the foregoing views, if we keep in mind that homestead exemption is a different thing from the exemption of an undivided interest in a homestead, and take the meaning of courts in their use of terms rather than their literal expressions when those expressions would seem to favor the acquisition of homestead in property held in joint-tenancy or tenancy in common.

First let us notice those decisions in which right terms are employed.

It is held that when statutes require ownership in a homestead, *entirety* is meant — not an undivided part or an undivided interest.[1]

The possession of a tenant in common is for his co-tenants

[1] Beecher v. Baldy, 7 Mich. 488; Amphlett v. Hibbard, 29 Mich. 298; Tharp v. Allen, 48 Mich. 392.

as well as for himself. He cannot acquire, therefore, a right of homestead in land of which he is thus possessed.[1]

How can homestead, with all of its privileges and restrictions, be accorded to one joint-tenant, when his entry and possession is not exclusive, but inures to the benefit of all?[2]

One tenant in common cannot dedicate the common property, or his interest in it, as a public highway,[3] nor give the right of way.[4]

How can he have the metes and bounds of a homestead laid off upon real estate held in common? He cannot do it so as to convey his interest by private deed to a grantee, as a specific part designated by boundaries, without the consent, and to the prejudice, of his co-tenants.[5]

A tenant in common cannot divest the interest of his co-

[1] Reinhart v. Bradshaw, 19 Nev. 255; Nickals v. Winn, 17 Nev. 188; Terry v. Berry, 13 Nev. 515; Atherton v. Fowler, 96 U. S. 513. *See* Hosmer v. Wallace, 97 U. S. 575; Trenouth v. San Francisco, 100 U. S. 251; Smelting Co. v. Kemp, 104 U. S. 647; Frisbie v. Whitney, 9 Wall. 193; Johnson v. Towsley, 13 Wall. 72; Hosmer v. Duggan, 56 Cal. 261; Davis v. Scott, 56 Cal. 165; Cowell v. Lammers, 10 Saw. 246; Avans v. Everett, 3 Lea, 76; Bemis v. Driscoll, 101 Mass. 421; Holmes v. Winchester, 138 Mass. 542 (Mass. Stat. 1855, ch. 238); Weller v. Weller, 131 Mass. 446; Howes v. Burt, 130 Mass. 368; Bates v. Bates, 97 Mass. 392; Thurston v. Maddox, 6 Allen, 427; Silloway v. Brown, 12 Allen, 30; Ward v. Huhn, 16 Minn. 159; St. Paul's Church v. Ford, 34 Barb. 16; West v. Ward, 26 Wis. 580; Ventress v. Collins, 28 La. Ann. 783; Borron v. Sollibellos, 28 La. Ann. 355; Simon v. Walker, 28 La. Ann. 608.

[2] Wiswell v. Wilkins, 5 Vt. 87; Small v. Clifford, 38 Me. 213; Terrell v. Martin, 64 Tex. 121; Taylor v. Cox, 2 B. Mon. 429; Lindley v. Groff (Minn.), 34 N. W. 26; Davis v. Givens, 71 Mo. 94; Blakeney v. Ferguson, 20 Ark. 547.

[3] Scott v. State, 1 Sneed (Tenn.), 629; St. Louis v. Gas Light Co. (Mo.), 9 S. W. 581.

[4] Merrill v. Berkshire, 11 Pick. 269.

[5] Rising v. Stannard, 17 Mass. 282; Bartlet v. Harlow, 12 Mass. 348; Varnum v. Abbott, 12 Mass. 474; Perkins v. Pitts, 11 Mass. 125; Baldwin v. Whiting, 13 Mass. 57; Peabody v. Minot, 24 Pick. 329; Blossom v. Brightman, 21 Pick. 285; Holcomb v. Coryell, 11 N. J. Eq. 548; Boston, etc. Co. v. Condit, 19 N. J. Eq. 394; Hartford Co. v. Miller, 41 Ct. 112; Marsh v. Holly, 42 Ct. 453; Griswold v. Johnson, 5 Ct. 363; Jeffers v. Radcliff, 10 N. H. 242; Whitton v. Whitton, 38 N. H. 127; Ballou v. Hale, 47 N. H. 347; Duncan v. Sylvester, 24 Me. 482; Jewett v. Stockton, 3 Yerg. (Tenn.) 492; Gates v. Salmon, 35 Cal. 576; Good v. Coombs, 28 Tex. 35; Dorn v. Dunham, 24 Tex. 366; Mattox v. Hightshue, 39 Ind. 95; Shepardson v. Rowland, 28 Wis. 108; Markoe v. Wakeman, 107 Ill. 251; Cornish v. Frees, 74 Wis. 490; West v. Ward, 26 Wis. 579.

tenant by taking possession of, and claiming homestead in, the common property. "The right of homestead is always subordinate to the prior rights or interests of other persons in the property." [1]

Before land held in common has been partitioned, homestead cannot be assigned in any part of it, because it is not then known what particular portion will be given to any one of the co-tenants. Each is seized "by one and by all," yet no one exclusively owns a foot of the land. It is impossible, where the law requires homesteads to be set apart by metes and bounds, that there can be any such setting apart before partition.[2] When a court or commissioners have assigned homesteads in such property, though illegally, there would be no wrong in so ordering a partition afterwards as to give to each tenant his share previously admeasured, if it can be done without injustice to any.[3] When land is sold to effect partition, the exempt interest of any owner may be demanded out of the proceeds.[4]

One may have an exemption right in his undivided interest in land, by statute. If such a one buy the other interests in the land so as to become sole owner of the whole as a homestead, would a judgment lien prior to his purchase, recorded against his then existing interest, now become operative over the whole? This is answered in the negative.[5]

It has been frequently held that homestead cannot be carved out of an undivided interest in real estate.[6]

[1] Lynch v. Lynch, 18 Neb. 586, 589; Bowker v. Collins, 4 Neb. 496; State Bank v. Carson, 4 Neb. 502; Gunn v. Barry, 15 Wall. 623; Homestead Cases, 22 Gratt. 331.

[2] Nance v. Hill, 26 S. C. 227.

[3] Mellichamp v. Mellichamp, 28 S. C. 125.

[4] *Ex parte* Carraway, 28 S. C. 233.

[5] Kaser v. Haas, 27 Minn. 406 (explaining Ward v. Huhn, 16 Minn. 159), and saying: "That the owner of an undivided interest only cannot claim the exemption is held in Massachusetts, New Hampshire, California, Indiana and Wisconsin; the contrary is held in Illinois, Iowa, Arkansas, Texas, Vermont and Michigan." Exposition of Minn. Gen. Stat. 1878, ch. 68, § 1.

[6] Bemis v. Driscoll, 101 Mass. 418; Thurston v. Maddocks, 6 Allen, 427; J. I. Case Co. v. Joyce, 89 Tenn. 337; Avens v. Everett, 3 Lea, 76; Barron v. Sollibellos, 28 La. Ann. 355; Ventress v. Collins, 28 La. Ann. 783; Simmon v. Walker, 28 La. Ann. 608; Lozo v. Sutherland, 38 Mich. 168; West v. Ward, 26 Wis. 579; Cameto v. Dupuy, 47 Cal. 79; Kingsley v. Kingsley, 39 Cal. 665; Seaton v. Son, 32 Cal. 481; Elias v. Verdugo, 27 Cal.

Where a different rule prevails, the fact that one has an undivided interest in a tract of land larger than the homestead limit will not entitle him to claim a greater exempt acreage than he would if he owned the whole.[1] If the whole is mortgaged, and the wife has joined in the act, the foreclosure will defeat the homestead right. Now, if, after foreclosure and sale, the homestead beneficiaries desire to redeem their interest, to claim homestead right therein, they can do so only by redeeming the whole tract.[2]

A statute which exempts "a homestead *or real estate*" to a given value, "in the possession of, or belonging to, each head of the family," who "shall have the right to elect where the homestead or said exemption shall be set apart, whether living on the same or not;" and which requires the homestead to be set apart by metes and bounds,[3] is held to preclude homestead in an undivided interest. The right does not attach to such interest. A home occupied by the owner of such an interest in it cannot be his homestead. He may mortgage his interest without his wife's joining in the act.[4]

The terms of this statute, distinguishing between homestead and exemption, may give color to a claim of exemption in a species of property not susceptible of being laid off by metes and bounds. Certainly there is more latitude here for construction in favor of saving to the debtor his interest as a joint-tenant or

418; Bishop v. Hubbard, 23 Cal. 514; Kellersberger v. Kopp, 6 Cal. 565; Reynolds v. Pixley, 6 Cal. 165; Wolf v. Fleischacker, 5 Cal. 244. *Contra*, Kaser v. Haas, 27 Minn. 406; but *compare* Ward v. Huhn, 16 Minn. 159; Kresin v. Mau, 15 Minn. 116, and Kelly v. Dill, 23 Minn. 435. In the above cited case of the J. I. Case Company v. Joyce, the denial of homestead in an undivided interest — in realty held by joint-tenancy — is strongly put for the court by Judge Snodgrass. Much of the opinion is in explanation of Tennessee statutes, but the general argument is applicable everywhere. See also the dissenting opinion of Judge Caldwell (with concurrence of the chief justice), which makes the best case possible for the other side. The following are cited by the court: Avens v. Everett, *supra;* Flatt v. Stadler, 16 Lea, 371–9; Chalfant v. Grant, 3 Lea, 118; Spiro v. Paxton, 3 Lea, 75; Gill v. Lattimore, 9 Lea, 381; Hollins v. Webb, 2 Leg. R. 74. *See* several cases cited in the dissenting opinion, 89 Tenn. 351.

[1] O'Brien v. Krenz, 36 Minn. 136; Ward v. Huhn, 16 Minn. 142.

[2] *Ib.;* Martin v. Sprague, 29 Minn. 53; Willis v. Jelineck, 27 Minn. 18.

[3] Tennessee Code, §§ 2935–6, 2940–1, 2944.

[4] Threshing Machine Co. v. Joyce (Tenn.), 16 S. W. 147.

tenant in common, than there is in other homestead statutes which have been construed to do so. Doubtless, however, the exposition of the court is correct. No occupancy of a home by an owner is possible when the occupant is not the owner of that home but only of an undivided part of it. No freeholders, appointed to lay off a homestead to him, could possibly do so out of any "real estate," however extensive — however exceeding many fold the legal maximum of quantity or value when his interest is only that of a joint-tenant or tenant in common.

§ 12. Exemption of Undivided Interest.

There are cases which have been cited as favoring the existence of homesteads in mere interests — mere rights in dwelling-houses and lands without ownership of the houses or ground with exclusive right of possession — mere ideal realty (a contradiction of terms), in which there could be no hearthstone or roof-tree. Evidently, whatever the terms used, the courts have meant that joint-tenants and tenants in common may have their interests exempt: not that they could live in an undivided interest and have homestead therein. Or they have meant that the owner of the interest could claim partition and then have his homestead laid off to him from his allotted portion. And sometimes they have made deliverances under the momentary impression that exemption from forced sale is synonymous with homestead or homestead right.[1]

No doubt husband and wife may hold in joint-tenancy, for they are one in such sense that the possession is exclusive; and where they so hold, the survivor takes sole title, and there is

[1] Horn v. Tufts, 39 N. H. 478; Danforth v. Beattie, 43 Vt. 138; McClary v. Bixby, 36 Vt. 254; Greenwood v. Maddox, 27 Ark. 660; Ward v. Mayfield, 41 Ark. 94; Hewitt v. Rankin, 41 Ia. 35; Tarrant v. Swain, 15 Kas. 146; Snedecor v. Freeman, 71 Ala. 140; McGuire v. Van Pelt, 55 Ala. 344; Robinson v. McDonald, 11 Tex. 385; Smith v. Deschaumes, 37 Tex. 429; Williams v. Wethered, 37 Tex. 130; Lacey v. Clements, 36 Tex. 663; Ferguson v. Reed, 45 Tex. 584; Clements v. Lacey, 51 Tex. 150; Jenkins v. Volz, 54 Tex. 636; Brown v. McLennan, 60 Tex. 43; McGrath v. Sinclair, 55 Miss. 89; Greenwood v. Maddox, 27 Ark. 648; Sentell v. Armor, 35 Ark. 49; Thompson v. King (Ark.), 14 S. W. 925; Lozo v. Sutherland, 38 Mich. 168; Sherrid v. Southwick, 43 Mich. 518; Tharp v. Allen, 46 Mich. 389; Cleaver v. Bigelow, 61 Mich. 47; Kruger v. Le Blanc, 75 Mich. 424.

nothing in conflict with established law or principle.[1] But how can any other joint-tenant or tenant in common have that exclusive possession which is essential to homestead occupancy? And how can even conjugal co-tenants have a homestead on their undivided land when the statute requires that it shall be upon the land of the owner, and makes provisions impracticable where there is joint-tenancy?[2]

No doubt homestead is practicable on land owned by husband and wife whose interests are undivided, *provided* the statute accords; but it is not practicable for a home or homestead to exist when the interest of the joint-tenants are such that each owner has right of possession, one for all, and all together do not constitute one family so as to have one home — and it is hardly possible that the legislator can make it practicable.

It has been held, however, that a tenant in common, carrying on a hotel, leasing the interests of the other tenants in common, and residing in the hotel with his family, is entitled to homestead in the property when it appears that he has no other real estate upon which to establish and claim a homestead.[3]

There seems to be nothing in the statutes of the state in which this was held which limits the benefit of homestead to persons who have no realty but that claimed as homestead.[4] This point may be discussed elsewhere. Here the case is cited for its bearing on the doctrine of homestead owned by tenants in common. The court holds that the doctrine is settled in the state that homestead can be claimed by a tenant in common.[5]

Two brothers owned forty acres in common. One of them was married, and though the land was held in common, he was recognized as having a homestead interest in it. They also owned in common and cultivated a large tract of land besides.

[1] Jackson v. Shelton, 89 Tenn. 82; *distinguishing* McRoberts v. Copeland, 85 Tenn. 211, and Ames v. Norman, 4 Sneed, 682, and *overruling* Cullom v. Cooper (Tenn.), Dec. term, 1888; Tenn. Code (M. & V.), §§ 2935–7, 2946; (T. & S.) § 2113*a et seq.*

[2] *See* the able dissenting opinion of Judge Caldwell in the J. I. Case Co. v. Joyce, 81 Tenn. 351.

[3] King v. Welbarn, 83 Mich. 195.

[4] Howell's Stat. of Mich., §§ 7721–7729.

[5] *Citing* Shepard v. Cross, 33 Mich. 98.

They contracted to furnish money to a cattle-raiser for half his profits, and borrowed money to do so. The business proved a failure, and their land (except the forty acres) was sold to pay debts. The married brother died, and the single one conveyed his interest in the forty acres to the widow. She claimed the whole as her homestead exempt from the debts of the partnership, and of the surviving brother as one of the partners. It is clear enough that the forty-acre tract had not been used in the cattle business and was not an asset of the partnership. But was not the unmarried brother's interest liable? Had it remained in his hands, perhaps it would have been; but his conveyance of it to his sister-in-law may have been in settlement of property rights between himself and his deceased brother's estate, as the court said. It cannot be decreed to have been conveyed in fraud of creditors in the absence of proof of such fact. This was the conclusion of the court.[1]

The exemption of interests in personal property has little or no analogy to the selection and dedication of a homestead. Such exemption has been allowed to joint-tenants or tenants in common.[2] It is not practicable to allow it without a division of the property so that the beneficiary may own in severalty. If the chattel is indivisible, such as a reaping machine, the interest of one partner cannot be separated without sale. If it consists of wheat, a share may be separated from the rest.[3]

§ 13. Co-tenancy of Husband and Wife.

It has been mentioned that when there are but two joint-tenants, and they are husband and wife, the property held by

[1] Fordyce v. Hicks, 80 Ia. 272.

[2] Servanti v. Lusk, 43 Cal. 238; Radcliff v. Wood, 25 Barb. 52.

[3] Newton v. Howe, 29 Wis. 531; Wright v. Pratt, 31 Wis. 99. In California, before 1868, land held in common or by joint-tenancy was not exempt under the homestead law: so a difference will be found between the earlier and the later cases presented below, though the later ones can go no further than to hold that the interest of the tenant is exempt — not that it can possibly constitute an exempt home. Wolf v. Fleischacker, 5 Cal. 244; S. C., 63 Am. Dec. 121; Reynolds v. Pixley, 6 Cal. 165; Giblin v. Jordan, 6 Cal. 417; Kellersberger v. Kopp, 6 Cal. 565; Bishop v. Hubbard, 23 Cal. 517; Elias v. Verdugo, 27 Cal. 418; Seaton v. Son, 32 Cal. 481; Kingsley v. Kingsley, 39 Cal. 665; Emerson v. Sansome, 41 Cal. 552; Cameto v. Dupuy, 47 Cal. 79; First Nat. Bank v. De La Guerra, 61 Cal. 109; Carroll v. Ellis, 63 Cal. 440; Fitzgerald v. Fernandez, 71 Cal. 504.

them as such may be made their homestead and occupied by them as such, without any of the absurd results which have been suggested. But they cannot join in conveying an undivided interest in such homestead property to a third person, so as to make him a joint-tenant or a tenant in common with them without destroying their homestead privilege.[1]

The husband was the head of his family. He had an interest in the tract of land on which he resided greater than the homestead limit of value in his state. His wife also owned an interest in it greater than the monetary homestead maximum. It was held, in a suit in which the husband was sued as debtor, that the whole exemption could be claimed by him to protect his interest as far as it would do so.[2]

In stating the exceptional case of married joint-tenants and such tenants in common — very curious as the exception is — some courts have gone beyond it and held, not only that they may hold and occupy their dwelling as their homestead under such title and without partition (which is certainly correct), but that they may hold it in common with others.[3] This, literally taken, is in direct conflict with the well-considered decision cited above on this point. If others have interest in the family dwelling, the married occupants cannot exclusively own, nor have exclusive right of possession.

The occupancy would be by sufferance, so far as the interests of others are concerned. Those others may be bachelors to whom the law offers no homestead rights; rather, they may be persons who have not complied with any of the conditions. With their consent, the man and wife might still occupy the dwelling, but it could not be wholly a homestead in the technical sense of the word, and the law does not recognize a part of a one.

With the assent of his co-tenants in common, one may claim homestead as against his creditors, it has been said, without qualification and without reference to the exceptional situation of marital parties as co-tenants;[4] but evidently only the exemption of the interest owned by him in the homestead could have been meant.

[1] Howes v. Burt, 130 Mass. 368.

[2] Hart v. Leete, 104 Mo. 315.

[3] Lozo v. Sutherland, 38 Mich. 168; Cleaver v. Bigelow, 61 Mich. 47; Tharp v. Allen, 46 Mich. 389; Sherrid v. Southwick, 43 Mich. 515.

[4] McGrath v. Sinclair, 55 Miss. 89; Thorn v. Thorn, 14 Ia. 49.

Husband and wife being tenants in common, and his interest in the land being sold in bankruptcy proceedings against him only (except two hundred acres reserved as the homestead), the purchasers became tenants in common with the wife.[1] This is not a case where exemption of the interest of a tenant in common is treated as homestead.[2]

It has been held (the homestead right not being distinguished from the mere right of exemption) that a husband and wife owning an undivided interest in land may claim homestead therein. His interest alone will not be considered when the value of the homestead is estimated; he is necessarily the occupant of the undivided property when he has homestead right in it, and his wife's interest must be counted with his in estimating the property.[3]

If a man and woman own real estate in common, and they marry each other, all objection to homestead in property held in common or by co-tenants would vanish in their particular case. They would have title and exclusive right of possession to the whole, and all the usual difficulties would disappear.

The wife of a partner in undivided land may apply to have a homestead set apart in it, with the consent of her husband, who does not himself apply, and may have the land partitioned for the purpose.[4]

An estate vested in a husband and wife is held as an entirety, and not by moieties, and the title therefore not an ordinary joint-tenancy.[5] One cannot incumber or alienate the property without joinder by the other, though the husband has the rents and profits while the wife lives.[6] It has been held, however, that the husband's interest can be seized

[1] Battle v. John, 49 Tex. 202.

[2] In Texas a tenant in common may have a homestead estate in land held in common. His estate is not limited to his undivided interest in 200 acres constituting a rural homestead but may be an undivided interest of 200 acres in a larger tract. Lewis v. Sellick, 69 Tex. 379; Jenkins v. Volz, 54 Tex. 639; Clements v. Lacy, 51 Tex. 156; Tex. Rev. Stat., § 2336; Brown v. McLennan, 60 Tex. 43.

[3] Herdman v. Cooper, 29 Ill. App. 589.

[4] Hunnicutt v. Summey, 63 Ga. 586. So, if the property has been already divided. Harris v. Visscher, 57 Ga. 229. But not exempt against prior debts due by partner. Van Dyke v. Kilgo, 54 Ga. 551. Wife would be too late to apply after bankruptcy surrender. Smith v. Roberts, 61 Ga. 223. *See* Laramore v. McKinzie, 60 Ga. 532.

[5] Gillan v. Dixon, 65 Pa. St. 395; Den v. Hardenburgh, 10 N. J. L. 42.

[6] Bates v. Seely, 46 Pa. St. 248; Stuckey v. Keefe's Ex'rs, 26 Pa. St.

and sold on execution during coverture,[1] and that the husband alone may convey his interest.[2]

A husband and wife together may be one tenant in common: they taking one moiety and a co-grantee the other.[3]

The law of survivorship, however, applies as in any joint-tenancy,[4] where it is recognized; but it is disfavored or abolished in some of the states, except in respect to joint trustees.[5] Still it would seem that it can be created by will or deed. It has been held that a state cannot divest joint-tenants of the right of survivorship.[6]

The homestead of the widow derived from her late husband, which is akin to dower, is different from other homesteads — not requiring the same conditions: it is held that it would not be lost by another's acquiring an interest in common with her, such as an easement appertaining to the homestead estate and enjoyed in common.[7]

The mother and children may be co-tenants of a homestead,— she having a terminable interest and they the fee,[8] — yet the children's interest be liable to probate sale,[9] when the exemption statute is merely to protect the homestead from creditors — not to restrict the power of the courts to deal with it as belonging to heirs.[10]

§ 14. Partnership Property.

It is generally held that partnership property cannot be the subject of homestead exemption.[11] For the policy of the state

397; Wales v. Coffin, 13 Allen, 213; Hemmingway v. Scales, 42 Miss. 1; S. C., 2 Am. Rep. 586; Beach v. Hollister, 3 Hun, 519.

[1] Tladung v. Rose, 58 Md. 13.

[2] Benedict v. Gaylord, 11 Ct. 332.

[3] Johnson v. Hart, 6 Watts & S. 319.

[4] Stuckey v. Keefe's Ex'rs, 26 Pa. St. 397.

[5] Lowe v. Brooks, 23 Ga. 325; Phelps v. Jepson, 1 Root (Ct.), 48; Nichols v. Denny, 37 Miss. 59; Jones v. Cable (Pa.), 7 A. 791; Sergeant v. Steinberger, 2 Ohio, 305; Miles v. Fisher, 10 Ohio, 1; 1 Wash. Real Prop. (5th Ed.), 408.

[6] Green v. Blanchar, 40 Cal. 194.

[7] Weller v. Weller, 131 Mass. 446; Dennis v. Wilson, 107 Mass. 591; Symmes v. Drew, 21 Pick. 278; Hoffman v. Savage, 15 Mass. 130.

[8] Hardin v. Osborne, 43 Miss. 532.

[9] McCaleb v. Burnett, 55 Miss. 83.

[10] Morton v. McCanless, 68 Miss. 810; 10 So. 72; Miss. Code of 1857, art. 151, p. 463; Acts 1865, p. 137.

[11] Terry v. Berry, 13 Nev. 515; Rhodes v. Williams, 12 Nev. 20; Bonsall v. Conly, 44 Pa. St. 447; Clegg v. Houston, 1 Phila. 353; Kingsley v. Kingsley, 39 Cal. 666; Gaylord v. Imhoff, 26 O. St. 317.; Guptil v. McFee, 9 Kas. 30; Wright v. Pratt, 31 Wis. 99; Russell v. Lennon, 39

is not to perpetuate partnerships but to protect homes. No homestead is offered to firms by statute; that is, no safeguard is thrown around the property of a partnership, to save it from execution, in the way family residences are saved.

The member of a firm cannot have a home for his family in the share which he has in the firm's effects, or in his share of the real estate of the firm. He cannot build a house in such unseparated share.

Even though the real estate, claimed by an individual partner as his homestead, stands in his name, and he has the legal title, he cannot acquire homestead exemption right in it, if it really belongs to his firm. He cannot acquire such right as against his partners, or as against their creditors.[1]

When there has been a dissolution of partnership, and a late member owns certain property in severalty derived from the firm, there would seem to be no reason why he may not have the benefit of a chattel exemption law.[2] If one partner can have individual ownership of a chattel by consent of his copartners after a suit against the firm has been prosecuted to judgment, it may come under the operation of exemption law.[3] But the judgment creditor cannot be thus divested of his general lien by such action on the part of the copartners.[4]

Partnership assets, when no longer the exclusive property of a firm, but that of the individual members, may be subject to statutory exemption.[5] Unless there are creditors of the firm, there can be nothing to hinder exemption.

Wis. 570; *Re* Smith, 2 Hughes, 307; *Re* Handlin, 3 Dill. 290; Holmes v. Winchester, 138 Mass. 542; Weller v. Weller, 131 Mass. 446; Pond v. Kimball, 101 Mass. 105; Bates v. Bates, 97 Mass. 392; State v. Spencer, 64 Mo. 355.

[1] Drake v. Moore, 66 Ia. 58; Hoyt v. Hoyt, 69 Ia. 174.

[2] Worman v. Giddey, 30 Mich. 151.

[3] Burns v. Harris, 67 N. C. 140.

[4] In North Carolina, partners may consent that one of them shall have homestead laid off in partnership realty, despite the creditors. McMillan v. Parker (N. C.), 13 S. E. 764; Stout v. McNeil, 98 N. C. 1; Scott v. Kenan, 94 N. C. 296; Burns v. Harris, 67 N. C. 140. And it is held that a creditor cannot question the allotment of homestead to one partner, from partnership lands,— the other partners consenting. McMillan v. Parker (N. C.), 13 S. E. 764.

[5] Watson v. McKinnon, 73 Tex. 210; Harrison v. Mitchell, 13 La. Ann. 260; Farmers' Bank v. Franklin, 1 La. Ann. 393; Brewer v. Granger, 45 Ala. 580; Stewart v. Brown, 37 N. Y. 350; Radcliff v. Wood, 25 Barb. 52.

If a mortgage be given by co-owners to secure a loan, and one subsequently buy the other's part, he cannot claim homestead in the land against the mortgage. Especially is this true when he has assumed the whole mortgage-note as the purchase-price, since exemption does not apply to the vendor's lien.[1]

A partner was allowed his homestead claim to one half a tract of land that had been owned by the firm, after the other partner had dissolved the partnership by deeding his interest to his wife.[2] The transfer to the wife did not make her a partner; but it made her joint-owner of undivided realty.

[1] Soulier v. Sheriff, 37 La. Ann. 162. Undivided property cannot be the object of a homestead right in Louisiana. Brannin v. Womble, 32 La. Ann. 805; Henderson v. Hoy, 26 La. Ann. 156; Cole v. La Chambre, 31 La. Ann. 41; Duncan v. Eastin, 30 La. Ann. 1130.

[2] Watson v. McKinnon, 73 Tex. 210. As to the dissolution by the conveyance: *Ib.;* Carroll v. Evans, 27 Tex. 262; Rogers v. Nichols, 20 Tex. 724; Story on Part., §§ 307, 358; Lindl. on Part., pp. 230, 698, 700.

CHAPTER. V.

DEDICATION.

§ 1. Selection of a Homestead.
2. Selection of Two or More Tracts.
3. Platting.
4. Form of Land Selected.
§ 5. Declaration: Methods.
6. Declaration: Requisites.
7. Notification.
8. Recording.

§ 1. Selection of a Homestead.

The beneficiary is confined to one homestead. He occupies, with his family, but one. He may own several houses susceptible of being family residences, and all may be used as homes by different persons under lease from him, and each may be the homestead of a tenant, if dedicated as such upon leasehold title, by the lessee; yet the landlord himself can claim only his own residence as his homestead. It would be manifestly absurd to hold that his tenants can have homesteads in the houses he has rented to them, and that he could include all or any of the leased tenements with the real estate he occupies as a home, to constitute his homestead.

Why is selection necessary? It is common enough for a man of means to have a winter and a summer residence; to have a city and a country home, yet he can have but one homestead, in the legal sense. He cannot have one, and his wife another, in that sense. He and his wife cannot have one, and his minor children another, in that sense. He may occupy a tract of land larger than that which the statute exempts. It therefore is necessary for him to select from his realty the house and land to be exempted, and dedicate it by making a declaration (in states which require this), to protect it from execution for his personal debts, upon his compliance with the condition. It is well settled that one person cannot have two homesteads.[1]

[1] Beard v. Johnson, 87 Ala. 729; Hay v. Baugh, 77 Ill. 502; Walters v. People, 18 Ill. 194; Weiner v. Sterling, 61 Ala. 98; Bender v. Meyer, 55 Ala. 576; Kresin v. Mau, 15 Minn. 116; Kelly v. Baker, 10 Minn. 124; Adams v. Jenkins, 16 Gray, 146; Thatcher v. Howard, 2 Met. 45; Good-

When a homestead, within the prescribed value, has been duly established, it has been held not impaired by the erection of a second dwelling for a tenant, upon the exempt grounds, and that the second will not be subject to execution, unless the property be of the full monetary extent without it.[1]

It is quite settled that there could have been no declaration upon the two dwellings, when the homestead was established;[2] but the subsequent erection of a dwelling-house on land already impressed with the homestead character, for a purpose other than a home for the declarant and his family, has been held not to affect the dwelling really occupied. The declarant remains the beneficiary as to his own residence.[3]

It has been held that after a homestead of the value of one thousand dollars (the limit under the applicable statute) has been laid off, if the debtor increase its value by building, his creditors may reach the excess by proceeding in equity but not by execution.[4] This is not the rule in every state. Ordinarily there would be division before sale, or a division of the proceeds after sale when the property is indivisible in kind.

A tenant at will, or a lawful possessor under any title, who is the head of a family and occupies the premises with his family, may have a home, part of which is held under one kind of title, and part under another, and the home be exempt;[5] for the parts constitute but one home. He may have a distinct home, and then add to it, enlarge it by acquiring additional ground and out-buildings, or by constructing new

all v. Boardman, 53 Vt. 92; True v. Morrill, 28 Vt. 672; Randell v. Elder, 12 Kas. 260; Schoffen v. Landauer, 60 Wis. 334; Hornby v. Sikes, 56 Wis. 382; Hoffman v. Junk, 51 Wis. 613; Kent v. Lasley, 48 Wis. 257, 264; Johnson v. Harrison, 41 Wis. 386; Jarvis v. Moe, 38 Wis. 440; Herrick v. Graves, 16 Wis. 157; *In re* Phelan, 16 Wis. 76; Casselman v. Packard, 16 Wis. 114; Bunker v. Locke, 15 Wis. 635; Phelps v. Rooney, 9 Wis. 70; Houston, etc. R. Co. v. Winter, 44 Tex. 597; Crockett v. Templeton, 65 Tex. 134; Garrison v. Grant, 57 Tex. 602; *In re* Allen, 78 Cal. 294; Maloney v. Hefer, 75 Cal. 424; Tiernan v. His Creditors, 62 Cal. 286; First N. Bank v. Massengill, 80 Ga. 333; Holland v. Withers, 76 Ga. 667; Reynolds v. Hull, 36 Ia. 394.

[1] Lubbock v. McMann, 82 Cal. 226.

[2] *Ib.;* Tiernan v. His Creditors, 62 Cal. 286; Maloney v. Hefer, 75 Cal. 424; *In re* Allen, 78 Cal. 294.

[3] Lubbock v. McMann, *supra;* Cal. Civ. Code, §§ 1241–3.

[4] Vanstory v. Thornton (N. C.), 14 S. E. 637.

[5] King v. Sturges, 56 Miss. 606; Partee v. Stewart, 50 Miss. 717; Campbell v. Adair, 45 Miss. 170; Mosely v. Anderson, 40 Miss. 54.

apartments to his dwelling; and he may dedicate the whole as one homestead, within legal limitations.

Though the householder occupy a leased lot, he may add by purchase an adjoining lot and hold it by a different title, and occupy both as his exempt home, if both constitute a single residence with its necessary appurtenances, provided he do not thus exceed the quantitative and monetary limitation.[1]

One urban lot being the quantitative limit, it cannot be extended by the erection of a business block thereon which encroaches upon an adjoining lot, and yet remain exempt. Though the family residence of the owner was a part of the block, and that part not worth more than the monetary limit, the whole block was subjected to execution, when such extension had been attempted.[2]

A house built for two families, part occupied by the owner and part by his tenant, was held to be not wholly exempt.[3]

A husband, who has divided the homestead, giving his wife half of the exempt land which she continues to occupy, cannot acquire homestead right in another tract of land; but his half of the first may remain exempt and still constitute part of the homestead as originally held.[4] Were he allowed to make such an exchange at will, the public would find it difficult to know what part of his landed estate could be looked upon as security when he is trusted. He certainly could not have one homestead and his wife have another.

A man living upon his wife's property as the family homestead cannot pre-empt another one on the public domain.[5]

If a homestead continues in legal existence as an exempt residence after the constitution, under which it was established, has been superseded, the beneficiary cannot have another set apart to him under the new constitution. If the new one allows more exemption than he already enjoys, he may have his old benefit supplemented.[6]

[1] Tyler v. Jewett, 82 Ala. 93, 99; Wassel v. Tunnah, 25 Ark. 101; Englehardt v. Shade, 47 Cal. 627; Walters v. People, 18 Ill. 194; S. C., 65 Am. Dec. 730.

[2] Geney v. Maynard, 44 Mich. 579.

[3] Dyson v. Sheley, 11 Mich. 527. But a homestead projecting on an adjoining lot owned by the same occupant was considered allowable. Geiges v. Greiner, 68 Mich. 153.

[4] Crockett v. Templeton, 65 Tex. 134. *Compare* Edmonson v. Blessing, 42 Tex. 596.

[5] Garrison v. Grant, 57 Tex. 602.

[6] First National Bank v. Massen-

§ 2. Selection of Two or More Tracts.

The separation of the homestead into parts, by a street or other intervening space, does not confine the exemption right to a single part.[1] Though a homestead may be confined by a statute (or by the construction given to a statute) to a single tract of land, yet that is not universally required; and it is plain that there may be but one family residence upon a farm or town property, while parts of the dwelling and appurtenances are separated. All, taken together, may constitute a single home, susceptible of dedication as a homestead.

While the homestead is limited to one tract or piece of land or one place of abode,[2] it may be composed of contiguous pieces, and each piece may be held under a different title.[3] And the titles need not be legal, since equitable interest is sufficient, as heretofore shown.[4]

When homestead is limited in quantity by the provision that it shall not exceed a given number of acres, the circumstance that the beneficiary lives with his family on a homestead of less than the maximum allowance is no reason for claiming another tract as exempt when it is not contiguous to that which he occupies.[5]

gill, 80 Ga. 333. Thus, under the Georgia constitution of 1868, exempting realty and personalty to the amount of $3,000, Massengill had had a "homestead of realty and personalty" set off to him. After the adoption of the constitution of 1877, he had another "homestead of realty and personalty" set off to him. The latter was held unauthorized. Exemption under the latter is $1,600 of realty and personalty. He could have his first homestead "supplemented" to reach that sum, if found below it. *See* Holland v. Withers, 76 Ga. 667.

[1] Acker v. Trueland, 56 Miss. 30; Parisot v. Tucker, 65 Miss. 439. *See* Baldwin v. Tillery, 62 Miss. 378; Colbert v. Henley, 64 Miss. 374; Perkins v. Quigley, 62 Mo. 498.

[2] Randal v. Elder, 12 Kas. 257.

[3] Randal v. Elder, 12 Kas. 257.

[4] Chap. on Ownership; Tarrant v. Swain, 15 Kas. 146; Moore v. Reaves, 15 Kas. 150; Linn Co. Bank v. Hopkins (Kan.), 28 P. 606: "Two tracts of land touching only at one point are not contiguous. In the case of Kresin v. Mau, 15 Minn. 116 (Gil. 87), it was said: 'Two tracts of land mutually touching only at a common corner — a mere point — cannot, according to any ordinary or authorized use of language, be spoken of as constituting one body or tract of land.' The same construction has been placed upon acts of congress in relation to the entry of public lands. 1 Lester, Land Laws, p. 360. See, also, Hill v. Bacon, 43 Ill. 477; Aldrich v. Thurston, 71 Ill. 324; Thompson, Homest. & Ex., §§ 120, 145, 147. The order of the district judge discharging the attachment levied upon the S. W. ¼ of the N. E. ¼ of section 21, in township 19, of range 24, should be reversed."

[5] McCrosky v. Walker (Ark.), 18

Contiguity is not invariably required. A homestead may include land separated by an easement (such as the right of

S. W. 169. Cockrill, C. J.: "The appellant is the owner of an undivided half of a forty-acre farm, upon which he has established a homestead. He is also owner of an undivided half of a tract of timbered land, containing one hundred and thirteen and one-half acres, distant one mile from the farm. The court found from the evidence that the last mentioned tract had long been in use in connection with the homestead, to supply fuel for its use, but declared that such use did not constitute it a part of the homestead, and for that reason declined to direct the clerk to issue a *supersedeas* to withhold it from sale on execution.

"The only question presented by the appeal is whether a homestead can embrace land a mile away from that upon which the dwelling is situated, when used in connection with the homestead. The courts divide in their answers to this query. In Thomp. Homest. & Ex., p. 145, the cases upon the two sides are collected, and it is there said that 'the weight of authority is that the detached tracts of land, although used and cultivated as a part of the farm, form no part of the statutory homestead.' It is difficult to determine how the question stands on the adjudicated cases. Some of the decisions on the question are of no value in determining the legal meaning of the term 'homestead,' because they are controlled by the phraseology of the written law, which they construe. There is no express ruling upon the point by this court, but the question has been several times most pertinently adverted to. In the first decision upon the question of the homestead exemption in this state, Chief Justice English defined a homestead as 'the place of a home or house; that part of a man's landed property which is about and contiguous to his dwelling-house.' Tumlinson v. Swinney, 22 Ark. 403. In McKenzie v. Murphy, 24 Ark. 158, Judge Fairchild, in delivering the opinion of the court, speaks of the homestead 'as the land, or town or city lot, upon which the family residence is situated.' In Williams v. Dorris, 31 Ark. 468, Chief Justice English treats the definition given in Tumlinson v. Swinney as applicable to the provisions of the constitution of 1868. As late as 1886, Judge Smith, in announcing the judgment of the court in McCloy v. Arnett, 47 Ark. 453; 2 S. W. Rep. 71, repeated the same definition in a case governed by the constitution of 1868, and said that that was 'the defined legal sense of the term.' There was nothing in the phraseology of the act first referred to, or in the constitution of 1868, to restrict the meaning of the term 'homestead.' The definition thus frequently sanctioned by the judges of this court is substantially that given by Webster, Worcester, and the Imperial Dictionary, as well as by Burrill, Bouvier and Anderson. In neither of the cases cited was there a claim of a non-contiguous tract of the land as a part of the homestead, and, while the cases may be said not to be strictly controlling as authority, they are entitled to great respect, as the opinions of some of the first jurists of our bench, to the effect that the common acceptation of the term as given by the lexicographers is also its legal meaning.

"We find nothing in the constitution of 1874, the provisions of which govern this cause, indicating that the framers of that instrument intended

way) into two tracts, yet retain the exempt character.[1] The easement may not be for the benefit of the public. It may be necessary to the homestead holder in the enjoyment of his own property. He may require it when other property separates his from a public road or street. In this respect, a homestead is not different from other real estate. So premises may be divided in the setting-apart of a homestead, though it be necessary to create an easement to enable one having the rear part of a building, or tract, or lot, to have an outlet.[2] The part assigned as a homestead would be of little value as a home, unless the means of ingress and egress were provided, if its situation is in the rear of a lot. Contiguous tracts, forming one plantation, were treated as a homestead though only one of them was occupied as such.[3]

to enlarge the commonly-accepted meaning of the term. It prescribes that the homestead of any resident of the state who is married or the head of a family shall not be subject to lien or sale, with certain exceptions, and that 'the homestead outside of a city, town or village, owned and occupied as a residence, shall consist of not exceeding one hundred and sixty acres of land, with the improvements thereon, to be selected by the owner.' Art. 9, §§ 3, 4. The privilege of selection cannot be considered an enlargement of the homestead privilege. It is rather a restriction, for the selection is limited to lands upon which the homestead has been already impressed, and is intended as a means of carving a part out of the whole when the homestead exceeds the area limited by the constitution. Even where it is held that the homestead may consist of non-contiguous tracts, a capricious and unreasonable selection of non-contiguous tracts within the homestead area is not permitted. Jaffrey v. McGough, 88 Ala. 648; 7 South. Rep. 333. By the terms of the constitution, the lands claimed as a homestead must be 'occupied as a residence,' and it is limited to a given area, 'with the improvements thereon.' As the improvements must comprise a dwelling-house, and must be upon the lands claimed as a homestead, it would seem to follow that the constitution contemplates that the homestead should be the land upon which the dwelling is situated; and that goes to confirm the view that the term is used throughout in its commonly-defined sense. We concur, therefore, with the circuit court in the ruling that it was not intended that the homestead might include a tract of non-contiguous land lying a mile away from that upon which the residence is situated. From a number of cases, Bunker v. Locke, 15 Wis. 635; Randal v. Elder, 12 Kas. 260; Kresin v. Mau, 15 Minn. 116 (Gil. 87) — may be selected as stating the reason for the rule."

[1] Allen v. Dodson, 39 Kas. 220; Randal v. Elder, 12 Kas. 257, *261.*

[2] Schaeffer v. Beldmeier, 9 Mo. App. 445; McCormick v. Bishop, 28 Ia. 233; Rhodes v. McCormick, 4 Ia. 368.

[3] Grimes v. Portman, 99 Mo. 229.

They would not generally be so treated. Non-occupancy would be fatal to any claim for the inclusion of a tract adjoining the farm actually used, in most of the states. If the decision cited is to be followed in the state where it was rendered, it hardly will be in others. Parts of a home farm may be devoted to pasturage or may lie idle, and yet the exemption right remain unforfeited; but, to extend the exemption to a contiguous tract of wild or neglected land seems unwarranted by any homestead statute.

When the law does not limit homestead to the particular place where the beneficiary resides but allows land appurtenant thereto to be assigned with it as such, it is not absolutely necessary that such land should be adjoining to the home tract.[1]

A homestead may embrace more than one lot or tract. If it embrace separate parcels, there must be unity of use so as to constitute together one dwelling or residence or home farm.[2] And this is true, whether the different parcels be contiguous or not. The criterion is the home character.

In selecting and dedicating a homestead, the owner has no right to declare upon two or more pieces, when he could just as well select the allowed quantity, having the value permitted by statute, in one lot or tract. He must not incommode others that he may have two or three of the richer fields of a farm separated from each other. Homestead in parcels is allowable only when necessary.

Even if the quantitative limit has not been reached, it cannot be eked out by another piece of land on which a business, not connected with, or essential to, the homestead, is done.[3] The owner is not obliged to reach the *maximum*. It is his right to do so, and very natural that he should, but he cannot disregard the condition that all he selects must be truly a home for himself and his family. The fact that he and they occupy one piece of land will not avail when the question arises whether he has complied with all conditions in respect to the others.

Two tracts widely separated could not be set apart as the

[1] *See* Riley v. Gaines, 14 S. C. 454.

[2] Reynolds v. Hull, 36 Ia. 394.

[3] Mouriquand v. Hart, 22 Kas. 594; Garrett v. Jones (Ala.), 10 So. 702.

homestead of the widow from the decedent's property, it was held.[1]

This probably would not be so held everywhere. The widow's homestead is a very different thing from that which the owner originally sets apart and dedicates as the home of his family. The widow, taking her homestead very much as she takes her dower, in many of the states, is not invariably required to occupy it as a condition of retaining it. When not so required, why may not her portion as homestead consist of widely separated tracts, just as her portion as dower may be, when there is any necessity for it?

There is very good reason, however, why the original dedication or selection of a home for the family by its head, should not be that of two widely separated tracts. Both could not be occupied as a homestead, and thus an essential condition to the enjoyment of the immunity from execution would be wanting. Such disconnected parcels are allowable only where occupation is unnecessary, or where, under exceptional statutory provisions, certain amounts in money or land are saved to the debtor when execution is pending against his property though no homestead has been previously dedicated. Such provisions create exemption rather than homestead; and if a given number of acres, or a given money-value of land, is saved to him, it would not matter that the thing exempt is in parts and they widely separated. The home idea does not enter into the apportionment.

Where the protection of the family home is the policy of the legislator — not merely the saving of a certain sum to the insolvent debtor — the purpose is accomplished when the household is secured from disturbance, though the extent of the allowable acreage be not covered by the selected site. A piece of land many miles away from the home, not cultivated or otherwise used for family purposes, is not necessary to the accomplishment of the legislator's purpose.

Good faith must be observed in the selection of homestead by the owner. Creditors have no notice of the selection but by his occupancy of the premises, in several states. If he has

[1] *In re* Armstrong, 80 Cal. 71; King v. Gotz, 70 Cal. 236; *In re* Crowey, 71 Cal. 302; *In re* Noah, 73 Cal. 592.

an outlying tract in addition to his home farm, how shall they know that they may not trust him, looking to that as security? What justice can there be in letting him have that as a means of credit, yet allowing him to claim it as exempt when the creditor is about to seize it?

The owner of two lots lived with his family in one and rented the other to a tenant. Apprehensive that creditors would attach the latter, he induced the tenant to vacate it; and he brought it within his home inclosure on the day before attachment was really levied upon it; and he admitted that he did so to render it part of his homestead, and for the purpose of defeating his creditors. Both lots were held to be embraced in his homestead.[1]

From the time he thus actually employed both, his homestead included both, no doubt; but the rule is not general that debts existing prior to dedication could be thus avoided. Both lots were deemed in use as one homestead, when the attachment was levied, but what notice had the creditor, at the time he trusted the debtor, that the rented property was not liable?

No prior, formal dedication and recordation of the homestead as such was required by the statute of the state where the cited decision was rendered. Debtors there may claim at the eleventh hour. Use is required, but it may be business use as well as home occupancy, and the use or occupancy may begin just before a levy with the sole purpose of defeating the levy, as this decision holds. Creditors cannot be quite sure that the premises occupied by the debtor are all that will prove exempt when pay-day comes. There is no notice of any sort as to what unoccupied property is good security, unless the debtor has already a home of the *maximum* quantity or value.

§ 3. Platting.

When the dwelling was partly on forty acres belonging to a husband and partly on an equal tract belonging to his wife, he could not resist execution by injunction, but should have resorted to the platting of the land in order to save the parts of the two tracts and the residence.[2] That is, he should have

[1] Milburn Wagon Co. v. Kennedy, 75 Tex. 212.

[2] Henderson v. Rainbow, 76 Ia. 320.

complied with the law so as to make his home reservation known to creditors. The conjunction of the parts of the two tracts may not have made a body of land larger than the statute allows; but how could the public know what parts were selected? The law governing the case provides that the homestead may embrace one or more lots or tracts of land, with improvements and appurtenances, not exceeding half an acre within a town plat or forty acres without such plat, unless the value be less than five hundred dollars. In such case, the quantity may be enlarged to reach that value. It cannot include lots or tracts which are not contiguous unless they are habitually used together, in good faith, as one homestead. The selection may be by the owner (husband or wife), by marking the bounds and giving description such as is usual in instruments conveying land, which description, with the plat, shall be recorded in the Homestead Book. If the owner (husband or wife) fail to make, plat and record as directed, he does not thus forfeit the right of exemption; but the officer executing the writ against the property may cause the homestead to be marked off, platted and recorded at the defendant's expense.[1]

A rural homestead, circumscribed by the extension of town boundaries after its dedication, may retain its former dimension when not platted so as to be parceled as town lots.[2]

When corporate bounds are extended so as to include a rural homestead, it will not thus be subjected to the urban limitation of quantity, though lands adjoining it be blocks, lots and streets.[3]

Part of a rural homestead, protruding within town lines, is not limited by the urban rule when the land has not been platted and does not abut on a street. Used for agricultural purposes and a home for years, it does not necessarily lose its exemption character or its rural advantages because of the encroachment of the town upon it.[4]

[1] McClain's Code of Iowa, §§ 3163 *et seq.*

[2] Finley v. Dietrick, 12 Ia. 516; McDaniel v. Mace, 47 Ia. 519; Truax v. Pool, 46 Ia. 256: the town not being incorporated, the country quantity allowed.

[3] Posey v. Bass, 77 Tex. 512; Bassett v. Messner, 30 Tex. 604; Nolan v. Reed, 38 Tex. 426.

[4] Beyer v. Thomeng (Ia.), 46 N. W. 1074; McDaniel v. Mace, 47 Ia. 509.

When the statute exempts "one lot," "two lots," "half a lot," etc., in any incorporated town, the *lot* is understood to be such a one as the plat of the town shows.[1]

Platting city lots is not everywhere made essential to the dedication of a homestead within the corporate limits. It may be postponed till the ground has been levied upon, when it will be the duty of the seizing and selling officer to have the platting done and the homestead officially set apart. Meanwhile the householder is under the protection of the homestead law.[2]

If the law does not make the selecting, platting and recording of the homestead an essential to the beneficiary's enjoyment of the privilege of exemption, he may occupy his home and let such acts alone till his land is levied upon, or about to be. He may then claim, and make it the duty of the seizing officer to have the platting and recording done. He is not deemed guilty of *laches* by such delay, and he forfeits none of his rights.[3]

Sale by the officer without platting when demanded strikes with nullity not only the adjudication of the exempt portion of the property but that of any other that might have formed a portion of the homestead.[4] Recording of the platting is essential to the validity of the sale.[5]

But, since the statute requiring platting is directory, it is held that if the owner and the officer fail to designate the homestead before execution, the sale of that with other land will not be void, even if it be voidable.[6] If both husband and wife join in the conveyance, there is no need of platting.[7]

A farm, jutting into an incorporated village, with the dwelling-house within the village lines, may yet be accounted a rural homestead, when the part thus protruding has not been

[1] Wilson v. Proctor, 28 Minn. 13; Lundberg v. Sharvey, 46 Minn. 350.

[2] Sargeant v. Chubbuck, 19 Ia. 37.

[3] Sargeant v. Chubbuck, 19 Ia. 37; Nye v. Walliker, 46 Ia. 306; Linscott v. Lamart, 46 Ia. 312; Green v. Farrar, 53 Ia. 426.

[4] Linscart v. Lamart, 46 Ia. 312; White v. Rowley, 46 Ia. 680; Lowell v. Shannon, 60 Ia. 713; Owens v. Hart, 62 Ia. 620; Goodrich v. Brown, 63 Ia. 247; Visek v. Doolittle, 69 Ia. 602.

[5] White v. Rowley, 46 Ia. 680.

[6] Newman v. Franklin, 69 Ia. 244; Martin v. Knapp, 57 Ia. 336. *See* Brumbaugh v. Zollinger, 59 Ia. 384. *See* Farr v. Reilly, 58 Ia. 399.

[7] Quinn v. Brown, 71 Ia. 376.

platted.[1] It is generally the duty of an owner occupying more acreage than the law exempts, to have it platted, where the law prescribes the mode, or directs it to be done; but neglect to do so is not necessarily fatal to the exemption right.[2]

The requirement that the homestead shall be reserved, or set off from non-exempt property, has been held a condition to the enjoyment of the exemption privilege; so that, upon neglect of it, the whole property will continue to be liable.[3]

Where exemption takes effect by operation of law, without any act on the part of the beneficiary, creditors cannot avail themselves of the debtor's acts or neglects relative to homestead selection.[4]

The laying off, or designating by metes and bounds, certain land as homestead, is not a necessary act in the creation of a homestead right. It makes certain what is to be held exempt; and, when the owner is in possession of other landed property, it may be necessary that the particular acreage, which is to be held with his family dwelling-house, should be distinctly selected and made known to creditors. If, however, only the number of exempt acres is owned by him, and the law accords him such exemption without making the platting, or setting of it out, a condition, he may simply occupy it and hold it free from any judgment rendered on any ordinary debt after the beginning of his occupancy of it.[5]

[1] Orr v. Doughty, 51 Ark. 527.

[2] When land in greater quantity than that which the law exempts is owned by the head of a family, he should have the prescribed quantity laid out, platted, and the plat recorded, in Georgia. Pritchard v. Ward, 64 Ga. 446.

[3] Spoon v. Reid, 78 N. C. 244; Nichol v. Davidson, 8 Lea, 389; Gaines v. Exchange Bank, 64 Tex. 18.

[4] In South Carolina, no declaration or formal selection of a homestead is required. The owner of land worth no more than $1,000 has it exempt by law. He cannot waive the exemption in favor of creditors. Myers v. Ham, 20 S. C. 522; Ketchin v. McCarley, 26 S. C. 1. A judgment bears no lien on such land. *Ib.;* Duncan v. Barnett, 11 S. C. 333, *distinguished.* On waiver, *see* Agnew v. Adams, 26 S. C. 101. Occupancy is not necessary to a claim of homestead in that state. Nance v. Hill, 26 S. C. 227; Swandale v. Swandale, 25 S. C. 389. If the homestead be worth more than $1,000, the debtor may pay the excess, sixty days after litigation over the appraisement has ceased. Simonds v. Haithcock, 26 S. C. 595. Notice of exceptions filed to appraisement by judgment creditors need not be served on the judgment debtor, who is a party. *Ex parte* Ellis, 20 S. C. 344.

[5] Ketchen v. McCarley (S. C.) 11 S.

It has been held that in an action to recover land bought by the plaintiff at an execution sale, under a judgment on a note, advantage can be taken of the fact that homestead was not laid off; though the defendant did not specially claim it.[1] The court said: "It appears from the evidence offered by the plaintiff [the purchaser] that no homestead was laid off, and that the land was all that the judgment debtor owned. . . The debt was presumably of the date of the judgment."[2] It therefore became material to show the date of the note.[3] The judge stated incidentally, as a fact found, that the indebtedness was contracted prior to 1868.

§ 4. Form of the Land Selected.

Land should be selected so that the number of acres be embraced in a compact body, when practicable, and not purposely laid out in an irregular shape to secure the most valuable tract within the limited quantity.[4] But the use made of the land may be such that a disconnected piece may be considered to form a part of the main portion of the homestead.[5]

As far as practicable, the legal subdivisions of land by the surveys of the general government should be observed in the selection of a state homestead, when a half or quarter or eighth or sixteenth of a section is the limit.[6] This is not a fixed rule but it is favored by the courts, rather than the will of the debtor to select a very irregular tract from selfish motives. It is not a rule to be followed when it works unreasonably.[7]

Judge Somerville humorously says: "A homestead, if we could suppose such a case, fenced in the shape of an animal, a

E. 1099; Cantrell v. Fowler, 24 S. C. 424.

[1] Buie v. Scott, 107 N. C. 181; Mobley v. Griffin, 104 N. C. 112.

[2] Hill v. Oxendine, 79 N. C. 331; Mebane v. Layton, 89 N. C. 396.

[3] Mobley v. Griffin, 104 N. C. 112; McCracken v. Adler, 98 N. C. 400.

[4] Jaffrey v. McGough, 88 Ala. 648; Kresin v. Mony, 15 Minn. 116.

[5] *Ib.;* David v. David, 56 Ala. 49; Alford v. Alford, 88 Ala. 656; Discus v. Hall, 83 Ala. 159; Tyler v. Jewett, 82 Ala. 93; Houston, etc. R. Co. v. Windsor, 44 Tex. 597, 611; Prior v. Stone, 19 Tex. 371; S. C., 70 Am. Dec. 350; Gregg v. Bostwick, 33 Cal. 220; Perkins v. Quigley, 62 Mo. 498; Hoitt v. Webb, 36 N. H. 158; Buxton v. Dearborn, 46 N. H. 43; Greely v. Scott, 2 Woods, 657; Hubbard v. Canady, 58 Ill. 425; Stevens v. Hollingsworth, 74 Ill. 202.

[6] Jaffrey v. McGough, 88 Ala. 648, 652; Aldrich v. Thurston, 71 Ill. 324.

[7] Kent v. Agard, 22 Wis. 150.

bird, a flower-garden, or other fantastic shape, would not cease to be exempt from execution on this account, provided it be of lawful area and value, and the entire tract owned was in this particular form; although it is manifest that *a selection* in these quaint forms, made from a large tract of land, would be unreasonable and capricious, and not allowable. If so, like the cloud described by Hamlet to Polonius, it might just as well be 'the shape of a camel,' a 'weasel,' or a 'whale,' as in any other that might be dictated by the fancy of the person making the selection."[1]

Judicial notice should be taken of the fact that government land is parceled in sections, and half and quarter sections, etc., and that city property is platted and divided into squares and lots. And if a homestead claimant has his home and farm on a forty-acre tract, for instance, and that tract is about the monetary limit of exemption, or within it, the court will deem that his homestead rather than parts of it and of another tract. So, if there are several lots, the one occupied by him, of the proper value, will be understood as his homestead; and an adjoining lot will not be included with it so as to render the value greater than the amount legally exempted.[2] But if one adjoining lot, or more, are used with that on which the dwelling stands for home purposes, and all together do not exceed in value the statutory limitation, they may all be exempt.[3]

In the older states, where boundaries are irregular, following running streams or other meandering lines, it will be found impracticable to confine the homestead, limited to a given number of acres, to squares or oblong forms, as may be readily done in the newer states where the land is laid off originally in sections. But it should never be allowed the homesteader to cut a tract into such a shape as to injure the remaining land for no other purpose than to give himself the richest part of it. Suppose he should select forty acres, in the form of a cross, with an acre's width to the upright and to the horizontal piece, carving this out of a plantation of

[1] Jaffrey v. McGough, 88 Ala. 651.

[2] Brock v. Leighton, 11 Bradw. (Ill. App.) 361; Gardner v. Eberhart, 82 Ill. 316; Raber v. Gund, 110 Ill. 581; Hill v. Bacon, 43 Ill. 478; Aldrich v. Thurston, 71 Ill. 324.

[3] Boyd v. Fullerton, 125 Ill. 437.

many hundred acres: would any court countenance it? This is an extreme case supposed; but there may be selections approaching to such an absurdity, such as that condemned by Judge Somerville, above noticed. In the absence of any statute prescribing the form of the homestead, courts ought never to permit a selection manifestly made in disregard of the rights of others. Creditors are interested in the parts of a tract which are not exempt; and it never was the intent of the legislator to cut them off from their remedy against non-exempt property while protecting a limited quantity as a homestead. While the confinement of a homestead to the regular shape of quarter or half sections of land, or to the form of city lots, as suggested by the learned judge quoted, is not a rule because not everywhere practicable, it may be laid down as a rule that one authorized to select, declare and record a homestead within a quantitative limitation, cannot be permitted to carve it out of his land in such form as to leave the remainder worthless or to impair its value so that creditors shall be injured.

§ 5. Declaration — Methods.

Dedication may be by declaring and recording, or simply by occupancy. The condition of dedication is necessary to the acquisition of the homestead character, in every state where there is a homestead law, though there is exemption, in a few others, without it — exemption without recognition of the technical homestead. In the majority of the homestead states, the only dedication required is family occupancy. No selection and declaration are necessary, in these, to the acquisition of the householder's right and privilege; and he need not make claim, or have his exempt home set apart from the rest of his real estate, till judgment against him, or some other cause, shall have rendered it necessary for him to ask that it be set apart to him by the court.

In a minority of the homestead states, it is required that, in addition to occupancy, there must be selection, declaration and recordation before the premises occupied can be invested with the homestead character. Each of the following paragraphs explains a method:

The declaration of homestead must be executed and ac-

knowledged and recorded like the grant of real property. It must show that the declarant is the head of a family, or the wife of one who makes the declaration for the joint benefit of herself and her husband, and that the latter has not made a declaration; that the declarant resides on the premises claimed as a homestead; and there must be a description of the property claimed, and a statement of its value in cash.[1]

The selection of the homestead by the owner, husband or wife, is made by marking the bounds and giving description such as is usual in instruments conveying land, which description, with the plat, shall be recorded in the Homestead Book provided for the purpose.[2]

A conveyance of the property, stating that it is designed to be held as a homestead exempt from sale on execution, must be recorded; or, a notice with a description of the property, so stating, written, acknowledged and subscribed by the owner, as a deed, must be recorded in the Homestead Exemption Book of the county. Like property, owned by a married woman and occupied by her as a residence, may be designated in like manner, with like effect.[3]

The homestead consisting of land and a dwelling, worth not exceeding five thousand dollars, may be selected by the husband or wife, or by both, or by other head of a family. The declaration must be written, stating the declarant to be the head of a family (or married to one), residing with the family on the selected premises; and it must contain a description of the property. It must be signed and acknowledged by the declarant, and recorded as a conveyance is required to be.[4]

To entitle any person to the benefit of the homestead act, he shall cause the word *homestead* to be entered of record on the margin of his recorded title.[5]

Any one claiming homestead may, at any time, make a written declaration, signed by the declarant, stating the property selected and claimed as exempt, which must be filed for record in the office of the probate court of the county in which

[1] Deering's Annotated Code and Stat. of Cal., §§ 1237 *et seq.*; Revised Stat. Idaho, §§ 3035 *et seq.*

[2] McClain's Code of Iowa, §§ 3163 *et seq.*

[3] Throop's An. Code of New York, §§ 1397–1404.

[4] Genl. Stat. of Nevada, 1885, § 539.

[5] Gen. Laws of Colorado, ch. 76, § 3.

the property is situated. The filing of such declaration for record shall operate as notice of its contents.[1]

The claimant may file, in the registry of deeds in the county or district where the land lies, a certificate signed by him declaring his wish to have exemption, and describing the land and buildings; and the register shall record it in a book kept for that purpose.[2]

To be entitled to the full benefit of a homestead exempt from levy, seizure, garnisheeing or sale, the householder or head of a family shall declare, by deed duly recorded in the deed-book of the county in which such homestead or the greater part thereof is situated, his intention to claim such homestead, with a description of the property so claimed. If such intent is expressed in the deed or will conveying such property, it shall not be necessary for the householder or head of the family to execute a deed declaring such intent.[3]

"The owner or the husband or wife may select the homestead and cause it to be marked out and platted." . . . It "shall be marked off by fixed and visible monuments, unless the same shall embrace the whole of a subdivision or lot, and in giving the description thereof, when marked off as aforesaid, the direction and distance of the starting point from some corner of the dwelling-house shall be stated. The description of the homestead, certified and acknowledged by the owner, shall be recorded by the register of deeds of the proper county in a book called the 'homestead book,' which shall be provided with a proper index." If the owner fail to mark and record as directed, his right is not lost, as an officer in charge of an execution against the property of the householder may mark, plat and record the homestead.[4]

The homestead of the householder becomes exempt upon its occupancy by him and his family from the date of the recording of his deed; but "any married woman may file her claim to the tract or lot of land occupied by her and her husband, or by her, if abandoned by her husband, as a homestead; said claim shall set forth the tract or lot claimed, that

[1] Code of Alabama, § 2828.

[2] Rev. Stat. of Maine, ch. 81, § 61.

[3] Code of Virginia, ch. 183, § 4; Acts of West Va. 1881, ch. 19, §§ 32–3; Warth's Code, ch. 41.

[4] Compiled Laws of Dakota (1887), §§ 2458–9.

she is the wife of the person in whose name the tract or lot appears of record, and said claim shall be acknowledged by her before some officer authorized to take proof or acknowlment of instruments of writing affecting real estate, and be filed in the recorder's office." The effect of her recorded declaration is to restrain her husband from alienating without her joinder.[1]

A homestead holder, to avoid loss of the exemption privilege when about to be absent for more than six months, may save it by notice of his claim containing a description of the property, duly subscribed and acknowledged, and filed in the office of the register of deeds of the county where his homestead is situated.[2]

A homestead, not exceeding one thousand dollars in value, may be selected by the owner who occupies it with his family as a home, at any time before sale. The wife may select when the husband neglects or refuses to do it.[3]

§ 6. Declaration: Requisites.

Where exemption is a constitutional right, incident to homestead, and there is no monetary limit fixed to it by the constitution, the legislature may yet make a statutory limitation, and prescribe the means by which the debtor may avail himself of the benefit.[4]

Where the constitution or law of a state requires that the legal homestead quantum shall be regularly set apart when there is more than that amount of land in the occupied tract, the widow of a debtor whose whole plantation had been sold for debt could not eject the purchaser on the ground of her homestead claim. The deceased debtor had never caused his eighty acres to be set apart from the tract, and that neglect left her without homestead right, after the sale.[5]

Declaration of homestead, where it is required by statute, must be made in form sufficient to comply with the requirement, and must state that the declarant and his family reside

[1] Rev. Stat. of Missouri. 1889, § 5435; Gen. Stat. of Vermont, ch. 68, § 7.

[2] Gen. Stat. of Minnesota, ch. 68, § 9, p. 768.

[3] Code of Washington, 1881, §§ 342, 2415.

[4] Const. Cal. XVII, 1; Civ. Code Cal., § 1237; Lubbock v. McMann, 82 Cal. 226; Ham v. Santa Rosa Bank, 62 Cal. 138; S. C., 45 Am. Rep. 654.

[5] Clancy v. Stephens (Ala.), 9 So. 522.

on the premises.[1] Without this statement made and filed, the declarant cannot be heard to prove by other evidence that he and his family were occupants when a conveyance was made in contravention of the homestead right.[2]

It would be of no legal significance to file notice of an intention to declare and occupy.[3] This would be no such notification as the legislator designed; would not be a compliance with any law. And, in the absence of notice, when that is required, there can be no homestead.[4]

Where the beneficiary is required to file a declaration and claim of homestead in a designated office, or with a certain officer, his failure to do so will cut him off from defending his temporary absence or his limited leasing of the premises when the question of his abandonment of them is raised. He will be deemed never to have acquired the exemption, or deemed to have forfeited his right.[5] He must not only file his declaration at the proper place, but in time to avail himself of exemption.[6]

When the declaration is on a wife's separate property, her examination and acknowledgment must be in strict compliance with the law, to bind her.[7] But when partly on her separate property and partly on community, and the declaration is made by herself, she may be presumed to have consented to the filing of it on her separate property.[8]

A joint declaration that the homestead to a given amount was acquired and improved with the husband's separate means may be adduced in evidence against the wife as tending to remove the presumption that the homestead is community property, though it may not wholly overcome it.[9] She is not

[1] Boreham v. Byrne, 83 Cal. 23; Lubbock v. McMann, 82 Cal. 226; *In re* Allen, 78 Cal. 294; Malony v. Hefer, 75 Cal. 424; Laughlin v. Wright, 63 Cal. 113; Prescott v. Prescott, 45 Cal. 58; First Nat. Bank of San Luis Obispo v. Bruce (Cal.), 29 P. 488; Lee v. Miller, 11 Allen, 37; Cole v. Gill, 14 Ia. 527; Alley v. Bay, 9 Ia. 509; Yost v. Devault, 9 Ia. 60.

[2] Boreham v. Byrne, 83 Cal. 23.

[3] Cook v. McChristian, 4 Cal. 23.

[4] Noble v. Hook, 24 Cal. 639.

[5] Murphy v. Hunt, 75 Ala. 438, 441; Boyle v. Shulman, 59 Ala. 566.

[6] Estate of Reed, 23 Cal. 410; Bartholomew v. Hook, 23 Cal. 277.

[7] Beck v. Soward, 76 Cal. 527; Hutchinson v. Ainsworth, 63 Cal. 286; Cal. Civ. Code, § 1186; Wedel v. Herman, 59 Cal. 513. *See* Clements v. Stanton, 47 Cal. 60, rendered before § 1186 was adopted. (*See* § 1191.)

[8] Arendt v. Mace, 76 Cal. 315.

[9] Estate of Bauer, 79 Cal. 304; Duff v. Duff, 71 Cal. 513.

estopped by such declaration from resorting to other evidence to show her rights in the property.[1]

The declarant of homestead must conform to law,[2] and act jointly with his wife in creating the homestead where so required.[3]

Declaration of homestead may be proved by a duly-certified transcript of it, with the declarant's affidavit attached.[4]

The requirement that the value must be stated in the declaration is substantially satisfied by the allegation that it does not exceed the statutory limit.[5] The estimate at a fixed sum, under the limit, complies with the law.[6] When such estimate was qualified with the word "about," it was held sufficient.[7] But a declaration without a statement of value is void,[8] and one estimating the value above the monetary limit is defective,[9] where the statute requires an estimate in the declaration.

A declaration without occupancy *at the time* of its filing is nugatory where the statute requires the two conditions to be observed simultaneously.[10]

[1] *Ib. See* Anthony v. Chapman, 65 Cal. 73; Carter v. McManus, 15 La. Ann. 676; Werkheiser v. Werkheiser, 3 Rawle, 326.

[2] In Virginia, there is no homestead exemption unless it is claimed and set apart according to law. Wray v. Davenport, 79 Va. 19.

[3] The husband alone could not create homestead in California under the act of 1860 (Stats. 1860, p. 311), amended by act of 1862 (Acts 1862, p. 519). Gambette v. Brook, 41 Cal. 83; Boreham v. Byrne, 83 Cal. 23.

[4] Stevenson v. Moody, 85 Ala. 33 (*withdrawing* the case of the same title in 83 Ala. 418); Code, § 2788.

[5] Schuyler v. Broughton, 76 Cal. 524.

[6] Read v. Rahm, 65 Cal. 343.

[7] Graves v. Baker, 68 Cal. 134.

[8] Ashley v. Olmstead, 54 Cal. 616.

[9] Ames v. Eldred, 55 Cal. 136.

[10] Fromans v. Mahlman (Cal.), 27 P. 1095. The court, after stating facts, said: "It is settled law in this state that to constitute a valid homestead, the claimant must actually reside on premises when the declaration is filed. Prescott v. Prescott, 45 Cal. 58; Babcock v. Gebbs, 52 Cal. 629; Aucker v. McCoy, 56 Cal. 524; Pfister v. Dascey, 68 Cal. 572; 10 Pac. Rep. 117; Lubbock v. McMann, 82 Cal. 228; 22 Pac. Rep. 1145. The question, then, is, does the evidence show that Mrs. Mahlman was actually residing on the premises in controversy when she filed her declaration of homestead? We are unable to see how this question can be answered otherwise than in the negative. The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could incumber or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose the statute has been liberally construed in some respects, but the

To ascertain whether the property claimed as exempt is within the monetary limit, it must be appraised as though the claimant held title in fee. He may have far less — a life interest — a leasehold — but he is not entitled to have a greater quantity of property removed from liability for debt, on that account. His boundaries do not enlarge as his title grows less.[1]

The provision which allows exemption to a given amount in the dwelling and land constituting the home, "owned by the debtor" and to be "set apart to him," has been expounded so as to allow the husband the full benefit from his share of a jointly owned homestead by himself and his wife; to entitle him to the entire exemption out of his interest without estimating that of his wife. It is reasoned that though there can be no mortgage or release of the homestead without the wife's signature and acknowledgment; and though she succeeds to the homestead, as exempted, during her occupancy after his death, yet the exemption is to him during his life, and he has the power of absolute disposal of the property. The exemption of his property from sale for his debt is declared to be the meaning of the statute. "There is no need of any exemption of the wife's property, because it is not liable for his debts. He is the housekeeper, and the exemption is to him, that, as the head of the family, he may provide it with a house. If, where the property is owned jointly by the husband and wife, the homestead, which the law gives to the husband, be taken partly from her interest, then she would be compelled to contribute to an exemption to him, not allowed

requirement as to residence at the time the declaration is filed has been strictly construed. Thus the court has many times used and emphasized the word "actually," to show that the residence must be real, and not sham or pretended. In Babcock v. Gibbs, *supra*, the homestead claimants went to their lots in the evening, and spread a blanket for a roof, and slept under it. The next day they filed a declaration of homestead, and commenced the erection of a house, which they completed and moved into in about a month. It was held that they were not actually residing on the premises when the declaration was filed, and hence that no homestead was thereby selected. Here it clearly appears from the evidence that the respondents went to Haywards, not to make their home or place of abode there, but only to spend a night or two, and then return to their homes in San Francisco. This was not enough to constitute an actual residence."

[1] Yates v. McKibben, 66 Ia. 357.

out of his own property. In such case, upon the death of the husband, would the wife own any portion of the homestead in fee, or merely have a qualified or conditional interest in it? The exemption is to *him;* against *his* debt; out of *his* property; and it follows that the interest of the wife cannot be made to contribute to it." [1]

§ 7. Notification.

Notification to the public that certain property is held as a homestead is of great importance. Purchasers at private sale, from the beneficiaries, are entitled to know that the conveyance must be in accordance with the requirements for the alienation of that class of property. Purchasers at judicial sale are equally interested in knowing. Creditors ought to be informed so that they may not be deceived as to the property of their debtors at the time they trust them — may not mistake a shadow for substance.

The legislator, with reference to restraints upon alienation as well as to exemption and the peculiar provisions affecting the estate of a decedent homestead beneficiary, has made the acquisition of homestead to depend upon notice.

In voluntary dedication of homestead, notice is either of two kinds: Notice to the public by a recorded declaration, or notice by occupancy. Where the latter is deemed sufficient by the legislator to put purchasers and creditors upon inquiry, no formal description of the home property, as a homestead, in the title deed; no special record in a book kept for the purpose to which the public may look; no inscription in the margin of the recorded title; no actual notification, written or verbal, to any one concerned, is required. The occupancy, being open and notorious, is deemed sufficient.

Doubtless it is sufficient to show that the dwelling with its appurtenances is the occupant's home, but it does not necessarily show that it is his homestead, in the legal sense. It seems to put all who are concerned upon inquiry; and the legislator, in states where occupancy alone is deemed notice, leaves the purchaser and creditor to ascertain for themselves the char-

[1] Judge Holt, for the court, in Johnson v. Kessler, 87 Ky. 458. *Compare* Miles v. Hall, 12 Bush, 105. *See* Giblin v. Jordan, 6 Cal. 416; Ontario State Bank v. Gerry, 91 Cal. 94; and Lowell v. Shannon, 60 Ia. 713.

acter of the property occupied as a home or to neglect it at their peril.

It is not to be assumed that every householder desires to avail himself of the homestead provisions. A poor man, with a family, living on the only real estate which he owns, may find the conditions to the enjoyment of the privilege of exemption too onerous in his case. He may not be willing to diminish his credit by cutting himself off from the right of mortgaging his property, if he lives where that would be one of the results of accepting the homestead privilege. Where such result does not follow dedication, he may not wish to place himself in a condition which would impair his general credit, since he would be less trusted if his only property should cease to be liable for his obligations. He might not wish to destroy the prop which sustains his credit.

Such a householder might not wish to subject his limited estate to the rules governing the homesteads of decedents. He might desire that, at his death, an adult son should enter at once upon the possession of his portion of the home farm, and not be obliged to await the majority of a minor child of the decedent. It is therefore by no means certain that the occupant of a home means to dedicate it as a homestead by his occupancy.

Since penning the last two paragraphs, the writer has found the following (not specially noticed before), which is fully in accord: "The object of the convention [in making the registry of the declaration necessary to homestead exemption] was transparent, and, it seems to us, a very wise one. It saw that the effect of the homestead provision coupled, as it was, with the prohibition of the conventional waiver thereof, would be to cripple the credit and resources of the beneficiaries, which, under many circumstances, would be more injurious than beneficial. It therefore gave them the option of availing themselves, or not, of the privilege, as their interests might require. It said to them: If you desire to secure your homestead from the risks and chances of business, you may do so by registering your exemptions as required by law. If, on the contrary, you desire to retain your whole property in a situation to serve as a basis of credit, for the purpose of conducting or extending your business operations, we leave you the option

of doing so by simply abstaining from registry. It never meant to say: You may abstain from registry until you have obtained credit, and you may then defeat your creditors by subsequent registry."[1]

In states where there are no onerous conditions; where mere occupancy is notice; where the householder may mortgage or sell unfettered; where he need not claim exemption till an execution is levied upon his property, the above remarks are inapplicable. The notice which is given to the public, by occupancy, in such case, is that a certain sum or a given quantity of real estate is exempt from forced sale when not subject to lien.

In some states, the promulgation of the homestead law is notice to creditors that exemption to a stated amount may be claimed from that date, or a stated time, by any debtor having a family and living with him, at the time of claiming, in the home claimed.

If there is no prescribed method of selection, occupancy of a home, with right of possession, is sufficient, when the quantity and value of the premises are within the legal limits. In such case, no formal notice to the public, or to an officer in charge of an execution, is necessary — the state of things operating as sufficient notice that the property is exempt.[2]

The continued residence of a family upon their homestead is notice that the householder has some interest in it, and "a person purchasing is bound at his peril to inquire as to the extent of that interest," it is said.[3]

§ 8. Recording.

Compliance with the condition that homestead shall be declared and recorded is essential to the right of enjoying the privilege of exemption, when the statute imposes that condition.[4]

[1] Succession of Furniss, 34 La. Ann. 1013–4.

[2] Beecher v. Baldy, 7 Mich. 488; Thomas v. Dodge, 8 Mich. 51; Grand Rapids, etc. Co. v. Weiden, 69 Mich. 572; Riggs v. Sterling, 60 Mich. 643; Griffin v. Nichols, 51 Mich. 575; Coates v. Caldwell, 71 Tex. 19; Shakleford v. Todhunter, 4 Bradw. 271; Myers v. Ham, 20 S. C. 522; Ketchin v. McCarley, 26 S. C. 1.

[3] McHugh v. Smiley, 17 Neb. 626; Uhl v. May, 5 Neb. 157; McKinzie v. Perrill, 15 Ohio St. 168.

[4] Goodwin v. Colorado Mortgage Co., 110 U. S. 1; Boreham v. Byrne,

Where the declaration must be executed and acknowledged and recorded like the grant of real property, and must show that the declarant is the head of a family, or is the wife of the head of a family who makes the declaration for the joint benefit of herself and her husband; and that the declarant occupies the premises, with his family; and also must describe the property and state its value,[1] the courts hold that there must be compliance with the statute in manner and form.[2]

If it is required that "to entitle any person to the benefit of [the homestead act] he shall cause the word 'homestead' to be entered of record on the margin of his recorded title,"[3] such inscription is essential to the benefit. Justice Harlan said for the court: "We are not at liberty to say that the legislature intended actual notice to creditors of the occupancy of particular premises as a homestead to be equivalent to the entry, on the record of title, of the word 'homestead.' The requirement that the record of the title shall show that the premises *are occupied* as a homestead before any person can become

83 Cal. 23; Lubbock v. McMann, 82 Cal. 226; *In re* Allen, 78 Cal. 294; Beck v. Soward, 76 Cal. 527; Malony v. Hefer, 75 Cal. 424; Laughlin v. Wright, 63 Cal. 113; Hutchinson v. Ainsworth, 63 Cal. 286; Ham v. Santa Rosa Bank, 62 Cal. 138; S. C., 45 Am. Rep. 654; Wedel v. Herman, 59 Cal. 513; Clements v. Stanton, 47 Cal. 60; Prescott v. Prescott, 45 Cal. 58; Gambette v. Brock, 41 Cal. 78; Mann v. Rogers, 35 Cal. 316; Gregg v. Bostick, 33 Cal. 220; McQuade v. Whaley, 31 Cal. 533; Noble v. Hook, 24 Cal. 639; Riley v. Pehl, 23 Cal. 70; Bartholomew v. Hook, 23 Cal. 278; Estate of Reed, 33 Cal. 410; Cohn v. Davis, 20 Cal. 194; Commercial Bank v. Corbett, 5 Saw. 547; Lackman v. Walker, 15 Nev. 422; Child v. Singleton, 15 Nev. 461; Smith v. Shrieves, 13 Nev. 303; Smith v. Stewart, 13 Nev. 70; Estate of Walley, 11 Nev. 264; Hawthorne v. Smith, 3 Nev. 164; Mills v. Spaulding, 50 Me. 57; Lawton v. Bruce, 39 Me. 484; Davenport v. Alstin, 14 Ga. 271; Murphy v. Hunt, 75 Ala. 438, 441; Boyle v. Shulman, 59 Ala. 566; Linsey v. McGannon, 9 W. Va. 154; Taylor v. Saloy, 38 La. Ann. 62; Gerson v. Gayle, 34 La. Ann. 337; Gilmer v. O'Neal, 32 La. Ann. 983; Bramin v. Womble, 32 La. Ann. 805; Doughty v. Sheriff, 27 La. Ann. 355; Robert v. Coco, 25 La. Ann. 199; Tennent v. Pruitt, 94 Mo. 145; Shindler v. Givens, 63 Mo. 395; Farra v. Quigley, 57 Mo. 284; Griswold v. Johnson, 22 Mo. App. 466; Barnett v. Knight, 7 Colo. 365. *See* Pritchard v. Ward, 64 Ga. 446; Huntington v. Chisholm, 61 Ga. 270; Wray v. Davenport, 79 Va. 19.

[1] Deering's Annotated Stat. of Cal., §§ 1237–1263; Rev. Stat. Idaho, §§ 3035–3088.

[2] The California cases above cited.

[3] Gen. Laws Colo., 1877, ch. 76, § 3; Gen. Stats., §§ 1631–2.

entitled to the benefits of the statute is absolute and unconditional." And an answer failing to show compliance with this requirement was held fatally defective, and the homestead right was denied, in a suit by a purchaser for possession.[1]

Where the exemptionist is required not only to occupy the land but to record his title before immunity from debt can be enjoyed relative to the land as his homestead, he will not be protected by simply living upon the land, with his family.[2] But exception was made in favor of one who had exchanged one homestead for another yet had not recorded his title to the latter. Homestead right, being already acquired, was not lost by the failure to record the new property to which the exemption had immediately attached on exchange.[3]

The fact, that one property had been exchanged for another, and the homestead character transferred from one to the other, appearing in the deed, would have been notice to the public, had the deed been recorded.[4] So long as it remained unrecorded, it would seem that the public, notified only by the record, would understand the first property to be exempt, and the second (for which the first was exchanged) liable for debt.

The husband can mortgage the property actually occupied as a residence by himself and his family, without his wife's consent, where the necessary act of recording, to complete the right of exemption, has been neglected.[5] He can do so, because the property is not homestead. He may not only act alone in creating a lien, but he may also alienate it in any way that would be legal in disposing of any of his other realty, for the reason that a condition necessary to the completion of the homestead character is wanting. It is equally clear that if the home has not been rendered exempt by compliance with this condition, it is open to creditors.

When registry of homesteads is made essential to their establishment, it must precede the recording of a mortgage to

[1] Goodwin v. Colo. Mortgage Co., 110 U. S. 1; Barnett v. Knight, 7 Colo. 365.

[2] Tennent v. Pruitt, 94 Mo. 145; Shindler v. Givens, 63 Mo. 395; Farra v. Quigley, 57 Mo. 284; Griswold v. Johnson, 22 Mo. App. 466.

[3] Smith v. Enos, 91 Mo. 579; Creath v. Dale, 84 Mo. 349.

[4] Cheney v. Rodgers, 54 Ga. 168; Murray v. Sells, 53 Ga. 257.

[5] Child v. Singleton, 15 Nev. 461; Smith v. Shrieves, 13 Nev. 303; Commercial Bank v. Corbett, 5 Saw. 547.

save the lien from bearing on the home set apart. Exemption, in such case, is inoperative against debts contracted prior to registry, where pre-existing debts of ordinary character are collectible by judgment and execution against the homestead.[1] It is too plain for argument, that an existing mortgage cannot be defeated by a subsequent declaration of homestead. The declaration cannot operate *ex post facto*.[2]

Recording, or lodging for the purpose of recording, is necessary to convey the interest of either marital party in the homestead, when the statute makes the wife's deed and acknowledgment depend upon record.[3]

The importance attached to recording does not everywhere have recognition. Where the statute requires that homestead be recorded, but adds that the neglect to record shall not affect the householder's exemption right, or words to that effect, it is held that he is guilty of no *laches*, and loses no rights, if he lets recording alone till the sheriff plats and sets apart and records his lot after a levy upon it.[4]

Selection is necessary when property, greater in quantity or value than the law exempts, is levied upon, and the homestead is to be reserved from it. It is not important that the selection be made before the levy; it may be done at any time before sale, in such way as to notify the officer in charge of the writ. The notification to him should be such as will enable him to omit the reservation from the sale; that is, the

[1] Kinder v. Lyons, 38 La. Ann. 713; Succession of Furniss, 34 La. Ann. 1013. Claims of homestead exemptions affecting debts and contracts existing before the constitution of 1879 are governed by the law in force at time of contract. Thomas v. Guilbeau, 35 La. Ann. 927; Poole v. Cook, 34 La. Ann. 331; Gilmer v. O'Neal, 32 La. Ann. 980; Gerson v. Gayle, 34 La. Ann. 337.

[2] Taylor v. Saloy, 38 La. Ann. 62; Gilmer v. O'Neal, 32 La. Ann. 983; Bramin v. Womble, 32 La. Ann. 805. *See* Gerson v. Gayle, 34 La. Ann. 337; Robert v. Coco, 25 La. Ann. 199; Doughty v. Sheriff, 27 La. Ann. 355. "Such exemptions, to be valid, shall be set apart and registered, as shall be provided by law." La. Const. of 1879; Broome v. Davis, 87 Ga. 584.

[3] Hensey v. Hensey (Ky.), 17 S. W. 333; Ky. Gen. Stat., ch. 38, art. 13, § 13; ch. 24, § 21. Under the New Hampshire statute of 1851, the wife's signature to a mortgage previously executed by her husband and recorded, had no effect when made without seal or witnesses. Wilson v. Mills (N. H.), 22 A. 455.

[4] Sargent v. Chubbuck, 19 Ia. 37; Nye v. Walliker, 46 Ia. 306; Green v. Farrar, 53 Ia. 426.

boundaries should be made known with certainty. This is required, though there be no formal method prescribed.[1]

On June 13, 1881, a judgment was rendered against a defendant, named Treadway, for over $10,000; on the 9th of July execution was issued and land levied upon; on the 5th of August the land was sold to the plaintiff at judicial sale, and six months thereafter he received his title from the sheriff, which was then duly recorded.

On the 1st of August, 1881, after the levy, Treadway married, and he and his wife afterwards lived on the land as their homestead, until the trial of the suit brought for their ejectment by the purchaser at judicial sale. Treadway claimed to have lived there long before, and to have supported the defendants as members of his family — a fact contested.

The ejectment suit turned upon the question of the validity of the judicial sale. Treadway occupied before the levy; he may have had a legal family before, though not married till afterwards, but he had filed no declaration before. Yet the court said: "From the instant the declaration of the homestead was filed for record, the property in contest became and was 'a homestead as provided by law,' and from that instant it came within the protection of the constitution and statute, and could not be levied upon, or sold for or upon any debt or liability not excepted and mentioned in the constitution."

The constitution expressly excepts only taxes, obligations contracted for the purchase of the homestead and for its improvements, and liens given by husband and wife.[2] It is silent as to property debts, or liens attached before the declaration of homestead, and therefore the court thought them cut off by the declaration.

The conclusion of the court may be thus stated: That when recording the homestead declaration is the method prescribed by law for fixing the exemption right, it may be done after judgment and levy, before sale, when the time of so doing is not otherwise specified; that a sale of the property, after such recordation, would be void, unless for a debt which

[1] First Nat. Bank v. Jacobs, 50 Mich. 340; Beecher v. Baldy, 7 Mich. 488; Herschfeldt v. George, 6 Mich. 468; Stevenson v. Jackson, 40 Mich. 702.

[2] Const. Nev., § 104.

is excepted from exemption; that the right is attached when the property is dedicated as a homestead, so as to prevent the execution of a judgment, and levy already made.[1]

But how can the recording of such declaration affect the lien of a judgment already rendered and of a levy thereunder? That is, if the lien has attached before the declaration, how can the recording of the declaration dislodge it? The court did not hold that no lien attached but that such liens were not excepted from the exemption by the constitution. If the declaration had been made and recorded before the levy of the execution, no lien would have been created by the levy; but, made afterwards, it could not affect the lien, if one had attached, if the general law governing liens had not been abrogated. The law is as decided, in the state where the decision was made, by virtue of it; but it cannot command general influence.

Considered as notice, recordation after credit has been obtained on the faith of the property not dedicated (and, in this case, held by an unmarried man believed to have no legal household), was poor notice to the creditor.

Of a constitution which required the recording of homestead declaration (as the one above cited), it was said by the supreme court expounding it: "The constitution, after defining the exemptions, says: 'Such exemptions, to be valid, shall be set apart and registered, as shall be provided by law.' Then, until set apart and registered, there is no valid exemption, which means, practically, no exemption at all. If there existed no valid exemption when the debt was contracted, certainly the constitution did not intend to leave it in the power of the debtor to create such an exemption thereafter, to the prejudice of antecedent creditors. What is the object of registry? Notice to whom? To third parties dealing with the debtor. What would be the use of such notice given after the debts have been contracted?"[2]

[1] Nevada Bank v. Treadway, 17 Fed. 887. *Citing:* Hawthorne v. Smith, 3 Nev. 182; Lachman v. Walker, 15 Nev. 425; Estate of Walley, 11 Nev. 264; North v. Shearn, 15 Tex. 174; Stone v. Darnell, 20 Tex. 14; Macmanus v. Campbell, 37 Tex. 267.

[2] Succession of Furniss, 34 La. Ann. 1013–14.

CHAPTER VI.

OCCUPANCY.

§ 1. The Condition Stated.
2. Declaration and Occupancy as Conditions.
3. Declaration Directory — Occupancy Essential.
4. Occupant Claiming Without Declaration.
5. Principal Use.
§ 6. Subordinate Uses.
7. Intention to Occupy.
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10. Retroaction: Building Material.
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12. Legal Possession as Occupancy.

§ 1. The Condition Stated.

Occupancy is one of the conditions upon which the privilege of exemption is tendered by the legislator. This condition is found in all the statutes, generally speaking, and in nearly the same phraseology in all; certainly the requirement is substantially the same wherever this condition is imposed; and, as already said, there is a near approach to universality in making this requirement. No other feature of the homestead system approximates so closely in all.

Actual occupancy — literal living in the exempt home — family residence there — present use by a household of a dwelling place as an abiding habitation — is the condition. The head of the family, on compliance with this and the other conditions, is privileged to avail himself of the beneficent offer of the legislator.

In the acquisition of the exemption right, compliance with this condition is indispensable. In the retention of the right, literal, continuous, actual occupancy is not so strictly required, as will be shown hereafter. The subject now in hand is occupancy as a condition to the acquisition of a homestead.

Legal possession may exist without actual occupancy, but this alone is not a condition in the acquisition of the homestead privilege. True, occupancy must be attended by it; the mere use of a house and its appurtenances as a residence, without the right thus to use it, would be of no avail. Pos-

session is often constructive; the owner is deemed in possession when he holds the title and controls the property, though he may never have set his foot upon it; but the exemptionist must be an occupant, as the authorities cited in the following sections fully show.

Contemplated occupancy has been countenanced in some decisions, though it is believed to have no warrant by any statute; such decisions will be considered in their place; the purpose now is to show that the current of authority follows the statutes, establishing the proposition that actual occupancy by the owner and his family is an essential condition to the acquisition of the exemption privilege.

§ 2. Declaration and Occupancy as Conditions.

In the states where both declaration and occupancy are essential to the acquisition of the homestead immunity, the householder cannot put off claiming exemption till his property has been levied upon for debt, nor even till judgment has been rendered against him, and then defeat the remedy of his creditors by showing that he actually occupied his home before the debts were contracted. In those states, the homestead character begins only at the time of the declaration of occupancy, ownership and family headship.

The declaration is insufficient if it do not state that the declarant and his family reside on the premises at the time it is made. Without such statement, the declaration is not even admissible in evidence to prove the existence of a homestead, under a statute requiring the averment of occupancy to be made in the instrument and duly recorded. It is not sufficient to declare that the property, fully described, is owned and possessed by the declarant, that it is within the statutory limitation of value and that the declarant is a married man; for there is still the radical defect — the omission of the averment of actual occupancy. There may be possession, in a legal sense, through a tenant, or even personal possession, without actual occupancy of the described property as the home of the owner and his family, at the time the declaration is made and recorded as notice to the world. Enforcing this requirement, it was judicially said that the statute requiring the averment of occupancy was an enabling act and intended as

such; that it had to be obeyed in order to make a selection and dedication; that the ability to protect the property as homestead from forced or voluntary sale depended upon compliance with this requirement. "Nothing could make the premises a valid, protected homestead without such a declaration as the statute required. Actual residence on the land would not so make it, in the absence of a sufficient declaration. A declaration sufficient in form without residence, and residence without a sufficient declaration, are alike ineffectual to constitute the homestead." And it was also said: "In all cases, residence on the land was requisite [by the act under construction] to consummate the claim of homestead."[1]

No particular length of time is prescribed as essential to the occupancy necessary to entitle one to declare homestead. One day may suffice;[2] but all of the conditions — actual occupancy, ownership, family headship and dedication, must co-exist, in those states where they are required; for the observance of all the conditions but one will not excuse the neglect of that.[3]

The statutory provisions that the house and land, constituting the residence of the claimant, may be selected as the homestead, and that it may be selected from any real property *occupied* and owned . . . (with no contrary or qualifying provisions express or implied), is construed to require *actual* occupancy in the acquisition of the exemption provided in the statute.[4]

[1] Boreham v. Byrne, 83 Cal. 23, 26–8. *Citing* Gregg v. Bostwick, 33 Cal. 220; S. C., 91 Am. Dec. 637; Mann v. Rogers, 35 Cal. 316; Gambette v. Brock, 41 Cal. 83.

[2] Skinner v. Hall, 69 Cal. 195. In this case the declarant's family did not reside with him, and the property declared upon was not all occupied by him as a residence but was in use for other purposes: yet the declaration was held good.

[3] Galligher v. Smiley, 28 Neb. 194.

[4] Deering's Annot. Code & Stat. of Cal., §§ 1237–1263; Boreham v. Byrne, 83 Cal. 23; Gregg v. Bostwick, 33 Cal. 220: S. C., 91 Am. Dec. 637; Mann v. Rogers, 35 Cal. 316; Gambette v. Brock, 41 Cal. 83; Prescott v. Prescott, 45 Cal. 58; Babcock v. Gibbs, 52 Cal. 629; Dorn v. Howe, 52 Cal. 630; Aucker v. McCoy, 56 Cal. 524; Laughlin v. Wright, 63 Cal. 113; Maloney v. Hefer, 75 Cal. 424; *In re* Allen, 78 Cal. 294; Lubbock v. McMann, 82 Cal. 226; Ackley v. Chamberlain, 16 Cal. 182; S. C., 76 Am. Dec. 516; Estate of Crowey, 71 Cal. 300; King v. Gotz, 70 Cal. 236; Pfister v. Dascey, 68 Cal. 572; Benedict v. Bunnell, 7 Cal. 245; Holden v. Pinney, 6 Cal. 234, 625; Skinner v. Hall, 69 Cal.

It is said that the conditions on which homestead protection is vouchsafed, such as family occupancy, ownership, and monetary value, must co-exist *at the time* the declaration is made.[1] And when they cease, the benefit has been held to cease with them.[2] Monetary value, however, is not a condition but a restriction, so that a given sum shall not be exceeded. The point of the deliverance is that the real conditions must be complied with by the defendant when he made the declaration.

§ 3. Declaration Directory — Occupancy Essential.

The citations above made may be sufficient to show the rule in those states which make exemption depend upon the recorded declaration of occupancy at the beginning, and date its effect upon creditors from the time they had such notice.

There is an exceptional course, where the statute, though providing for the declaration, makes it merely directory, and expressly provides that if it be not made, occupancy shall be sufficient to enable the householding head of a family to claim exemption at any time — even after a writ of execution has been issued against his home. It is provided that the selection of the homestead may be by the owner, husband or wife, by marking the bounds and giving description such as is usual in instruments conveying land, which description, with the plat, shall be recorded in the Homestead Book. But it is added that if the owner fail to mark, plat and record as directed, he does not thus *forfeit the right of exemption;* but the officer executing a writ against the property may cause the homestead to be marked off, platted and recorded.[3]

It will be seen that acquisition does not depend upon declaration, since there could have been no possibility of forfeiture, had declaration been made an essential condition — there would have been nothing to be forfeited, in the absence of that which was essential to the original creation. It will be further seen that inscription in the Homestead Book was not

195; *In re* Noah, 73 Cal. 590; Cary v. Tice, 6 Cal. 625.

[1] Denis v. Gale, 40 La. Ann. 286; Bossier v. Sheriff, 37 La. Ann. 263; Gallagher v. Payne, 34 La. Ann. 1057; Tilton v. Vignes, 33 La. Ann. 240; Const. La., art. 222.

[2] Chaffe v. McGehee, 38 La. Ann. 278; Nugent v. Carruth, 32 La. Ann. 444 (*overruling* Hardin v. Wolf, 29 La. Ann. 333). *Compare* Van Wickle v. Landry, 29 La. Ann. 330.

[3] McClain's Iowa Code, §§ 3163–9.

meant to be the only notice to creditors, as it is in other states having the same requirement.

Actual occupancy is made to take the place of both as well as to perform its own office, in the acquisition of homestead. Notorious home-keeping on the premises is notice, as in states where it is the only notice to creditors. It also answers for declaration — or, rather, is sufficient without it, as a means of acquiring,— thus also following the rule in the majority of the states.

The requirement, "the homestead must embrace *the house used as a home* by the owner thereof,"[1] means that there must be actual occupancy;[2] that the "use" shall be by the family of the owner, and is essential to his enjoyment of the exemption immunity;[3] that the homestead character does not attach to property before its actual occupancy as the family habitation — the prior intention to occupy it giving no exemption right or claim though subsequently followed by occupancy;[4] that though the home consists only of a room, a flat or any part of a house, such part becomes exempt because of its family occupancy, while the rest of the building would be liable to creditors because of its non-occupancy as a home.[5]

§ 4. Occupant Claiming Without Declaration.

The enactment: "That every householder having a family shall be entitled to an estate of homestead, to the extent in value of one thousand dollars, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and *occupied by him or her as a residence*,"[6] is held to mean that the homestead must be in fact the home; that the land must embrace a dwelling-house actually used as a residence by the owner and his family;[7] that the homestead must be determined by occupancy and not by intention;[8] that the

[1] McClain's Code, Ia., § 3169.

[2] Yost v. Devault, 9 Ia. 60; Hyatt v. Spearman, 20 Ia. 510.

[3] Cole v. Gill, 14 Ia. 527; Page v. Ewbank. 18 Ia. 580.

[4] Belknap v. Martin, 4 Bush, 47; Givans v. Dewey, 47 Ia. 414; Elston v. Robinson, 23 Ia. 208; Christy v. Dyer, 14 Ia. 438; Williams v. Swetland, 10 Ia. 51; Campbell v. Ayres, 18 Ia. 252; Charless v. Lamberson, 1 Ia. 435; First N. Bank v. Hollingsworth, 78 Ia. 575.

[5] Rhodes v. McCormick, 4 Ia. 368; McCormick v. Bishop, 28 Ia. 233; Mayfield v. Maasden, 59 Ia. 517; Johnson v. Moser, 66 Ia. 536; Arnold v. Gotshall, 71 Ia. 572.

[6] Starr & Curtis' Ann. Stat. of Ill., p. 1197.

[7] Kitchell v. Burgwin, 21 Ill. 40.

[8] Tourville v. Pierson, 39 Ill. 446;

occupancy comes too late, after judgment; that the exemption right does not attach till the claimant is the head of a family, the holder of the title, and the occupant of the premises with his family;[1] and that a tract of land must be actually occupied as a homestead to become exempt.[2]

The following terms of exemption are found in many statutes, in almost the same words in all which are here quoted from one: "A homestead, to be selected by the owner thereof, consisting . . . of land . . . , and the dwelling-house thereon and its appurtenances, owned and *occupied* by any resident of this state, shall be exempt from seizure and sale on execution. . . . "[3]

It is held, in construing this provision, that the word "occupied" should have controlling effect;[4] that it is the actual home, and no other, which is exempt;[5] that the word "homestead" means a place of residence, implying occupancy or literal possession;[6] that the chief characteristic of the homestead is that it is the land on which the dwelling of the owner and his family is situated.[7]

"The homestead of every housekeeper or head of a family, consisting of a dwelling-house and appurtenances, and the land used in connection therewith, not exceeding the amount and value herein limited, which is or shall be used by such housekeeper or head of a family as such homestead, shall, together with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided."[8]

Reinbach v. Walter, 27 Ill. 393; Freeman v. Stewart, 5 Biss. 19.

[1] Shackleford v. Todhunter, 4 Ill. App. 271.

[2] Gardner v. Ebenhart, 82 Ill. 316; Hotchkiss v. Brooks, 93 Ill. 386. And, generally, that there must be actual occupancy, as distinguished from constructive, and from mere legal possession. Fisher v. Cornell, 70 Ill. 216; Titman v. Moore, 43 Ill. 169; Cabeen v. Mulligan, 37 Ill. 230; Walters v. People, 21 Ill. 178; Cahill v. Wilson, 62 Ill. 157; Walters v. The People, 21 Ill. 178.

[3] Wis. Stat. (Sanborn & Berryman), § 2983.

[4] Weisbrod v. Daenicke, 36 Wis. 73.

[5] Jarvais v. Moe, 38 Wis. 440.

[6] Upham v. Second Ward Bank, 15 Wis. 449; Phelps v. Rooney, 9 Wis. 70; Harriman v. Queen's Ins. Co., 49 Wis. 71.

[7] Bunker v. Locke, 15 Wis. 635. See, to like effect with foregoing decisions: Bridge v. Ward, 35 Wis. 687; Casselman v. Packard, 16 Wis. 114; Binzel v. Grogan, 67 Wis. 147; Freeman v. Stewart, 5 Biss. 19; Carter v. Sommermeyer, 27 Wis. 665. But see, as not fully in accord, Scofield v. Hopkins, 61 Wis. 370.

[8] Rev. Stat. Mo. (1889), sec. 5435.

Where no formal dedication is required, there yet must be actual occupancy prior to sale under execution to enable the debtor to avail himself of the exemption privilege relative to his home.[1] There must be actual residence or use for homestead purposes.[2]

Failure to occupy a donated homestead on public domain is a forfeiture of whatever rights the applicant may have acquired.[3]

Both husband and wife must settle upon a pre-emption homestead. One hundred and sixty acres are given to a family of husband and wife as community property, and the land must be occupied by them.[4] Actual occupancy is necessary both in the acquisition and retention of a homestead.[5]

A constitutional provision is as follows: "A homestead . . . occupied as a residence by the family of the owner . . . shall be exempted from forced sale by any process of law . . ."[6] It is construed to mean, by homestead, the dwelling-house where the owner's family resides: the tests being use and quantity — the latter being specified in the same article.[7]

Occupancy is necessary to the creation of the character of immunity.[8] And it must be family occupancy; not that of the owner alone. A married man's conveyance was held

[1] Letchford v. Cary, 52 Miss. 791; Irwin v. Lewis, 50 Miss. 363; Lessley v. Phipps, 49 Miss. 790; Totter v. Dobbs, 38 Miss. 198.

[2] McDannell v. Ragsdale, 71 Tex. 23; Coates v. Caldwell, 71 Tex. 19; Langston v. Maxey, 74 Tex. 155; Newton v. Calhoun, 68 Tex. 451; Petty v. Barrett, 37 Tex. 84; Batts v. Scott, 37 Tex. 65; Philleo v. Smalley, 23 Tex. 498.

[3] Garrett v. Weaver, 70 Tex. 463; Tex. Rev. Stat., §§ 3942, 3947.

[4] Mills v. Brown, 69 Tex. 244.

[5] Minn. Gen. Stat., ch. 68, § 9; Jacoby v. Distilling Co., 41 Minn. 227, 230; Baillif v. Gerhard, 40 Minn. 172; Russell v. Speedy, 38 Minn. 303; Umland v. Holcombe, 26 Minn. 286; Liebstrau v. Goodsell, 26 Minn. 417; Kresin v. Mau, 15 Minn. 116; Donaldson v. Lamprey, 29 Minn. 18; Kelly v. Baker, 10 Minn. 124; Tillotson v. Millard, 7 Minn. 513.

[6] Const. Kansas, art. 15, § 9; Gen. Stat. Kas. (1889), § 235.

[7] Bebb v. Crowe, 39 Kas. 342; Mouriquand v. Hart, 22 Kas. 596.

[8] Hiatt v. Bullene, 20 Kas. 557; Tarrant v. Swain, 15 Kas. 146; Moore v. Reaves, 15 Kas. 150; Farlan v. Sook, 26 Kas. 397; Ashton v. Ingle, 20 Kas. 670. But see, as favoring constructive occupancy: Swenson v. Kiehl, 21 Kas. 533; Gilworth v. Cody, 21 Kas. 702; Monroe v. May, 9 Kas. 466; Edwards v. Fry, 9 Kas. 424.

good, though his wife did not join in the deed. She lived out of the state all the time he had occupied, and therefore there had been no such occupancy by his family as to give the exemption right.[1]

Under similar statutory requirement, similar ruling has been had. It is held that, should the husband alone mortgage his land exceeding in quantity the statutory limit, it would hold good as to the excess.[2] And it will hold good for the whole, if the claimant of homestead do not show actual occupancy, with selection of the legal quantity exempt, at the time the mortgage was executed.[3]

Actual occupancy of the new homestead, when an old one has been exchanged for it, has been held necessary in order to give it the exempt character.[4]

A mere tarrying for a night at a new place, followed by a declaration of that place as the family homestead; but not by actual residence there, will not be sufficient to make a legal change of homestead.[5] Actual occupancy is the rule[6] as against constructive;[7] and where it is not applicable, the statute will be found to authorize exemption of a certain sum, in favor of the insolvent debtor, rather than to protect his homestead.

§ 5. Principal Use.

A declaration of homestead covered two adjoining lots, both together within the statutory limitation of value. The family dwelling was upon one, and a business house and chicken yard upon the other. Only the first lot was held duly dedicated and exempt.[8] The decision was based on a former one, in which it had been said: "It is the principal use to which the property is put, and not quantity, which furnishes the test

[1] Koons v. Rittenhouse, 28 Kas. 359.

[2] Goodloe v. Dean, 81 Ala. 479; De Graffenreid v. Clark, 75 Ala. 425; Butts v. Broughton, 72 Ala. 294.

[3] Goodloe v. Dean, 81 Ala. 479.

[4] Currier v. Sutherland, 54 N. H. 475, 487; Tucker v. Kenniston, 47 N. H. 267. *See* Fogg v. Fogg, 40 N. H. 282, and Locke v. Rowell, 47 N. H. 46.

[5] Fromans v. Mahlman (Cal.), 27 Pac. 1094; Cal. Civ. Code, § 1263.

[6] Lubbock v. McMann, 82 Cal. 228, and other cases cited in Fromans v. Mahlman.

[7] True v. Morrill, 28 Vt. 672; Davis v. Andrews, 30 Vt. 683; Spaulding v. Crane, 46 Vt. 292; Lee v. Miller, 11 Allen, 37.

[8] *In re* Allen, 78 Cal. 293.

in determining the question whether or not property is subject to dedication as a homestead. And if only a part of the land described in the homestead declaration be actually used and appropriated as the home of the family, the remainder not so used and appropriated forms no part of the homestead claim in the sense of the statute."[1]

The principal use is the test of homestead. If it is for family living, the law means to protect it from forced sale. If it is for making money by renting to tenants and the like, the property may be subjected to forced sale.[2]

The claimant of an urban homestead, who has kept it rented to tenants ever since building upon it, using himself only a roadway upon it, can claim exemption only with regard to the strip thus used. The court, so holding, said that to protect the rented part as homestead "would be a perversion of the spirit, letter and purpose of the constitution;" . . . "would be an extravagant, not a liberal construction."[3]

The owner of a hotel lived in it with his family; but as it was used "primarily and principally as a hotel for the accommodation of the public," while the residence therein of the owner and his family "was but incidental to the business of running the hotel," it was held that "it would be doing violence to the statute to regard property so used as a homestead, which is, and was intended to be, the place where the home is."[4]

But there is a late case in which it is held that a building occupied by a hotel-keeper and his family may be used for the sole purpose of conducting a hotel, yet be exempt as a homestead, under a statute making occupancy a condition. The court said that to hold otherwise "would be in plain defiance of the statute and would render it nugatory as to those en-

[1] Maloney v. Hefer, 75 Cal. 422, *citing* Ackley v. Chamberlain, 16 Cal. 182; S. C., 76 Am. Dec. 516; Gregg v. Bostick, *supra*.

[2] Blum v. Rogers (Tex.), 15 S. W. 115; Garrett v. Jones (Ala.), 10 So. 702.

[3] Blackburn v. Knight, 16 S. W. (Tex.) 1075; Medlenka v. Downing, 59 Tex. 39; Wynne v. Hudson, 66 Tex. 1. The rented premises (in the first case cited) had been a part of the claimant's homestead, but the building upon it for renting purposes, and the actual and continued renting, constituted abandonment. Archibald v. Jacobs, 69 Tex. 249.

[4] Laughlin v. Wright, 63 Cal. 133.

gaged in the business of hotel-keeping. The benefits of this statute are to be secured to all owners of land which they occupy with their families, and who have no other home. There is no intent apparent anywhere to exclude the families of hotel-keepers from the benefits of this act."[1]

The *syllabus* puts the point more strongly perhaps than the court: "The homestead exemption may be claimed in premises occupied by the owner *exclusively* for hotel purposes, if his family reside therein and have no other residence or home."[2]

Granting that the latest decision on the point makes law for its own state, the doctrine of principal use as family home prevails elsewhere.[3]

A homestead used for the sale of intoxicating liquors in contravention of statute, by the owner with his wife's knowledge and consent, was subjected to the satisfaction of a judgment recovered for such violation of law.[4]

And, in a later case, property thus prostituted by the owner, without the consent, and against the remonstrance, of his wife, was held liable. The court said: "The consent by the wife is not required when the husband is the owner. It may be that this consideration of the law will in some cases cause a loss of homestead rights, and lead to hardships; but, if so, it is beyond our control. We must interpret the law as we find it. The general assembly may have thought it better to make the homestead liable in such cases than to permit the homestead right to operate as a shield for the protection of the offender against the consequences of his wrongful acts."[5]

A part of a homestead may lose its exempt character by its devotion to business purposes when it can no longer be considered as an appurtenance of the part occupied as a family residence.[6]

[1] King v. Welborn, 83 Mich. 195; Howell's Mich. Stat., § 7721. *Contra:* Laughlin v. Wright, 63 Cal. 113. *See* Green v. Pierce, 60 Wis. 372; Philleo v. Smalley, 23 Tex. 498.

[2] Citing the statute and section, as above. *See* Geney v. Maynard, 44 Mich. 578; Dyson v. Sheley, 11 Mich. 528.

[3] Rhodes v. McCormick, 4 Ia. 374; *In re* Noah, 73 Cal. 590; Mann v. Rogers, 35 Cal. 319; Gregg v. Bostwick, 33 Cal. 228; Ackley v. Chamberlain, 16 Cal. 183; Laughlin v. Wright, 63 Cal. 113.

[4] Arnold v. Gotshall, 71 Ia. 572.

[5] McClure v. Braniff, 75 Ia. 38, 43.

[6] *Ib.;* Smith v. Quiggans, 65 Ia. 637.

§ 6. Subordinate Uses.

When homestead has been declared upon premises already subjected to family occupancy, and the whole are used as a home, the subordinate employment of a part, in connection with the whole, for purposes which would not in themselves be adequate to entitle that part to exemption, may not always be such as to divest it of the homestead character appertaining to the whole.[1]

Since a shop used by the householder, situated in his exempt premises, may be considered a part of his homestead, so a part of the dwelling, appropriated to business purposes, may be so considered.[2]

A dwelling-house, used for storing household furniture, while the building is undergoing repairs, and the family boarding temporarily in a neighboring house awaiting the completion of the repairs, has been deemed the habitation of the family.[3]

A vacant lot, situated on one side of a public square while its owner's family residence was on the other, occasionally used as a place for staking out a horse and cow, was not such use for "homestead purposes" as would shield it from creditors.[4] Such use is often difficult of ascertainment, giving rise to many questions in the application of the law to particular circumstances.[5]

The burden of proof is on him who claims a place as his principal home and therefore exempt, when he is living away from it temporarily.[6]

[1] Lazell v. Lazell, 8 Allen, 576; West River Bank v. Galè, 42 Vt. 27; Hubbell v. Canaday, 58 Ill. 427; Orr v. Shraft, 22 Mich. 260; Clark v. Shannon, 1 Nev. 568; Englebrecht v. Shade, 47 Cal. 628; Estate of Delaney, 37 Cal. 176; Ornbaum v. His Creditors, 61 Cal. 457; Klenk v. Knoble, 37 Ark. 288; Achilles v. Willis, 81 Tex. 169; Moore v. Whitis, 30 Tex. 440.

[2] Wright v. Ditzler, 54 Ia. 620; Smith v. Quiggans, 65 Ia. 637.

[3] Neal v. Coe, 35 Ia. 407.

[4] Effinger v. Cates, 61 Tex. 590.

[5] Miller v. Menke, 56 Tex. 562; Arto v. Maydole, 54 Tex. 247; Peregov v. Kottwitz, 54 Tex. 500; Andrews v. Hagadon, 54 Tex. 575; Barnes v. White, 53 Tex. 631; Evans v. Womack, 48 Tex. 232; Moreland v. Barnhart, 44 Tex. 279; Anderson v. McKay, 30 Tex. 186; Franklin v. Coffee, 18 Tex. 413; Methery v. Walker, 17 Tex. 593; Gay v. McGuffin, 9 Tex. 501; Wells v. Barnett, 7 Tex. 584; Hardy v. De Leon, 5 Tex. 211; Englebrecht v. Shade, 47 Cal. 627.

[6] The claimant of an urban and country homestead, who lives in

"The almost uniform current of decisions is that actual occupation of property, as a home of the family, is necessary to impress upon it the character of a homestead."[1] Yet where one hundred and sixty acres were allowed as a rural homestead, it was held that the portion not employed by the residence and inclosures might be devoted to any use without forfeiture of the exemption right;[2] which is, however, no exception, since the actually occupied home must be held in conjunction with the land. And even if it is a little apart from the land, it may give the exempt character to the latter, for it is held: Actual occupancy as owner, tenant at will, or lawful possessor under any title, entitles the head of a family living with him to homestead right of a stated value. The dwelling may stand apart from a farm cultivated by the exemptionist, and be held under a different title, yet both together may constitute the homestead as understood by the legislator.[3]

Actual occupancy being required, it is held the farming of land upon shares but not living upon it, though living in a house adjoining, is not a possession of such land as a homestead, and does not render it exempt.[4]

An owner of two lots, who resides with his family upon one, and rents the other with the building thereon to a tenant, cannot have homestead in the latter, under a statute which defines the homestead as "the dwelling-house in which the claimant resides and the land on which the same is situated."[5]

One who remained as tenant of his house after he had sold it, and cultivated a tract adjoining, at the same time, which he owned, and upon which he subsequently built, was held to hold the tract exempt from execution.[6]

Occupancy may be without the having of a home on the

town, must establish that the country part claimed is used for homestead purposes, in Texas. Keith v. Hyndman, 57 Tex. 425.

[1] Drucker v. Rosenstein, 19 Fla. 191, 195; Oliver v. Snowden, 18 Fla. 823, *834*.

[2] McDougall v. Meginniss, 21 Fla. 362; Baker v. The State, 17 Fla. 406.

[3] King v. Sturges, 56 Miss. 606; Porter v. Stewart, 50 Miss. 717; Campbell v. Adair, 45 Miss. 170; Mosely v. Anderson, 40 Miss. 54.

[4] Wade v. Wade, 9 Bax. 612.

[5] Civil Code of Cal., § 1237; Malone v. Hefer, 75 Cal. 422; *In re* Crowey, 71 Cal. 300; Tiernan v. His Creditors, 62 Cal. 286; Blackburn v. Knight, 81 Tex. 326.

[6] Bennett v. Baird, 81 Ky. 554. *Compare* Brown v. Martin, 4 Bush, 47.

property occupied, when one lives in a hired dwelling and employ his own contiguous or near-lying land as part of his home place — there being no house on the premises. So it was said: If the exemptionist "owning and occupying a house and an adjoining garden had sold the house and the land under it, but had continued to own and occupy the garden, and as a lessee had remained in the house, the garden might continue to be a part of the place of his home; and adjacency is not a requisite of the homestead right."[1]

A dwelling-house is essential in some states.[2]

Upon exchange of homesteads, the temporary continuance of occupation by one of the parties after having ceased to own his residence is not such a blending of ownership and occupancy as gives the right of exemption, though the other contracting party consented to the delay in removing.[3]

A homestead house on leased land may be moved to another site, and preserve its exempt character during transit. The creditor would not be injured by the transfer of the building from one rented lot to another. The homestead character is none the less protected because the house is personal property; for even when a debtor was in the act of removing such property from his state, it was held inviolable as to a creditor's power to levy upon it.[4]

A father deeded his farm to his children in consideration of their caring for him. He and they continued to live upon it, and he was held to have retained his homestead right.[5] It did not matter in which of the beneficiaries the title was lodged. All the members of the family, including the father, had homestead rights. The necessary ownership and exclusive right of possession, under some title, existed in the family. That was

[1] Rogers v. Savings Bank, 63 N. H. 428; Allen v. Chase, 58 N. H. 419; Cole v. Bank, 59 N. H. 53, 321.

[2] A homestead on land without a dwelling-house is not recognized in Vermont. R. L., § 1894; Rice v. Rudd, 57 Vt. 6; Bugbee v. Bemis, 50 Vt. 218; Mills v. Grant's Estate, 36 Vt. 269; McClary v. Bixby, 36 Vt. 269; Nor in New Hampshire. Woodman v. Lane, 7 N. H. 245. But, in Vermont, there may be a house on one lot, and the homestead may extend so as to include part of another not joined to it, to make up the value of $500. Hastie v. Kelly, 57 Vt. 293; Spaulding v. Crane, 46 Vt. 297.

[3] Windle v. Brandt, 55 Ia. 221.

[4] Bunker v. Paquette, 37 Mich. 79, *citing* Woodbury v. Murray, 18 Johns. (N. Y.) 400.

[5] First N. Bank v. Warner, 22 Kas. 537.

all the state cared for in its effort to conserve and foster homes.

Buildings on the homestead farm, or city reservation, constitute no part of the homestead and are liable for debts when they are used for other purposes than that of the owner's home or as appurtenances to that home. Dwelling-houses on such land, rented to tenants, may be the homesteads of those tenants, but they form no part of the owner's residence, and are not exempt as his property, but subject to general judgment liens.[1]

The main use of a dwelling being that of a home for a family, other subordinate uses will not destroy its homestead character. Such subordinate uses may be its employment in part for business purposes, even by one renting a portion of the house for the purpose, without the forfeiture of the exemption right.[2]

A tenement was held to be protected as a homestead, in a case described by the pleadings as "an open and notorious house of prostitution, used and kept as such by [the homestead beneficiary], and well known to be such by him and his family." It was also used as a place for selling liquors "without license and contrary to law." Without the payment of the required tax in advance is evidently meant.

The court, assuming that such was the character of the premises, held them exempt as a homestead, notwithstanding the criminal purposes to which they were prostituted.[3] The law contemplates the conservation of lawful homes only.

[1] Ashton v. Ingle, 20 Kas. 670; Kirkwood v. Koester, 11 Kas. 471; Greeley v. Scott, 2 Wood, 657; Casselman v. Packard, 16 Wis. 114; Kurz v. Bursch, 13 Ia. 371; Rhodes v. McCormick, 4 Ia. 368; Hoit v. Webb, 36 N. H. 158; Gregg v. Bostwick, 33 Cal. 220; Iken v. Olenick, 42 Tex. 195. *Contra*, Hancock v. Morgan, 17 Tex. 582; Nolan v. Reed, 38 Tex. 525; Hubbell v. Canaday, 58 Ill. 425; Kelly v. Baker, 10 Minn. 154; Clark v. Shannon, 1 Nev. 568.

[2] Bebb v. Crowe, 39 Kas. 342. The second story of the main building, and part of the first, and of the cellar, were occupied by the family. "This occupation would usually be sufficient to make it the residence of the family, and bring it within the provisions of the homestead law in this state," said the court, *citing* Rush v. Gordon, 38 Kas. 535; Hogan v. Manners, 23 Kas. 551; *In re* Tertelling, 2 Dill. 339; Phelps v. Rooney, 9 Wis. 70; Kelly v. Baker, 10 Minn. 154; Umland v. Holcombe, 26 Minn. 288; Gainus v. Cannon, 42 Ark. 503. *See* Heathman v. Holmes (Cal.), 29 P. 404.

[3] Prince v. Hake, 75 Wis. 638, distinguishing Walsch v. Call, 32 Wis. 159.

§ 7. Intention to Occupy.

"Occupancy is essential to the existence of the homestead right, and, for the purpose of its creation or inception, the occupancy must be actual; but when the premises have become invested with the homestead character, and a homestead has been once acquired, a constructive occupancy may be sufficient to retain it, and it will not be lost by a temporary absence with no intention of abandonment. The statute exempts only a homestead in fact, the place of the home. It does not undertake to exempt a contemplated future homestead, and therefore the mere intention to occupy the premises at some future time as a home, without actual occupancy, is insufficient to impress upon them the homestead character."[1]

Residence and intention to remain are necessary to the acquisition of domicile.[2] Mere intent is insufficient; but it is all-important when domicile has first been acquired, and the question of giving it up is to be decided.[3]

As was said by the Chief Justice of the United States: "A secret intention of the seller, not made known, cannot affect a purchaser. Unless the purchaser knew, or from the circumstances ought to have known, that the lots were a part of the homestead, he had the right to treat with and purchase from the husband without the concurrence of his wife." And he held, for the Supreme Court, that a mere intention to make a lot part of the homestead, and the building of a kitchen upon it after its sale, will not clothe the lot with the exemption character.[4]

The testimony of an interested witness in his own favor, that during his absence with his family he secretly intended to resume his home, is of little worth in the absence of circumstances to sustain it. What was locked within his breast during his absence, no other person can know.[5]

[1] Currier v. Woodward, 62 N. H. 63, in exposition of Gen. L., ch. 138, § 1.

[2] Leach v. Pillsbury, 15 N. H. 137; Foss v. Foss, 58 N. H. 283; Norris v. Moulton, 34 N. H. 392; Holmes v. Greene, 7 Gray, 299, 301; Horn v. Tufts, 39 N. H. 498; Austin v. Stanley, 46 N. H. 51; Snapp v. Snapp, 87 Ky. 554; Tant v. Talbot, 81 Ky. 23; Hansford v. Holdam, 14 Bush, 210 (qualifying Brown v. Martin, 4 Bush, 50); Wade v. Wade, 9 Bax. (Tenn.) 612; Murchison v. Plyler, 87 N. C. 79.

[3] Hart v. Lindsey, 17 N. H. 235, 243.

[4] Grosholz v. Newman, 21 Wall. 481. (The case from Texas.)

[5] Spaulding v. Crane, 46 Vt. 300.

Use and intent must co-exist in order to impress the homestead stamp upon real estate.[1] It has however been held that if the head of a family buys the site of an intended home and begins to build a family dwelling-house on it with the intention of occupancy by him and his family, he has the homestead immunity before actually moving upon the premises, and cannot convey the property without his wife's joinder in the deed.[2]

[1] Fort v. Powell, 59 Tex. 321; Andrews v. Hagadon, 54 Tex. 571; Jordan v. Imthurn, 51 Tex. 276.

[2] Dobkins v. Kuykendall, 81 Tex. 180; 16 S. W. 743. Gaines, J., after stating the case: "In 1888 the plaintiff brought this suit against both the husband and the wife. It was in the ordinary form of trespass to try title. The defendants answer that they bought the land intending to make it their homestead, and made preparations to improve it for that purpose; that they had never abandoned it, and had not, since the purchase, owned any other land. She also pleaded, in effect, that when defendant Simon Kuykendall bought of plaintiff he intended to buy, and plaintiff intended to sell, all the land lying between the Powers, the Meisenhelter, the Keith, and Lauderdale surveys, and prayed that, if the deed should not be construed to convey the whole of that tract, it should be reformed in accordance with the real contract of the parties. In the view we take of the case, it is sufficient to say that there was testimony tending strongly to show that the plaintiff intended to sell the land as claimed by the defendants. On the other hand, the plaintiff's testimony in rebuttal was sufficient to authorize the jury to have found that only eighty acres or a little more was intended to be conveyed. The court charged the jury, in effect, that if, when the plaintiff conveyed to Kuykendall, it was the intention of the grantor to sell, and of the grantee to buy, only the eighty-two or eighty-three acres of land lying west of the tract in controversy, they should find a verdict for the plaintiff; and also that, if their intention was to convey the whole of the tract, then the quitclaim deed from Kuykendall to plaintiff reconveyed the land in controversy to the latter, and they should also find a verdict for the plaintiff, unless at the date of that deed the premises were the homestead of the defendants. But the jury were also instructed that, if it was the intention of the parties to the first deed to convey the whole tract, and if the defendants had dedicated it as their homestead when Kuykendall made the deed to plaintiff, they should find a verdict for the defendants. The jury were also correctly instructed as to what acts were necessary to constitute a dedication of land as a homestead when there had been no actual occupancy as a residence. The jury having found for the defendants, and judgment having been rendered accordingly, the plaintiff, having appealed, now complains that 'the court erred in making a charge to the jury upon the homestead question.' It is insisted that there was no evidence to warrant a charge upon that issue. In reference to this assignment, it is sufficient to say that the undisputed testimony showed that the defend-

"The actual use of a lot for the convenience of the family has always been regarded as the most satisfactory evidence of an intention to make it part of the homestead. In reported cases involving controversies over the intent, this best evidence of it did not generally exist, and the determination of the issue has been forced to other means. But even the positive and formal declaration of both husband and wife of a contrary intent, as has been held, are not sufficient to divest property, actually used as a homestead, of the homestead protection, even when the declaration is made at the very time to which the issue is confined."[1]

Where the statutory authorization of exemption was of "a dwelling-house, out-buildings, and the land used in connection therewith, not exceeding five hundred dollars in value, and *used* or *kept* by the householder or head of a family as a homestead," it was construed to require "more than the naked intention of the head of the family to make the premises his

ants had made such preparations upon the land as evinced their intention to make it their home, and that, under the rule of decision in this court, by such act, coupled with their intention ultimately to reside upon it, the homestead became complete, and continued until that intention was finally abandoned. Franklin v. Coffee, 18 Tex. 413; Moreland v. Barnhart, 44 Tex. 275; Barnes v. White, 53 Tex. 628. The second assignment of error raises the same question in a different form. The third is that 'the court should have charged the jury that, if there was any ambiguity in the description in said deed, and that said description needed correction to conform to the true facts, the defendant Simon Kuykendall had the power to make this correction alone, without being joined by his wife, as he in fact did do by the quitclaim deed introduced in evidence.' The court having charged that if the parties to the deed from the plaintiff to Kuykendall intended to convey only the eighty acres lying west of the land in controversy, they should find for the plaintiff, no further instruction upon that phase of the case was either necessary or proper. The charge is admirable for its brevity and clearness, and is not subject to any just criticism. It is also insisted that the court erred in not granting a new trial, because of the errors in the charge, and because the evidence showed that there was no intention to convey the land in controversy by the deed from plaintiff to Kuykendall. The evidence upon that question was conflicting, and it was the province of the jury to weigh the testimony and to determine the issue. Even if the verdict should appear to us to be against the weight of the evidence, we could not disturb it."

[1] Ruhl v. Kauffman, 65 Tex. 734, *citing* Jacobs v. Hawkins, 63 Tex. 1; Radford v. Lyon, 65 Tex. 471; Medlenka v. Downing, 59 Tex. 32. *See* First National Bank of San Luis Obispo v. Bruce (Cal.), 29 P. 586; Cal. Civ. Code, § 1241 (4).

family home, at some indefinite future time, to establish a homestead right. One of two conditions is essential to the existence of a homestead right under the statute. There must be either an actual personal use, by the head of the family, of a dwelling-house and lands appurtenant as a family home, or an actual keeping by him of the same for a family home with the present right and purpose of so using it. . . . To give the construction contended for the word 'kept' would be adding an additional ground or condition to the statute for acquiring a homestead and establish a dangerous precedent in this class of cases, as the intention of the head of the family, being locked up in his own breast, would not be known to, or readily ascertainable by, persons dealing with him. Such a doctrine would be productive of fraudulent claims to homesteads upon testimony that would be difficult to meet and practically disprovable. . Where the premises have never been used or kept as a homestead by the head of the family he can acquire no right to a homestead therein by a mere intention to use them as such at some indefinite future time."[1]

Intent to occupy, not carried out till a lien has attached, will not avail to defeat the lien.[2]

He who has voluntarily put a lien upon his land cannot defeat its vindication on the plea that he had purchased the land for a homestead and that he and his wife had designed it for that use, if he lived with her and the rest of his family on other premises when he gave the lien, though the dwelling he then occupied and owned was on leased land.[3]

[1] Keyes v. Bump, 59 Vt. 395; True v. Estate of Morrill, 28 Vt. 672; Spaulding v. Crane, 46 Vt. 292; Bugbee v. Bemis, 50 Vt. 216; West River Bank v. Gale, 42 Vt. 27; Davis v. Andrews, 30 Vt. 678. In Vermont, the finding of a county court that premises are "used or kept" as a homestead is conclusive. Russ v. Henry, 58 Vt. 388; Rice v. Rudd, 57 Vt. 6; Boyden v. Ward, 38 Vt. 628; Holmes v. Holmes' Estate, 26 Vt. 536.

[2] Grosholz v. Newman, 21 Wall. 481; True v. Morrill, 28 Vt. 672; Solary v. Howlett, 18 Fla. 756; Oliver v. Snowden, 17 Fla. 823; Lee v. Miller, 11 Allen (Mass.), 37; Faut v. Talbot, 15 Ky. 712; Williams v. Darris, 31 Ark. 466; Charles v. Lamberson, 1 Ia. 435; Cole v. Gill, 14 Ia. 527; Christy v. Dyer, 14 Ia. 438; Elston v. Robinson, 23 Ia. 208; Holden v. Pinney, 6 Cal. 235. Mere intent without acting is nothing. Greenman v. Greenman, 107 Ill. 404.

[3] Johnson v. Martin, 81 Tex. 18; 16 S. W. 550. Henry, J.: "This suit was brought by the appellee to recover

§ 8. Intent Subsequently Realized.

The claimant "was not occupying any part of the tract when he inherited an interest in it. He swears, however, that it was his purpose to make his home upon the land; and if,

the amount of a promissory note, and to foreclose a deed of trust made by appellants to secure it. The appellants pleaded that the land conveyed by the deed of trust was their homestead. The cause was tried by the court without a jury, and the following findings of fact were filed by the judge: 'At the time of the execution of said note and deed of trust defendant did not occupy the land in controversy, but at said time he and his wife occupied a house in the town of Brownwood, which said house belonged to defendant, and was used by him as a place of business and as a residence; and, further, that said house was situated on land which was leased by defendant for a term of five years, of which two and one-half years had expired. At the time of the execution of said note defendant had inclosed the land in controversy, and had built thereon a fish-pond or water-tank, and had put fish therein. He had also cleared away the spot of land upon which to build a house, and had a placed thereon certain stones for a foundation thereof. He had also expressed an intention of making said land a home for himself and family. No other steps were taken by the defendant towards making said land his home until more than one year after the execution of said note. He then planted some trees on said land, and about five months thereafter he built a house, which he has since used as a home for himself and family.' The court concluded that at the time of the execution of the deed of trust the land was not entitled to exemption as a homestead, and gave judgment accordingly. The defendant proposed to testify that at the date of the execution of the deed of trust he owned no homestead except the land in controversy. The evidence was objected to, and excluded. The witness had been permitted to testify to the facts. The excluded testimony was merely his own conclusion, which it would have been error to admit. The defendant also proposed to testify that the land was purchased by him 'for the purpose alone of a home for himself and his family,' and that, prior to the execution of the deed of trust, he and his wife went upon the land, 'and mutually designated and set apart said tract of land as their homestead by examining the same, and by agreeing between themselves that the same should become their future homestead,' and that 'it was their intention at the time of the execution and delivery of said deed of trust to make a homestead out of the tract of land upon which it was given.' To whatever extent the excluded evidence was not liable to the objection that it was a statement of a conclusion of the witness, instead of the facts upon which such conclusion was predicated, it must be held to have been properly rejected, because it was immaterial. The facts found by the court, that the defendant owned a house situated in a town, and upon land which he held a lease for, in which he resided and conducted his business, precluded his acquisition of a homestead in the country by the performance of the acts, and with the intention claimed by him to have existed. We think that if all of the acts with regard to

after he acquired a right in it, he manifested this intent, his interest would be protected from forced sale." [1]

Intent, with slight acts, have been held sufficient to acquire homestead.[2]

The constitutional authorization that a homestead occupied as a residence by the family of the owner shall be exempted from forced sale by any process of law,[3] and the statutory provision in accordance,[4] have been so far extended by the courts as to exempt unoccupied property when there were preparation and intention to make it a residence.[5]

It has been decided in several states that the purchase of real estate to be occupied as a homestead, and actually so occupied as soon as practicable, renders the property exempt as such from the date of the purchase.[6]

The rule varies in different states. In one it is said: "To constitute a valid claim of homestead, there must be actual occupancy in fact, or a clearly-defined intention of present residence and actual occupancy, delayed only by the time necessary to effect removal or to complete needed repairs or a dwelling-house in process of construction." [7] So, in that state, it was held that an intestate, who bought property just before his death with the view of repairing it and making it his home, should be regarded as having established it as his homestead

the land in controversy, as well as the purpose or intention of the defendant with regard to making it his future place of residence, be admitted, it still must be held that the house that he was occupying in town was beyond controversy exempt as a homestead. He could not have two exemptions at the same time. It is not necessary for us to hold, and we do not now decide, that, if he had owned no homestead in town, the proof was not sufficient in other respects to attach the exemption claimed to the land in controversy. We find no error in the proceediugs, and the judgment is affirmed."

[1] Crabtree v. Whiteselle, 65 Tex. 111, 114.

[2] Luhn v. Stone, 65 Tex. 439; Brown v. McLennan, 60 Tex. 43; Jenkins v. Volz, 54 Tex. 639; Clements v. Lacy, 51 Tex. 150.

[3] Const. Kansas, art. 15, § 9.

[4] Gen. Stat. Kas. (1889), § 235.

[5] Swenson v. Kiehl, 21 Kas. 533; Gilworth v. Cody, 21 Kas. 702.

[6] Emporia Ass'n v. Watson (Kas.), 25 Pac. 586; Gilworth v. Cody, 21 Kas. 702; Harrison v. Andrews, 18 Kas. 535; Colby v. Crocker, 17 Kas. 527; Mitchell v. Milhoan, 11 Kas. 617; Edwards v. Fry, 9 Kas. 417; Monroe v. May, 9 Kas. 466; Riggs v. Sterling, 27 N. W. 705; Scofield v. Hopkins, 61 Wis. 374; Reske v. Reske, 51 Mich. 541; Crawford v. Richeson, 101 Ill. 351; Hanlon v. Pollard, 17 Neb. 368.

[7] Blum v. Carter, 63 Ala. 235.

free from his debts when his widow and children took it at his death, before the contemplated improvement and occupancy had been accomplished.[1]

In another state, it is judicially said: "The property must, when claimed as exempt, be stamped with the character of a home by some circumstance other than the *intention* to make it so. A bare lot unoccupied cannot be a homestead. Lumber placed upon it for the purpose of building is not occupancy, even though there may be a contract made for the building. . . . It would be difficult to draw the line where exemption begins to attach to unoccupied land, if this claim of immunity is allowed."[2] And it is held in another state, that a mere intention to erect and occupy a dwelling does not impress the homestead character upon the site.[3]

When the claimant of homestead had recorded his declaration of intention to make his premises his homestead, and had begun to build a house but had not actually occupied it as the statute required, it was held that these preliminary acts did not avail against his creditors.[4] Here was a strong case for the claimant, if intention ought ever to avail him. He had notified creditors by the record, and had openly begun to build. In some states, the legal requirements of occupancy would have been so construed as to shield him from his creditors. Here is an illustration to follow — but it must be remembered that the statutes were not precisely the same, under which the last cited and the next cited cases were tried.

When a man had purchased land, and begun to erect a dwelling and a business house on it, four or five months before judgment was rendered against him, he was allowed to defeat the lien of the judgment by moving upon the land, after the decree had been duly recorded, and by having his wife join him there some three months after he had gone thither. He claimed to have intended to make the property his homestead at the time the erection of the buildings was begun. The court said: "Where the purchase is made for the pur-

[1] Englehardt v. Yung's Heirs, 76 Ala. 534.

[2] Drucker v. Rosenstein, 19 Fla. 191, *198;* Solary v. Hewlett, 18 Fla. 756.

[3] Williams v. Dorris, 31 Ark. 466; Tumlinson v. Swinney, 22 Ark. 402; McKenzie v. Murphy, 24 Ark. 157; Johnson v. Turner, 29 Ark. 280.

[4] Lee v. Miller, 11 Allen (Mass.), 38.

pose of a homestead with a view to an early occupancy, and this is followed in reasonable time by such occupancy, this may secure the homestead as such from the time of its purchase. Some time must usually intervene in the preparation of the property for actual occupancy, and the homestead character is not made to depend on the personal presence of the members of the family."[1] Not on the personal presence, but on family occupancy; not on each member being ready to respond at call, but on the fact that the property is the family habitation. Is there not obscurity in the last clause of the above quotation? An insolvent debtor, having a homestead, cannot have another, after assignment for the benefit of his creditors, on the ground that he has begun to improve the property thus claimed and intends to make it his homestead.[2] Could he have a second by actual occupancy?

In a state where both the constitution and the corresponding statute require that the homestead shall be "owned and occupied" by the exemptionist,[3] the courts formerly understood that actual occupancy was meant; but now there is much latitude of construction. There it was formerly held that actual occupancy by a family is a requisite to the enjoyment of a homestead exempt from execution; that the mere ownership of the prescribed quantity of land with intent to build upon it and to make it the family residence is insufficient; that a contemplated residence is not yet a residence; that the law knows no exempt home *in futuro*, when no dwelling or place of abode of any kind has been even begun to be erected; that there must be a homestead *in fact* for the exemption to protect from creditors.[4]

Yet the intent to make a homestead on a vacant city lot

[1] Van Ratcliff v. Call, 72 Tex. 491 (quoting and approving Gardner v. Douglass, 64 Tex. 78); Ruhl v. Kauffman, 65 Tex. 734; Jacobs v. Hawkins, 63 Tex. 1; Brooks v. Chatham, 57 Tex. 33; Moreland v. Barnhart, 44 Tex. 280; Anderson v. McKay, 30 Tex. 190; White v. Wadlington, 78 Tex. 159.

[2] Archibald v. Jacobs, 69 Tex. 248, distinguished from Gardner v. Douglass, 64 Tex. 79; Swope v. Stanzenberger, 59 Tex. 390; Franklin v. Coffee, 18 Tex. 417; Barns v. White, 5 Tex. 628.

[3] Const. of Michigan, art. XVI, §§ 1–4; Howell's Stat., §§ 7721–9.

[4] Coolidge v. Wells, 20 Mich. 87; Wisner v. Farnham, 2 Mich. 472; Dyson v. Sheley, 11 Mich. 527.

was held to render it exempt. The owner, having purchased the site of his contemplated home, inclosed it, and applied its proceeds to the accumulation of a fund for building a dwelling-house on the lot, was held to have it exempt from forced sale from the date of purchase to any reasonable time within which the building might be erected. Whatever the particular improvements done on this particular site with the view of making it a family home, the law was broadly stated to be as follows: "A city lot purchased with the intention of making it a homestead for the purchaser and his family will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof, and such means as he can procure, within a reasonable time, to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit. What will be regarded as a reasonable time must necessarily depend upon the circumstances of each particular case."[1]

The inclosing of a lot is in itself no indication that a dwelling is to be erected upon it, in the state where this decision was rendered, for neither fields nor city residences are there required to be fenced: so that act may be left out of the list of reasons given. Occupancy in any other way than as a family home gives no homestead right, in face of the constitutional condition that there shall be occupancy by a family — for in that sense the court evidently understood the word as used in the constitution, while a different sense is attributable to it in the quotation above made. The occupancy of a city lot as a market place, or of a plantation as a sheep-ranch, is not such as to fulfill one of the conditions necessary to the enjoyment of homestead right.

Omitting this second reason as inapplicable, let us see whether the third — using the proceeds to erect a house — is any better sustained. Is there any homestead statute in

[1] Deville v. Widoe, 64 Mich. 593, *596*, in which it is said: "The following authorities will be found to support the views herein expressed: Reske v. Reske, 51 Mich. 541; Barber v. Rorabeck, 36 Mich. 399; Bouchard v. Bourassa, 57 Mich. 8; Griffin v. Nichols, 51 Mich. 575. See, also, Scofield v. Hopkins, 61 Wis. 370 (21 N. W. R. 259)."

any state of the Union which makes the disposition of the rents and profits of a vacant lot or houseless plantation, any ground for or condition to the enjoyment of homestead exemption? If not in the statute, a court cannot supply the omission without legislating.

Nothing is left but the intention of building and occupying a home. The court's mention of the inclosing, occupying otherwise than as a home, and using the proceeds, is merely the support of the owner's declaration by the recital of corroborative facts. Nothing but intent remains. Can one read the constitutional and statutory provisions for homestead, and conclude that all may be reduced to this?

The duration of the time in which intent will hold the homestead right depends upon circumstances, if the decision quoted above be sound. In the case decided, it held good some three years. There might be a case in which a worthy man (or an unworthy one, for the law makes no distinction between them relative to homestead right,) might find it necessary to intend for ten years before his savings would prove sufficient for the erection of even a humble home.[1]

The subsequent user or occupation of the premises as a family residence has no retroactive effect so as to render the property exempt from a lien antedating the erection of the building, and its occupancy by the family of the owner.[2]

The intent to occupy must not only antedate the subjection of the homestead site to the lien, but it must be established by circumstantial or other evidence to have had such prior existence; otherwise (the intent being questionable), the court where this doctrine prevails will hold the homestead right non-existing.[3]

The same court subsequently held: "Present intention of occupancy as a homestead, with present action to carry the

[1] The case above criticised scarcely goes farther than that of Reske v. Reske, 51 Mich. 541. A young man, unmarried, bought a lot, held it three years without occupying it as a dwelling place, yet was given the benefit of the homestead exemption, because he had married meanwhile, moved his residence to a house near by, established a wood-yard on the contemplated home site, inclosed the ground, built a barn, dug a well and *intended* to erect a dwelling-house and occupy it.

[2] Avery v. Stephens, 48 Mich. 246; Upman v. Second Ward Bank, 15 Wis. 449; Kelly v. Dill, 23 Minn. 435.

[3] Bowles v. Hoard, 71 Mich. 150.

intention into effect, constitutes a homestead in law." Intent alone is now held insufficient: it must be accompanied by "present action." One would think the action must be that of moving upon the homestead and occupying it as a family residence; but the court will be satisfied with the planting of trees and nothing more for the first seventeen months, followed then by the making of a contract for the building of a dwelling.

Such "present intention," and such very slight "present action" at the time of the purchase, gave the lot the exemption character *eo instanti*, in the estimation of the court, so that the mechanics, whose lien would have been good on ordinary property, was powerless of hold on this. The woman who held the homestead had her house and kept her money, under the benevolent provision of the law and its very liberal construction.[1]

§ 9. Retroaction.

The law of relation, with reference to the exemption right, is not created or even recognized in any homestead statute. Until the conditions of ownership, family headship and occupancy (and dedication too in states where that is required), have been complied with, and the homestead privileges thus fully acquired, no exemption right exists in embryo, susceptible of being made available by some subsequent act that shall relate back to the time when the claimant first intended to acquire the right, so as to defeat intervening obligations.

There are decisions, as has been shown, which teach that occupancy relates back to the filing of the declaration, even to the purchase of the property. It has even been held that an unmarried man, having no family whatever, having no dwelling-house and not being a householder in any sense, may buy a vacant lot with the view to making it a home — then

[1] Mills v. Hobbs, 76 Mich. 122, *126*. The mechanics had no notice that the building was claimed as a homestead while doing their work. The court said: "There is nothing in the record to show that McCartney *did not know* that it was a homestead when he contracted to build the house; and there is nothing in the statute requiring the owner to give notice to the contractor, subcontractor or material-men, that such owner claims the premises as a homestead. It is the fact of its being a homestead, or not, that determines the right of lien."

get married, build a house, occupy it, and successively claim exemption from the date of purchase: his occupancy relating back to his marriage, and both to the compliance with the single condition of ownership. Preparation to occupy, and even mere intention to do so, have been held to bar creditors, when such preparation or intent was followed by actual occupancy. In other words, the debtor has been relieved from his obligations contracted between the time of first occupying and that of first forming the design of doing so, in his own mind.

The criticism of the cases cited in this and the foregoing section turns on the want of notice to the public. The court rendering them may have considered that the constitutional designation of a day when the exemption provision should become operative was sufficient notice to the public, so that all who should thereafter give credit would know that payment might be defeated by subsequent homestead acquisition. The decisions, however, seem to disregard the compensatory character of homestead; the balancing of its benefits and its burdens.

It has been held that when a debtor buys property and makes preparation for building a dwelling-house upon it, judgment creditors when docketing their judgments are presumed to know what he has done or is doing on the land, "indicating his intention of making it his homestead; and any further notice to them was deemed superfluous."[1]

So, where the constitutional exemption is of "a homestead . . . occupied as a residence by the family of the owner," it was judicially held that: "A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure *ab initio* a homestead inviolability."[2]

Property purchased for a home, and occupied within a subsequent period which the court characterized as "reasonable," was protected from forced sale by the application of the law of relation — from occupancy to purchase — so that the prop-

[1] Scofield v. Hopkins, 61 Wis. 371–2; Kent v. Lasley, 48 Wis. 257: Manseau v. Mueller, 45 Wis. 436; Bennett v. Child, 19 Wis. 366.

[2] Edwards v. Fry, 9 Kas. 417, 425; Monroe v. May, 9 Kas. 466, 475; Gilworth v. Cody, 21 Kas. 702; Const. Kas., art. 15, § 9; Gen. Stat. (1889), § 235.

erty was treated as inviolable from the date of its acquisition.[1]

When the statute makes no provision relative to intention, the courts take note of circumstances rather than of interested professions. The claimant's testimony that he intended to occupy is strongly repelled by proof of the facts that he had contracted to sell the property claimed and had received payments on his contract.[2] But when preparations for living in the house, even from the date of purchase, are proven to the court, they strongly support the claimant's own testimony that he intended to occupy from that time.[3]

The doctrine of the state, where the last-cited decisions were rendered, seems to be that evidence of intention must be taken with caution; but that intention, when established, is a circumstance to be received as favorable to constructive occupancy.

In another state, though the statute confined the exemption right to the dwelling "in which the claimant resides, and its appurtenances and the land on which the same is situated," and fixed a limit in quantity and value, yet it was construed to include property purchased with *intent to reside* on it, though the purchaser did not reside there. And the property was declared exempt from the day of purchase, through the intervening time from the date of the contract to that of actual occupancy.[4]

It has been held that occupancy relates back to the filing of the deed declaratory of homestead selection, so that it will be in time to save the homestead from execution if one should move upon the land before a judgment becomes a lien. It is held that the occupancy then begun is retroactive to the time of filing, so that the land is deemed a homestead from that date.[5] If the deed was filed before the debt was contracted, the creditor is debarred his remedy by the subsequent action of the debtor in taking up his home on the land.[6]

[1] Monroe v. May, 9 Kas. 466.

[2] Gapen v. Stephenson, 18 Kas. 140.

[3] Monroe v. May, 9 Kas. 466.

[4] Hanlon v. Pollard, 17 Neb. 368 (Neb. Comp. Stat. (1889), ch. 36, § 1), *citing* Edwards v. Fry, 9 Kas. 417; Monroe v. May, 9 Kas. 466; Gilworth v. Cody, 21 Kas. 702; Crawford v. Richeson, 101 Ill. 357.

[5] Finnegan v. Prindeville, 83 Mo. 517.

[6] Griswold v. Johnson, 22 Mo. App. 466. *See* Berry v. Ewing, 91 Mo. 395.

On the other hand, in a state where declaration is authorized but not made indispensable, it was held that occupancy after the creation of a debt did *not* reach back by the law of relation so as to save the homestead from execution for that debt.[1]

Intention did not create retroaction; nor preparation to occupy; nor subsequent family occupancy.[2]

§ 10. Retroaction: Building Material.

Where the homestead law is: "A homestead, to be selected by the owner thereof, consisting, when not included in any city, or village, of any quantity of land not exceeding forty acres, used for agricultural purposes, and when included in any city or village, of any quantity of land not exceeding one-fourth of an acre and the dwelling-house thereon and its appurtenances, *owned and occupied* by any resident of this state, shall be exempt from seizure or sale on execution, from the lien of every judgment, and from liability in any form for the debts of such owner, except laborers', mechanics' and purchase-money liens, and mortgages lawfully executed, and taxes lawfully assessed, and except as otherwise specially provided in these statutes; and such exemption shall not be impaired by temporary removal with the intention to re-occupy the same as a homestead, . . ."[3] the word "occupied" is construed to be not confined to actual occupancy, but to include *intended occupancy*. It is said: "The occupancy required by the statute does not mean actual, physical occupation by the owner personally, for the same section requiring it declares that such exemption shall not be impaired by temporary removal with the intention to re-occupy the same as a homestead." And then an argument is drawn from the extension of the exemp-

[1] Elston v. Robinson, 23 Ia. 208; Yost v. Devault, 3 Ia. 345.

[2] In Elston v. Robinson, 23 Ia. 210, the court used the following language: "The fact that the owner commenced a building upon a lot before the right of the creditor attached, but which, by no other act of the owner, had been impressed with the homestead character, would not make the same exempt. Under our statute there is an unbroken series of decisions that occupancy, the use of the house by the family as a homestead, are essential requirements to impress the property with the character of a homestead. A mere intention to occupy it, though subsequently carried out, is not sufficient."

[3] Annotated Stat. Wis., § 2983.

tion to the proceeds of sale held for investment in a new home. Then it is added: "The *bona fide* intention of acquiring the premises for a homestead, without defrauding any one, evidenced by overt acts in fitting them to become such, followed by actual occupancy in a reasonable time [in this case the exemptionists had not actually occupied at all], must be held to give to the premises answering the description prescribed in the statute the character of a homestead, and the homestead exemption thus secured covers not only the land, but such materials so used thereon, and relates back to the time of purchase with such intent to make the premises a homestead."[1]

To quote further from the court: "It would seem that materials actually upon the ground, and designed to be used in the construction of a dwelling-house, well, or other essentials of a homestead, with the intention of the owner to occupy the same, with his family, as such, would also be exempt." And this seeming was inferred from prior decisions (which were approved), holding that "lath, shingles and lumber, obtained by the debtor for the purpose of repairing the dwelling-house occupied by him as a homestead, and actually deposited upon land included in the homestead, were exempt.[2]

That is to say, without any statutory warrant expressed, as soon as building material, for a family dwelling to be, is lodged upon ground set apart as a homestead, or intended to be set apart, it is impliedly exempt, being devoted to a use which renders it a thing set apart under statute, which no creditor may touch.

It seems very plain that the statute means that the property shall be "occupied" at the time exemption attaches — not at a future time; that *occupancy* means habitation by the family — not mere preparation to inhabit. There is no qualification of the word "occupied," by the legislator, in that part of the statute which lays down how homestead is to be acquired; but there is the express further provision that the exemption, when once acquired, "shall not be impaired by temporary removal with the intention to *re-occupy:*" from which we may logically infer that he meant that temporary

[1] Scofield v. Hopkins, 61 Wis. 370.

[2] Krueger v. Pierce, 37 Wis. 269; Zimmer v. Pauley, 51 Wis. 285.

removal is a cessation of occupancy which would forfeit the exemption but for this further provision. One cannot re-occupy without having first occupied and ceased to occupy. Intention is limited by the statute to re-occupancy. It should have been coupled with occupancy as one of the conditions of acquiring a homestead, if the legislator had meant to make intention and preparation to occupy equivalent to occupancy. If the expression of such means of acquiring was not necessary, why was it necessary in that part of the statute which provides for the means of retaining the exemption right? Why should "intention to re-occupy" be expressed, and "intention to occupy" be omitted?

The argument drawn from the statutory provision, respecting temporary removal with intent to re-occupy, does not sustain the proposition that "the occupancy, required by the statute [in acquiring exemption in the first instance], does not mean actual, physical occupation by the owner personally."

And the argument from the further provision of the statute exempting the proceeds of a homestead sale while held "with the *intention* to procure another homestead therewith, for a period not exceeding two years," seems equally fallacious. Why should the legislator expressly make the beneficiary's *intention* a condition here, and significantly avoid it in the part of the statute declaring how exemption shall be acquired? If the expression was necessary where used, it was necessary where it is omitted, if intention and preparation to make a homestead were meant to be equivalent to actual occupancy.

The reasons on which the decision is based do not seem to be such as should commend themselves to the bench and bar of other states having statutes which require occupancy as a condition to the acquisition of exemption of homesteads, though it is law in the state where it was rendered, where it had been foreshadowed, and in many respects anticipated by prior deliverances.[1]

§ 11. Inherited Homesteads.

The rule requiring occupancy as a condition to the enjoyment of the exemption right finds no exception in the case of

[1] Scofield v. Hopkins, 61 Wis. 370.

inherited property which has never been the home of the claimant.[1] Distinction, however, has been made between inheritance and purchase, favoring the former, with respect to the homestead right.[2] One who lived on a part of his father's land, and who inherited it on his father's death, was adjudged entitled to hold it exempt from his own debts previously contracted, on the ground that his creditors had not trusted him in consideration of his ownership of the land.[3]

In exposition of a statute which provided that homestead exemption "shall not apply to sales under execution, attachment or judgment, at the suit of creditors, if the debt or liability existed prior to the *purchase* of the land or the erection of improvements thereon,"[4] the courts construed the word "purchase" not to mean acquisition, but to be confined to its sense as distinguished from taking by descent. The conclusion was that though the debtor may have contracted debts before inheriting property which he uses as a homestead, his creditors are debarred; but that, if he had purchased the property after contracting the debts, and then used it as a homestead, they could have subjected the property to the payment.[5]

What did the legislator design? That property *acquired* after the creation of indebtedness, in any way, should be liable to forced sale after judgment, seems the manifest meaning. The limitation of the word "purchase" to its ordinary meaning, and the disregard of occupancy, under some sort of title, as a condition to the enjoyment of the homestead right, would open the door to all debt-contracting young men for entering into their subsequent inheritances, with their families, without having their patrimony liable for their antecedent debts. Such a result was hardly contemplated by the legislator, and seems against the spirit of the statute.

§ 12. Legal Possession as Occupancy.

"A homestead, in the possession of each head of a family, and the improvements thereon, to the value in all of one thousand dollars, shall be exempt from sale, under legal process, during the life of such head of a family, to inure to the

[1] Creager v. Creager, 87 Ky. 449.
[2] Jewell v. Clark's Ex'rs, 78 Ky. 398.
[3] *Ib.*
[4] Gen'l Stat. Ky., ch. 38, art. 13, § 16.
[5] Jewell v. Clark's Ex'rs, 78 Ky. 398.

benefit of the widow, and shall be exempt during the minority of their children occupying the same — nor shall said property be alienated without the joint consent of husband and wife, when that relation exists. This exemption shall not operate against public taxes, nor debts contracted for the purchase-money of such homestead, or improvements thereon."[1]

An illustration of "enlarged liberality" of construction follows in allowing homestead exemption, under the constitution and laws as above given, to one who did not live upon the property held exempt and never had lived upon it, as his home. He owned a lot, and was in legal possession, and the court held that sufficient compliance with the constitutional requirement; that is, that *land* "in the possession of each head of a family" is equivalent to "a *homestead* in the possession of each head of a family." Mention is made that the owner tilled the lot as a garden; that he was poor — had no other land — and it was said, in comparison of two statutes: "It certainly could not have been intended, under the latter law, to ostracise the poor man from its benefits simply because the land upon which he earns his bread had no house upon it. If . . . he is compelled by his poverty to occupy rented premises, then, under this law, the *usufruct* of the soil by which his family is maintained must be held to fix the homestead intended to be protected. . . . We hold that the possession and use of the land, whether it be improved and resided upon or not, or whether, in the language of the ancient law, it be a 'messuage or a croft,' is none the less a homestead in the sense of the statute, and is protected under the law."[2]

Legal possession of property used for family support has been held sufficient.[3]

[1] Tenn. Const. 1870, art. 11, § 11; Acts 1870–1, ch. 80, p. 98, embodying substantially that section of the constitution.

[2] Dickinson v. Mayer, 11 Heisk. 521. The language of the "latter statute," thus construed, is: "A homestead in the possession of each head of a family." Act Jan. 31, 1871, Acts of 1870–1, p. 98. Same language in Code, § 2114*a*, construed directly opposite in Wade v. Wade, 9 Bax. 612. This last case is approved in Collins v. Boyett, 87 Tenn. 334; but, in the matter of *enlarged* liberal construction, D. v. M. is approved in 87 Tenn. 281.

[3] It was held not necessary in Texas for the family of a decedent homestead holder to actually oc-

Mere occupation, without title or color of title, legal or equitable, from "the sovereignty of the state," is not sufficient to support homestead donation, under a provision as follows: "No person shall settle upon or occupy, nor shall any survey be made or patented . . . upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or the general land office, or where the appropriation is evidenced by the occupation of the owner or of some person holding for him." [1]

cupy the land. If used for their support, and no other homestead is acquired, it remains exempt. Foreman v. Meroney, 62 Tex. 723, distinguished from Pressley v. Robinson, 57 Tex. 453. Const. of Texas, art. 16, § 52.

[1] Texas Rev. Stat., §§ 3936, 3951; Paston v. Blanks, 77 Tex. 330. Possessory right is always essential. Caldewood v. Tevis, 37 Cal. 367.

CHAPTER VII.

LIMITATIONS OF THE VALUE AND QUANTITY OF REALTY.

§ 1. Value and Quantity.
2. Monetary Limit Only.
3. Increase of Value After Acquisition.
4. Quantitative Limit Only.
§ 5. Indivisible and Excessive Property.
6. Extension of Corporate Bounds.
7. What Law Governs Limits.
8. Exemption of Real and Personal Property.

§ 1. Value and Quantity.

In granting home protection, the state does not treat every town residence or country farm, owned and occupied by the head of a family, as a homestead in the legal acceptation of the word. It designates the quantity and the value within which the person entitled to the protection may have a homestead in the legal sense of the term. It does not invariably limit him in both quantity and value, but such double restriction is required by several of the statutes.

Some of the states have monetary restrictions but not quantitative, while others have the latter without the former; some require both limitations when homesteads are first dedicated but do not subsequently confine them to the pecuniary restriction when they have increased in value. The equality of the urban and rural homestead in monetary estimate is not invariably required, even in the declaration and dedication of the exempt realty. The quantitative limit is not inflexible in every case, but some statutes make it elastic so as to measure with the appraisement; thus most of those which prescribe the two-fold gauge are construed to imply the shrinkage of quantity as the price enhances.

First will be considered the double limitations by which the town and country homesteads are required to be equal in value, though not in extent; by which any person entitled to choose may take either yet have the full exemption.

There is great latitude in the allowances, comparing the limit of one state to that of another, which will appear from

a few illustrations. Eighty acres in the country or a lot in town, neither exceeding two thousand dollars in value including improvements;[1] forty acres in the country or a town lot (or parts of lots equal to one), neither exceeding fifteen hundred dollars in value including improvements;[2] one hundred and sixty acres in the country or a town residence not limited in quantity, neither exceeding two thousand dollars in value including improvements;[3] one hundred and sixty acres in the country or two contiguous lots in town, neither exceeding two thousand dollars in value including improvements:[4] these few examples are the best that can be found of double limitations with equality of exemption preserved between rural and urban homesteads. Illustrations of both restrictions will follow, in their place, showing material variances from those given above.

Where the double limitation is prescribed, it is impracticable to continuously restrain the homestead to both. The effect is to decrease the quantity as the value is increased. When the homestead is selected, declared or set out, it may be precisely of the allowable quantity and estimate; but land is not stationary in price, and its rise in the market or the improvements put upon it after dedication, may render it of so much greater worth than it had at first that the quantity must be reduced to keep it within the law of exemption. There are states which do not hold subsequent advances in value as affecting the original allowance of acreage, but the topic now is the rise of value in those states which do so hold. In them, the excess of value is liable to be reached by creditors though the quantitative limit be not in excess. In other words, only so much of the original quantity as is within the monetary limitation remains exempt.

Increase in value operates as a reduction of the area, rendering appraisement and partition necessary in case of a judgment creating a lien on the excess, or one vindicating a pre-

[1] Const. Ala., art. 10, sec. 2. A declarant claimed eighty-eight acres worth no more than $2,000: *held*, that he should have declared which eighty of the eighty-eight constituted his homestead. Clark v. Spencer, 75 Ala. 49.

[2] Const. Mich., art. 16, §§ 1–4; Howell's Stat., §§ 7721–9.

[3] Acts of Miss., 1882, p. 140, amending the Rev. Code of 1880, §§ 1248–9. *See* Miss. Code of 1892, exempting $3,000, if the homestead is recorded.

[4] Comp. Stat. Neb. (1889), ch. 36, §§ 1–16.

existing lien. When the reduction has reached the point where divisibility of the property is impracticable, the householder ceases to have a homestead, in kind, while he retains his exemption right to the amount of the monetary limit and may claim from the proceeds of a forced sale.[1]

A homestead, like any other real estate, is likely to fluctuate in price.[2] The law of supply and demand affects it. If it is partially taken out of commerce by the restraint upon alienation which prevails in several states, it is still affected by the rise or fall of neighboring real estate not thus restrained. Besides, every improvement put upon the land or buildings enhances the value. These and other causes frequently render a lot or farm of the prescribed dimensions worth far more than the prescribed price, when it is appraised a few years after dedication, at the instance of judgment creditors aiming to reach the excess.

§ 2. Monetary Limit Only.

Many states fix no dimensions to a homestead either urban or rural, but do not exempt it beyond a stated sum. Whatever the quantity of realty held by the beneficiary, he cannot claim the protection of the state against his creditors so far as concerns any surplus of value beyond the fixed limit.

The favorite *ultimatum* of exemption seems to be one thousand dollars. Several states have prescribed that sum as the monetary limit within which the home will be protected from forced sale.[3] Some prescribe less, some more, varying from five hundred[4] to five thousand dollars.[5] Those providing

[1] Vermont Bank v. Elliott, 53 Mich. 256; Farley v. Whitehead, 63 Ala. 295; Giddens v. Williamson, 65 Ala. 439.

[2] Beckner v. Rule, 91 Mo. 62.

[3] The following, to illustrate the $1,000 limit: Illinois Annot. Stat., p. 1097 *et seq.;* Giouque's Ohio Rev. Stat., § 5438; Kentucky Gen. Stat. (1888), pp. 574–8; North Carolina Const., art. X, secs. 2, 3, 4, 8; South Carolina Const., art. I, sec. 20, art. II, sec. 32; Tennessee Const., art. XI, § 11; New York An. Code Civ. Proc. (Throop), §§ 1397–9; West Virginia Const., art. VI, § 48.

[4] The following instances of $500 limit: New Hampshire Gen. Laws, ch. 138, pp. 330–2; Vermont Gen. Stat., ch. 68.

[5] The following are examples of $5,000 limit: California Code & Stat. (Deering's), §§ 1237 *et seq.;* Idaho Stats. (1887), § 3058; Nevada Gen. Stat., § 539. (The $5,000 limit, in Texas, is not the sole restriction as in the above three states.)

money exemptions from the proceeds of realty and personalty are not considered in this section. Only homesteads are now in hand, and only those which are without territorial restriction.[1]

In the absence of any quantitative restriction, the homestead is measured by value only.[2] Eleven hundred acres of land, not worth more than the *ultimatum*, five thousand dollars, were held exempt as a homestead.[3] The tract was mainly used as a pasture, though lived upon by the family of the owner; and it was considered as "occupied" in the sense required by statute which is strict in its provisions relative to homestead use.[4]

The exempt realty, if not exceeding the prescribed monetary value where that is the only limit, may consist of more than one town lot, if they are contiguous and constitute together but one family home duly occupied as such.[5] And by parity of reasoning, two contiguous tracts of land might constitute one home farm worth no more than five thousand dollars.

An estimate of the actual cash value must appear in the declaration of homestead.[6] It is the only limitation, and

[1] In addition to the examples above given, there are others which belong to the class now being treated, restricted in other amounts; as, Louisiana, at $2,000. Const. La., §§ 219, 220. By the constitution of Georgia of 1868, the limit was $2,000; by that of 1877, $1,000. See Civ. Code, §§ 2055, 5135. Under the former, real and personal exemption amounted to $3,000; under the latter, to $1,600. In Virginia, there is exemption of real or personal property, or of both, selected by the debtor, to the amount of $2,000, in addition to the articles exempt from levy or distress for rent. Const. Va., art. XI, §§ 1, 3, 5. A town lot or a farm, worth not more than $800, is exempt in Massachusetts. Mercier v. Chace, 11 Allen, 194. The land must be owned by the householder — not held in common with others. Holmes v. Winchester, 138 Mass. 542, in ex. of Stat. of 1855, ch. 238.

[2] Estate of Delaney, 37 Cal. 176; Mann v. Rogers, 35 Cal. 319; Gregg v. Bostwick, 33 Cal. 220; McDonald v. Badger, 23 Cal. 393.

[3] First N. Bank v. Guerra, 61 Cal. 109; Ornbaum v. His Creditors, 61 Cal. 455.

[4] Prescott v. Prescott, 45 Cal. 58. And actual occupancy has always been one of the tests. Cook v. McChristian, 4 Cal. 24; Reynolds v. Pixley, 6 Cal. 165; Riley v. Pehl, 23 Cal. 74; Ackley v. Chamberlain, 16 Cal. 181; Elmore v. Elmore, 10 Cal. 226; Rix v. McHenry, 7 Cal. 91; Benedict v. Bunnell, 7 Cal. 246; Cary v. Tice, 6 Cal. 626.

[5] Englebrecht v. Shade, 47 Cal. 627; McDonald v. Badger, 23 Cal. 394.

[6] Civ. Code Cal., § 1263; Jones v. Waddy, 66 Cal. 457; Read v. Rahm, 65 Cal. 343.

therefore an indefinite allegation that the property selected is worth "five thousand dollars and over," was held not admissible.[1] But when the premises were estimated at eight thousand, the declaration was received, and the court said that it was not invalid because the value of the property was in excess of the limit fixed for a homestead.[2]

The whole premises could not be the declarant's homestead, in the legal meaning of the code, and the declaration upon the whole, without partition cutting off three thousand dollars' worth as non-exempt, would seem to have been an improper course. In case of judgment and execution, partition would be necessary, since the surplus is liable to creditors.[3]

A substantial declaration of the value, without giving details, is sufficient.[4] If such declaration is erroneous; that is, if it is an under-estimate, creditors may have it corrected by appraisement; or they may have the whole property sold when it is not susceptible of partition, and execute their judgment upon the excess.[5]

The monetary restriction usually has reference only to the homestead, but there are decisions favoring the exemption of other property with it to make up the maximum of exemption.[6]

Where the only criterion is value, a homestead not exceeding the *maximum* has been held good without any formal declaration or designation.[7] But it must be regularly desig-

[1] Ames v. Eldred, 55 Cal. 136.

[2] Ham v. Santa Rosa Bank, 62 Cal. 125; S. C., 45 Am. Rep. 654.

[3] Tiernan v. His Creditors, 62 Cal. 286.

[4] Read v. Rahm, 65 Cal. 343.

[5] Mann v. Rogers, 35 Cal. 319; Gregg v. Bostwick, 33 Cal. 222; Cohen v. Davis, 20 Cal. 187; Holden v. Pinney, 6 Cal. 236; Taylor v. Hargous, 4 Cal. 272; Cook v. McChristian, 4 Cal. 24.

[6] In Nevada, where is exempted by statute, "The homestead, consisting of a quantity of land [not limited], together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of $5,000," . . . it was held that business stores, separated from each other, may be included in the homestead, and that the law does not limit the uses to which the property may be put in addition to its use as a home; that in addition to the dwelling, there may be other structures for other purposes. Smith v. Stewart, 13 Nev. 65; 1 Comp. Laws, Nev. 568; Clark v. Shannon, 1 Nev. 568; Goldman v. Clark, 1 Nev. 516; Ackley v. Chamberlain, 16 Cal. 181; Kelly v. Baker, 10 Minn. 124; Stats. of Minn. 498.

[7] Pinkerton v. Tumlin, 22 Ga. 165; Dearing v. Thomas, 25 Ga. 224.

nated if the premises occupied as a home do exceed the fixed value exempt; that is, the portion containing the home must be separated from so much as enhances the estimate above the prescribed limit.[1] If this cannot be done, the creditor may cause the whole to be sold, but the exempt amount must be reserved from the proceeds and given to the debtor.[2] If a selection by the owner exceed the legal limit, the court may order the sale of the property and the investment of the proceeds in a new home of the required estimation, in one state. Or, if the property, claimed as his homestead by the debtor-owner, consists of scattered parcels, the court may order that they be sold and invested in property suited for a home.[3] The excess, above the monetary limit, is liable.[4]

Where the law exempts one lot regardless of value, and requires it to be occupied as a family residence (though not inhibiting other uses in connection with the home purpose),[5] what are we to understand by the word "lot?" Is it necessarily a town or a city lot according to the municipal plan or plat? Or is it such subdivision as the platting of the land containing the homestead sets forth as a "lot?" It has been held that in a town of over five thousand inhabitants, the size of the lot is governed by the map of the survey of the land from which the homestead is claimed.[6]

[1] Davenport v. Alston, 14 Ga. 271.

[2] Dearing v. Thomas, *supra.*

[3] Harris v. Colquit, 44 Ga. 663; Blivens v. Johnson, 40 Ga. 297; Georgia Code, § 5135.

[4] Young v. Morgan, 89 Ill. 199; Moriarty v. Galt, 112 Ill. 373; Raber v. Gund, 110 Ill. 581; Eldridge v. Pierce, 90 Ill. 481; Browning v. Harris, 99 Ill. 462. In Parrott v. Kumpf, 102 Ill. 423, held that if the homestead is not properly released in the mortgage, the purchaser takes the excess over $1,000 unless the homestead has not been set off, so that he gets no right of possession by his purchase. Only excess of value liable on collector's bond. Crawford v. Richeson, 101 Ill. 351. In New York, a lot and buildings, *occupied* as a residence, designated as a homestead, are exempt, to the extent of $1,000, from sale on execution. N. Y. Code, § 1397. The exemption ceases on non-occupation. § 1400. The lien of a judgment attaches to the surplus above $1,000. § 1402. A mortgage on exempt property is ineffectual until the exemption has been canceled. § 1404. How it may be canceled. § 1403. Not ineffectual as to surplus. Peck v. Ormsby, 55 Hun, 265. In Georgia, if the debtor's right of exemption in land is less than the value of the land, the difference is liable for his debt. Vining v. Officers, 82 Ga. 222.

[5] Jacoby v. Distilling Co., 41 Minn. 227, 230; Umland v. Holcombe, 26 Minn. 286; Kelly v. Baker, 10 Minn. 124.

[6] Lundberg v. Sharvy, 46 Minn. 350;

The statutory limitation of a homestead to a "lot," however, is not always governed by the map of the survey. The meaning of the word is to be sought from the legislative intent, from the context, etc., as in the interpretation of other words.[1]

49 N. W. 60. Gilfillan, C. J.: "According to the complaint the plaintiff is the owner of two adjoining lots in Portland division of Duluth, according to the recorded plat thereof, on which stands, partly on each lot, the dwelling-house occupied as their residence by himself and family. As we understand the complaint, the lots in that division, including those of the plaintiff, are twenty-five feet wide by one hundred and forty feet deep, while in the remainder of the platted portion of the city of Duluth the ordinary size of lots is fifty feet by one hundred and forty feet. The defendant, the bank, having a judgment against him, has caused execution to issue and to be levied upon the two lots. The action is to set aside the levy, the plaintiff claiming that both lots are exempt because of his homestead. The statute (Gen. St. 1878, ch. 68, § 1) exempts 'a quantity of land not exceeding in amount one lot, if within the laid-out or platted portion of any incorporated town, city, or village having over five thousand inhabitants.' In Wilson v. Proctor, 28 Minn. 13; 8 N. W. Rep. 830, the court had occasion to define the word 'lot' as used in this statute, and it was held not to be synonymous with 'tract' or 'parcel,' but to be used in the sense of a city, town, or village lot, according to the survey and plat of the city, town or village in which the property is situated. It was admitted that the construction was not free from difficulty, but it is the only one indicated by the terms of the act, and any other would lead to greater difficulty. There would be no trouble in applying the term as thus construed if city, town, and village lots were uniform in size, so that the word would express a fixed standard of quantity. But, as every one knows, they vary not only as between different cities, towns, and villages, but as between different parts of or additions to the same city, town, or village. Thus, in some additions to the city of St. Paul, lots are sixty by one hundred and fifty feet, in others fifty by one hundred and fifty, in others forty by one hundred and twenty to one hundred and fifty. In such case, which size of lots is to be taken to ascertain the quantity exempt? If the homestead is claimed in an addition where the lots are forty by one hundred and twenty, is that size or the size in some other addition where they are sixty by one hundred and fifty to be taken as the measure of the quantity to be exempt? No reason can be given to justify going from one addition over to another to get the measure of quantity that would not equally justify going for that purpose to some other city, town, or village. The only practicable rule is to be governed by the plat in which the land claimed is laid out or platted. It is true in a plat there may be fractional lots or lots materially less than the ordinary size of lots on the plat, but in such case the ordinary or prevailing size in the addition would probably be taken as the measure. The case seems a hard one, but there is no other way of disposing of it that would be justified by the statute. Order reversed."

[1] *Ante*, p. 25.

Two half-lots may constitute one *lot* within the meaning of the word as used in a statute.[1] The word does not imply that the ground must be platted as an essential to the constitution of a statutory lot. Even when platting is contemplated by the legislator, if the provision is merely directory, there may be exemption without conformity to the direction; that is, compliance may be deferred till it shall have become necessary by the levying of an execution.[2] Then the officer must have the land platted and the debtor's homestead set off before sale. Neglect of this would invalidate the sale.

In a state where five hundred dollars' worth of realty is exempt, there was a debtor whose dwelling, occupying an acre and a half, was estimated to be worth four hundred and fifty dollars. He had a disconnected lot, worth six hundred and fifty, used as part of his homestead. Both being sold, he was held entitled to the value of the first lot, and fifty dollars from the proceeds of the second, to make up his allowance.[3]

But it has been held that the exemption amount could not be pieced out, by adding disjoined parcels, when the occupied home was worth less than the *maximum*.[4] For the statute requires that the exempt realty must not only be owned by the beneficiary, but used as the home of his family.[5]

This rule, however, did not exclude the proceeds of a homestead, sold by its owner in an adjoining state, from being held exempt though never used or *occupied* for homestead purposes for which they were intended.[6] The exemption limit was the same in both states.[7] The exemption of proceeds of

[1] *Ante*, p. 115.

[2] Nye v. Wallaker, 46 Ia. 306; Mintzer v. St. Paul Trust Co., 74 Tex. 20; *ante*, p. 156.

[3] Hastie v. Kelley, 57 Vt. 293.

[4] Mills v. Estate of Grant, 36 Vt. 269; Davis v. Andrews, 30 Vt. 683; True v. Morrill, 28 Vt. 672.

[5] Doane v. Doane, 46 Vt. 485; Morgan v. Stearns, 41 Vt. 398; McClary v. Bixby, 36 Vt. 257; Jewett v. Brock, 32 Vt. 65; Davis v. Andrews, 30 Vt. 683; Howe v. Adams, 28 Vt. 544.

[6] Keyes v. Rines, 37 Vt. 260. The homestead was sold in New Hampshire and the proceeds brought to Vermont to be invested in a new residence.

[7] New Hampshire exempts homestead to the value of $500. Gen. Laws, ch. 138, pp. 330–2. That sum is saved the debtor from execution. Austin v. Stanley, 46 N. H. 51; Buxton v. Dearborn, 46 N. H. 43; Horn v. Tufts, 39 N. H. 484; Hoitt v. Webb, 36 N. H. 158; Norris v. Moulton, 34 N. H. 392; Tucker v. Kenniston, 47 N. H. 267; Barney v. Leeds, 51 N. H. 253; Fogg v. Fogg, 40 N. H. 289.

an old homestead, designed for investment in a new one, is a common provision,[1] and in this case the court respected those coming from an adjoining state, through comity.

The two instances given above, in one of which all the proceeds of one lot, and fifty dollars more from those of a disconnected one, were allowed as exempt to make up the *maximum*, while in the other only the proceeds of one lot were held exempt, are not in conflict with each other. For, in the first instance, the disconnected lot had been in use as a part of the homestead, while in the second there had been no such use of the outlying lot.

§ 3. Increase of Value After Acquisition.

There is a marked difference in the provisions of the statutes relative to the increase of value after a homestead has been acquired. Under some of them, the beneficiary is not entitled to the increase above the *maximum* value. He is allowed that value though his home be sold, as indivisible, in order to satisfy his creditors out of the surplus.[2]

As was said in a late opinion: "Whatever rights may be conferred upon citizens of other states under exemption statutes, it is clear to us that such a claim [to have the benefit of

[1] Starr & Curtiss An. Stat. Ill., p. 1097 *et seq.* In Wisconsin, the proceeds of the sale of a homestead, designed for investment in a new one, are exempt for two years. Rev. Stats. Wis., § 2983. And the interest of notes taken for the price, which the holder meant to employ in paying for and improving a new residence, was held exempt. Bailey v. Steve, 70 Wis. 316. This may suffice for illustration of the exemption of such proceeds in many states, though interest on notes may not be so generally held exempt.

[2] For instance, the limit in Illinois is $1,000. If the homestead is worth more, and cannot be divided, the debtor is entitled to that amount out of the proceeds of a judicial sale. Stubblefield v. Graves, 50 Ill. 103; Hume v. Gossett, 43 Ill. 299. Two premises are not permitted to be held as one homestead, though both be worth no more than $1,000. Walters v. People, 18 Ill. 194. But a farm, composed of different tracts, occupied as a home, and being within the monetary limit, and consisting of not more than forty acres, is exempt. If it exceed that acreage and that value, the excess is liable to creditors. If a single lot, occupied as a homestead, exceeds $1,000 in value, the "estate of homestead" includes no more, though the lot be part of a larger tract, all used as a homestead in the common meaning of the word. And the excess of value of that lot is liable to creditors. Raber v. Gund, 110 Ill. 581; Hartman v. Shultz, 101 Ill. 437.

the increase] can have no foundation in reason or authority in this state. In growing states, cities, towns and communities, property which is to-day worth but a thousand dollars may next year be worth five thousand. In some of the larger cities of the state, the growth in value of real estate has been such that a thousand dollars' worth of property, only a few days ago, is now worth many thousands."[1]

Yet it has been held, where this rule prevails, that there can be no re-assignment of homestead to reduce the quantity when the value has increased: the court saying that if that were permissible, a new assignment might be had to increase the quantity in case of diminution in value.[2] But, without re-assignment, the excess is liable to the creditor.

A new homestead, within the statutory limitations, may be purchased by the beneficiary whose old one has been sold because of its excess and indivisibility; and, under one statute, it seems that the judge of probate may order the sale of scattered lots worth together no more than the limit, and the investment of their price in a dwelling-house for the beneficiary's family as above stated.

When the constitution or statute of a state restrains execution on the debtor's home if the property is worth no more than a given sum — for instance, two thousand dollars — there is no such restraint implied as to any excess of value, above that sum.[3] As a judgment creditor has the right of making his money out of that excess, after homestead estimated at the monetary limit has been laid off, it seems equally clear that if, years after, another judgment creditor should look to any excess above the thousand dollars in value for the satisfaction of his judgment, he might cause a revaluation of the homestead and levy upon the excess if any. But some of the courts say "Not so."[4] The reason given by them is: "The policy of the act is to secure a fixed and permanent abode for the head of the family, his wife and children, in the possession of which they should not be disquieted and disturbed, if by their

[1] Mooney v. Moriarity, 36 Ill. Ap. 175; Moriarity v. Galt, 112 Ill. 373; Stubblefield v. Graves, 50 Ill. 103.

[2] Kenley v. Bryan, 110 Ill. 652.

[3] Tingley v. Gregory, 30 Neb. 196. In Nebraska the excess above $2,000 is liable.

[4] Hardy v. Lane, 6 Lea, 380; Tenn. Code, §§ 2116*a*, 2118*a*.

industry they so far improve the premises as to make them really more valuable than they were when first assigned to them."[1] . . . Is it the policy of the act that such improvements may be made at the expense of the creditor, or out of money that ought to have gone to him; made so as to raise the value from one to fifty thousand dollars, and yet he be denied a revaluation and payment out of the sum in excess of that which the law has declared exempt? If so, such policy should have been clearly expressed or plainly implied by the statute.

Another (and better) reason given is that after homestead has been set apart by commissioners, and their certificate (showing that fact, the metes and bounds of the reservation, etc.), has been registered, good and valid title vests in the owner as head of the family, and in his widow and minor heirs at his death, exempt from execution, according to the statute which the court was expounding.[2]

But what is to be understood by the paragraph of the opinion next to the concluding one? It is: "We do not intend to decide, one way or the other, what right creditors might assert, in cases where debtors might expend extravagant sums upon the homestead, accumulations which ought to be applied to their debts."[3]

Where acceleration of value is to the benefit of the owner, and is protected as exempt, however much it may enhance the homestead above the original limitation, it is possible for very costly homes to defy the creditors of an insolvent, and quite common for dwellings or farms, originally worth no more than a few hundred dollars, to become worth as many thousands and yet remain exempt.

The statutory limitation of homestead being confined to quantity, in the following words: "If within a town plat it must not exceed one-half an acre in extent, and if not within a town plat, it must not embrace in the aggregate more than forty acres; but if, when thus limited, in either case its value is less than five hundred dollars, it may be enlarged till its value reaches that amount,"[4] . . . there is no monetary limit whatever to the growth of value after the homestead

[1] *Ib.*

[2] §§ 2116*a*, 2118*a*, Tenn. Code.

[3] Hardy v. Lane, *supra.*

[4] McC.'s Ia. Code, § 3171 (1996).

has been acquired. Referring to a homestead of forty acres, with buildings estimated to cost about ten thousand dollars (having terraces and drives, etc.), it was said: "It has seemed to be the policy of legislation in this state not to place restrictions on the value of homesteads. We have no greater discretion in the application of the law in a case like this than in a case where the homestead as to value would be at the other extreme." [1]

The statute fixes no dedication limit of five hundred dollars; it makes the rule flexible as to quantity where the urban half acre or the rural forty-acre farm is worth less than that sum.[2]

In such case, the estimate is made on the basis of the title in fee. If the householder has a less title, such as a life estate, he cannot have the quantity enlarged in consequence. When the claim for an excess of the statutory quantity is made, the burden of proof is upon him to show that the whole does not exceed in value the sum above stated — according to the authorities above cited.

The section following the one quoted contains another limitation, which is relative to appurtenances: The homestead "must not embrace more than one dwelling-house, or any other buildings except as such are properly appurtenant to the homestead; but a shop or other building situated thereon, and really used and occupied . . . and not exceeding three hundred dollars in value, may be deemed appurtenant to such homestead." There are no other limitations of value.

It is impossible that all the homesteads, in any state, can be of equal value, one with another. Whether urban or rural, they are subject to the fluctuations of the real-estate market, and difference of value is caused by improvements on the one hand, and by dilapidation upon the other. When it is alleged and proved that a certain dwelling is the homestead of a party

[1] First N. B'k v. Hollinsworth, 78 Ia. 575, *582*. The court goes on to say that "there is no evidence of fraud or design to cheat in making the expenditures." . . . "It is conceded that the defendant is insolvent," etc. The Dakota statute is like that of Iowa. Compiled Laws of Dak. (1887), §§ 2449–2468, 5778–5781.

[2] Boot v. Brewster, 75 Ia. 631; S. C., 36 N. W. 649; Rhodes v. McCormack, 4 Ia. 368; Kurz v. Brusch, 13 Ia. 371; Thorn v. Thorn, 14 Ia. 49; Yates v. McKibben, 66 Ia. 357.

litigant, we can hardly conclude that the legal quantity and value exempt by law have been alleged and proved to be the exact extent and true appraisement of that family residence.

If there is an allegation of the number of acres legally exempt, is the price implied? It has been judicially so held, as the following extract will show: "The constitution authorizes the selection and holding of a homestead in the country, not exceeding forty acres of land, not exceeding in value one thousand five hundred dollars. Now, if one says, 'This whole parcel of forty acres is my homestead, selected by me under the constitution,' would not that be considered, by every one hearing the remark, as an averment implying that the whole premises were worth not to exceed the constitutional limit? There is no necessity of any technicality of pleading, either at law or in equity, in this age of liberality and advancement in the administration of justice. That averment is sufficient, either in declaration or bill of complaint, which necessarily covers with its language the full information of the claim sought to be collected or enforced. The language of the pleader, in the bill of complaint before us, clearly imports that the whole forty acres is claimed as a homestead, which necessarily implies that it is not worth over one thousand five hundred dollars; and that as plainly as if the fact itself were stated in words and figures."[1]

As the report shows that the homestead had been held twenty-two years, and that, besides the dwelling-house and other buildings, there was a barn, one hundred feet long, on this tract of forty acres, it is not likely that the homestead had not risen above the value of one thousand five hundred dollars since its selection. One cannot but think that some persons would be inclined to make a negative answer to the question propounded by the court in the extract quoted above.

If the *allegata* be sufficient, the *probata* should correspond: the pleader should prove that his homestead is not worth more than one thousand five hundred dollars, if he has alleged it. Every one knows that homesteads have increased in value by improvements within the period mentioned, or may have thus increased.

[1] Evans v. Grand Rapids, etc. Co., 68 Mich. 602.

§ 4. Quantitative Limit Only.

The only limitation in some states is that of extent. Whatever the value, the quantity of real estate selected is the only criterion.[1] Even though the double restriction be required in the original selection or setting apart of the homestead, the test of value is omitted when the quantity has been reduced to a designated amount or below it, under the provisions of several states. Thus, where the monetary limit of twenty-five hundred dollars is fixed by a constitution for a rural homestead of one hundred and sixty acres, or for an urban one of an acre, each with its improvements, it is provided that if the former be reduced to less than eighty acres, or the latter to less than a quarter of an acre, no monetary test shall be applied.[2]

When there is quantitative limitation, the homestead right will be confined to it, though the tract occupied may be much larger. There was a farm of about one hundred acres which was sold — the grantor before the sale, and the grantee afterwards, occupied it as a home residence; but no more than forty acres of it were held exempt.[3]

In the pioneer state, where the first homestead was authorized and where the rule of limitation has undergone many changes, the present provision is this: The homestead of a family to the amount of two hundred acres of land with improvements, or a lot or lots in a town to the value of five thousand dollars exclusive of improvements, used as a home or as a place of business by the head of the family, is exempt, with the improvements thereon, except as to claims for purchase-money, improvements or taxes.[4] It will be observed that

[1] For example: In Florida there is exemption of one hundred and sixty acres in the country, or half an acre in town, with improvements. McClellan's Dig. of Laws of Fla., pp. 528–9. In Kansas, one hundred and sixty of "farming land," or one acre in town, including improvements. Const. of Kas., art. 15, § 9; Taylor's Gen. Stat. (1889), §§ 235, 2593–7. In Wisconsin, forty acres "used for agricultural purposes," or one-fourth of an acre in town, with improvements. Sanborn & Berryman's An. Stat. of Wis., p. 1717, § 2983. In Minnesota, a city lot or eighty acres of rural land. Sumner v. Sawtelle, 8 Minn. 272; Tillotson v. Millard, 7 Minn. 419. A town home in Minnesota cannot be on parts of lots. Kresin v. Mau, 15 Minn. 118; Ward v. Huhn, 16 Minn. 161.

[2] Const. of Arkansas, art. IX, §§ 3–6; Dig. of Stat. of Ark., §§ 3590–3.

[3] Martin v. Aultman (Wis.), 49 N.W. 749.

[4] Const. of Texas, art. 16, §§ 50–2. In Texas a home *and* a business establishment are both exempt.

there is no limit whatever to the monetary value of the country home of two hundred acres. If it has had improvements put upon it before its selection and dedication, so as to render it worth ten thousand dollars or more, it could still be selected. Or, if it be improved after selection, to that or any amount, it would still be exempt under the constitution.

The site of the urban home must not exceed five thousand dollars in value, but the dwelling and other improvements are not estimated, and they may be worth far more than the ground on which they stand. They subsequently may be enlarged and embellished to any degree. The only danger of transcending the homestead limit is in rendering the ground too valuable. It is thus seen that both rural and urban homesteads are practically without monetary limitation.

The only difference between them is that the town groundsite is limited monetarily while the country land is not. Two householders, acquiring homesteads at the same time, are treated differently because one settles in town and the other in the country. One's city lot or lots may be of the full *maximum* value, five thousand dollars, while the other's plantation of two hundred acres may be worth twice or several times as much. Buildings and other improvements may be equal — they are not estimated in either case. The fact that this disparity is made by the constitution does not relieve it wholly of objection. Were it statutory only, perhaps it would be questioned. This distinction between town and country homesteads is not found in other states, as to monetary value.

Even the plantation acreage has been extended beyond the statute figures to cover the case of the owner of an undivided interest in a tract of land consisting of more than two hundred acres. His homestead right was found to be not confined to his undivided interest in two hundred acres with improvements, but to extend to an undivided interest of two hundred acres of the whole tract.[1]

If the homestead plantation, after having been duly dedicated or set out, should ever find itself in town by reason of the extension of the municipal corporation limits, would it

[1] Brown v. McLennan, 60 Tex. 43; Jenkins v. Volz, 54 Tex. 639.

then come under the five thousand dollars limitation? The negative has been held.[1]

This extensive *messuage* need not be all of a piece. It may consist of different parcels, and they are not required to be contiguous.[2] Its parcels, however, must constitute one home, or a home and a business place; these two need not be joined or adjacent.[3]

While the same beneficiary may have a homestead and an exempt business place both within town lines, or both without town lines, it seems that he cannot distribute his exemption right so as to have it partly urban and partly rural, unless he can show good cause for such distribution.[4]

§ 5. Indivisible and Excessive Property.

It was held, in one state, that when a homestead has been reduced to its "lowest practicable area," and still exceeds the monetary limit, it is not exempt; no part of it is protected from creditors, and there is no restraint of alienation. The owner may mortgage it or sell it at will, and a judgment creditor may sell it under execution.[5] The homestead is exempted by the constitution in that state, yet the terms are such that an indivisible home property, excessive in value, fails to answer the description of the homestead contemplated by the framers of the instrument, and the statute accords.[6]

It frequently happens that the quantitative and monetary limits cannot each be at its *maximum*. A town lot, or a quarter section of land in the county, may be worth far more than

[1] Bassett v. Messner, 30 Tex. 604, *636*. The limit was less when this decision was rendered. Allen v. Whitaker (Tex.), 18 S. W. 160.

[2] Macmanus v. Campbell, 37 Tex. 267; Ragland v. Rogers, 34 Tex. 617; Williams v. Hall, 33 Tex. 215; Campbell v. Macmanus, 32 Tex. 442; Homestead Cases, 31 Tex. 678.

[3] Stanley v. Greenwood, 24 Tex. 225; Pryor v. Stone, 19 Tex. 371; Hancock v. Morgan, 17 Tex. 582.

[4] Keith v. Hyndman, 57 Tex. 425. Rural homestead of two hundred acres, in Texas, cannot be made less by the beneficiary who owns that amount of land and more, in a tract, it would seem. Radford v. Lyon, 65 Tex. 471. Citing to the same effect, Medlenka v. Downing, 59 Tex. 37 (as rendered "without the aid of statute)."

[5] Farley v. Whitehead, 63 Ala. 295.

[6] Ala. Code, 2820. Present constitution like that of 1868 in this respect. Acreage changed. *See* Pizzalla v. Campbell, 46 Ala. 40; Melton v. Andrews, 45 Ala. 454.

the highest estimation allowed as exempt. In such case, the quantity must be reduced, if practicable. But limit has been fixed to the reduction. A state, which limits the town homestead to an acre, and the country one to one hundred and sixty acres, provides that the former to the extent of a quarter of an acre, and the latter to the extent of eighty acres, shall be exempt "regardless of value." That is to say, that when once duly established and within the value of twenty-five hundred dollars, it is not lost when thus reduced, though the quarter of an acre, or the eighth of a section in value, exceed that sum.[1] The general rule is, however, as already stated, that property designated as a homestead, but limited by law, is liable to forced sale for debt so far as it exceeds the limitation.[2]

The lienholder can satisfy his claim against the excess only (according to a decision after a change of statute), if he holds a deed of trust on the homestead property given by both the debtor and his wife, to secure a debt, and the husband has since died. Upon his death, her homestead rights, as against the trust deed, become established.[3] The value of the property at the time of the death determines whether there is excess of the statutory limitation.[4]

§ 6. Extension of Corporate Bounds.

When the rural homestead becomes urban by the extension of town limits, it ought to be measured by the rule applicable to the latter, if it has been laid out as town lots. If, on the contrary, it is brought in by the extension of the corporation lines, but is still used for agricultural purposes, and is yet a homestead farm, it would be within the spirit of the constitutions and laws treating upon the subject to hold it still a rural homestead, entitled to its original acreage. The decisions are not all in accord, even under the same or similar legislation,[5] as the following examples show:

[1] Digest Stat. of Arkansas (1884), §§ 2994–6; Const. of Arkansas, art. 9, §§ 1–5. The monetary maximum has been reduced from five thousand to two thousand five hundred dollars. Dig., § 2994; Wassell v. Tunnah, 25 Ark. 104.

[2] Hargadene v. Whitfield, 71 Tex. 482; Paschal v. Cushman, 26 Tex. 74; Gregg v. Bostwick, 33 Cal. 222.

[3] McLane v. Paschal, 74 Tex. 20.

[4] *Ib.;* Wood v. Wheeler, 7 Tex. 25.

[5] Favorable to rural measurement: Taylor v. Boulware, 17 Tex. 74; Bassett v. Messner, 30 Tex. 604; Nolan v. Reed, 38 Tex. 425; Finley v. Diet-

A rural homestead becoming urban by its inclusion within incorporated limits, or becoming surrounded by land platted by others, does not have to be reduced in area as a necessary consequence.[1]

Town limits were extended so as to include one's rural homestead of seven acres; but, as the exempt land had not been platted, the owner was adjudged to have lost no right in it as a rural homestead.[2]

A homestead partly in town and partly in the country, consisting of a hotel (in which the householder resided with his family and also conducted his business as a hotel-keeper), and of a farm slightly separated from the urban property, was recognized as legally exempt, since the monetary value of the whole was not in excess of that allowed by law.[3]

Where one lot, with its improvements, is the urban limitation, and forty acres the rural, it is yet held that the latter quantity, if unplatted, may be within corporation limits.[4] And further, that this may be platted after its acquisition as a homestead without forfeiting the exemption.[5] But two platted lots, resided upon by the owner, and both together within the monetary limits, are not exempt if a business block is situated

rick, 12 Ia. 516; Barber v. Rorabeck, 36 Mich. 399. Unfavorable: Bull v. Conroe, 13 Wis. 233; Parker v. King, 16 Wis. 223; Sarahos v. Fenlon, 5 Kas. 592.

[1] Baldwin v. Robinson, 39 Minn. 244; Gen. Stat. Minn. (1878), ch. 68, § 1; Finley v. Dietrick, 12 Ia. 516; McDaniel v. Mace, 47 Ia. 509; Bassett v. Messner, 30 Tex. 604; Barber v. Rorabeck, 36 Mich. 399.

[2] Posey v. Bass, 77 Tex. 512; 14 S. W. 156.

[3] Parisot v. Tucker, 65 Miss. 439. Mississippi Code, 1880, § 1248, allows "the land and buildings owned and occupied as a residence," not exceeding eighty acres not over $2,000 in value. Section 1249 allows the land and buildings owned and occupied as a residence in a city, town or village, not over $2,000 in value. In Mississippi the head of a family may hold his town residence exempt to the extent of $2,000, or his country residence to that extent if embracing not more than one hundred and sixty acres. Miss. Acts 1882, p. 140, amending § 1248 of Rev. Code of 1880, as to quantity. Formerly, the allowance was greater. Morrison v. McDaniel, 30 Miss. 217; Johnson v. Richardson, 33 Miss. 462. Within the money value, part of the premises may be used for business. Baldwin v. Tillery, 62 Miss. 378. The same acreage and value are allowed in Nebraska. Comp. Stat. Neb. (1889), ch. 36, §§ 1–16; Spitley v. Frost (Neb.), 15 Fed. 299, *303*.

[4] Barber v. Rorabeck, 36 Mich. 399.

[5] Bouchard v. Bourassa, 57 Mich. 8.

thereon.[1] Parts of adjacent lots, worth not more than the *maximum*, constituting together the site of the family residence, were held exempt.[2]

If a tract of the dimensions allowed for a rural homestead be taken in so as to be embraced within the corporate limits of a village or town, it does not therefore lose its exempt character as excessive in quantity. While yet unplatted, and not exceeding the monetary limit in value, it is still exempt as before the extension of the corporation lines so as to embrace it.[3]

The right to the number of acres of land allowed for a rural homestead, not exceeding the monetary limitation, has been held to be not affected by the inclusion of the exempt acres within town limits after the selection of the homestead. This ruling has been supported by reference to the benevolent purpose of homestead legislation and the rule of liberal construction based on that purpose. And it has been defended on the argument that the right to the rural homestead was vested, and could not be divested by the action of the authorities in changing the boundaries of the town. Without conceding that there was a vested right, others holding to liberal construction maintain that it is a valuable right, and sustain the ruling on grounds of public policy.[4] But there are counter deliverances.[5]

The homestead acre within city limits need not be occupied as a home in every part to entitle it to the legally authorized exemption, provided none of it is used for a different or inconsistent purpose. The acres of a rural homestead are subject to the same view.[6] But if a part of the tract run into an incorporated town, it will be liable for debt, though the whole should not exceed the number of acres exempt by law as a rural homestead.[7]

[1] Geney v. Maynard, 44 Mich. 579.

[2] Geiges v. Greiner, 68 Mich. 153; S. C., 36 N. W. 48. In Michigan, a town lot, or forty acres in the country, not exceeding $1,500 in value, is the limit. Howell's Stat., § 7721; Const., art. 16, § 2.

[3] Barber v. Rorabeck, 36 Mich. 399.

[4] Barber v. Rorabeck, 36 Mich. 399; Finley v. Dietrick, 12 Ia. 516; Deere v. Chapman, 25 Ill. 498; Webster v. Orne, 45 Vt. 40; Nolan v. Reed, 38 Tex. 425; Clark v. Nolan, 38 Tex. 416. *Vested right:* Bassett v. Messner, 30 Tex. 604.

[5] Bull v. Conroe, 13 Wis. 260; Parker v. King, 16 Wis. 237.

[6] Morrissey v. Donohue, 32 Kas. 646.

[7] Sarahas v. Fenlon, 5 Kas. 592.

The number of acres constituting a country homestead cannot retain their inviolable character with reference to forced sales after having come within incorporated town limits; only the urban quantity can then be thus favored,[1] though the reduction from the greater number of acres to the less, under statutory construction, may depend upon the platting into lots.[2]

This reduction of quantity, when a rural homestead is converted into an urban one, cannot be laid down as an invariable rule. The contrary has been held, upon construction of provisions that do not expressly authorize any variation from the rule. Though the statute limited the area of a rural homestead but not of an urban, it was construed to allow one to be located partly in town and partly in the country, within the urban monetary limit.[3]

§ 7. What Law Governs Limits.

The limitations are to be governed by the law in force when the debt, sought to be enforced against the homestead, was contracted. Whatever was then the *quantum* and value exempt is now the only impediment to the creditor. Additions under new statutory authorizations cannot affect his remedy against the excess of the old homestead. It would be manifestly unjust to him were the rule otherwise; and the rule cannot be otherwise without trenching upon the constitution which protects his vested rights, and his remedy to enforce them so far as it is essential to those rights. So, if the monetary limit be raised, or the allowable extent be enlarged, by statute or even by constitution, the debtor will not be protected against debts previously contracted so far as the subsequent additions to his homestead are concerned.[4]

If the surety of a creditor is proceeding against the debtor's

[1] Gray v. Crockett, 30 Kas. 138, and 31 Kas. 346.

[2] *See* Finley v. Dietrick, 12 Ia. 516.

[3] Fitzgerald v. Rees, 67 Miss. 473, under Code of 1880, § 1249. See amendment, Acts of 1882, p. 140, as to the rural acreage. *See* Keith v. Hyndman, 57 Tex. 425; Bassett v. Messner, 30 Tex. 604, *606*.

[4] Peevey v. Cabaniss, 70 Ala. 253; Keel v. Larkin, 72 Ala. 493; Cochran v. Miller, 74 Ala, 50; Bolling v. Jones, 67 Ala. 508; Gerding v. Beall, 63 Ga. 561; Hawks v. Hawks, 64 Ga. 239; Dixon v. Lawson, 65 Ga. 661; Lowdermilk v. Corpening. 92 N. C. 333; Wright v. Straub, 64 Tex. 64; McLane v. Paschal, 62 Tex. 102.

homestead, the time when he contracted as surety governs as to what portion of the property is liable now; that is to say, what was *then* homestead is exempt *now* as to him, and no more, though the homestead may have been enlarged since in extent, value, or both, under a subsequent law.[1] When the limitation is fixed by the constitution, the legislature cannot enlarge or diminish it.[2]

While a lien cannot be dislodged by a statute, a new one cannot be saddled upon a homestead by statute after its exempt character has been established, unless for obligations coming under the exceptions to exemption.[3]

A monetary limit fixed by one constitution may be continued unchanged by another succeeding it so as not to affect a homestead right acquired under the former. Where two thousand dollars in value was the limitation, and a new constitution reduced it to one thousand, an applicant for homestead to the larger amount, whose right had accrued under the first instrument, was allowed his prayer after the second had gone into effect. The second constitution had been made before the right accrued but had not been ratified: so the applicant's right was governed by the former one. There was this provision in the second — the constitution now in force: "Homesteads . . . which have been heretofore set apart by virtue of the provisions of the existing constitution of this state, and in accordance with the laws for the enforcement thereof, or which may be hereafter set apart at any time, shall be and remain valid as against all debts and liabilities existing at the time of the adoption of this constitution, to the same extent that they would have been had said existing constitution not been revised." Commenting on this provision, the court said: "The phraseology of the section which we have quoted clearly contemplates that the setting apart of the larger allowance, provided for by the constitution of 1868, might go for an indefinite time in the future, and that the property so set apart 'at any time' should be protected against any and all debts, etc., which arose whilst that constitution was in force. The

[1] Keel v. Larkin, *supra*.

[2] Wharton v. Taylor, 88 N. C. 230 (*overruling* Martin v. Hughes, 67 N. C. 293); Withers v. Jenkins, 21 S. C. 365.

[3] Cumming v. Bloodworth, 87 N. C. 83; Lanahan v. Sears, 102 U. S. 318.

new constitution (1877) is to be considered as speaking from the time it became authoritative and operative as a constitution, and not from the time the convention framed it and agreed to it. The term 'hereafter' does not mark a period *ending* with the actual substitution of the new constitution for the old, but an intermediate duration *beginning* with that substitution. It follows that the application we are dealing with is consistent with both constitutions and did not come too late. As to the class of debts and liabilities here involved, the homestead and exemption provisions of the earlier constitution are by the later one continued in full force."[1]

After the repeal of a homestead or any exemption law, a claim not founded on rights existing when the law was in force — not asserted then — cannot be successfully preferred.[2]

A new constitution having fixed the monetary maximum of homestead exemption higher than the former one had done, it was construed to have no retroactive effect. The holder of a homestead under the old constitution, which was of the *maximum* value when designated, and which had since increased to the highest sum allowed as exempt under the new provision, was held not authorized to claim more.[3]

§ 8. Exemption of Real and Personal Property.

In a state where real and personal property, or either, as the debtor may choose, is exempt from execution to a certain limit of value, there is exemption but not necessarily any homestead protection as such. A piece of land or a chattel may be above this value yet indivisible: then the exempt sum is reserved from the proceeds of an execution sale, as in case of excessive and indivisible homesteads in other states. The selection of land or chattels, within the limits, should be by the owner: by the husband, if he is the owner;[4] by the wife, if she is;[5] and it has been held that a brother may select for

[1] Gerding v. Beall, 63 Ga. 561.

[2] Clark v. Snodgrass, 66 Ala. 233.

[3] Linch v. Broad, 70 Tex. 92 ($5,000 *maximum* by Const. Texas); McLane v. Paschal, 62 Tex. 102.

[4] State v. Melogue, 9 Ind. 196; Austin v. Swank, 9 Ind. 109; Holman v. Martin, 12 Ind. 553; Sullivan v. Winslow, 22 Ind. 154. Six hundred dollars of real or personal property, or of both, or of either, exempt in Indiana.

[5] Crane v. Wagoner, 33 Ind. 83.

his sister who is the owner, when living in her family and contributing to its support.[1]

There is an allowance in lieu of homestead, determined by facts existing when a surplus remains after selling the homestead and satisfying creditors so far as the non-exempt portion can do so. The court, in disposing of the surplus, makes the allowance. This course, not presented here as generally followed, is authorized by a state statute.[2]

There is a constitutional exemption of real or personal property, or both, selected by the debtor, to the amount of two thousand dollars, in addition to the articles exempt from levy or distress for rent.[3]

What part of this amount is taken in realty as a homestead must be claimed by the owner. All the exemption, to the amount of two thousand dollars, he may have in realty set apart as a homestead as required by statute.[4] He is not entitled by virtue of the constitution, if he fails to comply with the mode prescribed by statute. The constitution does not confer the exemption absolutely, but authorizes it upon his selection of the property; and the legislature has pointed out how the selection shall be made. The code is held to be reconcilable with the constitution, in this matter.[5]

The constitution of another state exempts property real or personal, or both (belonging to the head of a family, trustee of minors, etc.), to the amount of sixteen hundred dollars.[6] There are two forms of homestead exemption recognized: one under the constitution directly and the other under statute; but the beneficiary cannot have both.

In another state, a defendant may select real or personal property to the amount of one hundred dollars,— the value ascertained by appraisers at the time of levy,— which shall be exempt in "any civil proceeding whatever," except on judg-

[1] Graham v. Crockett, 18 Ind. 119.

[2] Ohio Rev. Stat., § 5441; Niehaus v. Faul, 43 Ohio St. 63; Bills v. Bills, 41 Ohio St. 206; Bartram v. McCracken, 41 Ohio St. 377; Jackson v. Reid, 32 Ohio St. 443; Kelly v. Duffy, 31 Ohio St. 437; Cooper v. Cooper, 24 Ohio St. 488.

[3] Const. Va., art. XI, §§ 1, 3, 5.

[4] Va. Code, ch. 183; Wray v. Davenport, 79 Va. 19.

[5] Linkenhoker v. Detrick, 81 Va. 44; Reed v. Union Bank, 29 Gratt. 719; White v. Owen, 30 Gratt. 43.

[6] Const. Ga. (1877), art. IX, sec. 1 *et seq.*

ment for breach of promise to marry or for seduction. If the property seized is indivisible, the defendant is entitled to a hundred dollars from the proceeds of sale.[1]

In yet another, three hundred dollars' worth of realty or personalty or both are saved to the debtor from execution, the value ascertained by appraisement, and the exempt amount reserved from the sale of indivisible property, as above.[2] The exemption must be claimed by the debtor, since otherwise his right to it would be forfeited. He would be deemed to have acquiesced in the sale of all the property levied upon. When duly claiming, he retains or rather avails himself of the right, so that even if all must be sold because not susceptible of division, he would have the amount of the exemption paid to him from the proceeds.[3] A claim made on the day of sale was held to be in time.[4]

[1] Rev. Code of Md., p. 623.

[2] Brightly's Pur. Dig., I, pp. 636–8.

[3] Bowman v. Smiley, 31 Pa. St. 225; Dodson's Appeal, 25 Pa. St. 234; Miller's Appeal, 16 Pa. St. 300; Line's Appeal, 2 Grant's Cas. 198.

[4] Seibert's Appeal, 73 Pa. St. 361.

MONETARY LIMITATIONS.

Alabama	$2,000	Nevada	$5,000
Arizona	4,000	New Hampshire	500
Arkansas	2,500	New Jersey	1,000
California	5,000	New Mexico	1,000
Colorado	2,000	New York	1,000
Florida	No money limit.	North Carolina	1,000
Georgia	1,600	North Dakota	5,000
Idaho (head of family)	5,000	Ohio	1,000
Idaho (others)	1,000	Oklahoma	No money limit.
Illinois	1,000	South Carolina	1,000
Iowa	No money limit.	South Dakota	5,000
Kansas	No money limit.	Tennessee	1,000
Kentucky	1,000	Texas, *urban*	5,000
Louisiana	2,000	Texas, *rural*	No money limit.
Maine	500	Utah (head of family)	1,000
Massachusetts	800	Utah (wife)	500
Michigan	1,500	Utah (each child)	250
Minnesota	No money limit.	Vermont	500
Mississippi	2,000	Virginia	2,000
Mississippi (if recorded)	3,000	Washington	1,000
Missouri	1,500	West Virginia	1,000
Montana	2,500	Wisconsin	No money limit.
Nebraska	2,000	Wyoming	1,500
Other states	No homestead law.		

CHAPTER VIII.

EXEMPT BUSINESS PLACES.

§ 1. Appurtenances.
2. Business Houses Not Appurtenant.
3. Dwelling and Business Houses as One Homestead Within the Maximum.
4. Means of Family Support.
5. Dual Homesteads — "Business Homesteads."
§ 6. Dual and "Business Homesteads."
7. "Business Homesteads" — Increase of Exemption.
8. Alternate Homesteads.
9. Business Uses as Indicia.
10. Several Business Callings.

§ 1. Appurtenances.

The exemption of a homestead generally includes the appurtenances of the family dwelling. These are not confined to barns, stables and the other usual out-buildings, but may include the shop of an artisan, the studio of an artist, the office of a doctor or lawyer, or any like appendage, used by the head of the family in pursuing his personal calling. Such shop or office is required to be on the homestead premises, and included within the limitations prescribed to them as to value and extent.[1]

Shops rented to tenants are not protected as appurtenances of the lessor's homestead, though on the home lot;[2] and a saloon for the sale of intoxicating liquors was held not exempt, though it was part of the dwelling-house.[3] A house solely used as a hotel is not a homestead.[4]

[1] Orr v. Shraft, 22 Mich. 260; Hubbell v. Canaday, 58 Ill. 427; Wright v. Ditzler, 54 Ia. 620; Smith v. Quiggans, 65 Ia. 637; West River Bank v. Gale, 42 Vt. 27; Mercier v. Chace, 11 Allen, 194; Lazell v. Lazell, 8 Allen, 576; Clark v. Shannon, 1 Nev. 568; Skinner v. Hall, 69 Cal. 195; Ornbaum v. His Creditors, 61 Cal. 457; Englebrecht v. Shade, 47 Cal. 628; Estate of Delaney, 37 Cal. 176; *Re* Tertelling, 2 Dill. 339; Pryor v. Stone, 19 Tex. 371; Wassell v. Tunnah, 25 Ark. 101; Kelly v. Baker, 10 Minn. 124; Sumner v. Sawtelle, 8 Minn. 272; Tillotson v. Millard, 7 Minn. 419; Ward v. Hughn, 16 Minn. 159; Kresin v. Mau, 15 Minn. 116; Piper v. Johnston, 12 Minn. 60.

[2] Kurz v. Brusch, 13 Ia. 371.

[3] Arnold v. Gotshall, 71 Ia. 572; McClure v. Braniff, 75 Ia. 38, *43*.

[4] Green v. Pearce, 60 Wis. 372.

The rule is that a mechanical or business or other appendage must be merely incidental to the home purpose. This rule will be recognized under the prevalent system of homestead. It will not be respected under exceptional methods of a few states. Wherever homestead, so called, is nothing more than exemption to a specified amount in value of realty, this rule will be found inapplicable. Where a factory, storehouse, block of stores, mills, and the like, are claimed as appendages of the messuage — not exempt by statute under their proper business names, but by construction, under the general name of homestead — the adjunct is often far more valuable than that to which it is attached.

If a lot is not appurtenant to the family residence, but several squares away from it, it constitutes no part of the homestead, though used for family purposes.[1]

[1] Achilles v. Willis, 81 Tex. 169; 16 S. W. Rep. 746. Gaines, J.: "This action was brought by appellants to restrain the appellees from selling two lots or parcels of land in the city of Austin, under execution. The plaintiffs claimed that the lots constitute their homestead, and that therefore they were exempt from forced sale. On one of the parcels known as 'Lot 12,' in block 19, was situated a dwelling-house; and the other, called the 'Lavaca-Street Property,' was distant some three or four blocks from the former, and had upon it a butcher's shop and a part of a stable. The injunction was dissolved as to the latter, but was perpetuated as to the former, lot. The appellees have not assigned errors, and therefore the sole question before us is whether or not the court erred in holding the Lavaca-street lot subject to forced sale. The plaintiff, Andreas Achilles, testified that he bought lot 12, in block 19, as a residence for his family in 1886, and that they moved upon the lot, and made their home there for some three or four months; that he then rented the property, and made his family residence in the second story of a house leased by him, and used as a place of business, but that he never intended to abandon lot 12 as his homestead. He also testified that in 1887 he bought the Lavaca-street lot, which was on the opposite side of the street from his business house. He also testified 'that he used this property as a wood-yard till he failed, in December, 1887; that in January, 1888, his brother, A. H. Achilles, bought the stock of goods from his trustee, and run the business, including the wood-yard business, up to March 31, 1890, till after the levy; that during that time he clerked for his brother and had no interest in the business; . . . that the Lavaca-street lot has a stable on it, half of the stable being on his lot, and the other half on the adjoining lot; that the middle of the stable is his line, and that the stable runs back east seventy-six feet; that the stable is about thirty feet wide; that there is a bedroom in the corner of the stable on his part about eight feet square; that there is a butcher shop in the south-west corner of his lot

Where two lots adjoined each other, and one and a part of the other were occupied as the family home of the householder, and both were within the monetary limitation, a portion of the second lot was held liable to execution for debt, because it was devoted to business purposes. The householder pursued thereon his business calling of wagon-building and general blacksmithing. The test applied was that of principal use; and it was found that the portion of the second lot whose *status* was in question was principally devoted to business uses. Had the question of liability been with reference to the whole property — both lots — it might have been

about twenty and one-half by fourteen and one-half feet, and a shed-room to it, fourteen and one-half feet by eight feet; that the shop and shed-room buildings do not belong to him; that they belong to August Hoecke, and were there when he bought the property, and were rented, and that since he bought he has rented the ground covered by them, and received ground-rent, $5, up to about January 1, 1890, and that since that time Hoecke has occupied it, but paid him no rent, but a little meat; that he was using the stable for his cow and horses and wagon and feed at the time he failed, and has used it ever since in the same way; that the stalls in which he keeps his horses and cow are on the north side of the stable, on the other lot, and the bins where he keeps his feed are on the south side, and on his lot, and the bedroom is on the south side; that all the lot, except the part covered by the stable and shop and shed, is what has been used for a wood-yard.' He also testified 'that he bought this lot for the purpose of using the same in connection with his homestead on lot 12, in block 19, and that since he purchased it he has been keeping his horses and cow therein, with feed for them, and his fire-wood, chickens, etc., and used the lot as a yard to wash the family clothing.' No other witness testified with reference to this matter. It may be doubted whether the testimony discloses such use of the lot as would entitle it to be exempt from forced sale. A part was rented, and the open space seems to have been mainly used as a place to deposit wood kept in connection with plaintiff's business. But conceding, for the sake of the argument, that such use was shown, does it follow that it would not be subject to sale under execution? The head of a family is not entitled to two residence homesteads. He is entitled to one, which may consist of two or more detached lots. The nucleus must be the lot upon which the dwelling is situated. This lot will draw to it such others as may be conveniently near to it, and may be used in connection with it for the comfort and convenience of the family. The plaintiffs established in this case that lot 12 was their homestead proper. They failed to show that the lot in question had ever been used in connection with it for home purposes. The court below held that, under these circumstances, it had never become a part of the homestead, and we are not prepared to say that this conclusion was not correct. The judgment is therefore affirmed."

thought that the principal use was that of a home; and this view would have accorded with decisions in several states.

The court, however, separated the first lot and the part of the second, on which the dwelling-house and appurtenances were situated, from the rest, and held the latter liable, quoting approvingly from a prior decision: "It is the principal use to which the property is put, and not quantity, which furnishes the test in determining the question whether or not property is subject to dedication as a homestead. And if only a part of the land described in the homestead declaration be actually used and appropriated as the home of the family, the remainder not so used and appropriated forms no part of the homestead claim in the sense of the statute." [1]

The court applied the general rule that property cannot be impressed with the character of a homestead unless actually occupied by the householder and his family as their home residence.[2]

§ 2. Business Houses Not Appurtenant.

The construction, given to the statute of the state whence the cases are cited in the last two notes, is that the homestead embraces only the dwelling-house and appurtenant outbuildings and land constituting the family home, and not disconnected establishments used for business or other purposes; that the purpose of the legislator is to exempt the home, and not necessarily property to the possible *maximum* value — five thousand dollars. What may be considered the leading case on this point [3] was rendered under a statute since modified, but which has been literally copied in another state,[4] and there differently construed.[5] The case last cited from the former state was discussed but not followed. It was expressly

[1] *In re* Allen, 78 Cal. 293; Maloney v. Hefer, 75 Cal. 422; Gregg v. Bostwick, 33 Cal. 220; S. C., 91 Am. Dec. 637; Ackley v. Chamberlain, 16 Cal. 182; S. C., 76 Am. Dec. 516.

[2] *In re* Noah, 73 Cal. 590; *In re* Crowey, 71 Cal. 300; Skinner v. Hall, 69 Cal. 195; Pfister v. Dascey, 68 Cal. 572; Laughlin v. Wright, 63 Cal. 113; Tiernan v. His Creditors, 62 Cal. 286; Aucker v. McCoy, 56 Cal. 526; Dorn v. Howe, 52 Cal. 630; Babcock v. Gibbs, 52 Cal. 629; Prescott v. Prescott, 45 Cal. 58; Mann v. Rogers, 35 Cal. 319.

[3] Gregg v. Bostwick, 33 Cal. 220.

[4] Nevada, Act of 1865.

[5] Smith v. Stewart, 13 Nev. 65. *See* Goldman v. Clark, 1 Nev. 516.

stated that the decision in that case was rendered when the statute of its state was precisely like the one under construction, yet it was held that a dwelling-house, two store buildings used in merchandising, and a store-house used for storing goods, all separate from each other, but all standing upon one piece of ground, were exempt as a homestead. It was further held that the statute exempts a tract of land on which the homestead is located, to the extent of five thousand dollars in value, and allows it to be used in any way, for any business or calling, provided it is the site of the homestead and used and claimed as the family home.

It had previously been held in a case with which the last one cited is in accord (though rendered under a prior and somewhat different statute), that the owner of two lots, who lived on one and had a public livery-stable on the other, and who had mortgaged the latter to secure his note, was entitled to hold both lots and their improvements exempt as his homestead. He was relieved from his mortgage because his wife had not joined in its execution. The court said the debtor has the privilege of selecting any land included in the homestead tract, provided it does not exceed five thousand dollars in value, and that he is not limited in the uses to which it may be applied.[1] This is exemption, but not homestead.

This decision, under a former statute, was followed; and that of a neighboring state, under a statute from which the present one was copied, was not followed. None of the statutes, however, gave warrant for treating business establishments as homesteads, or as parts of homesteads. The one which was alike in the two states, and still in force in the latter, is as follows, with respect to the part construed:

"The *homestead*, consisting of a quantity of land, together *with the dwelling-house thereon and its appurtenances*, not exceeding in value five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after November 13, 1861, except process to enforce the payment of purchase-money. . . .

[1] Clark v. Shannon, 1 Nev. 477; Nev., Act of 1861, §§ 4–7.

"Said selection shall be made by either the husband or wife or both of them, or other head of a family, declaring their intention in writing to claim the same *as a homestead.* Said declaration shall state . . . that they . . . are, at the time of making such declaration, *residing with their family, or with the person or persons under their care and maintenance, on the premises*, particularly describing said premises, and that it is their intention to *use* and claim the same *as a homestead.*" . . .[1]

There is a provision that when indivisible property including the homestead shall be subject to execution, five thousand dollars shall be reserved to the debtor from the proceeds.[2]

By simple inspection, the professional reader will see that there is nothing exempted but the homestead. Its appurtenances are a part of it, and consist only of out-buildings and such other things as are usual, and necessary to the purposes of the family. There is nothing further exempted by express provision. To find anything further implied would tax the keenest ingenuity.

Whether we take the word *homestead* as used in common parlance, or in its technical sense, we shall be unable to extend its meaning so as to include anything more than the family residence and its auxiliary appendages for domestic use, and the land belonging to the home, all constituting the premises repeatedly mentioned in the statute.

In common language, no one would point to a merchant's business house, or to a public livery establishment, and say: "That is my friend's homestead; that is his family residence." In legal language, no one would seriously say, pointing to such a house: "That is a *homestead* where the owner *resides with his family* as the statute requires."

There is not a word or an implication in the statute which favors, in the slightest degree, the exemption of a business establishment. There is nothing which entitles the benficiary to the *maximum* of the monetary limitation, when his family residence and appurtenances and the land with it are worth less. When worth more, and not susceptible of being set apart, its owner may have the *maximum* from the proceeds, after

[1] Gen. Stat. Nev. 1885, § 539, from the Act of 1865, above noticed.

[2] *Ib.*, § 541.

execution. But this does not furnish any implication that a homestead worth less than that sum may be eked out with buildings not used as homestead — not occupied as such by the family according to the statute.

There is no room for construction, either strict or liberal, since there is no ambiguity, and the meaning of the legislator is plainly expressed, leaving nothing for the court to do but to follow the statute.

In the state where this construction was given, the profession will recognize the force of *stare decisis*, and take the law as expounded by the court. But as the same statute has been followed in another state, where it originated, without any interpolations by construction, what is the profession to understand in the other homestead states which have each authorized one homestead and required its occupancy by the family of the householder? It would seem that they ought not to give the construction, and its reasons, any extraterritorial influence. Especially would it seem so, when the views of the supreme courts of the two states are conflicting, so that both cannot be accepted as law throughout the country.[1]

§ 3. Dwelling and Business Houses as One Homestead Within the Maximum.

In one of the cases above cited,[2] it was held that the mortgage of a public livery-stable by the owner without his wife's joinder was null and void and did not estop him from claiming the property subsequently as exempt under the law exempting homesteads. It was said, by way of reasoning, that the statute exempted five thousand dollars' worth of property, though no part of it was pointed out to show that the homestead must reach the *maximum*, and the reader will look in vain to find it.

This is not recognized as law in another state where the limitation of exemption is the same, and the phraseology of the provision, on this subject, substantially the same.

[1] Even in Nevada, in cases where business places are not drawn in question, the decisions recognize that it is the home of the family, occupied as such, which is to be declared upon and recorded, that it may be exempt. Lachman v. Walker, 15 Nev. 422; Child v. Singleton, 15 Nev. 461; Smith v. Shrieves, 13 Nev. 303; Estate of Walley, 11 Nev. 264; Bank of San Jose v. Corbett, 5 Saw. 547.

[2] Clark v. Shannon, 1 Nev. 477.

On the contrary, it is held that "the resident may make his homestead as small as he pleases, provided it be not so contracted as to show an intent to evade the law, by making it too small for actual use as a homestead." This was held under a constitutional exemption of "any lot in any city, town or village, with the dwelling and appurtenances thereon, owned and occupied by any resident of this state, and not exceeding in value five thousand dollars" . . . which should "not be incumbered in any manner while owned by him."

Besides his homestead, the householder had a brewery which he alone mortgaged, declaring in the instrument that it was not a part of his homestead. Afterwards he sought to hold it, and his dwelling too, as exempt — both within the limit — then five thousand dollars. He discordantly meant to keep the money he had obtained by the mortgage and repudiate the mortgage, as the mortgagor in the other case successfully did. But the court denied him such double-dealing, declared that there was no homestead *minimum* of value fixed by law, and recognized his right to dispose of his brewery without his wife's joinder, as it was a business establishment constituting no part of his messuage.[1]

Where the wife is a beneficiary to the highest amount of the exemption if the homestead is worth so much (as she generally is), her husband alone cannot mortgage or sell any part of it without her consent. But a commercial building, a brewery or other business edifice, is not a part of the homestead, and does not become such when the family residence and its land and appurtenances fall below the extreme allowance. If not a part of the homestead, the husband alone may mortgage it. Any question concerning the restraint of his *jus disponendi* must be strictly construed.

A different view of the homestead grant has been taken. The law having authorized the exemption of a limited quantity of land with the dwelling occupied by the beneficiary, it was argued: "No limitations were imposed by the legislature upon the use which should be made of the homestead of eighty acres, or of one lot, provided only it was a dwelling

[1] Klenk v. Knoble, 37 Ark. 298, 302–7; Ark. Const. of 1868, art. 12, §§ 2, 3, since superseded; Tumlinson v. Swinney, 22 Ark. 400; Frits v. Frits, 32 Ark. 327; Lindsay v. Norrill, 36 Ark. 545.

place of the party claiming the exemption:" therefore, "as to the balance, beyond what was required for the site of his house, the claimant seems to have been left free to allow it to remain uninclosed, unimproved, vacant and idle, or to *devote it to any use which he might choose.*"[1]

§ 4. Means of Family Support.

The scope of the exemption of the homestead has been enlarged by construction so as to include the beneficiary's "usual means of employment for the support of his family." In illustration it was said that a mill-owner, who has a farm attached to his mill, can hold both his residence and mill exempt, but not the farm, if his cultivation of it is a business secondary to milling. This ruling was with reference to a rural homestead allowed by statute to consist of not more than one hundred and sixty acres. Only such portion of the tract as was ancillary to the business of lumbering, in connection with the saw-mill, was decided to belong to the homestead, and to be exempt.

Justice Bradley, in delivering the opinion, said, of his own exposition: "The amount of property which the necessary interpretation of the exemption will sometimes embrace will undoubtedly appear as a great hardship and injustice to creditors. It is a great stride from the state of things in which the sanctity of a debt induced the legislature not only to take from the debtor all his property, but even his liberty itself. It may be a question whether it is not carrying the principle of exemption too far for the public welfare. It is true that the farmer without his farm, the blacksmith without his forge, the miller without his mill, the trader or business man without his shop, in fine, any citizen without his place to work and labor or pursue his ordinary calling, is deprived of the power to support himself and his family, and becomes a burden instead of a help to the community. These establishments or places of labor or occupation are respectively adjuncts of a man's homestead, and, within the intent and meaning of the constitution,[2] form a part of it. Whether the provision is

[1] Kelly v. Baker, 10 Minn. 124; Palmer v. Hawes (Wis.), 50 N. W. 341; Baker v. The State, 17 Fla. 406. *Contra:* Casselman v. Packard, 16 Wis. 115.

[2] Of Florida.

politic or impolitic, is a question with which the courts are not concerned. . . . The mill, in the sense of the constitution, is appurtenant to, and part of, the debtor's homestead. If it be objected that the value is unreasonably great, we answer that the constitution prescribes no limit of value and the courts cannot prescribe one."[1]

Considered as means of family support, are homestead crops exempt? Distinction should be made between crops growing on a homestead and those which have been gathered and thus separated from the soil. While the former take the character of the land as to exemption,[2] the latter do not.[3] The non-exemption of gathered crops is not, however, universally recognized.[4] And even though crops be exempt, it is too late to claim the benefit after they or their proceeds have been surrendered to creditors.[5] Crops are the produce of the homestead soil. What is produced by the householder's skill, without the aid of the soil, is not exempt.[6]

A man and wife having joined in giving a deed of trust on their homestead and their cotton crop, the husband was sus-

[1] Greely v. Scott, 2 Woods, 657, *660.*

[2] Alexander v. Holt, 59 Tex. 205. *Questioned:* Sloan v. Price, 84 Ga. 172.

[3] Coates v. Caldwell, 71 Tex. 19; Lee v. Welborne, 71 Tex. 500; Horgan v. Amick, 62 Cal. 401; Bank v. Green, 78 N. C. 247.

[4] Marshall v. Cook, 46 Ga. 301; Wade v. Weslow, 62 Ga. 562.

[5] A head of family, having a homestead, voluntarily paid to the sheriff proceeds of cotton raised on it towards satisfying a judgment against him and others. Afterwards a rule was taken to distribute the money so as to have it applied also to another judgment. It was too late for him to recall it after the sheriff had already paid it over. Cloud v. Kendrick, 82 Ga. 730. A crop raised by the debtor, by use of exempted property and his own labor, cannot be subjected to execution in Georgia for prior debts. Kupferman v. Buckholts, 73 Ga. 778; Wade v. Weslow, 62 Ga. 562; Johnson v. Franklin, 63 Ga. 378.

[6] The Georgia Code, § 2026, exempts from levy and sale (except as provided for in the constitution), "all produce, rents or profits arising from homesteads in this state." Expounded: "To be exempt they must have been 'produce, rents or profits' arising directly from the use of the homestead or exempted property, such as crops and rents . . . :" so "debts due a physician, in the earning of which his skill was the principal factor; and the use of a . . . house set apart as a homestead; and riding an exempted horse in paying his physician's calls, were mere incidents;" the debts "were not exempt from garnishment. . . ." Staples v. Keister, 81 Ga. 772, in which Wade v. Weslow, 62 Ga. 562; Johnson v. Franklin, 63 Ga. 378; Kupferman v. Buckholts, 73 Ga. 778, are distinguished.

tained in using the cotton to pay a creditor other than the holder of the deed; and it was held that his wife could not prevent such disposition of it on the ground that it should have been applied to the payment of the debt secured by the deed of trust.[1] It would seem that the creditor, holding the deed of trust, had just right to complain of the application of the crop to the payment of another creditor.

The usufruct of homestead property is not exempt because that which produces it is so. In the absence of any law creating the exemption, the income of such property, when it has taken independent form, is liable to the creditor.[2] Were a different rule to prevail, the income "could be capitalized and recapitalized from that one nucleus to the building up of collossal fortunes in defiance of debts past and future. And what a door would be opened to frauds and perjuries, as each owner of a homestead would be tempted to allege and establish that all his estate, no difference how acquired, was but the increment of his own, or the homestead of some remote ancestor!"[3]

When upon the death of their father his homestead land belongs to his children, the rent which falls due after the death is not a part of his estate. It belongs to the children and is not liable for his debts.[4] The owner of the reversion is entitled to rents falling due after it has become vested.[5]

§ 5. Dual Homesteads — "Business Homesteads."

Under the constitutional provision: "The homestead in a city, town or village shall consist of a lot or lots, not exceeding in value five thousand dollars at the time of the designation of the homestead, without reference to the value of any improvements thereon; *provided*, that the same shall be used for the purpose of a home, or as a place of exercising the calling or business of the head of a family,"[6] it is held that an

[1] Vaughn v. Powell, 65 Miss. 401.

[2] Citizens' National Bank v. Green, 78 N. C. 247.

[3] *Ib.*

[4] Porter v. Sweeney, 61 Tex. 213.

[5] Burden v. Thayer, 3 Metc. 76; Bank of Pa. v. Wise, 3 Watts, 396; Martin v. Martin, 7 Md. 376; Story's Eq. 475; Wood's Landlord and Tenant, 476; 1 Wash. Real Prop. 127, 519; 2 id. 289. *See* Linch v. Broad, 70 Tex. 93, and cases there cited.

[6] Constitution of Texas, 1876, art. XVI, § 51.

urban homestead may embrace one lot or more where the householder exercises his calling, in addition to the lot or lots where his family resides; that the disjunctive form of the *proviso* must be construed to mean, not that there is one exempt property which must be used either as a home or as a place of business, but that there may be two properties,—one for residence and the other for business; that these need not be contiguous but may be entirely detached from each other. A different construction, said the court, "would involve us in inextricable difficulty, or lead to results which would evidently contravene the object sought to be secured by the constitution, as is manifest when considered in connection with the previous legislation and decisions of this court. . . . When it became apparent that this court did not regard the place of business of the head of the family, if entirely distinct and separate from their home, as within the exemption by reason of its use, then there was an enlargement of the homestead exemption as we find it in the present constitution. . . . If the clause in the proviso had been connected by the conjunction *and*, . . . it would have had an entirely different effect from what we think was intended, or lead to absurd results. In that case there would have been no exemption of an urban homestead unless there were lots used for both a home and a place of business."[1]

The facts of the case in which this construction was made were as follows: Menke was a merchant who resided with his family on two lots containing his dwelling-house, a garden, a stable and the usual appendages of a family residence. He had a storehouse besides, situated on two lots which fronted the court-house square of the town, entirely disconnected from the other property. Being about to make an assignment as an insolvent, he erected a new brick store-house on his business lots, in close proximity to the store he was then using, moved his goods into it, and employed his old store-house as a warehouse. As all four of the lots, *minus the improvements*, did not exceed five thousand dollars in value when first designated, all were held exempt.

The homestead with its appurtenances, and the business es-

[1] Miller v. Menke, 56 Tex. 539, 549.

tablishment with its appurtenances — the new brick store and all improvements (however much the property was enhanced in value by the improvements), were free from forced sale by creditors.

The court, in showing that there may be two exempt establishments — one a homestead and the other a business place — both, though not necessarily contiguous, enjoyed by one person — said that the home may be abandoned and the other retained, or *vice versa*. Ceasing to use a store for business purposes would be abandonment just as ceasing to live in the dwelling would be. It will be seen that one of the conditions or *indicia* of homestead differs in the two cases. Not family occupancy but business use is the criterion when a merchant claims his store-house, or the manufacturer claims his factory, as exempt.

Rural homesteads, consisting not only of family dwellings but the land on which farmers pursue their calling, must be in family occupancy. This is a general rule which is still observed where separate "business homesteads" (as they are paradoxically called) are recognized in towns without this requirement.

If, under the constitution whose construction has just been noticed, the family homestead should be terminated by abandonment, could the "business homestead" still be maintained by use for the support of the family? There is no answer to this question in the opinion and decision making the construction, above cited. The better answer would be in the negative. The right of exemption ought not to continue after the home has been broken up, since the policy of homestead exemption is to conserve homes for the good of society and the state — not to enrich one class of citizens at the expense of another.

The exempt business establishment, under this view, would be deemed subordinate to the protected home, dependent upon it for a right to exist, appendant to it as means for supporting the family. But in the state to which the decision above mentioned applies, the constitution makes either home-occupancy or business-use sufficient; at least, so the court construed it. But, in either case, the benefit is confined to heads of families.

In the language of Judge Walker, in a case following that above considered,[1] in the same court, speaking of the constitution of 1876: "Now, for the first time in our history, the head of a family may possess a dual homestead, disjoined and isolated as respects locality of lots and houses within a town or city, and each of them dedicated to distinct uses. The one, domestic — the hearth-stone home; the other, the industrial home, or place of work or of business for the head of the family. The one, his 'vine and fig tree;' the refuge of the family against the misery and desolation which the homeless know; the other, a sea-wall uplifted against the tide and waves of poverty and disaster, securing to him a spot of earth where he, and his family after him, may toil and earn their bread." This duality of homestead and other provisions of the constitution are declared in the same opinion to be "in advance of similar benefactions hitherto extended under our former constitutions and laws, and are doubtless far in advance, in the characteristics named, of the laws of any people on the globe."

While the court denies that the object is to afford protection to the capital which is invested in business, or to encourage its extension and increase, it admits that such results may ensue.

The point of the decision, however, is that there cannot be triplicate homesteads. A druggist had his exempt domestic home situated on two acres of ground in the town of Hillsboro; his drug-store, on other lots, situated in a different part of the town, which was his business homestead; and he claimed another lot or lots where his warehouse stood detached from the store, as also exempt.

Under the section of the constitution already quoted, why not? There is no limitation of the number of lots, and it had long been the law, and yet is, that the lots need not be contiguous. But probably the court wisely saw that the allowance of triple homesteads would soon be followed by claim for quadruple ones. The reason assigned for holding the warehouse not exempt was that the facts did not show that the storing of goods in it was a use of it in the exercise of the druggist's business. Suppose the facts had shown it?

[1] McDonald v. Campbell, 57 Tex. 614, 617–18.

Suppose they had shown forty different houses and lots so used?

A more general reason given is as follows: "Whilst the law means to allow the head of a family, exempt from execution, one or more lots where he may exercise his vocation and conduct his business, its scope is not intended to extend so far as to protect from execution a lot or lots in excess of the lot or lots on which the vocation or the business of the head of the family is followed, even though such extra lots might be actually used in a way which was incidentally useful or profitable to the business which was being followed." [1]

In the case cited just before this one, a warehouse was held exempt, though not differing from the one in this case except that it was on a lot adjoining the store held exempt as a business place — a difference not material, since the law does not require that lots must be contiguous in order to be exempt, as has been already remarked. The allowance of both residential and business homesteads is confined to one state.

§ 6. Dual and "Business Homesteads."

As this new departure — the allowance of dual homesteads — is important, further construction of the section under consideration [2] should be noticed. The designation therein of the business homestead as "a place to exercise the calling or business of the head of a family" is held to be employed in a very broad sense. The words *calling* and *business* are held to "embrace every legitimate avocation in life by which an honest support for a family may be obtained. The former was probably used in the sense of 'profession' or 'trade,' which would embrace all such employments as by course of study or apprenticeship in any of the learned professions, liberal arts, or mechanical occupations, a person has acquired skill or ability to follow. . . . The latter word was probably used, in contradistinction to the other, to denote . . . 'that which occupies the time, attention and labor of men for the purpose of profit or improvement.'" [3]

An illustration is found in a later case. A firm consisting

[1] *Id.*, p. 617.

[2] § 51, art. XVI, Constitution of Texas, 1876, already quoted.

[3] Shryock v. Latimer, 57 Tex. 674.

of three members, owning lots not exceeding the limitation in value, erected thereon a factory for the manufacture of cotton-gins. In connection with the factory, they established a general mercantile business. One member took charge of this, another superintended the factory in which many operatives were employed, while the third traveled in the interest of the firm. At times, each had worked in the factory.

The point was made by counsel that as the firm, manufacturers of gins, had in their employment many persons and large and expensive machinery, such a place of business was not, in legal contemplation, the place of business for the head of a family, nor was such machinery to be considered as tools or apparatus of trade, and that therefore the machinery was not exempt.

The court said the only limitations, by the constitution of 1876, are value at the time the lots were designated, and use in the calling or business of the head of a family; and added: "Neither the value of the improvements placed upon it [the ground], nor the nature and extent of the operations carried on there, will subject it to forced sale; and all the machinery annexed to the freehold in such manner and under such circumstances as to become a part of the realty would follow the title of the freehold and be exempt with it as parts of the homestead."[1]

One of the partners having ceased to work in the factory and having given his time to the mercantile establishment was held to have abandoned the business homestead; but the others continued and enjoyed protection in it, though each may have had a domestic homestead of his own, in addition.

The case shows that under the coupled terms, *calling* and *business*, the most extensive manufacturing establishments may claim protection from creditors; that the most costly machinery, worth ten times the monetary limitation as to the value of the ground, is protected when attached to the realty; and that not individuals alone, but firms may become beneficiaries of the exemption provision; and that abandonment by one member of a firm does not affect the rights of the other members. Corporations, as such, have not been held capable

[1] Willis v. Morris, 66 Tex. 628; Low v. Tandy, 70 Tex. 745.

of becoming homestead beneficiaries; they cannot even have "business homesteads," since they, as artificial persons, cannot be heads of families. They may be included among beneficiaries, however, at the next advance in the progress of homestead exemption.

Partners, having their office in a large building of which they owned a fourth, were denied their claim of their interest as a business homestead,[1] mainly because it was not adapted to their particular calling.

The proprietor and keeper of a hotel had his family living with him in the establishment. After a while he built a storehouse, moved with his family into the rear of it, and conducted the grocery business therein. Later, his wife carried on millinery in the front part of the store. On the death of the husband, his wife claimed the entire property — hotel and store — as homestead. She succeeded. But when, afterwards, she quit her business and went to live with her adult son elsewhere, taking the minor children with her, and mortgaged the whole property, she lost the homestead privilege.[2]

The two establishments were treated as a "residence homestead" and a "business homestead." "We think," the court said, "both pieces of property were homestead, and on his

[1] Van Slyke v. Barrett (Tex.), 16 S. W. 902. The court said, after stating the facts: "The building may have been adapted to use as a store or a bank, but not to the trade of these cattle dealers. Shryock v. Latimer, 57 Tex. 674. The laws and the constitution will not force a homestead out of every interest in property whether it suits the calling or occupation or not. Many illustrations might be given where there would be an interest in a building and a calling to which a business homestead could attach, and yet it might be impossible, by decree of the court, to set apart such an interest as a homestead for the business. A person claiming the benefit of the law must come within the reach of the law to secure its protection. It cannot be pretended in this case that Curtis & Atkinson were using the whole, or even one-half, of their property rights in the building. They were, at best, sharing with another one room on the upper floor of a building, in which they had a one-fourth interest. Could it be said that their entire interest would be exempt? We think not. The law of homestead rights could not be made to apply to such a case. The parties have brought themselves within its provisions. This being our view of the case, no other question need be considered. The judgment of the lower court ought to be reversed, and the cause remanded."

[2] Harle v. Richards (Tex.), 14 S. W. 257; 78 Tex. 80.

[the owner's] death, descended and vested one-half in the widow and the other half in the children, subject to the right of occupancy by the widow and minor children.

"To entitle the store-house to protection as a *business homestead* separate from a residence, the head of the family must have a calling or business to which the property is adapted and reasonably necessary; and such property must be used as a place to carry on the calling or business of the head of the family, and is protected so long as so used.[1]

"When the widow closed her millinery business and ceased to use the store-house for business purposes and went to live with her son, we think it was thereby abandoned and divested of its homestead character and became liable to forced sale for debts and subject to partition."[2]

If living in the "business homestead" saves a "residence homestead" from the consequences of abandonment when it is leased for hire, would the converse be true? That is, would the doing of business in the "residence homestead," with the other rented out, save the latter from the consequences of abandonment as a "business homestead?" If not, why?

Leasing out property not needed for homestead purposes exposes it to liability;[3] and there should be no difference, whether the property be claimed as homestead of one class or of the other.

§ 7. "Business Homesteads"—Increase of Exemption.

The raising of the protection from naked land worth two thousand dollars to the same sort (i. e., vacant lots) worth five thousand, by the provision of the constitution under consideration, is not retroactive. It does not cover, with the mantle of protection, any additional ground, if that which was worth two thousand dollars when designated under the old constitution is now worth five thousand dollars under the new, without counting the value of the improvements, which may be worth many-fold more.[4] For instance: A beneficiary owned

[1] *Id., citing* Pfeiffer v. McNutt, 74 Tex. 640.

[2] *Id.*

[3] Blum v. Rogers, 78 Tex. 530.

[4] Actual use for homestead purposes, not for business purposes, was required by the successive Texas constitutions of 1845, 1856 and 1869. Several town lots might constitute a homestead, but they must all be used

six stores, two of which he occupied with his own mercantile business. He also owned a dwelling situate on four lots of ground, which, without the residence and appurtenances thereon, was estimated at two thousand dollars in 1859, but at five thousand dollars in 1877. The lots containing the stores which the beneficiary occupied were estimated at fourteen thousand dollars exclusive of the stores and all improvements.

It was contended that all the vacant lots were worth no more when first acquired than the allowance under the present constitution, and that the value then should be taken; that the four lots containing the family residence were then worth no more than two thousand dollars; so, more property should be set apart as exempt to make up the additional three thousand dollars, under the constitution as it now is. But the court declined to take this view.[1]

The term *business homestead* seems to be a misnomer. If, because a factory or a merchant's store-building is used to support the owner's family, it may be designated by this term, why may not an exempt chattel employed for the same purpose be so designated? Domestic animals are exempted to a prescribed number in most of the states, because they contribute to the support of the owner's family — but we do not call a horse a homestead.

§ 8. Alternate Homesteads.

The idea of duality of homestead, already advanced, may have given rise to that of alternate homesteads. A beneficiary had two improved lots, and he and his wife occupied sometimes the one and sometimes the other. Had one been claimed as the domestic and the other the business place, both might have been protected under the cases which have already passed under brief review; but such was not the case. The question was whether the property under seizure was exempt. If the other was, that could not be unless one of the two was

for that purpose. Iken v. Olenick, 42 Tex. 195. *Contra*, Hancock v. Morgan, 17 Tex. 582. The constitution of 1876 first included business establishments with homesteads, which cannot be conveyed by the husband alone unless previously abandoned as a business place. Miller v. Menke, 56 Tex. 539; Inge v. Cain, 65 Tex. 75.

[1] Linch v. Broad, 70 Tex. 92, *citing* McLane v. Paschal, 62 Tex. 102.

used for business purposes and therefore exempt. It so happened that the beneficiary and his wife were living on the seized lot at the time the levy was made. The court decided that they held that by actual occupancy, and so the seizure had to let go its grip. But had the other property been abandoned by a temporary removal only?

It will be seen that the alternate occupancy of two homes may lead to great abuse. It is permanent occupancy of neither, and no homestead would be allowed in either, under the laws of the states generally. There seems to be no provision, in those of the state where this case arose, which countenances alternation of homes, though permanent exchanges are permissible and not uncommon. Nor did the court hold that habitual alternation is tolerable in that state. It merely held that the property actually occupied by the man and wife, at the time execution was levied upon it, was exempt as their homestead, claimed by them as such, though they had been living, sometimes at that place and sometimes at another.[1] For the doctrine of duality of homestead does not allow two domestic places to be exempt as homes. It is confined to two places, one occupied by the family and the other used by the head of it in his calling or business.

§ 9. Business Uses as Indicia.

The owner of both may enlarge either or both by improvements without incurring liability to creditors, though the increase of value take it far beyond the monetary limit at the time of the homestead designation. But he cannot erect a building adjoining his business house, and lease it to tenants without exposing it to liability to forced sale. The *indicium* — use by himself in his calling or business — would be wanting.[2]

"Use, for the purposes of a home," being one of the constitutionally required conditions to the exemption of real prop-

[1] Ingle v. Lea, 70 Tex. 609.

[2] Hargadene v. Whitfield, 71 Tex. 482. 490, *citing*, as to use: Wynne v. Hudson, 66 Tex. 1; Shryock v. Latimer, 57 Tex. 674; Medlenka v. Downing, 59 Tex. 39; Iken v. Olenick, 42 Tex. 201. To which citations may be added: Pfeiffer v. McNatt, 74 Tex. 640. *See* further, sec. 51 of art. 16 of Texas Constitution; Rev. Stats. of Tex., arts. 2336. 2004, 2009; Wright v. McNutt, 49 Tex. 425; Gilliam v. Null, 58 Tex. 305; Cannon v. Bonner, 38 Tex. 490; Baylor v. Nat. Bank, 38 Tex. 454.

erty, in favor of the head of a family, was construed to refer to lots other than those on which the family resided.[1] But he could hold two lots as exempt when his store covered part of both as his business establishment, and also a warehouse attached thereto, the court said. Liberal construction of the term, "place for the exercise of the calling or business," was expressly recognized by the court. And (presumably under the same liberality) it was held that ceasing to use the store, by reason of failure in business and making an assignment, was not abandonment so long as the merchant meant to resume business there whenever pecuniarily able to do so, whether in the former line or any other.[2]

It has been held that a partner may have homestead right in his interest in partnership realty; that such interest may be secured from forced sale as a part of his homestead, when the partnership firm is solvent; that his occupancy of such property as his place of business is such use as will be deemed a destination of it as homestead; and that his creditors, himself and his partners cannot impose any lien upon this interest as a business homestead of the partner, except for purchase-money and improvements.[3]

A merchant's place of business was on a lot different from those on which he lived. He owned an undivided interest in the business lot. The cessation of his business upon his death did not divest his interest of its exemption character. That interest passed to his heirs, and an allowance, in lieu of homestead, was due to his widow and minor children.[4]

"Property used by the head of the family for carrying on the business he pursues for the support of his family is just as much a part of the urban homestead as the urban residence; and when the homestead character attaches it continues until voluntarily abandoned. . . . To be an abandonment that would subject such property to seizure and sale, there must be a voluntary . . . closing of the business. . . .[5] Being

[1] Axer v. Bassett, 63 Tex. 545. *See* Railway Co. v. Winter, 44 Tex. 597; Liverpool Ins. Co. v. Ende, 65 Tex. 118; Ingle v. Lea, 70 Tex. 609.

[2] Hargadine v. Whitfield, *supra;* Gassoway v. White, 70 Tex. 475; Bowman v. Watson, 66 Tex. 295.

[3] Swearingen v. Bassett, 65 Tex. 267.

[4] Clift v. Kaufman, 60 Tex. 64; McDonald v. Campbell, 57 Tex. 615; Mabry v. Ward, 50 Tex. 411; Henderson v. Ford, 46 Tex. 628; Pryor v. Stone, 19 Tex. 371.

[5] Clift v. Kauffman, 60 Tex. 64;

Harter's [the homestead holder's] place of business at the time of his death, *we think it immaterial* that the business was conducted in the name of Weaver. . . . Conceding there was fraud on his part in resuming and conducting the business in the name of Weaver, we cannot see how that could be made to operate as an estoppel against appellee's homestead claim. The property being homestead, and protected against creditors, could not be the subject of fraudulent dealing as to creditors. . . .[1] Whatever right appellants had, remained unchanged by reason of the business being resumed and carried on in the name of Weaver.[2] Harter had obtained his stock of goods on credit. Those who furnished him with the goods required that *the business should be so conducted to protect it against the demands of Harter's other creditors.*" Such use of the homestead — to protect non-exempt goods from creditors — was held not fraudulent as to creditors.[3]

A debtor whose business had ceased at his "business homestead" more than a week before, sold the place to a purchaser who knew that the creditors of his grantor were about to attach it. It was held that there had been no abandonment, and that the sale was without fraud.[4] But the leasing of a store-house from year to year is abandonment of the homestead right.[5]

An insolvent's "business homestead" being attached, he and his wife conveyed it to their son. No attachment lien was created, for the constitution ordains that "no mortgage, trust deed or other lien on the homestead shall ever be valid except for purchase-money therefor or improvements made thereon."[6] There is no difference made between the part of the homestead used by the family and that used for business.[7] Such liens being void, they are not vitalized by the subsequent divestiture of the homestead character.[8] The defendant may plead his exemption against such attachment and prevent the

Cline v. Upton, 56 Tex. 320; Griffie v. Maxey, 58 Tex. 214.

[1] *Citing* Beard v. Blum, 64 Tex. 59.

[2] *Citing* Blum v. Merchant, 58 Tex. 400.

[3] King v. Harter, 70 Tex. 581.

[4] Scheuber v. Ballow, 64 Tex. 166.

[5] Oppenheimer v. Fritter, 79 Tex. 99; Duncan v. Alexander (Tex.), 18 S. W. 817.

[6] Const. of Texas, art. 16, sec. 50.

[7] Willis v. Mike, 76 Tex. 82.

[8] *Ib.;* Inge v. Cain, 65 Tex. 80.

maturing of the lien by judgment — otherwise he risks being treated as having waived his exemption.

A gambling-house is not a "business homestead," though conducted by the head of a family.[1] For the word *lawful* must be understood to qualify the term used, so that only lawful "business homesteads" are exempt; just as the word *family*, when occurring in statutes, means a legally constituted family.[2]

§ 10. Several Business Callings.

Suppose the head of a family has more than one calling and carries all on in his business house, will that be countenanced by the courts under the section of the constitution copied above?

An instance is given of one who had several callings, pursuing all of them for a livelihood. He was a notary, conveyancer, postmaster and mayor of his town. The court, in treating his peculiar case, said: "We cannot see that this fact (multifarious employments) should militate against his rights to have some place protected by law from forced sale where he can do business and support his family. It may be asked, however, should he have more than one such place, or should he have several places protected for several avocations? Could he legally claim one house exempt for the transaction of his business as mayor and deputy postmaster, and another as a notary public and conveyancer? We must answer this question in the negative. But we are met by the fact in this case that these two houses are connected by archways through the partition wall running between them, from which it is suggested that there are not two distinct places used in the exercise of the several callings. We do not think that the fact that the houses were connected by these openings should necessarily control the case. Suppose a man should in this way try to protect a block of business houses by doing a conveyancing business in one corner of them. This would be an absurdity; it would be too unreasonable to admit of discussion. The law is intended as a protection to a fair and reasonable claim falling within its provisions; not an unfair and unreasonable claim." The conclusion was that the claimant

[1] Tillman v. Brown, 64 Tex. 181. [2] *Ante*, ch. III, § 8, p. 7.

should be protected in one of the buildings only, where he might prosecute more than one calling.[1]

Where unity of homestead is maintained but shops allowed thereon in which heads of families prosecute their callings, which is generally allowed in all the states, there can be no objection that a lawyer is also a notary and conveyancer, attending to the three callings in his one office in his residence or on the home premises; that an insurance office and a real estate office are combined in one and employed by the householder in the prosecution of two agencies; that a barber who is also a cupper (as formerly it was common), has his shop in his homestead yard, and the like.*

[1] Pfeiffer v. McNatt, 74 Tex. 640.

*See, further, on topics slightly touched in this chapter, more extended treatment in others:

On exemption of crops, ch. XXV, § 7.

On exemption of partnership interests, ch. IV, § 14.

On claiming in attachment cases, ch. X, § 7; ch. XXIII, §§ 17–19; ch. XXVIII, §§ 1, 2, 8.

On fraud upon creditors, ch. XVI.

On limitation to one homestead, ch. VII, § 1.

CHAPTER IX.

QUASI-ESTATE OF HOMESTEAD.

§ 1. Qualification of the Legal Title.
2. Defeasible but Indeterminate "Estate."
3. Similar to Dower.
4. Right of Occupancy Called an "Estate."
5. The Right and the Estate Compared.
6. The Right Not Strictly an Estate.
7. New Features but Not New Title.
8. Trust Estate.
9. Qualified Title.
10. Exemption and "Estate of Homestead."

§ 1. Qualification of the Legal Title.

Estate of homestead is a term that has come somewhat into use, though it is eschewed by the courts in most of the states. If employed only in the sense in which we may speak of dower as an estate, meaning, for instance, that it is an estate for life, or for years, it may not mislead. If, on the other hand, we use the term as though it designated a new kind of estate distinguishable from those of freehold long established, we may create confusion if we do not lead to error.

The estate in fee may be qualified by restraint of alienation and of testamentary disposition, and may be clothed with certain immunities. The estate for life, of a widow, may be qualified or absolute; may be defeasible by remarriage or non-occupancy. The estate for years, of a minor, may be subject to conditions.

The qualifications or conditions, affecting the tenure, do not, in any case, constitute a distinctive "estate of homestead" to be classified among freehold estates as a new species. The privileges, accorded by law to the beneficiary claiming them, attach to any title by which he may hold — even to leasehold. Exemption of realty from forced sale does not differ in character from exemption of chattels from such sale; yet who would claim an *estate* in personal property? or consider it, therefore, analogous to an *estate?* Who would claim homestead estate in his household goods?

Paradoxical as it may seem, one may have a home in movable property, such as a house on wheels, a wharf-boat in which a family permanently abides — perhaps in a floating dwelling moored from time to time to the shore — possibly in any home having no "local habitation." Take a house on wheels; there can be no "homestead estate" in it, but it may be exempt under the homestead law, though it is a chattel. "House is necessarily embraced in the word homestead.[1] If the head of a family owns a house and no interest or estate in the land on which it stands, the house is a chattel. If he occupies it with his family, it is their home. He may be compelled to move it from one lot to another as fast as legal process can oust him, still, though ambulatory, unsatisfactory, and in all its appointments mean; though it advertises the thriftless poverty of its proprietors, and is a caricature of the princely possibility of the exemption laws, it is the home of a family, and is embraced in the spirit and purpose, if not the letter, of the constitution."[2] Such a novel, migratory, chattel home might exist in any state, and would be protected under the homestead laws of several, even perhaps of some which recognize the homestead right as a peculiar and unique "estate of homestead." Its introduction here may serve to show that homestead is not always an estate of any kind.

But it is said in the same state in which the above decision was rendered: "The homestead right when fixed is an estate in the land — it is more than a mere privilege of occupancy. The land on which the estate has been fixed is exempt from execution, nor can it be a subject of mortgage by its owner. The creditor has no rights in it nor to it as a security; nor is he defrauded by the debtor holding it or by any disposition he may make of it."[3]

What kind of an estate in land? It is one in fee, or for life, or for a term, or at will: not a new kind of estate in land. The estate of homestead has no independent existence, apart from the title.[4] However, it *resembles* an estate in some respects: hence the title of this chapter.

[1] Franklin v. Coffee, 18 Tex. 417. *See* Scott v. Dyer, 60 Tex. 135.

[2] Cullers v. James, 66 Tex. 498.

[3] Hargadine v. Whitfield, 71 Tex. 482–*488*.

[4] Kitterlin v. Milwaukee Ins. Co., 134 Ill. 647.

§ 2. Defeasible but Indeterminate "Estate."

Under a statute exempting homestead to a certain value when owned and occupied by the beneficiary as his family residence, or rightfully possessed as such; and containing the exemption to his widow and minor children during their occupancy of the premises; and forbidding the husband to convey without joinder by his wife, it was held that these provisions created a new kind of estate, resembling freehold, defeasible but indeterminate.[1] It was held to be such a freehold estate "as will avail the tenant in defense to a writ of entry."[2] "If the tenant seek to defeat the suit by justifying his acts of possession under some right less than the entire freehold, he must specify the right or title upon which he relies, and disclaim it as to the residue."[3]

Such "estate of homestead" is not disposable by will;[4] and the court, so holding, evidently meant that the realty, on which the exemption right rested, would not be affected by last testament so as to defeat the exemption provisions for the widow and children of the testator. This is a qualification of the estate in fee, or for life, or for years, as the case may be: not a new kind of estate based on the limitation suggested. This restriction no more justifies the use of the novel term than others which usually accompany the homestead privileges.

In the language of Judge Gray: "A right of homestead under our statutes [those of his state] is a freehold estate defeasible, during the life of the householder, only by deed in which his wife, if any, or, if she is insane, her guardian joins, or by acquiring a new homestead. . . . The title in the homestead estate after the death of the husband and father, and so long as either the widow remaining unmarried or any child under age continues to occupy it, most nearly resembles

[1] Brettun v. Fox, 100 Mass. 235; Kerley v. Kerley, 13 Allen, 287; Woodbury v. Luddy, 14 Allen, 1; Silloway v. Brown, 12 Allen, 32; Dulanty v. Pynchon, 6 Allen, 510; Doyle v. Coburn, 6 Allen, 71; White v. Rice, 5 Allen, 73; Smith v. Provin, 4 Allen, 516.

[2] Swan v. Stephens, 99 Mass. 7.

[3] *Ib., citing* Dunbar v. Mitchell, 12 Mass. 374; Russell v. Lewis, 2 Pick. 508; Wheelright v. Freeman, 12 Met. 154; Johnson v. Raynor, 6 Gray. 107. *See* Castle v. Palmer, 6 Allen, 401; Parks v. Reilly, 5 Allen, 77; Walcot v. Knight, 6 Mass. 418.

[4] Brettun v. Fox, 100 Mass. 235.

that of husband and wife at common law under a grant to both of them, by which they become seized not of moieties, but of the entirety, *per tout et per my*, and neither could dispose of any part without the assent of the other. But, although the title in the homestead estate is in the widow during widowhood and in all the minors respectively while under age, the right of possession and enjoyment is in those only of the family who remain in the occupation of the homestead. This is the only construction which will reconcile all the provisions of the statute, and, while avoiding the anomaly and inconvenience of frequent changes in the title of the real estate upon any child's temporary departure from or return to the homestead, will carry out the purpose of securing one home for the family, free from the intrusion of creditors or strangers." [1]

Applying the principle, the learned judge says: "In this case, the only minor child having voluntarily left the premises and taken up her abode elsewhere with her guardian, though she still had a joint title with the widow in the homestead estate, yet, while not living thereon, had no right of possession, and could not maintain an action in the nature of trespass for an entry upon and occupation of the premises. We need not therefore consider the embarrassment attending the maintenance of such an action by a ward against her guardian. So long as the child resides elsewhere, the exclusive right of possession was in the widow, who might maintain an action against a trespasser. The guardian of the child had no better right to the use or occupation than any stranger. The result is that this action cannot be maintained in the joint names of the widow and the minor child. But the writ may be amended by striking out the name of the child, and the widow will thereupon be entitled to judgment against the defendant." [2]

It will be seen, by inspection of the foregoing, that estate in homestead, as distinguished from the estate out of which it is carved, is "the right of possession and enjoyment" "in

[1] Abbott v. Abbott, 97 Mass. 136, *citing* on the nature of the joint possession, 2 Bl. Com. 182; Shaw v. Hearsey, 5 Mass. 523.

[2] *Ib.*, 139, 140, *citing* on trespass for entry, French v. Fuller, 23 Pick. 104.

those only of the family who remain in the occupation of the homestead."

It will be seen, further, that distinction is made between "the title in the homestead estate" and such right of "possession and enjoyment." The non-occupying minor did not lose her title to the property by losing her "right of possession and enjoyment," nor did she lose her "estate in homestead."

The court does not seem to have thought that the minor had forfeited her estate in the homestead, for it is intimated that she might return at will, and that the widow was in possession — *one for all* — during the girl's absence. So this "estate" was something different from the "right of possession and enjoyment," and also different from title to the land. There might have been adult heirs who would have shared in the title to the land, but not in the "estate in homestead," nor in the "right of possession and enjoyment." There seems to be some confusion in these terms thus brought together. "The *right* of homestead" is first declared to be a "freehold estate defeasible during the life of the householder" except in certain ways; then we have the distinctions above pointed out, and finally it is said: "This is the only construction which will reconcile all the provisions of the statute."[1]

§ 3. Similar to Dower.

The right or interest which is awarded the widow as her homestead from her husband's estate is frequently called an "estate of homestead" by the court from which the above decisions are cited.[2] The sense is much the same as when we say "estate of dower," meaning the widow's life estate in her portion of her deceased husband's landed property, and not meaning a new kind of title. In some states she takes absolutely; in others she has no property right of homestead but only the personal privilege of occupancy which she cannot convey.

By a statute giving the right of homestead to a wife, which may be set off and assigned her during the life of her husband, it was held that such right does not constitute a vested

[1] *Ib.*, p. 139.

[2] Paul v. Paul, 136 Mass. 286; Cowdrey v. Cowdrey, 131 Mass. 186; Foster v. Leland, 141 Mass. 187; Mercier v. Chace, 11 Allen, 194; Monk v. Capen, 5 Allen, 146; Weller v. Weller, 131 Mass. 446.

estate or interest in the land, prior to the assignment; that her right is inchoate and similar to that of dower; that no estate technically rests in the wife; and that she has no such right or intent as can be set up in defense to an action of trespass *quare clausum fregit.* Under a former statute she could not set up such interest as an estate in land in defense of such an action, though the homestead had been assigned.[1]

In the case first cited above the court said: "The wife cannot be considered, at least while her husband lives, as having any vested estate in the premises until her homestead has been assigned her; till then she has merely an imperfect, an inchoate right, which is not assignable, and is not a vested estate. . . ." Evidently, the term *estate* is employed in the sense in which it would be used in speaking of dower. The court is not to be understood as implying that the wife, after homestead has been assigned her, would have any *estate* in it of a character distinguishable from estate for life. The qualifications imposed by the homestead law do not make her vested right a new and peculiar estate thus distinguishable; as the law conferring dower does not make such right an estate outside of the usual classification of estates. The wife's or widow's estate in the homestead, like her estate of dower, is a life estate of freehold; and the former may be an estate for years in leasehold, under some statutes.

The two statutes above cited have been thus compared, with reference to the homestead right of the widow. In the first: "Her interest was a mere personal right to occupy during her life. It was no estate that she could transfer to another." In the second: "The homestead right was secured to the wife, widow and children of every person owning and occupying a homestead, for and during the life of such wife or widow and the minority of such children. The homestead right thus exempted is not the entire estate in the homestead, but a life estate merely."[2]

[1] Tidd v. Quinn, 52 N. H. 341; Gen. Stat. N. H., ch. 124, § 1; Acts of 1868, ch. 1, § 33. *See* Gen. Laws N. H. 1878, ch. 138, p. 330; Barney v. Leeds, 51 N. H. 253; Judge of Probate v. Simonds, 46 N. H. 368; Bennett v. Cutler, 44 N. H. 70; Meader v. Place, 43 N. H. 307; Foss v. Strachn, 42 N. H. 40; Strachn v. Foss, 42 N. H. 43; Horn v. Tufts, 39 N. H. 484; Gunnison v. Twitchell, 38 N. H. 62; Fletcher v. State Bank, 37 N. H. 391; Atkinson v. Atkinson, 37 N. H. 434; Norris v. Moulton, 34 N. H. 397.

[2] Cross v. Weare, 62 N. H. 125, *quoting* from the above cited cases in 46

Yes, the widow has life-estate, the minor heirs an estate for years, both in the freehold estate; but there is no "estate of homestead" to be distinguished from these as a separate class; and the court did not so intend. The term "estate in homestead" has been thus frequently applied,[1] but not with strict propriety when there was no property right; a mere privilege.

§ 4. Right of Occupancy Called "Estate."

The right to the use and occupancy of the homestead is a substantial interest, which, by the laws of most of the states, inures to the benefit of the surviving members of the beneficiary's family. It is this substantial interest which is frequently called "estate in homestead."[2] It is usually an estate for life of the surviving spouse, and an estate for years of the minor children. It is generally made conditional — dependent upon occupancy, but may be absolute, and is so under several homestead systems, so that the holder of the estate is not confined to a particular use of it.[3]

The survivor stands in place of the deceased owner, having the same rights, and may retain or dispose of the estate in the property as the owner could have done, to the extent of that estate, when the statute declares him or her "entitled to hold" it, for the term designated. The meaning is "the right to possess the property in virtue of a legal ownership, and is not limited to an actual personal occupancy; and unless the term 'homestead' itself implies a condition, the tenure is that of an ordinary tenant for life. . . . The survivor takes a life estate in the homestead premises analogous to that of dower."[4]

and 52 N. H. *See* Gen. Laws of N. H. 1878, ch. 138, p. 330. *See* Batchelder v. Fottler, 62 N. H. 445, *overruling* Spaulding's Appeal, 52 N. H. 336.

[1] Otto v. Sprague, 27 Kas. 620; Citizens' Bank v. Bowen, 25 Kas. 117; Wicks v. Smith, 21 Kas. 412; Hixon v. George, 18 Kas. 253; Moore v. Reaves, 15 Kas. 150; Brandon v. Brandon, 14 Kas. 342; Helm v. Helm, 11 Kas. 19; Vandiver v. Vandiver, 20 Kas. 501. *See* Jenness v. Cutter, 12 Kas. 516; Herrold v. Reen, 58 Cal. 446, and cases therein cited. *See* Skouton v. Wood, 57 Mo. 380, modified by Poland v. Vesper, 67 Mo. 727.

[2] 1 Wash. on Real Prop. 342.

[3] Holbrook v. Wigbtman, 31 Minn. 168, 170, decided under statute since amended by Laws 1889, ch. 46, § 63 *et seq.*

[4] Holbrook v. Wightman, 31 Minn. 171–2, modifying Eaton v. Robbins, 29 Minn. 327, and saying: "Eighty acres, and the dwelling-house thereon, owned and occupied, etc., constitute the exempt homestead. This the law transmits to the survivor for

If a surviving husband or wife has an unconditional life estate in the homestead, the fee may be administered upon as a part of the decedent's estate when it is not in the survivor. This life estate, being unconditional, need not be occupied by minor heirs, nor even by the surviving spouse, in order to preserve its exemption. Being owned absolutely for life, it may be alienated at the will of the owner. The exemption privilege, however, would not pass to the grantee with the life estate. The title would be shorn of this immunity.[1]

The occupant owning a homestead may not hold the legal title, yet be a beneficiary within the provisions of the law.[2]

§ 5. The Right and the Estate Compared.

The study of the subject in hand will be greatly facilitated by reference to the decisions of a state which, under one statute, denied "estate of homestead," but, under a later one employing the term, maintain it. Of the homestead right, under the old law, it is now said:

"A right so precarious and restricted was not only to some extent anomalous in the law of real property, but it failed to meet the varied wants and necessities of homestead occupants and their families, growing out of the ownership of such an interest. Temporary removals, even, could not safely be made without giving color to the claim of abandonment; and, if the occupant did not happen to own the estate to which the right

life, not merely to retain it as a family residence, nor as long as it shall remain a homestead." Edwards' Lessee v. Darby, 12 Wheat. 206, 210; Dwarris on Stat. 179, *note;* Wilder v. Haughey, 21 Minn. 101.

[1] McCarthy v. Van Der Mey, 42 Minn. 189; Holbrook v. Wightman, 31 Minn. 168, both under old statutes; Laws 1876, ch. 37, since amended; Laws of 1889, ch. 46. By the homestead law of Minnesota, in Gen. Stat. 1878, ch. 68, § 1, the right of the wife and of minor children depends upon their occupancy. The Laws of 1889 affect the estate in fee so that it is no longer an asset of the decedent's estate to be administered, and cannot now be sold to pay debts due by the general estate of the decedent. The court said in deciding McCarthy v. Van Der Mey, speaking of a surviving wife's homestead right: "This estate is an absolute, unconditional estate for life. It is not qualified by or subject to a distinct or independent right of occupancy by the minor children. The survivor has the sole right to the use, enjoyment and disposition of such estate during his or her life. . . . We need not consider . . . the effect of the act of 1889."

[2] Jelinek v. Stepan, 41 Minn. 412; Hartman v. Munch, 21 Minn. 107; Wilder v. Haughey, 21 Minn. 101.

attached, however valuable he may have rendered it by improvements, and however imperative his necessities might require a change of residence, he could not sell or otherwise dispose of it to any one except the owner of the estate, who might allow him something or nothing for it, just as he saw fit. The homestead occupant thus circumstanced was placed completely at the mercy of the owner of the legal title.

"Again, the right of the surviving husband or wife to the homestead might be defeated altogether, by partition proceedings at the suit of the heirs, at that advanced period of life when the comforts of a home are most needed. With a view of remedying these inconveniences and manifest defects in the prior law, and placing the right of homestead upon a substantial and solid basis, the legislature, in 1873, passed an amendatory act, radically changing some of the provisions of the homestead law," providing "that every householder having a family 'shall be entitled *to an estate of homestead*, to the extent in value of one thousand dollars, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and *all right and title therein*, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided.' . . . Since this estate is measured exclusively by the value of the premises themselves, it follows that where the owner of the fee and the owner of the homestead is the same person, such owner cannot have any disposable interest in the premises independent of the homestead, where the total value does not exceed one thousand dollars; and since the homestead, in such case, comprises the entire interest, it follows that any conveyance by the owner which does not conform to the requirements of the statute with respect to the conveyance of homesteads, will be inoperative and void as to such homestead. . . .

"The right of homestead having been . . . enlarged into *an estate*, it follows that, like all other estates, it can have no separate existence independent of the title which constitutes one of its essential elements. Every owner of a homestead, under the present law, has no estate in the premises,

either in fee, for life or years, to the extent of $1,000. Where the head of the family, having an estate in fee in the homestead premises, dies, and the right of homestead devolves upon the surviving husband or wife by operation of law, a life estate is carved out of the fee for the purposes of such estate of homestead, and the heirs take a reversion in fee only, expectant upon the termination of such life estate. In like manner, where the homestead is cast upon the children of the family, an estate for years is, by operation of law, carved out of the fee for the purposes of such estate of homestead in the children. These rights, flowing from the present statute, are analogous to the common-law doctrines by which the inheritance of the heirs is subjected to the dower of the wife and the curtesy of the surviving husband." [1]

§ 6. The Right Not Strictly an Estate.

The right of homestead, under the older legislation, was not an estate in land. It was not alienable so as to become vested in a grantee. It was a right to enjoy a home free from liability to forced sale to pay the debts of the owner of the land,

[1] Mr. Justice Mulkey, for the court, in Browning v. Harris, 99 Ill. 460–2. Further to show that homestead *estate* now exists in Illinois, White v. Plummer, 96 Ill. 394, holding that a surviving wife has such homestead estate that she may rent it. Eldridge v. Pierce, 90 Ill. 474, holding that the homestead estate embraces the entire interest up to $1,000. Leupold v. Krause, 95 Ill. 440; Hartman v. Schultz, 101 Ill. 437; Watson v. Saxer, 102 Ill. 585; Rice v. Rice, 108 Ill. 199; The People v. Stitt, 7 Ill. Ap. 294; Ryhiner v. Frank, 105 Ill. 326; Kimbrell v. Willis, 97 Ill. 494; Cowdrey v. Hitchcock, 103 Ill. 262; Moriarty v. Galt, 112 Ill. 378; Raber v. Gund, 110 Ill. 581; Rock v. Haas, 110 Ill. 528; Trowbridge v. Cross, 117 Ill. 109; Lewis v. McGraw, 19 Ill. Ap. 313; Hotchkiss v. Brooks, 93 Ill. 387; Hartwell v. McDonald, 69 Ill. 293; Conklin v. Foster, 57 Ill. 104; Tomlin v. Hilgard, 43 Ill. 300; Trickey v. Schlader, 52 Ill. 78; McClurken v. McClurken, 46 Ill. 327; Jones v. Gilbert, 135 Ill. 27; Bliss v. Clark, 39 Ill. 590; Conroy v. Sullivan, 44 Ill. 451; Turner v. Bennett, 70 Ill. 263. By the Act of 1873 (Laws of Illinois), p. 99, it was enacted, "That every householder having a family shall be entitled to an *estate of homestead*, to the extent in value of $1,000, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence, . . ." and it was made exempt from sale for debt and from the laws of conveyance, descent, and devise, with certain exceptions. By the Act of 1887, it is provided that, "No release, waiver or conveyance of the *estate* so exempted shall be valid" unless in writing signed by the husband and wife, duly acknowledged, etc., or by order of court in case of a minor's releasing, etc.

with restraint upon his power of alienation. It was a right which could be waived, abandoned or terminated in modes provided by law. Whether the legal title was in the husband or the wife, the modes were applicable.

This mere right of homestead enjoyment was not an estate; it was not, technically speaking, a right or title or interest to real estate, or in it. The owner's title for years, for life, or forever, was not divested by subjecting it to the family right of homestead enjoyment. His title was not affected by the restraint upon alienation. Where he was allowed to sell, it must be subject to the homestead right, which was held to be an immediately irremovable incumbrance (unless the special mode prescribed by statute was employed), but which did not diminish his title.[1]

In some principal aspects, the older legislation, under which the courts did not recognize "estate of homestead," were not materially different from the present in which the term is nominally employed, and to which the courts attach importance. The act of 1851 provided: "There shall be exempt from levy and forced sale under any process or order from any court of law or equity, the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, to the value of one thousand dollars; . . . and no release or waiver of such exemption shall be valid unless in writing, subscribed" by husband and wife and acknowledged as in conveyances of real estate "as conditions to the alienation of the homestead."

The term "estate of homestead" is not employed, but terms nearly equivalent are used. The liability of any excess of value beyond the limitation is the same under both that and the present law.[2] It was liable to liens under both.[3] And by simple comparison of the two acts (that of 1851 and that of

[1] Warner v. Crosby, 89 Ill. 320, 326-8; Hewitt v. Templeton, 48 Ill. 367; McDonald v. Crandall, 43 Ill. 231; Coe v. Smith, 47 Ill. 225; Hartwell v. McDonald, 69 Ill. 293; Dawson v. Hayden, 67 Ill. 52; Finley v. McConnell, 60 Ill. 259; Boyd v. Cudderback, 31 Ill. 113; Pardee v. Lindley, 31 Ill. 174; Allen v. Hawley, 66 Ill. 164; Deere v. Chapman, 25 Ill. 498; Shackleford v. Todhunter, 4 Ill. Ap. 271; Brown v. Keller, 32 Ill. 151; Blue v. Blue, 38 Ill. 9.

[2] Watson v. Doyle, 130 Ill. 415; McDonald v. Crandall, 43 Ill. 231; Clark v. Crosby, 6 Ill. App. 102; Haworth v. Travis, 67 Ill. 302; Eldridge v. Pierce, 90 Ill. 478; Hotchkiss v. Brooks, 93 Ill. 386.

[3] Moriarty v. Galt, 112 Ill. 377.

1873) with each other, and both with intervening acts, it will be seen that there is no very radical change relative to the main subject, exemption.

Justice Davis, of the nature of the homestead right, said: "It cannot in an absolute sense be said to be an estate in the land; the law creates none and leaves the fee as it was before, but in substance declares that the right of occupancy shall not be disturbed while the homestead character exists. While this continues, the judgment creditor cannot lay his hands on the property, nor the husband sell it without the consent of his wife, and not then without an express release, on the part of both, of the benefits of the law. The purpose of the legislature was to secure a homestead for the family, and the disposition of the property, either by judicial sale or private conveyance, was left unaffected except so far as was necessary to accomplish this object. As long as the property retained its peculiar character, it was within the protection of the law; but the exemption from sale under execution or by deed (except with homestead waiver) could be lost by abandonment or surrender; that is to say, by acts *in pais*."

. . . As land including a homestead "can be sold by the owner subject to the homestead, so a judgment is a lien on the land subject to the homestead, and the land or fee can be sold under execution subject to the homestead; and the purchaser, as in the case of a deed by the debtor without the waiver, has the absolute title when the homestead right ceases." [1]

This opinion of Judge Davis was approvingly quoted in another state (whose statutes on this subject were similar to those which he had expounded), in the following language: "This has been the uniform holding of this court up to the present time; . . . that the fee remained unaffected; or, rather, not divested out of the owner, or vested in those claiming exemption, and was therefore liable for the satisfaction of debts of the owner, subject to the right of homestead." [2]

[1] Black v. Curran, 14 Wall. 463, 468–9, Davis, J., construing Ill. Stat.; rendered, 1871; *citing* Hewitt v. Templeton, 48 Ill. 367; Coe v. Smith, 47 Ill. 225. *Compare* Hartwell v. McDonald, 69 Ill. 293, in which it is said that the United States Supreme Court in Black v. Curran, *supra*, mistook the Illinois statute.

[2] Flatt v. Stadler, 16 Lea, 371; *cit-*

The legal estate of the head of the family may be sold for his debts, while the homestead right of occupation and enjoyment may remain to him and his family; that is, the land may be sold, subject to the homestead exemption right in that land; or, in yet other words, the reversion of the homestead may be sold. Where such course is authorized, there is no inconsistency in the co-existence of the legal estate, and what is called the homestead estate, in the same real property.[1]

The exemption of real estate from sale under legal process, during the life of the beneficiary and that of his widow, and the minority of his children, with inhibition of alienation unless both the husband and wife join in the act, does not necessarily preclude the sale of the reversion under legal process.[2]

§ 7. New Features but Not New Title.

Under the rulings of another state, the mere right of exemption, conferred by constitution or statute, is not an estate. The assignment of homestead is to designate to what property the exemption attaches; not to confer estate upon any one.[3] Yet, after such assignment, the property possesses new characteristics which qualify it. It becomes the family homestead, vested in the head of the family as the representative of the members; and they, with him, are the objects of the protection afforded by the exemption.[4]

Following the same line of argument where the homestead holder can convey the fee, the homestead right, in another state, has been held a privilege and not an estate of homestead.[5]

ing Jones v. Ragland, 4 Lea, 543; Gilbert v. Cowan, 3 Lea, 203; Hicks v. Pepper, 1 Bax. 42.

[1] Gilbert v. Cowan, 3 Lea, 203; Mash v. Russell, 1 Lea, 543.

[2] Held under the constitution of Tennessee, art. 11, § 11, and act of 1879, that lands of debtor may be sold subject to right of homestead. Flatt v. Stadler, 16 Lea, 371. *See* Black v. Curran, 14 Wall. 469. The sale by the husband alone would not affect the wife's homestead right. Rhea v. Rhea, 15 Lea, 527. Minor heirs cannot divest themselves of their right. Farrow v. Farrow, 13 Lea, 120.

[3] *Ex parte* Ray, 20 S. C. 246; Elliott v. Mackorell, 19 S. C. 239; Youngblood v. Lathen, 20 S. C. 370.

[4] *In re* Kennedy, 2 S. C. 227; Howze v. Howze, 2 S. C. 229; *Ex parte* Strobel, 2 S. C. 311. *See* Hardin v. Howze, 18 S. C. 74.

[5] In Kentucky, the owner of a homestead may convey the fee. He may invest the price in a new homestead, preserving the exemption. At

In several states, the homestead right is not treated as an affirmative one but rather of negative character; an exemption rather than positive property right;[1] but the wife's homestead interest in her husband's dedicated property is held to be real property within the meaning of the statute for the redemption of property from tax sale.[2] Her right is said to be more like a vested interest or title than her dower right is in his other realty.[3]

But her right of occupancy after his death is not a right in his estate taken by inheritance, but merely a personal one unaccompanied by title or interest, to or in the property.[4]

The nature of the homestead tenure has been stated substantially as follows: Where the homestead of a decedent who owned the property continues to his widow for life and to his children during their minority, and then goes to his heirs by the laws of descent, it is to be considered a particular estate carved out of the estate proper, of the decedent. That is, while in the hands of the widow and minors, it is such particular estate. Its reversion to the heirs renders it quite different from personal property exempted in their favor which becomes theirs unqualifiedly.[5]

This "particular estate" is nothing more than one for life or for years carved out of the estate in fee. The court making the above statement has deprecated inquiry into the peculiarities of title, as unprofitable and misleading, saying: "If we look beyond the essential characteristics of a homestead . . . and enter upon an inquiry as to the tenure upon which the right of occupancy depends, we are sure to contravene this

his death, the homestead goes to his widow and children, with its exemption character retained. Indivisible property including a homestead may be sold by order of court and $1,000 reserved for the debtor out of the price. Lear v. Totten, 14 Bush, 101; Genl. Stat. Ky., ch. 38, art. 13, §§ 12, 13. "This court has frequently held that the homestead right is not an estate in the land but a mere privilege of occupancy." Little's Guardian v. Woodward, 14 Bush, 588. The widow and children do not take an estate in fee in the realty set apart as a homestead from the property of the deceased debtor. Evans v. Evans, 13 Bush, 587; Pribble v. Hall, 13 Bush, 66; Brame v. Craig, 12 Bush, 404.

[1] Burns v. Keas, 21 Ia. 257; Robinson v. Baker, 47 Mich. 619 (11 N. W. 410).

[2] Adams v. Beale, 19 Ia. 61.

[3] Chase v. Abbott, 20 Ia. 154.

[4] Mahaffy v. Mahaffy, 63 Ia. 55.

[5] Hunter v. Law, 68 Ala. 365.

policy "— the policy of the law in protecting and encouraging homesteads.[1]

§ 8. Trust Estate.

The interest of the family in the property dedicated by its head has been declared a trust estate.

"The homestead estate, being set apart for the use and benefit of the family, is in the nature of a trust estate; and when it is sought to subject the same to the payment of any claim for which it may be liable, the party must file his petition setting forth the grounds of his claim, how and in what manner the estate is liable, and the names of the *cestui que trusts*." [2]

Considered as a trust estate, the equitable owners of the homestead are the members of the family — the beneficiaries, including the head. The legal owner of the land on which the homestead estate is based is the husband or wife, or both; but neither could have homestead set apart in the land unless there were a family. The number of the members is immaterial — there may be only the husband and wife — but there must be a family, great or small, since it is for that, and that only, the exemption right is created.[3]

Homestead and dower right do not attach to the naked legal title in land held in trust.[4]

§ 9. Qualified Title.

The nature of homestead is virtually the same in all the states where there is exemption of realty from execution, and the restraints on rights of ownership usually attending it. Some employ the term "estate of homestead," while others use different ones, but everywhere it is true that government confers no property, title or interest upon the householder, but merely qualifies, or enables him to qualify, what he possessed before. His fee remains his fee, shorn of its alienability to some extent, and also of its disposability by will to some degree. So, if his title is less than the fee. It will be observed

[1] Tyler v. Jewett, 82 Ala. 93, 100, *quoting* Watts v. Gordon, 65 Ala. 546. *See* Discus v. Hall, 83 Ala. 159; Beard v. Johnson, 87 Ala. 729.

[2] Wilson v. Rogers, 68 Ga. 549; Wilder v. Frederick, 59 Ga. 669. *See* Dewhurst v. Wright (Fla.), 10 So. 702.

[3] Willingham v. Maynard, 59 Ga. 330, 332.

[4] Rice v. Rice, 108 Ill. 200.

that the qualifications are all negative. The dedicated property he cannot bequeath freely by testament, cannot sell by his sole act, and his creditors cannot sell it for his debts. These negative qualifications are generally made in the homestead states, though not without exceptions as to some of these inhibitions. The positive statement of a statute that he shall have estate of homestead forms no exception, for nothing but restrictions and immunities are meant; no positive estate is conferred; the qualifications of title already held are negative, as in the states where such estate is not recognized. It may be said to be as nearly uniform as anything in homestead law is, that the legal owner of the homestead has his interest affected negatively only when he dedicates it and accepts the conditions.

The interest of the minor, while his parents live, is no property-right in or to the homestead. They can dispose of it without affecting any right of his which he can assert, or his next friend or the probate or orphans' court can assert against their action. After his parents' death, leaving the property unsold, he cannot make any disposition of it whatever. Adult heirs are held aloof while he occupies the premises. If there is any estate of homestead now, held by him in any way different from that held by his co-heirs who are adults, it can be nothing but the defeasible right of occupancy for a term of years — and this can hardly be termed an estate in contradistinction from the legal estate which all the heirs in common hold.

The widow's homestead comes more nearly to the requirements of any estate than those already considered. It is usually held for life; defeasible by abandonment, generally — by remarriage, less generally — by neither, in a few states. There is nearly as much plausibility in calling her limited homestead interest an estate as there is in attributing the term to her dower right. It has negative qualities which the latter wants: non-liability for debt; and non-alienability, for the most part; but there is positivity in the creation of this new twin-sister to dower. So the widow's right may be called a life-estate without violence to any principle.

The right to occupancy of the homestead, or the receipt of the rents and profits, cannot be alienated by the widow, though

it may be abandoned by her. She cannot sell; she cannot abandon the rights of the minor children; but she can give up her own right, and an abortive attempt to alienate it may be abandonment in the eye of the law.

Her right, under the provision above mentioned, is limited to the usufruct (wholly hers when there are no minor children), free from liability to forced sale. This continues during her life. The purpose is to give her a home and support: so she need not occupy the premises to preserve their inviolable character but may lease them, since she may thus make them more conducive to effect the benevolent purpose of the law towards her. She is not obliged to cultivate a farm or live upon it to preserve its character as exempt land. If she could legally alienate the homestead property, the exemption benefit would not appertain simply to the homestead right but would be a reservation of land from forced sale without regard to its use. If she attempts to convey the property, she forfeits her homestead right as in case of direct abandonment.[1]

The homestead for the widow may be set apart from any portion of the decedent's estate which is suitable for the purpose, though it may have been used by him as a place of business.[2] As to suitability for the purpose, the court trying an appealed case will presume the evidence to have been sufficient to establish it and thus to support the order setting apart the property.[3]

§ 10. Exemption and "Estate of Homestead."

A husband and wife resided upon a lot in San Francisco, in a dwelling situated on the front part of it. The property was owned by both in community. The wife had it recorded as their homestead. Afterwards they built another dwelling on

[1] Garibaldi v. Jones, 48 Ark. 231; Phipps v. Acton, 12 Bush (Ky.), 375; Locke v. Rowell, 47 N. H. 46; Wright v. Dunning, 46 Ill. 271; Whittle v. Samuels, 54 Ga. 548; Orman v. Orman, 26 Ia. 361. *See* Craddock v. Edwards, 81 Tex. 609.

[2] *In re* Sharp, 78 Cal. 483, *approving* *In re* Bowman, 69 Cal. 245; Estate of Busse, 35 Cal. 310; and *distinguishing In re* Noah, 73 Cal. 590.

[3] *In re* Sharp, *supra;* Ferrer v. Insurance Co. 47 Cal. 429; Livermore v. Webb, 56 Cal. 492; Tompkins v. Weeks, 26 Cal. 58; *In re* Bowman, 69 Cal. 245; Bunting v. Beideman, 1 Cal. 182; Cal. Code Proc., § 1465 *et seq.;* Civ. Code, tit. 5, div. 2.

the rear part of the lot and rented it to a tenant. Then a judgment creditor of the husband levied upon the whole lot. The wife enjoined the sale, alleging that the whole property was within the value of the homestead limit — five thousand dollars. By agreement the whole case seems to have been disposed of on the trial of the injunction.

It was held that while the declarant of homestead cannot include two dwellings in his declaration, if he subsequently add another to the one he has legally dedicated and occupied, the effect will be not to vitiate the property first declared upon when the second house stands on a part of the dedicated ground. The whole will not thus be subjected to execution for debt. And it was held the second house, though rented to a tenant, will not be so subject, unless it enhance the value of the whole property beyond the statutory limit; or, rather, unless the property be worth five thousand dollars without the new house and the ground it stands upon. The method of segregation, in such case, is pointed out by statute.

The following extract is from the opinion of the court: "The whole lot being adapted to use as a homestead, and actually used as such at the time of the dedication, it then became as an entirety affected with the homestead character. And this is so without regard to the value of the lot, either at the time of its dedication or at any subsequent period. There is no statutory limit as to the value of the property which may be selected and upon which the character may be impressed. When the attributes of residence and selection according to law exist so as to express its essence, the homestead becomes an *estate in the premises* selected, exempted by law from forced sale. They may be of greater or less value than the interest in them exempted by law. The excess, if there be one, though it may be homestead in fact, is subject to the *jus disponendi* of the owner and the claims of his creditors.[1] But it does not follow that the excess in value is subject to seizure and sale at the instance of an execution creditor. If the property so impressed with the character of homestead is worth more than the homestead exemption, and the creditor desires to avail himself of that excess, the proceedings pro-

[1] *Citing* Ham v. Santa Rosa Bank, 62 Cal. 109.

vided by the code[1] must be taken for the admeasurement and application of such excess.[2] It follows that a sale, unless made under order of court, and for purposes of segregation of the excess as provided in the sections referred to, would convey no title. But though the sale of a homestead under execution conveys no title, it may create a cloud and involve the homestead claimant in litigation, and will therefore be enjoined.[3]

"So far as we have been able to discover, no case has before arisen under our statutes where the precise question now submitted has been presented. In every case where it has been held that a second tenement used for purposes other than the residence of the family has operated to prevent the homestead character from attaching to such second tenement and the land used in connection therewith, such second tenement existed at the time of the attempted homestead selection, and was not one constructed after the homestead character had attached to the land. Here the homestead character had attached before the second building was constructed, and, reasoning from the analogy of the statutes and of the cases cited, the construction of such a building was not an act which relieved it of the homestead character, and rendered the land subject to direct seizure and sale under exemption." And the court adds that if the second building had increased the value of the whole property beyond the statutory limit, the plaintiff would have been entitled to make the levy, but not to sell; only as a basis for proceedings under the statute to ascertain the excess, to make partition, and for sale of the part not necessary to make up the maximum.[4]

Judge Paterson dissented, saying it was immaterial whether the second house was built before or after the declaration; that the sole question before the court was whether the property was exempt; that the statute provides that the homestead shall consist of "the dwelling-house in which the claimant resides and the land on which the same is situated;"[5] and the

[1] *Citing* Civ. Code, §§ 1245–1259.

[2] *Citing* Barrett v. Simms, 62 Cal. 440.

[3] *Citing* Culver v. Rogers, 28 Cal. 520; Eby v. Foster, 61 Cal. 287.

[4] Lubbuck v. McMann, 82 Cal. 226, Fox, J.

[5] *Citing* Civ. Code Cal., §§ 1237, 1240; Gregg v. Bostwick, 33 Cal. 228; S. C., 91 Am. Dec. 637; Laughlin v. Wright, 63 Cal. 116.

dissenting opinion concludes as follows: "It has been held uniformly that, in order to be exempt from execution, the property claimed as a homestead must be actually occupied as a residence by the family of the owner — temporary absences excepted, of course — and that any portion of his real estate not so used is not exempt from execution, whatever may be its extent or value; and that where houses and lots are rented for money rent to tenants who are not servants or employees of the owner, the latter cannot claim them as a part of his own home and residence, although they may adjoin the same."[1]

The differences between the two opinions turn upon the definition of *homestead*. The word is used in the constitution in its ordinary sense: "The legislature shall protect by law from forced sale a *certain portion of the homestead*, and other property of all heads of families."[2] The statute employs the term in its technical sense, as will be seen in the requirements for its selection, dedication, alienation, exemption and various provisions inapplicable to an ordinary place of residence.[3]

The court used the word in the common, and the dissenting judge used it in the legal, sense. So the court understood the entire family residence, irrespective of value or quantity, to be susceptible of dedication so as to constitute an estate of homestead, though only the value to the amount of five thousand dollars would be exempt under the statute. On the other hand, the dissenting judge recognized only the exempt portion to be susceptible of dedication as homestead.

Courts in other states, under statutes not materially dissimilar, will be likely to understand *homestead* as the dissenting judge did, as they have understood it heretofore. Even where "estate of homestead" is recognized, it will generally be confined to exempt property, while that which is not exempt will be held liable to execution, whether attached to the home farm or lot, or disconnected.

[1] *Citing* Ashton v. Ingall, 20 Kas. 670; Austin v. Stanley, 46 N. H. 51; Kurz v. Brusch, 13 Kas. 371; S. C., 81 Am. Dec. 435; Casselman v. Packard, 16 Wis. 114; S. C., 82 Am. Dec. 710.

[2] Const. Cal., art. 17, § 1.

[3] Deering's Code & Stat. Cal., §§ 1237–1263. *See* especially, §§ 1237, 1240, Civ. Code.

CHAPTER X.

LIABILITIES.

§ 1. Debts Prior to the Law.
2. Debts Prior to Purchase and Occupancy.
3. Debts Prior to Filing the Deed.
4. Debts Prior to Designation of Homestead.
5. Debts by Written Contract.
6. Dormant Liens.
7. Attachment Liens.
(1) Claiming Homestead After Attachment.
§ 7. Attachment Liens (continued).
(2) Attaching After Homestead Has Been Established.
(3) Effect of the Perfected Attachment Lien Upon the Homestead.
8. Tort.
9. Fiduciary Debts.
10. Taxes.

§ 1. Debts Prior to the Law.

Antecedent debts are those prior to the passage of the homestead law or to the date fixed by the law for the beginning of exemption. They are debts contracted, or incurred, before notice given that the family residence is not to be liable therefor. The enactment of the exemption statute is deemed such notice on the presumption that creditors know the law.

It seems almost incredible that legislatures and courts ever have thought that a creditor could be cut off from making his money out of property to which he had looked when trusting its owner. Without any notice whatever that such property would be screened from the sheriff's eye by the veil of exemption, he had trusted the owner. The legislatures of several states — even the conventions that made constitutions — seem to have seen no injustice in cloaking the property of debtors with exemption, and leaving unnotified creditors in the lurch.

Solemn contracts between debtors and creditors, with implication that, if necessary, all the means of the former should be exhausted in payment of value received, were disregarded by the obligor under countenance of legislation. It was not till the highest court of the country had declared such legislation unconstitutional, that those laws were abrogated, and debtors left to the old rules of integrity.

There seemed to be a notion that creditors had no rights which debtors were bound to regard. There was an impression that contracts had no reference to their remedies which legislators were bound to recognize. The principles of equity, apart from the constitutional inhibition to pass laws impairing the obligations of contracts, ought to have controlled the courts, especially when mortgages and other liens under equity cognizance were concerned. But homestead and exemption laws had to be considered as something outside of the ordinary realm of jurisprudence, exceptional to established principles, based upon humanity rather than upon justice — with the humanity confined to one of the contracting parties.

In what sense would a contract be impaired by the subsequent passage of a law exempting from execution property that was liable before under the contract? What is the reason that underlies the decisions of the highest court declaring such a law unconstitutional?

The contract would be impaired because the creditor's remedy against the debtor's property, existing when the contract was made, would be taken away to the extent of the exemption; and the reason underlying the decisions is that the debtor's property is the common pledge of his creditors. It is that which gives its owner credit. Creditors trust his property rather than himself.

Homestead laws have been said to be in derogation of common right because they interfere with the creditor in his efforts to collect his just debts. While the argument, drawn from this consideration, in favor of the strict construction of exemption laws, does not meet with general favor; and while it is entitled to little when the exemption law has been passed and the homestead dedicated and the world notified before the giving of the credit by contract, yet it is true that the debtor's property, liable for debt before the passage of an exemption law, cannot have its *status* changed in that respect by the passage of the law, without derogation of the creditor's right.

The laws that sought to deprive the creditor of his remedy and relieve the debtor of his promise were retroactive. They referred to future executions, it is true; but they looked back to contracts anterior to themselves. A claim perfectly good

yesterday is reduced in value from *par* to *zero* by a law passed to-day: a practical retroaction though not technically such as would be violative of the constitution. A contract with a perfect legal remedy yesterday is shorn of its means of enforcement and therefore rendered valueless to-day: an impairment which the spirit of the constitution forbids.

The ground of unconstitutionality was found in the prohibition of the states from passing any law impairing the obligation of contracts. It was held to be impairment when the creditor's remedy is denied him. It is as bad for him to lose his means of enforcement as to have the contract itself destroyed. The old homestead laws which put liable property out of the way and even declared it inviolate cut straightly between the contract and the remedy, severed them from each other, and left a useless promise in the hands of the creditor while the means of performance were gone. That is, this was true unless he could find other property to pounce upon. But the laws were as bad as if they had denied execution altogether; for it might be that the debtor had no property but his homestead.

"The remedy subsisting in a state when and where a contract is made and is to be performed *is a part of its obligation;* and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution and is therefore void." This was said by the highest court of the country relative to a state constitutional inhibition of "execution or other final process issued for the collection of any debt against a homestead" of the certain value designated. There had been judgment rendered on debts contracted prior to the adoption of that inhibition, and the state court had held the homestead not liable for them; and the above-quoted remark was made in the reversing decision.[1]

This decision was in accord with a prior one rendered by the same court.[2] The doctrine enunciated, that the remedy is part of the obligation, and state laws impairing it are in contravention of the constitution of the United States, is now

[1] Edwards v. Kearzy, 96 U. S. 595 (case from North Carolina, 74 N. C. 241).

[2] Gunn v. Barry, 15 Wall. 610.

well established, and applied to homestead laws and exemptions.[1]

The constitutional inhibition is to states — not expressly to congress. Whatever the spirit of it may be, however congress or the general government entire may be constrained by that spirit from doing injustice, the letter bears only upon the states. It is hardly presumable that the framers of the constitution meant to invest congress with the power of coming between contracting parties and rendering their mutual obligations nugatory which were perfectly valid when taken. So far as passing uniform bankrupt laws, the framers did mean that congress might intervene between debtor and creditor. If further intervention was to be tolerated, why did they not say so? Why did they confine the grant to the bankrupt law?

It is the prevailing opinion, however, that congress can affect the remedy of a contract. The supreme court said disjunctively: "Nor can it be truly said that congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely." [2]

If it is possible for congress constitutionally to obliterate

[1] Lamb v. Chamness, 84 N. C. 379; Sluder v. Rogers, 64 N. C. 289; Fowler v. Wood, 31 S. C. 398; *Ex parte* Young, 29 S. C. 298; Bull v. Rowe, 13 S. C. 365; Douglass v. Craig, 13 S. C. 371; Carrigan v. Bozeman, 13 S. C. 376; Charles v. Charles, 13 S. C. 385; Cochran v. Darcy, 5 S. C. 125; *Ex parte* Hewett, 5 S. C. 409; De La Howe v. Harper, 5 S. C. 470; Compton v. Patterson, 28 S. C. 115; Hasford v. Wynn, 26 S. C. 130; Agnew v. Adams, 17 S. C. 364; Clark v. Trawick, 56 Ga. 359; Wheeler v. Redding, 55 Ga. 87; Bush v. Lester, 55 Ga. 579; Pratt v. Atkins. 54 Ga. 569; Wofford v. Gaines, 53 Ga. 485; Grant v. Cosby, 51 Ga. 460; Smith v. Ezell, 51 Ga. 570; Burnside v. Terry, 51 Ga. 186; Whittington v. Colbert, 50 Ga. 584; Chambliss v. Jordan, 50 Ga. 81; Larence v. Evans, 50 Ga. 216; Gunn v. Thornton, 49 Ga. 380; Jones v. Brandon, 48 Ga. 593; Ladd v. Dudley, 45 N. H. 61; Squire v. Mudgett, 61 N. H. 149; The Homestead Cases, 22 Gratt. 266; Russell v. Randolph, 26 Gratt. 705; Pennington v. Seal, 49 Miss. 528; Lesley v. Phipps, 49 Miss. 790; Smith v. Brown, 28 Miss. 813; Coffman v. Bank of Kentucky, 40 Miss. 29; Barlow v. Gregory, 31 Ct. 264; Clark v. Potter, 13 Gray, 21; Woods v. Sanford, 9 Gray, 16; Johnson v. Fay, 16 Gray, 144.

[2] Strong, J., in Legal Tender Cases, 12 Wall. 457; Hepburn v. Griswold, 8 Wall. 603.

contracts entirely, it can be done only by way of enacting a bankrupt law: so that has nothing to do with "rendering contracts fruitless" in any other way.

It has been held that vested rights may be divested by a state law, when a contract is not impaired.[1]

Some of the old laws and decisions thereon disregarded judgments rendered on debts existing prior to the passage of the exemption statutes, disregarded attachments duly laid and even judgment liens already matured, and even pre-existing mortgages. No agreement between debtor and creditor was too sacred to be touched. All right and equity was disregarded under the legislator's assumption that it was a humane and beneficent policy for the state to step between the creditor and the debtor to protect the latter from the consequences of his own voluntarily-taken obligations. The courts, as if they thought the state legislatures unrestricted in power, sustained such laws and denied creditors the right of enforcing their contracts in many instances.[2]

The assignment of a homestead to a bankrupt is void as to debts antedating the authorization of a homestead.[3]

It was held that the debtor's homestead was exempt from a

[1] Beers v. Haughton, 9 Pet. 359; Watson v. Mercer, 8 Pet. 88. (*Contra*, Gunn v. Berry, 15 Wall. 619, by way of argument.) *See* Allen v. Shields, 72 N. C. 504; Wilson v. Sparks, 72 N. C. 208; Garrett v. Cheshire, 69 N. C. 396.

[2] Gunn v. Barry, 44 Ga. 353; Pulliam v. Sewell, 40 Ga. 73; Chambliss v. Phelps, 39 Ga. 386; Hardeman v. Downer, 39 Ga. 425; Hill v. Kessler, 63 N. C. 437; *Re* Kennedy, 2 S. C. 216; Stephenson v. Osborne, 41 Miss. 119; Sneider v. Heidelberger, 45 Ala. 126; Grimes v. Bryne, 2 Minn. 89; Rockwell v. Hubbell, 2 Doug. (Mich.) 198; Root v. McGrew, 3 Kas. 215; Cusic v. Douglas, 3 Kas. 123; Cook v. McChristian, 4 Cal. 23; Bigelow v. Pritchard, 21 Pick. 174; Morse v. Goold, 11 N. Y. 281. (*See* Quackenbush v. Danks, 1 Denio, 128.) Hill v. Hill, 42 Pa. St. 198; Baldy's Appeal, 40 Pa. St. 328; Baylor v. San Antonio Bank, 38 Tex. 448.

[3] Fowler v. Wood, 31 S. C. 398. (*See* Fowler v. Wood, 26 S. C. 169.) Ante-homestead debts in South Carolina are those contracted before the adoption of the constitution of 1868. Douglas v. Craig, 13 S. C. 371. But a senior lienholder, with claim prior to 1868, need not first exhaust the homestead. *Ex parte* Young, 29 S. C. 298. The creditor may enforce his ante-homestead claim by legal remedy, and therefore is denied resort to an equity proceeding to vacate homestead proceedings. Compton v. Patterson, 28 S. C. 115. Assignment of homestead is null as to debts prior to 1868. Hosford v. Wynn, 26 S. C. 130; Agnew v. Adams, 17 S. C. 364. Creditors' rights lost by *laches*. Solomons v. Shaw, 25 S. C. 112.

judgment rendered on an account in which some of the items were for antecedent debts and some subsequent to the date when the statute came into operation.[1] Had the court given judgment for the former only, the right of execution would have been clear; but, having allowed the whole amount, and forced sale to pay the subsequent debts being inhibited, the property was protected from the entire judgment in the opinion of the court.

An antecedent debt, novated after the passage of the exemption act, may be collected by forced sale of the homestead.[2] A judgment rendered after the passage is not to be hindered by exemption, if the creditor prove that the debt was contracted before.[3]

A land-owner obligated himself by contract when he was unmarried and not entitled to exemption. Before judgment had been rendered against him, he took a wife, became the head of a family and was entitled to exemption. When execution was levied against his land (owned and not exempt when the debt was contracted), he claimed that it was exempt. The value of the land was within the constitutional and statutory limit.

The creditor contended that the land was liable upon debts contracted before the debtor's marriage. The court said that debts existing at the time of the enactment of the homestead law could not be affected by the enactment, and it claimed to be in advance of the United States supreme court in so holding;[4] but it decided that debts originating after the enactment are on an entirely different footing. Marriage may put the debtor in a position to avail himself of the exemption which the creditor knew he could have by getting married. No lien had attached to the property before the marriage; none could attach afterwards by virtue of the judgment.[5] Had a lien been acquired by judgment or levy before marriage, a different question would have arisen, on which the court thought it un-

[1] Bachman v. Crawford, 3 Humph. 213.

[2] Woodlie v. Towles, 9 Bax. 592; Belote v. Wynne, 7 Yer. 543; Bell v. Morrison, 1 Pet. 351.

[3] Douglass v. Gregg, 7 Bax. 384.

[4] Dye v. Cook, 88 Tenn. 275; citing on this matter, Kennedy v. Stacey, 1 Bax. 220; Hannum v. McInturf, 6 Bax. 225.

[5] *Id.*, citing North v. Shearon, 15 Tex. 174; Trotter v. Dobbs, 38 Miss. 198.

necessary to intimate an opinion.[1] Such lien, legally created, would seem as stable as a conventional one.

§ 2. Debts Prior to Purchase and Occupancy.

In some of the states, the homestead is exempt from ordinary debts, and all others except a few specified ones to be specially treated in this chapter, which have been created after the passage of the exemption statute or constitutional ordinance so providing, or after the date fixed for the exemption to become operative. A provision that "the homestead may be sold for debts contracted prior to the purchase thereof"[2] was construed to render the property liable for any debt antedating not only the purchase but the establishment of the homestead by actual occupancy. The statute thus construed directs that declaration be made, but does not render it essential; so it is held that the date of occupancy fixes the time of the beginning of exemption.[3] This accords with the general doctrine — actual occupancy being almost everywhere essential to exemption, and the two beginning together. Under the operation of this rule, between the dates of purchase and occupancy the property is liable for debts *then* or *previously* contracted.[4] The rule is the same, whether the debt be foreign or domestic.[5]

A householder obtained title to his homestead in 1883. A judgment had been rendered against him in 1882, and the subsequently purchased realty became subject to it. A general execution had been issued. The court, in deciding upon the claim that the property was exempt, said: "The indebtedness was contracted prior to the acquisition of the homestead, and for such indebtedness it could be sold, unless it was acquired with the proceeds of a prior homestead, and this is not claimed."[6]

[1] *Id.*, citing Pender v. Lancaster, 14 S. C. 25.

[2] McClain's Iowa Code, § 3167 (1992); Ia. Code (1873), § 1992; Rev. Stat. (1860), § 2281.

[3] Arnold v. Gotshall, 71 Ia. 572; First N. Bank v. Hollingsworth, 78 Ia. 575; Johnson v. Moser, 66 Ia. 536; Givans v. Dewey, 47 Ia. 414.

[4] Hale v. Heaslip, 16 Ia. 451; Page v. Ewbank, 18 Ia. 580; Delavan v. Pratt, 19 Ia. 429; Hyatt v. Spearman, 20 Ia. 510; Elston v. Robinson, 23 Ia. 208; Peterson v. Little, 74 Ia. 223.

[5] Laing v. Cunningham, 17 Ia. 510; Brainard v. Van Kuran, 22 Ia. 261.

[6] Lamb v. McConkey, 76 Ia. 47.

This rule, that after the purchase but before occupancy the land is liable, is not followed where the statute exempts from the date of purchase.[1]

The novation of a prescribed debt, made before actual occupancy, renders the property liable after that event.[2] If the owner, by wrong-doing, before occupancy of the homestead, has pecuniarily benefited himself; and if the circumstances are such that the person wronged can maintain action on an

[1] Hensey v. Hensey (Ky.), 17 S. W. 333. Bentley, J.: "The appellants allege in their answer that the mortgage was not recorded or lodged for record, and that they, at the time the action to foreclose the mortgage was brought, were living on the land, with their family, as a homestead, and the land was not worth as much as $1,000. The court, not deeming the answer sufficient, gave judgment for the sale of the land to satisfy the mortgage lien. This was error. It is well settled by this court that the debtor with a family may in good faith move on the land, and make a home of it, and thereby acquire a homestead in it, notwithstanding his indebtedness was created prior to his moving on the land, provided the indebtedness was not created before the purchase of the land or the erection of the improvements. So the only question is, does the mortgage defeat the appellants' right in that regard? Section 13, article 13, chapter 38, General Statutes, provides: 'No mortgage, release, or waiver of such exemption shall be valid unless the same be in writing, subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate.' Of course, this language means conveyances of real estate by the husband and wife; and it declares that the mortgage, release, etc., to be valid as a conveyance or release of the homestead right, must be sufficient to convey the wife's potential or other interest in the real estate; and, if the mortgage is not sufficient to convey her interest, it is also insufficient to convey the homestead interest of the husband. In the latter respect mortgage, etc., is unlike the conveyance of real estate in general, because the conveyance of the general estate may be sufficient to convey the husband's title, but not that of the wife; whereas, as said, the mortgage of the homestead must be sufficient to convey the wife's interest therein; otherwise it is invalid, for such purpose, as to both husband and wife. So the question is, is the mortgage sufficient as to the wife to convey the homestead? Upon that subject, section 21, chapter 24, General Statutes, provides that a deed of a married woman, to be effectual, must be acknowledged before the proper officer, and lodged for record in the proper office. As has been construed by this court, it is as essential, to make the deed effectual against a married woman, to have the same recorded or lodged for record in the proper office as it is that she should acknowledge the same before the proper officer. This requisite not having been complied with, the mortgage was ineffectual to convey either of the appellants' homestead right. The judgment is reversed, and remanded with directions for further proceedings consistent with this opinion."

[2] Sloan v. Waugh, 18 Ia. 224.

implied promise, there is debt antedating the establishment of the homestead, and it may be collected from the property.[1]

Though a homestead may have been validly conveyed and re-acquired by its owner, while ordinary debts against him existed, it will be liable for all indebtedness contracted before the re-acquisition.[2]

Ordinary debt contracted before the homestead was established may be prosecuted to judgment afterwards so as to create a lien upon the property, which is held to outrank the mortgage of the homestead made subsequent to the contracting of such debt. This rule is confined to the parties and others chargeable with notice of the character of the debt.[3]

Under the rule that a debt existing when the homestead was acquired is collectible against the homestead, judgment upon it is held to create a lien retroactive in effect from the date of the debt: so that a senior judgment on a junior debt, not thus pre-existing, is postponed to it.[4] But, prior to judgment, such antecedent debt is without lien, so that an unnotified purchaser of the homestead is not affected.[5] He takes, subject to the lien, if his purchase is after it is attached.[6]

The retroaction above mentioned must have statutory support to sustain it, since it does not stand upon any settled principle.

The wife need not sign a mortgage on the homestead given to secure a debt created prior to the establishment by actual occupation, where such debts are collectible from the property. Such a mortgage is held valid as to her, because it creates no additional burden relative to her rights and interests, while it would be invalid as to persons innocently purchasing the property before judgment on the secured debt, to whom even the recordation of the mortgage would not be legal notice.[7] For they would have bought while there was no lien upon the property, and while the debt was merely a personal one.

[1] Warner v. Cammack, 37 Ia. 642.

[2] Butler v. Nelson, 72 Ia. 732.

[3] Hale v. Heaslip, 16 Ia. 451; Hyatt v. Spearman, 20 Ia. 510; Elston v. Robinson, 23 Ia. 208. *See* Linscott v. Lamart, 46 Ia. 312.

[4] Phelps v. Finn, 45 Ia. 447.

[5] Higley v. Millard, 45 Ia. 586.

[6] Kimball v. Wilson, 59 Ia. 638.

[7] Higley v. Millard, 45 Ia. 586. *See* ch. XII, § 4.

A homestead may be exchanged for one of equal or less value without subjecting the new one to liability for debts contracted by the owner after the acquisition of the old one but before that of the new.[1] Courts are liberal to the debtor making the exchange. The time necessary to effect it is considered, and a reasonable interval between the sale of the first and the purchase of the second is respected, when the exchange is effected in this way and not by direct swapping with the owner of the new home. Meanwhile, the proceeds of the old are held exempt.[2]

If the new is of greater value than the old exempt property was, so that it was paid for by the addition of a sum greater than the proceeds of the latter; if the circumstances are such that the acquisition of the new homestead cannot reasonably be considered in lieu of the old one, the property would be liable for debts prior to its purchase.[3]

A debtor bought a homestead and paid for it, but had it deeded to his wife to defeat his creditors. Occupied by him and her, the home was attached. There was an attachment for a claim subsequent to the acquisition of the homestead, and a second attachment for one prior to that acquisition. There was judgment, and the land was sold under the first attachment. The purchaser came into possession, having paid the debtor and his wife to relinquish any claim. The title of the purchaser was construed to be no better than that of the debtor had been, and therefore subject to the lien of the second attachment bond on a debt antedating the acquisition of the homestead.[4]

A father secured the exemption of fifty acres of land, as the head of a family having no members except a minor son. The exemption expired with the son's minority. The son then bought the land for valuable consideration, and held possession for four years, without notice of an outstanding judgment against his father. The court held that the lien of the

[1] State v. Geddis, 44 Ia. 539; Benham v. Chamberlain, 39 Ia. 358; Furman v. Dewell, 35 Ia. 170; Robb v. McBride, 28 Ia. 386; Sargent v. Chubbock, 19 Ia. 37; Pearson v. Minturn, 18 Ia. 36; Lamb v. McConkey, 76 Ia. 47.

[2] Cases last cited.

[3] Farra v. Quigly, 57 Mo. 284.

[4] Peake v. Cameron, 102 Mo. 568; 15 S. W. 70; Rev. Stat. Mo. (1879), §§ 2689, 2695.

judgment had ceased to be operative, because the son had held for four years before the levy was made to enforce the judgment against the father.[1]

Where exemption is inapplicable to "sales under execution, attachment or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the land or the erection of improvements thereon,"[2] it is held that the repair of the home building is not meant by "erection of improvements." So, a householder, occupying a homestead within the monetary limit, who made repairs after having contracted a debt, did not render the homestead liable therefor — the debt not being for the repairs.[3]

Inheriting land is the same as the purchase of it, so far as the statutory provisions relative to anterior debts are concerned.[4] But a different view was formerly taken. A housekeeper resided, with his family, on a part of his father's land, and continued to occupy the same home after his father's death, and after his acquisition of title by descent. Judgment was rendered against him on a debt contracted prior to his acquisition of the title. He was held entitled to hold his homestead against this judgment, on the ground that he had not disappointed the expectation of the creditor by expending money or property for this land which would otherwise have gone to satisfy the creditor.[5]

When a surety has a right of action by way of recourse against his defaulting principal, and the right relates back to the time of his contract of suretyship, upon his payment for his principal, it is held superior to a homestead right acquired by another after he had signed his obligation; that a cause of action arising prior to the homestead exemption takes precedence of the exemption claim.

In a case involving this matter as one of rank, it was said that when the surety took his obligation there was no home-

[1] Blalock v. Denham, 85 Ga. 646; 11 S. E. 1038; Ga. Code, §§ 2040, 3583.

[2] Gen. Stat. of Kentucky (1888), pp. 574–8 (new ed.), ch. 38, art. 13, § 16; Hensey v. Hensey (Ky.), 17 S. W. 333; Travis v. Davis (Ky.), 15 S. W. 525.

[3] O'Gorman v. Madden (Ky.), 5 S. W. 756.

[4] Creager v. Creager, 87 Ky. 449.

[5] Jewell v. Clark, 78 Ky. 398. The reconciliation of this case with that last above cited is put on the ground of non-occupancy by Creager.

stead law. His taking it "created an existing cause of action, contingent" upon his principal's default. "An implied contract was then raised by the law between" them, that the principal should indemnify the surety; "and this implied contract took effect from the date of the surety's signing the bond, and not merely from the time he paid the money: the payment in such case relating to the inception of the implied liability. Thus, where such a liability was created by reason of the surety's signing as aforesaid, and afterwards a homestead act was passed; and the surety, after the passage of the act, paid the debt, it was ruled that the demand of the surety was superior to the claim of homestead exemption.[1] And when he signed the bond, "the implied contract of indemnity took immediate effect and became a vested right, arising on a contract which subsequent legislation could not divest, even if so intended, for this would amount to impairing the obligation of a contract — a contract implied by law."[2]

Declaration of homestead cannot dislodge a lien already fixed upon the realty declared upon, however the lien may have been created.[3]

§ 3. Debts Prior to Filing the Deed.

The "homestead shall be subject to attachment and execution upon all causes of action existing at the time of the acquiring such homestead, except as herein otherwise provided; and for this purpose such time shall be the date of the filing, in the proper office for the records of deeds, the deed of such homestead, when the party holds title under a deed; but when he holds title by descent or devise, from the time he becomes invested with the title thereto; and in case of existing estates, such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created."[4]

[1] Rice v. Southgate, 16 Gray, 142; Appleton v. Bascom, 3 Met. (Mass.) 169.

[2] Berry v. Ewing, 91 Mo. 395; Harvey v. Wickham, 23 Mo. 112; Gunn v. Barry, 15 Wall. 610.

[3] The recording of a declaration of homestead, under the statute of West Virginia, Acts of 1864, chapter 29, when he was an obligor on a forfeited forthcoming bond, did not free his property from the lien of the bond, since it had the force of a judgment after its return to the clerk's office, which occurred before the declaration had been made. Cabell v. Givens, 30 W. Va. 760.

[4] Rev. Stat. of Missouri (1889),

By this statute, homesteads are liable for all debts created before the filing of the title deeds evidencing their ownership, in the state where it was enacted.[1]

The filing of a deed, after judgment and issuance of execution, will be of no avail.[2]

Under the provision relative to existing estates, exempting them from liability for debt accruing after the passage of the law, the rule is practically the same as in cases of subsequent purchase; for, in either circumstance, liability for debt existing prior to homestead acquisition remains as though no exemption law had been passed. The design of the legislator was to secure to heads of families and housekeepers, who held land when the law was passed, homesteads therein from the date of the passage free from subsequent debts; and to secure, to those afterwards acquiring lands, homesteads therein free from debts created after the filing of their deeds. In both cases, exemption begins with the acquisition of the homestead evidenced by the record.[3]

A non-resident, acquiring land for a homestead and filing his deed, has it protected from his subsequent debts if he occupy it as his home before those debts have ripened to judgment liens. His exemption is not affected by the fact of his non-residence at the time of the acquisition of the land of his homestead.[4]

If a homestead is liable for debts antecedent to its acquisition, it does not matter whether they were contracted in the state where the homestead lies or in some other. The *locus in quo* of the debt or cause of action has no effect on the question of the liability of the property. No preference is to be given to home creditors over foreign.[5]

The obligation of a principal to a surety who has had to pay for him is a cause of action dating back to the time the suretyship was assumed, by the law of relation — not fixed by

§ 5441; R. S. (1879), § 2695; Laws of 1887, p. 197.

[1] O'Shea *v.* Payne, 81 Mo. 516; Kelsay v. Frazier, 78 Mo. 111; Rogers v. Marsh, 73 Mo. 64; Stivers v. Horne, 62 Mo. 473; Griswold v. Johnson, 22 Mo. App. 466; Daudt v. Harmon, 16 Mo. App. 203.

[2] Bunn v. Lindsay, 95 Mo. 250; Lincoln v. Rowe, 64 Mo. 138; Shindler v. Givens, 63 Mo. 394.

[3] State v. Diveling, 66 Mo. 375.

[4] Finnegan v. Prindeville, 83 Mo. 517.

[5] O'Shea v. Payne, 81 Mo. 516.

the date when the fact became apparent that the surety would have to pay. The principal cannot hold his homestead exempt against such debt if it was acquired after the execution of the bond signed by the surety. This was held relative to a curator's bond.[1] If the homestead had been acquired at any time after the curator's default, when the surety's contingent obligation first became certain, it would seem that his homestead ought not to be exempt as against the debt thus due by him to his surety; but the case cited does not go so far.

If an exempt homestead be sold under execution, though the sale be null, it may becloud the title; so, in such case, the cloud may be relieved by means of a bill in equity.[2]

The burden of proof is on the purchaser at an administrator's sale of a homestead to show that creditors' claims antedate homestead acquisition, it was held.[3] That is, if he seek to establish his title, he must not only show his deed, but also show that the administrator had the right to sell the property to satisfy valid claims.

From the proceeds of land bought by a husband in his wife's name, and subsequently sold by his creditors for his debts after having had the conveyance to the wife set aside for fraud, a sum was allowed him to purchase a homestead; but this cannot be done if the debts sued upon accrued before the statutory exemption.[4] The fraud of the husband did not mitigate against the allowance, since it is said that no fraud upon creditors can be perpetrated by any disposition a debtor can make of his homestead.[5]

Property deeded to a wife, partly in consideration for a homestead in a state (other than the one where the deed was given), where husband and wife must join in a homestead conveyance, was held not in fraud of creditors and therefore not susceptible of being subjected to the husband's debts.[6] It was contended, in the argument on the case cited, that as

[1] Berry v. Ewing, 91 Mo. 395.

[2] Harrington v. Utterback, 57 Mo. 519.

[3] Kelsay v. Frazier, 78 Mo. 111.

[4] Buck v. Ashbrook, 59 Mo. 200.

[5] Davis v. Land, 88 Mo. 436; Burns v. Bangert, 92 Mo. 167; State v. Diveling. 66 Mo. 375; Vogler v. Montgomery, 54 Mo. 577 Abernathy v. Whitehead, 69 Mo. 30; Hartzler v. Tootle, 85 Mo. 23.

[6] Stinde v. Behrens, 81 Mo. 254, *overruling* Stinde v. Behrens, 6 Mo. App. 309.

homestead laws have no extraterritorial force, the proceeds of property exempt in one state are not necessarily so when brought into another;[1] and that when exemptionists sell their homestead with intent to take the price to another state, they lose the right of exemption.[2]

But the court held that the homestead had not been abandoned; that the husband and wife, having the right to sell it, could legally agree that part of the consideration should be property situated beyond the bounds of the state to be conveyed to the wife; that she could hold it as a homestead free from liability, and that no liable property had been put out of the reach of creditors.[3]

The exception "otherwise provided," in the section above quoted, is found in the following: "Whenever such housekeeper or head of a family shall acquire another homestead . . . the prior homestead shall thereupon be liable for his debts, but such other homestead shall not be liable for causes of action against him to which such prior homestead would not have been liable: *Provided* that such other shall have been acquired with the consideration derived from the sale or other disposition of such prior homestead, or with other means not derived from the property of such housekeeper or head of a family."[4] That is to say, the new homestead, to take the place of the old, must have been acquired by means other than those derived from non-exempt property, so that creditors shall not have their remedy impaired.

The title of a new homestead which takes the place of the old does not have the date of its exemption fixed by the filing of the deed. If no deed has been filed, it is exempt from occupancy as the successor of the former homestead, and all debts accrued after the filing of the first deed are precluded from enforcement against the new home from that date.[5] The second, however, must have been acquired with the proceeds from the sale of the first, or by other means not liable to cred-

[1] *Citing* Boykin v. Edwards, 21 Ala. 261.

[2] *Citing* State v. Davis, 46 Mo. 108; Orr v. Box, 22 Minn. 485; Tenney v. Sly, 44 Ind. 269; Traweek v. Harris, 8 Tex. 312; Jordan v. Godman, 19 Tex. 275.

[3] Stinde v. Behrens, *supra.*

[4] Rev. Stat. Mo. (1889), § 5442; (1879), § 2696.

[5] Smith v. Enos, 91 Mo. 579.

itors,[1] in order to stand in the former's position. It would be manifestly unjust to allow the exemptionist to sell at will, pocket the money, carve a new homestead from liable lands, sell again, dedicate again, and so on *ad infinitum*.

A substituted homestead must be bought with the proceeds of that in lieu of which it stands, or with means not liable to creditors, in order to render it exempt against debts accrued after the filing of the deed of the former homestead. If the new homestead be not purchased with such proceeds or means, it will be liable for debts due up to the time when its deed was filed — just as in case of the first homestead.[2]

The owner of two tracts of land held one as his homestead while the other was unimproved. After having contracted a debt, he sold the home tract and invested a part of the proceeds to build a house on the other to be occupied as a homestead in lieu of the one sold. But the latter was not exempt from the debt as the former had been. With respect to it, the debt antedated homestead dedication, though not the acquisition of the land or the filing of the deed. Whether the owner had the design of ultimately making the unimproved tract his homestead, at the time he purchased it, was immaterial.[3] It is true that subsequent occupancy has been held, under the statute above cited, to relate back to the filing of the deed, so as to bar intervening debts;[4] but no such retroaction is permissible when another homestead has been enjoyed between the dates of filing and occupancy.

Under a statute similar to the one above considered, providing that the homestead should not be exempt as to debts existing when the deed of the property was left for record, it was decided that immediate occupancy after recording was not essential to exemption against debts contracted between the dates of record and occupancy.[5]

The proceeds of a homestead are not exempt if the seller means to take them to another state.[6]

[1] Beckman v. Meyer, 75 Mo. 333; Creath v. Dale, 84 Mo. 349.

[2] Farry v. Quigley, 57 Mo. 284.

[3] Stanley v. Baker, 75 Mo. 60.

[4] Finnegan v. Prindeville, 83 Mo. 517.

[5] West River Bank v. Gale, 42 Vt. 27; Lamb v. Mason, 45 Vt. 500; Gen. Stat. Vt. (1863), ch. 68, § 7; (1850), ch. 65, § 6.

[6] State v. Laies, 46 Mo. 108.

§ 4. Debts Prior to Designation of Homestead.

It is prescribed, in one section of a statute: "A lot of land, with one or more buildings thereon, not exceeding in value one thousand dollars, owned and occupied as a residence by a householder having a family, and *heretofore designated as a homestead*, as prescribed by law, or *hereafter designated for that purpose*, as prescribed in the next section, is exempt from sale by virtue of any execution issued upon a judgment recovered for a debt contracted after the 30th day of April, 1850; *unless the judgment was recovered wholly for a debt or debts contracted before the designation of the property*, or for the purchase-money thereof." And the next section prescribes that designation shall be by recording the deed of the homestead, or of a notice describing the property, stating that it is designed to be held exempt, subscribed, acknowledged and certified and recorded like a deed in the Homestead Exemption Book.[1]

In construing, the court said: "The first section exempts the homestead from sale under execution *for debts thereafter contracted*, to the value of one thousand dollars. . . . The second . . . declares that no property shall be exempt . . . for a debt contracted . . . prior to the recording of the deed or notice mentioned in the previous part of the same section." The exemption was held not applicable to indebtedness arising from torts, but only to debts created by contract and antedating the designation of the homestead.[2] And even the latter were held not to be discharged, as against the property, but the only effect of the exemption was to postpone the lien of a judgment thereon while the homestead right existed.[3]

The homestead continues liable, after its designation by the filing of the deed or notice, for a debt previously created, under a statute similar to that above cited.[4]

A statute provides "that no person, after the first day of March next (1874), who has not made, and had recorded, a

[1] Throop's New York Code of Civ. Proc., §§ 1397–8, Act of April 10, 1850.

[2] Lathrop v. Singer, 39 Barb. 396; Schouton v. Kilmer, 8 How. (N. Y.) 527. *See* Cook v. Newman, 8 How. (N. Y.) 523.

[3] Allen v. Cook, 26 Barb. 374.

[4] New Jersey Rev. Stat., p. 1055, § 2; Mut. Life Ins. Co. v. Newton (N. J.), 15 Atl. 542.

declaration of intention [to hold homestead as previously prescribed], shall have the benefit of such homestead as to debts contracted before the recording of such declaration."[1] Such declaration must describe the property; must be duly acknowledged before the proper officer, and must be recorded in a book kept for the purpose by the clerk of the county in which the homestead is situated.[2]

Such a declaration was duly recorded August 26, 1874, and the homestead was held exempt as to debts contracted after that date but not as to any contracted from the first of March to that date. But, whether debts contracted after the adoption of the constitution and before the first day of March should be exempt (if the latter date, or a prior one, had been the time of the recording) was not decided — the court saying that the question was not presented.[3]

A debtor dying, his widow, in 1880, made the declaration in behalf of their children; but as they stood in his shoes, the homestead was liable for his debts contracted after the date fixed by the statute.[4]

Debts are deemed antecedent to homestead acquisition, and therefore susceptible of being enforced against it, up to the time when the property is dedicated by both declaration and occupancy, under some statutes.[5]

Though the debts antedate the purchase and dedication of the homestead, and though judgment thereon will bear upon it, it has been held they may be defeated by the dedication and occupancy of land as a homestead prior to the rendition of the judgment. The position of the court was that debts antecedent to the purchase and dedication (though not to the passage of the law), to be collectible from the homestead,

[1] Acts of West Virginia (1872–3), ch. 193, § 10; Acts of West Virginia (1881), ch. 19, § 32. Warth's Code, ch. 41: "Nothing herein contained shall affect or impair any right acquired under chapter 193 of the acts of 1872–3."

[2] Acts of 1872–3, § 9.

[3] Speidel v. Schlosser, 13 W. Va. 686, *701.*

[4] Reinhardt v. Reinhardt, 21 W. Va. 76.

[5] Boreham v. Byrne, 83 Cal. 23, *26–8*, and cases therein cited; Lubbock v. McMann, 82 Cal. 226; Maloney v. Hefer, 75 Cal. 424; Denis v. Gayle, 40 La. Ann. 291; Bossier v. Sheriff, 37 La. Ann. 263; Code and Stat. Cal., § 1237 *et seq.;* Const. La., art. 222.

must be liens upon it.[1] But if they are secured by liens, homestead laws cannot dislodge them, and there would be no need of allusion to them in an exemption law. They differ from ordinary personal debts in their susceptibility of being collected from the homestead after being prosecuted to judgment. It has been held that a judgment rendered and recorded does not operate as a lien upon real estate afterwards purchased by a judgment debtor, who occupies it as a homestead instantaneously with the act of purchase.[2]

When a lien has attached it cannot be dislodged by any subsequent homestead declaration and occupation of the land on which it rests.[3]

§ 5. Debts by Written Contract.

Where "the homestead may be sold for debts created by written contract executed by the persons having power to convey, and expressly stipulating that the homestead is liable therefor, but it shall not in such case be sold except to supply the deficiency remaining after exhausting the other property pledged for the payment of the debt in the same written contract,"[4] it is held that the words "created by written contract" refer to the mode of making the obligation rather than to the time when the liability begins. The written contract, as evidence of the obligation, may bear date at the time the debt is contracted or at a later time.[5]

[1] Hawthorne v. Smith, 3 Nev. 164; Culver v. Rogers, 28 Cal. 520; *Re* Henkel, 2 Saw. 305.

[2] Neumaier v. Vincent, 41 Minn. 481. *Compare* Kelly v. Dill, 23 Minn. 435, and Liebetrau v. Goodsell, 26 Minn. 417. On this subject see different views, in decisions on statutes similar to that of Minnesota: Deville v. Widoe, 64 Mich. 593; Reske v. Reske, 51 Mich. 541; Edwards v. Fry, 9 Kan. 417; Gilworth v. Cody, 21 Kan. 702; Scofield v. Hopkins, 61 Wis. 370.

[3] Bunn v. Lindsay, 95 Mo. 250, *258;* Johnson v. Harrison, 41 Wis. 381; Tuttle v. Howe, 14 Minn. 145. 152; Brooks v. The State, 54 Ga. 36; Smith v. Whittle, 50 Ga. 627; Gunn v. Thornton, 49 Ga. 380; Burnside v. Terry, 51 Ga. 186; Mims v. Ross, 42 Ga. 121; Ryan v. Wessells, 15 Ia. 145; Hannahs v. Felt, 15 Ia. 141; Hawthorne v. Smith, 3 Nev. 164, 168; McCauley's Estate, 50 Cal. 544; Willis v. Matthews, 46 Tex. 478; Chipman v. McKinney, 41 Tex. 76; Potshuisky v. Krempkan, 26 Tex. 307; McCormick v. Wilcox, 25 Ill. 247; Ely v. Eastwood, 26 Ill. 108; Smith v. Marc, 26 Ill. 150; Kurz v. Brusch, 13 Ia. 371; Lucas v. Pickel, 20 Ia. 490; Bishop's Fund v. Ryder, 13 Conn. 87.

[4] McC.'s Ia. Code, § 3168 (1993).

[5] Stevens v. Myers, 11 Ia. 183.

Contracts are presumed to include homestead statutes as well as all others which bear upon the agreement, so that the rights of the parties remain unaffected by the subsequent repeal of a statute in force when they contracted.[1] The *lex contractus* does not govern so as to affect the operation of homestead exemption upon the remedy.[2]

A lien is created by agreement between parties contracting to that effect, and it has been held that a homestead cannot be subjected to one in any other way.[3] But in many states homesteads may be subjected to liens in other ways. Judgments for torts or taxes create liens. Assessments do. Under some acts of the United States, liens on homesteads may arise.

Even a written confession of judgment, in which the defendant consents that execution may issue against any of his property, "homestead included," is held insufficient authorization for the sale of it.[4] But this is not the law in every state;[5] nor anywhere, if the confession be followed by the rendition of judgment, provided no interest of wife or children or other homestead beneficiary intervenes.

It has been suggested that an equitable lien may be created on a homestead by contract, when money is advanced to remove an existing lien, even though the instrument, intended to create a legal lien in favor of those advancing the money, should be void.[6]

The phrase "created by written contract" applies to any written agreement by competent parties as well as to deeds of sale or mortgage;[7] but is not to be extended, by construction, to cover a verbal agreement designed to be reduced to writing but never written.[8] Consent to have the homestead

[1] Bridgman v. Wilcut, 4 G. Gr. (Ia.) 563.

[2] Helfenstein v. Cave, 3 Ia. 287.

[3] Meyer v. Berlandi, 39 Minn. 438; Keller v. Struck, 31 Minn. 446; Coleman v. Ballandi, 22 Minn. 144; Cogel v. Mickow, 11 Minn. 354.

[4] Rutt v. Howell, 50 Ia. 535.

[5] In Louisiana, exemption not applying to antecedent debts by the act of 1865, it was held that confessions of judgment on prescribed debts, made by the debtor, will hold good as against homestead claims of his family — the date of the debt being prior to that of the homestead creation, but the date of the confession subsequent. Martin v. Kirkpatrick, 30 La. Ann. 1214.

[6] Ayres v. Probasco, 14 Kas. 175, 198.

[7] Foley v. Cooper, 43 Ia. 376.

[8] Rutt v. Howell, 50 Ia. 535.

made liable, by written contract with one creditor, will not lay the property open to execution by any other creditor; it is not a general waiver of exemption. If such contract in favor of a particular creditor be a mortgage, a general creditor cannot be subrogated to the rights of the favored mortgagee. The latter would share *pro rata* with all the other creditors in case of a general assignment by the owner for the benefit of creditors, and could only proceed against the homestead under his mortgage after the exhaustion of the other property; that is, after his share from the general assignment has proved inadequate to satisfy his claim.[1]

§ 6. Dormant Liens.

If a statute limits homestead to the time of occupancy, a judgment against the owner is a dormant lien on the homestead which springs to life when occupancy ceases — whether it cease by sale, abandonment or otherwise.[2] This doubtless needs qualification. Personal judgments against homestead-holders do not create liens against homesteads, as a general rule. Where they create dormant ones — liens with enforcement suspended during occupancy — the owner certainly cannot dislodge them by sale or otherwise.

Where exemption from liability to "attachment, levy or sale upon execution or other process issuing out of any court" of the state was limited to the time during which the property "shall be owned and occupied by the debtor as a homestead," it was held that a judgment against a debtor in a court of record in his county created a lien upon the homestead, but that such lien could not be enforced while the debtor owned and occupied it.[3]

The property may be subjected to liens though they cannot be enforced while the homestead right exists. They follow the property, however, and may be enforced when it is in third hands, after the expiration of the exemption right. The

[1] Dickson v. Chorn, 6 Ia. 19.

[2] Kellerman v. Aultman, 30 Fed. 888, Brewer, J.; Code Civ. Proc. Neb., § 477; Ses. L. Neb. 1875, p. 45. In 1879 the homestead law was changed. Dorrington v. Myers, 11 Neb. 388; Bank v. Carson, 4 Neb. 501.

[3] McHugh v. Smiley, 17 Neb. 620, 624; Eaton v. Ryan, 5 Neb. 47; State Bank v. Carson, 4 Neb. 498; Hoyt v. Howe, 3 Wis. 752; Folsom v. Carli, 5 Minn. 264.

creditor's remedy is thus postponed but not defeated. And when it becomes operative, it is not too late for the creditor to have a judgment recognizing a homestead in favor of his judgment debtor set aside as void because the conditions of homestead have ceased to exist.[1] Present inhibition of forced sale is not exemption from ultimate liability.[2]

The general rule of law is (as already remarked), that when a lien upon land exists before the establishment of the homestead right upon it, it cannot be displaced by the subsequent creation of the right. The lien-holder has his *jus ad rem*, and not a mere remedy which may be affected by legislation. But it has been held doubtful whether such right in the thing cannot be displaced by the subsequent occupancy of the thing itself, as a homestead, by the debtor.[3]

A lien created on a homestead while it is occupied, by a levy then duly laid, may hold good when the occupancy ceases, where the statute exonerates homesteads from sale under execution, but not from levy; and does not protect property from such sale after it has ceased to be a homestead. The creditor, having made legal seizure, may await the death of the homestead-holder (and he may even have to wait much longer, if a wife and minor children survive), and finally sell what was the homestead, and get tardy payment of his debt. Such a levy was held to have created a lien which was good against a subsequent purchase under a mortgage given by the debtor-owner after the levy.[4]

Yet the fee of real estate cannot be sold by order of a probate court, upon the petition of an administrator, for the

[1] Denis v. Gayle, 40 La. Ann. 286. (*See* Culvitt v. Williams, 35 La. Ann. 325, as to "contiuuing jurisdiction.")

[2] By the constitution of Texas of 1845, a lien on the homestead could be created but was inoperative unless it could be enforced without a forced sale. Sampson v. Williamson, 6 Tex. 109; Bomack v. Sykes, 24 Tex. 218; Inge v. Cain, 65 Tex. 75. When the lien-bearing property ceased to be used as a homestead, foreclosure was allowed. Lee v. Kingsbury, 13 Tex. 68; Stewart v. Mackey, 16 Tex. 56. And the constitution of that state of 1869 was the same in regard to such liens. Jordan v. Peak, 38 Tex. 429; Petty v. Barrett, 37 Tex. 84.

[3] Hanna v. Morrow, 43 Ark. 107, *citing* Moore v. Granger, 30 Ark. 574; Patrick v. Baxter, 42 Ark. 175; Tumlinson v. Swinney, 22 Ark. 400; Norris v. Kidd, 28 Ark. 485.

[4] Brandon v. Moore, 50 Ark. 247; Chambers v. Sallie, 29 Ark. 412; Norris v. Kidd, 28 Ark. 485; Const. of 1868, Act of 1852.

payment of the debts of the intestate, subject to the home stead right of a minor child, under a constitutional provision by which the widow and minor children of the decedent homestead-holder are entitled to the usufruct of the homestead during her life and their minority, and which exempts such property from the lien of any judgment except for purchase-money, taxes, improvements or indebtedness of fiduciaries.[1]

Under such provisions, the sale of a homestead by an administrator to pay the debts of the decedent, while the children were minors, was declared to be void. The administrator had sold under an order of court, and had subsequently bought the property himself from the purchaser at the probate sale. On reaching their majority, the children brought an action of ejectment, to recover the property. The homestead right had terminated with their minority; it no longer existed when their suit was instituted. But they were held entitled to the property as heirs: the sale being a nullity; and the property, in their hands, was held liable for their father's debts.[2]

And dormant liens may be enforced against property that was homestead but which has ceased to be such.[3]

Where judgments rest as dormant liens upon homesteads, enforceable as soon as the family occupancy of the beneficiaries ceases, it is reasoned that no higher evidence that the property is no longer needed as a home need be found than the fact that the owner has sold it. The conditions, upon which the exemption is granted, cease upon sale. Then a judgment or mortgage, previously suspended, becomes operative.[4]

The lien of a judgment against the owner of a homestead is dormant as to that property while held by him; but if he sell it, the lien awakes to life and may be enforced against the

[1] Const. Ark. 1874, art. IX, §§ 6, 10; Stayton v. Halpern, 50 Ark. 329; McCloy v. Arnett, 47 Ark. 445, under Const. 1868, XIV, 5; Act of 1852; Garabaldi v. Jones, 48 Ark. 236; Nichols v. Shearon, 49 Ark. 75.

[2] Nichols v. Shearon, 49 Ark. 75; Altheimer v. Davis, 37 Ark. 316; Booth v. Goodwin, 29 Ark. 633; Wehrle v. Wehrle, 39 Ohio St. 365.

[3] Lamb v. Shays, 14 Ia. 567; Cummings v. Long, 16 Ia. 41.

[4] Herbert v. Mayer, 42 La. Ann. 839; S. C., 8 So. 590; Const. of La., art. 219; Civ. Code La., art. 3397; Denis v. Gayle, 40 La. Ann. 291; Hayden v. Slaughter, 43 La. Ann. 385; S. C., 8 So. 919.

late homestead property in the hands of the vendee. Should the vendor of such property repurchase it, before the enforcement of the lien, the exemption would not revive, nor the lien be displaced or rendered again dormant.[1]

There may be a suspended judgment lien on a homestead: as when the statute allows judgments to be docketed against it but prevents their enforcement during the time the homestead remains exempt, yet allows execution afterwards. Meanwhile, the exemptionist may sell the land on which the benefit rests, subject to the judgment, but also protected for the time being by the suspension of the lien. The purchaser acquires this protection with the land, so far as the homestead extends with the land.[2]

"This lien is created by the act of docketing, and *eo instanti* attaches to the debtor's estate in the land, and there is nothing else to which it can adhere; but its enforcement is deferred by the law until the exemption expires. There is no undefined, shadowy interest, springing into existence in the future, to which the lien then attaches itself, meanwhile awaiting its advent, but it *fastens at once upon the estate* of the debtor in the land, to be enforced at a future uncertain time.

"This gives the creditor a *present interest* in the land as a security for his debt, and leaves the debtor free to do whatever an owner, not in debt by docketed judgment, could do with his own property, with the single proviso that he must not carry his spoliations, not necessary to the full enjoyment of the premises, so far as to impair the security they afford to his debt."[3]

A lien against a homestead, resulting from the docketing of a judgment, may be enforced on the death of the debtor who leaves no widow or children.[4]

There is no need of a levy to complete the lien, in such case.[5]

[1] Herbert v. Mayer, 42 La. Ann. 839; Denis v. Gayle, 40 La. Ann. 291; La. Const., art. 219; Civ. Code, 3397.

[2] Jones v. Britton, 102 N. C. 167; Rankin v. Shaw, 94 N. C. 405; Markham v. Hicks, 90 N. C. 204; Wilson v. Patton, 87 N. C. 318; Hinton v. Adrian, 86 N. C. 61.

[3] Smith, C. J., in Jones v. Britton, *supra*.

[4] Rogers v. Kimsey, 101 N. C. 559. Held, that since the act of 1876–7, chapter 253, no lien is created on the homestead by docketing a judgment. Utley v. Jones, 92 N. C. 261; Markham v. Hicks, 90 N. C. 204.

[5] Lytle v. Lytle, 94 N. C. 683;

The holder of this dormant lien is not a reversionist; he cannot bring an action of waste. The homestead is not a determinable fee, nor a reversionary estate. The occupant may commit waste without becoming liable to the action of waste. But there is a limit: he must not wantonly and unnecessarily reduce the value of his whole premises so as to impair the value of the lien which is enforceable on the homestead when the exemption shall have ceased.[1]

The committing of waste, such as the cutting of the wood off the premises, may be enjoined where there is a judgment operating as a lien upon a homestead worth not more than the statutory limit of value, if the wood-land constitutes a valuable part of the property. An injunction may be issued restraining the homestead occupant himself from cutting timber beyond what is necessary for his own use; or restraining a third person, to whom he has sold the wood, from cutting and hauling it away.[2]

May a valid lien be displaced by the death of the debtor? It has been held so; held that his lien-bearing property may be relieved by that event, in favor of his family, if he was occupying it as a homestead when he died. It is said: "Had he lived, such use of the property could not have displaced the lien given by him; upon his death, however, the property, to the extent of the interest which he owned at the time the trust deed was executed — the same having become in fact his homestead — *was discharged of the lien*, and his family were entitled to hold it free from the claims of all creditors, his estate being insolvent.

"It matters not what the lien may be; unless it be such as under the constitution may be enforced by the sale of the

Sawyers v. Sawyers, 93 N. C. 321; Lee v. Eure, 93 N. C. 5; Miller v. Miller, 89 N. C. 402; Mebane v. Layton, 89 N. C. 396.

[1] Formerly held a determinable fee, in North Carolina. Poe v. Hardie, 65 N. C. 447. Then called a "determinable exemption." Bank v. Green, 78 N. C. 247. A quality of exemption attached to existing estate. Littlejohn v. Egerton, 77 N. C. 379; Keener v. Goodson, 89 N. C. 273. The "reversionary interest" could be sold in that state formerly; *i. e.*, the land subject to the homestead right. The husband could sell it without joinder by the wife. Jenkins v. Bobbitt, 77 N. C. 385. This was before 1870.

[2] Jones v. Britton, 102 N. C. 166; Webb v. Boyle, 63 N. C. 271; Gordon v. Lowther, 75 N. C. 193; Braswell v. Morehead, Busb. Eq. 26; Camp v. Bates, 11 Conn. 51.

homestead, upon the death of the head of the family, it must give way to the homestead exemption.

"Persons, in taking liens, contract with reference to this fact, and cannot complain if the event occurs which they might have foreseen would defeat the lien." [1]

It will be observed that the statement in this quotation is — not that the occupancy — setting apart or designating of the homestead — displaced the lien, but that the death of the debtor did so. The *property was indebted;* it was liable to be proceeded against *in rem*, whoever might hold the title; and it is therefore difficult to perceive how the death of him who put the burden on could take it off. As the lien-holder had a vested right in the property,[2] it is equally difficult to see how any legislature, or convention making a state constitution, could impair that right. And it would seem to follow that "persons, in taking liens," may contract with reference to constitutional guaranties, and conclude that, if the lien is valid when made, the property cannot escape its indebtedness by the death of anybody.

The theory of the court rendering the decision is that the lien was only conditionally *in rem* when created; that the statute qualified it, so that the creditor knew when contracting that his lien was defeasible by the death of the debtor. This novel exception to the general rule governing property obligations leaves the rule itself intact, unaffected in the states to which this statute and decision are inapplicable.

That court has frequently avowed the principle that an attached lien cannot be detached by exemption; that when a judgment lien has attached to real property, it cannot be rendered nugatory by any attempt of the debtor to stamp the lien-bearing property with the homestead character.[3]

Liens resting on the homestead are not displaced to give the widow and minor heirs an exempt home at the expense of the lien-holders.[4]

A privileged debt, bearing on no particular property spe-

[1] Griffie v. Maxey, 58 Tex. 214, *citing* Reeves v. Petty, 44 Tex. 250.

[2] Bank v. Morris, 6 Hill, 362.

[3] Van Ratcliff v. Call, 72 Tex. 495; Reed v. Howard, 71 Tex. 204; Wright v. Straub, 64 Tex. 66; Gage v. Neblett, 57 Tex. 374.

[4] Phipps v. Acton, 12 Bush, 375.

cially, ought to be satisfied out of other than the homestead property, if practicable.[1]

§ 7. Attachment Liens.

(1) *Claiming homestead after attachment:* When the law gives the right of attachment for debt, it gives also that of sale to complete the object: the satisfaction of the debt. "Such right is, from the time the lien attaches by seizure, a vested right and property. In this respect, there is no difference between a lien secured by a levy of an attachment and one secured by the docketing of a judgment, or the levy of an execution, except that it may be defeated by the dissolution of the attachment, or failure to obtain judgment." This was said in deciding that an owner cannot defeat an attachment lien by selecting the attached property as his homestead after the seizure. And it is added: "There is no reason to suppose from the language, either of the constitution or of the statute,[2] that it was intended to give to the debtor the power, by his acts, to deprive others of rights previously obtained in his property. They could be deprived of such rights only by due process of law."[3]

There is an unguarded remark, in the quotation from the decision first above cited, that, in respect to the vested right of the lien-holder, "there is no difference between a lien secured by a levy of an attachment and one secured by the docketing of a judgment or the levy of an execution, except that it may be defeated by the dissolution of the attachment or failure to obtain judgment." There is this marked difference: the attachment lien always bears on specific property while the ordinary judgment creates a general lien. And this is an important difference in its bearing on subsequent homestead selection, as will be pointed out particularly hereafter.

It is true, as judicially said, that there is no difference between the liens as to the creation of vested rights; but the point to which attention is called (and which perhaps was not pertinent to the thought of the court), is that there is no vested right lodged in the judgment creditor by a general

[1] Harrison v. Obertheir, 40 Tex. 385.
[2] Constitution and Stat. of Minn.
[3] Kelly v. Dill, 23 Minn. 435, 439; Tuttle v. Howe, 14 Minn. 145.

judgment which would preclude the debtor from claiming homestead in realty levied upon under the judgment, before or at the time of the levy, since there would be no specific lien upon it. Other realty of his might satisfy the judgment. Whether the debtor would be permitted to claim homestead in realty specifically burdened by an attachment lien, when the creditor has a vested right of lien on the particular property claimed, is a different question; and a question that has been fully answered by the decisions next cited. The answer is negative — except that, as against other than the attacher, the homestead may be legally claimed.

When property, not exempt from execution, has been attached, no subsequent action of the owner, such as claiming it as a homestead, moving upon it, making it the family home and complying generally with the legal requisites for establishing a homestead, will defeat the attachment lien. When the preliminary seizure has been effected legally, it precludes homestead dedication as effectually as levy after judgment could do so.[1]

So, an attachment not dissolved is like an execution levy not set aside. Either is a bar to homestead claim, but either may be removed or dissolved on proper pleading and proof so as to make way for homestead claim.

Again it is said, under a different statute, that attachment of land for debt is not defeated by the debtor's becoming a resident of the state and claiming homestead after the levy but before the inchoate lien has been perfected by judgment.[2] That is to say, the inchoate lien is not displaced by the mere compliance with the requisites for obtaining a homestead without taking steps in the attachment case to dislodge the lien. Such a homestead would be subject to the lien subsequently perfected by judgment.

To the same effect, it is said under another statute that attachment of real estate having been laid so that the lien has taken hold, it is not dislodged by the subsequent conversion of the realty to homestead purposes.[3] When the lien is ma-

[1] Avery v. Stephens, 48 Mich. 246.

[2] Watkins v. Overby, 83 N. C. 165; Ladd v. Adams, 66 N. C. 164; McKeithan v. Terry, 64 N. C. 25.

[3] Bullene v. Hiatt, 12 Kas. 98; Robinson v. Wilson, 15 Kas. 595.

tured by judgment, it will be held, by the law of retroaction, to have existed as a perfect lien from the date of the levy, and therefore prior to the dedication of the land levied upon, as a homestead. The decisions may not show the distinction above indicated, between the contingent and the perfected attachment lien, but they hold that subsequent homestead selection will not defeat a prior lien.[1] And that the lien of a judgment on attachment reaches back, by the law of relation, to the date of the preliminary levy.[2]

Should an attachment of a house and land be made, yet the inchoate, contingent lien, thus created, be never ripened by judgment, the homestead dedication of the seized property between the dates of seizure and the judgment of dissolution, would be perfectly good. What had seemed a lien upon it was no lien, since the dissolution, by the law of relation, retroacts as well as the other sort of judgment mentioned.

And, as above remarked, even though the attachment be sustained by judgment, the homestead established after the attaching and before the judgment would hold good as to ordinary creditors, though not as to the attaching creditor.

The rule may be thus briefly stated: The lien created by the levy of an attachment is not displaced by the making a homestead of the land attached, before the lien has been followed by judgment.[3]

After judgment sustaining an attachment, it is too late to claim homestead in the attached property as against the per-

[1] Lee v. Miller, 11 Allen (Mass.), 37; Elston v. Robinson, 21 Ia. 531; Tourville v. Pierson, 39 Ill. 447; Kresin v. Marr, 15 Minn. 116; Coolidge v. Wells, 20 Mich. 79; Hale v. Heaslip, 16 Ia. 452; Hyatt v. Bullene, 20 Kas. 557; Kelly v. Dill, 23 Minn. 435.

[2] Wright v. Dunning, 46 Ill. 276; Austin v. Stanley, 46 N. H. 51; Tuttle v. Howe, 14 Minn. 145; Tuttle v. Turner, 28 Tex. 773.

[3] Baird v. Trice, 51 Tex. 555 (overruling Stone v. Darrell, 20 Tex. 11); Clements v. Lacey, 51 Tex. 150; Railroad Co. v. Winter, 44 Tex. 597; Mabry v. Harrison, 44 Tex. 286; Chipman v. McKinney, 41 Tex. 76; Potshnisky v. Krempkan, 26 Tex. 307; Reynolds v. Tenant, 51 Ark. 84; Richardson v. Adler, 46 Ark. 43; Patrick v. Baxter, 42 Ark. 175; Ryan v. Wessels, 15 Ia. 145; Hannahs v. Felt, 15 Ia. 141; Bullene v. Hiatt, 12 Kan. 98; Robinson v. Wilson, 15 Kan. 595; Carter v. Champion, 8 Conn. 549; Lyon v. Sanford, 5 Conn. 544; Kelly v. Dill, 23 Minn. 435; Tuttle v. Howe, 14 Minn. 145; Smith v. Bradstreet, 16 Pick. 264; People v. Cameron, 7 Ill. 468; Peck v. Webber, 7 How. (Miss.) 658; Goore v. McDaniel, 1 McCord, 480.

fected attachment lien.[1] For then the debt sued upon has become a property debt, like a mortgage. It is no longer an ordinary one, as it was before, but it now is secured by a lien on specific property.

This effect of the attachment judgment does not depend upon the defendant's course — his appearance in the case or his absence and default. Whether the attachment proceedings were *inter partes* or *ex parte;* whether *in personam* or *in rem*, this effect is the same; for the defendant in any case must have had notice, either by service or publication, so as to have had opportunity to defend, else the whole proceeding would be null and void. If notified, whether he respond or not, the proceedings, if done according to statute, and continued to judgment, will result in a valid, specific lien vindicable upon the property attached as that of the debtor. All the reasons applicable when the defendant appears and defends, yet fails to plead homestead, apply also when he stays away and allows default or allows judgment *in rem*. The lien created is the same in either case. It would be a mere mockery to have attachment proceedings if their result could be defeated and the lien dislodged by subsequent claim. The general rule is that the lien will stand.

This rule is not without exception; or, rather, it is not always followed; for in the state affording several of the above-cited decisions, it has been narrowed, if not disregarded. After an attachment had been sustained by judgment, the debtor, in a separate action, successfully asserted homestead in the land attached.[2] It was remarked by the court, in according the homestead, that the debtor had not defended in the attachment suit. Whether that fact made a difference is not apparent; for any attachment without notice is a nullity; while any with notice may be defended; and the failure of the debtor to defend cannot affect its legality.

It is said that property not exempt at the date of judgment

[1] Perkins v. Bragg, 29 Ind. 507; State v. Manly, 15 Ind. 8; Smith v. Chadwick, 51 Me. 515; Hadley v. Bryars, 58 Ala. 139; Hewes v. Parkman, 20 Pick. 90; Nash v. Farrington, 4 Allen, 157; Behymer v. Cook, 5 Colo. 395; Kelly v. Dill, 23 Minn. 435; Barney v. Keniston, 58 N. H. 168; Drake's Att., § 244*a;* Waples' Att. & Gar., pp. 164–7; *post*, ch. XXIII, § 17.

[2] Seligson v. Collins, 64 Tex. 314.

may become so by being dedicated as a homestead before the time of sale.[1] This is so in several states, as to general judgments. The debtor selects his homestead before sale. No lien is thereby dislodged; no vested right of the judgment creditor is thereby divested; for the judgment creates none. It is rendered subject to the right of the debtor to select his exempt portion. No specific lien rests upon any piece of the defendant's property. So, the particular piece selected after judgment, not exempt at the time of the judgment, becomes so by selection before sale.

But an attachment judgment does affect particular property — does confirm a specific lien upon the property attached and makes it as good as a mortgage: how now can subsequent selection of it as a homestead be tolerated without divesting the lienholder of a vested right?

Where recording is essential to the creation of an attachment lien, there is no reason why homestead may not be declared between the act of attaching and the date of recording. There would then be no lien in the way.[2] If the attachment be recorded after the homestead declaration, it may be dissolved on showing that the attached property is exempt by reason of the timely homestead declaration.

On the other hand, if the recording of the declaration of homestead is necessary to exemption, the property may be validly attached before the recording; and, even though the proceeds of a former homestead have been invested in realty designed for a new one, it has been held that the new property is attachable before the recording of the homestead declaration.[3]

[1] Trotter v. Dobbs, 38 Miss. 198; Lessley v. Phipps, 49 Miss. 790. In Davis v. Day (Ark.), 19 S. W. 502, it was held that an execution sale did not convey the homestead interest of a claimant under a trust deed made and recorded after the judgment but before the sale. The judgment, being founded upon a debt contracted under the constitution of 1874, was not a lien upon the homestead of the defendant. Cohn v. Hoffman, 45 Ark. 376. The holder of the deed of trust had a homestead interest from the date of the recording of his deed.

[2] Wilson v. Madison, 58 Cal. 1; McCracken v. Harris, 54 Cal. 81; Sullivan v. Hendrickson, 54 Cal. 258; Hawthorne v. Smith, 3 Nev. 185.

[3] Rev. Stat. of Idaho, §§ 3071–2, 3038–9; Wright v. Westheimer (Idaho), 28 P. 430. The court, by Sullivan, C. J., said, after stating the facts: "The third and fourth specifications of error will be considered

(2) *Attaching after homestead has been established:* It is settled beyond question that homesteads are as free from attachment as from execution. If their owners use the means provided by law, they can effectually defeat any effort to subject

together, and are as follows: *Third.* 'The court erred in failing to find that said property was exempt from execution and attachment, and was not subject to the debt sued on by Westheimer & Sons against the plaintiff.' *Fourth.* 'The court erred in failing to hold that the property in dispute in this action was exempt from seizure, levy, and sale under execution and attachment, because of the fact that plaintiff procured the money to purchase this property from the sale of property on which he had a valid homestead exemption under the laws of the state of Idaho.' The contention is that, as the property attached had been purchased with the proceeds of the sale of the homestead of appellant, and that as appellant purchased said property as a home for himself and family and filed his homestead declaration therefor as soon as he had established his residence thereon, the same is exempt under the homestead laws. The question for consideration, then, is, under the homestead laws of the state of Idaho, can a person sell his homestead, which is exempt from execution and forced sale, and purchase another home with the proceeds thereof, and hold the same, exempt from execution and attachment, without filing in the proper county recorder's office the declaration of homestead required by section 3071 of the Revised Statutes of Idaho? The evidence contained in the record establishes the following facts: That the appellant, with his family, consisting of a wife and eight small children, was residing in the town of Blackfoot, Bingham county; that he was the owner of the home in which he was then residing; that he had filed in the proper recorder's office his declaration of homestead, claiming the said property as a homestead, and that the same was exempt from execution and forced sale; that, being indebted to divers persons, he concluded to sell said homestead, purchase another of less value, and pay certain of his creditors with the surplus. He thereupon sold his homestead, paid part of his debts, and invested $1,000 of the proceeds of the sale of said homestead in the lots and premises in question, for the purpose of making a home for himself and family. He removed his family thereon about December 3 or 4, 1890, and filed his homestead declaration therefor on December 4, 1890. That appellant filed his homestead declaration after the levy of the attachment on November 21, 1890, and before the levy of the second writ of attachment, December 5, 1890. The second writ of attachment is not a lien upon said homestead, because the homestead declaration was filed prior to the levy of said writ. Rev. St. Idaho, § 3039. The writ of attachment, levied upon said premises on November 21, 1890, is a valid lien thereon, unless the fact of its having been purchased with a part of the proceeds arising from the sale of the former homestead of appellant exempts it from such lien. Section 3070, Rev. St. Idaho, is as follows: 'In order to select a homestead, the husband or the head of the family, or, in case the husband has not made such selection, the wife, must execute and acknowledge, in the same

such property to the payment of judgments, on ordinary debts contracted after it became exempt, under the operation of either writ. In other words, the general rule is that home-

manner as conveyance of real estate is acknowledged, a declaration of homestead, and file the same for record.' Section 3071 provides what such declaration must contain. Section 3072 provides that such declaration must be recorded in the office of the recorder of the county in which the land is situated. Section 3073 provides that, after the filing of the declaration for record, the premises therein described constitute a homestead. Section 3038 provides that the homestead is exempt from execution and forced sale, except as provided in title 7 of the Revised Statutes. Section 3039 provides that the homestead is subject to execution or forced sale in satisfaction of judgments obtained for certain debts and incumbrances, and, among others, in an action in which an attachment was levied upon the premises, before the filing of the declaration of homestead. This provision applies to the case at bar, unless it is excepted for the reason of its having been purchased with the proceeds of the former homestead. The writ of attachment was levied November 21, 1890, the homestead declaration was filed December 4, 1890. Section 3041 provides that a homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof, executed and acknowledged by the husband and wife, if the claimant is married, and by the claimant, if unmarried. From the above provisions it will be observed that to select a homestead in this state, under the homestead law, certain things must be done and performed before it is a homestead, or is exempt from execution and forced sale, and that after a homestead has been once acquired it can be abandoned only as the statute prescribes. The appellant in this case abandoned his first homestead by selling and conveying it to one C. S. Smith. There is no provision in the statutes of Idaho exempting the money for which a homestead may be sold from execution or attachment until it may be invested in another homestead, except in cases of involuntary sales, which provision is not applicable to this case. Our statutes are silent upon the question under consideration. They contain no provisions for an exchange of one homestead for another, nor the purchase of another with the proceeds of the sale of the one exempt, nor for the exemption of the new homestead so purchased. . . . The statutes of some of the states permit the exchange of one homestead for another, and the sale of one, and with the proceeds thereof the purchase of another, and hold the latter exempt from attachment and execution; but states having such statutes do not require the making and filing of a homestead declaration as a precedent condition to the procurement of a homestead, and its exemption from attachment and execution. We are of the opinion that, under our statutes, a residence purchased with the proceeds of the sale of a former homestead, which was exempt from attachment and execution, does not for that reason become a homestead, and exempt from attachment and execution under our homestead laws. The required homestead declaration must be filed in order to secure the benefit of the exemption laws. The judg-

steads are not attachable for such debts.[1] They are liable for debts contracted before the time when the exemption character was impressed on the homestead, and they cannot be saved from the effect of the writ by pleading that character under such circumstances.[2] Homesteads, being exempt from ordinary debts contracted after they have been established, may be saved from attachment by timely plea, just as they may be saved from execution by the same means. The ordinary creditor cannot make his debt a lien-bearing one as to the debtor's homestead by means of attachment if the debtor will exercise his right to have the attachment dissolved by showing to the court, in the attachment proceedings, that the attached property is exempt.[3]

Will the attachment of a homestead be effectual, if the debtor fail to plead exemption to dissolve it? If he sit idly by and see the attachment followed by judgment against his homestead, will the effect be to fasten a lien upon the property? Or would the whole attachment proceeding be an absolute nullity?

It is said to be unnecessary for the defendant to set up his homestead right when the plaintiff has made no allegation relative to it which requires an answer.[4] But, though there be no mention of the debtor's homestead in the attachment plaintiff's pleadings (as there ordinarily is not), the sheriff's return is in the case; and if that shows that the homestead has been attached under the pleadings, is there no necessity for the defendant to set up his homestead right if he would save it?

ment of the court below should be affirmed, and the respondents are entitled to judgment against the appellant for their costs on this appeal, and it is so ordered."

[1] Plant v. Smythe, 45 Cal. 161; Myers v. Mott, 29 Cal. 359; Crocker v. Pierce, 31 Me. 177; George v. Bassett, 54 Vt. 217; Rowell v. Powell, 53 Vt. 302; Parks v. Cushman, 9 Vt. 320; Pierce v. Jackson, 6 Mass. 242; Spencer v. Blaisdell, 4 N. H. 198; Halsey v. Fairbanks, 4 Mason, 206; Sappington v. Oeschli, 49 Mo. 244; Reed v. Ownby, 44 Mo. 204; Peake v. Cameron, 102 Mo. 568; Handy v. Dobbin, 12 Johns. 220; Wilson v. Paulson, 57 Ga. 596; Cox v. Milner, 23 Ill. 422; Savery v. Browning, 18 Ia. 246; Nashville Bank v. Ragsdale, Peck, 296; Davis v. Garret, 3 Iredell, 459.

[2] Peake v. Cameron, 102 Mo. 568.

[3] Hadley v. Bryars, 58 Ala. 139; Kelly v. Dill, 23 Minn. 435; Barney v. Keniston, 58 N. H. 168; Perkins v. Bragg, 29 Ind. 507; Clapp v. Thomas, 5 Allen, 158; Nash v. Farrington, 4 Allen, 157; Colson v. Wilson, 58 Me. 416; Smith v. Chadwick, 51 Me. 515; Behymer v. Cook, 5 Colo. 395.

[4] Willis v. Matthews, 46 Tex. 483; Tadlock v. Eccles, 20 Tex. 790.

The general proposition is true that an attachment lien cannot be created on exempt property,[1] provided the exemption is pleaded; provided the defendant uses the means of preventing such result. Courts are not presumed to know that the attached property is exempt. Even where homesteads are recorded, and where the record is notice to all the world, it is not notice to the courts in such a sense as to require or even to authorize them to take judicial cognizance of the exemption. Even if they were deemed affected by the notice, may there not be a homestead waiver? If the defendant chooses to let his homestead become saddled with a property debt, is the court to prevent him? If he chooses to let his homestead be sold under an ordinary judgment and execution, is the court to prevent him? Leaving out of the question all others' rights, and confining the matter in hand to the exemptionist himself, it seems that he would be concluded by allowing his homestead to become subject to a perfected lien; and that an attachment would ripen into such a lien if allowed to take its course, whether the *res* be a homestead or some other thing.

It has recently been held that a defendant whose homestead is attached may delay till after judgment and then successfully claim the *res*.[2]

This ruling was made in a case where a debtor claimed homestead in property on which he had not lived for six years, and who had had a home elsewhere during the time. On the trial he professed to have had an intention to return during his absence. It was not a case of selection after general judgment, but of maintenance of homestead despite a lien created by attachment proceedings in which he had not sought to dissolve the attachment on the ground that the *res* was his homestead and therefore exempt. The doctrine of the case is that the attachment of a homestead is an absolute nullity. The court said such conclusion relative to attachment had never before been declared in the state, but referred to cases in which it had been "adverted to."[3]

The facts of this case show the danger of the doctrine. The defendant's long absence, with a home elsewhere, may have

[1] Ackley v. Chamberlain, 16 Cal. 181; Bowman v. Norton, 16 Cal. 220.

[2] Robinson v. Swearingin (Ark.), 17 S. W. 365.

[3] *Citing* Irwin v. Taylor, 48 Ark. 226; Reynolds v. Tenant, 51 Ark. 87; Richardson v. Adler, 46 Ark. 43.

led the attaching creditor to believe that he had abandoned his homestead; and an abandoned homestead is always liable to attachment.[1] The plaintiff could not know of his debtor's secret intention to return during his six years of absence. This is only one of many cases in which the continuance of a declared homestead is doubtful. If the exemptionist need not plead to attachment, but may sit supinely by and treat the proceeding as an absolute nullity, he could thus put his creditor to disadvantage in all doubtful cases. He could keep him from attaching liable property after this exempt property, to an amount sufficient to satisfy the debt, had been attached. And there are so many cases of doubtful homestead right, constantly occurring, that the rule of absolute nullity would prove mischievous. On the other hand, it is always perfectly easy and practicable for the homestead holder to set up his exemption in the attachment case, and have the attachment dissolved.

It is true that the attaching creditor has notice, either by record or known occupancy, that the homestead is exempt; and, therefore, it may be argued that the debtor ought not to be required to go to the trouble and expense of pleading his exemption right in order to defeat an attachment. But the debtor's hardship is no greater than that of any property-holder who has a perfect title, yet is driven to defend and set it up against an action of ejectment. It seems for the public good that, instead of letting a homestead-holder sit by till an attachment has ripened into judgment and then claim exemption, the better rule would be that he must plead his right before judgment, or be deemed to have waived it.

If, under the operation of this rule, the occupant of a recorded or otherwise publicly known homestead should be wantonly put to expense and annoyance by fruitless attachments, he has such remedy in damages as one would have for ejectment suits brought without color of cause, merely to worry him and subject him to expense.

In the present state of the law as given by the courts, it is the safer course for the practitioner to plead homestead in an attachment case and have the suit set aside, rather than to

[1] Larabee v. Wood, 54 Vt. 452; Goodall v. Boardman, 53 Vt. 92.

risk his client's right of homestead by allowing the case to go on to judgment. Should the court, after judgment, hold that a valid lien has been fastened on the property, it must be remembered that it is well settled homestead law that there can be no exemption against any valid lien.

It is not only safer to plead, but it is necessary to do so to save the homestead wherever non-action is deemed waiver. Presumption of waiver, created by failure to plead exemption, may possibly be removed;[1] but it cannot be done effectually after the maturity of a valid attachment lien. And it is not universally conceded that the lien may be saddled on a homestead when the defendant allows the case to go on to judgment against him because of his failure to defeat it by pleading exemption. Even where he appeared in the case and set up other defenses but neglected this, he was not held to have waived his homestead immunity, but allowed to claim it after judgment, in an attachment case. The court mentioned the fact that exemption had not been pleaded, by way of argument to prove that it had not been passed upon by the court, and was therefore still available.

The court said: "The only question involved in this case is whether lot No. 5, in block No. 16, in the city of Bunker Hill, in Russell county, was and is exempt as a homestead from a certain attachment and judgment and order of sale. The attachment was levied upon the property on June 30, 1888. The judgment was rendered on October 8, 1888, and the property was sold on an order of sale issued on such judgment on January 26, 1889; and on March 2, 1889, Andrew Hill, who was the defendant below, and the judgment debtor, and who is now the defendant in error, moved the court to set aside the sale upon the ground 'that at the time of the rendition of said judgment said lot 5, block 16, was, and for a long time prior thereto had been, and ever since has been, a part of the homestead of said defendant and his family, used and occupied as such, and exempt from seizure and sale by virtue of process issued on such judgment.' The court sustained the motion, and the plaintiff, M. Hoffman, brought the case to this court for review. As the court below found in favor of

[1] Hoisington v. Armstrong, 22 Kas. 110.

Hill, the party claiming the property as his homestead, and against Hoffman, the party claiming under the attachment, the judgment, and the order of sale, and the sale, it will be proper for this court to construe the evidence introduced upon the motion to set aside the sale liberally for the purpose of upholding the views of the court below; and, construing the evidence in this manner, we think the facts of the case are substantially as follows: For several years prior to the levy of the aforesaid attachment Hill was the owner of lots Nos. 5 and 6, in block No. 16, in the city of Bunker Hill. These lots adjoined each other, and constituted only a single tract of land, and together contained only about one-eighth of an acre. Hill was the head of a family consisting of himself and his wife and an adopted daughter. There was a building on lot No. 6, the porch of which extended over the boundary line between the two lots and onto lot No. 5, which building Hill and his family occupied and used as a residence, and also as a hotel and boarding-house. There was also a building on lot No. 5, which Hill and family used in connection with their residence, hotel and boarding-house. There were also out-buildings partly on both lots. Hill and his family in fact used these two lots together as a homestead and for hotel and boarding-house purposes; and this they had done for several years prior to the levy of the aforesaid attachment, and they still occupy the same for such purposes. Hoffman claims that the property is not a homestead under the provisions of the homestead exemption laws, for several reasons, but none of them are tenable. He also claims that the question as to whether the property was a homestead or not had been previously determined by the court upon a motion to dissolve the attachment, and had therefore become *res adjudicata.* But the motion to dissolve the attachment was not based upon the ground that the property was a homestead, nor did it in any manner present any such ground; and it was not filed or prosecuted by Hill and wife, but by Hill alone. Mrs. Hill was not a party to the action, nor did she make any appearance in the case; and it does not appear that she ever consented to the attachment or the judgment or the order of sale or the sale. The motion to discharge the attachment was based upon the ground that the grounds for the attachment

were not true. We think the decision of the court below in this case must be affirmed."

And the court further added that it had held uniformly that no alienation of the homestead of a husband and wife, and no subjection of it to any lien or incumbrance, can be effected without their joint consent, except for taxes, purchase-money and improvements.[1]

Doubtless joint action is requisite in selling their homestead or voluntarily subjecting it to any lien; but are the three liabilities, named by the court, the only exceptions to the creation of liens without their consent? There are several federal statutes under which liens may be created upon a homestead. If the householder establish a distillery upon his homestead lot without paying the required tax in advance and without complying with the other requisites, the land and buildings as well as the paraphernalia of the distillery may be seized and a lien thus created under which the government may proceed *in rem* and have the homestead condemned and sold as forfeited.[2] There may be forfeiture of realty under an insurrection law still upon the statute-book, by process *in rem*,[3] and homesteads form no exception. Judgments for torts are usually enforceable against homesteads.

The court probably meant that, as a general rule, married persons must join in order to sell or incumber their homestead, but did not think it necessary to advert to forfeitures. The particular thing meant was that attachment is not an exception. But would it be denied that they may waive exemption, in case of attachment, either expressly or impliedly? And could there be stronger implication than failure to plead exemption when setting up other defenses? It would have been an effective plea in the attachment case under review. The attaching creditor would have asked that the homestead be segregated from the part not exempt, and would have maintained his attachment as to the latter, if the plea had been filed. As it was, he was cut off from all remedy by the *laches* of the defendant. The court stated that the property attached was not all in use as a homestead, yet held all free

[1] Hoffman v. Hill (Kas.), 28 P. 623, *citing* Morris v. Ward, 5 Kas. 239.

[2] United States v. A Distillery, 2 Blatch. 192; Dobbins' Distillery, 96 U. S. 395.

[3] U. S. Rev. St., §§ 5308–11.

from the attachment that had been prosecuted to judgment in default of an exemption plea. The opinion states: "It follows from the decisions made by this and other courts of last resort that it makes no difference that the homestead, or a part thereof, may be used for some other purpose than as a homestead where the whole of it constitutes only one tract of land not exceeding in area the amount permitted to be exempted under the homestead exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof by making it, for instance, another person's homestead or a part thereof, or by using it or permitting it to be used in some other manner inconsistent with the homestead interests of the husband and wife."[1]

It has been decided, upon reasoning which should pass current everywhere, that when a portion has been segregated from the homestead, the attachment of it cannot be defeated by the plea of exemption.[2]

In states where the homestead-holder must plead his rights against attachment (as well as against ejectment or any other wrongful procedure against his homestead), the plaintiff's rights are secured; for he may cause an excessive homestead to be laid off, or an abandoned portion segregated, when he finds that his suit will not hold all that has been attached, upon the defendant's claiming exemption. And, if all is exempt and so

[1] *Contra*, a wife has been held concluded by her husband's not pleading. Baxter *v.* Dear, 24 Tex. 17.

[2] Curtis v. Des Jordins (Ark.), 17 S. W. 709. Cockrill, C. J.: "The bill of exceptions does not profess to contain all the evidence introduced upon the trial. The only question, therefore, is, does the judgment follow from the court's special finding of facts? The finding is, in substance, that the store-house which was condemned to be sold under the attachment had been segregated by the judgment debtor from his homestead property. The question as to what constitutes such a separation is not presented, for the presumption is that there was sufficient evidence adduced to sustain the court in finding that the debtor had manifested the intent to contract the limits of his homestead, and that the separation had been effected prior to the act of March 18, 1887, which prohibits the conveyance or incumbrance of the homestead without the assent of the wife, if that act may be said to affect such a case. Railway Co. v. Amos, 54 Ark. 162; 15 S. W. 362. After the separation, the segregated part was not embraced within the homestead (Klenk v. Knoble, 37 Ark. 303), and was therefore the subject of seizure and sale."

claimed, he may be in time to look to other property to make his money.

In states where the husband represents and binds the other homestead beneficiaries in litigation involving the home as in any other, he defends against attachment for all; and if the result is against him they are concluded.[1] In those where the wife must be made a party and served with process, her position is that of an attachment defendant, and she may plead homestead though he do not, and save the home for all the beneficiaries. In states where she is not made a party yet privileged to make herself one, she may intervene, in the suit against her husband, and plead homestead.[2] She may be presumed to know of the attachment, since it is the duty of the officer to take possession under the writ. But as real estate is not subject to manucaption, and may be seized by giving the husband notice of seizure and making return to court, she may not know in fact that the attachment has been laid. In such case, it would be hard for her to have an attachment lien perfected against her homestead because her husband has failed to plead exemption. And her rights, under some statutes, would remain in the homestead — the lien being subject to them. Under others, her failure to plead would conclude her.[3]

If the homestead be sold on credit, with no view of buying another with the price when collected, the credit may be attached.[4] For, in such case, the beneficiaries have given up their benefit voluntarily, and the state's policy of making homes permanent would not be furthered by saving the price to them to the prejudice of their creditors.

So, if a debtor has absconded from the state, or has become a non-resident, there would seem to be no reason why a home should be conserved for him, though his family might be kept together in it, to the good of the state. Attachment has been allowed under such circumstances.[5]

When the homestead law confines exemption to realty, it has been held that the surplus proceeds of a sale of the homestead under a deed of trust are subject to garnishment, if the

[1] Barfield v. Jefferson, 84 Ga. 609.

[2] McClure v. Braniff, 75 Ia. 38.

[3] Graham v. Culver (Wy.), 29 P. 270.

[4] Knabb v. Drake, 23 Pa. St. 489; Scott v. Brigham, 27 Vt. 561.

[5] *See* McCarthy's Appeal, 68 Pa. St. 217; Yelverton v. Burton, 26 Pa. St. 351; Board of Comm'rs v. Riley, 75 N. C. 144; McBrayer v. Dillard, 49 Ala. 174.

debtor failed to set up his homestead right in the land at the proper time.[1] If the wife joined in such deed, she cannot afterwards, as a widow, have surplus proceeds assigned her as homestead, after the foreclosure.[2] The consideration received for the deed of trust, if covering the homestead right, leaves nothing further to be claimed.

Whether the proceeds of a homestead sale are liable to attachment or garnishment depends upon the disposition which the vendors mean to make of them. They would be liable if held for ordinary purposes,[3] but not if held to purchase another homestead.[4] This distinction is pretty general where there is no statutory provision making a different local rule.

While a homestead, or the money from its sale held for reinvestment in another home, is as exempt from attachment as from execution, and will be protected from either writ when the exempt character is brought to the knowledge of the court, it may be attached when excessive in quantity if the exempt portion be reserved to the debtor and saved from the operation of the lien.[5] If the surplus can be distinguished from the exempt quantity, only that ought to be attached; but if the whole is proceeded against, the plaintiff should except the exempt portion in the prayer for judgment with privilege. If he does not, the court should except it in the judgment. This will be found applicable only when homesteads are not required to be set out by metes and bounds, or their value ascertained by appraisement, when the benefit first begins.

It goes without the saying that homesteads may be attached for such debts as antedate the beginning of exemption, or any others not affected by exemption, provided the statutory conditions for resort to the extraordinary remedy exist. In such case, the attachment lies as against any other property.[6]

A husband owned land under a contract for a deed. He assigned to his wife and it became the homestead of both. A

[1] Casebolt v. Donaldson, 67 Mo. 309.

[2] Woerther v. Miller, 13 Mo. Ap. 567.

[3] Kirby v. Giddings, 75 Tex. 679; Mann v. Kelsey, 71 Tex. 609; Whittenberg v. Lloyd, 49 Tex. 633.

[4] Watkins v. Davis, 61 Tex. 414; Schneider v. Bray, 59 Tex. 670; Kessler v. Draub, 52 Tex. 575; Wolfe v. Buckley, 52 Tex. 641; Watkins v. Blatschinski, 40 Wis. 347.

[6] Parker v. Coop, 60 Tex. 111.

[7] Thompson v. Wickersham, 9 Bax. 216.

judgment was rendered against him after the assignment; subsequently, his wife was garnished for the same debt and judgment against her, as garnishee, was rendered. Neither judgment held good against the land: the former, because the land contract was not his, having been conveyed at a time when he is presumed to have been solvent, and ostensibly for valid consideration; the latter, because the land was her homestead when it was conveyed and when the judgment of garnishment was rendered.[1]

(3) *Effect of the perfected attachment lien upon the homestead:* Attachment is always subject to existing incumbrances resting upon the property attached. The property debt of the thing adjudged to have been validly attached ranks below older lien debts and below prior incumbrances, whether founded upon debt or not. The plaintiff attaches only the defendant's right in the thing. The proceeding is *in rem*, but the *res* is the defendant's property right only — not also other's rights. The action is not a general but a limited proceeding *in rem*. So the attachment lien, perfected by judgment retroacting to the date of the attaching, rests on what the defendant's property right is. The title of the property being in him, the lien is good as to that; but incumbrances on the property existing before the attachment are not affected.

Wherever, in any state, the homestead benefit of the family — the wife and children — is held to be an incumbrance upon the title of homestead property; wherever these beneficiaries are recognized as having legal rights in such property — in its enjoyment though not in its title — the attaching creditor must be understood to attach subject to such rights. And only what is attached is affected by the perfection of his inchoate lien by judgment.

The beneficiaries' right, or their incumbrance on the property, differs from an incumbrance by mortgage and like liens; it is not a lien in any proper sense; it is more nearly akin to a servitude; but it burdens the property and is as clearly irremovable by a subsequently created lien as a prior mortgage would be. The state having provided for the burdening of homestead property in this novel form, from motives of pub-

[1] Belden v. Younger, 76 Iowa, 567.

lic policy to conserve homes, cannot have meant that junior incumbrances should be marshaled above the homestead right of the family.

The husband, who is the head of the family and the title holder, cannot claim to own an incumbrance on his own property; no one can hold a lien upon his own title; no one can have any interest *in* property adverse to his right *to* his property. It follows, that the husband cannot claim any homestead right in his realty as against his title.

The effect of the perfecting of the creditor's attachment lien upon the homestead of the debtor is to make the property liable to the vindication of that lien, and to leave the debtor-owner without any recourse. He has no incumbrance to interfere. His right of property is liable to be sold to satisfy the lien. But sale must be subject to the right (or incumbrance, if the term is allowable) of the wife and children, whose enjoyment of the property, for the period of homestead endurance, is secured by law. They must be left undisturbed in their home, while he — not as a co-incumbrancer but as the husband — must be left with them that the family may remain intact, and the policy of the state respected.

That this is his position seems clear upon the reflection that a homestead-holder without a family (a character tolerated in some states) would have nothing to protect him in his continued residence in a homestead subjected to a valid attachment lien upon his property right therein, and sold to satisfy such lien. He would stand precisely as though he had sold the property himself at private sale. He would have no marital or parental relations to bind him to the home. He had no *incumbrance* in the nature of homestead right, on the property: so, when the title is gone, all is gone.

The husband-father has no right of continued occupancy after valid forced sale to satisfy the attachment lien on his property dedicated as the family homestead, any more than his bachelor or childless-widower neighbor would have, except as the head of a family which has homestead right, with whom it is his privilege and his duty to live. The subsequent loss of his family would be to him the loss of his right to stay. The death of his wife and the arrival of all his children to the age of majority would leave him without anything to

support a claim to occupancy. Then the purchaser at the attachment sale could take possession.

Must the wife plead homestead, in behalf of herself and the minor children when there are any, to save their rights against attachment? It has been shown that the general rule is that the owner of an attached homestead must plead exemption before judgment, if he would prevent the perfecting of the attachment lien; that the homestead is not liable to attachment, but that waiver is presumed in the absence of plea; that by pleading exemption and sustaining the plea by proof, the attachment may be, and of right must be, dissolved. If the husband, the head of the family, and the owner of the homestead property, fails to plead exemption, the wife may do so in some states, and save both the title, and the rights of any sort, to or in the homestead property from having an attachment lien fastened upon it.

Pleading is necessary to keep the property free from lien; but the question above put is whether it is necessary in order to preserve the wife and children's rights to the continued enjoyment of the homestead. No. They hold the right as an incumbrance or servitude upon the property, and it stands good, like a mortgage, without being set up in the attachment proceedings. It has no business to oppose the creation of a junior incumbrance which cannot affect itself — just as a senior mortgage is unconcerned about the birth of a junior.

The family, apart from the member of it who holds the title, owns no property in the homestead — nothing that it can sell, or mortgage, or lease, or donate — but has rights in it secured by law which the attachment is not directed against, and which the family therefore need not plead.

If a widower, with minor children, has his homestead attached, is his plea of exemption necessary to save his children's right to the enjoyment of the home till their majority?

The father is the natural guardian of his infant children and represents them in legal matters. He represents his wife too, ordinarily, though in homestead law she stands apart from him so far as to be not affected by his failure to plead; but the rule is not universal. As a beneficiary of the exemption provision, she is not cut off by his failure to plead, as above shown; as the holder of a peculiar incumbrance, she

is not put below a subsequent lienholder by attachment so far as occupancy is concerned, though she does not compete with him as having anything affecting the homestead title. And, if she has minor children, by the husband-owner, they share her position. But, when there is no wife, the widower represents his minor children, not only as to any property rights they may have through him but also as to any incumbrance or right of enjoyment they have in his homestead.

It may be asked whether, in case of no plea, and the consequent completion of the attachment lien, they would still hold an incumbrance on the homestead older than the attachment lien and not dislodged or outranked by it? Not if their father had waived it for them by failure to plead. Just as a senior mortgage may be waived in favor of a junior, so the peculiar homestead incumbrance may be waived by one who has the control of it and the right of waiver — such as a father must have respecting the homestead right of his motherless children, unless they hold by their own right.[1]

Another answer is, that such children have no such incumbrance independent of their father while he lives. When he waives homestead right and lets the property go under an attachment, the children are in the position they would have been in if he had sold the property. They have no veto power upon the sale as their mother had when living. It is true that their homestead rights existing at their father's death may survive him. The law so provides. The policy of the state is to keep them a home. But it is not the policy of the state to keep them a home despite their living father. They must abide his action; live with him; go with him when he has sold his home or has let it be sold.

It seems, for the reasons above given, that the homestead rights of present enjoyment, of a wife and children, are reserved to them without pleading, unaffected by a perfected attachment lien vindicable by the sale of the title; but that those rights of the wifeless owner, with children, need to be pleaded in order to be saved.

[1] Children inheriting from their mother become tenants in common with their father. Broad v. Murray, 44 Cal. 228. If the curtesy of their father be sold, they may retain the homestead during their minority. Littell v. Jones (Ark.), 19 S. W. 497.

What would be the effect of fastening an attachment lien upon the homestead by judgment (through the failure of the debtor to plead exemption), at a time when he has a wife and minor children living with him on the property, upon their rights at his death? Would they not only have right of asylum while he should live, despite the lien and the loss of title by sale thereunder, but also after his death — she during her life or widowhood, and they during their majority?

The attachment, being *ab initio* subject to the *incumbrance* they held, could not affect such homestead rights. The judgment could not extend the lien over more than it covered in its incipiency. Nothing lodged in others could be reached to pay the defendant's liability. The case may be likened to the sale of a fee subject to a life estate for years.

The right of survivorship may be lost to the widow, so far as the title is concerned, by the creation of a valid lien on the homestead, in a third person, and sale thereunder; her dower right would certainly fall; but her homestead right of asylum would be protected when not subject to the lien.

§ 8. Tort.

Exemption laws are mostly enacted with reference to the relation of debtor and creditor. They have reference to heirs so far as to postpone their enjoyment of inherited property under some circumstances. But, since they protect from execution against debts rather than other liabilities; against "debts contracted," as the phrase frequently occurs in the homestead statutes, they do not seem to contemplate the protection of a wrong-doer for liability for his own torts, or for any trespass committed by him. Where a constitution or statute exempts debtors' homes from "sale on execution, or any other process from a court, for any debt contracted" (using the language quoted or language of similar import), it is generally held that there is no exemption provided from obligations arising from torts.[1]

[1] Kenyon v. Gould, 61 Pa. St. 292; Kirkpatrick v. White, 29 Pa. St. 176; Lathrop v. Singer, 39 Barb. 396; Schouton v. Kilmer, 8 How. Pr. (N. Y.) 527; McLaren v. Anderson (Ala.), 8 So. 188; Vincent v. State, 74 Ala. 274; Williams v. Bowden, 69 Ala. 433; Meredith v. Holmes, 68 Ala. 190; Davis v. Henson, 29 Ga. 345; Edwards v. Mahon, 5 Phila. 531; Lane v. Baker, 2 Grant's Cas. (Pa.) 424; Dorrell v. Hannah, 80 Ind. 497;

Since the exemption relates to "debt contracted" only, it does not screen the householder against a judgment awarding damages against him for breach of promise to marry, which is called a *quasi*-tort.[1]

Exemption from sale under any judicial process, "issued on any demand for any debt contracted," is the language of a constitution under which it was held that a fine is not a "debt contracted," in the sense in which this phrase is employed.[2] Where the phrase, or a like one, occurs in other constitutions, or in statutes, it does not extend exemption to defeat executions for torts.[3]

When the use of a home for the sale of intoxicating liquors is inhibited by law, and the owner incurs pecuniary penalties and costs for such use, the homestead is held liable under the judgment imposing the fine, notwithstanding the fact that the wrong-doer's wife and co-householder did not join in the violation of the law and consequent subjection of their homestead to a monetary burden.[4]

A defaulter, having funds belonging to the state, cannot claim the privilege of a debtor and treat the state as a mere creditor, and shield himself under exemption and homestead laws.[5]

When the claimant of the homestead seeks to prevent execution for liability for his own crime or tort, he should not be treated as a debtor entitled to the benefit of exemption.[6] But whether the homestead be liable for the torts of its owner depends upon the terms of the exemption. Courts interpret the restriction upon the creditor's remedy according to its expres-

Smith v. Wood, 83 Ind. 522; Gentry v. Purcell, 84 Ind. 83; Thompson v. Ross, 87 Ind. 156; Nowling v. McIntosh, 89 Ind. 593; Donaldson v. Banta (Ind.), 29 N. E. 362; Ries v. McClatchey, 128 Ind. 125.

[1] Burton v. Mill, 78 Va. 468; Whitacre v. Rector, 29 Gratt. 714; Grubb v. Sult, 32 Gratt. 203; Wade v. Kalbfleisch, 58 N. Y. 282; 1 Minor's Inst., 253; 4 *Ib.* 457; Va. Code, ch. 126, § 19.

[2] Whiteacre v. Rector, 29 Gratt. 714–15; Const. Va., art. 11, § 1; Code, ch. 183.

[3] Lathrop v. Singer, 39 Barb. 396; Schouton v. Kilmer, 8 How. (N. Y.) 527; Lane v. Baber, 2 Grant's Cases, 424; Davis v. Henson, 29 Ga. 345.

[4] McClure v. Braniff, 75 Ia. 38.

[5] Vincent v. The State, 74 Ala. 274.

[6] Williams v. Bowden, 69 Ala. 433; Meredith v. Holmes, 68 Ala. 190; Massie v. Enyart, 33 Ark. 688; Smith v. Ragsdale, 36 Ark. 297; Lathrop v. Singer, 39 Barb. (N. Y.) 396; Tate v. Laforest, 25 La. Ann. 187 (denying the benefit of insolvent law).

sion in the constitution or statutes which they are called upon to interpret. Under phraseology different from that above quoted, they have held the homestead exempt from execution of judgments in actions of tort.[1]

If an action on an implied contract sounds not in tort but in contract, a judgment thereon cannot be executed against property non-liable for debts created by contract.[2]

Exemption from *liability* as well as debt would include that from torts as well as from contracts.[3]

Judgment in an action for slander may be executed against a homestead which is protected from "any debt growing out of, or founded upon, any contract express or implied."[4] But under a statute exempting from "debts contracted" and another requiring the wife's signature to any alienation of homestead by her husband, it was held that a judgment on such an action could not be enforced against his homestead.[5] The court confessedly extended the terms of the first act, saying: "The judgment in this case was not strictly a 'debt contracted.'" It was unqualifiedly not such. Construed with the second statute, the first was not supplemented so as legitimately to make the judgment a "debt contracted," nor to make both warrant the protection of the homestead from execution. The court said: "In the light of both these laws this court has constantly held that it was the evident intent of the legislature to protect the homestead as a shelter for the wife and children, independently of any acts of the husband. He cannot deprive them of their right to it without the consent of the wife, either by his contracts or his torts."

This is not universally-received doctrine on this subject. Protection from contracts is not protection from torts, and restraint of alienation does not make it so. The family may need protection from the effect of the wrongs and misdemeanors done by its head as well as from his ill-advised contracts made without his wife's joinder; but the question is, not what the family may need, but what has the legislator enacted. That upon a judgment in an action *ex delicto*, a homestead

[1] Conroy v. Sullivan, 44 Ill. 451; Gill v. Edwards, 87 N. C. 77; Smith v. Omans, 17 Wis. 395.

[2] Crane v. Waggoner, 27 Ind. 52.

[3] Smith v. Omans, 17 Wis. 395.

[4] State v. Melogue, 9 Ind. 196.

[5] Conroy v. Sullivan, 44 Ill. 451.

cannot be sold under an execution, was held in exposition of a constitutional provision.[1]

Much depends upon the sense in which the word "debt" or "indebtedness" is used, when the question of its inclusion of liability for tort is under consideration. It has been decided that the contract clause of the federal constitution does not protect the action for tort, and that therefore a homestead is exempt from execution in such action commenced before the exemption right accrued though finished by judgment afterwards. That is to say, the debt created by the judgment did not relate back to the committal of the tort so as to antedate the exemption law and therefore come under the protection of the constitution inhibiting the impairing of contracts.[2]

It seems erroneous to say that the relation of debtor and creditor exists before judgment because of the tort and the claim for damages;[3] but, after judgment decreeing damages in a certain sum, there is nothing erroneous in the application of the law of relation to the debt thus created, and in making it affect intermediate sales, when the purchaser had notice.

If the tort-claim is not a debt till judgment, it is then a lien-bearing debt, though there is no specific lien upon the homestead. The general lien requires seizure to make it specific on the property seized.

One who has a right of action for tort is not a creditor while his action is pending, but he becomes one when he gets judgment in his favor. Does not such judgment, giving damages against the defendant, retroact by the law of relation so as to strike with nullity, or with voidable character, any transfer of real property by him, after the institution of the suit for the purpose of defeating the execution of the judgment? Such a transfer has been so far disregarded as to allow the property to be subjected to execution under the tort judgment.[4]

A sheriff sold land under execution, treating the defendant's claim of homestead as a nullity. The sale was set aside in consequence, though the record showed that the judgment

[1] The N. C. Const. of 1868; Gill v. Edwards, 87 N. C. 77; Dellinger v. Tweed, 66 N. C. 206.

[2] Parker v. Savage, 6 Lea, 406; Const. U. S., art. 1, § 10; Const. Tenn., art. 1, § 20; art. 11, § 2.

[3] So held by way of statute exposition. Patrick v. Ford, 5 Sneed, 530.

[4] Langford v. Fly, 7 Humph. 585.

was for tort from which there was no exemption. The ground of invalidating the sale was that the cause of action did not appear on the face of the writ or in the journal entry of the judgment. It was not for the sheriff to go beyond the writ to inquire whether the judgment was for debt or for tort; for a cause of action, against execution of a judgment upon which the plea of homestead would have been available, or for a cause to which exemption has no reference. Homestead had been pleaded: so the clerk should have issued no execution till the court had acted on the plea.[1]

§ 9. Fiduciary Debts.

Liability incurred in a fiduciary capacity includes that of a defaulting tax collector (and his sureties, it is held), under a constitutional provision for homestead which excepts debts created in such capacity from exemption.[2] The provision referred to is that "every householder or head of a family shall be entitled . . . to hold exempt from levy, seizure, garnisheeing, or sale under execution, order or other process . . . real and personal estate, or either . . . the value not exceeding two thousand dollars, to be selected by him," except for the purchase price of the property; for services of a laborer or mechanic; "for liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney at law, for money collected;" "for a lawful claim for any taxes, levies or assessments . . . ;" "for rents hereafter accruing;" and "for the legal or taxable fees of any public officer or officers of a court, hereafter accruing."[3] The sureties' homestead property was held under the exception embracing "public officers" or "other fiduciary," though the language does not plainly include them. The court said: "As soon as there is a breach of the condition of the officer's bond, he and his sureties, by one and the same act, become liable to the party injured. The liability incurred by the officer is at the same time incurred by the surety." Clearly; there can be no doubt of the surety's liability; but as he is not an officer, nor a fiduciary of any sort, is his homestead liable to be

[1] McLaren v. Anderson (Ala.), 8 So. 188.

[2] Commonwealth v. Ford, 29 Gratt. 683.

[3] Const. Va., art. 11, § 1; Code of 1873, ch. 183.

proceeded against by "levy, seizure, sale under execution, order or other process, *issued on any demand*," etc., as the constitution has it? Could it not have been more plausibly reached under the clause relative to "lawful claims for any taxes?"[1]

Where debt contracted in a fiduciary capacity is excepted from exemption, a judgment for money or property misappropriated by an agent, in violation of his trust, may be enforced against his homestead.[2] A tutor for a minor, indebted in that capacity, cannot claim homestead exemption from the debt.[3] Such debt may be prosecuted to judgment, and execution may be levied upon the homestead as on any other property, where the law grants no exemption as to such liability.[4]

A homestead assigned the debtor in bankruptcy proceedings was held free from a fiduciary debt which had not been discharged by those proceedings.[5]

§ 10. Taxes.

Taxes are usually mentioned among the obligations not affected by homestead exemption. It is necessary to include them among the other exceptions where they are considered as debts, if the state is to retain its remedy. The sovereign creditor is, like any other, entitled to the same remedies, and liable to the same obligations in many respects. It is bound by its own laws. Its rights against a debtor are no more sacred than those of any other creditor. If the state has an ordinary claim against him, it must submit to the same curtailment of remedy, the same limitation of right to the forced sale of his property that it has imposed upon all creditors.[6]

Different terms are used, in different state statutes, to save the tax-claim from the effect of the exemption provision, but they are all meant to leave the remedy for the collection of

[1] Com. v. Ford, *supra;* Homestead Cases, 22 Gratt. 266.

[2] Bridewell v. Halliday, 37 La. Ann. 410.

[3] Platt v. Sheriff, 41 La. Ann. 856.

[4] Gilbert v. Neely, 35 Ark. 24, with reference to the constitution of Arkansas of 1868.

[5] Simpson v. Houston, 97 N. C. 344. And the exemption follows the land when it is sold by the debtor to another person, in North Carolina. Ib.; Lamb v. Chamness, 84 N. C. 379; Murphy v. McNeil, 82 N. C. 221.

[6] Loomis v. Gerson, 62 Ill. 13; Green v. United States, 9 Wall. 655; Fink v. O'Neil, 106 U. S. 272; Commonwealth v. Lay, 12 Bush, 283; Gunn v. Barry. 15 Wall. 610; State v. Pitts, 51 Mo. 133. *Compare* Commonwealth v. Cook, 8 Bush, 220; Brooks v. The State, 54 Ga. 36.

taxes untouched, and they all have the same reason underlying them. The reason is that revenue must be had for the support of the state, the county or the municipality laying the assessment, and that property is the source whence such revenue should be derived; and that, since homesteads are protected by the state and minor governments, they should bear their proportion of the burden, since there is no danger that a tax, which is never more than a small percentage of the property value, need ever deprive the owner of his home and leave his family shelterless.

The reason, and the language excepting taxes from the operation of exemption, is virtually the same in all the states. The tax, bearing a lien upon the property taxed, may be enforced by judgment and sale, either by a judicial proceeding against the property itself, or by a personal suit against the delinquent praying for judgment against him simply, or for such judgment with recognition of the lien, and vindication of it by the sale of the property taxed. In a proceeding directly against the property only, seizure and notice must precede judgment, and the writ following it should be *venditioni exponas.* In a personal proceeding simply, no seizure precedes judgment, and the writ following it is *fieri facias.* These differences cannot affect the right of the estate, or of any subordinate tax-collector, to collect the tax by forced sale of the homestead.

A tax-sale, a sale for the non-payment of taxes, a sale on execution issued on a judgment recovered for taxes, are all the same so far as the liability of homesteads for taxes assessed upon them are concerned. They are usually treated as equivalent expressions. The general language exempting homesteads from debts does not include tax debts when any one of the above expressions are found among the exceptions.

A different view, however, has prevailed in one state. Under the statutory provision: "No property shall, by virtue of this act, be exempt from sale for the non-payment of taxes or assessments," it has been held that "A sale on an execution, although issued on a judgment recovered for taxes, is not a sale for the 'non-payment of taxes' in the ordinary acceptation of that term. A 'tax-sale,' or, what is the same thing, a 'sale for the non-payment of taxes,' has a distinct and well defined meaning. It means a sale made in a proceeding *in*

rem, and was so generally understood when the homestead law was enacted; . . . not a sale on an execution issued on a judgment *in personam*."[1]

A judicial proceeding *in rem*, with notice to the delinquent owner of the property, with sale following judgment, would certainly be within the provision quoted; but that a suit *in personam*, followed by judgment and execution, "for the non-payment of taxes," would not be within that provision, is a position not commending itself to general favor. Even in the state where the decision was rendered from which the above extract is taken, this position was not so well established at the time as to prevent two of the judges from dissenting both to the reasoning and the conclusion of the opinion. Elsewhere, this position seems entitled to no following. The intention of the legislator, generally speaking, is to leave the law for the collection of taxes unaffected by homestead laws.

Tax on homesteads, as well as upon other realty, is a lien, generally of the highest rank, susceptible of being vindicated by judicial proceeding, under which the lien-bearing thing may be subjected to forced sale so that the purchaser shall have a valid title, subject to redemption where the statute so provides.[2]

The liability of homestead property for taxes does not differ from that of any other property.[3] The state, county, or city, as the case may be, proceeds against it as though there were no exemption law in existence. There is none, so far as tax debt, and the remedy for collecting it, are concerned. Homesteads are not exempt from taxes: that is the sense of all the real-estate exemption laws which embrace taxes among the exceptions.

A homestead sold under execution for taxes, where exemption does not apply to them, is conveyed to the purchaser free from any homestead right of the delinquent tax-payer.[4]

[1] Douthett v. Winter, 108 Ill. 330; Douthett v. Kettle, 104 Ill. 356; People v. Stahl, 101 Ill. 346; Humes v. Gossett, 43 Ill. 299; Connor v. Nichols, 31 Ill. 148; Thornton v. Boyden, 31 Ill. 200; Smith v. Miller, 31 Ill. 157.

[2] Eaton's Appeal, 83 Pa. St. 152; Lufkin v. Galveston, 58 Tex. 545; Shell v. Duncan, 31 S. C. 547; Lamar v. Sheppard, 80 Ga. 25; Stokes v. Georgia, 46 Ga. 412; Colquitt v. Brown, 63 Ga. 440; Cooper v. Corbin, 105 Ill. 224; Binkert v. Wabash R. Co., 98 Ill. 206; People v. Biggins, 96 Ill. 481.

[3] Lufkin v. Galveston, 58 Tex. 545. *See* Galveston v. Heard, 54 Tex. 420.

[4] Shell v. Duncan, 31 S. C. 547.

Exemption holds good against claims of the state which have not been excepted. If taxes have been specially reserved from the general exclusion of claims against homesteads, it is fair to infer that the legislator did not mean to make any other state claim collectible against such favored property.[1]

When taxes have been excepted from the operation of an exemption law, it does not follow that the state may execute a judgment against a defaulting tax collector's homestead. The suit against him, for money collected and not paid over, is not a suit for taxes in the sense in which the phrase is used in the exemption laws. The state, having deliberately forbidden forced sales of homesteads in all cases but the expressly excepted ones, must abide by its own statute.[2] Its rights must be determined precisely as that of other creditors are ascertained: by reference to the governing law. Whether the defaulting tax collector's home is exempt depends upon what latitude may be given properly to the word *tax* or *taxes* when excepted.

The redemption of a homestead sold for taxes may be by the wife of the beneficiary, as head of the family, when he is situated so that he cannot act. And her tender of the tax money and what else is required, within the time allowed for the redemption, is sufficient. The purchaser is bound to give up the property.[3] And if the husband is so situated that he can act, but does not, why may not she tender payment and redeem the property?

"Under the law, . . . the homestead exemption did not extend to process issued to enforce the payment of taxes or obligations contracted for the purchase of . . . a homestead, 'provided the court or authority issuing said process shall certify thereon that the same is issued for some one or more, and no other of said purposes.'" Such certificate held essential. Burnside v. Watkins, 30 S. C. 459. The circuit judge may indorse on the judgment, even at the term after the judgment was rendered, that it was for purchase-money, though the fact may not have been pleaded. Green v. Spann, 25 S. C. 273.

[1] Colquitt v. Brown, 63 Ga. 440.

[2] Ren v. Driskell, 11 Lea, 642.

[3] Lamar v. Sheppard, 80 Ga. 25; Adams v. Beale, 19 Ia. 66. In North Carolina a widow, as tenant-for-life of her homestead, may forfeit her title by suffering the property to be sold for taxes, and failing to redeem within a year. Tucker v. Tucker, 108 N. C. 235. *See* Jones v. Britton, 102 N. C. 166; *Ex parte* Macay, 84 N. C. 63.

CHAPTER XI.

LIABILITY FOR PURCHASE-MONEY AND IMPROVEMENTS.

§ 1. Exemption Inapplicable.
2. When no Lien is Recognized.
3. Money Borrowed to Pay the Price — Subrogation.
4. Borrowed and Purchase-money Distinguished.
5. Notes for Price in Third Hands.
6. Marshaling Accounts, as to Homestead.
§ 7. Mortgage for the Price.
8. Payment Essential to Ownership.
9. Price Returned when Title Fails.
10. Insurance and Voidable Title.
11. Improvements.

§ 1. Exemption Inapplicable.

Purchase-money is the equivalent for the thing bought. It is a term employed in homestead laws to express the debt owing by the purchaser for his homestead. It is the unpaid price of the land. It is the consideration or essence of the contract of purchase while the land is the object. The price and the object are presumed to be equal; the contract is mutually fair between the parties; the scales of justice are in equipoise.

Manifestly, the purchaser cannot have both the thing bought and the price; cannot have both while the seller has nothing. Just as consistently might the seller take the purchase-money and retain the thing for which it was given. Such injustice cannot be tolerated in favor of either party by any roundabout maneuvre, any indirect method, any ingenious construction of contract, any countenance of dishonest dealing on the plea of liberality or humanity to the purchaser and his family.

There is no constitutional authority in the state to take from one citizen and give to another, leaving the bereft party without any *quid pro quo*. Neither the state nor the nation can take private property, even for public use, without "adequate compensation." To deny a vendor the price of his property is the same as to take the property itself for the private use of another person who renders no equivalent.

The state can no more do this by homestead laws than by any other means; cannot do it indirectly any more than directly. So, were those laws all silent on the subject of purchase-money, the stipulated price of the homestead would yet be a debt susceptible of prosecution to judgment, and the judgment could be executed upon the land. Even in the absence of any vendor's lien, such judgment could be executed upon the land, though the plaintiff might be obliged by law first to exhaust other property.

The homestead statutes are not silent, however, on this subject, but they expressly except debt for purchase-money from those affected by exemption provisions. All but one or two make the exception declaratively, and that one or two do it impliedly. They do not all employ the same terms. From the narrow restriction of the non-exempt debts for purchase-money to those evidenced by act of mortgage, to the broad provisions which include money borrowed to pay the price, there is much included variety. These extremes, with the intermediate provisions of more moderate tenor, each subjected to a crucible of construction different from those which try the rest, present to the profession a variegated landscape which must now be particularly explored after the judicial guides who have gone before.

Whatever the differences statutory and constructive, uniformity remains respecting the proposition that the purchaser of property for a homestead, or any other purpose, cannot have the land and repudiate the price, by means of any statutory or constitutional provision; that he can have no exemption from the debt incurred by his contract of purchase; that he cannot retain both the object and the consideration of the contract; that, according to the homely, nursery aphorism (worthy to be received as a legal maxim), he "can't have the pudding and eat it too."

The general rule, with little exception, is that homesteads are liable for their purchase-price, and that there is no exemption from such a debt. Equity creates a lien upon such property in favor of the vendor, even when there is no conventional creation of it. The debt is a property debt, and a judgment upon it may be enforced against the indebted thing, when a homestead, as readily as against any other property fictitously

indebted. The general liability of homesteads, for unpaid purchase-money, is well established.[1]

The nature and scope of this lien are clearly stated by the late Judge West, as follows: "Without any contract or agreement, by operation of law this lien springs at once out of the contract of purchase, and exists and survives until waived, or extinguished by payment, as between the original parties to the notes, wholly independent of any agreement, verbal or written. Hence the averment in the petition in this case as to the existence of the vendor's lien, though not as full as it should have been, was sufficient."[2]

The vendor's privilege remains intact, though the property he has sold may have passed subsequently through successive hands, and the last holder may have paid the price to his immediate grantor and claimed homestead in the property.[3]

Purchase-money may be collected from the homestead, however often the evidence of the debt may have been changed, if it can yet be traced. The lien which attends the claim continues good against the homestead.[4]

§ 2. When no Lien is Recognized.

Several states allow no exemption from any obligation whatever which is incurred in the purchase of property for a homestead. Such debt can be prosecuted to judgment, and the judgment executed against the homestead, though there be no recognized vendor's lien expressed or implied, in law or equity, and the householder's obligation for the purchase-money be merely personal.

Though a note or bond given for land create no lien, yet

[1] Toms v. Fite, 93 N. C. 274; Toms v. Logan, 93 N. C. 276; Fox v. Brooks, 88 N. C. 234; Durham v. Bostick, 72 N. C. 357; Tunstall v. Jones, 25 Ark. 274; Williams v. Jones, 100 Ill. 362; Palmer v. Simpson, 69 Ga. 792; McDaniel v. Westberry, 74 Ga. 380; Christy v. Dyer, 14 Ia. 438; Cole v. Gill, 14 Ia. 527; Burnap v. Cook, 16 Ia. 149; Hyatt v. Spearman, 20 Ia. 510; Bills v. Mason, 42 Ia. 329; Campbell v. Maginnis, 70 Ia. 589; Patrick v. Rembert, 55 Miss. 87; Bradley v. Curtis, 79 Ky. 327; Williams v. Young, 17 Cal. 403; Skinner v. Beatty, 16 Cal. 157.

[2] Joiner v. Perkins, 59 Tex. 300, *citing* Flanagan v. Cushman, 48 Tex. 244; Rogers v. Blum, 56 Tex. 1; Briscoe v. Bronaugh, 1 Tex. 326; Hood v. Cordova, 17 Wall. 1; White v. Downs, 40 Tex. 225.

[3] Sparger v. Cumpton, 54 Ga. 355; Greenway v. Goss, 55 Ga. 588; McDaniel v. Westberry, 74 Ga. 380.

[4] Bradley v. Curtis, 79 Ky. 327.

"obligations contracted for the purchase of a homestead" are excepted from those which cannot be enforced against it. Such note or bond prosecuted to judgment may be collected under execution.[1] Judge Ashe, in delivering the court's opinion, after recognizing the principle above stated, and after saying that it is settled in his state that the vendor of real estate who has conveyed it by deed has no lien upon the land for the purchase-money,[2] interprets the constitutional provision that "no property shall be exempt from sale for taxes or for *payment of obligations contracted for the purchase* of said premises,"[3] so as to make it read as follows: "No property shall be exempt from sale for taxes or from *execution* for payment of obligations contracted for the purchase of said premises." He adds: "This gives no lien to the holder of the note for the purchase-money, but its plain and evident meaning is that if such holder shall obtain a judgment on the instrument and issue his *execution* against the vendee, his (the vendee's) right to a homestead in the land purchased by him shall not be an impediment to the sale of the land under the execution."[4]

If the vendee indorses notes which he holds from a third person and passes them to the vendor of his homestead, his position is as though he had given his own notes to secure the purchase-money, and the homestead is not exempt from that debt — for the case is not as though the vendor had accepted the notes as payment, without indorsement.[5] And the same learned judge, speaking for the court in another case, says that the term "obligation" in the above quotation from the constitution, "is not used in its technical sense, but embraces every contract to pay for the land, *whether by specialty or parol;* but the contract, we are of the opinion, must be made with the bargainor and the consideration must be the price of the land purchased." So it was held that one who has not discharged his obligation to pay for land is not entitled to homestead in it against a judgment on his contract; and that if the bargainee agreed with the bargainor to pay a

[1] Smith v. High, 85 N. C. 93.

[2] *Citing* Womble v. Battle, 3 Ired. Eq. 182; Cameron v. Mason, 7 Ired. Eq. 180; Simmons v. Spruill, 3 Jones' Eq. 9; Hoskins v. Wall, 77 N. C. 249.

[3] Const. N. C., art. 10, § 2.

[4] Smith v. High, *supra.*

[5] Whitaker v. Elliott, 73 N. C. 186.

note which the latter owed to a third person, in consideration of the land purchased, the land is liable for the payment of the debt.[1]

Of the vendor's lien for purchase-money, and the enforcement of the debt without it by ordinary judgment and execution, it is judicially said: "It is insisted by defendants in error that, as plaintiff in error is not entitled to the vendor's lien, he cannot enforce the payment of the debt as purchase-money. The statute exempting the homestead from forced sale for the payment of debts contains this exception: 'No property shall by virtue of this act be exempt from sale for the non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof.'

"The exemption and exception from its operation are parts of the same statute, and must be read together as one act; and as to the excepted cases it is as if there were no exemption. If the only purpose of this exception to the statute was to preserve the vendor's lien, it is difficult to see why it should have been inserted, as it would give to the vendor no additional security, and would add nothing to his rights.

"A vendor's lien is a mere creature of the courts of equity, and not cognizable in courts of law. It is in the nature of a trust, equity regarding the purchaser as holding the estate for the payment of the purchase-money upon the principle that one who has gotten the estate of another ought not, in conscience, to be allowed to retain it and not pay the consideration money.

"This lien . . . in this state cannot be transferred by assignment to the assignee of the note given for the purchase-money. . . .

"That the demand, here sought to be enforced, was a liability incurred for the purchase of the premises, cannot be questioned. It is the common understanding of the term, *purchase-money*, that it means money paid for the land, or the debts created by the purchase. In using the language, 'debt or liability incurred in the purchase,' it was not intended to restrict the operation of the exception to cases only where the party held a vendor's lien.

[1] Fox v. Brooks, 88 N. C. 234.

"It is true that authorities may be found, to sustain the position of defendants in error, in some of the states; but they are based upon constitutional or statutory provisions widely different from our own. In some there are no exceptions to the exemption, and in others the vendor's lien is excepted in express terms."[1]

It is not strictly true that there is any state in which there is no exception to exemption; but the court probably meant that in some of them the exceptions are not expressly named.

Again it is said, in the same state, respecting the character of debt for a homestead: "The sole question presented in this case is whether the debt in question is a debt 'incurred for the purchase' of the premises in which defendants in error claim an estate of homestead. We cannot doubt that it is. The land was sold by Gray to Jones. For a part of the purchase-price Jones gave his notes, payable to the vendor, with Beale as security. The notes were sold and assigned by the payee to Williams. Williams afterwards, by an arrangement with Jones, surrendered these notes to him, and took from him, in lieu thereof, and as security for the same debt, the note of Jones alone, and a trust deed upon the land so bought, to secure the payment thereof.

"The statute as to homestead exemption provides that 'no property shall, by virtue of this act, be exempt from sale . . . for a debt or liability incurred for the purchase or improvement thereof.' This debt is admitted to be the same debt as that for which the original notes were given, and it is agreed that the first notes were given for purchase-money. It falls clearly within the express words of the statute. . . .

"There is no ground for saying the limitation in the statute was intended *merely* to protect the vendor's lien. It is not so limited by its words. . . .

"The plaintiff in error represents or stands in the place of the vendor, as the owner of the debt for the purchase of the property. Without reviewing in detail the cases referred to by the counsel, we merely say we find nothing in former de-

[1] Kimble v. Esworthy, 6 Bradw. (Ill.) 517; *approving* Austin v. Underwood, 37 Ill. 438; Magee v. Magee, 51 Ill. 500, and Bush v. Scott, 76 Ill. 524; and holding inapplicable, Phelps v. Conover, 25 Ill. 272.

cisions of this court at all incompatible with the views herein expressed."[1]

§ 3. Money Borrowed to Pay the Price — Subrogation.

Money borrowed of a third person by the vendee of a homestead, and paid to the vendor, is purchase-money for which the purchased property is liable to such third person, under the broad application of the term *purchase-money* in many of the homestead statutes.[2]

Since borrowed money, paid for homestead property, is treated as purchase-price, the creditor has his lien on the property bought; or, where he has not, he may obtain a lien-bearing judgment.[3] The homestead is liable for money borrowed to pay a balance due on the purchase-price.[4]

[1] Williams v. Jones, 100 Ill. 362; *distinguishing* Eyster v. Hathaway, 50 Ill. 522.

[2] Allen v. Hawley, 66 Ill. 164; Magee v. Magee, 51 Ill. 500; Austin v. Underwood, 37 Ill. 438; Silsbe v. Lucas, 36 Ill. 462; Lassen v. Vance, 8 Cal. 271; Carr v. Caldwell, 10 Cal. 385; Hamrick v. Peoples' Bank, 54 Ga. 502; Nichols v. Overacher, 16 Kan. 54; Pinchain v. Collard, 13 Tex. 333.

[3] Bugg v. Russell, 75 Ga. 837. Chief Justice Jackson, for the court, says: "While homestead rights are constitutional and favorites of our law, *fraud is not;* and to permit Bugg to perpetrate such a fraud as to make a homestead out of the money which he begged Russell to lend, without paying a dollar of it back to him, would be to sink law and equity into a slough of iniquity and putridity nauseating to every sense of moral purity. The court was right to make him pay the debt." Notwithstanding the usuriousness of the interest stipulated, the creditor was allowed to recover, and homestead exemption not allowed to favor fraud. The court, evidently with righteous indignation, said of Bugg: "Shall he not pay the man whose money got him the homestead right out of the property, before he asserts and sets apart that right paid for by Russell? Justice, equity, law, common sense, all demand that he shall; and Russell was not far wrong when he said that he would not pay him two dollars and a half for his homestead. The sense of right in the heart of an honest man, when a swindler would cheat him, nine times out of ten, is the law of the land. Not a cent of usury went into the money which paid for the land; this $1,125 is free from it; it bought for Bugg and Bugg must pay for it. Inasmuch as such must be the result of this in a hundred trials, it is needless to consider allegations of error on minor points. It is well, however, to add that the case is distinguishable from Anderson v. Tribble, 63 Ga. 32 and 66 Ga. 584. There the title was in Tribble, and never had been in another, out of whom Anderson's money, and his money alone, put it in Tribble. If there be *obiter* in that case, or loose expressions which are at all at issue with the ruling now made, we cannot see their equity."

[4] White v. Wheelan, 71 Ga. 533.

"Whatever may be the decision of other states of the Union as to the liability of property set apart as a homestead for the debts of the person interested in the homestead," said the court in deciding the above cited case, "the law is settled by the repeated rulings and decisions of this court in this state, that the property is liable for the purchase-money loaned to extinguish an incumbrance on the homestead, although this incumbrance may only be the unpaid purchase-money for the property set apart for the homestead."[1]

The lender of the money, in this case, held no mortgage or conventional lien of any kind. He loaned the homestead holder two hundred dollars for the payment of a balance due upon his purchase of the homestead. He took merely a promissory note for the loan, but proved the purpose, and recovered. The homestead holder, with that money, had taken up his last remaining note from his vendor; and the money borrowed for the purpose was "purchase-money" within the statute and the decisions.

It is held that a homestead, set apart before purchase-money was made collectible from such property, does not become liable by the passage of an act rendering homesteads liable, so far as an antecedent debt of the owner for such money is concerned.[2] Not as an antecedent debt; but certainly it would be liable under the vendor's lien, if that bore upon the property when the homestead was created. The legislature, by providing that homesteads shall be liable, does not imply that liens prior to the declaration of liability shall be dislodged. The vested right of the lien-holder cannot thus be divested. And the court, holding as above stated, should not be understood to teach that vested rights can be divested either by implication or express enactment.

A resulting trustee has no protected homestead, when he has bought it with borrowed money, against the lender. A grantee, holding for another person, acquires no right from the resulting trust. His position is that of a purchaser holding nominal title but mortgaging the property purchased to secure the promised price.[1]

[1] *Ib.;* Middlebrooks v. Warren, 59 Ga. 232; Sale v. Wingfield, 55 Ga. 622; Wofford v. Gaines, 53 Ga. 485; Hawks v. Hawks, 46 Ga. 204, 207; Lathrop v. Association, 45 Ga. 483; Kelly v. Stephens, 39 Ga. 466.

[2] Hawks v. Hawks, 64 Ga. 239.

[3] Shepherd v. White, 11 Tex. 354;

When the legal title is given to the husband, any allegation that the money was advanced by others in behalf of the wife must be duly established to create a resulting trust in her favor, as against the creditors of her husband.[1]

Of course, like any other allegation, it must be proved, but the presumption would be so strong against the creation of such trust that it would seem to require something more than the testimony of the husband and wife to establish the fact, in the face of the title, and against the interests of the creditors.

An alien, tracing his money to its investment by another in a tract of land, would seem entitled to a money judgment against the investor, and a lien on the land susceptible of foreclosure, though no resulting trust in it would be raised in his favor. If such funds are employed by a husband, complemented by his wife's money, to buy a homestead, a lien for purchase-money is not thus created.[2]

It is right that, without any express subrogation, the lender of the purchase-money has, and ought to have, his law-created recourse against the homestead bought with it. Those who deny this rest upon the consideration that he is not the holder of the vendor's lien (which is true); and that, though the denial of his right would be unjust to him, the homestead laws do not purport to be founded upon justice to creditors (which is untrue, since exemption affects only those who have given credit after notice).[3]

A homestead was abandoned and another acquired. The beneficiary's notes for the first property were out, but he sold it. An agreement was made between the three parties: himself, his vendee and the holder of the notes, by which his vendee agreed to take up the notes, and give his own with lien on the land he had purchased, which had been the orig-

Re Whitehead, 3 N. B. R. 599; New England, etc. Co. v. Merriam, 2 Allen, 390.

[1] Shelton v. Aultman, 82 Ala. 315; McCall v. Rogers, 77 Ala. 349; Mo. Life Ins. Co. v. Randall, 71 Ala. 220; Tilford v. Torrey, 53 Ala. 120.

[2] Zundell v. Gess, 73 Tex. 144.

[3] Williams v. Jones, 100 Ill. 362; Stansell v. Roberts, 13 Ohio, 148; Skaggs v. Nelson, 25 Miss. 88; Zundell v. Gess, 73 Tex. 144; Wynn v. Flannigan, 25 Tex. 781; Malone v. Kaufman, 38 Tex. 454; Notte's Appeal, 45 Pa. St. 361; Bugg v. Russell, 75 Ga. 837; Eyster v. Hathaway, 50 Ill. 521; Burnap v. Cook, 16 Ia. 149; Bentley v. Jordan, 3 Lea, 353; Lear v. Heffner, 28 La. Ann. 829.

inal homestead above mentioned. He gave the new notes. It was held that equity will enforce the intention to secure the notes by lien, and that there was no homestead in the way.[1]

The lender of money to pay the purchase-price of a homestead, who takes a deed of trust on the land, has the right of being subrogated to the vendor's lien; but if he takes a chattel mortgage, the rule is otherwise.[2] Of course, subrogation may be created, in the latter case, by agreement.[3]

One who loans money to enable another to purchase a homestead, and who becomes subrogated to the rights of the vendor against the land, cannot be defeated in collecting it by the claim of homestead immunity on the part of the borrower.[4]

The court said, in the first case just cited: "The transaction . . . may be regarded as if the appellants had furnished the means of paying the purchase-money of the land upon an agreement that they were to have the same remedies to recover the money thus provided that the original vendor possessed to enforce his demand.

"So well is it established in our own state by frequent decisions that the effect of such a transaction is to subrogate the parties who have purchased the claim against the vendee, or have furnished him the means to pay the debt due the vendor, to all the rights and remedies and liens previously held by the latter to enforce his debt, that there will be no necessity to strengthen the principle by argument, but we merely refer to authorities to sustain it." [5]

The lender who takes a mortgage to secure his advances which the purchaser pays to his vendor, whether those advances be in money or goods, is held to have the same rights as the vendor himself would have, were the mortgage given directly to him.[6]

[1] Thorn v. Dill, 56 Tex. 145.

[2] Pridgen v. Warn, 79 Tex. 588; 15 S. W. 559; Hicks v. Morris, 57 Tex. 658.

[3] Fievel v. Zuber, 67 Tex. 275.

[4] Warhmund v. Merritt, 60 Tex. 24; Eylar v. Eylar, 60 Tex. 315; Joiner v. Perkins, 59 Tex. 300; Dillon v. Kauffman, 58 Tex. 696; Hicks v. Morris, 57 Tex. 658; Wright v. Heffner, 57 Tex. 518; Flanigan v. Cushman, 48 Tex. 244; Cannon v. McDaniel, 46 Tex. 304. See Denni v. Elliott, 60 Tex. 337 (deed of trust to lender).

[5] Warhmund v. Merritt, 60 Tex. 24.

[6] Austin v. Underwood, 37 Ill. 438; Eylar v. Eylar, 60 Tex. 315; Pridgen v. Warn (Tex.), 15 S. W. 559; Lassen v. Vance, 8 Cal. 271; Clark v. Mun-

Money advanced to purchase supplies for making a crop has been regarded in the nature of purchase-money and therefore ground for good claim against the homestead.[1]

§ 4. Borrowed and Purchase-money Distinguished.

"A homestead in possession of each head of a family, and the improvements thereon, to the value in all of one thousand dollars, shall be exempt from sale under any legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. This exemption shall not operate against public taxes, nor debts contracted for the purchase-money of such homestead, or improvements thereon."[2]

The statute, to effectuate this article, provides "such estate shall not be exempt from sale for the payment of public taxes legally assessed upon it, or from sale for *the satisfaction of any debt or liability contracted for its purchase*, or legally incurred for improvements thereon."[3]

Moore sold land to Polk, partly on credit. He enforced his lien, and the land was sold under a decree and bought by Jordan, who paid most of the purchase-money, and gave his note for the balance to Polk; that is, the excess of his bid over the sum due to Moore, who was fully paid. The clerk and master reported the sale to the court, and that Jordan had paid the purchase-money in full; so the sale was confirmed. Polk sued upon his note, and Jordan and wife, defendants, claimed homestead in the land.

The court said, after holding that Polk had not the vendor's lien: "A more difficult question is, whether Polk is not entitled, under our homestead laws, and *without reference to the vendor's equitable lien*, to subject the homestead right to the satisfaction of his debt by virtue of the fact that it is for the purchase-money of the land. . . . It is obvious that the homestead is not exempt from sale 'for the satisfaction of any debt or liability contracted for its purchase.' It may be sold by execution issued on a judgment recovered on such a debt,

roe, 14 Mass. 351; Holbrook v. Finney, 4 Mass. 566.

[1] Stephens v. Smith, 62 Ga. 177; Tift v. Newsom, 44 Ga. 600.

[2] Const. Tenn., art. 11, § 11.

[3] Rev. Stat. Tenn. (T. & S.), § 2114a.

or otherwise subjected by legal process.[1] The creditor proceeds, *not by virtue of the vendor's lien*, which is only enforceable in equity, and may be lost by waiver, but by virtue of the general right of a creditor to subject his debtor's property by 'legal process,'— the homestead exemption not applying to such a debt. Unless, therefore, the facts in this case take the 'debt or liability' out of the proviso of the statute, the right to subject the property, covered by the homestead claim, to its satisfaction, would seem to be clear. . . .

"The fact is indisputable that the purchase-money represented by the note in controversy has not been paid, and it is this fact which prevents the operation of the homestead exemption. The statute has guarded against the injustice of exempting land from liability for the debt by which it was obtained;— an injustice so obvious that the courts of the states, where no statutory provision on the subject exists, have made the exception themselves. . . . All the authorities agree that the homestead continues liable as long as any part of the purchase-money remains unpaid."[2]

"It is the debt which the statute provides for, without regard to the form it may assume."[3]

Judge Freeman says of money borrowed to pay for a homestead: "This could in no sense be held to be the purchase-money of the land. That had been paid by" the purchaser with borrowed money. "This was a debt for borrowed money, advanced or loaned, it is true, to pay for the land, but still but a debt for loaned money. The lien on the face of the note did not make it such. That was a form of security carried out by the parties themselves, but is not a vendor's lien, but one by contract.

"The using of borrowed money to pay for land does not give the lender the right even to be subrogated to the vendor's lien, much less does the note given for such money give such lien. . . .

"This being so," one who paid a judgment rendered in favor of the lender and others "cannot claim to be subrogated

[1] *Citing* Woodlie v. Towles, 1 Memphis L. J. 68; S. C., 1 Leg. Rep. 331.

[2] Bentley v. Jordan, 3 Lea, 353, Cooper, J., for the court, *citing* for the last quoted statement, Bush v. Scott, 76 Ill. 525; Harris v. Glenn, 56 Ga. 94.

[3] *Ib.*

to a vendor's lien by having paid the judgments stayed by him. The notes themselves were not entitled to such lien; and, as a matter of course, paying them cannot give such a right." So the bill, filed by the borrower and his wife for the homestead bought with the money of another, was sustained.[1]

Decisions are not uniformly favorable to the borrower. It is maintained that as money borrowed to pay a lien-holder is not in the nature of purchase-money, the lender, without contract to that effect, is not subrogated to the rights of the former lien-holder.[2] But if the borrowing transaction is such that it created a property-debt against the land subsequently or simultaneously bought, a lien will be created which will hold against the homestead right.[3]

The doctrine is that the mere fact that money was loaned to raise the lien does not show subrogation.

Borrowed money is not "purchase-money" as the phrase is used, though the borrower may buy land with it, give his notes for it to the lender, and secure them upon the land purchased. The lender may have a lien given him upon the land bought, but it is not the vendor's lien.[4] The latter is always to secure the price of the land. So a note held by the vendor may have been renewed, and the rate of interest changed, yet his lien would not be lost.[5] But a third person, lending money to take up such note, should have himself secured by conventional lien (since the money he advances is not technically "purchase-money"), in states where the language of the statute is not broad enough to give such advances as favorable a position as they have under the statutes of several other states. Nowhere is a lien established by the mere loan of money to the purchaser of a homestead to enable the latter to pay for the property. The debt created by the borrower is merely a personal debt. But it is generally favored above other personal debts of the homestead holder by excepting it from the

[1] Gray v. Baird, 4 Lea, 212, *citing* Durant v. Davis, 10 Heisk. 522.

[2] White's Adm'r v. Curd, 86 Ky. 191; Griffin v. Procter, 14 Bush, 571.

[3] Purcell v. Dittman, 81 Ky. 148; Bradley v. Curtis, 79 Ky. 337.

[4] Gray v. Baird, 4 Lea, 212; Durant v. Davis, 10 Heisk. 522. *Contra:* Guinn v. Spurgin, 1 Lea, 228.

[5] Bentley v. Jordan, 3 Lea, 353. *See* De Hymel v. Mortgage Co., 80 Tex. 493.

exemption provision. While other ordinary debts, prosecuted to judgment against him, result in no general judgment lien against the homestead, a debt for borrowed money to pay for a homestead or its improvement, when prosecuted to judgment, against him, does result in a general judgment lien in vindication of which the homestead may be subjected to forced sale, according to many statutes. Exemption is inapplicable to such an ordinary debt, where this rule prevails.

Whether this rule prevails or not, in any particular state, is sometimes left questionable by the language of the statute there. If only purchase-money is excluded from the operation of exemption, borrowed money to pay purchase-money clearly is not. But take this provision: "No property shall, by virtue of this act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof."[1] It will be noticed that the phraseology is peculiar. It is not that "no property shall . . . be exempt from sale for the non-payment of taxes, assessments" and its purchase-price or the cost of improvements. This would have been a natural form of expression, if the exclusion of technical "purchase-money" was meant, and the cost of improvements was meant. But we have the roundabout verbiage, "debt or responsibility incurred for the purchase," which would not be out of the way if borrowed money to pay the price was meant to be included. Does it not seem probable that the legislator employed this language for the purpose of including such borrowed-money debt as well as the price proper? If one borrows money to pay his vendor, he certainly "incurs" a debt. He "incurs" this debt, not *by* the purchase, but "for the purchase" as the statute has it. So, if there is "a debt or liability incurred for . . . the improvement" of his homestead, may it not have been done by obtaining a loan with which to pay the carpenter, as well as by going in debt to the carpenter himself?

Were the question pristine, it would seem that the legislator not only *meant* that debt contracted by borrowing to pay for a homestead or its improvement should be excepted from

[1] Ill. Stat. (S. & C.), p. 1102, ¶ 8.

the exemption, but that he *said* what he meant. As it is not new and open under the statute cited (though similar phraseology may yet have construction under other statutes), it seems now necessary to show how the rightful interpreters have answered: "Where money is borrowed with a view of being used in the purchase or improvement of real estate, and is so used, it cannot, in such case, be said properly that the liability or debt incurred by such borrowing is a debt incurred for the purchase of the property, or a debt or liability for the improvement thereof. As between the lender and the borrower, it is a liability for money loaned. As between the borrower and the vendor to him of the property, it may be purchase-money; and as between the borrower and the maker of the improvements, it may be regarded as paid for a debt 'for the improvement thereof.'"[1] How consonant would have been the addition: As between the borrower and the lender of money to be used and actually used in buying a homestead, the debt created is "incurred for the purchase!"

It had been held that if the lender advanced cash to pay the price of the homestead at the time of the purchase, the purchaser incurred a debt or obligation to him for the purchase, for which the homestead was liable.[2] And that when a balance of price was paid by a third person at the request of the homestead purchaser, the debt incurred by the latter was for purchase-money.[3] But if the money is lent to the purchaser, that he may pay it over to the vendor, this is not a debt incurred for the purchase, it is held.[4]

The difference between purchase-money and borrowed-money-to-pay-purchase-money is that the former is secured by the vendor's lien while the latter is not secured by any lien. There may be a conventional lien created by the agreement of the parties — the lender and the borrower — but the law creates none. Wherever, then, such broad language, as that above quoted from the statute, is found in other statutes and held to include loans to the purchaser that he may pay the price, the lender has no lien by virtue of his loan, but he may

[1] Parrott v. Kumpf, 102 Ill. 423, *427*.
[2] Austin v. Underwood, 37 Ill. 438.
[3] Magee v. Magee, 51 Ill. 500.
[4] Eyster v. Hathaway, 50 Ill. 521, cited in the Parrott Case; Winslow v. Noble, 101 Ill. 194. *See* Best v. Gholson, 89 Ill. 465.

get judgment and vindicate the general judgment-lien against the borrower's homestead — for there is no exemption.

§ 5. Notes for Price in Third Hands.

The authorities sustain the proposition that the character of a debt and of the vendor's right of payment out of the land he has sold is not affected by changing the form of the evidence of the debt by securing it with additional security, real or personal, or new security, or higher security.[1]

"Nor, as between the parties, is the lien waived, lost or abandoned by the fact that the original note for the purchase-money was, by the direction of the vendor, executed to a third person. Nor is such a lien lost, as between the parties, by the fact that such third person afterwards surrenders to the vendee his original note (as in this case), and takes others in its stead."[2]

A man and wife bought land on which the vendor owed a thousand dollars to his grantor, which debt was a lien upon the land. All the parties agreeing, the marital purchasers gave their joint note to their vendor's grantor who retained his lien. Then title was passed to the wife only, by the vendor, who acknowledged the payment to him of fifteen hundred dollars, which included the thousand of the note. It was held, under these circumstances, that the wife, though a married

[1] Bentley v. Jordan, 3 Lea, 353, 360; Austin v. Underwood, 37 Ill. 438; Wafford v. Gaines, 53 Ga. 485; Hawkes v. Hawkes, 46 Ga. 204; Chase v. Abbott, 20 Ia. 154; Dick v. Powell, 2 Swan (Tenn.), 632; Mulherrin v. Hill, 5 Heisk. 58; Stratton v. Perry, 2 Tenn. Ch. 633; Burns v. Thayer, 101 Mass. 426; Ladd v. Dudley, 45 N. H. 61; Weymouth v. Sanborn, 43 N. H. 171; Strachn v. Foss, 42 N. H. 43; Wood v. Lord, 51 N. H. 448; Kibbey v. Jones, 7 Bush, 243; Pryor v. Smith, 4 Bush, 379; Lowry v. Fisher, 2 Bush, 70; Pratt v. Topeka Bank, 12 Kas. 570; Woodlie v. Towles, 1 Leg. Rep. 331; McLaughlin v. Bank, 7 How. 228; Birrell v. Schie, 9 Cal. 104; Dillon v. Byrne, 5 Cal. 455; Mills v. Spaulding, 50 Me. 57; Weaver's Estate, 25 Pa. St. 434; Reed v. Defebaugh, 24 Pa. St. 495. *Compare* Harley v. Davis, 16 Minn. 487; Phelps v. Conover, 25 Ill. 314; Eyster v. Hathaway, 50 Ill. 522; Adams v. Jenkins, 16 Gray, 146.

[2] Joiner v. Perkins, 59 Tex. 300, *citing* De Bruhl v. Maas, 54 Tex. 473; Gillum v. Collier, 53 Tex. 592; Clements v. Lacey, 51 Tex. 150; Irvine v. Garner, 50 Tex. 448; Flanagan v. Cushman, 48 Tex. 241; Prince v. Malone (Gal. Term, 1881, declining to follow Malone v. Kaufman, 38 Tex. 154). See, also, Hicks v. Morris, 57 Tex. 659 (expressly overruling Malone v. Kaufman, *supra*); Pinchain v. Collard, 13 Tex. 333; Senter v. Lambeth, 59 Tex. 259; Glaze v. Watson, 55 Tex. 563.

woman when she made the note, could not hold the land and repudiate her contract.[1]

A mortgage that is valid against a homestead, or a note for purchase-money, may be assigned so that the transferee shall be subrogated to the rights of the original holder.[2] At the request of the owner of the homestead, with the obligation to pay assumed, subrogation would take place.[3] If the purchaser of a homestead has agreed to pay the purchase-money to a person other than his grantor, such person derives from the agreement between the contracting parties, and that between the grantor and himself, for valid consideration, the right and lien which the grantor would have had.[4] And it has been held that an attaching creditor may redeem the land attached from a mortgage, and become in equity the assignee of the mortgage debt, as though he had been requested by the mortgagee to redeem it. So he is entitled to "keep the debt on foot," with its securities, against the debtor.[5]

"The assignment of a note, given for the purchase of real estate, carries with it the lien of the vendor and all the equities and remedies the latter would have had if he had never parted with the debt. And this on principle would seem to be the better rule. What reason can be given why, if the assignment of the debt carries with it the lien, any and all other equities and rights do not necessarily follow? The principal thing is the debt; the lien is an incident and the principal one that attaches to it. If, then, the debt and the principal incident pass to the assignee, why not all other equities and rights?"[6]

The vendor's lien may be waived by giving up the note and taking personal security for the debt instead of the property sold. It has been held that the assignment of the original note is waiver of the lien.[7] Ordinarily, the note and lien go together into the hands of the assignee. The note, without

[1] Purcell v. Dittman, 81 Ky. 148.

[2] Lamb v. Mason, 50 Vt. 350; Keyes v. Wood, 21 Vt. 331; Pratt v. Bank, 10 Vt. 293.

[3] Magee v. Magee, 51 Ill. 500; Austin v. Underwood, 37 Ill. 438; Carr v. Caldwell, 10 Cal. 385; Lassen v. Vance, 8 Cal. 271.

[4] Pinchain v. Collard, 13 Tex. 333; Hamrick v. Bank, 54 Ga. 52.

[5] Lamb v. Mason, 50 Vt. 351; Warren v. Warren, 30 Vt. 530.

[6] Bills v. Mason, 42 Ia. 329, 333; Blair v. Marsh, 8 Ia. 144.

[7] Moshier v. Meek, 80 Ill. 79. *See* Ontario State Bank v. Gerry, 91 Cal. 94.

the lien, would be worthless if the debtor owned nothing but his homestead.

Nothing which the debtor can do, short of payment, can rid the home of the lien bearing upon it. He cannot relieve the property by selling it. Should he sell, and afterwards take the property back, the original lien would remain.

The cancellation of a deed absolutely conveying the homestead, and executed by both husband and wife, does not reinvest them with such right as to prevent the land from sale to satisfy unpaid purchase-money notes held by a party which acquired them before the cancellation.[1]

If the assignee of a note, given for homestead purchase-money, should surrender it to the maker and take the latter's note in exchange, it is held that the property will be bound by a trust deed given to secure the note.[2] The new note, in such case, stands in the place of the old one, and is evidence of a debt incurred by the purchase of the homestead property; for the consideration has merely changed form without changing character.[3]

An exemptionist, renewing a note with lien on his homestead which had been originally given before his marriage, rebinds the hypothecated property.[4] And he cannot avoid responsibility by having that property conveyed afterwards to his wife, through a third person, in fraud of the creditor holding the secured note, to whom it was given.[5]

If the deed given to the intermediary was fraudulent, that from him to his grantor's wife will be deemed tainted with the same disease.[6]

A deed of trust of land subject to homestead and subject to the purchase-money lien is not fraudulent because of such reservations.[7] There might be fraudulent concealment of the

[1] Brooks v. Young, 60 Tex. 32.

[2] Williams v. Jones, 100 Ill. 362, on statute providing that "no property shall . . . be exempt from sale . . . for a debt or liability incurred for the purchase or improvement thereof." Kimble v. Esworthy, 6 Bradw. 517.

[3] Wood v. Lord, 51 N. H. 448. *See* Ladd v. Dudley, 45 N. H. 61.

[4] Hambrick v. Jones, 64 Miss. 240; Miss. Code, 1880, § 2692; Smith v. Scherck, 60 Miss. 491. *See* Billingsly v. Neblett, 56 Miss. 537.

[5] Ib.

[6] Pope v. Pope, 40 Miss. 516; Lincoln v. Claflin, 7 Wall. 132; Carey v. Hotailing, 1 Hill (N. Y.), 311.

[7] Carter v. Hicks, 2 Lea, 511.

homestead character of the property and of the purchase-money lien which would outrank the trust deed; but, if the grantee of the trust is made acquainted with the true state of facts, there certainly would be no fraud in giving the deed.

There are some transactions, reported in the books, which seem to contradict what has been above said, that nothing which the debtor can do, short of payment, can rid the home of the lien bearing upon it.

A purchaser bought a house and lot on credit, and then deeded the property to his wife. He gave his note for the purchase-money; and, at his request, the note was bought by a third person. The homestead, thus bought but not paid for, was held exempt from judgment on this note given for purchase-money and transferred to third hands in the course of business. It was even held that if the wife herself (who had become the holder of the legal title to the property) had been the maker of the note, and had requested the third party to purchase it, he would have had no right against her estate of homestead; that, admitting the acts of herself and husband to be fraudulent, the holder of the note could not make his money, as purchase-money or in any way, out of the property thus obtained without price or consideration.[1]

The court said that the right, which the payee of the promissory note had had, to enforce the vendor's lien, was personal, and was ended when he indorsed the note to a third person, though the maker consented to the transfer, or advised it.[2]

If the lien was once fastened upon the realty, could it be dislodged by the transfer of the evidence of the debt? It was a *property* debt if the property was bound for it, as in case of all vendor's liens whether on homesteads or not, and of all liens on realty, whether on homesteads or not. For exemption has nothing to do with lien debts.

[1] Gruhn v. Richardson, 128 Ill. 178. *Citing* Winslow v. Noble, 101 Ill. 194; Eyster v. Hathaway, 50 Ill. 522. *Adding:* "Even the fraudulent acts of the party entitled to a homestead are not allowed to divest that right. Leupold v. Krause, 95 Ill. 440. The case made is, as we think, governed by the ruling in Allen v. Jackson, 122 Ill. 567."

[2] Gruhn v. Richardson, *supra*, citing Richards v. Leaming, 27 Ill. 432; Keith v. Horner, 32 Ill. 524; McLaurie v. Thomas, 39 Ill. 291; Lehndorf v. Cope, 122 Ill. 333.

The lender, by advancing the price to the purchaser, becomes only an ordinary creditor, though a favored one where the exemption statute excepts the debt due him against the householder from the operation of the exemption. His credit is merely *personal*, no doubt; and, should he assign it, the assignee does not have, necessarily, the same right to obtain a general judgment lien bearing on the homestead, that the assignor had possessed. Whether this right passes on assignment depends on the statute of each state as construed by the supreme court of each. But everywhere a lien-bearing debt is a property debt, and one non-lien-bearing is personal.

If the statute, in excepting from exemption, names the character of debt that is thus excepted (and not the kind of creditor whose claim is to be good against the homestead), it would seem that transfer or assignment would not forfeit the right. For instance, if *any debt incurred for the purchase of the homestead* is the language employed, and if the courts construe the language to include debts created by loan of money to pay the vendor, then the transfer of the debt ought not to forfeit the right reserved by the exception of such debt from the operation of exemption. On the other hand, if the statute provides that persons advancing money, to purchasers of homesteads, to pay the price, shall not be affected by the homestead exemption law, the assignment of their claims to others who are not loaners would not carry with it the right to create a lien on the homestead by judgment, to be followed by execution and forced sale.

§ 6. Marshaling Accounts, as to Homestead.

A debtor, insolvent apart from a costly and elegant homestead, gave his note for five thousand dollars in consideration of several loans previously made to him, the first of which was of fifteen hundred dollars before he had acquired the homestead. He had made payments exceeding this last mentioned loan without directing their application. The payee did not indorse them on the note nor designate their application to any special loan. "In view of the evident purpose of the law to protect the homestead, *held* that the payments should be so applied as to cancel the fifteen hundred dollars

indebtedness which might otherwise be a lien on the homestead."[1]

The general rule governing payments on an open account is that they are to be applied to the extinguishment of the items in the order of their dates.[2] The court, in the case above mentioned, considered that the running account had been settled by the giving of the note, so that the rule did not apply, if indeed it had not consisted previously of "distinct debts" rather than items of account. If neither party elected to what items of indebtedness the five thousand dollar note payment should be accredited, "then the law applies it according to its own notions of justice."[3]

The court admitted that the rule for applying payments, so as to preserve the creditor's security by crediting them to unsecured items or to those less secured, has strong support on authority, if slightly modified,[4] so as to be applied only under equitable considerations applicable to special cases.

It held that since neither party had elected whether the payment should be applied to the extinguishment of the fifteen hundred dollar debt, it should be so applied as to preserve the homestead to the debtor and his wife. The court added: "Under the head of 'The justice of the case,' the appellant calls attention to the character of the homestead in this case, it being stated that it contains about forty acres, with buildings costing about ten thousand dollars, with terraces, drives, etc., and that the homestead was built in part with the money obtained from the plaintiff. It has seemed to be the policy of legislation in this state not to place restrictions on the value of homesteads. We have no greater discretion in the application of the law in a case like this than in a case where the homestead as to value would be at the other extreme. In either case, the rule applicable to the facts is

[1] First N. Bank of Stewart v. Hollinsworth, 78 Ia. 575. (The extract is from the syllabus of the reported case.)

[2] *Ib.; citing* Field v. Holland, 6 Cr. 8; Mack v. Adler, 22 Fed. Rep. 570; Schulenburg v. Martin, 2 Fed. Rep. 747; Pardee v. Markle, 111 Pa. St. 551; Hannon v. Engleman, 49 Wis. 278; Hersey v. Bennett, 28 Minn. 86.

[3] *Citing* Whiting v. Eichelberger, 16 Ia. 422, and referring to the previous citations.

[4] *Citing* Leeds v. Gifford, 5 Atl. (N. J.) 795; Hersey v. Bennett, 28 Minn. 86; Coons v. Tome, 9 Fed. 532; Sanborn v. Stark, 31 Fed. 18. *See* Nichols v. Knowles, 17 Fed. 494.

the same. Again, while the statement as to the cost may be true, it is doubtful, in view of the record, if, after discharging the four-thousand-dollar incumbrance, there remains a homestead of extravagant value. The house seems to have been built when the defendant was thought to be solvent and prosperous in business. . . . It is conceded that the defendant is insolvent, and that his other property has been applied to the payment of his debts. To us it does not seem a greater hardship to the plaintiff than to the other creditors." [1]

If there is error in this decision, it is, perhaps, attributable to treating the application of the payments as coming under an exception to the rule above stated. The homestead was liable for debts contracted prior to its purchase and occupancy, and the fifteen hundred dollar debt seems to have been prior.

§ 7. Mortgage for the Price.

A mortgage for the purchase-money, given simultaneously with the taking of a deed absolute in form, is deemed prior to the transfer so far as to give it precedence over later liens put upon the property.[2] A married man may act alone in securing the purchase-money to his vendor, when acquiring property to be dedicated as a homestead, for his wife's right in it has not yet arisen. Hence it is held that though the requirement, that the signature of the wife must accompany that of the husband in the conveyance of the homestead, is strictly enforced, yet mortgages to secure purchase-money are excepted from the requirement.[3]

The signatures of both husband and wife are unnecessary when a mortgage is given to secure the price of a homestead to be established. Only the one taking the title need sign.[4]

Nor is the wife's signature essential to the renewal of an

[1] First N. Bank v. Hollingsworth, *supra*.

[2] Curtis v. Root, 20 Ill. 57.

[3] Beecher v. Baldy, 7 Mich. 488; Dye v. Mann, 10 Mich. 291; McKee v. Wilcox, 11 Mich. 358; Ring v. Burt, 17 Mich. 465; Fisher v. Meister, 24 Mich. 447; Snyder v. People, 26 Mich. 106; Comstock v. Comstock, 27 Mich. 97; Wallace v. Harris, 32 Mich. 380; Amphlett v. Hibbard, 29 Mich. 298; Phillips v. Stauch, 20 Mich. 369; Stevenson v. Jackson, 40 Mich. 702; Watertown Ins. Co. v. Sewing Machine Co., 41 Mich. 131; Sherrid v. Southwick, 43 Mich. 515; Shoemaker v. Collins, 49 Mich. 595; Hall v. Loomis, 63 Mich. 709; Girzi v. Carey, 53 Mich. 447.

[4] Christy v. Dyer, 14 Ia. 438; Yost v. Devault, 9 Ia. 60.

obligation which would otherwise be soon prescribed by time, by which a mortgage on the homestead is continued in force.[1]

However stringent the rule of restraint against the husband's sole alienation of the homestead, and against his creation of a lien upon it without his wife's concurrence, exception is made in case of mortgage to secure the purchase price.[2]

The wife's signature is necessary to a mortgage given by the husband to secure a loan obtained by him and paid as part of the price in exchanging his old homestead for a new one, when the mortgage is to rest on the latter.[3] The mortgage in such case is not given to the guarantor, to secure purchase-money, but to another to secure him for money loaned by him for any purpose the borrower may design. It is such a hypothecation of the homestead as involves the safety of the wife's home, and her signature is essential to the validity of it.

To pay the price, the husband has been allowed to convey the homestead, notwithstanding the rule forbidding alienation without her consent.[4]

The reason is that the wife's security of home is not affected by such a transaction. She has no right to it till the home is paid for; and what goes to pay does her no wrong. The spirit of the restraint upon alienations imposed by statute is not violated by acts of the husband which do not affect the home. For instance, if homestead enjoyment remain unmolested, the husband alone may grant the right of way through the exempt property, when he is the owner of the legal title.[5]

[1] Mahon v. Cooley, 36 Ia. 479. *See* Burnap v. Cook, 16 Ia. 149.

[2] In Minnesota, a conveyance or mortgage of the homestead made by a married man without his wife's signature is absolutely void, unless given to secure the price of the homestead. Alt v. Banholzer, 39 Minn. 511. The invalidity is not cured by subsequent abandonment of the homestead right. Barton v. Drake, 21 Minn. 299. Nor is want of the wife's signature remedied by subsequent divorce. Alt v. Banholzer, *supra*. *See* Same parties, 36 Minn. 57. And the invalidity is not confined to the rights of the wife, but extends to every right — the deed is wholly void. Conway v. Elgin, 38 Minn. 469.

[3] Dikeman v. Arnold, 71 Mich. 656.

[4] In Texas the husband alone may convey land to satisfy the claim for its purchase-money, if done in good faith and not to defraud the wife of homestead rights. Roy v. Clarke, 75 Tex. 28; Clements v. Lacy, 51 Tex. 160.

[5] Ottumwa R. Co. v. McWilliams, 71 Ia. 164. To nearly same effect, Chicago R. Co. v. Swinney, 38 Ia. 182.

So he may grant a license to mine upon it, when the home of the family is not thereby disturbed; at least, such grants are not necessarily void because not signed by the wife.[1] And on the same principle, he alone may give a mortgage to secure purchase-money.

An unrecorded mortgage for purchase-money has been given preference over a recorded mortgage for debt not excepted from exemption, though both were held valid and both had been duly foreclosed.[2]

A mortgagor, without title, gave a mortgage on promise of the mortgagee to procure him the title to the land thus pre-mortgaged. It was held to be a purchase-money mortgage, against the land subsequently owned by the mortgagor as his homestead.[3]

A verbal promise not to foreclose a mortgage was held not obligatory.[4]

§ 8. Payment Essential to Ownership.

The purchaser of a dwelling or land for a homestead buys as though he had any other purpose. He may contract alone. If he is married, his wife need not join in the mortgage to secure the purchase-money,[5] as already shown.

Land bought by a husband for a home, but not paid for, may be given up by him alone; or he alone may secure the purchase-money, by mortgage to the grantor. The reason is that ownership being necessary to the enjoyment of exemption, the right does not attach, *quoad* the creditor, till the price has been paid.[6] He alone may adjust equities and incumbrances existing prior to the purchase.[7]

[1] Harkness v. Burton, 39 Ia. 101; Chicago R. Co. v. Swinney, 38 Ia. 182. *See* Sibley v. Lawrence, 46 Ia. 563, relative to leasing a coal mine on a homestead.

[2] Walker v. Johnson, 64 Ga. 363. The proceeds of a judicial sale of a homestead, sold on claim for purchase-money, must be applied to the satisfaction of the oldest execution, in South Carolina, though under that exemption the property could not have been sold. *Semble.* Lawrence v. Grambling, 19 S. C. 461.

[3] Whitney v. Traynor, 74 Wis. 289.

[4] Martin v. McNeely, 101 N. C. 634; Boone v. Hardie, 87 N. C. 72; Bonham v. Craig, 80 N. C. 224; Kessler v. Hall, 64 N. C. 60; Walters v. Walters, 11 Ired. 145.

[5] Davenport v. Hicks, 54 Vt. 23; Alt v. Banholzer, 39 Minn. 511. See authorities in sec. 6.

[6] De Bruhl v. Maas, 54 Tex. 464.

[7] Gillum v. Collier, 53 Tex. 592.

Ownership being one of the conditions of homestead, the purchaser cannot claim the privileges of exemption against his vendor whom he has not paid; for he does not own as to him. The vendor's right is superior; and it has been held that the title is not fully vested in the purchaser before the payment of the price.[1] This is clearly true when he holds land under a bond for title,[2] or has given a mortgage for the purchase price.[3]

If title is taken and notes given for the purchase-money, they are considered anterior to the taking of the title, since it is said that the contract must precede the purchase. Both transactions are one, in a sense, but it is held that purchase-money notes would bear on a homestead as evidences of pre-existing debt, independent of the special statutory provision that purchase-money debts shall so bear.[4] The contract to purchase precedes its execution.[5]

If the purchase-money has not been paid, the vendor can recover the property by ejectment, or suit to recover under a statute so empowering him to proceed.[6]

The purchaser's title, when he has not paid for the property purchased, though not good against the vendor, cannot be disregarded by others on the ground that the price has not been paid. As to them, the condition of ownership, in respect to homestead, has been observed.[7]

A contractor to sell land advanced money to the party agreeing to buy, for the purpose of having a dwelling-house built upon it. The house was built, with the understanding that the advances should be repaid before the giving of the deed. The buyer occupied the dwelling as his homestead, which he assigned to his wife. The contractor to sell (who had received part of the price, on the contract) deeded the

[1] Stone v. Darnell, 20 Tex. 14.

[2] Farmer v. Simpson, 6 Tex. 310.

[3] Curtis v. Root, 20 Ill. 57.

[4] Purcell v. Dittman, 81 Ky. 148; Bradley v. Curtis, 79 Ky. 327.

[5] Christy v. Dyer, 14 Ia. 441; Stevens v. Stevens, 10 Allen, 146. *Compare* Thurston v. Maddocks, 6 Allen, 429.

[6] Broach v. Barfield, 57 Ga. 601; Carswell v. Hartridge, 55 Ga. 412; Biggers v. Bird, 55 Ga. 650. *See* Lackey v. Bostwick, 54 Ga. 45; Johnson v. Griffin, etc. Co., 55 Ga. 691; Bush v. Lester, 55 Ga. 579; Isaacs v. Tinley, 58 Ga. 457.

[7] McHendry v. Reilly, 13 Cal. 76; Clark v. Trawick, 56 Ga. 359; Smith v. Whittle, 50 Ga. 626; Hopper v. Parkinson, 5 Nev. 233.

property to another person, who repaired and improved it, and paid taxes and insurance on it.

The contractor to sell was sued by the other party to the contract for specific performance. The wife of the latter was declared to be entitled to the conveyance on payment of the balance of the price, and on reimbursing the person who had paid taxes in the sum thus expended. Her homestead right was held paramount to the advances made to her husband by the contractor to sell, for the purpose of erecting the dwelling-house; and also to the sums expended by the person to whom the deed had been given, in making repairs.[1]

Two joint purchasers of land paid for it in part — one paying more than the other. The one who had paid the more, died: the other administered on his estate, caused it to be resold with titles withheld till full payment of the price and the land to stand pledged for such payment. One-half the price was to be paid to the heirs of the deceased and the other half to the administrator: the original joint purchasers. The administrator became the purchaser of the land. He was found indebted to the estate on account of the interest of the deceased in the land, and also for rents and profits accruing before the resale. He was held not entitled to homestead as against his indebtedness. The money owing by him was purchase-money payable to the distributees of the estate of the deceased.[2]

Co-purchasers, becoming tenants in common, acquire no right of homestead which can be interposed by one against the other who claims for excess of his part paid on a mortgage to secure the purchase-money.[3]

No homestead right is acquired by a purchaser who takes a deed against a lien (reserved in the deed which he takes), to secure the payment of a stated sum of money though not purchase-money, technically speaking. He obtains the property with its liability for the lien.[4]

Land not paid for cannot even be applied to the payment of funeral expenses to the displacement of the vendor's lien.[5]

[1] Chopin v. Runte, 75 Wis. 361; McWilliams v. Bones, 84 Ga. 203.

[2] Edwards v. Edwards, 14 S. C. 11.

[3] Newbold v. Smart, 67 Ala. 326.

[4] Berry v. Boggess, 62 Tex. 239. *See* Claybrooks v. Kelly, 61 Tex. 634.

[5] Robertson v. Paul, 16 Tex. 472. *See* Phelps v. Porter, 40 Ga. 485, on application of personalty, unpaid for, to the support of widow and children.

A vendee in possession under warranty cannot defend against the payment of the purchase-money either in equity or at law while he retains possession, except on the ground of fraud or the inability of the vendor to respond to his covenants by reason of his insolvency.[1] And when the deed shows on its face that the purchase-money has not been paid, a sub-vendee is charged with notice, and is not an innocent purchaser.[2]

A judgment in a suit for the recovery of purchase-money ought to show that it was rendered on that kind of claim; but, when it does not show this, the purchaser of a homestead, sold under the judgment, may establish that fact by extrinsic evidence when his title is attacked on the ground that the property was exempt.[3]

§ 9. Price Returned when Title Fails.

In a suit for purchase-money, the plaintiff cannot recover when he has given no title to the purchaser. Though the defendant may be the owner by title subsequently obtained of one who could rightfully convey, he will not be bound by his contract with one who had no such right, and any form of lien held by the latter will prove abortive.[4] The purchaser getting no title, his wife can claim no homestead in property which he does not own and to which she claims no title in her own right.[5]

The purchaser of a homestead who obtains no title is entitled to have his money back, with interest.[6] It was said, perhaps unnecessarily, in the beginning of this chapter, that he cannot have both the property and its purchase-money; but he can have one. If his title fails, why should he not have his money back, which he has paid out for nothing?

A purchaser, evicted by the holder of a paramount title, becomes a creditor of his grantor to the amount of the price

[1] Thompson v. Sheppard, 85 Ala. 611, *619;* Woodall v. Kelly, 85 Ala. 368; Strong v. Waddell, 56 Ala. 471; Garner v. Leverett, 32 Ala. 410.

[2] Witter v. Dudley, 42 Ala. 616.

[3] Durham v. Bostwick, 72 N. C. 356; People v. Stahl, 101 Ill. 346; White v. Clark, 36 Ill. 285; Stevenson v. Marony, 29 Ill. 532; Freeman on Judgments, 180.

[4] Farmer v. Word, 72 Ga. 16.

[5] Snodgrass v. Parks, 79 Cal. 55.

[6] Cline v. Upton, 59 Tex. 27; Burns v. Ledbetter, 56 Tex. 286; Stone v. Darnell, 25 Tex. Sup. 435: Andrews v. Richardson, 21 Tex. 287; Howard v. North, 5 Tex. 316.

paid. He has been a creditor from the date of the payment, though the fact has not appeared till his eviction.

The grantor's widow cannot interpose her homestead right in the property thus abortively sought to be sold by her late husband, against an execution issued by the plaintiff on a judgment giving him back his money, because of breach of warranty. She might claim homestead in the land, if her right was accorded by an existing statute and she had not joined in the deed, and her husband really owned but did not legally convey. But if her right arose after the sale (though before the eviction of the vendee), by the passage of a statute creating it in the interval between those two events, it is held that she cannot interpose her claim against the plaintiff recovering the price on breach of warranty.[1]

The vendee is as much entitled to have his money back when he has bought at judicial sale *provoked by the vendor as owner*, as when he has bought at private sale. Whatever the transaction, if the court is a mere agent, the duty of warranty is not affected by the fact that the sale is judicial in form.

Of the court as an agent, the following extract is illustrative: "Reliance seems to be placed on the fact that the sale of the land was made by the master" [in chancery]. . . . "The court acquired jurisdiction to order a sale of the land by virtue of the contract entered into between the complainant and defendant to the suit in the original trade. The court and its officer, the master, were therefore the *agents of the vendee, the owner of the land* — as much so in reality, though not in form, as if he had executed to them a regular power of attorney to sell, and to appropriate the proceeds in conformity with the contract. He was entitled to the surplus proceeds of sale after satisfying the debt of his vendor and the costs of suit. If the master, after entering all proper credits on the notes given to him, had, under order of the court, transferred the notes to the defendant, there could not have been a doubt that the unpaid balance would have been a 'debt or liability contracted for the purchase' of the land."[2]

[1] Corr v. Shackelford, 68 Ala. 241; Bibb v. Freeman, 59 Ala. 612; Watts v. Burnett, 56 Ala. 340; Wilson v. Brown, 58 Ala. 62.

[2] Bentley v. Jordan, 3 Lea, 353, 359.

To avoid a deed for a homestead, the party praying for the rescission of the contract must return the price or consideration received, according to the rule of equity.[1]

§ 10. Insurance and Voidable Title.

A stranger to a contract cannot impeach the transaction because of its effect on the homestead, resulting in a mortgage upon it prohibited by the law of the place of contract. This was laid down in a case presenting the following facts: The occupant of a building, which was claimed as exempt, conveyed it to a firm, to pay debt, who reconveyed to him on the same day, and took his notes therefor and held the vendor's lien. He insured the property and transferred the policy to the firm. The building was burned, and a transferee of the notes and policy sued the insurance company for the loss.

The company pleaded in defense that the transaction between the insuring occupant and the firm was void under the homestead laws of the state where it took place; that the notes given by him, with security in the nature of a mortgage, gave no rights against the homestead or exempt business place; and that the plaintiff (the transferee of the notes and policy) had not derived them from a holder having any insurable interest.[2] The court said the transaction was not abso-

[1] Pearson v. Cox, 71 Tex. 246.

[2] The transaction was had in Texas. The constitution of that state provides (sec. 50) that the homestead of a family shall be protected from forced sale for debts except for purchase-money, taxes, work done and material used for improvements contracted for in writing, *with the consent of the wife* given as required in a conveyance of the homestead. "Nor shall the owner, if a married man, sell the homestead without the consent of his wife given in such manner as may be prescribed by law. No mortgage, trust deed or other lien on the homestead shall ever be valid except for the purchase-money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed or other lien, shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead, involving any conditions of defeasance, shall be void." Section 51 limits the country homestead to two hundred acres and improvements, and the urban to a lot or lots worth no more than five thousand dollars, and improvements irrespective of value. Either species must be used for residence or business by the head of a family. Temporary renting is permitted, if no other homestead has been acquired.

lutely void. It would hold till questioned by some one having the right to question it. The insurance company was a stranger to it and could not successfully assail it. As between the parties to it, the notes were valid and the security attached to such interest or estate in the property as was conveyed to the firm. The deed or mortgage given by the homestead occupant to secure his notes to the firm "would be effective in several contingencies to pass some sort of substantial interest in the insured property itself, under the decisions of that state," the court said.[1]

The actual form which the security for the notes took from the written instruments between the maker and the first holder (the firm) was that of securing a vendor's lien for purchase-money, the court said. The conclusion was that the plaintiff, as the transferee of the notes and security and policy, represented such an insurable interest as would support a recovery for the loss by fire.[2]

Had the wife of the homestead holder attacked his conveyance of it to the firm, she would have had no difficulty in having it declared void under the section above cited. Indeed, the terms of that section are so broad an inhibition of sale without her joinder that it would seem a contravention of the policy of the law to conserve homes if we allow sole sale by him to be merely voidable under any circumstances, when purchase-money, or some other exceptional matter, is not involved. It was not involved in the conveyance to the firm. If the firm acquired title in any way; if, for instance, the homestead character did not exist at the date of this first sale, then it is quite clear that purchase-money figures quite prominently in the reconveyance. The notes, taken by the firm and secured to them, were purchase-money notes, and the court's conclusion seems unanswerable.

The firm's possession of the policy was rightful, by the terms of the agreement — they being appointed to receive the proceeds.[3]

[1] *Citing* Jordan v. Godman, 19 Tex. 273; Sears v. Sears, 45 Tex. 557; Reece v. Renfro, 68 Tex. 192; McElroy v. McGriffin, 68 Tex. 208; Irion v. Mills, 41 Tex. 310.

[2] Parks v. Hartford Ins. Co. 100 Mo. 373, *380*.

[3] Franklin v. Ins. Co., 43 Mo. 495.

§ 11. Improvements.

Most of the homestead statutes couple improvements with purchase-money, and except debts created thereby from the operation of exemption. Improvements, as the word is used in those laws, embrace the erection of dwelling-houses and appurtenant buildings, their betterment and repair, and whatever is made a fixture of the homestead.[1] It is quite common to include material furnished and labor done, in building or preserving home structures, in the general term, *improvements*. Shades of difference appear when comparing the statutes, but the general rule is that legally created claims for anything wrought or contributed to make the home or enhance its value shall be collectible from the owner, even to the execution of judgment against his homestead.

The rule is certainly just. There is no more reason for exempting a dwelling-house and its additions and auxiliary structures from such claims than there is for exempting the land on which they stand from the payment of its price. It would be unconscionable, in either case, to let the occupant have the property for nothing; to give him a homestead at the expense of the grantor and constructor.

The dwelling and appurtenances upon real estate at the time of its purchase, constituting a part of it, are not to be separately considered here under the caption of this section, since the unpaid price for the whole has been already treated as purchase-money. If the vendor of the buildings and the grantor of the land were different persons, the term *purchase-money* would be applicable to the price due to either.

Most of the states provide that the mechanic, laborer and material-furnisher shall have a lien upon the homestead for their contributions to it, or provide for their creation of a lien or privilege. Even clerical and domestic service, rendered on the homestead, is privileged in a few states; and, in several, it is so, with respect to personal property Liens upon crops of the homestead farm, for utensils, fertilizers, plantation supplies, money advanced to make the crop, and the like, created by contract authorized by statute, have been likened to that for purchase-money.[2]

[1] Greenwood v. Maddox, 27 Ark. 660.

[2] Tift v. Newsom, 44 Ga. 600.

Statutory requisites, for the creation of the mechanic's, laborer's or furnisher's lien, must be observed. As exceptions to exemption, they have been construed strictly; so that, while debts contracted for the erection of buildings and for labor done in the dwelling-house and in the field were held to be within the exceptions, a different view was taken of work done to improve the land and of money advanced for that purpose. The debts contracted for the labor and loan for that purpose were not privileged by the statute.[1]

Material and labor furnished for putting up the home buildings, in good faith, are not secured by a lien in equity where there is none by law.[2] And if a legal lien may be created by contract so as to bear upon the homestead, married beneficiaries of exemption must join in the creation.[3] So, where there is no lien against the homestead, by law, for supplies furnished, the debt created is merely personal of the obligor. Though the head of a family, for supplies furnished to it, has a judgment rendered against him, it is not a lien on the homestead.[4]

But it does not follow from the lack of lien, that the homestead would not be liable for such debts when prosecuted to judgment. Exemption does not cut off all ordinary debts but only those rendered non-collectible against it, by statute.

A promissory note, given for building material worked up in a homestead house, was prosecuted to judgment, with its consideration stated in the finding of the court. The homestead was liable under the judgment, in the absence of liable chattels.[5]

[1] Lewton v. Hower, 18 Fla. 872, 882.

[2] Chapin v. Runte, 75 Wis. 369; Spear v. Evans, 51 Wis. 42; Campbell v. Babcock, 27 Wis. 512; Smith v. Lackor, 23 Minn. 454; Coleman v. Ballandi, 22 Minn. 144; Cogel v. Mickow, 11 Minn. 478; Ellerman v. Wurz (Tex.), 14 S. W. 333.

[3] In Texas, to hold a homestead for material furnished with consent of the wife of the homestead holder, it must be shown that she consented before the purchase, according to the construction of article 16, section 50, of the constitution of that state, made in Lyon v. Ozee, 66 Tex. 95. *Compare* Taylor v. Huck, 65 Tex. 238. *See* Gaylord v. Loughbridge, 50 Tex. 573; Eckhardt v. Schlecht, 29 Tex. 130.

[4] Daniel v. Bush, 80 Ga. 218. *See* Willingham v. Maynard, 59 Ga. 330; Delavan v. Pratt, 19 Ia. 429.

[5] Tyler v. Johnson (Kan.), 28 P. 198. Green, C., after stating the facts: "It is claimed that the finding of the court that the indebtedness for which the note was given was for lumber and material furnished by Tyler and

The vendor of personal property contracted with the vendee that the ownership and possession of it should remain in him till payment. The vendee affixed it to his realty. The property consisted of a windmill and a wheel and chain. The contract was sued upon, and the defense was that the chattels had become fixtures of the homestead, and were exempt. They were regarded by the court as personal property, as between the plaintiff and defendant, by virtue of their contract, though they may have become part of the realty, as to others. The court say (in the syllabus prepared by one of them, the organ): "In the sale of personal property that is to be affixed to realty, the contracting parties at the time of the sale have the power, as between themselves at least, to fix the

used by Hamill in the erection of a dwelling-house, on the premises in question while he was still the owner, and the judgment entered upon such finding, constituted a lien upon the property of Hamill, whether a homestead or not: that for that particular debt there was no homestead exemption. This question involves the construction of section 9 of article 15 of the constitution. Section 9 provides for the exemption of one hundred and sixty acres of farming land, or one acre within the limits of an incorporated city, occupied as a residence by the family; '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.' The plain reading of this clause of the constitution is that there shall be no exemption for the purchase-price of land or for improvements erected thereon. The court in this case found that the debt for which judgment was given was for improvements. This finding was conclusive as the finding of the amount due. Reed v. Umbarger, 11 Kan. 207. This court has said, in a case where there was a judgment upon several promissory notes given for the purchase-price of land, that the judgment should be an ordinary personal judgment against the defendant for the amount of the note and costs, authorizing an ordinary execution to be issued against the property in general of the judgment debtor, subject to execution; and on such an execution, the officer, after exhausting the personal property of the judgment debtor subject to execution, might levy on such real estate (or on any other real estate of the judgment debtor subject to execution), whether the real estate first mentioned was occupied as a homestead or not. Greeno v. Barnard, 18 Kan. 578. In construing this same clause of the constitution with reference to obligations contracted for the purchase-price of the homestead it has been said: 'There is no homestead exemption law as against obligations contracted for the purchase-money. As to such obligations, the rule is just the same as if no exemption law had ever been adopted. And land held as a homestead is, with respect to such obligations, governed by just the same rules as if it were not a homestead.' Nichols v. Overacker, 16 Kan. 54." *Compare* Steenbergen v. Gowdy (Ky.), 19 S. W. 186.

status of such property and say whether, when affixed to the realty of the vendee, it shall remain personal property or become a part of the realty."[1] It seems certain enough that parties, by their conventions, cannot determine whether things shall be real or personal so as to conclude anybody but themselves and their privies.

The court concluded: "If said property did not constitute an improvement upon the realty, the homestead would be exempt from the payment of the debt contracted therefor, and the sale of the homestead to satisfy such debt should be enjoined."[2]

Where the mechanic's lien, not expressly mentioned among the exceptions to debts cut off by exemption, was claimed to be included under the provision excepting lawful mortgages, such a lien was found fatally defective for want of description of the property on which it was claimed to rest. There was a written list descriptive of the dwelling-house, the materials used, the style of architecture, the quality of the work and the compensation to be paid, signed by both the contesting parties; but, distinctly because the *locus* of the structure had not been set out by metes and bounds, nor by any way that would exclusively identify it, there was held to be no compliance with the law, and the claim against the homestead failed.[3]

The law may regulate the rank of liens; and it has been thought that the legislator may authorize the marshaling of the mechanic's, laborer's and material-man's liens above prior mortgages.[4] This may be right to a limited extent. The labor, skill or material put upon mortgaged property augments the security of the mortgage debt. But if the subsequent lien is so great as to cover the value of the mortgaged

[1] Marshall v. Bacheldor (Kan.), 28 P. 168, Strang, C., *citing* Fortman v. Geopper, 14 O. St. 558; 1 Benj. on Sales, § 425; Tied. Sales, §§ 83, 85.

[2] *Ib.; citing* Eaves v. Estes, 10 Kan. 314; Railroad Co. v. Morgan, 42 Kan. 23; Ford v. Cobb, 20 N. Y. 344; Holmes v. Tremper, 20 Johns. 29. In South Carolina, a homestead was held liable for the commissions of an agent for buying a water wheel to be attached to the homestead property as an improvement. All v. Goodson, 33 S. C. 229. *See* Phelps v. Shay (Neb.), 48 N. W. 896.

[3] Hammond v. Wells, 45 Mich. 11; Const. Mich., art. XVI, § 2.

[4] North Pres. Church v. Jevne, 32 Ill. 214; S. C., 83 Am. Dec. 261; Croskey v. Northwestern Co., 48 Ill. 481.

property (thus rendering the mortgage worthless if given a second place), the legislator cannot give it such lower rank without divesting the vested right of the mortgagee.

The recognition of the laborer's and mechanic's lien on the homestead, by constitutional or statutory provision, does not include the lien for material furnished. The maxim, *Expressio unius exclusio alterius*, is held applicable.[1]

If the statute does include the material-man's claim and renders it susceptible of becoming a lien, all requirements must be observed. Otherwise notes given for material furnished for the erection of improvements on the homestead cannot be enforced as a lien, and the property may be sold clear of incumbrance,[2] by the owner, or by him and his wife, if he has one, where the law requires the joinder of both in alienation.

Though requirements as to form and record of mechanic's and other liens must be observed by the lienholder, he is not responsible for the neglect of officers when he has complied with the law on his part.[3]

[1] Cumming v. Bloodworth, 87 N. C. 83, declaring the act of 1869–70 (Bat. Rev., ch. 65) to be in conflict with Const., art. 10, §§ 2, 4, which gives to every resident of the state who owns and occupies land, a homestead not exceeding $1.000 in value, exempt from debt except for taxes, purchase-money, and liens of laborers and mechanics.

[2] Dean v. McAdams, 22 Kas. 544. See Murray v. Rapley, 30 Ark. 568.

[3] In Minnesota, the mechanic's claim is no lien on the homestead till a statement of it has been duly filed. Meyer v. Berlandi, 39 Minn. 438; Rugg v. Hoover, 28 Minn. 404. If filed against more land than is subject to it, the lien is not vitiated. Smith v. Headley, 33 Minn. 384; North Star Works v. Strong, 33 Minn. 1. See Tuttle v. Howe, 14 Minn. 145. Nor is its legality affected by the failure of the officer to record it. *Ib.;* Gorham v. Summers, 25 Minn. 81. The record must show on its face that the claimant is entitled to the lien. Clark v. Schatz, 24 Minn. 300; Kellar v. Houlihan, 32 Minn. 486. In Kentucky the mechanic's lien on the homestead, for repairs or additional improvements of the dwelling, must be written and recorded, and signed by the wife as well as himself if the householder is married. Otherwise for constructing the homestead building originally. Roberts v. Riggs, 84 Ky. 251. If the owner is a married woman, the mechanic, to make his lien hold good, must aver that the improvements were for the benefit and comfort of herself and family, and were necessary. *Ib.;* Pell v. Cole, 2 Met. (Ky.) 252; Harris v. Dale, 5 Bush, 61; Gatewood v. Bryan, 7 Bush, 509; Gen. Ky. Stat., ch. 52, art. 2, § 2. In Texas a mechanic's lien must be recorded within six months. Without record, it is nugatory. Cameron v. Marshall, 65 Tex. 7; Tex. Rev. Stat. 3165, 3174.

Where claim for labor done on the homestead for its improvement is excepted from exemption, is a lawyer's services in defending the homestead to be classed with such labor?[1] It is reasoned, in the affirmative, that if the lawyer could not hold the homestead liable, he would not give his services, and that his professional aid is "in the nature of labor done and purchase-money thereon."[2] It might be as plausibly argued that a doctor would not attend the family of a householder unless he could hold the homestead responsible for his bill, and therefore he is to be considered as a laborer on the premises, entitled to recover from them.[3]

A widow who had a life estate of homestead married a second husband, who erected improvements. At her death he was allowed compensation for them.[4] But a purchaser at sheriff's sale, when ejected from their homestead by the widow and minor children of the late owner, was denied compensation for the improvements he had made.[5]

As against a judgment for improvements put upon land by one to whom they equitably belong, one claiming homestead in the improved property cannot have it; it is not free from the lien of the judgment.[6] But it has been held that the burden of proof is upon the purchaser of a homestead, sold under a mechanic lien, to show that he is within the law after the householding debtor has set up his exemption. He may show

Homesteads in California were liable on judgments for debts secured by mechanics', laborers' or vendors' liens upon the premises, prior to March 9, 1887. Walsh v. McMenomy, 74 Cal. 356. *See* Richards v. Shear, 70 Cal. 187. In California, by the act of 1887, homesteads are liable on mechanics' liens for work and material in building and repairing them. The lien is good, though filed after the declaration of homestead, if the material was furnished before. Lumber Co. v. Gottschalk, 81 Cal. 641. So, in Kentucky, a homestead is not exempt from payment for improvements made before it was set apart as a homestead. Fish v. Hunt, 81 Ky. 584. Nor in the other states, where the lien had attached before dedication. Pope v. Graham, 44 Tex. 198; Potshuisky v. Krempkan, 26 Tex. 309; Tuttle v. Howe, 14 Minn. 145.

[1] Yes, according to Strohecker v. Irvine, 76 Ga. 639. *Compare* Collier v. Simpson, 74 Ga. 697, and Ross v. Worsham, 65 Ga. 624.

[2] *Ib.*

[3] Medical bills are privileged by the Georgia Code against homesteads.

[4] Bond v. Hill, 37 Tex. 626.

[5] Andrews v. Melton, 51 Ala. 400.

[6] Barker v. Owen, 93 N. C. 198; Wharton v. Moore, 84 N. C. 479; Justice v. Baxter, 93 N. C. 405. *See* Saunders v. Wilson, 19 Tex. 194, and M'Coy v. Grandy, 3 Ohio St. 463; Moseley v. Bevins (Ky.), 15 S. W. 527, *overruling* Griffin v. Proctor, 14 Bush, 571.

by the record or by recital in the judgment that the lien had been duly filed, but the recital of such fact in the writ has been held insufficient.[1]

[1] McMillan v. Parker (N. C.), 13 S. E. 764. Avery, J.: "The record of a judgment, execution, levy, and sale of a tract of land as the property of a defendant in an action for possession, the sheriff's deed to the plaintiff, or to one with whom the plaintiff connects himself, by mesne conveyances, together with evidence or admission of the identity of the land conveyed by the sheriff with that declared for in the complaint, and of the actual possession of some portion of said land by the defendant when the action was brought, will, nothing more appearing, constitute a *prima facie* proof of title in the plaintiff. Mobley v. Griffin, 104 N. C. 112; 10 S. E. Rep. 142. But where it is admitted, as in this case, that the sale under the execution was made to satisfy a debt contracted since the homestead provision of the constitution became operative, and without assigning a homestead to the defendant in execution, when he did not hold one under a previous allotment, the burden of proof is shifted, and the *onus* is on the plaintiff to show the liability of the land to be sold to satisfy the debt. Mobley v. Griffin, *supra;* Long v. Walker, 105 N. C. 90; 10 S. E. Rep. 858; McCracken v. Adler, 98 N. C. 400; 4 S. E. Rep. 138. The plaintiffs in this case have taken up this burden, and attempted to bring themselves within the exception (contained in article 10, section 4, of the constitution, and provided for in chapter 41 of the Code), by showing that the sale was made to satisfy a subsisting mechanic's lien upon the land. They offered the record of the action before the justice of the peace, from which it appeared that the plaintiffs complained for 'an account for labor done in November, December and January in the years 1887 and 1888 to the amount of $128.88.' The judgment was entered on the judgment docket in the following form, after entitling the case: 'Judgment by confession in J. P. court of Harnett county on the 13th of July, 1888, in favor of plaintiff and against defendant for $128.82, and the further sum of costs in this action. Docketed Aug. 23, 1868, 10 A. M. J. P. costs, 80 cents; C. S. C. costs, $1.05.' On the 6th of June, 1888, the plaintiffs had filed a lien, the form of which we need not discuss, with an account for furnishing and putting tin on a roof, amounting to the sum of $137.82. In Boyle v. Robbins, 71 N. C. 133, the act of 1868–69, ch. 117, § 9 (which has been brought forward and re-enacted in the Code, section 1791), was construed to require, at least by implication, that the justice of the peace should set forth in the judgment the date of the lien, and that it should also embody a general description of the property which the plaintiff seeks to subject to primary liability under it. If only personal property be bound by the lien, the justice must insert in his execution a requirement that the specific property subject to the lien shall be first sold before seizing other goods or chattels, while, if the property described in the notice be land, the justice's judgment must be docketed in the superior court, and the clerk must incorporate in the execution a similar direction as to the order of selling. So that the judgment cannot be enforced in strict compliance with

Where there is liability for improvements, a judgment on an obligation for them is a lien which will attach to the homestead after its sale; and it is even maintained that the purchaser is presumed to know that a general judgment lien is upon a debt for improving the homestead, though the judgment does not disclose the fact.[1]

Because a mechanic or material-man has no lien on the homestead when he has neglected to record his claim, or has neglected to observe some other statutory requisite, he does not lose his debt, necessarily. He still has his claim against the householder, and may prosecute it to judgment, and thus create a lien upon all the defendant's realty, except the homestead.[2] The vendor may lose his lien or fail to create one, yet

the law unless the officer whose duty it is to issue execution has gotten such information from the record in his court as will satisfy him that some property, described with reasonable certainty, is subject to the lien, and consequently to a prior liability for the debt. The most convenient method of recording the date of the lien and the description of the property bound by it is to embody it in the judgment, which will constitute a part of the record in either court, no matter which officer may find it necessary to insert the date and description in the execution. The case at bar illustrates the importance of adhering to this rule for another reason. It is essential that the judgment should be identified as that brought within the period prescribed in the statute (Code, § 1790) to enforce the lien. The defendants in the answers deny that this judgment was rendered upon the account, filed as a lien, and, while some circumstances tend to show that the same claim was or may have been the subject both of the lien and the action, we have no evidence sufficient to establish absolutely the identity of the two accounts. The burden being on the plaintiffs to bring the judgment within the exception, under section 4, article 10, of the constitution, before he can establish the validity of the sale of the defendant's homestead, we think that in failing to connect the judgment and execution with the lien filed they have failed to adduce testimony that is essential to show their title. The words inserted in the execution after the words, 'You are commanded to satisfy said judgment,' and before the words, 'Out of the personal property of the defendant within your county, to wit, by first selling the right, title and interest which the said owners had in the property at the time of filing their lien, and next" — do not answer the purpose of connecting the lien with the judgment. If it were true that the plaintiffs recovered two judgments against the defendants for sums nearly the same as that claimed in the lien, neither being for an identical amount, he might issue on either, selecting the one not secured by some other means than the lien."

[1] Hurd v. Hixon, 27 Kas. 722; Greeno v. Barnard, 18 Kas. 518.

[2] Miller v. Brown, 11 Lea, 155.

have his rightful claim against the homestead-holder.[1] There is nothing peculiar in the law stated, as any lien-bearing debt may survive the loss of the lien-right, with regard to any other property as well as homestead.

The essentials for the creation of a lien, for improvements put upon the homestead at the instigation of the owner, do not apply when the improvements are involuntary; as when they are made by a city. The assessment creates the lien;[2] and the governing principle is different.[3]

[1] Bentley v. Jordan, 3 Lea, 353.

[2] Bordages v. Higgins (Tex.), 19 S. W. 446.

[3] *Ante*, p. 18.

CHAPTER XII.

RESTRAINT OF ALIENATION.

§ 1. Restraint and Exemption Relative.
2. Sale by Husband and Wife.
3. Trust Deed by Husband and Wife.
4. Mortgage by Husband and Wife.
5. No Alienation by Husband Alone.
6. Sales Subsequently Validated.
§ 7. Wife's Right Relative to Sales.
8. Estoppel by Sole Deed.
9. Conveyance by Husband to Wife.
10. Incumbrance Inhibited.
11. Interests of Non-owning Beneficiaries.
12. Conveyance to Pay Privileged Debts.

§ 1. Restraint and Exemption Relative.

In several states the dedication of a homestead is a voluntary act on the part of the householder by which he consents to accept certain disabilities. He obtains the benefit of exemption by the acceptance of the conditions upon which it is offered. He agrees that he shall no longer have sole control of his own dedicated property, so far as selling or incumbering it is concerned, as long as he enjoys the protection from forced sale, which he has in return for yielding his own right to sell or mortgage it. He can regain his individual right to alienate only by abandoning his privileges.

Though not a contract, the mutual arrangement between himself and the state, with the proffer of the law on one side and his acceptance by dedication on the other, is somewhat in the nature of corresponding obligations.

The state does not arbitrarily forbid his selling his own at will, or his using it to promote his credit, by pledging or mortgaging it for the purpose of raising money, whenever he conceives it to his interest so to do. It does not inhibit the selling of his home or subjecting it to a lien by any positive enactment to that effect. It merely provides that he shall have exemption from forced sale, with certain exceptions, if he will consent to accept that benefit on the terms offered.

The state does not make any invidious distinction between him and others when it thus makes the restraint upon the

alienation of his dedicated homestead depend upon his voluntary acceptance of the terms. The law is general, being applicable to all real-estate owners having families living with them in the dedicated homes. Were it to make the arbitrary distinction between property holders that one should not have the power to sell his own, while another should have it, with nothing conditional in either case, it would be an unconstitutional discrimination.

In states where no declaration or any form of dedication is required, the acceptance of the state's terms is not so apparent; but even in these, restraint of alienation, being confined to homesteads, may be considered as accepted by the owner when he becomes a householder and holds his home as exempt under the statute.

There are yet other states which give exemption protection yet impose no restraint upon the owner. In such, if mutuality of obligation between them and him is wanting, there is nothing of which the owner or debtor can complain. In no case is the state under any obligation which prevents it from repealing the exemption law at will.

There is no contract between the state and the homestead holder: the mutuality above mentioned is rather incidental than contractual.

It would seem that no one should be prevented from paying his debts by the sale or incumbrance of any property he has; that the debtor and his wife together ought not to be hindered in joining together to relieve themselves of the obligation to pay, though their home be lost to them in consequence. And it has been held that a statute forbidding this is unconstitutional.[1]

The legislator, having left liens upon the homestead, created prior to its dedication, unaffected; and having granted no exemption against antecedent debts, justifies the inviolability of the homestead from attacks to make it pay later debts by the consideration that the creditors had notice that the property was not liable. Under this view, the appropriation of it by the owner to pay such debts by sale and the surrender of the proceeds for the purpose, or by subjecting it to a lien to secure

[1] Dunker v. Chedic, 4 Nev. 823; Const. Nev., art. 4, § 30.

the debt, may be constitutionally forbidden, so long as the property remains unabandoned as a homestead. The right of the beneficiaries to abandon the dedicated homestead and give up their privileges remains intact; so they may resume the right and power of alienation at will. The husband cannot resume this right and power, however, by disclaimer of the exemption right.[1]

One who has not complied with the terms of the homestead law requiring selection and dedication holds his home as he does his other property, and is not restrained in the alienation of it.[2]

The following extract from a decision will further present the doctrine of free disposal in the absence of dedication:

"It is argued by counsel for plaintiffs that the declaration is required only to protect the land claimed as a homestead from *forced sale.* The act cannot be so construed; nor has it ever been so construed. It is manifest from the perusal of the act that it was to disable either spouse from making a voluntary alienation of the land, but only when a sufficient declaration was made. If there was no sufficient declaration, the power of the husband to alienate the land of his own will remained unimpaired."[3]

When no declaration is required, disability to sell has been imposed with the grant of exemption.[4]

Where exemption and restraint of voluntary alienation are not correlative, the statutes creating the former are not construed to imply the latter. In some of the states, the *jus disponendi* is not affected by homestead laws, at the present time; in others, it was formerly left unrestrained, though now restricted to the joint action of husband and wife when the owner is married. The principle, however, is established, that statutory exemption of property from forced sale does not necessarily imply that voluntary alienation by the owner is inhibited.[5]

[1] Robinson v. Davenport, 40 Tex. 334; Williams v. Swetland, 10 Ia. 56; Lambert v. Kinnery, 74 N. C. 348.

[2] Derr v. Wilson, 84 Ky. 14; Boreham v. Byrne, 83 Cal. 23, *28;* People v. Plumsted, 2 Mich. 465 (under statute now superseded); Simmons v. Anderson, 56 Ga. 53; Homestead Ass'n v. Enslow, 7 S. C. 19.

[3] Boreham v. Byrne, 83 Cal. 23, *28.*

[4] Kennedy v. Stacey, 1 Bax. 220. Act of May 5, 1870.

[5] Brame v. Craig, 12 Bush, 404; Kennedy v. Stacey, 57 Tenn. 223;

Under general statutory terms of exemption from seizure and sale, without any express restraint upon voluntary alienation, a mortgage given by the owner upon his exempt home was treated as nugatory, though he was free to sell the property — free to do so after having given the mortgage, and competent to grant an unincumbered title. The reason given was that the exemption right is not susceptible of being waived by a contract of mortgage.[1] The restraint upon alienating, which is a usual feature of homestead laws, is not found in all;[2] and it is true generally that where there is no restraint put upon alienation, the owner may mortgage, sell or donate his homestead property without doing anything to the prejudice of his creditors, for they are said to have no concern with it.[3]

§ 2. Sale by Husband and Wife.

Where "a conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument,"[4] the homestead right can be directly conveyed only by their joint action in a deed, or by abandonment;[5] but if the owner alone convey the property, and a subsequent purchaser buy it of the first vendee, he is said to be not affected with notice of the invalidity of the first conveyance, and to acquire a good title.[6]

Homestead Ass'n v. Enslow, 7 S. C. 19; Re Cross, 2 Dill. 320; Dawson v. Hayden, 67 Ill. 52; Smith v. Marc, 26 Ill. 150; Ely v. Eastwood, 26 Ill. 108; Rector v. Rotton, 3 Neb. 171; Edmondson v. Blessing, 42 Tex. 506; Jordon v. Peck, 38 Tex. 429; Hartman v. Thomas, 37 Tex. 90; Morrill v. Hopkins, 36 Tex. 687; Stewart v. Mackey, 16 Tex. 57; Lee v. Kingsbury, 13 Tex. 71.

[1] Van Wickle v. Landry, 29 La. An. 330; Hardin v. Wolf, 29 La. An. 333; Le Blanc v. St. Germain, 25 La. An. 289.

[2] In Kentucky the husband's power of alienation is not affected, the statute merely exempting from coercive process. Prebble v. Hall, 13 Bush, 61; Brame v. Craig, 12 Bush, 404. The owner may dispose of his $1,000 homestead at will. His title is not a mere life estate with the fee exposed to creditors. Derr v. Wilson, 84 Ky. 14. But his creditors may sell it after his death, subject to occupancy by his widow and children, if he has died without making any disposition of it. *Ib.*

[3] Grimes v. Portman, 99 Mo. 229; State v. Mason, 88 Mo. 228; Holland v. Kreider, 86 Mo. 59; Beckmann v. Meyer, 75 Mo. 333.

[4] McC. Ia. Code, § 3165 (1990).

[5] Lunt v. Neeley, 67 Ia. 97. *Compare* Price v. Osborne, 34 Wis. 34.

[6] *Ib.*

The husband alone cannot sell a tract of land, within the homestead acreage, which he owns and occupies with his family; for the exemption right attaches to all of it, when it is not platted and does not exceed the prescribed number of acres.[1]

Both husband and wife joining in a sale with conveyance and acknowledgment on her part, it is not generally necessary that the renunciation of the homestead right should be expressed in the deed. It has been decided that in a deed conveying the homestead, made by husband and wife jointly, there need be no express renunciation of their homestead right, nor any reference to it.[2] If the property is free from liability when sold, it will go so into the hands of the purchaser.[3] But it will become liable to the purchaser's debts, like any other property of his, under general judgment against him.

The purchaser of a homestead steps into the shoes of the grantor, so far as concerns its liability at the time. It cannot be attacked in his hands for debts of the grantor which could not have been enforced against it before the sale. It has ceased to be a homestead by the transfer, if the grantee has not made it his own exempt home; but it has not been rendered defenseless against the obligations of the grantor, unless for taxes, purchase-money, improvements, or whatever else the governing statute may have excepted from the general exemption. And the purchaser may plead and prove the grantor's exemption right.[4]

If any reservation is meant, it should be expressed.[5]

When a statute or a constitution requires the joint consent of husband and wife to the alienation of the homestead, the consent need not be written unless that method is prescribed.[6] The wife's assent to the grant of an easement, on the homestead, to a railroad company, conferring right of way, may be

[1] Woolcut v. Lerdell, 78 Ia. 668, *citing* Goodrich v. Brown, 63 Ia. 247, and Barnett v. Mendenhall, 42 Ia. 296.

[2] Weigeman v. Marsot, 13 Mo. Ap. 576.

[3] Holland v. Kreider, 86 Mo. 59; Kendall v. Powers, 96 Mo. 142.

[4] Elwell v. Hitchcock, 41 Kas. 130; German Ins. Co. v. Nichols, 41 Kas. 133; Hixon v. George, 18 Kas. 253.

[5] Martin v. Martin, 30 Kas. 708.

[6] Dudley v. Shaw (Kas.), 24 Pac. 1114.

proved by parol testimony or any kind of evidence that would be admissible to support any other material fact. It need not be in writing, — much less need it be by signature to a deed.[1]

The wife does not become surety for her husband when both sign a conveyance of their homestead of which he is the owner. She does not jeopardize her separate property by thus signing the deed of such homestead.[2]

Where dedication is effected by a court proceeding — not by a recorded declaration or by occupancy merely — the homestead cannot be alienated by both husband and wife unless the deed be approved by the court.[3]

§ 3. Trust-deed by Husband and Wife.

The inability of the husband to alienate his homestead without his wife's consent and her participation in the act of conveyance extends to conditional sales, such as those by mortgage or deed of trust. Otherwise he might easily deprive her of home protection by hypothecating his property, allowing it to be sold and failing to redeem it.

The inhibition, operating as a restraint (since thus one beneficiary cannot deprive the other of the exemption right, when they are man and wife), extends also to the alienation of equitable interests. The husband's conveyance of an equitable interest in a homestead to secure the payment of a pre-existing debt creates no lien when the wife does not sign.[4] If the creditor has no conventional lien, and if no lien is created by law in favor of pre-existing debts against a homestead, the husband alone cannot give him one. That is all the cited cases import. The wife cannot defeat or even impede a lien-creditor; she can defeat her husband's purpose to convey an equitable interest as security for an existing obligation. Ordinary pre-existing debts must be reduced to judgment before

[1] *Id.;* Pilcher v. Railroad Co., 38 Kas. 516.

[2] Witherington v. Mason, 86 Ala. 345.

[3] Linch v. McIntyre, 78 Ga. 209. Formerly alienation was inhibited in Georgia. Now it requires the sanction of the Superior Court. *See* Roberts v. Trammell, 55 Ga. 383; Shaffer v. Huff, 49 Ga. 589; Burnside v. Terry, 45 Ga. 630; Simpson v. Robert, 35 Ga. 180.

[4] Moore v. Reaves, 15 Kas. 150; McKee v. Wilcox, 11 Mich. 358; McCabe v. Mazzuchelli, 13 Wis. 478. Joint deed: Ott v. Sprague, 27 Kas. 620. *Compare* Reihl v. Bingenheimer, 28 Wis. 84.

they can bear a lien on the homestead. Then the lien is general, as though there were no homestead.

If both husband and wife have joined in giving a deed of trust, and it be foreclosed after his death, she may be denied homestead claim to the remaining proceeds after the satisfaction of the debt.[1] And it follows that the purchaser at the foreclosure of a deed of trust takes the land free from any claim of homestead made by the wife of the grantor after the sale.[2] The deed of trust, covering more realty than the homestead but including it, being regularly given by the wife as well as the husband, becomes a complete alienation of the whole upon foreclosure.

A wife, who had life-estate in property which included hers and her husband's homestead, joined him in conveying the property by deed of trust, under which the whole was sold. It was not necessary that she should acknowledge the deed so as to make the non-exempt portion of the property pass by the act, since the governing statute put her in the position of a *feme sole* with respect to such acknowledgment; but as there could be no release or waiver of her homestead right without her acknowledgment, the purchaser was required to pay her one thousand dollars — the maximum of the exemption — upon the property being found indivisible so that her homestead could not be set apart in kind.[3]

The law favors the payment of debts; and a deed of trust for the purpose, given by both husband and wife, ought to be everywhere enforceable.[4]

A deed of trust on the homestead, duly executed by husband and wife, may be renewed by the husband alone so as to prevent prescription.[5] In renewing the note about to become outlawed, he creates no new obligation; he binds his wife to nothing to which she was not bound before; he burdens the

[1] Woerther v. Miller, 13 Mo. App. 567.

[2] Weigman v. Marsot, 13 Mo. App. 576.

[3] Knight v. Paxton, 124 U. S. 552; 1 Starr & Curtis' Annot. Stat. Ill., ch. 52; Bradshaw v. Atkins, 110 Ill. 323, 329; Edwards v. Shoeneman, 104 Ill. 278; Hogan v. Hogan, 89 Ill. 427.

[4] The husband and wife may execute a deed of trust to secure a debt, in Virginia, which will hold good against the homestead. And it is queried whether he alone may not do so. White v. Owen, 30 Gratt. 43.

[5] Smith v. Scherck, 60 Miss. 491; Jenness v. Cutler, 12 Kas. 500.

homestead with no weight that was not previously incumbent upon it. This reasoning is not entirely satisfactory; the wife's joining in the renewal of the note would seem more regular. As a party, she ought to be left to her own action. So it has been held that, under statutes forbidding a husband to mortgage the homestead without the consent of his wife, he cannot enlarge the terms of a mortgage previously given, nor renew it, nor extend the statute of limitations respecting it.[1]

§ 4. Mortgage by Husband and Wife.

As mortgage is a species of alienation, or the creation of a lien where not a kind of alienation, the general rule is that both husband and wife must join in creating it upon the homestead, whether the title be in the one or the other, or in both.[2]

Is the joinder of both necessary to the giving of a mortgage to secure a debt antecedent to the homestead?

As to antecedent debts, there is no homestead. They may be prosecuted to judgment creating a general lien, as though there were no homestead law; and the lien will bear upon the homestead just as upon any other realty of the judgment debtor. And this has led to the conclusion of some courts that there need be no joinder by the wife, when the husband mortgages his homestead to secure such a debt.[3]

The received doctrine, however, is that her joinder is necessary. And it is supported by both reason and authority. There is a difference between the general liability of the homestead for such debts, and the particular liability which is created by mortgage; between an ordinary debt which may be collected of the homestead after judgment, and a property

[1] Dunn v. Buckley, 56 Wis. 190, 192; Campbell v. Babcock, 27 Wis. 512; Spencer v. Fredendall, 15 Wis. 666; Barber v. Babel, 36 Cal. 21; Thompson v. Pickel, 20 Ia. 490.

[2] Jelinek v. Stepan, 41 Minn. 412; Furguson v. Kumber, 25 Minn. 183; Smith v. Lackor, 23 Minn. 454; Barton v. Drake, 21 Minn. 239; Kaes v. Gross, 92 Mo. 648; Riecke v. Westenhoff, 85 Mo. 642. *See* Lewis v. Curry, 74 Mo. 49, rendered under Wagner's Stat., p. 697; and *see* Schneider v. Hoffman, 9 Mo. App. 280; Black v. Epperson, 40 Tex. 187; Tong v. Eifort, 80 Ky. 152; Duncan v. Moore, 67 Miss. 136; Ontario Bank v. Gerry (Cal.), 27 P. 531; Fleming v. Graham (N. C.), 14 S. E. 920.

[3] Kennedy v. Stacey, 57 Tenn. 220; Dunker v. Chedic, 4 Nev. 823; Higley v. Millard, 45 Ia. 586.

debt which may be proceeded upon *in rem*. The husband alone cannot convert the less liability to the greater; the ordinary personal obligation to property indebtedness with respect to the homestead, without making the wife's home less certain of continuance than it was before.

As he alone cannot sell the homestead outright to an antecedent creditor in consideration of the cancellation of the debt (which, by the civil law, would be *dation en paiement*), without his wife's consent, it would seem, by parity of reason, that he alone cannot put a lien upon it under which it may be sold.

Though there is no homestead as to antecedent creditors, there is a requirement in several states that the homestead shall be the last property exhausted under a general judgment bearing upon it with other realty; and also under a mortgage covering that and other property.[1] Thus, a distinction is made between that and other property when all is liable. Wherever this distinction exists, there is an additional reason why the wife should have her chance of home continuance saved to her from any ill-advised conversion of the ordinary antecedent debt to that of one secured by a specific lien upon the homestead.

The authorities preponderate in favor of these reasons, though not all based upon them. Good reasons, whether those above assigned or others founded upon statutes and the policy of the state, will be seen in the opinions. It may be concluded that the question above put should be answered in the affirmative.[2] In a state which has since extended its exceptions to exemption, it was held that a mortgage made alone by a husband or wife is void,[3] except for purchase-money.[4] After a joint sale by both, with abandonment, the foreclosure of a mortgage given by the husband alone would not affect the wife.[5]

After a husband and wife had mutually conveyed a part of their homestead property, the purchaser found that it had

[1] Jackson v. Shelton, 89 Tenn. 82.

[2] Moore v. Reaves, 15 Kas. 150; Ott v. Sprague, 27 Kas. 620; McCabe v. Mazzuchelli, 13 Wis. 478; McKee v. Wilcox, 11 Mich. 358.

[3] Morris v. Ward, 5 Kas. 239; Dollman v. Harris, 5 Kas. 597; Ayers v. Probasco, 14 Kas. 175. *See* Jenness v. Cutler, 12 Kas. 500.

[4] Pratt v. Topeka Bank, 12 Kas. 570; Andrews v. Alcorn, 13 Kas. 351; Nichols v. Overacker, 16 Kas. 54.

[5] Morris v. Ward, 5 Kas. 239.

been validly incumbered, returned the deed, leased the property for six years, and received from the grantors a promise of an unincumbered title to be given at the end of that time. The agreement was binding on the husband and wife, who were legally obligated to convey the part of their homestead described in the deed at the stipulated time. The return of the instrument, meanwhile, did not impair the sale. The purchaser's rights under the contract dated from the delivery of the deed to him.[1]

Restraint upon alienation by which the husband cannot mortgage his own land occupied by his family as a homestead without his wife's consent and signature is not for the benefit of creditors. Husband and wife together may convey their homestead, within the monetary limit, without receiving any consideration whatever, and yet the creditors are not injured, since they could not have any claim against that species of property, according to the statutes and judicial expositions.[2] The moral fraud of such a transaction is relegated to the court of conscience.

A husband and wife joined in mortgaging two tracts of land. Subsequently the husband sold one of them with full warranty, and upon that the mortgage was afterwards foreclosed. The purchaser from the husband could make the other tract bear its portion of the mortgage burden, notwithstanding the assertion of homestead right in it on the part of the widow and minor heirs of the husband now deceased, to whom it had been set apart.[3]

No lien attaches to real estate by virtue of a judgment against its owner, when such property is not subject to levy and sale in satisfaction of the decree.[4] Ordinarily, the foreclosure of a valid homestead mortgage is like any other.[5]

[1] Bunz v. Cornelius, 19 Neb. 107. (Souverbye v. Arden, 1 Johns. Ch. 255; Connelly v. Doe, 8 Blackf. 320; 3 Wash. Real Prop. 285; Tiedeman on Real Prop., § 812, on the effect of returning the deed.)

[2] Tong v. Eifort, 80 Ky. 152; Dowd v. Hurley, 78 Ky. 260.

[3] Calhoun v. Snyder, 6 Binney, 135; Hall v. Morgan, 79 Mo. 47. It was made necessary to the valid mortgage of a homestead owned by a married person that both spouses join in the act, by Mo. Rev. Stat. (1879), § 2689. Riecke v. Westenhoff, 85 Mo. 642.

[4] Grimes v. Portman, 99 Mo. 229; Freeman on Judgments, §§ 339, 340, 355; Freeman on Executions, § 249; Holland v. Kreider, 86 Mo. 59.

[5] In California, a claim secured by mortgage must be presented for al-

The assent of husband and wife occupying their homestead, to its incumbrance, must be contemporaneous. Both must sign the instrument. A deed of trust given by the husband alone, though he is the owner of the property, cannot be rendered valid by a later conveyance from the wife to the creditor.[1]

To secure a joint and several promissory note of a husband and wife, they mortgaged their homestead. Upon his death, the homestead was set apart to her out of his estate. Unless the mortgagee's claim was presented for allowance against the estate, the mortgage could not be foreclosed.[2] A complaint against the wife alone, on foreclosure, praying for a personal judgment against her but not averring the presentation of the claim, is insufficient to constitute a cause of action.[3]

In every foreclosure of a mortgage of the homestead, husband and wife being interested, both must be made parties defendant.[4] Even though the wife be disinterested directly, as when the mortgage was given by the husband before marriage and thus has priority to any right of hers, she should be made

lowance to the administrator of the deceased mortgagor's estate, before it can be foreclosed on the homestead. Even if foreclosure has been commenced during the mortgagor's life, and the plaintiff has waived recourse against any other property, and the plea of *lis pendens* has been filed, the plaintiff cannot proceed further in his action without presenting his claim to the representative of the decedent mortgagor. Bollinger v. Manning, 79 Cal. 7; Cal. Civ. Code of Proc., §§ 1475, 1502; Camp v. Grider, 62 Cal. 20; Wise v. Williams, 72 Cal. 547. Where the mortgaged homestead is the whole estate (there being no other assets) the rule is the same. Bollinger v. Manning, *supra*. But if the mortgage is on a homestead which is the separate property of the wife, and the mortgagee waives all claims against the husband's estate, he need not present his claim to the administrator. Bull v. Coe, 77 Cal. 54; Shadt v. Heppe, 45 Cal. 437. Nor need he present his claim when the mortgage was given by both husband and wife, if the husband has been adjudged insolvent. Montgomery v. Robinson, 76 Cal. 229. For the rule in Illinois, when mortgagees waive homestead right, and the mortgage covers other lands than the homestead, see First N. Bank v. Briggs, 22 Ill. App. 228, *citing* Rogers v. Meyers, 68 Ill. 92; Brown v. Cozard, 92 Ill. 178; Plain v. Roth, 107 Ill. 588.

[1] Miss. Code, 1880, § 1258; Duncan v. Moore, 67 Miss. 136; Cummings v. Busby, 62 Miss. 195; Bank of La. v. Lyon, 52 Miss. 181; Johnson v. Brook, 31 Miss. 1. *Compare* Smith v. Scherck, 60 Miss. 491.

[2] Mechanics' Ass'n v. King, 83 Cal. 440; Camp v. Grider, 62 Cal. 20.

[3] Hearn v. Kennedy, 85 Cal. 55. Dissent by Beatty, C. J.

[4] Burnap v. Cook, 16 Ia. 149; Goodrich v. Brown, 63 Ia. 247.

a party to the foreclosure if the sale is meant to bind her thereafter relative to right of dower.[1] Though she be dead, and succeeded by a second wife; and though she had not signed a mortgage which was therefore invalid, it is held that the second wife must be made a party to the foreclosure.[2] But a mortgage put upon premises by the husband, before the homestead had become such by actual occupancy, may be foreclosed without making her a party.[3]

A husband cannot mortgage his homestead to his wife, if the law prohibits all mortgages of homesteads. Both he and she cannot together incumber such property with a mortgage, when *all* mortgages are forbidden. A constitutional inhibition is paraphrased as follows: "No mortgage, trust-deed, or other lien created by the husband, whether alone or together with his wife, shall ever be valid." This is the lan guage of the original, with the addition of the phrase beginning with the word "whether."[4]

The court argued that the policy of the provision favors the construction given, since the wife, indisposed to sell, might be induced to incumber the homestead by plausible assurances, on the part of the husband, of his ability to relieve it; and then her home might ultimately be lost to her. But it is said that the inhibition does not apply to unmarried beneficiaries — on the authority of the cases last cited.

If the protection of the wife is the only purpose of the legislator, it might be inferred that the mortgage of a homestead to her by her husband was not meant to be forbidden. The court thought this point new in the state, but could not believe that any substantial distinction was made in the constitution between the limitation of the husband's power and that of the husband and wife, since the effect upon the wife's rights might be as great by the exercise of the joint power as by that of the husband's single power. The letter and spirit of the constitution would be violated in either case.[5]

[1] Chase v. Abbott, 20 Ia. 154.

[2] Larson v. Reynolds, 13 Ia. 579.

[3] Kemerer v. Bournes, 53 Ia. 172.

[4] Const. Texas, art. 16, § 50; Madden v. Madden (Tex.), 15 S. W. 480; Lacey v. Rollins, 74 Tex. 566; Smith v. Van Hutton, 75 Tex. 626; Watts v. Miller, 76 Tex. 14; Inge v. Cain, 65 Tex. 79.

[5] Madden v. Madden, *supra;* Groesbeck v. Groesbeck, 78 Tex. 664; 14 S. W. 792; Campbell v. Elliott, 52 Tex. 159.

The question would not be affected by the fact of the homestead being carved out of the husband's separate property.[1]

A mortgage was given by a husband and wife on their homestead, and on other real estate, both belonging to her. A second mortgage was given by her to another person, on the same real estate, less the homestead. The second mortgagee asked that the first be required to exhaust the homestead before resorting to the other realty, so that he, the second mortgagee, who could not look to the homestead, might have something upon which to satisfy his mortgage. The court said that if neither of the two pieces of property covered by the first mortgage was a homestead, the prayer for such relief would be granted, "as the first mortgagee has two funds for the satisfaction of *his* mortgage," while the second mortgagee has but one. But the relief was denied, owing to the homestead character of one of the properties subject to the first mortgage lien.[2]

Suit was brought on a promissory note to obtain judgment with recognition of lien upon the homestead of the defendants, who were husband and wife. He had given his note to a bank for borrowed money, and had pledged a contract to purchase real estate, as security. Subsequently he had paid for the land, and caused it to be deeded to his wife, who made declaration of homestead upon it. The bank failed to record the contract, but sued upon the note. The court said that if the contract were a mortgage it would not be enforceable against the homestead which had been declared by the wife.[3]

If a husband and wife join in executing a mortgage on their homestead to secure his debt, and there are no witnesses, as required by statute, to the signature of the wife who signed after the mortgage had been recorded, she will not lose her life estate in the homestead.[4]

[1] Madden v. Madden, *supra*.

[2] Mitchelson v. Smith, 28 Neb. 583.

[3] Ontario Bank v. Gerry (Cal.), 27 P. 531; Cal. Civ. Code, § 1241 (4).

[4] Wilson v. Mills, 22 Atlan. (N. H.) 455, Clark, J., who said: "The defendant did not release her homestead by signing her husband's mortgage, without witnesses or seal after it was delivered and recorded. Under the act of 1851, no release or waiver of the homestead exemption was valid 'unless made by deed executed by the husband and wife, with all the formalities required by law for the conveyance of real estate.' The defendant has had a life estate in the premises set off to her as a home-

After a husband and wife had joined in mortgaging their home property, they declared homestead upon it. The husband died and the wife administered upon his estate. The mortgagee, in his complaint, expressly waived recourse against any other property than the land mortgaged. The court held that, as homestead had been declared on that property, the mortgagee must present his claim against the husband's estate, notwithstanding the waiver.[1]

A married man cannot give a valid mortgage of his homestead without his wife's signature, when the law requires her signature, though she may be living apart from him; her right of homestead may have expired; or he may have been necessitated to give it to obtain food.[2]

§ 5. No Alienation by Husband Alone.

Under the prevailing homestead system, where homestead dedication or occupation is one of the conditions to the enjoyment of exemption, restraint upon alienation is imposed for the purpose of family protection and conservation. This restraint applies to permanent fixtures[3]—to those that become realty as part of the homestead.

Most of the statutes offering exemption of family residences forbid the sale or incumbrance of the protected home by a husband without the consent of his wife. The inhibition is expressed in different terms in different statutes; in some more stringently than in others. Not only the wife's consent, but her signature, is required by several statutes. And she must be examined apart by the officer taking the acknowledgment, and express to him that her signature was made knowingly and voluntarily; and the officer must certify to the examination, under the requirement of some states.

Under the general rule that the husband alone cannot sell

stead, as against the plaintiff's mortgage. Dickinson v. McLane, 57 N. H. 31; Lake v. Page, 63 N. H. 318. The mortgage note was not signed by the defendant. It was neither her debt, nor a contract respecting her property, and, being a married woman, she could not bind herself by a promise to pay it, either by way of contract or estoppel. Bank v. Buzzell, 60 N. H. 189." Gen. Laws of N. H., ch. 135, § 3.

[1] Wise v. Williams, 88 Cal. 30, *citing* Mechanics, etc. v. King, 83 Cal. 440; Bollinger v. Manning, 79 Cal. 7; Camp v. Grider, 62 Cal. 20.

[2] Herron v. Knapp, 72 Wis. 553; Ferguson v. Mason, 60 Wis. 377.

[3] House v. Phelan (Tex.), 19 S. W. 140.

or incumber his dedicated homestead, all alienation of it in any form by his act, when the property itself is not liable *in rem*, is absolutely void, not only as to the rights of his wife, who does not join him in the deed, and as to the children, to whom the law gives the protection of shelter and the comforts of a habitation, but also as to himself. His act is a nullity, and he escapes the consequences which would follow it so far as his own right and title is concerned but for the equitable rights and interests of his family. His deed or contract is as though it was never written or designed.[1]

The right to sell includes the right to sell conditionally, which is the same as to say the right to mortgage the property;[2] so the inhibition to sell is extended to mortgaging.[3]

The husband's sale conveys no title in law or equity, where the wife has not joined, and the property is homestead.[4]

A husband alone cannot convey property which he has acquired by the exchange of the homestead for the purpose of making a new homestead, though it has not yet been occupied by his family as such.[5]

The doctrine has been carried so far as this: When the

[1] Cowgill v. Warrington, 66 Ia. 666; Alley v. Bay, 9 Ia. 509; Williams v. Swetland, 10 Ia. 51; Larson v. Reynolds, 13 Ia. 579; Burnap v. Cook, 16 Ia. 149; Lanahan v. Sears, 102 U. S. 318; Richards v. Chace, 2 Gray, 385; Doyle v. Coburn, 6 Allen, 72; Connor v. McMurray, 2 Allen, 202; Morris v. Ward, 5 Kas. 239; Ayres v. Probasco, 14 Kas. 190; Coker v. Roberts, 71 Tex. 598; Kennedy v. Stacey, 1 Bax. 220; Hoge v. Hollister, 2 Tenn. Ch. 606; Rogers v. Renshaw, 37 Tex. 625; Pastee v. Stuart, 50 Miss. 721; Bennett v. Cutler, 44 N. H. 69; Foss v. Strachn, 42 N. H. 40; Gunnison v. Twitchel, 38 N. H. 72; Gleason v. Spray, 81 Cal. 217; Sears v. Dixon, 33 Cal. 326; Revalk v. Kramer, 8 Cal. 66; Building Ass'n v. Chalmers, 75 Cal. 332; McHugh v. Smiley, 17 Neb. 626; Phillips v. Stauch, 20 Mich. 381; Amphlett v. Hibbard, 29 Mich. 298; Sherrid v. Southwick, 43 Mich. 515.

[2] Richards v. Chase, 2 Gray, 385; Boyd v. Cudderback, 31 Ill. 119; Jordan v. Peak, 38 Tex. 439; Sampson v. Williamson, 6 Tex. 102; Dunker v. Chedic, 4 Nev. 382.

[3] Gleason v. Spray, 81 Cal. 217; Barber v. Babel, 36 Cal. 11; Burkett v. Burkett, 78 Cal. 310; Fledge v. Garvey, 47 Cal. 371; Gagliardo v. Dumont, 54 Cal. 496; Hershey v. Dennis, 53 Cal. 77; McLeran v. Benton, 43 Cal. 467; Leonis v. Lazzarovich, 55 Cal. 52; Hutchinson v. Ainsworth, 63 Cal. 286; Cal. Civ. Code, § 1242.

[4] Myers v. Evans, 81 Tex. 317; 16 S. W. 1060. In Georgia a widow's homestead may be sold, under order of court, with the consent of the adult heirs, so as to give the purchaser title in fee. The proceeds of the sale may be invested in other property, and the rights of those heirs will be transferred to that. Ga. Code, § 2025; Fleetwood v. Lord (Ga.), 13 S. E. 574.

[5] Cowgill v. Warrington, 66 Ia. 666.

boundaries of the homestead to be carved out of a tract of land greater than the exempt portion have not been established, the husband alone, though owning the tract in his own right, cannot convey it until that portion, including the family residence, shall have been duly ascertained and reserved.[1]

Though the governing statute provides that a married man shall not alienate his homestead without his wife's signature to the deed, and her examination apart from him,[2] yet if he acquire and occupy a new homestead with his family, before the delivery of the deed of the old one to the grantee, the alienation will hold good, though she merely signed it, and had no private examination. The reason is, such sale is not that of a homestead; the day of delivery is the date of sale.[3]

The provision that land, occupied as a residence, shall not be alienated by married beneficiaries without the joint consent of both husband and wife, was held to imply that the owner may sell it when unmarried; that the surviving husband may sell it absolutely subject to the minor children's right of occupancy.[4]

What the husband alone cannot do directly, he cannot do indirectly. For instance, he cannot stand by and see it sold under a void mortgage, and thus deprive his family of the home protection vouchsafed to them by the law.[5]

When a homestead has been sold for cash, or notes have been taken for the price, the money or notes are usually exempt if held to buy a new homestead.[6] Both husband and wife should join in such sale.[7]

An owner cannot lease his homestead and thus deprive his

[1] Goodrich v. Brown, 63 Ia. 247.

[2] Ala. Code, § 2508.

[3] Woodstock Iron Co. v. Richardson (Ala.), 10 So. 144. See same title, 90 Ala. 268; Jenkins v. Harrison, 66 Ala. 356; Elsberry v. Boykin, 65 Ala. 340; Stiles v. Brown, 16 Vt. 565: Mitchell v. Bartlett, 51 N. Y. 453; Lee v. Insurance Co., 6 Mass. 219; Smith v. Porter, 10 Gray, 66; Barrows v. Barrows (Ill.), 28 N. E. 983; Wilson v. Gray, 59 Miss. 525. (*See* counter cases cited by the court.)

[4] Hannon v. Sommer, 10 Fed. Rep. 601 (Cir. Ct., Dist. Kansas); Dayton v. Donart, 22 Kas. 256.

[5] Wood v. Lord, 51 N. H. 448; Morris v. Sargeant, 18 Ia. 90; Abbott v. Cromartie, 72 N. C. 548; Parks v. Ct. Ins. Co., 26 Mo. App. 511.

[6] Huskins v. Hanlon, 72 Ia. 37.

[7] Harper v. Forbes, 15 Cal. 202; Guiod v. Guiod, 14 Cal. 506; Dorsey v. McFarland, 7 Cal. 342; Taylor v. Hargous, 4 Cal. 268; Atkinson v. Atkinson, 40 N. H. 249.

wife of her home without her consent.[1] This rule, though widely prevailing, has been qualified so that, where the qualification is allowed, an owner may lease parts of the homestead, not needed for household purposes, without his wife's consent.[2]

An exempt family dwelling-house, on leased ground, mortgaged by the husband to secure money borrowed which was used in the construction of the house, cannot be successfully claimed as exempt from the demand of the mortgagee on the ground that she did not sign the instrument.[3]

Though voluntary alienation may not be by the husband alone, he is yet entitled to receive and dispose of the price of homestead property paid in compensation for the taking of any part of his homestead under the law of eminent domain.[4] Some authorities make distinction between the voluntary and involuntary granting of the right of way. And when it is voluntary on the part of the husband who owns the homestead, the authorities are not wholly agreed as to whether he can convey alone, and whether the compensation paid to him takes the exempt character.

It was held competent for a husband to give the right of roadway through the homestead without his wife's joinder, when her interests were not affected.[5] What he receives in compensation, when his dwelling is removed for the roadway, is exempt as the house was before removal, when it has been regularly condemned; but if the husband alone should voluntarily convey the right of way, it has been held questionable whether the price received by him would be exempt.[6]

On the other hand, it has been held that the husband cannot make a valid contract with a railroad company, giving them the right of way across the homestead, without the consent of the wife and her signature to the agreement.[7]

[1] Thimes v. Stumpff, 33 Kas. 53; Coughlin v. Coughlin, 26 Kas. 116; Ott v. Sprague, 27 Kas. 620; Chambers v. Cox, 23 Kas. 395; Hogan v. Manners, 23 Kas. 551; Ayers v. Probasco, 14 Kas. 190; Monroe v. May, 9 Kas. 476; Anderson v. Anderson, 9 Kas. 112; Dollman v. Harris, 5 Kas. 597.

[2] Harkness v. Burton, 39 Ia. 101.

[3] Fournier v. Chisholm, 45 Mich. 417.

[4] Canty v. Latterner, 31 Minn. 239.

[5] Randall v. Tex. Cent. R. Co., 63 Tex. 586; Chicago, etc. R. Co. v. Titterington (Tex.), 19 S. W. 472; Chicago, etc. R. Co. v. Swenney, 38 Ia. 182.

[6] Huskins v. Hanlon, 72 Ia. 37.

[7] Evans v. Grand Rapids, etc. R. Co., 68 Mich. 602.

There seems to be reason for this view; for the unrestrained right of conveying such way would imply that of conveying like ways to other railways, so that the homestead might be ruined. If the question depends upon her interest, as one of the cases above cited seems to hold, it is easy to see that her interest would be seriously affected by the granting of several rights of way across the home farm, or by the granting of one if the road is to run through the house or yard. If her interest is the criterion, the court must pass upon it in each case.

A householder held his land under a school certificate and occupied it, with his wife, as homestead. He assigned his certificate without her concurrence by signature, but both surrendered possession to the purchaser. The transfer was declared void for want of her signature; and her surrender did not operate as an estoppel to her subsequent assertion of interest and claim of homestead.

The case turned upon the transfer by assignment. The court held that act not merely voidable, as it would be in some of the states, but absolutely void, since the statute inhibiting conveyance without the wife's signature was positive, as before construed.[1] The court said: "Under the statute, both the husband and wife must be bound by the conveyance or contract to convey, or neither is. Neither of them, acting alone, can give it validity. So that, if it is to become effectual by estoppel, the estoppel must operate as to both."[2]

§ 6. Sales Subsequently Validated.

It has been held that subsequent abandonment of the homestead will inure to the benefit of the grantee when sale by the husband has passed before.[3] And that, upon the death of both spouses, a prior sale by the husband cannot be questioned by the administrator, if there are no minor heirs' interests involved.[4]

If, after a bond has been executed by a husband alone to

[1] *Citing* Gen. Stat. of Minn., c. 68, § 2 (1878); Barton v. Drake, 21 Minn. 299; Alt v. Banholzer, 39 Minn. 511.

[2] Law v. Butler, 44 Minn. 482.

[3] Hall v. Fullerton, 69 Ill. 448; Vasey v. Trustees, 59 Ill. 188; Hewitt v. Templeton, 48 Ill. 367; McDonald v. Crandall, 43 Ill. 238; Brown v. Coon, 36 Ill. 243; Jordan v. Godman, 19 Tex. 273; Stewart v. Mackey, 16 Tex. 56.

[4] Lyon v. Mills, 41 Tex. 311.

convey the homestead at a future time, the wife should die; or if he and she should abandon their exemption right, the other party to the contract could enforce specific performance.[1] If the wife should refuse to join in the conveyance, in conformity to her husband's executory agreement, the other contracting party can recover of him whatever he may have expended in good faith by way of improving the property.[2]

Homestead owners, after giving bond to convey their homestead, are bound to comply and give their deed at the stipulated time. If the bond requires the deed to be given to a husband and wife, and it is really given to the husband alone, he will hold for her, in trust, as well as for himself.[3]

A mortgage, void for want of the wife's joinder, does not become valid at her death.[4] Nor would the husband's executory agreement to sell; but he would be liable to the grantee for non-performance, if the latter had agreed to buy in good faith.[5] And it has been held that, upon the wife's death, specific performance can be enforced — that is, that such executory agreement would not be void.[6]

An imperfect conveyance cannot be ratified by the grantor so as to render it valid, if his wife asserts her homestead right in the property sought to be conveyed.[7]

Real estate not occupied as a residence may be validly mortgaged by the husband-owner, so that his wife, who, with her husband, occupies another home at the time, cannot afterwards have it or a part of it included in the homestead plat subsequently set out and recorded so as to affect the rights of the mortgagee.[8] No subsequent adoption or selection of property as a homestead can retroact so as to invalidate prior lawful conveyances,[9] whether by sale or mortgage; for, a mortgage

[1] Eberling v. Verein, 72 Tex. 339; Goff v. Jones, 70 Tex. 572; Brewer v. Wall, 23 Tex. 589; Cross v. Everts, 28 Tex. 534.

[2] *Ib.;* and Kempner v. Heidenheimer, 65 Tex. 587.

[3] Schriber v. Platt, 19 Neb. 625.

[4] Larson v. Reynolds, 13 Ia. 579.

[5] Wright v. Hays, 34 Tex. 261; Cross v. Evarts, 28 Tex. 524.

[6] Allison v. Shilling, 27 Tex. 450.

[7] Coker v. Roberts, 71 Tex. 598; Jacobs v. Hawkins, 63 Tex. 1; Wheatley v. Griffin, 60 Tex. 209; Wood v. Wheeler, 7 Tex. 14; Texas Const., art. 16, § 15.

[8] Lucas v. Pickel, 20 Ia. 490.

[9] Yost v. Devault, 3 Ia. 345.

is a conveyance held to be inhibited by a statute which did not expressly include incumbrances when forbidding conveyance by a husband or wife alone.[1]

One state inhibiting the alienation of a homestead by one of the marital parties without joinder by the other spouse, it was held in another state that, because of such inhibition, a sale solely by the husband to pay a pre-existing debt, and a conveyance back to him with the vendor's lien preserved, were void. The debt was not thus paid, nor was the vendor's lien created in favor of the creditor.[2]

§ 7. Wife's Right Relative to Sales.

A wife cannot be deprived of her homestead rights by being driven from her home by her husband, and then living apart from him. She is still his wife and entitled to all the property privileges and immunities which the law awards her.

So, when a discarded and outdriven wife subsequently obtained a divorce with judgment for alimony against her husband, she properly disregarded the sale of the homestead by him alone, made after she had been sent away and before the rendition of the judgment; and she executed her judgment against the property as his, and bought it at the judicial sale. Her homestead right had continued all the while. His legal right remained in him, notwithstanding his attempted conveyance of it without her signature. Though still his and her homestead, the property could be subjected to forced sale at her suit, since her judgment for alimony was a lien upon it, and he was estopped from setting up his homestead interest against it, after having alienated it in contravention of law so far as he could do so. It is said that he had abandoned the homestead and had thus forfeited the exemption. He could not claim it for his vendee; nor against his wife whom he had sought to defraud.[3]

If the wife is the owner of the homestead dedicated by her alone, or with the concurrence of her husband, she cannot afterwards alienate or incumber it without his consent, while the dedication continues and its privileges are enjoyed by

[1] Babcock v. Hoey, 11 Ia. 375.

[2] Parks v. Ct. Ins. Co., 26 Mo. App. 511.

[3] Keyes v. Scanlan, 63 Wis. 345; Barker v. Dayton, 28 Wis. 368.

their family.[1] But when the family enjoyment has ceased, the reason for the restraint no longer exists. So, when a wife, abandoned by her husband, conveyed her homestead, which was her separate property, to her sister, the husband vainly sought homestead therein after her death.[2]

If the title is in the wife, and she voluntarily conveys the property to pay a debt of her husband, where the statute declares such act of hers under coverture to be absolutely void, nobody but herself can plead the statute against the conveyance; for the plea of coverture is personal, and she alone is privileged to plead it. True, if the property was homestead, there would be interests that might be prejudiced, and relief might be afforded. But aside from that, the deed would hold between the parties.[3]

[1] Dollman v. Harris, 5 Kas. 597; Low v. Anderson, 41 Iowa, 476.

[2] Hector v. Knox, 63 Tex. 613.

[3] Palmer v. Smith (Ga.), 13 S. E. 956. Simmons, J.: "1. Under the facts reported the judge directed the jury to return a verdict in favor of Smith, the defendant, on the ground that the deed put in evidence from Walls and his wife to Palmer, Stewart & Co. was made by Mrs. Walls in payment of her husband's debts, and was therefore void under our code; and that Smith, the defendant, could plead this fact. The record does not show that Smith was privy in blood or estate to Mrs. Walls. Where a married woman, having a separate estate, conveys her property to a third person in payment of her husband's debts, and afterwards seeks to recover the property, or to cancel the deed, the deed will be declared void, on her motion, as against all persons who had notice that it was made for such purpose. But where she has conveyed her separate estate in payment of her husband's debts to one party, and another party is in possession of the property, who is not in privity with her in blood or estate, and is sued therefor by the vendee of the wife, the defendant cannot set up in his defense that the deed is void because made in payment of the husband's debts. This plea of the wife is a personal privilege, confined to her or her privies; and, if she or they do not set it up, no stranger has the right to do so. The property conveyed by her under such circumstances belongs to her; and, if she honestly wishes it to remain in the hands of her vendee in payment of her husband's just debts, and does not choose to claim it for herself, what right has a stranger, who does not hold under her, to set up this defense, and put her money in his pocket? The plea of infancy is a personal privilege, and no one but the infant can avail himself of it. The plea of usury is also a personal privilege, and no one but the party promising usury, or his privies, can take advantage of it, except in cases of insolvency. We think the plea of coverture is also a personal privilege to the wife, and can avail no one except herself and her privies. We therefore hold that under the facts as disclosed by the record the deed

The husband, selling the homestead ostensibly to pay a balance of purchase-money, but really to defraud his wife of her rights in it, conveys no title good against her when the purchaser had notice.[1] If the sale is one requiring her signature, a misrepresentation of the effect which would follow the signing of the instrument may be fraudulent.[2] It was held so when a wife thus had been induced to sign away her homestead.[3]

Inducement to sign through fear will invalidate the wife's signature.[4]

from Walls and wife to Palmer, Stewart & Co. was not void as between these parties. Zellner v. Mobley, 84 Ga. 746; 11 S. E. Rep. 402; Sutton v. Aiken, 62 Ga. 741; 1 Wait, Act. & Def. 157; Juchert v. Johnson, (Ind. Sup.), 9 N. E. Rep. 413; Bennett v. Mattingly, 110 Ind. 197; 10 N. E. Rep. 299, and 11 N. E. Rep. 792; Insurance Co. v. Baker, 71 Ind. 103. 2. The deed above referred to contained the following clause: 'The said premises described having been recently set apart as a homestead by the ordinary of Fulton county, Georgia, to-wit, in the month of April, 1869.' Counsel for the defendant in error contended that 'this was homestead property, and ejectment could not be maintained upon that deed. Plaintiffs are seeking to recover homestead property on that deed, and the constitution of 1868 denied to the court the power of rendering or enforcing such a judgment.' Under the facts reported, the principle contended for does not apply. The evidence does not show to whom or out of whose property the homestead was set apart. It does not show that Walls and his wife ever occupied the land as a homestead, nor does it show that they ever resided in the state of Georgia; but we can infer that, if they ever did reside in Georgia, they had removed to the state of Alabama, because the deed in controversy was executed in that state, and the two letters from Walls, the husband, attached to the motion for a new trial, show that he still resides in Alabama. If they had never resided in this state, no homestead could have been set apart to them under its laws. If they had had a homestead set apart to them, and removed from this state to another, under the reasoning of the decision in the case of Bank v. Smisson, 73 Ga. 422, they lost their homestead rights in the property. If this property was the wife's, its homestead could not have been set apart to them out of it. We think, therefore, that the facts as disclosed by the record could not defeat the deed as a conveyance of the wife's prior title to the premises. Judgment reversed."

[1] Morris v. Geisecke, 60 Tex. 633. *See* Newman v. Farquhar, 60 Tex. 640.

[2] Townsend v. Cowles, 31 Ala. 428; Colter v. Morgan, 12 B. Mon. 278; Broadwell v. Broadwell, 1 Gilman, 595; Drew v. Clark, Cooke (Tenn.), 374.

[3] Ramey v. Allison, 64 Tex. 697. *See* Varner v. Carson, 59 Tex. 306; Lott v. Kaiser, 61 Tex. 671; Shelby v. Burtis, 18 Tex. 651; Kerr on Fraud and Mistake, p. 69.

[4] Kocourek v. Marak, 54 Tex. 201; Tarpley v. Tarpley, 10 Minn. 458.

A husband, having sold the family homestead without his wife's joinder, and moved from it without her consent (though she accompanied him as in duty bound), did not thus destroy her homestead right. Afterwards they recovered possession of the land as their homestead.[1]

§ 8. Estoppel by Sole Deed.

The general rule is that conveyance of homestead by the husband alone is void even as to himself. But it has been held that it will estop him, both at law and in equity, from setting up any right or claim adverse to it; that neither in his own behalf, nor as the trustee or representative of his wife and children, can he be heard to aver anything against his own solemn asseverations in the conveyance. And it is further held that his sole conveyance, when no homestead has been set apart and the right to it was inchoate, operates upon his wife and children, so that, during his life-time, they cannot claim; not that they are estopped, but because he, as their representative, is estopped, and they cannot through him set up anything adverse to his deed.[2]

The doctrine of estoppel, as thus enounced, does not deny the wife's right to claim when her disabilities have been removed by the death of her husband. So long as he remains her legal representative, she cannot assert her own rights for herself and her children. But the husband cannot deprive her of her rights by conveying them by his sole deed; cannot release or waive her homestead right any more than he can release her dower right. He is estopped from denying his

[1] Myers v. Evans, 81 Tex. 317; 16 S. W. 1060.

[2] Foss v. Strachn, 42 N. H. 40, *citing* on the general doctrine that a grantor is estopped from denying his deed, its covenants and recitals, Stowe v. Wyse, 7 Ct. 214; Wilkinson v. Scott, 17 Mass. 249, 257; Kimball v. Blaisdell, 5 N. H. 533; Thorndike v. Norris, 24 N. H. 454; Wark v. Willard, 13 N. H. 389; Brown v. Manter, 21 N. H. 528; Jewell v. Porter, 31 N. H. 34; Johnson v. Goss, N. H. (not reported); Eveleth v. Crouch, 15 Mass. 307; Barber v. Harris, 15 Wend. 615; Pennel v. Weyant, 2 Harr. 501; Currier v. Earl, 1 Shep. 216; White v. Patten, 24 Pick. 324; Dunbar v. Mitchel, 12 Mass. 373; Blake v. Tucker, 12 Vt. 39. The doctrine of Foss v. Strachn, applying the usual rule of estoppel to homestead conveyances, was repeated in the case immediately following. Strachn v. Foss, 42 N. H. 43; Guiod v. Guiod, 14 Cal. 506; Bowman v. Norton, 16 Cal. 219.

own deed, but she can controvert it on acquiring legal standing in court.[1] Had he legally negatived the homestead right by abandoning the property as a residence, or had he transferred the right from one home to another by exchange, her right to claim homestead in the property first held would have become extinct by such an act of his.[2]

The general law of estoppel does not apply, however, to a husband who has given a deed of sale or mortgage, when the law makes such act of his absolutely void, without his wife's assent, or signature and acknowledgment. It never applies to acts that are absolute nullities.[3]

The grantee of a homestead is presumed to have notice that the grantor has no right to convey. He is notified either by the record or by the notorious occupancy of the home by the grantor — one or the other of these two kinds of notice being sufficient in any state where sales of homesteads by a married person without joinder by the other spouse are prohibited. The grantee therefore is presumed to know the character of the property which he purchases. And he, as all others, is presumed to know the law. So he ought to be estopped as well as the grantor. The absolute nullity of such transactions relieves from the necessity of applying the rule of estoppel. The husband alone cannot convey. His separate conveyance is absolutely void; void even as to himself; and it does not operate as an estoppel to him.[4]

Beneficiaries cannot claim successfully against a mortgagee who had neither actual nor constructive notice that the property mortgaged was subject to their homestead right.[5] If he has had notice, he cannot be heard to attack the regularity of

[1] Wood v. Lord, 51 N. H. 448.

[2] Horn v. Tufts, 39 N. H. 478.

[3] Housatonic Bank v. Martin, 1 Met 294; Chandler v. Ford, 3 Ad. & E. 649.

[4] Moses v. McClain, 82 Ala. 370; Strauss v. Harrison, 79 Ala. 324; Crim v. Nelms, 78 Ala. 604; Alford v. Lehman, 76 Ala. 526; De Graffenreid v. Clark, 75 Ala. 425; Slaughter v. McBride, 69 Ala. 510; Seaman v. Nolen, 68 Ala. 463; Halso v. Seawright, 65 Ala. 431; McGuire v. Van Pelt, 55 Ala. 344; Miller v. Marx, 55 Ala. 322.

[5] Roberts v. Robinson, 63 Ga. 666; Georgia, Acts of 1876, p. 51; Code, §§ 2054, 5135; Cheney v. Rodgers, 54 Ga. 168; Bonds v. Strickland, 60 Ga. 624; Willingham v. Maynard, 59 Ga. 330; Roberts v. Trammell, 55 Ga. 383.

proceedings establishing the homestead. A purchaser, with notice, cannot be heard for such purpose.[1]

Both husband and wife having absolutely conveyed their homestead, she cannot claim successfully that the conveyance was meant as a mortgage, as against a purchaser from a third person without notice of any such intendment.[2] Their continued residence upon the homestead was not such a circumstance as to put such purchaser upon inquiry as to their reserved intention, when the recorded deed showed regular transfer.[3]

Yet a deed to a homestead which is a complete conveyance on its face may be shown by parol to have been given as security for debt, and to convey no title.[4]

The requirement that both husband and wife shall join in the conveyance has been held not satisfied by each making a separate deed to the same purport.[5] There seems to be no established rule of general authority on this subject. If the two deeds together are substantially one conveyance, made on the same day to the same grantee, with separate examination of the wife and due acknowledgment by her, they would not be treated as nullities by every court.

Though the husband or wife contracts separately to convey the homestead, or to incumber it, and signs the instrument to effect the purpose, it is held that no damages can be recovered of either for the breach of such contract — it having been void from its incipiency.[6] Were such a contract made by the husband with fraudulent purpose, the wrong-doer would doubtless be amenable to the law; but if with the belief that the wife would sign, he would not be even liable to damages for the value of land above the contract price, on failure to complete the transaction by reason of her dissent. If the price has already been advanced by the purchaser,

[1] Brown v. Driggers, 62 Ga. 354.

[2] Love v. Breedlove, 75 Tex. 649.

[3] *Ib.;* Heidenheimer v. Stuart, 65 Tex. 321; Hurt v. Cooper, 63 Tex. 362; Eylar v. Eylar, 60 Tex. 315. *See* Alstine v. Cundiff, 52 Tex. 453.

[4] Silberberg v. Pearson, 75 Tex. 287; Brewster v. Davis, 56 Tex. 478.

[5] Dickinson v. McLane, 57 N. H. 31. *See* Luther v. Drake, 21 Ia. 92; Poole v. Gerrard, 6 Cal. 72.

[6] Barnett v. Mendenhall, 42 Ia. 296; Clark v. Evarts, 46 Ia. 248; Cowgell v. Warrington, 66 Ia. 666.

doubtless he could recover that from the other party incompetent to convey.[1] Or, if money has been loaned on a mortgage signed by the husband alone, resting on the homestead, it would be recoverable immediately on the ground that the instrument is a nullity. A junior mortgagee, finding such an instrument impeding the recovery of his valid claim, may have it set aside, though the owners of the mortgaged homestead have not sought to do so.[2] Specific performance of a mortgage or sale by the husband alone cannot be enforced.[4] But money judiciously expended for the improvement and betterment of the property, by a purchaser in good faith, may be recovered.[3]

It is held questionable, however, whether the wife may not recover rents and profits from the purchaser for the time he has held the homestead under such invalid conveyance.[5]

§ 9. Conveyance by Husband to Wife.

Family protection being the object of the law when inhibiting alienation, there is no contravention of the spirit of the law when the homestead is conveyed to his wife, or to his wife and children, by the owner who is the head of the family.[6]

A conveyance from husband to wife, with no consideration but "love and affection," was held fraudulent as to creditors, though the latter could not subject the homestead to the payment of the debts due them, by reason of the fraud. Had both husband and wife joined in conveying to a third person, and the latter had conveyed to her, they would have lost their homestead property.[7]

Had the husband conveyed to the wife directly to defraud creditors, while he and she were in the occupancy of quarters as a homestead other than the homestead thus conveyed, the creditors would have the right of disregarding the conveyance.[8]

[1] Donner v. Redenbaugh, 61 Ia. 269.
[2] Alley v. Bay, 9 Ia. 509.
[3] Garlock v. Baker, 46 Ia. 334.
[4] Stinson v. Richardson, 44 Ia. 373.
[5] *Ib.*
[6] Albright v. Albright, 70 Wis. 528; Dull v. Merrill, 69 Mich. 49; Riehl v. Bingenheimer, 28 Wis. 84; Murphy v. Crouch, 24 Wis. 365. *Compare* Hoyt v. Howe, 3 Wis. 752, and Upman v. Bank, 15 Wis. 449. *See* Malony v. Horan, 12 Abb. Pr. 289; Castle v. Palmer, 6 Allen, 401; Turner v. Bernheimer (Ala.), 10 So. 750.
[7] Ruohs v. Hooke, 3 Lea, 302.
[8] Gibbs v. Patten, 2 Lea, 180.

It is held a meritorious consideration for the conveyance of a homestead by a husband to his wife, that she has a right to it at his death, when there is no child and no one injured by the transfer.[1] A reasonable provision may be made for the wife's support, by a conveyance to her, in the nature of a settlement.[2]

The transfer of a homestead by a husband, for the purpose of having the grantee immediately convey it to the grantor's wife, which purpose was accomplished, was judicially treated as a direct conveyance of the husband to his wife: therefore not vitiated by lack of her signature.[3] But when the design of preserving the homestead did not appear, in a like transaction, it was held that the right was lost, though both husband and wife continued to occupy the dwelling all the while.[4]

A deed of a homestead, absolute in form, given by a husband and his wife, when the legal title was solely in him, to secure a debt, and containing a stipulation by the grantee that he would reconvey to the wife upon receiving payment for the debt, was construed as a mortgage.[5]

A wife's contract to convey her homestead cannot be specifically enforced, where the statute renders it nugatory without her husband's signature and acknowledgment.[6] And a husband's sale, conveyance or incumbrance is equally futile, except with reference to any excess of property value above the homestead allowance.[7] Should he convey directly to his wife, any such excess would still be open to his creditors.[8]

Though a statute provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and

[1] Albright v. Albright, 70 Wis. 528; Wis. R. S., §§ 2203, 2270-2272. *See* Leach v. Leach, 65 Wis. 284.

[2] Hunt v. Johnson, 44 N. Y. 27; Sims v. Rickets, 35 Ind. 181; Wilder v. Brooks, 10 Minn. 50; Jones v. Clifton, 101 U. S. 228; Thompson v. Allen, 103 Pa. St. 44.

[3] Stevens v. Castel, 63 Mich. 111; Hugunin v. Dewey, 20 Ia. 368. The conveyance of a homestead by a husband to his wife is no evidence of intent to defraud creditors. Dull v. Merrill, 69 Mich. 49.

[4] Jones v. Currier, 65 Ia. 533.

[5] McHugh v. Smiley, 17 Neb. 626.

[6] Larson v. Butts, 22 Neb. 370; Neb. Com. Stat., ch. 36, § 4; Swift v. Dewey, 20 Neb. 107; Bonorden v. Kriz, 13 Neb. 121; Aultman v. Jenkins, 19 Neb. 209.

[7] Swift v. Dewey, 20 Neb. 107; Neb. act of 1879, limiting to $2,000.

[8] Hick's Tea Co. v. Mack, 19 Neb. 339.

acknowledged by both husband and wife,"[1] yet the husband alone may convey it to his wife. If the transaction is free from fraud, and the rights of creditors and subsequent purchasers are not contravened, there is no necessity for both husband and wife to join in conveying to a third person, that such person may then deed the property to her. The direct conveyance is as good as though the title had taken the circumlocutory course through a third party as trustee.[2]

The rule fails when the reason fails. The rule is that both spouses shall join in the conveyance: what is the reason? This restraint upon alienation is for the protection of the marital parties, especially the wife, and to secure a home for the family. The children may be unhoused by the mutual action of their parents in conveying, but that is not likely to occur. To guard against that danger, the approval of a court to such alienation or incumbrance is required in one state, though the others hold the joinder of husband and wife in a deed or mortgage sufficient to pass homestead property, deeming this sufficient protection to their children.

The reason is inapplicable when, husband and wife holding homestead estate in real property, the one transfers to the other his or her legal title. Since the employment of an intermediary is futile, what utility can there be in a wife's joining to convey land to herself?

The common-law rule is contrary to this; the husband's deed, given directly to his wife, being void.[3]

[1] Neb. Com. Stat., ch. 36, § 4.

[2] Furrow v. Athey, 21 Neb. 671; Deming v. Williams, 26 Ct. 226; Hunt v. Johnson, 44 N. Y. 27; Garlick v. Strong, 3 Paige (N. Y.), 452; Coates v. Gerlach, 44 Pa. St. 43; Huber v. Huber, 10 Ohio, 373; Brookbank v. Kennard, 41 Ind. 339; Story v. Marshall, 24 Tex. 305; Wilder v. Brooks, 10 Minn. 50; Baker v. Koneman, 13 Cal. 9; Eddins v. Buck, 23 Ark. 507; Reihl v. Bingenheimer, 28 Wis. 84.

[3] Johnson v. Vandervort, 16 Neb. 144; Smith v. Dean, 15 Neb. 432. The provisions of Neb. Com. Stat. (1887), ch. 36, §4, are to protect the husband or wife who do not join in conveying; not for the benefit of others who are without privity of interest with either of them. Cobbey v. Knapp, 23 Neb. 579. In Illinois the husband's conveyance of his homestead to his wife really conveys to her only the excess above $1,000 of value. This is held because the statute forbids any transfer of the homestead without the signature and acknowledgment of both husband and wife. Ill. Rev. Stat., ch. 52, § 4; Barrows v. Barrows (Ill.), 28 N. E. 983; Kitterlin v. Ins. Co., 134 Ill. 647; Gage

The conveyance of the legal title from the husband to the wife does not affect the homestead right when their occupancy of the home continues as before. "It is not material in which the title may be."[1]

It does not matter which owns the homestead, or which is the debtor; the exemption operates alike in either case.[2]

§ 10. Incumbrance Inhibited.

Under constitutional inhibition that no mortgage, trust-deed or other lien on the homestead shall be valid except for purchase-money or improvements, whether such incumbrances are created by the husband alone or by him and his wife, and "all pretended sales of the homestead involving any conditions of defeasance shall be void,"[3] no lien attaches when both make an absolute deed and then have the homestead conveyed back to them by the purchaser who reserves a mortgage for unpaid purchase-money — the object of the two conveyances being to secure a loan made by him to the husband and wife.[4]

The lien-holder cannot enforce such unconstitutional lien on the plea that he was misled by the representatives of the homestead beneficiaries.[5]

The inhibition is imperative. It cannot be avoided by any cunningly contrived series of conveyances. It cannot be overcome by the apparent passage of an absolute title through any number of parties. If the circumstances of a circuitous route through several grantors and grantees clearly show that the purpose is to create a lien on the homestead to secure a loan to the owners, the whole transaction will be void as an attempt to circumvent the constitution.[6]

v. Wheeler, 129 Ill. 197. The husband may convey to his wife directly all that is transferable. Crum v. Sawyer, 132 Ill. 443; Thomas v. Mueller, 106 Ill. 36.

[1] McHugh v. Smiley, 17 Neb. 626; McMahon v. Speilman, 15 Neb. 653; Stout v. Rapp, 17 Neb. 462; Partee v. Stuart, 50 Miss. 721.

[2] Stout v. Rapp, 17 Neb. 462, 470; Murray v. Sells, 53 Ga. 257; Orr v. Shaft, 22 Mich. 260; Tourville v. Pierson, 39 Ill. 447; Crane v. Waggoner, 33 Ind. 83; Dwinell v. Edwards, 23 Ohio St. 603.

[3] Const. Tex., art. 16, § 50.

[4] O'Shaughnessy v. Moore, 73 Tex. 108; Ullman v. Jasper, 70 Tex. 446; Moores v. Wills, 69 Tex. 109.

[5] Mortgage Co. v. Norton, 71 Tex. 683.

[6] Hays v. Hays, 66 Tex. 606; Heidenheimer v. Stewart, 65 Tex. 321; Inge v. Cain, 65 Tex. 75; Hurt v.

Under some circumstances, however, the voluntary creation of a lien upon a homestead by the beneficiaries would be an abandonment of their exemption right. With that given up, there would be no violation of the constitutional provision above mentioned, and the conveyance or mortgage would stand good against the property. The property may have been designated as a homestead, and preparations to occupy may have been such as to give the property protection from creditors under the decisions,[1] yet if the owners execute a mortgage upon it before actual occupancy, the homestead right will be deemed abandoned, and the lien will be valid.[2] And, when the lien has attached, subsequent claim of homestead, to defeat it, would be vain.[3]

While a homestead cannot be incumbered under the constitution as it now exists, mortgages existing before its dedication may be enforced. A mortgage given on his homestead by a man to a woman, in contemplation of marriage with her, and which was recognized in his will after their marriage, was sustained as valid, though there was no consideration but the marriage itself.[4]

The foreclosure of a mortgage on a homestead, without making the wife a party, was held void; but it was declared that if the exemption was applicable to only an undivided half interest in the land, and the owner of the other half had joined in giving the mortgage, and had afterwards conveyed his part to the wife, the foreclosure would hold good as to that half interest.[5]

Cooper, 63 Tex. 362; Armstrong v. Moore, 59 Tex. 646.

[1] Inge v. Cain, 65 Tex. 75; Gardner v. Douglass, 64 Tex. 76; Moreland v. Barnhardt, 44 Tex. 275, 280; Anderson v. McKay, 30 Tex. 190; Franklin v. Coffee, 18 Tex. 413.

[2] Kempner v. Comer, 73 Tex. 196; Jacobs v. Hawkins, 63 Tex. 1.

[3] Potshuisky v. Krempkan, 26 Tex. 308; Swope v. Stantzenberger, 59 Tex. 387; Baird v. Trice, 51 Tex. 556; Mabry v. Harrison, 44 Tex. 286. By the constitution of Texas, no incumbrance can be put upon a homestead by the husband or by him and his wife jointly, except for purchase-money or improvements. By the constitution of 1845, of that state, art. 8, § 22, forced sales of homesteads conveyed no right unless some further act of transfer accompanied them. Campbell v. Elliott, 52 Tex. 151. *Distinguished* from Cross v. Evarts, 28 Tex. 523; Brewer v. Wall, 23 Tex. 385; Stewart v. Mackey, 16 Tex. 56.

[4] McCormick v. Neel, 53 Tex. 15.

[5] Thompson v. Jones, 60 Tex. 94.

A mortgagee, foreclosing on a homestead and becoming the purchaser, cannot retain proceeds above his lien to satisfy ordinary debt due him by the mortgagor.[1]

Where the mortgage of the homestead is inhibited except for specified debts, one purchasing his co-tenant's interest can mortgage only the part purchased — not his original interest.[2] When he had mortgaged his interest, he afterwards had the property partitioned and fixed his dwelling on the share allotted to him; and it was held that he could claim it as exempt from the mortgage he had given. No mortgage could hold good, unless to secure debts specified in the constitution as exceptional to those exempted.[3]

Where homestead mortgages are forbidden, except for purchase-money, etc., and a mortgagor seeks to avail himself of the prohibition, it is incumbent on him to prove that the mortgaged realty is his homestead.[4]

In exposition of a constitutional provision that, after the homestead has been set apart, the debtor shall not "alienate or incumber the property so exempted, but it may be sold by the defendant and his wife, if any, jointly, with the sanction of the judge of the superior court of the county where the debtor resides or the land is situated, the proceeds to be reinvested upon the same uses,"[5] it is held that homesteads cannot be mortgaged. Both husband and wife joining, and the superior court nominally authorizing, the mortgage would be a nullity. They may sell by permission of court, when the price is to go to buy another home, but not otherwise. If they obtain a loan on such a mortgage, they are allowed to repudiate this security with impunity. A wife, who had homestead carved out of her husband's separate property, obtained a loan on the strength of it — she waiving the exemption right. When her note became due, she failed to honor it; and when sued upon the mortgage she set up its invalidity. Doubtless it was worthless on the ground that she did not own a

[1] Hunter v. Wooldert, 55 Tex. 433; North v. Shearn, 15 Tex. 175; Wood v. Wheeler, 11 Tex. 122; Houghton v. Lee, 50 Cal. 101; Keyes v. Rines, 37 Vt. 260; Mitchell v. Millbraun, 11 Kas. 628; 2 Jones on Mort., § 1093.

[2] Sims v. Thompson, 39 Ark. 301.

[3] Sentell v. Armor, 35 Ark. 49; Frits v. Frits, 32 Ark. 327.

[4] Worsham v. Freeman, 34 Ark. 55.

[5] Const. of Ga., 1877, art. 9, § 3.

foot of the land she had mortgaged. But the principal ground on which the plaintiff was kept out of his money was the absolute nullity of all homestead mortgages under the new constitution. Had the husband and wife and the court made the mortgage sued upon, it would yet have been an abortion. Admitting the title of the property to be still in the husband, the court said that a new use had been created when it was set apart as a homestead by the judgment of the ordinary. The use was for the benefit of his wife during her life, and his children during their minority. When the use ceases, the husband becomes reinvested with all his rights which existed prior to the creation of the use. (Was he divested of rights before, by this constitution?) He can then either sell or mortgage the land. "But," says the court, "so long as the homestead estate remains, he cannot sell without the consent of his wife, nor without an order from the judge of the superior court, nor as we now think can he mortgage it with the consent of his wife and with an order of the judge of the superior court." Twice elsewhere in the opinion, the nullity of all homestead mortgages, under the new constitution, is unqualifiedly stated.[1]

§ 11. Interests of Non-owning Beneficiaries.

The right of homestead, existing before any part of the premises where the beneficiaries reside has been set off so that the homestead itself becomes something tangible, has been treated as a mere incumbrance, upon the title of the husband-owner, in favor of his wife and children.[2]

The exemption right cannot exist apart from that which is exempted; cannot be separately conveyed.[3]

The wife does not become joint owner with her husband in the legal title to the homestead upon their becoming joint occupants of the home, for the right of exemption which she thus enjoys is not an affirmative property right conferred upon her by law.[4] Her interest is immediate and substantial,

[1] Planters' Bank v. Dickinson, 83 Ga. 711.

[2] McClary v. Bixby, 36 Vt. 260; Jewett v. Brock, 32 Vt. 65; Davis v. Andrews, 30 Vt. 678.

[3] Chamberlain v. Lyell, 3 Mich. 458; Barker v. Rollins, 30 Ia. 412; Bowyer's Appeal, 21 Pa. St. 210; Hewitt v. Templeton, 48 Ill. 367; McDonald v. Crandall, 43 Ill. 231.

[4] Burns v. Keas, 21 Ia. 257.

and it is secured against acts of alienation or forfeiture on the part of her husband which would otherwise prove fatal with respect to his interest; and she has estate in the homestead so far as to be enabled to avail herself of a statutory authorization to redeem the property from a tax sale.[1] In some respects her homestead right is of a higher character than that of dower.[2]

The wife and children certainly have no *jus in re* while her husband, their father, holds the full legal title in fee. The object of requiring her signature to his deed of conveyance is that she may relinquish her homestead right just as though she were signing to release her dower right. She has no present title to either dower or homestead, it is said; certainly she has no legal title in her homestead right, though it be presently existing. The policy of the state, that a home for the wife and children shall not be alienated by the householder with the same freedom which he conveys as to the sale of his other property, is satisfied when he procures a new home for his family and moves into it with them. Then there is no longer any incumbrance upon the first occupied home. Considered as an incumbrance, the homestead right of the wife is novel indeed. It would be upon her husband's legal estate and against him. Yet it would be something which she could not enforce against him, assign to a third party, or renounce to the prejudice of the children or even herself. Her creditors could not reach it. Yet her right, with all the difficulties admitted, has been treated as an incumbrance on her husband's property, in her favor; and it has been likened to a mortgage.[3] But it is altogether unlike a mortgage in many respects. It cannot be assigned, or foreclosed or canceled by her. If the homestead is carved upon her own separate property, and her right remaining is in the nature of a mortgage, she would be both mortgagor and mortgagee — which is absurd.

The decision above cited in this section was rendered under a statute which has been superseded by one which makes the conveyance of his homestead, by a married man, absolutely void unless the wife joins in the deed.[4]

When both spouses unite in mortgaging the legal title to the

[1] Adams v. Beale, 19 Ia. 61.
[2] Chase v. Abbott, 20 Ia. 154.
[3] Howe v. Adams, 28 Vt. 541.
[4] Abell v. Lathrop, 47 Vt. 375.

land on which their statutory right of homestead rests, they create equities, in favor of the mortgagee, superior to their own. Thereafter, they hold the legal estate as trustees of the mortgagee.[1] But the mortgagee must exhaust, first, any property mortgaged by them on which the homestead right does not rest, if he holds two mortgages given by them, and one involves the homestead while the other does not. The wife, having signed both, is estopped from defeating the interests she has conveyed.[2]

After mortgages had been satisfied out of the proceeds of sale, by consent of junior judgment creditors who were parties to the suit in which the sale was made, the owners of the land claimed to have homestead rights which they demanded should be satisfied out of the remaining proceeds. The mortgages having been paid, the equitable "two fund doctrine" was inapplicable to them, and the junior lien-holders — the judgment creditors — were not subrogated to the rights of the mortgagees, and therefore could not resist the claim to homestead.[3]

The owner and his wife having joined in a trust-deed to secure a debt, thus incumbering their homestead, he died and she abandoned the occupancy of the home. The purchaser at the trustee sale sued the heirs for possession. It was held that his right must be postponed to the allowance given by statute in lieu of homestead, and that he acquired no title.[4]

§ 12. Conveyance to Pay Privileged Debts.

The husband alone may dispose of his own property, which has been dedicated as his homestead, to pay debts for which the property was liable before dedication and which bear upon it

[1] Threshing Machine Co. v. Mitchell, 74 Mich. 679; Screiber v. Carey, 48 Wis. 215; Fairbank v. Cudworth, 33 Wis. 358; Seatoff v. Anderson, 28 Wis. 215; Avery v. Judd, 21 Wis. 262.

[2] Thresbing Machine Co. v. Mitchell, 74 Mich. 679; Bank v. Truesdail, 38 Mich. 440; Sibley v. Baker, 23 Mich. 312; Searle v. Chapman, 121 Mass. 19; Hopkins v. Wolley, 81 N. Y. 77; Bank v. Roop, 80 N. Y. 591; Patty v. Pease, 8 Paige (N. Y.), 277; White v. Polleys, 20 Wis. 503; Ogden v. Glidden, 9 Wis. 46; Darst v. Bates, 95 Ill. 493; Niles v. Harmon, 80 Ill. 396; Jones on Mort., § 1632.

[3] *Ex parte* Carraway. 28 S. C. 233; *Ex parte* Kurz, 24 S. C. 468. (State Bank v. Harbin, 18 S. C. 425, is distinguished from the Carraway Case.)

[4] Abney v. Pope, 52 Tex. 288; McLane v. Paschal, 47 Tex. 370; Mayman v. Reviere, 47 Tex. 357; Terry v. Terry, 39 Tex. 313; Robertson's Adm'r v. Paul, 16 Tex. 472. *See* Saunders v. Howard, 51 Tex. 23.

afterwards, because there is no exemption as to such property liabilities.[1] Even where the wife's joinder and signature is required in homestead alienation, the rule seems to be relaxed when the purpose is to remove debts for which the property itself is liable.[2]

It was held that when there are two mortgages, and the prior one releases the homestead while the second one does not; and the junior mortgagee pays off the first mortgage, becomes therefore legally subrogated to the senior's rights, and then forecloses both mortgages together and buys the property at the sale, he gets title free from the homestead claim.[3]

A mortgage given by a husband and his wife on their homestead, resting upon lots held by them in common, he cannot recover for advances to pay it off after her death, when the money was earned principally by her minor children — his step-children — who lived with him and were beneficiaries of the homestead.[4]

Land already subject to a lien does not become relieved of it by the creation of the homestead estate upon it,[5] as has been elsewhere herein fully shown — exemption not interfering with the vested rights of lien-holders, and not having any reference to property debts.

The homestead may be validly hypothecated to secure a joint note of the husband and wife,[6] or of the husband alone,[7] both signing in either case. It may be validly hypothecated to secure any debt of theirs — there being no restraint whatever when both join in the act.

Husband and wife may join in deeding the homestead to secure a loan from the grantee, without divesting themselves of their homestead right, if they retain possession of the property: the deed being construed as a mortgage.[8]

[1] Hook v. Richeson, 115 Ill. 431; Chappell v. Spire, 106 Ill. 472; Nichols v. Overacker, 16 Kas. 59. (*See* Moore v. Reaves, 15 Kas. 150.) Dillon v. Byrne, 5 Cal. 455; Carr v. Caldwell, 10 Cal. 385; Peterson v. Hornblower, 33 Cal. 275; Amphlett v. Hibbard, 29 Mich. 298; Hopper v. Parkinson, 5 Nev. 233; Christy v. Dyer, 14 Ia. 438; Barnes v. Gay, 7 Ia. 26; Thurston v. Maddocks, 6 Allen, 427.

[2] Wood v. Lord, 51 N. H. 448; Burnside v. Terry, 51 Ga. 186.

[3] Ebert v. Gerding, 116 Ill. 216.

[4] Capek v. Kropik, 129 Ill. 509.

[5] Hook v. Richeson, 115 Ill. 431; Chappell v. Spire, 106 Ill. 472.

[6] Low v. Anderson, 41 Ia. 476.

[7] Rock v. Kreig, 39 Ia. 239.

[8] McClure v. Braniff, 75 Ia. 38.

CHAPTER XIII.

RESTRAINT OF ALIENATION — CONTINUED.

§ 1. Restraint — As to Excess.
2. Excess First Exhausted.
3. Sale of Interests in Homestead Property.
4. Assignment of Homestead.
5. Conveyance Strictly Construed.
6. Wife's Acknowledgment — How Construed.
§ 7. Wife's Joinder — In General.
8. Leasing, as Alienation.
9. Exchange of Homesteads.
10. Proceeds for Investment in a New Home.
11. Proceeds Held for General Purposes.

§ 1. Restraint — As to Excess.

The excess above the quantitative limit is under no restraint as to sale or mortgage.[1] The same is true of the excess above the monetary limitation. If property, including the homestead but exceeding the limit, be mortgaged by the husband alone, the lien will be void as to the homestead but valid as to the rest.[2]

It is not always practicable to sever the salable quantity, or the part representing the excess of value, after the whole has been nominally sold. Suppose forty acres to be the limit, and the farm including it to consist of sixty; fifteen hundred dollars the monetary allowance, and the farm sold at three thousand dollars, or fifty per acre: manifestly, it would not be just to make the purchaser pay fifty per acre for the excessive twenty acres which contain none of the improvements.

The validity of the sale of the excess in value or quantity may depend upon the prior disseveration of that excess from the homestead itself. If property including the homestead be sold and conveyed by one deed, how shall it be known what part of the object of the contract was legally conveyed?

[1] Pardee v. Lindley, 31 Ill. 174, 187; Barrett v. Wilson, 102 Ill. 302; Hait v. Houle, 19 Wis. 472.

[2] Boyd v. Cudderback, 31 Ill. 113; Smith v. Miller, 31 Ill. 161; Coe v. Smith, 47 Ill. 225; Black v. Lusk, 69 Ill. 70; Reid v. McGowan, 28 S. C. 74; Bank of La. v. Lyons, 52 Miss. 181; Johnson v. Poullain, 62 Ga. 376; Clark v. Allen, 87 Ala. 198; Wallace v. Harris, 32 Mich. 398; Ring v. Burt, 17 Mich. 465.

By what mode shall the contracting parties sever the proper quantity, reserved under the law, from the excess? How shall fifteen hundred dollars' worth of homestead be singled out from the overplus so as to leave the family undisturbed in its exact rights and privileges? Under the hammer of an official auctioneer, the whole of indivisible property may be sold, and the exempt part of the price handed over to the beneficiary. But the private sale of the homestead portion being void, there seems to be no method devised, of universal acceptance, by which the beneficiary of a limited homestead can voluntarily sell real estate including it without first effecting partition.[1] If the homestead has been marked off by metes and bounds, and the declaration thereupon duly recorded, there would be means, after sale of that with more land, by which the excess could be severed from the mass, and the conveyance would be good as to all but the homestead,[2] unless the purchaser, in consideration of the dwelling-house and improvements, has been misled to give more per acre than he would have given for the excess.

If not defrauded, and not disposed to give up his purchase for the reason above stated, the purchaser, buying the excess while yet intermingled with the exempt portion of acres, or value, may resort to a court of equity to have his exact purchase determined.[3]

In most of the states, the sale of the homestead by the sheriff upon execution is nugatory and the title void, if the property is not in excess of the statutory limitation of value.[4] And it is generally true, that a sale by the husband, under such circumstances, is void; the states which have no restraint are few. And the rule, both with regard to sheriff's sale and private sale by the husband, is that the title given thereunder is void when there is no excess of quantity or value in the homestead.

A sale, with reservation of the homestead, conveys the ex-

[1] Rhyne v. Guevara, 67 Miss. 139; Richards v. Chace, 2 Gray, 383.

[2] Winn v. Patterson, 9 Pet. 663; Danforth v. Wear, 9 Wheat. 673.

[3] Bank of La. v. Lyons, 52 Miss. 184; Ring v. Burt, 17 Mich. 465; Dye v. Mann, 10 Mich. 291; Black v. Lusk, 69 Ill. 74; Brown v. Coon, 36 Ill. 247; Pardee v. Lindley, 31 Ill. 187; Smith v. Miller. 31 Ill. 161.

[4] Barrett v. Wilson, 102 Ill. 302.

cess; but that excess must be subsequently ascertained; and, if there be none, nothing is conveyed; and the vendee, who has paid the price, is entitled to have it returned to him.

When a mortgage is given on land out of which a homestead is to be taken by the mortgagor, and it is reserved from the operation of the mortgage but is undefined, the extent of the reserved portion must be ascertained judicially before the foreclosure of the mortgage.[1] Just as in case of sale, with like reservation, nothing is mortgaged if there be no excess above the homestead limitation; the mortgagee gets nothing, and is entitled to have his money returned if he has paid any on the supposed or contingent mortgage. And the rule would be the same, if he had advanced the money under a judicial order; for, if he get nothing, he is entitled to have his money back in this case as in the other.

There would be no meaning in a relinquishment of the homestead right in a mortgage given before the existence of such right. To plead in defense to an action to foreclose that the land is a homestead is irrelevant. The plea, to be effective, should be that the land was a homestead when the mortgage was given.[2] For it could not be made such to the prejudice of the mortgagee after the lien had been fastened upon the land, in his favor. The defense, that the land was a homestead when the mortgage was given, is the same as to plead the invalidity of the mortgage.

A debtor mortgaged his plantation, describing it by metes and bounds, and also describing it as consisting of two hundred acres. It proved to embrace forty-two acres more, and he claimed homestead in the excess; but it was denied him. It was said that the claimed portion of land was within the boundaries described, and there was no distinct reservation; that a homestead cannot be carved out of the entire tract as against the lien imposed by the mortgage.[3] This case involved no question as to the validity of the mortgage given to the extent of two hundred acres. Had not the land been described by metes and bounds, only the stated acreage would have been mortgaged, and there might have been homestead allowed in the forty-two acres of excess.

[1] Adger v. Bostwick, 12 S. C. 64.
[2] Symonds v. Lappin, 82 Ill. 213.
[3] Reid v. McGowan, 28 S. C. 74.

A debtor may sell his homestead free from liens bearing on his other lands; and if he sell all together, the grantee will get an equitable title to the number of acres exempt, even though all may have been subsequently sold, by a creditor of his grantor, under execution. He may still have the exempt quantity, which he bought, carved out of the whole.[1] The execution sale is void, as to the homestead,[2] under such circumstances, while the private sale by the debtor is good, where he is not restrained from selling alone. And where the wife's concurrence is necessary and is given, the sale of the homestead is good, under like circumstances.

Where the method of dedicating homestead is only visible occupancy,[3] right of exemption begins from the date of occupancy, whether there has been special selection or setting apart of the portion exempt or not. The excess above the limit is still alienable, and still liable for debt, and still subject to administration upon the death of the householder if the executor or administrator then has the homestead separated from it. If he neglects this, and the widow continues to occupy the whole, she must pay the taxes and bear expenses on the whole.[4]

It seems that a wife, induced to join her husband in the mortgage of their homestead by the promise of the mortgagee that he would convey other property to her husband, cannot be deprived of her homestead by foreclosure of the mortgage when that promise has not been fulfilled. If the only consideration of the note and mortgage was the promise of the mortgagee to make the conveyance, and he never did this or offered to do it, he cannot enforce the collection of the note and mortgage upon any equitable principle. There would be no consideration for the mortgage. The mortgagor ought to be allowed to compel compliance on the part of the mortgagee; but, not doing so, the latter ought not to be allowed to foreclose.

Where an "estate of homestead" is created by statute in place of "homestead exemption" under a former law, an excess above the statutory limitation of homestead value is still

[1] Clark v. Allen, 87 Ala. 198.

[2] *Ib.*; Clark v. Spencer, 75 Ala. 49; De Graffenreid v. Clark, 75 Ala. 425; Hardy v. Sulzbacker, 62 Ala. 44.

[3] Ferguson v. Kumber, 25 Minn. 183; Barton v. Drake, 21 Minn. 299.

[4] Wilson v. Proctor, 28 Minn. 13.

liable to forced sale. The provisions of the two statutes are held virtually alike in this respect.[1] So, a householder, whose residence was worth fifty thousand dollars, was not protected from execution as to forty-nine thousand of its value. The "estate of homestead" was one thousand dollars' worth of the whole. This could be sold or conveyed by him only in the way pointed out by the statute; but there was no restraint upon his alienation of the rest. He did contract to sell his residence; and, on the purchaser's subsequent consent to accept a deed subject to homestead right of one thousand dollars, the court held the transaction valid though the grantor's wife did not sign the deed.[2]

A judgment lien does not attach to a homestead sold in good faith by its owner. But if the sale is merely colorable, made for the purpose of acquiring a new homestead and to enable the vendor to avail himself virtually of the exemption of two homesteads, the lien would attach — if the new homestead has been acquired not with the proceeds of the one sold.[3]

The right to sell is not questioned; the point is that there was no sale under the circumstances. Having bought a new homestead, the owner could not have exemption as to that and yet have it in the other which had not been really disposed of to get means of buying the new one.

The urban homestead, where it is not limited in area but in value, cannot be sold on execution by the sheriff so as to convey any excess. He must have the homestead laid off, and then sell the excess. If, however, the debtor has his residence on one side of a street, and an orchard or like property on the other which he has rented to a tenant, the latter may be subjected to execution.[4] The renting of the portion subjected to execution may be treated as an abandonment of the homestead right in it. Even if the residence portion was not worth the maximum which the law allows to a homestead, the other part, devoted to other than homestead use, may be subject to

[1] Watson v. Doyle, 130 Ill. 415, *424;* Moriarty v. Galt, 112 Ill. 377; Browning v. Harris, 99 Ill. 462; Eldridge v. Pierce, 90 Ill. 478.

[2] Watson v. Doyle, *supra.*

[3] Carver v. Lassallette, 57 Wis. 232; Carhart v. Harshaw, 45 Wis. 340, 347; Schoffen v. Landauer, 60 Wis. 334.

[4] Code of Miss. (1880), § 1251; Rhyne v. Guevara, 67 Miss. 139; Lazar v. Caston, 67 Miss. 275.

execution. There seems to be no reason for confining this rule to urban homesteads.

If there are surplus proceeds from the foreclosure of a mortgage given by husband and wife on land in which they had homestead right, that right attaches to the surplus, and the court may direct these proceeds to be invested in a new homestead for them.[1] They are entitled to this as against the general creditors of the husband.[2]

§ 2. Excess First Exhausted.

By the law of several states, when the homestead has been legally mortgaged with other property, it cannot be sold till all the rest has been exhausted; and the mortgagor may require the enforcement of his right in this respect.[3] When homestead, with other property, is made security otherwise than by mortgage, the same order of sale is observed.[4]

This requirement is made in tender and commendable solicitude for the preservation of homes, pursuant to the policy of the law. If the realty, in excess of the homestead, is sufficient to satisfy the mortgage, the creditor cannot complain of this order of proceeding to foreclose. If a senior mortgagee has been satisfied, and yet some of the excess remains unsold, a junior is required to exhaust it before selling the homestead.[5] And this would be required of any mortgagee, whatever his rank, wherever this rule of law prevails.

The right of the homestead mortgagors to have other property, included in the same mortgage, exhausted before the homestead be sold, may be supported by reason, in the ab-

[1] White v. Fulghum, 87 Tenn. 281; Bentley v. Jordan, 3 Lea, 353; Fauver v. Fleenor, 13 Lea, 624.

[2] *Ib.*; Gilliam v. McCormack, 85 Tenn. 609; Gwynne v. Estes, 14 Lea, 673. *Contra*, Parr v. Fumbanks, 11 Lea, 392.

[3] Frick Co. v. Ketels, 42 Kas. 527; La Rue v. Gilbert, 18 Kas. 220; Colby v. Crocker, 17 Kas. 527; Marr v. Lewis, 31 Ark. 203; Ray v. Adams. 45 Ala. 168; Bartholomew v. Hook, 23 Cal. 277; McLaughlin v. Hart, 46 Cal. 638; Brown v. Cozard, 68 Ill. 178; Dickson v. Chorn, 6 Ia. 19; Foley v. Cooper, 43 Ia. 376; Butler v. Stainback, 87 N. C. 216, *220;* Wilson v. Patton, 87 N. C. 318, *324;* McArthur v. Martin, 23 Minn. 74; Horton v. Kelly, 40 Minn. 193; Dunn v. Buckley, 56 Wis. 192; Lloyd v. Frank, 30 Wis. 306; White v. Polleys, 20 Wis. 530; Jones v. Dow, 18 Wis. 253; Lay v. Gibbons, 14 Ia. 377; Boyd v. Ellis, 11 Ia. 97.

[4] Spear v. Evans, 51 Wis. 42; Dunn v. Buckley, *supra.*

[5] Armitage v. Toll, 64 Mich. 412.

sence of any statute expressly conferring it. It is a proper presumption, that the husband and wife, when joining to create a lien upon land exceeding the homestead yet including it, or an unmarried householder when doing so, did not design to render themselves homeless unnecessarily. If the other property should prove sufficient to satisfy the mortgage, they would, as a general rule, mean that their home remain undisturbed.

On the other hand, it may be fairly assumed that the mortgagee understood this. Ordinarily, a mutual understanding to this effect would be inoperative without its expression as a part of the agreement; but, where the homestead is involved, both parties know the beneficent spirit of the law governing contracts which affect it.

The exemption right is not wholly and certainly waived by the hypothecation of the homestead with other property to secure debt; it is only contingently waived; the property only subjected to lien on the happening of a future event: the failure of the other property to satisfy the debt. For, besides the mortgagor and mortgagee, there is another party: the state, whose policy is to protect homes. This qualification of waiver may be said to exist wherever the law requires the exhaustion of other property before the homestead when both have been mortgaged together, if the mortgagors require it.

Can a junior mortgagee require a senior to exhaust the homestead to satisfy the first mortgage which rests on that and more land, that the junior may make his money out of the excess which is all that his mortgage covers?

A husband and wife duly mortgaged their homestead and more land. Subsequently, the husband alone put a second mortgage upon the land excepting the homestead. The senior mortgagee foreclosed and made the junior and certain judgment creditors parties to the proceeding. These parties contended that he ought to satisfy his lien from the homestead portion and leave the rest for them, to satisfy their claims.

The homestead right is such an interest as entitles the beneficiary owning it to require the exhaustion of other property of his, incumbered with it, to be first exhausted. It is such interest in the real estate of the married householder that it will vest in the marital survivor for life and, in the heirs of

the deceased owner, forever. It is exempt from execution for the benefit of the owner's family. It is alienable by the married owners alone.[1]

There is a principle that a lien-holder having choice of two funds, one of which is subject to the lien of another creditor, ought in equity to proceed against the one upon which the other creditor has no claim (if it be sufficient), so as to give the latter a chance to make his money.

This principle cannot be invoked to the injury of the creditor holding a lien on the double fund, or of the common debtor, or (as in this case) of the homestead beneficiaries.[2]

Unless there is statutory direction, it is not an invariable rule that the senior mortgagee must exhaust the homestead last. It has been held that when a mortgage covers the homestead with other lands, the mortgagee cannot be compelled, by another judgment creditor, to exhaust the homestead first.[3] Though such creditor's judgment may be a lien on land other than the homestead, out of which he could make his money if the other creditor, holding a mortgage on that and the homestead too, could be required to look only to the latter, yet he is powerless to compel such course. He may have nothing left to proceed against after the first judgment or mortgage has been satisfied, while the debtor retains his homestead.

This order of procedure is statutory. The rule may be stated thus: A mortgagee of the homestead cannot be compelled by other creditors of the mortgagor to exhaust other property covered by the same mortgage before foreclosing the homestead, *unless so required by statute.* He may exhaust the homestead first, if he chooses; he may relinquish his lien upon all but that, if he chooses; and neither the debtor himself, nor his wife as co-mortgagor, nor any of his judgment creditors, can control the mortgagee in this matter.[4]

[1] Comp. Stat. of Nebraska, ch. 36, § 17; Bonorden v. Kriz, 13 Neb. 121.

[2] McCreery v. Schaffer, 26 Neb. 173; Colby v. Crocker, 17 Kas. 527; La Rue v. Gilbert, 18 Kas. 220; Brown v. Cozard, 68 Ill. 178; McLaughlin v. Hart, 46 Cal. 638; McArthur v. Martin, 23 Minn. 74.

[3] La Rue v. Gilbert, 18 Kas. 220.

[4] Witherington v. Mason, 86 Ala. 345; Vancleave v. Wilson, 73 Ala. 387; Seaman v. Nolen, 68 Ala. 463; White v. Polleys, 20 Wis. 530; Chapman v. Lester, 12 Kas. 592; Seale v. Chapman, 121 Mass. 19; Brown v. Cozard, 68 Ill. 178.

A judgment creditor may require a homestead to be first exhausted by a mortgagee whose mortgage covers that and other realty, if it was dedicated as a homestead after his judgment had been obtained.[1]

The exempted amount in homestead cannot be claimed from the proceeds of two tracts, one of which was not the homestead, after both have been sold under vendor's lien, and nothing remained over from the homestead sale.[2]

There is no homestead against valid liens. Proceeds, to be exempt, must be in excess of what was required to satisfy the lien or liens on the homestead. If, though there was no excess of homestead proceeds, there was excess of proceeds from the sale of the other property which was sold at the same time, that excess would belong to the debtor, but not as homestead proceeds. It would not be exempt upon attack by another judgment creditor.

When, on the foreclosure of a mortgage, the debtor's land was first exposed to sale in separate tracts but had no bid, and then the whole including the homestead was sold together, it was held that the law requiring the exhaustion of other lands before the homestead had been observed by the first offering.[3]

[1] Bowen v. Barksdale, 33 S. C. 142; State Bank v. Harbin, 18 S. C. 425.

[2] Hayden v. Robinson, 83 Ky. 615.

[3] Brumbaugh v. Shoemaker, 51 Iowa, 148; 50 N. W. 493. Rothrock, J.: "1. The counsel for appellant in their argument say: 'No claim is made that the homestead was ever platted or recorded by the sheriff. The fact that the sheriff offered the one hundred and sixty acre tract in forties, ending with that on which Brumbaugh lived, and received no bid, is claimed to have been a substantial compliance with the statute.' In answer to this proposition, counsel cite us to Linscott v. Lamart, 46 Iowa, 312, and White v. Rowley, id. 680. These cases are not analogous to the case at bar. In Linscott v. Lamart it was held that the sale was void because the sheriff sold a part of the homestead in satisfaction of an execution for which the homestead was not in any event liable. In this case the homestead was liable after exhausting the other land embraced in the decree of foreclosure. In White v. Rowley the execution was for a debt contracted after the homestead right accrued. The homestead was in no event liable for the debt. There was a dispute as to the boundaries of the homestead. The plaintiff attempted to make a selection different from the government subdivisions, and claimed that the sheriff levied upon and sold part of the homestead. Under these circumstances, it was held that it was the duty of the sheriff to have caused the homestead to be platted. It will be

§ 3. Sale of Interests in Homestead Property.

Real estate, jointly owned by one Parks and his son, and occupied by the former and his wife to the time of his death, had been conveyed by the joint owners to a daughter of Parks, though the wife did not join in the conveyance, and though he remained in possession. Upon the death of both parents, the daughter conveyed to one Bolton. Meanwhile, creditors of Parks' sons had obtained judgment against them. Bolton knew of this judgment when he bought the property, and of the occupancy of the homestead by Parks, after selling to his daughter, to the time of his death.

Bolton brought an action in equity, against the judgment creditors, to quiet his title. It was held that Parks' undivided interest in the homestead property was not conveyed to his daughter, because his wife did not join in the conveyance;[1] that the creditors, as judgment lien-holders, had the right to question the conveyance, though Parks' heirs had not done so; that his undivided interest had descended to his wife and children; that the judgment was a lien on the shares of the two sons who were the judgment debtors; that those shares

observed that the plaintiff in that case supposed that the selection he had made was valid, and there was a dispute as to what constituted the homestead. In the case at bar there was no dispute. The plaintiff avers that a certain quarter of the quarter section was his homestead and that defendant knew it when he made the purchase. It is not a case where the boundaries of the homestead were in dispute. The precise question presented in this case was determined in Burmeister v. Dewey, 27 Iowa, 468, where it was held that a sheriff's sale in foreclosure of a mortgage should not be set aside where the sheriff first offered the land in forty-acre tracts, according to the government subdivisions, and, receiving no bids, then offered and sold the whole of the lands, including the homestead. It was there held that offering the lands other than the homestead in separate tracts, and endeavoring thus to sell before offering and selling in a body, was exhausting the other property, within the meaning of section 2281 of the revision. The same rule was followed in Eggers v. Redwood, 50 Iowa, 289. We are content with the reasoning and the conclusion reached in those cases, and are not disposed to overrule them. What we hold is that the sale is not void, and cannot be set aside upon the averments made in this petition. Whether the sheriff would be liable in a proper proceeding for a misapplication of a part of the purchase-money we do not determine, because he is not a party to this action, and no relief is asked against him. Affirmed."

[1] Iowa Code, § 1990; Belden v. Younger, 76 Ia. 567; Barnett v. Mendenhall, 42 Ia. 296; Alley v. Bay, 9 Ia. 509.

had been rightfully sold under execution to enforce the judgment; and that Bolton, being chargeable with knowledge, was not an innocent purchaser as to those shares, and therefore could claim no priority over the judgment creditors.[1]

The professional reader will perceive that this deliverance recognizes that homestead right may exist in property held by joint-tenancy. In states where this cannot be, such a transaction as that detailed above would have a different legal result. The sale by Parks and his son would have conveyed the whole property to the daughter; the sale by her to Bolton would have given all to him, and his suit to quiet title would have prevailed.

A verbal agreement for the transfer of a homestead, assented to by both husband and wife, followed by giving possession and performing the agreement, has been held to convey equitable title.[2] And when a father had thus agreed with his son and given him possession, and promised to pass legal title to him by his last will, the equitable title was held to have been passed, though the father revoked the bequest by a codicil to his will. The son had died, the equitable title was judicially recognized as being in his widow and children, notwithstanding the revocation of the devise.[3]

The sale of a homestead, by mortgage foreclosure to which the defendant's wife was not made a party, was held not to pass title, even to the half interest owned by him at the time of the incumbrance. The ruling was avowedly in deference to a prior decision, "without reference to our individual views upon the matter," the court said.[4]

A conveyance of land, embracing the homestead and more realty, though signed by the wife and acknowledged by her in proper form, fails to transfer the homestead if the conveyance expressly states that she joined her husband therein "solely for the purpose of relinquishing her dower interest in the land." Under the following statutory provision: "When

[1] Bolton v. Oberne, 79 Ia. 278, *citing* the foregoing cases on the point of the wife's non-joinder; and, on the last point, Lunt v. Neely, 67 Ia. 98.

[2] Drake v. Painter, 77 Ia. 731.

[3] Winkleman v. Winkleman, 79 Ia. 319.

[4] Thompson v. Jones, 77 Tex. 626, referring to a case between the same parties, 60 Tex. 94; and *citing* Campbell v. Elliott, 52 Tex. 151.

the homestead, after being reduced to the lowest practicable area, exceeds two thousand dollars in value, and the husband has aliened the same by deed, mortgage or other conveyance, without the voluntary signature and assent of the wife, shown and acknowledged as required by law, the husband, or, if he fails to act, the wife, or if there is no wife, or she fails to act, his minor children, may, by bill in equity, have the land sold, and the homestead interest separated from that of the alienee," it was held that such conveyance, by the husband alone, vested in the alienee no title of the homestead interest of two thousand dollars.[1]

Before the above provision was enacted, no means existed for carving a homestead, or saving its value, out of property worth more than the monetary limit yet indivisible: so a homestead thus circumstanced was deemed beyond the pale of constitutional protection, and a married owner could alien the whole without his wife's joinder.[2]

The method prescribed by the section quoted is sale of the whole realty by order of court to reserve from its proceeds the sum protected as exempt in lieu of the homestead. The purchaser gets good title to the whole, including the homestead, without the wife's signature, when the sale is under such order. The husband has the primary right to receive the sum reserved.[3]

A deed made by the husband alone conveys any excess of realty above the homestead interest. If he file a bill to enforce his lien on the whole of land which includes the homestead, the court acquires jurisdiction of the subject-matter. If it also has jurisdiction of the parties, it may require the complainant to do equity; and so may order a sale of the land and award two thousand dollars of the proceeds to the husband as his homestead interest. The court may do this instead of abating the purchase-money by two thousand dollars and decreeing the sale of the excess for the payment of the balance. The former is deemed the better course and the more equitable, since it saves the parties from the expense, delay

[1] Thompson v. Sheppard, 85 Ala. 611, *617;* Moses v. McClain, 82 Ala. 370; Ala. Code (1886), § 2538; Act of Feb. 9, 1877; Long v. Mostyn, 65 Ala. 543.

[2] Farley v. Whitehead, 63 Ala. 295.

[3] Thompson v. Sheppard, *supra.*

and inconvenience of another bill for the resale of the land to separate the homestead interest from that which is not exempt.[1]

§ 4. Assignment of Homestead.

The exemption right to a certain sum from the proceeds of a family residence sold under execution for debt is not an assignable interest. The husband alone may mortgage or sell the property in which this interest of the family exists, but cannot extinguish the interest by such act where the statute authorizes the carving of a homestead of the limited value, out of the property subject to that right and interest. The husband and wife together may yield their right by waiver but he alone cannot.[2]

When there had been judgment rendered against a wife, the owner of a homestead enjoyed by herself and her husband, she conveyed it by assigning her contract to purchase it. He did not join in the assignment, but both joined in abandoning the premises to the assignee. The judgment lien was held valid against the property — the assignment being absolutely void.[3]

The mortgagor should be made a party defendant, in foreclosure proceedings, though he has made an assignment yet claimed his homestead on which the mortgage rests. The assignee cannot represent him, unless the mortgage was acknowledged according to the statute of the state where the homestead was situated.[4]

Where notice is required, creditors not notified or included in the list of creditors filed in the probate court when homestead is assigned out of lands levied upon are not affected by the assignment. As to them, the proceedings setting the homestead apart are void.[5] The court remarked in a case involving this requirement: "It was said in the argument that the wife of a debtor is not supposed to know all his creditors.

[1] *Ib.*

[2] Bennett v. Cutler, 44 N. H. 69; Atkinson v. Atkinson, 37 N. H. 434; Gunnison v. Twitchell, 38 N. H. 72.

[3] Belden v. Younger, 76 Ia. 567. *See* Morehead Banking Co. v. Whitaker (N. C.), 14 S. E. 924.

[4] Dendel v. Sutton, 20 Fed. 787 (Ct. Ct., S. Dist. Illinois); Swenson v. Halberg, 1 Fed. 444.

[5] Wheeler v. Christopher, 68 Ga. 635; Boroughs v. White, 69 Ga. 842.

But she must know them if she wishes to bind them. In taking homestead, she represents her husband. She has only his right, and must comply with the law just as he would have to comply with it did he make the application in person."[1]

Exempt property may be excepted by the debtor from a general assignment.[2] It has been held that it may be thus excepted and claimed by the assignor, though he may have waived his right in favor of a preferred creditor.[3]

If his homestead is under mortgage, the claim of exemption cannot be made by the mortgagee, but it may be made by the mortgagor who makes the general assignment.[4] His homestead right is subject to the mortgage, and that right may be assigned.

An assignment to creditors, from which a homestead with more than the limit is excepted, does not convey the excess to the assignee.[5] This is simply because the excess was not assigned. It will be observed that the word *homestead* as used above is employed in the ordinary — not the technical sense. The assignee did not merely reserve his legally restricted and exempt family residence, but his family residence unrestricted. Had he exempted his homestead, in the sense in which the word is usually understood as a legal term, the assignment would have conveyed the excess.

An insolvent's homestead, so far as it is liable for debts contracted before it was dedicated, passes to the assignee, who may validly convey it. Should the conveyance be subject to the homestead right, that qualification will be understood as meaning any right against the order of assignment.[6]

An insolvent's assignment, with his homestead right reserved, creates no lien on a homestead set out for him before judgment, though the legal title of that has passed to the assignee with title to the rest of the property assigned. The debtor, however, can convey to a purchaser only his equitable interest after the settlement of the assignee's trust.[7]

Homestead exemption, considered as a personal privilege,

[1] Stewart v. Stisher, 83 Ga. 297–9.

[2] Hartzler v. Tootle, 85 Mo. 23, distinguishing Billingsley v. Spencer, 64 Mo. 355; McCord v. Moore, 5 Heisk. 734.

[3] *Re* Poleman, 5 Biss. 526.

[4] Edmondson v. Hyde, 2 Saw. 218.

[5] Wilhoit v. Bryant, 78 Cal. 263.

[6] Tilden v. Crimmins, 60 Vt. 546; Collender Co. v. Marshall, 57 Vt. 232; Vt. R. L., §§ 1901, 1920.

[7] Schuler v. Miller, 45 O. St. 325. *See* Halsey v. Whitney, 4 Mason, 206.

is not an assignable estate and does not run with the land. It is a possessory right which may be waived or abandoned.[1]

Before accepting any benefit of an assignment by the debtor in which he has reserved his right of homestead, a creditor may contest that right.[2] It is otherwise, if the creditor has accepted without objection to the reservation.

§ 5. Conveyance Strictly Construed.

The homestead can be conveyed, and the exemption right barred, only upon strict compliance with the terms of the law.[3] While an absolute sale in good faith by husband and wife may be valid under the constitution and laws of a state, executory agreements to sell, and sales containing conditions of defeasance, have been treated as nullities.[4]

When the constitution of a state prohibits the forced sale of a homestead, one holding a mortgage on such property cannot go into a federal court and, by action of ejectment, "get around the state constitution by the form of his proceeding."[5]

The mortgage, if valid, cannot be rendered nugatory without affecting the vested rights of the mortgagee. No doubt, by constitution or statute, the mortgaging of a homestead may be inhibited. Then the forced sale under mortgage may be forbidden — the mortgage itself being void. But if the mortgage, or any other lien, rested on the land before the homestead character attached to it, why may it not be enforced anywhere?

[1] Schuler v. Miller, 45 O. St. 330; McComb v. Thompson, 42 O. St. 139; Roig v. Schultz, 42 O. St. 165; Carpenter v. Warner, 38 O. St. 416; Chilcote v. Conley, 36 O. St. 547; Butt v. Green, 29 O. St. 667; Conley v. Chilcote, 25 O. St. 324.

[2] Creager v. Creager, 87 Ky. 449.

[3] Dickinson v. McLane, 57 N. H. 31; Barnett v. Mendenhall, 42 Ia. 296; Black v. Lusk, 69 Ill. 70; Vanzant v. Vanzant, 23 Ill. 485; Ives v. Mills, 37 Ill. 73; Moore v. Titman, 33 Ill. 360; Connor v. Nichols, 31 Ill. 148; Cross v. Evarts, 28 Tex. 532; Moore v. Dunning, 29 Ill. 130; Hoge v. Hollister, 2 Tenn. Ch. 606; Connor v. McMurray, 2 Allen, 202; Fisher v. Meister, 24 Mich. 447.

[4] An executory agreement to sell the homestead at a future time is void in Texas. Jones v. Goff, 63 Tex. 248; Hardie v. Campbell, 63 Tex. 292. But by the latter decision an absolute sale by the husband and wife is valid — not coming under the constitutional inhibition of "pretended sales" involving a "condition of defeasance." And *see* Astugueville v. Loustaunau, 61 Tex. 233.

[5] Lanahan v. Sears, 102 U. S. 612.

When a homestead is illegally mortgaged, the invalidity is not cured by the subsequent abandonment of the homestead by both the marital parties. Removal of both from the premises will not render the conveyance valid which was void when executed for want of the wife's joining in the deed.[1] As such conveyance is a nullity, it will be no bar or estoppel to the action of husband and wife in subsequently executing a valid deed.[2] The radical defect in the husband's sole deed would not be healed by his wife's subsequent death.[3]

It has been questioned whether the wife's desertion of her husband relieves from the requirement of a constitution that the mortgage of the homestead of a husband and wife must be signed by her to give it validity.[4] The question depends upon a prior one: Is she still his wife, and constructively a member of his family and a beneficiary of the homestead provision? If she never lived with him, it is held that he alone may sell.[5]

Both a mortgage and a sale, by the husband alone, may be good in part and bad in part. His sole disposition of the homestead, in either way, would be wholly bad; but there might be other land sold or mortgaged with it that would be validly conveyed by him. The nullity, as to the homestead, does not extend to the conveyance of other lands in the same instrument, not requiring the wife's signature in their alienation.[6]

Though the wife may claim to have signed a mortgage of the homestead in ignorance of the fact that the description of land, in the instrument, included it, she will be held to her act, in the absence of fraud or of anything said or done by the mortgagee to mislead her.[7]

Whether a sale under a mortgage is a "forced sale" has been thought to depend upon the question whether it is judicially done or otherwise. When a mortgage was foreclosed

[1] Phillips v. Stauch, 20 Mich. 369; Bruner v. Bateman, 66 Ia. 488; Lunt v. Neeley, 67 Ia. 97.

[2] Dye v. Mann, 10 Mich. 291; Amphlett v. Hibbard, 29 Mich. 298.

[3] Shoemaker v. Collins, 49 Mich. 597; Larson v. Reynolds, 13 Ia. 579.

[4] Martin v. Platt, 64 Mich. 629.

[5] Black v. Singley (Mich.), 51 N. W. 704; Stanton v. Hitchcock, 64 Mich. 316.

[6] Hanchett v. McQueen, 32 Mich. 22; Smith v. Rumsey, 33 Mich. 183; Griffin v. Johnson, 37 Mich. 92; Stevenson v. Jackson, 40 Mich. 702; Dye v. Mann, 10 Mich. 291; Wallace v. Harris, 32 Mich. 380.

[7] Peake v. Thomas, 39 Mich. 585.

by order of court, the sale was deemed a *forced* one; when the sale was by the mortgagee, pursuant to authorization in the instrument, it was held not to be a "forced sale," such as had been inhibited by the constitution and statute of the state where the distinction was made at the time the decisions making it were rendered.[1]

The distinction is thus drawn and illustrated: Forced sale is alienation against the presumed will of the debtor; so a mortgage, containing the mortgagor's assent to alienation, may be foreclosed without violating any inhibition of the forced sale of the property hypothecated, though it be a homestead.[2]

The mortgage of a homestead made by both husband and wife, regular in all respects except a defect in the description of the property conveyed, is susceptible of subsequent correction. It is not to be treated as void by creditors or any persons antagonistic to the conveyance. It precludes the attachment or execution of the property in disregard of it as a valid transaction. The defect may be corrected just as a conveyance from a person not married may be under like circumstances.[3]

An equity court will correct evident errors of description, admitted to be such by both parties when the conveyance is by husband and wife, of property including their homestead.[4] An absolute deed cannot be reformed into a mortgage to protect a wife's homestead, though alleged to have been intended and understood to be one by both husband and wife when conveying.[5]

If the property sold by husband and wife includes their homestead, it has been held that their right to enjoy the priv-

[1] Jordan v. Peak, 38 Tex. 439; Stewart v. Mackey, 16 Tex. 58; Sampson v. Williamson, 6 Tex. 102. Similar distinction was made in Illinois. Wing v. Cropper, 35 Ill. 264; Smith v. Marc, 26 Ill. 155; Ely v. Eastwood, 26 Ill. 108.

[2] Hart v. Sanderson's Adm'r, 18 Fla. 103, 115; Patterson v. Taylor, 15 Fla. 337. Mortgage of the homestead by husband and wife is allowed in Florida. First N. Bank v. Ashmead, 23 Fla. 379.

[3] Beyschlag v. Van Wagoner, 46 Mich. 91.

[4] Gardner v. Moore, 75 Ala. 394. And generally, as to error of description: Carper v. Munger, 62 Ind. 481; Houx v. County of Bates, 61 Mo. 391. *Contra:* Leonis v. Lazzarovich, 55 Cal. 52; Martin v. Hargadine, 46 Ill. 322.

[5] Barnett v. People's Bank, 65 Ga. 51; Act (Ga.) Dec. 12, 1871: "To provide for sales, etc."

ileges secured to them by law must be expressly conveyed by apt words or it will be presumed to have been reserved.[1]

There is no universally established rule that without express mention and waiver of the homestead right it will be deemed reserved. A warranty deed made by the husband and wife, and duly executed in all respects, is not everywhere deemed insufficient to release an unmentioned homestead right. The doctrine ought to be entertained and acted upon with caution, by the profession, even where the courts have avowed it. The doctrine has been denied.[2]

"The power of alienation is not derived from the statute relating to alienation of the homestead. It is an incident of the ownership of the property, independent of the homestead law; and the directions and prohibitions of the statute as to the alienation are mere restrictions upon this antecedent power. Without any such restrictions, the property passes by a conveyance, as if there were no homestead. No express waiver of the homestead is essential, unless the statute requires it, because, the property having passed by the conveyance, the homestead necessarily ceases."[3]

An instrument, signed by both spouses, need not state that the property conveyed is the homestead, since such averment is not necessary to the validity of the conveyance.[4]

The necessity of the joinder of both is not obviated by the husband's conveyance to the wife, and hers subsequently to a third person,[5] though his to her would be good as to title.[6]

The wife's sole signature to the transfer of the homestead right is very different from such individual action to relinquish dower.[7]

[1] Connor v. McMurray, 2 Allen, 202. *See* Greenough v. Turner, 11 Gray, 332; Redfern v. Redfern, 38 Ill. 509; Boyd v. Cudderback, 31 Ill. 113; Thornton v. Boyden, 31 Ill. 200; Smith v. Miller, 31 Ill. 157; Patterson v. Kreig, 29 Ill. 514; Miller v. Marckle, 27 Ill. 405; Hodge v. Hollister, 2 Tenn. Ch. 606.

[2] Waterman v. Baldwin, 68 Ia. 255; O'Brien v. Young, 15 Ia. 5; Babcock v. Hoey, 11 Ia. 375; Robbins v. Cookendorfer, 10 Bush, 629; Wing v. Hayden, 10 Bush, 280.

[3] Note by Mr. Freeman to Pool v. Gerrard, 65 Am. Dec. 482.

[4] Babcock v. Hoey, 11 Ia. 375; O'Brien v. Young, 15 Ia. 5; Reynolds v. Morse, 52 Ia. 155; Van Sickles v. Town, 53 Ia. 259; Waterman v. Baldwin, 68 Ia. 255.

[5] Spoon v. Van Fossen, 53 Ia. 494.

[6] Harsh v. Giffin, 72 Ia. 608. *See* Luther v. Drake, 21 Ia. 92, rendered under another statute.

[7] Sharp v. Bailey, 14 Ia. 387; Fuller v. Hunt, 48 Ia. 163; Wilson v. Christophen, 53 Ia. 481; Eisenstadt v. Cra-

§ 6. Wife's Acknowledgment — How Construed.

Courts strictly require the observance of the law respecting the wife's examination and acknowledgment apart from her husband, while they readily lend the ear to her subsequent complaints of duress, fraud and undue influence.[1] But the rule is not to be pressed to the point of injustice.[2] The wife's signature to a sale or mortgage must be her free act. Procured by duress, it is of no validity.[3] The effect is the same if she sign when insane, or wanting in mental capacity so as to prevent her from acting with free and intelligent volition,[4] though there may be circumstances under which the rights of an innocent mortgagee will be maintained.[5]

The wife's signature is not essential to an agreement to convey property fraudulently acquired as a homestead.[6] If not validly acquired, and not a homestead, the exemption provisions do not apply: so, if the property fraudulently acquired is susceptible of sale, the husband alone may sell. And if the property was lawfully acquired, yet the homestead character fraudulently created, he alone may sell.

When her signature has been obtained by fraud practiced upon her by her husband, she may repudiate the act provided the rights of the other contracting party are not infringed. But it has been held that the fraudulent inducement and deceptive statements of the husband to the wife will not militate against the rights of an innocent grantee or mortgagee when the wife has actually signed the instrument.[7] On such points as this, the practitioner must look to the statutes and judicial rulings of his own state, since no general rule can be stated. There can be no doubt, however, that if the other contracting party is privy to the fraud practiced by the husband upon the wife, she may have the deed set aside.

mer, 55 Ia. 753. *Compare* Reynolds v. Morse, 52 Ia. 155.

[1] First N. Bank v. Bryan, 62 Ia. 42; Westbrook v. Jeffers, 33 Tex. 86; Cross v. Everts, 28 Tex. 532; Nichols v. Nichols, 61 Vt. 426; Helm v. Helm, 11 Kas. 19.

[2] Morris v. Sargent, 18 Ia. 90; Norton v. Nichols, 35 Mich. 150; Howstienne v. Schnoor, 33 Mich. 274; Lawyer v. Slingerland, 11 Minn. 447.

[3] First Nat. Bank v. Bryan, 62 Ia. 42.

[4] Alexander v. Vennum, 61 Ia. 160.

[5] Abbott v. Creal, 56 Ia. 175.

[6] Muir v. Bozarth, 44 Ia. 499.

[7] Edgell v. Hagens, 53 Ia. 223; Van Sickles v. Town, 53 Ia. 259; Etna

A conveyance, in which the grantor and grantee design to defeat the interest of the wife in the estate of her husband, is void as to her interest. Such design is presumed when the contracting parties know that the effect of the conveyance would be to deprive her of her right, were it valid. The invalidity is not avoided by the fact that there was a valid consideration.[1]

Under the inhibition of the "mortgage or the alienation of the homestead . . . without the voluntary signature and assent of the wife,"[2] it is held that an instrument of conveyance, duly signed, sealed and acknowledged, but inoperative for non-delivery, cannot be enforced as to the homestead, but may be, as to the husband, in equity proceeding, treating the instrument as a contract to convey.[3]

If the wife's signature to a deed by her husband, for the relinquishment of her dower, be attested by two witnesses, though it be not separately acknowledged where the statute requires separate acknowledgment by her in assenting to the conveyance of the homestead, it will prove effectual to validate the conveyance upon the abandonment of the homestead and the acquisition of another one before the delivery of the deed to the grantee.[4]

Life Ins. Co. v. Franks, 53 Ia. 618; Sawyer v. Perry, 62 Ia. 238; Miller v. Wolbert, 71 Ia. 539; Rubelman v. Rummel, 72 Ia. 40.

[1] Nichols v. Nichols, 61 Vt. 426; Ladd v. Ladd, 14 Vt. 194; Thayer v. Thayer, 14 Vt. 118; Jenny v. Jenny, 24 Vt. 324; Jones v. Spear, 21 Vt. 426; Prout v. Vaughn, 52 Vt. 451; McLane v. Johnson, 43 Vt. 49; Edgell v. Lowell, 4 Vt. 405; Van Wick v. Seward, 18 Wend. 385–7; Cunningham v. Freeborn, 3 Paige, 557; Habergham v. Vincent, 2 Vesey, Jr. 204; Read v. Livingston, 3 Johns. 500; Hyslop v. Clarke, 14 Johns. 458, 465; 1 Story, Eq., § 629; Bump's Fr. Cov. 282–3; Schouler, Ex. & Adm'rs, § 220; Nichols v. Nichols, *supra;* Bassett v. McKenna, 52 Vt. 438; Robinson v. Stewart, 10 N. Y. 189; Sands v. Codwise, 4 Johns. 536; Holland v. Cruft, 20 Pick. 321.

[2] So in Const. of Ala., art. X, § 2.

[3] Jenkins v. Harrison, 66 Ala. 345, and cases cited.

[4] This under Alabama Code, §§ 1894, 2508, as construed in the case of Woodstock Iron Co. v. Richardson (Ala.), 10 So. 144. Coleman, J.: "When this case was before the court at a former term, it was held that a conveyance of the homestead, in all respects effectual for that purpose, except that it was not acknowledged by the wife as required by law, was a nullity; and that a proper acknowledgment made by the wife after the death of the husband did not defeat or affect the title of the heirs. This conclusion necessarily resulted from well-settled principles

The signature of the wife to a mortgage, or any species of alienation, is inoperative to divest her of her home protection, when obtained by fraudulent misrepresentations by which she was induced to sign the instrument. Even though she is in

of law, as declared by repeated decisions of this court, and many of them being referred to in the opinion. Richardson v. Iron Co., 90 Ala. 268; 8 South. Rep. 7. The question presented on this appeal was not considered in that opinion, and could not have arisen from the evidence as then stated in the record. The undisputed facts, as they appear in the present record, show that the instrument was signed and dated and properly attested by two witnesses, but not acknowledged by the wife in the manner required by law for the conveyance of a homestead, and a few days prior to its delivery to the grantee. That, at the time it was signed, dated and attested, the grantor and his wife occupied as a homestead the land described in the instrument. The testimony further shows that at that time the husband and owner of the land contemplated and was preparing to change his homestead, and a few days thereafter actually removed to and occupied another and different place as his homestead. The evidence further shows that, prior to his removal, the grantor and grantee were negotiating for the sale and purchase of the land then occupied as a homestead, and, in pursuance of the understanding between them, the instrument was prepared, signed, dated and duly attested, as above stated. The evidence further shows that the grantor retained the instrument in his own possession and under his control until he had acquired a new homestead. That subsequent to his removal to the newly-acquired homestead the purchase-money was paid for the premises conveyed, and the deed, without the acknowledgment by the wife, delivered to the grantee. These facts are not controverted. 'Delivery is essential to give effect to a deed; . . . that, though signed, attested or acknowledged, so long as the grantor retains control over it,—so long as he does not part with it,—with the purpose that it shall inure to the grantee, title will not pass from him.' Jenkins v. Harrison, 66 Ala. 356; Elsberry v. Boykin, 65 Ala. 340. A deed or other writing only takes effect from its delivery. Stiles v. Brown, 16 Vt. 565. A deed duly signed and dated, but delivered at a subsequent date, takes effect only from the date of delivery, and the delivery cannot relate back, so as to vest title from the date of the deed. Mitchell v. Bartlett, 51 N. Y. 453. Notwithstanding there is a written date, the true date may be shown by extraneous evidence, even in the most solemn instruments, as deeds under seal. Lee v. Insurance Co., 6 Mass. 219. The deed only takes effect from the actual time of its delivery, and the actual date of delivery will always control the date mentioned in the deed. Tied. Real Prop., § 812; Smith v. Porter, 10 Gray, 66; Newlin v. Osborne, 67 Amer. Dec. 268. Acceptance by the grantee is essential to pass title from the grantor and to the validity of the deed. Tied. Real Prop., § 814; 66 Ala. 356, *supra*. The writing and signing a note on Sunday is not the execution of it on that day, unless it be delivered on that day to the payee; delivery being essential to make it operative as a contract. If delivered on a subsequent

fault for not reading before signing, there may be circumstances under which she should not be held to an agreement thus evidenced: as when the notary before whom the act was acknowledged was himself the inducer, for his own benefit.[1]

"A mortgage of the homestead, to be of any validity, requires that the 'joint consent' of both the husband and wife should be given thereto; and this consent must not be brought about by any fraud, deception, or misstatement of any material facts by the other party to the alienation, but must be the voluntary and intelligent consent of both the husband and wife."[2] And her consent must be in writing.[3] And if she has failed to assent, and the mortgage was fraudulently given by the husband, she cannot make it valid by a subsequent act, since proceedings that are criminal cannot be ratified.[4]

A wife cannot be bound by any mortgage, assignment or contract of any sort which deprives her of that home protection which the law vouchsafes to her in providing that her residence (within restrictions as to quantity or value, or both) shall be exempt from forced sale for debt. No lien can be created or enforced against such home, against her will, though she may have no legal title in or to the property. Her husband cannot change the character of any validly existing lien, or the rank of a mortgage, by his contract, nor re-create a lost lien, unless he do so jointly with her, or with her consent.[5]

One buying a homestead of a husband and wife gets good

day, not Sunday, it takes effect as a valid instrument from the day of delivery. Flanagan v. Meyer, 41 Ala. 135. It is legally impossible to have two homesteads at the same time. Boyle v. Shulman, 59 Ala. 569. If the wife had died after the husband acquired a new homestead, and before the delivery of the deed, according to all the principles of law cited in the foregoing authorities, the deed took effect from the day of its delivery. The principle involved in the present appeal is vitally different from that adjudicated on the former appeal. Under the facts stated we do not doubt the purchaser received a good title. Reversed and remanded."

[1] Warden v. Reser, 38 Kas. 86, in which the following cases are *distinguished:* Roach v. Karr, 18 Kas. 534; Ort v. Fowler, 31 Kas. 478. Nor when induced by violence. Helm v. Helm, 11 Kas. 19.

[2] Bird v. Logan, 35 Kas. 228.

[3] Jenkins v. Simmons, 37 Kas. 496.

[4] Howell v. McCrie, 36 Kas. 636.

[5] Jenkins v. Simmons, 37 Kas. 496; Spencer v. Fredendall, 15 Wis. 666; Campbell v. Babcock, 27 Wis. 512; Barber v. Babel, 36 Cal. 11; Snell v. Palmer, 12 Bradw. 337; Tolman v. Leathers, 1 McCrary, 329; Anderson v. Culbert, 55 Ia. 233.

title though apprised of the fact that the husband alone has previously sold it.[1] But under such circumstances, as under any other, the wife must sign the deed, since her verbal assent to the sale or incumbrance of the common homestead is never of any force or effect.[2]

A chancery court will not specifically enforce, as an executory agreement to convey, a conveyance by husband and wife of their homestead, when the certificate of acknowledgment is substantially defective, on the averment that the examination and acknowledgment were rightly made but not so certified by the officer. Nor will such court reform a certificate on such showing. The wife's interest is not conveyed.[3] But a mistake may be reformed by such court, when the execution of the mortgage is regular, yet there is an error of boundary description duly proven.[4]

A substantial compliance with the requirement that the wife be examined apart from her husband, shown by the certificate, will suffice. If it is certified that she signed voluntarily without constraint or threat on the part of her husband, the certificate may be received as sufficiently formal.[5]

[1] Garlock v. Baker, 46 Ia. 334.

[2] Donner v. Redenbaugh, 61 Ia. 269; Stinson v. Richardson, 44 Ia. 373; Clay v. Richardson, 59 Ia. 483; Anderson v. Culvert, 55 Ia. 233; Clark v. Evarts, 46 Ia. 248. But it was held that ratification, where there are defects of form, may be either express or presumed from acts. Spafford v. Warren, 47 Ia. 47.

[3] Cox v. Holcomb, 87 Ala. 589; Ala. Code (1886), § 2508; Balkum v. Wood, 58 Ala. 642; Jenkins v. Harrison, 66 Ala. 345; Blythe v. Dargin, 68 Ala. 370; Scott v. Simons, 70 Ala. 354; Gardner v. Moore, 75 Ala. 394 (*see* McBryde v. Wilkinson, 29 Ala. 662); Stovall v. Fowler, 72 Ala. 77; Allen v. Kellam, 69 Ala. 442; Watson v. Mancill, 86 Ala. 600; Russell v. Rumsey, 35 Ill. 362; Johnson v. Taylor, 40 Tex. 360; Hutchinson v. Ainsworth, 63 Cal. 286; Kottenbroeck v. Craft, 36 O. St. 584 (*see* Warrall v. Kem, 51 Mo. 150); Gibb v. Rose, 40 Md. 387. Code of Alabama, section 1894, provides that, when a wife relinquishes her dower, "her signature must be attested by two witnesses, . . . or acknowledged by her," etc. Section 2508 provides that an alienation of a homestead by a married man shall not be valid "without the voluntary signature and assent of the wife, which must be shown by her examination, separate and apart from him, and prescribes the form of the certificate of her acknowledgment.

[4] Witherington v. Mason, 86 Ala. 345. *See* Daniels v. Lowry, 96 Ala. 519; Code, § 2508.

[5] Homer v. Sconfield, 84 Ala. 313; Alabama Code (1886), § 2508. Liberal construction as to grantee. Gates v. Hester, 81 Ala. 357; Sharpe v. Orm,

Omission of saying she signed without *threat* was held fatal to the certificate.[1]

If there be no requirement of law that the wife shall be examined separate from her husband upon signing a mortgage or other conveyance, courts cannot hold her act inoperative when she signs with her husband and the certificate shows that fact, but not examination apart.[2]

The purpose of requirements that the wife must sign, must be examined apart, and must acknowledge, is to make sure that she gives consent to the conveyance. So, if her name is not in the body of the instrument, her signature may show her consent, being sworn and certified. If the clerk's certificate is in the proper form and avers her acknowledgment, and is conclusive on other matters, it is held that it cannot be contradicted by evidence that the wife was not examined apart from her husband.[3]

The wife's signature, duly obtained, binds her, though her name may not have been used in the instrument she signs.[4] But when it is stated, in the concluding part of the deed, that she signs merely to relinquish her right of dower, the signature will not be evidence of her consent to the entire deed.[5]

A clerk of probate may take the wife's acknowledgment and make the certificate,[6] he acting as the minister of the

61 Ala. 263. Substantial compliance, when no fraud charged. Miller v. Marx, 55 Ala. 322; Moog v. Strang, 69 Ala. 98; Downing v. Blair, 75 Ala. 216. Parol counter-testimony. Barnett v. Proskauer, 62 Ala. 486. *Compare* Strauss v. Harrison, 79 Ala. 324, as to substantial compliance.

[1] Motes v. Carter, 73 Ala. 553, under statute, acts of 1876–7 (Ala.), p. 33. As to notary's certificate, etc., *see* Morrell v. McDonald, 66 Ala 572; Coleman v. Smith, 55 Ala. 368; Miller v. Marx, 55 Ala. 322.

[2] Jones v. Roper, 86 Ala. 210, under Code Ala. (1876), § 2822, act of April 23, 1873. *See* Code Ala. (1886), § 2508. Cahall v. Citizens' Association, 61 Ala. 232; Miller v. Marx, 55 Ala. 322; Lyons v. Conner, 57 Ala. 181; Scott v. Simons, 71 Ala. 352; Butts v. Broughton, 72 Ala. 294. The wife, owning the homestead, need not be examined apart when conveying with her husband, in Alabama. Dawson v. Burrus, 73 Ala. 111; Weiner v. Sterling, 61 Ala. 98; Forsyth v. Preer, 62 Ala. 443; Cahall v. Building Ass'n, 61 Ala. 232.

[3] Shelton v. Aultman (Ala.), 8 So. 232.

[4] Shelton v. Aultman, 82 Ala. 315; Hood v. Powell, 73 Ala. 171.

[5] Long v. Mostyn, 65 Ala. 543.

[6] Shelton v. Aultman, 82 Ala. 315; Halso v. Seawright, 65 Ala. 431; Hood v. Powell, 73 Ala. 171.

court, presumably authorized by it. His authority may be questioned.[1]

Under the provision that the conveyance of a homestead by a married man must be separately acknowledged by his wife, to give it validity, she is too late when she waits till her widowhood before making the acknowledgment. The title of the decedent's heirs is not affected by such a tardy act.[2] The title of the decedent not having been divested before his death, nothing can be done by the widow to affect their rights.[3] The principle is well founded that a deed, void for want of the wife's acknowledgment, cannot be validated by her after interests of third parties have intervened. She cannot make subsequent acknowledgment to their prejudice.[4]

§ 7. Ib.: Wife's Joinder — In General.

The law does not require a wife to join in selling that which she does not own; it does not make her one of the grantors of a homestead owned by her husband, when it makes her consent, and even her signature to the deed, necessary to the validity of the conveyance. She is not required to assume the responsibility of the conveyance, nor any liability as a seller: for she conveys nothing — sells nothing. She merely assents to her husband's selling his own property which the law inhibits his selling without her consent; she signs to show that assent. Conveyance is void without it.[5]

[1] Russell v. State, 77 Ala. 89.

[2] Richardson v. Woodstock Co., 90 Ala. 266; 8 So. 7.

[3] Cahall v. Ass'n, 61 Ala. 246; Jackson v. Leek, 12 Wend. 105; Shoenberger v. Zook, 34 Pa. St. 24.

[4] Smith v. Pearce, 85 Ala. 264; Wilson v. Mills (N. H.), 22 A. 455. Clark, J.: "The defendant did not release her homestead by signing her husband's mortgage, without witnesses or seal, after it was delivered and recorded. Under the act of 1851 no release or waiver of the homestead exemption was valid 'unless made by deed executed by the husband and wife, with all the formalities required by law for the conveyance of real estate.' The defendant has a life-estate in the premises set off to her as a homestead, as against the plaintiff's mortgage. Parkinson v. McLane, 57 N. H. 31; Lake v. Page, 63 N. H. 318; 1 Atl. Rep. 113. The mortgage note was not signed by the defendant. It was neither her debt, nor a contract respecting her property, and, being a married woman, she could not bind herself by a promise to pay it, either by way of contract or estoppel. Bank v. Buzzell, 60 N. H. 189. Case discharged."

[5] Hood v. Powell, 73 Ala. 171; Ca-

The married debtor's house, on leased land, claimed and occupied by him as his homestead, cannot be conveyed without his wife's signature attached after examination apart from him, where the law requires such joinder in the conveyance of real-estate homesteads.[1]

Though an unmarried owner contracted to borrow money and mortgage his land to secure the payment, if he marry between the dates of the agreement and its execution, it is held that his wife will have her homestead right in the property, notwithstanding the fact that the lender be ignorant of the marriage when accepting the mortgage instrument and parting with his money.[2] In such case, the lender is deceived and morally defrauded by the borrower, but the transaction is legally consummated at the date of the signing of the mortgage, which, being invalid as to the homestead for want of the wife's signature, fails to defeat her homestead right.

The lender would thus be greatly wronged, but the rights of the wife are not lost or affected by the fraudulent acts of the husband.[3] It cannot be safely said that, in every state, the mortgage of land by one who is single when he makes the contract, and is married when he executes the mortgage, and who takes the money of the mortgagee who believes him to be still unmarried and who therefore relies upon the mortgage as valid, will deprive the wife of any homestead right as against the mortgage. The better view, perhaps, is that she would acquire such right by marriage; that the mortgage would be void; that the money would be fraudulently obtained, and that the lender could recover it from the false mortgagor.

An attorney in fact may convey the homestead of a husband and wife when duly authorized by them to do so.[4] But if not duly authorized; if the wife was not privily examined apart from her husband before signing the power of attorney, he

hall v. Cit. Mut. Ass'n, 61 Ala. 232; Long v. Mostyn, 65 Ala. 543; March v. England, 65 Ala. 275; Dooley v. Villalonga, 61 Ala. 129; Seaman v. Nolen, 68 Ala. 463; Roger v. Adams, 66 Ala. 600.

[1] Watts v. Gordon, 65 Ala. 546.

[2] Tolman v. Leathers, 1 McCrary, 329.

[3] Eli v. Gridley, 27 Ia. 376.

[4] Jones v. Robbins, 74 Tex. 615 (*distinguishing* Jones v. Goff, 63 Tex. 253); Patton v. King, 26 Tex. 686; Cannon v. Boutwell, 53 Tex. 626; Warren v. Jones, 69 Tex. 462, 467.

would have no authority as their agent to convey,[1] unless the property had been abandoned as a homestead.[2]

A wife, who did not join her husband in giving a power of attorney to sell his land to pay debts contracted before the exemption law had been adopted by constitutional provision, was denied homestead in the land.[3] She never had had any claim, as a homestead beneficiary, against such antecedent debts. The reason why the husband was competent to apply the land to the satisfaction of such debts is that there never was homestead as to them. The land was liable to judgment, judgment-lien, execution and forced sale for those debts; so, to pay them without force, the husband alone may sell the land to get the means of doing so.

The wife's sole signature (the husband's being wanting) to the transfer of her homestead right is very different from such signature to relinquish dower. In the latter case it would be effectual, but not in the former.[4] The reason is obvious. The dower right appertains to her alone, and she alone may relinquish it. The homestead right is involved with the family comfort and privilege, of which she and her husband together are made the managers. Her signature is as important as his, in the giving of it up; though the title may be wholly in him.

Where the wife's signature to the alienation of a homestead owned by her husband is not required by law to give the conveyance efficacy, the only purpose of her signing is to relinquish her right of dower. She has no legal interest in the property, present or future; no vested right; no means of preventing conveyance, though she may lose her home by it.[5]

Signing and acknowledging "solely for the purpose of relinquishing dower interest" as stated in the deed, the wife does not convey her homestead interest, though the deed purports to convey the entire property and is signed by both her and her husband.[6]

[1] Jones v. Robbins, *supra;* Johnson v. Bryan, 62 Tex. 624; Langton v. Marshall, 59 Tex. 296; Ruleman v. Pritchett, 56 Tex. 483.

[2] *Ib.*

[3] Leonard v. Mason, 1 Lea, 384.

[4] Wilson v. Christopherson, 53 Ia. 481; Eisenstadt v. Cramer, 55 Ia. 753. *Compare* Reynolds v. Morse, 52 Ia. 155.

[5] Klenk v. Noble, 37 Ark. 298.

[6] Thompson v. Sheppard, 85 Ala. 611.

He alone cannot sell the homestead, though it exceed the maximum limitation;[1] and she cannot be said to have joined in the sale when she expressly limits her signature to the relinquishment of her dower.

Warranty of the title of homestead property by husband and wife is binding upon both.[2] The title may be in the husband alone, so that he alone is really the grantor, and she merely a renunciator of the homestead right; but, in such case, if there is a contract of warranty in the deed, and she knowingly signs it after all the requirements of law have been observed, she is like a third person stepping in to sign and take upon himself the obligation of warranty.

The purchaser of a homestead from a husband and wife, evidenced by a deed duly executed, given in payment of a pre-existent debt, obtains good title though the husband may have fraudulently induced his wife to join in the conveyance — the purchaser being ignorant of that fact.[3]

A purchaser of property previously conveyed by a married owner was held unaffected by notice that the prior sale was invalid because not made jointly by the husband and wife.[4] A purchaser without notice of the invalidity of the previous alienation of a homestead is free from a claim of prior date to that of the establishment of the homestead right, where the creditor has not recovered judgment and thus created a lien on the premises.[5] Ordinary antecedent debts are not property debts, and therefore cannot be in the way of the free conveyance of the homestead. They become property debts only when a judgment lien has been created. They differ from other ordinary personal debts in their susceptibility of being converted into property debts of the homestead.

After a husband had mortgaged his property, both himself and his wife joined in the sale of it. Subsequently she bought it. When the mortgagee came to foreclose, she claimed homestead in the land, but was denied.[6]

[1] *Id.*

[2] Amos v. Cosby, 74 Ga. 793.

[3] Webb v. Burney, 70 Tex. 322; Hussey v. Moser, 70 Tex. 42; Henderson v. Terry, 62 Tex. 284; Pierce v. Fort, 60 Tex. 464; Williams v. Pouns, 48 Tex. 144; Pool v. Chase, 46 Tex. 210; Miller v. Yturria, 69 Tex. 549.

[4] Lunt v. Neeley, 67 Ia. 97.

[5] Higley v. Millard, 45 Ia. 586.

[6] Johnson v. Van Velsor, 43 Mich. 208.

A wife may join in mortgaging her own land to secure her own debt, or her husband's, and the lien will bear on the included homestead.[1] She is not bound by a mortgage when she does not join in the act, though the land be simply held under title-bond.[2] Whether her signature is requisite to validity, in any case of mortgage or sale (when she has no title in herself), depends upon her relation to the homestead estate or right of herself and the family which she, with her husband, represents. In other words, whether there is homestead or not.

When no part of land mortgaged is the homestead, the wife's signature is superfluous. A subsequent selection of a part of the mortgaged land, by the owner (the mortgagor), as his homestead, and its occupancy as such by himself and his family, would have no effect on the mortgage. It could not be treated as invalid for want of the wife's signature.[3] If valid when executed, the mortgage remains valid, unaffected by the subsequent declaration of homestead. It has been fastened upon the property; the land has become a thing indebted; and it would be novel indeed, and unjust, to allow the mortgagors to deprive the mortgagee of his conventional lien by anything that they could do short of payment.

§ 8. Leasing, as Alienation.

When ordained by a constitution or statute, that the homestead of a husband and wife shall not be alienated without their joint consent,[4] the inhibition is applicable to a lease which deprives the beneficiaries of their occupancy of the home. The husband alone cannot lease the premises without his wife's joinder, though with her knowledge and verbal acquiescence. A husband leased his homestead of eighty acres to a gas company for twenty-five years, giving them the privilege of prospecting for coal, and for gas, oil and other minerals; and of erecting engine houses, storehouses, derricks and other machinery.

Nearly a year afterwards, when the lessee had entered upon the premises and expended large sums in erecting machinery

[1] Drye v. Cook, 14 Bush, 459.

[2] Griffin v. Proctor's Adm'r, 14 Bush, 571.

[3] Gibson v. Mundell, 29 O. St. 523; Boreham v. Byrne, 83 Cal. 23, *28*.

[4] Const. of Kansas, art. 15, § 9; Comp. Laws of Kas. (1879), ch. 38, § 1.

and buildings and in boring wells, both husband and wife contracted to sell the homestead; and they recognized the lease, but did not recite it, in the contract. The recognition did not correspond with the lease that had been given in some material particulars. This contract to sell was followed by a conveyance in due form and substance, regularly signed by both husband and wife. This sale was succeeded by one from the grantee to a land company: so the case now considered was between the two companies.

The trial court found that one of the conditions of the lease from the husband to the gas company was that the lessee "shall not materially or unreasonably interfere with the occupation and use of said premises," by the lessor and his family, as a homestead, or "enter upon the surface of the land purchased and platted . . . into lots and streets, or drill or sink shafts thereon, but is entitled to the gas, coal, oil and other mineral, under the surface." On the other hand, the appeal court said that the lessee had power, under the lease, to occupy any part or the whole of the homestead. These different conclusions, or inferences from the lease, are important when the question, whether the wife's occupancy of the homestead was disturbed by the lease, is made a factor in the settlement of the main question, whether the husband was inhibited by the constitution from leasing without his wife's consent. The trial court found for the gas company: the supreme court did not affirm the decision.

The latter held that the lease of a homestead, by the husband alone, is such alienation as the above-cited constitution and statute prohibit, if it give the lessee possession of the premises in such a way as to interfere with the wife's possession and enjoyment of them. And, after reciting the facts, and showing that the wife's silence when the lease was given, her recognition of the existence of a lease when she signed the contract to sell, and her knowledge of the transaction, did not amount to such "consent" as the legislator had contemplated, the court reversed the judgment and remanded the case.[1]

[1] Land Co. v. Gas Co., 43 Kas. 518; 516; Coughlin v. Coughlin, 26 Kas. Pilcher v. At. etc. R. Co., 38 Kas. 116.

It is to be inferred that the leasing of a part of the homestead without his wife's consent and without disturbing her occupancy of the home would not have been considered such alienation as is prohibited. The whole homestead is doubtless expressed when the constitution says *a homestead;* and the inhibition is that it "shall not be alienated without the joint consent of husband and wife when that relation exists." Leasing for twenty-five years — for ten — for one — is all the same so far as its character as a species of alienation is concerned.

§ 9. Exchange of Homesteads.

Whoever may sell his homestead may swap it for another. Man and wife may do so where their joinder is requisite to sale or mortgage. The new homestead acquired by exchange must have the same record notice to the public that was necessary to the old, in states where record is required, such as filing the title, inscribing *Homestead* on its margin, or the like. If both the exchanged properties were exempt before the mutual transfer, both the contracting parties should furnish such record evidence, each for his own new acquisition.

The voluntary exchange of a homestead for property not previously exempt does not have the effect of giving it the exempt character, as a general rule. The legislator has specified the kind of property to which it gives protection from the creditor, and does not leave that discrimination to the debtor. So when that which the law exempts has been voluntarily given by the owner for something not clothed with such immunity, or has been converted into money (unless the money is held temporarily as a means of obtaining other property exempt by law), the exemption does not attach (as a general proposition) to that which is taken in lieu of exempt property.[1]

It is not essential, where property is exchanged, that the realty given for a homestead shall have been exempt. That which is received may have its homestead character from

[1] Andrews v. Rowen, 28 How. Pr. 128; Scott v. Brigham, 27 Vt. 561; Edson v. Trask, 22 Vt. 18; Schneider v. Bray, 59 Tex. 668 (explaining Wolfe v. Buckley, 52 Tex. 641, and Whittenberg v. Lloyd, 49 Tex. 633); Friedlander v. Mahoney, 31 Ia. 315; Wygant v. Smith, 2 Lans. (N. Y.) 185; Pate v. Fertilizing Co., 54 Ga. 515; Watkins v. Blatschinski, 40 Wis. 347.

other causes — not from the peculiar nature of the land or money given for it.[1] The realty given in exchange may be wild land, or mill property or business houses — not a family home. The realty received may be a farm, or a house and lot in town, ready for family habitation and homestead dedication, or it may have been the exempt home of another now received free from liens.

If the property received in exchange is itself legally exempt, it does not lose this characteristic by the transaction.

The rule applies to chattels, so that an article exempt may be given for another similar article belonging to the exempt class, without the loss of legal protection from execution; and, as a general, though not universal rule, real property may be exchanged with like result.

As an exempt farming utensil may be so worn out that a new one is needed in its place, so an exempt family dwelling may be in such need of repair that it had better be traded off for a new house. While the new one would come into the possession of the exchanger with all the existing burdens upon it (just as the old one would go with whatever liens for purchase-money, taxes, improvements or other liabilities which it might bear), it would have such immunity in the future as its predecessor had possessed.

There is difference, however, between exempt chattels and realty dedicated as homestead, in this: No particularized farming utensil, oxen, household furniture, or the like, is designated, marked, branded or set apart as exempt before the executioner comes; the debtor is allowed by law certain kinds of articles, but he is not required to have them distinguished from the rest of his personalty by dedication, recordation or any act, beforehand; he may therefore swap horses or any chattel, and hold as exempt what he happens to have, within the legal exemption, when the officer comes to sell his goods. It is rarely required that exempt chattels shall be described and recorded, but, where required,[2] the exchange of them is like that of recorded homesteads; the thing taken in exchange is not necessarily exempt by reason of the recordation of what was given in exchange. The homestead, in many

[1] Emporium Ass'n v. Watson (Kas.), 25 Pac. 586.

[2] Dean v. King, 13 Ired. (N. C.) 20; Lloyd v. Durham, 1 Winst. (N. C.) 288.

states, must have been previously selected according to forms of law; in most of them, must be actually occupied by the family as a home; and, when allotted by the court just before execution directed against realty in general, it must be in a state of occupancy — except where the law merely exempts a given value of realty without special regard to its homestead character.

The ordinary creditor, being without a lien to secure his debt, is not concerned in the exchange, by his debtor, of one piece of exempt property for another, whether it be real or personal. He loses no right or remedy, since he had none against the property first held by his debtor.

The law applicable to the exchange of homesteads is so simple, and so general in all the states, that it seems unnecessary to extend the treatment of the subject to any great length. The decisions of a single state may suffice to illustrate the subject.

It is generally allowed that an old homestead may be changed for a new one, but not everywhere minutely provided how, and under what circumstances, it may be done. Where it is authorized that the owner may change the metes and bounds, and the record of the plat and description, from time to time, or may make an entire change, but "shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her right or that of the children,"[1] the new homestead, if itself free from incumbrances when selected, takes the place of the old in relation to debts contracted prior to the first selection and during its continuance.[2] Though the new home is liable for debts ante-dating the selection of the old one,[3] it is not for those subsequently contracted and not prosecuted to judgment,[4] unless the value of the new place exceeds that of the first[5] — other money being requisite to its purchase besides the proceeds of the first homestead — so as to render it answerable for obligations to the extent for which the sum

[1] McC.'s Ia. Code, § 3175 (2000).

[2] Sargent v. Chubbuck, 19 Ia. 37; Elston v. Robinson, 21 Ia. 531.

[3] Bills v. Mason, 42 Ia. 329.

[4] Pearson v. Minturn, 18 Ia. 36; Robb v. McBride, 28 Ia. 386.

[5] Lay v. Templeton, 59 Ia. 684; Benham v. Chamberlain, 39 Ia. 358.

newly invested was liable. The fact that additional money has been invested will not render any part of the new home liable unless its value is greater than the old one was. The burden of proof is on him who alleges that his new homestead was bought with the proceeds of the old, for the purpose of having it declared free from claims prior to its origin.[1] And when it was impracticable to find what part of the value of the farm was exempt before its exchange for another, the new homestead could not be relieved from a debt existing at the date of the exchange.[2]

The holder of a homestead exchanged it for a half interest in another property in which he already owned the other half interest. The latter half continued to be subject to a judgment lien created before the exchange.[3] Changing residence from one place to another, and complying with the exemption laws so as to make the second take the place of the first as a homestead, operates so as to make a general judgment lien, then bearing on the second, apply to the first, while the second is relieved from it, just as the first was exempt before the exchange: so it has been held.[4]

An owner who gives up one for another homestead, and has the latter conveyed to his wife, does not thus forfeit the protection against the debts which could not be urged against the first property. The second occupies the same exempt position, as though he had taken the title of it in his own name.[5]

Changes in the metes and bounds of a homestead cannot be made to affect the rights of a mortgagee, or any third person, without the consent of the party interested, and that of both husband and wife when the homestead-holder is married.[6]

§ 10. Proceeds for Investment in New Home.

In making an exchange, reasonable time is allowed with regard to the investment of the proceeds of the old exempt residence in the purchase and establishment of a new one, the removal from one home to the other, and the like.[7] During

[1] First N. Bank v. Baker, 57 Ia. 197; Paine v. Means, 65 Ia. 547; First N. Bank v. Thompson, 72 Ia. 417. *See* Atkinson v. Hancock, 67 Ia. 452, and Coad v. Neal, 55 Ia. 528.

[2] Paine v. Means, 65 Ia. 547.

[3] Thompson v. Rogers, 51 Ia. 333.

[4] Furman v. Dewell, 35 Ia. 170.

[5] Jones v. Brandt, 59 Ia. 332.

[6] Goodrich v. Brown, 63 Ia. 247.

[7] Cowgell v. Warrington, 66 Ia. 666; Watson v. Saxer, 102 Ill. 585.

such interval, debts contracted are as though incurred after the dedication of the new home, unless the debtor has fraudulently gained credit by holding out that his means of payment were not exempt.[1] They must be held for the distinct purpose of purchasing a new home, since they otherwise would be liable to garnishment[2] or any remedy of the creditor.

If one sells his homestead and invests the proceeds in property in a state other than that in which his homestead was situated, and afterwards sells that property, he cannot claim exemption for its proceeds on his return to his former state. The homestead character which had attached to the price received for his home would be lost by the investment in an other state.[3]

[1] Benham v. Chamberlain, 39 Ia. 358; State v. Geddis, 44 Ia. 537.

[2] Huskins v. Hanlon, 72 Ia. 37.

[3] Dalton v. Webb (Ia.), 50 N. W. 58. Granger, J.: "Prior to May, 1885, the plaintiff was owing the defendant Webb, which claim has since May, 1885, been placed in judgment, aggregating some $576.15. Prior to May, 1885, the plaintiff was the owner of four hundred and fifty-four acres of land in and about the town of Tabor, Iowa. In May, 1885, the plaintiff sold the entire tract to C. F. Lawrence for $15,000, which amount was exhausted by the payment of incumbrances on the land and an indebtedness of plaintiff to Lawrence. A very much disputed question in the case, and one of grave doubt under the evidence, is whether or not it was then agreed, as a part of the consideration for the land, that the plaintiff should continue to occupy his home on the land during his life, he then being a man some sixty-nine or seventy years of age. It is a fact that he continued to reside on the land, or a part of it, for two years after the sale, when a son of C. F. Lawrence, to whom part of the land had been deeded, paid to the plaintiff $2,500 to vacate the premises. Of this $2,500, $1,000 were paid on an indebtedness of plaintiffs to one Wadham, and of the remainder about $700 were invested in what the plaintiff now claims as his homestead, one-half being paid on the purchase price and the other half on improvements. The remaining $800 were by the plaintiff invested in an attempt to provide him a homestead in Nebraska, under the general homestead law, the money being used in buildings and other improvements on the land. Afterwards the homestead claim in Nebraska was sold for $1,350 and this amount was paid towards the present homestead of plaintiff. The present homestead was purchased of one Goodell, the purchase price being $2,150, the plaintiff assuming a mortgage thereon of $800. Plaintiff's statement in evidence is: 'For the property I now claim as a homestead I paid Mr. Goodell about $2,150. I took it subject to a mortgage of $800, paid $350 of the homestead money on it, and the balance was paid from money coming from Nebraska land.' For the purposes of the case we will assume that the $1,500 that plaintiff received from Lawrence in 1887 to

The circumstances of delay in procuring the new place may be such as to cut off from it the exemption that attached to the old. Investment of the proceeds of the latter in another state will debar the owner from claiming exemption from debts antedating the establishment of his new home pur-

vacate the premises are the proceeds of a homestead interest, without saying that such would be our finding upon a consideration of the evidence. The defendant Webb has, by an execution issued on his judgment, levied on the present homestead, and this action is to determine the liability of the homestead therefor. The district court decreed the homestead exempt. In doing so, we think, it erred. No more than $350 of the purchase price of a homestead representing a value of about $2,500 can be said to be the proceeds of the former homestead, unless we hold that the $1,350 for the Nebraska land were, when invested in this homestead, the proceeds of the former homestead, and to be protected as such. To so hold is to overrule the case of Rogers v. Raisor, 60 Ia. 355; 14 N. W. Rep. 317. That case, in its purpose, is an exact parallel to this, and the principle there announced is conclusive of the question we are considering. In that case the proceeds of an Iowa homestead were taken to Missouri and invested in a homestead there. Afterwards the Missouri homestead was sold and another homestead purchased in Iowa. It was sought to be subjected to the payment of a debt from which the former Iowa homestead was exempt. In deciding the case, the following language is used: 'What, then, was the character impressed on the proceeds of the Iowa homestead when taken to Missouri for re-investment? The laws of Iowa ceased to operate upon it, and to affect its character, as soon as it was invested in real estate in the state of Missouri. It was not the proceeds of the sale of a homestead under the laws of Missouri, for those laws can apply only to a homestead held under the laws of that state. It follows that the fund arising from the sale of the Iowa homestead, upon being carried into Missouri, lost the distinctive character of being the proceeds of a sale of a homestead.' The case holds that the new homestead in Iowa is not exempt. The $350 of the proceeds of the former homestead invested in the purchase price of this could not change the rule. The homestead laws receive and are entitled to liberal interpretation, but it should only be done within the spirit of the legislative purpose. At best but $800 of the $1,350 from the Nebraska land were ever the proceeds of a homestead, and under the rule announced that part lost its character as homestead property, and is no longer entitled to exemption. Some importance is attached to the fact that the wife did not go to Nebraska with her husband, nor consent to the use of the money there. It is true that she did not desire to go, and that plaintiff, because of her health, did not think she should, but the record does not show that she ever had or made any objection to the investment of the money there; nor does it appear that before the investment in Nebraska there was any purpose to invest it in the Iowa homestead. We think there should be a decree dismissing plaintiff's petition, and the cause is remanded for that purpose. Reversed."

chased by those proceeds when brought back. The proceeds have lost their exempt character and therefore cannot transfer it to the new purchase: so that comes into being with all the responsibility of an original establishment under the exemption laws.[1]

The proceeds of the sale of a homestead are exempt if "held with the intention to procure another homestead therewith" within the time prescribed by statute, or to complete a new homestead within such time.[2]

It is held that a statutory provision exempting the proceeds of a homestead for two years when held to purchase another, does not make it a condition that the holder shall remain in the state for the time, nor that he shall intend to purchase his new homestead within the state.[3] This is very generous towards other states. The policy of the law having state welfare in view by the conservation of homes is here broadened so as to aid in the protection of them in sister commonwealths: a commendable liberality, if the creditor be left out of sight. Were all the states to act upon the same principle, the stability of homes would be better secured.

The rule governing involuntary exchanges is that the property received in lieu of exempt property takes the exemption character, whether it had it before or not. Illustration is found where exempt property is burned, and the insurance paid takes its place under the protection of the law from execution.[4]

A homestead having been sold, and the price invested in a new exempt residence, there was not necessarily any interim when either the land or the price was liable for the ordinary obligations of the owner.[5]

If homestead land is exchanged for other land, or sold and

[1] Rogers v. Raisor, 60 Ia. 355.

[2] R. S. of Wis., § 2983; Bailey v. Stevé, 70 Wis. 316; Binzel v. Grogan, 67 Wis. 147; Scofield v. Hopkins, 61 Wis. 370; Hewett v. Allen, 54 Wis. 583.

[3] Hewett v. Allen, 54 Wis. 583.

[4] Houghton v. Lee, 50 Cal. 101; Cameron v. Fay, 55 Tex. 58; German Ins. Co. v. York (Kas.), 29 P. 586. *Contra* as to personal property in New Hampshire: Wooster v. Page, 54 N. H. 125; S. C., 20 Am. Rep. 128; Paul v. Reed, 52 N. H. 136; Manchester v. Burns, 45 N. H. 488; Morse v. Towns, 45 N. H. 185. *See* Brown v. Heath, 45 N. H. 168.

[5] Cheney v. Rosser, 59 Ga. 861. Providing for re-investment: McLellan v. Weston, 59 Ga. 883.

other land taken in payment with the design of living upon it as a homestead, it does not matter that the husband owned the former, and the deed to the latter is given to the wife. For homestead purposes, it is immaterial which spouse holds the title. The husband, as head of the family, is presumptively in possession when both live together and keep house on the property. This occupancy gives notice; so creditors of the wife are presumed to know that the property is the family homestead though the paper title be in her and not in the head of the household.[1]

[1] Broome v. Davis (Ga.), 13 S. E. 749. Bleckley, C. J.: "Before the translation of our Brother Lumpkin to this bench, though his judicial accuracy was remarkable, he shared in the fallibility which is inherent in all courts except those of last resort. In some rare instances he committed error, and the very last of his errors is now before us for correction. The facts of the case are correctly set forth in the reporter's statement. 1. It is settled law that property paid for in full with other property previously set apart, in due and proper manner, under the homestead and exemption laws, takes the place of the latter, and is impressed with the homestead character. Mitchell v. Prater, 78 Ga. 767; 3 S. E. Rep. 658; Murray v. Sells, 53 Ga. 257; Cheney v. Rodgers, 54 Ga. 168, 59 Ga. 861; Morris v. Tennent, 56 Ga. 577; Dodd v. Thompson, 63 Ga. 393. This is true, though the conveyance of the new property be made to the wife (*supra*, 78 Ga., 3 S. E. Rep., and 53 Ga.); or to the husband and wife (*supra*, 54 Ga.); and the homestead right can be asserted against a purchaser with notice (*supra*, 53 and 54 Ga.). A mortgagee stands on the same plane with a purchaser. Lane v. Partee, 41 Ga. 202. 2. Could the creditor and mortgagee of the wife, his rights having attached while the paper title to the land in controversy was in her, stand upon that title, and claim protection as a mortgagee without notice, notwithstanding the husband was at the same time in actual possession of the premises? Possession of land is notice to the world of whatever right or title the occupant has. Cogan v. Christie, 48 Ga. 585; Sewell v. Holland, 61 Ga. 608; Atkins v. Paul, 67 Ga. 97; Finch v. Beal, 68 Ga. 594; Association v. Atlanta, 77 Ga. 496. In this state, notwithstanding his reduced importance as a domestic factor, the husband is still the head of his family, and, though his wife may reside with him, she does not thereby divest his possession of the homestead, and make the possession her own. Presumptively he is the owner. Primrose v. Browning, 59 Ga. 69; Neal v. Perkerson, 61 Ga. 346; City of Atlanta v. Word, 78 Ga. 276. While for most purposes this presumption would be rebutted by the mere production of a conveyance from a third person to the wife, yet this alone should not excuse a stranger, about to give her credit on the faith of the premises, from consulting the husband touching his rights as the actual occupant. His possession, to be of any force at all as notice, must be treated as directing inquiry to be made of himself, and not as a suggestion to go to his wife and

§ 11. Proceeds Held for General Purposes.

When a homestead is voluntarily sold, its proceeds are not exempt, if held for general purposes.[1] Homes are not conserved by such sales. The very purpose of home exemption is thwarted by them. Exempt lands sold, and the proceeds converted into merchandise, are precisely as though exempt chattels were exchanged for other personal property of a character which the law does not hold inviolate from forced sale.[2]

Sometimes the term, *homestead*, is made to stand for a certain monetary exemption to the debtor, composed of realty and personalty, or either; and, under such provision, things taken in exchange for exempt property have been covered with the mantle of inviolability, when they were the same kind of property that had been given in exchange.[3]

When the price of the homestead is held with no purpose to convert it into a new home, it is as though it had been invested in stocks or merchandise, and is not exempt.

Intention to invest the proceeds of a homestead, voluntarily sold, in another homestead, must exist at the time of the sale to render them exempt. Illustration is given as follows: Smith never purchased or owned any land after selling his homestead, and there is nothing in the record [of the case being tried] that tends to show that he had any expectation of purchasing any, except his own testimony that he, at the time of the trial, intended to use the proceeds to buy another

deal with her upon what she might say, fortified by documents in her possession. So long as a man clings to his home in person, he has a right to be treated by strangers as the head of the family, and as entitled to answer for it and himself touching his right to be there and remain. If the true title to the property is in him, though the apparent title be in his wife, he cannot be driven out as the result of contracts of sale or mortgage made by her without his consent, and with persons who have not consulted him. Indeed, he would be incapable of effectually consenting to any sale or mortgage of homestead property, except with the approbation of the proper judicial officer. Code, §§ 2025, 5212, 5218. The judgment is reversed."

[1] Mann v. Kelsey, 71 Tex. 609; Watkins v. Davis, 61 Tex. 414; Schneider v. Bray, 59 Tex. 639; Cameron v. Fay, 55 Tex. 60; Whittenberg v. Lloyd, 49 Tex. 642; Pate v. Fertilizing Co., 54 Ga. 515; Friedlander v. Mahoney, 31 Ia. 315; Knabb v. Drake, 23 Pa. St. 489.

[2] Andrews v. Rowan, 28 How. (N. Y.) 128; Wygant v. Smith, 2 Lans. 185; Scott v. Brigham, 27 Vt. 561; Edson v. Trask, 23 Vt. 18.

[3] Morris v. Tennent, 56 Ga. 577.

farm as a home for himself and his family. There was no evidence that he had such intention at the time of the sale. So the court said: "We do not think that the money . . . is exempt from the payment of Smith's debts. . . . We think the intention to use the proceeds in procuring another homestead should be formed at or before the time of sale, and the intention should be to procure another homestead immediately. It would not do to form the intention two years after the sale, nor would a present intention to procure the homestead two years after be sufficient. If the party himself supposed that he could get along without a homestead, the law would not protect his money or his credits, and exempt them from the payment of his debts, merely because it supposed he needed a homestead. The law does not, *in express terms*, in any case exempt money or credits, merely because they are proceeds of a homestead. They are exempted only by a sort of equitable fiction drawn from the spirit of the homestead exemption laws, and adopted for the purpose of enabling persons to change their homesteads when they desire."[1]

If the sale is a judicial one, to enforce a lien, any surplus remaining cannot be applied to satisfy other debts not secured by lien.[2] But upon the death of both husband and wife leaving no minor children, and no other children occupying the premises, the late homestead may be sold under execution for ordinary debts.[3]

Since a homestead cannot be seized and sold under execution to satisfy debts for which it is not liable, the proceeds of a sale of a debtor's lands will be presumed not to embrace the price of the homestead. His claim to have any part of them exempt as such will be denied when the presumption has not been removed. Where "the constitution exempts the homestead from attachment, levy and sale by mesne process, it is a criminal offense for the sheriff to sell such homestead," it was held, "whether the homestead has been set apart to the debtor or not." Where this is law, the sale of a homestead is illegal and void. "This being so, the

[1] Smith v. Gore, 23 Kas. 488; S. C., 33 Am. Rep. 188.

[2] Mitchell v. Milhoan, 11 Kas. 617.

[3] Stratton v. McCandliss, 32 Kas. 512.

money in the hands of the sheriff can in no sense be regarded as its representative."[1]

The sale of exempt real or personal property by the sheriff is a nullity when the owner has not had the opportunity of claiming. And it has been held that money recovered of him by the owner, as damages, is exempt from attachment or execution.[2]

[1] Ross v. Bradford, 28 S. C. 71; Cantrell v. Fowler, 24 S. C. 428; Myers v. Ham, 20 S. C. 522; Hosford v. Wynn, 22 S. C. 309.

[2] Cooney v. Cooney, 65 Barb. 524; Tillotson v. Wolcott, 48 N. Y. 190; Andrews v. Rowan, 28 How. (N. Y.) 126; Hudson v. Plets, 11 Paige, 180; Stebbins v. Peeler, 29 Vt. 289; Keyes v. Rines, 37 Vt. 263; Mitchell v. Milhoan, 11 Kas. 617. *See* Temple v. Scott, 3 Minn. 306.

CHAPTER XIV.

RESTRAINT OF TESTAMENTARY DISPOSITION.

§ 1. How Restrained.
2. Devise is Not Alienation.
3. Authorization to Sell.
4. Deed, Will and Claim.
5. Testamentary Disposition Inhibited.
§ 6. Wills Consistent with Homestead Rights.
7. Willing the Homestead and More — Election When Necessary.
8. Spirit of Exemption Laws — Election.

§ 1. How Restrained.

As a general rule, the homestead is not subject to the last will and testament of the owner. The restraint is mostly by implication. Few statutes expressly forbid the disposition of homestead by will, but nearly all contain provisions inconsistent with that power.

(1) Exemption being authorized in favor of the family as well as its head, it would be defeated by devising the home so as to prevent its enjoyment by the beneficiaries.

(2) Present as well as future benefits being conferred on the wife and children of the householder, they may be deemed vested rights when consented to by the act of dedication on his part, so that he cannot divest them by will.

(3) The non-alienation clause, found in most of the statutes, which forbids a married owner from selling or incumbering the homestead by his sole act, may not inhibit testamentary disposition by him, if the clause is to be confined to its letter; but it usually means more than the literal terms express. Read with the other provisions usually accompanying it, it may mean that the homestead property shall not be passed from the married owner to any other person by any instrument made by him alone. This would not affect unmarried proprietors, as the restraint of alienation does not.

(4) The law of survivorship, applied to married homestead beneficiaries, is inconsistent with the power of disposition by will.

(5) Wills, when allowed with reference to homesteads, must not contravene statutory rights; and there can be none which cuts off the right of election between the interest conferred by testament and that conferred by statute. A will, to be legal, must be consistent with the homestead right. A will which gives the homestead beneficiary precisely what the law gives would not be invalid should it give more.

(6) The spirit of the homestead legislation is against any testamentary disposition of exempt realty which would defeat the purpose and policy of the law.

(7) The right to devise remains intact when not expressly or impliedly inhibited; and all laws inhibiting or restraining it should be strictly construed.

It is said that though there be a will, the decedent dies intestate, so far as his homestead is concerned, when his right to dispose of it by last testament is inhibited. His heirs take the homestead, though they be non-resident, and it has been bequeathed to resident legatees so far as the form is concerned. That is, in a state whose constitution exempts the homestead from forced sale under any process, and provides that this exemption shall accrue to the heirs of the homestead-holder, it is held that the property cannot be willed away from them.[1] It is true that disposition by will is not forced sale, nor any sort of sale; but the constitutional provision that the exemption shall accrue or inure to the heirs could be defeated if the owner could will it away from them.[2]

§ 2. Devise is Not Alienation.

The common restraint upon alienation, couched in such language as "the homestead shall not be alienated without the joint consent of husband and wife when the owner is married," is not literally a restraint upon testamentary disposition. Other provisions may put such disposition beyond the power of the owner, such as those vesting homestead right in the surviving spouse for life, in the minor heirs for the years of their minority, or those creating an estate of homestead with such characteristics as render it inconsistent with the owner's right of devise. But the usual non-alienation clause,

[1] Scull v. Beatty, 27 Fla. 426; 9 So. 4. [2] Fla. Const. 1868, art. 9, §§ 1, 3.

standing alone, cannot be extended to affect the right of willing the homestead, unless devise is a species of alienation.

Such a non-alienation clause[1] was construed as inhibiting testamentary disposition of the homestead by the head of a family having a wife and children, while, at the same time, it was held that no new right of property, or tenure, is conferred upon the widow as to either heirs or creditors. Without the exemption provision, heirs are not protected from creditors though the widow's dower is inviolable. With the provision, not only heirs, but the widow too, are protected, while her dower right remains as before. Hence it was concluded that the rights of the widow and children of a homestead-holder are not controlled or modified by his will in respect to the homestead. It will be noted that the court did not rely wholly on the non-alienation clause, but drew upon other provisions, to prove that the homestead was not subject to devise.[2]

Alienation is well illustrated by a sale — the property passing from the seller to the buyer. The former alienates — the latter receives. Properly it cannot be said that a thing is alienated to the buyer: it is alienated from the seller.

When an owner dies intestate, his property descends to his heir; but, as the heir is but a continuation of the ancestor, there is no alienation of the property. If the owner dies testate, his legatee succeeds to the property, but the testator cannot be said to have alienated it. Certainly, there was no such effect produced immediately upon the act of making his will. He was not then divested of any property right or interest. The devisee then had no right or title vested in himself. The testator still retained title, possession and control. He could modify or revoke his will at pleasure. He could make a new one with disposition of his property totally different from that first designed and expressed.

Not only the testator, but the state, is free to change the conditions of the will. The testament is as though it had never been made, so far as concerns the power of the state to control the making of devises. There is nothing vested — no right fixed which the state would impair by limiting, or even wholly denying, the will-making prerogative. The law author-

[1] Const. of Florida, art. IX.

[2] Brokaw v. McDougall, 20 Fla. 212, *225;* Wilson v. Fridenburg, 19 Fla. 461.

izing, regulating or forbidding testaments, or affecting rights of inheritance or legacy, may be changed at the will of the legislature so as to bear upon all existing wills while the testator lives, up to the time the property willed becomes vested in the devisee by the death of the testator. It is because the bequest is not to take effect till the death of the testator, and no right is vested till that event, that the rules of devise and descent are subject to change meanwhile.[1]

A will does not divest the owner of the property willed, for the power of alienation still remains in him to the day of his death. It transfers nothing to the devisee which he can alienate. The instrument is nothing more than the owner's written expression of intention, of which the law takes no account till he dies with his intention unaltered. It is what the owner wishes at the time he dies, evidenced by written expression duly executed, that the law respects. Then there is transfer from the testator to the devisee: but is that alienation?

Answer: "A will is never a conveyance. A conveyance operates in the life-time of the grantor, while a will does not operate until after the death of the maker. Of course death transfers all property, and a will says where it shall go; but this does not render a will 'a conveyance.' . . . It is the death that transfers the property."[2]

"When death occurs, the title to the property of the person dying must be transferred to some person. It cannot remain in the deceased, and the will simply designates where it shall go. The title may go to one or more of the persons occupying the property as a homestead, or it may go to some other person."[3]

"It is not the will alone, however, that determines where the property shall go, for the will operating alone would be powerless. It is the will, and death, and the statutes, operating together, that determine where the property shall go. Indeed, it is the statutes which give force and efficacy to all. A will, which is never operative or in force during the life-

[1] Cooley's Const. Lim. (Angell's ed.) 447; Henson v. Moore, 104 Ill. 403, 409; Sturgis v. Ewing, 18 Ill. 176; Strong v. Clem, 12 Ind. 37; Logan v. Walton, 12 Ind. 639; Noel v. Ewing, 9 Ind. 37.

[2] Comstock v. Adams, 23 Kas. 524.

[3] Martindale v. Smith, 31 Kas. 273.

time of the testator, is in this respect wholly unlike a deed or contract, which must have force and effect as soon as it is executed. . . . It is true that a deed or contract may transfer property upon a contingency, or upon a condition precedent or subsequent, or to be used or enjoyed only at or after some future time; but still, when the deed or contract is executed, rights become vested. . . ."[1]

Alienation is generally understood to be conveyance of title from one living party to another. It is defined as "the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law."[2]

When a mortgage is not a sale subject to conditions but is a hypothecation to secure debt, it is not an alienation.[3]

§ 3. Authorization to Sell.

The general right of a property owner to dispose of his property by will, when it is restrained by statute or limited or denied, is affected so far, and so far only, as the legislator designed — the statute being strictly construed. But if the right be denied, with exceptions made in a proviso, those exceptions must be construed in relation to the statutory inhibition, while the inhibition itself must be construed in relation to the common-law right.

It is ordained, by constitution, "that the general assembly shall enact such laws as will exempt from attachment and sale, under any mesne or final process issued from any court, to the head of any family residing in this state, a homestead in lands, whether held in fee or any lesser estate; . . . and every head of a family residing in this state, whether entitled to a homestead exemption in lands or not, personal property not to exceed in value five hundred dollars. . . ."[4]

[1] Vining v. Willis, 40 Kas. 609, *612*. Valentine, J., for the court, in exposition of Constitution of Kansas, art. 15, § 9: "A homestead . . . shall not be alienated without the joint consent of husband and wife, when that relation exists." Held, that testamentary disposition is not alienation.

[2] Bouv. Law Dict.

[3] Warren v. Raymond, 17 S. C. 178; Smith v. Grant, 15 S. C. 150; Simons v. Bryce, 10 S. C. 354.

[4] Const. of South Carolina, as amended in 1880. *See* art. I, § 20; art. II, § 32.

Pursuant to this requisition, the general assembly enacted: "No waiver of the right of homestead, however solemn, made by the head of the family, at any time prior to the assignment of homestead, shall defeat the homestead provided for by this chapter: *provided*, however, that no right of homestead shall exist or be allowed in any property, real or personal, *aliened* or *mortgaged*, by any person or persons whomsoever, as against the title or claim of the alienee or mortgagee, or his, her or their heirs or assigns."[1]

Treating this as a complete inhibition of all disposition of such property by the owner (except the methods mentioned in the proviso),—a rendering which seems broader than the statute,—the court, in construing the statute, completely reversed the question hereinbefore discussed relative to the alienation and the testamentary disposition of a homestead. Instead of asking whether prohibiting alienation carries with it a prohibition of devise, it asked whether authorization to sell or mortgage carries with it authorization to devise. This was right, conceding that the statute prohibited all disposition except by sale or mortgage.

The court said, in the case in which the above constitutional and statutory provisions were expounded,[2] of one who had willed his property to be sold to pay his creditors, that he might have claimed exemption and had the property assigned as his homestead, but, not having done so, his widow had that right, notwithstanding the will; that he might have precluded her right by alienating or mortgaging it;[3] and that the question presented by the case was whether his testamentary disposition was such an alienation in the sense of the act as to exclude her right to claim the exemption of the property after his death.

On this question, the court said:

"The provisions of the homestead law, in the circumstances authorizing the exemption, are general in their character, specifying the cases in which the exemption is excluded, *viz.*, alienation and mortgage by the debtor. These are clearly

[1] Gen. Stat. South Carolina, §§ 1997, 1998.

[2] Hendrix v. Seaborn, 25 S. C. 481, 484.

[3] *Citing* Homestead Ass'n v. Enslow, 7 S. C. 19; Smith v. Mallone, 10 S. C. 40.

exceptions to a general rule, and therefore are not to be extended or enlarged by implication. It is to be assumed that, if other exceptions, such as a legacy or devise, had been intended, they would have been added to the list."

By reference to the section under construction, it will be seen that the exceptions are not to the exemption but to waiver prior to assignment. Before the owner's residence has been assigned as a homestead exempt from forced sale, he cannot waive his right to have it assigned but he may sell the property or may mortgage it without being hindered by this inhibition of the right to waive the privilege of having it assigned as a homestead. The inhibition of disposition by will when the property has not been assigned may be inferred, however, from another provision of the statute which now will be considered.

After providing how the family residence may be claimed and assigned as exempt, the legislature enacted: "If the husband be dead, the wife or children; if the father and mother be dead, the children living on the homestead . . . shall be entitled to have the family homestead [residence] exempted in like manner as if the husband or parents were living. . . ."[1] That is to say, the head of the family may have his residence clothed with the homestead character, if he choose; or, should he not, his widow may; or, should neither do so, the children may, after the death of the parents. This provision seems to imply that the father and husband cannot defeat this right of the widow and children by any testamentary disposition that would put the residence out of the family. This implication seems to accord with the spirit of the statute.

The situation is peculiar. The state is interested in the preservation of homes and may pass laws tending to keep them in the families occupying them, if the property right of the owners is not arbitrarily taken away and given to others. The right to have the family residence assigned as exempt with the corresponding onerous conditions is left optional with the owner. But, prior to his election, restraint of testamentary disposition is foisted upon him, according to the decision under review — and there is no design now to question the constitutionality of the restraint. Not only is the restraint

[1] Gen. Stat. So. Car., § 1997.

prior to his election to have homestead assigned, but contingent rights of wife and children are created prior to homestead designation. No doubt the state may regulate will-making, or forbid it, but a law to that effect should have general bearing. This point, however, will not now be discussed. It will be assumed that the section under consideration gives the wife and children the right to have homestead assigned in the family residence if the husband-father has died without exercising his right to have it done, and that he cannot defeat their right by devising it beyond their reach.

It has been suggested that the father-husband, as to his right of homestead, is like the first taker in a fee conditional after issue born. He may alien by deed but not by devise. The transfer must take place in his life-time or descend to the heirs of limitation *per formam doni*. And the suggestion was supported by reference to alienation or forfeiture by a joint-tenant so as to defeat the *jus accrescendi*, who cannot, on the other hand, devise the property, for the reason that the devise cannot take effect till his death when it goes to the survivor.[1]

The illustration is sufficiently apt, if inhibition of the husband's right to devise be first established while the right to sell remains; but, if used in argument to prove the inhibition, it would be the assumption of the proposition sought to be established.

The testator (in the case mentioned)[2] had never exercised his right to have his residence assigned as a homestead, and might have paid his debts with it by selling it while he lived. Not doing so, his wife succeeded to the right of having homestead assigned, if the will to have it go to pay debts was nugatory. It does not appear that the property was exempt from forced sale prior to its acquisition of the homestead character at the instigation of the husband, or the surviving wife, or of their orphan children.

§ 4. Deed, Will and Claim.

Smith and wife deeded their homestead to their sons, subject to a deed previously made by him to her as trustee for

[1] Jones v. Postell, Harper (S. C.), Hendrix v. Seaborn, 25 S. C. 481, 92; Burnett v. Burnett, 17 S. C. 552; *486.*

[2] Hendrix v. Seaborn, *supra.*

the sons' benefit. He willed the same property to them, subject to the deed of trust he had given to her. She accepted the executorship under the will; but, afterwards, upon her remarriage, claimed homestead in the estate which consisted of other realty besides the homestead that had been both deeded and willed to the sons.

What was the legal effect of the two instruments — the deeds to the sons and to the wife? asks the court — and answers: "Evidently they form part and parcel of one transaction and must be construed together and also in connection with Smith's will. . . . These papers are drawn in the form of deeds, but in many of their features they certainly partake very strongly of the nature and character of testamentary instruments. . . . And looking at these instruments in the light of all the facts of this case exhibited by the record, we would, we think, be justified, if necessary to do so, in holding them to be deeds of apportionment made in contemplation of death, which can only be given the effect intended, by the parties, by treating them as testamentary instruments. If so, then unquestionably there was a homestead belonging to Smith at his death. And the fact, that his wife may have consented to the disposition of it by these testamentary instruments, will not authorize her to claim for herself and child to whom the homestead has thus been conveyed, the value of a homestead out of other property belonging to the estate."

Considered as absolute conveyances, they vested the homestead in the sons: so the widow could not have another, the court held. But if Smith was insolvent when he conveyed to them; "if the effect is to hinder, delay or defeat the claims of creditors, as it [the conveyance] was voluntary, it is certainly fraudulent and void as to them. . . . Their right . . . is superior to that of any one claiming under a voluntary conveyance." And the court denied that other property of the estate could be withdrawn from liability to creditors by being set apart as a homestead to the widow after the previously-existing one had been voluntarily conveyed in fraud of their rights. "The homestead exemption cannot be distorted in this way, so as to be made an engine of fraud upon the rights of creditors." The claim for a second homestead

out of non-exempt lands, in lieu of the first which had been voluntarily conveyed, was denied.[1]

If the sons took by the joint deed of the husband and wife, the subsequent will of Smith would seem superfluous as to the homestead. If that deed be considered as a testament, the fact of her signing it would not make it operative as *her* will while she yet survived; it would be his only — and subject to the objection that he could not will the homestead away from her. The right view seems to be that it was a deed in which she joined and thus cut off all her homestead rights in that property and precluded herself from claiming its equivalent in other property at the expense of creditors.

A testator, who had never had any homestead set apart to him, willed his property to his wife for life and in trust for his minor children. She had the homestead assigned to her and the children, notwithstanding the will, and against the remonstrance of a judgment creditor of the deceased husband. This was sustained by the court.[2] It is said, in the reported opinion, that the property set apart "did not vest by the death of the husband in any one, but by his will was transmitted to the wife and minor children for whose benefit the exemption is sought."

If the husband could not have had a homestead set apart to himself, *after* the judgment lien had attached, so as to affect the creditor's right, could the widow dislodge the lien by any application of hers, or by any action upon it? Unless exemption is made to precede the setting apart — to attach by mere occupancy — the creditor's right was complete upon judgment. The point of the decision is that the widow had the right of having the homestead assigned when the decedent had failed to do so, which seems indisputable, as she was the head of a family and the occupant of the premises, and the property had been transmitted to her for life in trust for the children, by will, without possibly cutting her off from any of her statutory rights.[3] And an estate not thus willed, but carved out of the husband's separate property, is exempt

[1] Woodall v. Rudd, 41 Tex. 375.
[2] Bridwell v. Bridwell, 76 Ga. 627.
[3] *See* Hodo v. Johnson, 40 Ga. 440; Akin v. Geiger, 52 Ga. 407; Mims v. Ross, 42 Ga. 121; Gunn v. Miller, 43 Ga. 377; Georgia Code, § 2002.

as to creditors; but adult heirs should not be prejudiced concerning their rights.[1]

A testator willed land to his widow and children. They occupied it as their home; and the widow's portion, being not more than the law allows for a homestead, she had it laid off as such. She held this, not as the technical "widow's homestead," assigned to her from her late husband's estate, but as a homestead in her own property, devised to her and held in fee. Had it been the former, it could have been sold by her creditors subject to her life occupancy, and the occupancy of the decedent's children during their minority, for the debts she had contracted subsequent to its acquisition; but, being the latter, it could not be sold by creditors. As the head of a family, a woman has the same rights of homestead as a man; when she owns property dedicated as a homestead, it is the same as if he owned property so dedicated.

In the instance above stated, if only a widow's homestead from the decedent's estate had been assigned her as a widow, the legal title would have been in the heirs; but, as the title was in her by virtue of the will, she had the right of alienation under the laws of her state, and this right is held inconsistent there with the right of creditors to sell it for her debts; for the court considered her in the precise attitude of a purchaser of a homestead who subsequently has contracted debts from which it is exempt.[2]

§ 5. Testamentary Disposition Inhibited.

The disposal of the homestead by testament may be inferentially forbidden by provisions inconsistent with it. An enactment that it shall descend to the surviving spouse is such a provision. The following section of a statute is illustrative: "The surviving husband or wife shall be entitled to hold for the term of his or her natural life, free from all claims on account of the debts of the deceased, the homestead of such deceased, as such homestead is or may be defined in the statutes relating to homestead exemptions."[3]

[1] Lee v. Hale, 77 Ga. 1; Kemp v. Kemp, 42 Ga. 523; Griffin v. Griffin, 42 Ga. 523; Roff v. Johnson, 40 Ga. 555; Hodo v. Johnson, 40 Ga. 440.

[2] Allensworth v. Kimbrough, 79 Ky. 332; Gen. Stat. of Ky. 433-5; Lear v. Totten, 14 Bush, 104; Brooks v. Collins, 11 Bush, 622. *See* Gregory v. Oats (Ky.), 18 S. W. 231.

[3] Laws of Minn. 1876, ch. 37, § 2.

The question was raised, whether the owner could divest the interest of the survivor by will; and it was answered in the negative. The provision in favor of the survivor was treated as controlling the law empowering testators to devise their interests in lands. The spirit of the provision was deemed irreconcilable with power in the owner to will the homestead away from the survivor. The protection of the homestead from devise was likened to the preservation of dower from any attempt of the husband to defeat it by his last testament. So, though there was no express denial of the power to will a homestead in the act itself, the court found the power denied by implication, from provisions inconsistent therewith.[1]

Like provisions have been construed in the same way — the right of homestead disposition by will being denied upon similar reasoning.[2]

A statute which provides that the homestead, at the death of its owner, "shall pass and vest in" his widow and children, but all his "right, title and interest" "in the premises, except the estate of homestead thus continued, shall be subject to the laws relating to devise, descent," *etc.*,[3] puts it beyond the power of the testator to deprive his widow of her life estate, and the children of their estate for years, in the premises.

This section has been construed as excepting homesteads from laws relating to devises, so that it inhibits the husband, when willing his own property, from so devising as to put his widow to election between a bequest and her homestead. It is said to be as much beyond his power to devise the homestead as to alienate it by his sole deed.[4]

Where the homestead of "any resident of the state" is exempt not only from his debts while he lives but "from administration" after his death,[5] it is held not disposable by will.

[1] Holbrook v. Wightman, 31 Minn. 168; Eaton v. Robbins, 29 Minn. 327.

[2] Meech v. Meech, 37 Vt. 414, *418;* Succession of Hunter, 13 La. Ann. 257; Runnels v. Runnels, 27 Tex. 515, *519.*

[3] Rev. Stat. of Missouri (1889), § 5439; Rev. Stat. (1879), § 2693.

[4] Rockhey v. Rockhey, 97 Mo. 76; Kaes v. Gross, 92 Mo. 647; Davidson v. Davis, 86 Mo. 440; Gragg v. Gragg, 65 Mo. 343; Richardson v. Richardson, 49 Mo. 29; Rose v. McHose, 26 Mo. 590. *Compare* Gant v. Henly, 64 Mo. 162. *See* Schneider v. Hoffman, 9 Mo. App. 280, in exposition of Mo. Stat. of 1865.

[5] Code of Alabama (1886), §§ 2507, 2543.

The court, in exposition, said that it is not merely the homestead of one dying intestate that is exempt, but the homestead of "any resident" — thus including both testate and intestate decedents. It is declared expressly to be "exempted from administration." The effect is "to take the homestead out of the operation of the will during the life of the widow and the minority of the children, for the purpose and to the extent declared by the statute," the court said.[1]

The rights of widows and minor children to homestead cannot be defeated by will, even where the owner may sell all his property in his life-time.[2] It has been held that the rights of minor children to homestead cannot be defeated by the last testament of their father, even if he has been divorced from his wife. If his children have ceased to live with him, the rule is the same. Though they share with their mother a homestead which she has in her own right, the rule still holds. While he lives, he has the enjoyment of the homestead he occupies, though the divorce was for his fault. It is even held that a divorced wife, as guardian of her minor children, may bring action for the setting apart of her former husband's homestead, for their benefit.[3]

After divorce and a division of property between spouses, the husband, having minor children, continued to occupy the homestead as the head of a family, though the court had given the wife charge of the children; and he was entitled to claim exemption. His homestead right could not be willed away from those children, for it descended to them at his death, notwithstanding the fact that they were under the care of their mother, since the constitution[4] provided that on the death of the husband or wife, or both, the homestead shall descend as other real property of the deceased, but shall not be partitioned among the heirs while the guardian of the minors is allowed to occupy it by order of court. As their guardian, the divorced wife may apply to have the homestead of their deceased father set apart for their benefit. They are not to lose this right on account of the divorce decree giving the wife life tenure in certain real estate, on division of the prop-

[1] Bell v. Bell, 84 Ala. 64; Jarrell v. Payne, 75 Ala. 577; Coffee v. Joseph, 74 Ala. 271. *See* Hubbard v. Russell, 73 Ala. 578.

[2] Brettun v. Fox, 100 Mass. 234.

[3] Hall v. Fields, 81 Tex. 553; 17 S. W. 82.

[4] Const. of Tex., art. 16, § 52.

erty between their divorced parents.[1] She, however, could not successfully claim any right to his homestead, in her own behalf.[2] The homestead was his, not hers, though the children were not with him; and she, as a divorced wife, had no right in it, and no inheritance from it, whosever may have been the fault which led to the divorce.[3]

As the withholding of homesteads from administration is common,[4] the principle above enunciated, or the conclusion from the fact, would seem to be of general application.

[1] Hall v. Fields, 17 S. W. (Tex.) 82.

[2] *Ib.*; Duke v. Reed, 64 Tex. 713; Trawick v. Harris, 8 Tex. 312; Earle v. Earle, 9 Tex. 630; Sears v. Sears, 45 Tex. 557.

[3] Zapp v. Strohmeyer, 75 Tex. 638. In Hall v. Fields, *supra*, the court said: "From the relationship of minor children to their father, we can have no doubt, under our present constitution and laws, that it is not necessary that the children should reside with their father at the time of his death to entitle them to a right in his homestead. It is not so required by the constitution. Const., art. 16, § 52. By the Revised Statutes (art. 1993), the exempt property must be set apart 'for the use and benefit of the widow and minor children, and unmarried daughters remaining with the family of the deceased.' Adult children, including unmarried daughters who do not remain with the family of the deceased, do not share in the exemptions; but the widow and minor children do, although they may not be with the deceased. That the children were awarded by the court, in the divorce proceeding, to the custody of their mother, can and ought to make no difference. Their mother was still legally bound for their support, and it would be a double misfortune to them to be deprived, on account of the unhappy termination of the marriage of their father and mother, both of their right to the society and protection of the father. . . . They had no homestead rights, as such, in the home of either their father or their mother. At any time before his death the father may have abandoned or sold his homestead without affecting the legal rights of his minor children, and so the mother could sell her life interest in the eighty acres set apart to her and the homestead which she had bought. . . . It cannot be said that, living with their mother on a homestead belonging to her, the children have a homestead, and consequently cannot look to their father's estate for one, when at any time the mother may sell. Had she died prior to her husband, and her home had been set apart to the children, then it might be urged with propriety that they could not claim two homesteads. But their father being dead, they will not be required to depend on the contingency of homestead rights in their mother's estate." Garrett, J.

[4] Yoe v. Hanvey, 25 S. C. 94; Estate of James, 23 Cal. 417; Estate of Tompkins, 12 Cal. 114; Plate v. Koehler, 8 Mo. App. 396; Carter v. Randolph, 47 Tex. 379; O'Docherty v. McGloin, 25 Tex. 72; Sossaman v. Powell, 21 Tex. 665; Bates v. Bates, 97 Mass. 392; Doane v. Doane, 33 Vt. 650.

The will must never contravene the statute. Whether the homestead provision for the family be to conserve homes for the good of the state, as it is in nearly all the states, or be a charitable provision for impecunious widows and children, as it is under some exceptional statutes, the rule is still the same — that the provision cannot be defeated by testamentary disposition. In one state, where the owner of a homestead may freely sell it without the concurrence of his wife; and may sell community property without her consent, as he is the head of the community, he cannot cut her off by will from the right to claim a thousand dollars from his estate when she has nothing of her own, or so much as will make up that sum when added to her property if it be less.[1] She becomes a usufructuary of the money, but the principal goes to the children upon her death, and she is required to give security; but if there be no children, she need give no security but may take the allowance absolutely, since it does not return to the estate.[2] The court said, in the case last cited, that the act was "intended to provide for the widow and minor children of a deceased person, left in necessitous circumstances. . . . It was a sum taken from the succession and bestowed as a bounty upon the widow and minor children." This bounty is called "homestead," but the humane policy of its authorization is very different from the policy of homestead laws in general.

The right of the survivor of the marital homestead-holders has been held to be subject to the disposal of the owner by last testament; that is, the husband or wife who has the legal title may will it so that the survivor will take nothing. Only in case of intestacy will the provision favoring the survivor operate.[3]

The court say, in the case above cited, speaking of the statute cited: "It was not intended to interfere with the right of the owner to dispose of such property in the same manner and with the same effect that he or she might dispose of other

[1] Succession of Hunter, 13 La. Ann. 257.

[2] Welsh v. Welsh, 41 La. Ann. 717, and cases therein cited; Rev. Stat. of La., § 2885.

[3] Kelly v. Alred, 65 Miss. 495; Norris v. Callahan, 59 Miss. 140; Miss. Code, 1880, § 1277.

real estate by will. When there has been no testamentary disposition of the homestead by the owner, the surviving husband or wife, as the case may be, takes by descent; but the right of the survivor is not absolute, but dependent on the owner dying intestate as to the homestead."[1]

If the husband die intestate and childless, his widow does not take half his estate and the homestead in addition.[2]

A husband willed his homestead. His widow owned an estate in her own right, which, with the money paid her on her husband's life insurance policy, was equal to what she would have been entitled to from her husband's estate had she been impecunious. Under these circumstances, the will, devising the homestead to another, was sustained.[3]

The disposition of the homestead by will being forbidden by the constitution of a state, a testator was held to have died intestate so far as his homestead was concerned. His testamentary disposition of it went for nothing. The item bequeathing the homestead was treated as unwritten.[4] Though the legatee was a resident of the state, he acquired no rights by the will against non-resident heirs.[5]

§ 6. Wills Consistent with Homestead Rights.

A wife, owning the property constituting the homestead of herself and her husband, may will a half interest in it or less, so that the devisee may take at her death. The surviving husband is not thus divested of any right.[6] The inhibition of alienation without "the joint consent of husband and wife, when that relation exists," is inapplicable to such a devise. The disposition of property by will is not an alienation of it in the sense of the inhibition. The title of the testator is not divested by last will and testament, in any case. Nothing is transferred or conveyed by him to the devisee; he retains title

[1] The remedy of the survivor when cut off is to renounce the will and claim a distributive share of the estate, in Mississippi. Code, §§ 1172-4. *See* Turner v. Turner, 30 Miss. 428; Nash v. Young, 31 Miss. 134.

[2] Glover v. Hill, 57 Miss. 240. Many cases cited by counsel *contra*.

[3] Osburn v. Sims, 62 Miss. 429; Miss. Code, 1880, § 1277. But see amendment, Acts of 1882, p. 112.

[4] Scull v. Beatty 27 Fla. 426; 9 So. 4; Wilson v. Fridenburg, 19 Fla. 461; same parties, 21 Fla. 386.

[5] *Id.;* Miller v. Finegan, 26 Fla. 29; S. C., 7 So. 140.

[6] Vining v. Willis, 40 Kas. 609.

and control; he may make a second will, a deed or a mortgage with reference to the same property first bequeathed, since the one named as devisee acquires no rights prior to the testator's death.[1]

It would be different if a wife or husband, having the legal title to the homestead, should convey a half interest in it by deed to be operative only at the death of the grantor. In such case, the grantee would acquire a present interest which he could convey with like restriction as to his grantor's death. Rights are vested at once. This is such an alienation as contemplated in the inhibition mentioned. Both the husband and the wife must join to make such a deed relative to their homestead.

The husband may will the homestead to his wife, and the devise will take effect immediately at his death, though he may have devised that his debts be first paid. The title was transferred at once to her in such a case. She would have been entitled to one-half, had there been no will, and the testator could bequeath all, so as to give her entire possession at his death, when he left no children as occupants of the homestead. The devise would have been subject to their interest had there been any such children thus occupying.[2]

A homestead goes to the devisee exempt from the personal debts of the testator, just as it goes to the widow and children when the owner dies intestate.[3] Both a rural and an urban homestead were held to descend to heirs free from the decedent's debts, when both were within the monetary limit and separated from each other only by a railroad.[4] There was no will, but a devise of the same property to the heirs would not have altered the result.

A testator, possessed of land which had been set apart as the homestead of himself and wife, bequeathed it. At his death, his widow retained it as her homestead during her life. The devisee, at her death, brought an action of ejectment to

[1] *Ib.;* Comstock v. Adams, 23 Kas. 524; Martindale v. Smith, 31 Kas. 273.

[2] Martindale v. Smith, 31 Kas. 270. *See* Vandiver v. Vandiver, 20 Kas. 501; Dayton v. Donart, 22 Kas. 256; Comstock v. Adams, 23 Kas. 514, 524.

[3] Johnson v. Harrison, 41 Wis. 381. So under Tay. Stat., 1171, §§ 4, 5; Laws 1864, ch. 270.

[4] Parisot v. Tucker, 65 Miss. 439; Mississippi Code (1880), §§ 1248-9, 1277.

recover the land, under the will. It was objected that the complaint did not aver how long the widow's homestead right was to endure, or that it had been terminated. But as the homestead had been the separate property of the husband, it could not have been assigned to his widow by greater title than life tenure; and as her death was alleged in the complaint, further particularity was unnecessary. It was further objected that the decedent may have left children who have rights in the family homestead, for aught the complaint shows; but the court said that the allegation, that it had been set apart to the widow, disposed of the objection. The complainant pleaded as devisee under the will and as owner of the land. General allegations may help to make a complaint certain against such objections.[1]

When the homestead of the widow and minors has terminated in any way, the heirs take possession as though their right had never been suspended. The estate goes into their hands free from their ancestor's liabilities, under some state homestead systems; subject to such liabilities, under others.[2]

§ 7. Willing the Homestead and More: Election when Unnecessary.

There is no need of election when the property, devised to one who has the right of homestead under the statute, is not greater than that which the devisee may take under the statute. In such case the rule of election has no application. The will operates on nothing beyond the statutory allowance. No written renunciation of it is necessary in such case when the law itself gives the devisee precisely what the will purports to give.

A husband willed to his wife all his estate after the payment of his debts, to be held during her widowhood, and to be disposed of by her for her support if necessary — any balance, at her death, to go to his children.

She, as executrix, had the will probated, paid debts, and occupied the homestead. Three years after her husband's death she was remarried. Then the children, all adults,

[1] Hutchinson v. McNally, 85 Cal. 619.

[2] Wolf v. Ogden, 66 Ill. 224; Burson v. Goodspeed, 60 Ill. 281; Kemp v. Kemp, 42 Ga. 527.

brought ejectment. The court said that she had probably intended to act under the will, but recognized her right to claim under the statute. Since the will gave her no greater estate than the law gave her, there was no necessity for election.[1] She was entitled to the same homestead estate which her husband had owned, there being no minor children.[2] That estate was vested absolutely in her by the law then in force.[3] The will did not give her more, but less, than the estate gave, for it did not devise the property to her absolutely. It had been held, before the decision on this will, that if a widow accept property under a will which is greater in amount than that which the law would give her, she cannot afterwards claim homestead right when it is repugnant to the terms of the will.[4]

It would have been better, however, if the devisee under the above stated will had formally renounced it instead of acting apparently under it till her remarriage. She would thus have avoided litigation and the setting of a precedent that may lead to new cases under circumstances of doubtful election. She certainly took a different estate under the law from that which the testator sought to give her; and, under such circumstances, election by formal act would have simplified the situation. Ordinarily, there should be election in such case, since silence would imply assent to the will.[5]

Occupancy has been considered equivalent to election to take homestead when the question was between that and dower or the distributive share of the estate.[6]

A widow who did not renounce her husband's will by formal act,[7] but who occupied the family homestead till her death, a period of six years, was held to have elected to take the

[1] Burgess v. Bowles, 99 Mo. 543, *547;* Hasenritter v. Hasenritter, 77 Mo. 162.

[2] Register v. Hensley, 70 Mo. 190; Skouten v. Wood, 57 Mo. 380.

[3] Wagner's Stat. (Mo.), p. 698, § 5; p. 88, §§ 33, 35; Cummings v. Cummings, 51 Mo. 261; Hastings v. Myers, 21 Mo. 519; Freund v. McCall, 73 Mo. 343; Kelsay v. Frazier, 78 Mo. 111.

[4] Davidson v. Davis, 86 Mo. 440. (This case was approved in Burgess v. Bowles, *supra*, and reconciled with Kaes v. Gross, 92 Mo. 647, which had overruled it inadvertently.)

[5] Register v. Hensley, 70 Mo. 189: Daudt v. Music, 9 Mo. App. 169.

[6] McDonald v. McDonald, 76 Ia. 137; Thomas v. Thomas, 73 Ia. 657; Mobley v. Mobley, 73 Ia. 654; Darrah v. Cunningham, 72 Ia. 123; Holbrook v. Perry, 66 Ia. 286; Burdick v. Kent, 52 Ia. 583; Whitehead v. Conklin, 48 Ia. 478; Butterfield v. Wicks, 44 Ia. 310.

[7] Ia. Code, § 2452.

homestead for life in lieu of dower. Her occupancy was equivalent to election.[1] If she occupied a larger tract than the law allows for homestead, which included the prescribed amount, her right to homestead would not thereby be defeated, or the presumption of her election to take it overcome.[2]

The wife is not required to elect between a bequest by the husband of half his property — and her interest in the homestead.[3]

§ 8. Spirit of Exemption Laws — Election.

In a leading case, construing a will in which bequests were expressly in lieu of dower but not thus given in lieu of homestead — a case in a state where homestead devise is not expressly prohibited by statute — the court took the spirit of the statute into consideration, and inferred from the non-alienation clause, the vesting of the homestead in the widow and children of the decedent householder, and the preservation of it from creditors for family use,— all under the provisions of the statute,— that these purposes cannot be defeated by the will of the householder. It is argued from analogy, that as he cannot defeat dower he cannot defeat homestead which resembles it. It is inquired: If the homestead is not to be kept for the widow and minor children, "why should it not be appropriated to the purpose of paying honest creditors as well as leave it to the caprice of the husband to dispose of by will? Why should the husband be restrained from deeding or mortgaging it during his life and be permitted to will it away when he dies?" Pertinent questions, had they been addressed to the legislature, the reader may say; but, to show the spirit of the legislation already done, they are admissible here. The will before the court was silent as to homestead; and the point to be decided was whether the widowed devisee must elect between homestead and the bequests. The intent of the testator on this point was sought in the terms of the testament. She must be excluded from neither if exclusion does not clearly appear to have been the intent.[4] The conclusion was that the husband,

[1] Schlarb v. Holderbaum, 80 Ia. 394.
[2] Stevens v. Stevens, 50 Ia. 491.
[3] McGowan v. Baldwin, 46 Minn. 477.
[4] *Re* Wells' Estate, 63 Vt. 116.

who had expressly willed bequests to her in lieu of dower, meant also that they should be in lieu of homestead; but that the spirit of the law forbade him from devising the homestead from his wife and children absolutely: so she was put to her election between her right under the will and her right under the statute.[1] The court said no distinction could be made between dower and homestead as to the rule of election between either and a bequest in lieu of it. The rule as to dower is that the will must clearly show a bequest is in lieu of dower — otherwise she may take both.

The spirit of a homestead statute similar to the one above construed was held inconsistent with the power of the husband to will the homestead.[2] The statute exempted the homestead from execution; forbade the sale or incumbrance of it by the husband-owner alone; and continued it after the husband's death during its occupancy by his widow and minor children. The right created was declared to be a freehold estate during its continuance, which could not be terminated by the will of the husband without violence to the spirit and intent of the statute.[3]

A widow, not actually electing to take under her husband's will, and not having her share of the estate laid off to her, lived several years, till her death, on lands including the acreage allowed as a homestead (forty), and much more. This was a passive election to take homestead in lieu of dower. Her interest did not descend to her heirs, as it was a life estate.[4] Her occupation of one hundred and sixty acres instead of forty did not defeat her right to homestead in the included forty.[5] Her failure to have the limited area platted did not defeat that right.[6]

A wife, by will, though she be entitled to make one, cannot cut off her surviving husband from his right of tenancy by curtesy (called dower), or his right of homestead, when they are conferred by law, or when he has the legal right of election between the two.[7]

[1] Meech v. Meech, 37 Vt. 414.
[2] Brettun v. Fox, 100 Mass. 234.
[3] *Ib.*
[4] Schlarb v. Holderbaum, 80 Ia. 394. *Compare* McDonald v. McDonald, 76 Ia. 127.
[5] *Ib.;* Stevens v. Stevens, 50 Ia. 491; Darrah v. Cunningham, 72 Ia. 123.
[6] Thomas v. Thomas, 73 Ia. 657.
[7] Stewart v. Brand, 23 Ia. 481.

When a homestead is inalienable by a married woman acting alone in the conveyance, while such person is duly authorized to devise any of her property without restraint, there can be no doubt about the meaning. *Alienation* or *conveyance* cannot be then rightfully construed to include disposition by will. Take these provisions:

"No conveyance of the homestead interest, when this interest is separate property of the wife, shall be valid or binding unless signed and acknowledged by the husband living with his wife, and also by her as the owner."[1] A married woman may dispose of her estate, real and personal, by last will and testament, in the same manner as if she were not married.[2] Taking these laws together, a married woman may dispose of her individually-owned homestead by will but not by deed. So the cited sections have been understood. A wife, living with her husband, willed her homestead to her brother. The will was maintained by the court, which said that the legislature had not intended to prevent the owner's disposition of homestead property by will, "in the same manner and with the same effect" that other real estate may be devised. And the rule was declared the same, whether the husband or wife be the sole owner and testator.[3] Yet it was added that if the survivor be dissatisfied with the will of his deceased spouse, his remedy is by renouncing the will and claiming his distributive share, whether it include homestead or other property; or, if the will made no provision for him, to claim without renouncing.[4] So, while the will of the testatrix is valid, and will have effect unless statutory rights are claimed, the deed of a married woman alone would be absolutely void as a conveyance of her homestead. In the absence of a will and of children, the survivor takes the homestead by descent; the right of survivorship depends on intestacy;[5] yet as the survivor may claim under the statute despite the will, the difference between testacy and intestacy need not irrevocably affect the survivor's rights.

Under a statute expressly exempting homestead "from the

[1] Mississippi Code (1880), § 1260.
[2] *Ib.*, § 1169.
[3] Kelly v. Alred, 65 Miss. 497.
[4] *Ib.*, citing Code, §§ 1172–4; Turner v. Turner, 30 Miss. 428; Nash v. Young, 31 Miss. 134.
[5] Kelly v. Alred, *supra;* Norris v. Callahan, 59 Miss. 140.

laws of conveyance, descent and devise," [1] the following case arose: A wife, owning her homestead and other real estate in her own right, and residing with her husband on the homestead, willed half of the land to her nephew, and the other half (which included the homestead) to her brother. She cut her husband off — not with a shilling — but with *one ton of hay* (printed in italics in the report of the case, perhaps to call attention to the *innuendo*).

Her husband eschewed the hay by renouncing the will and claiming under the statute. The court decided that he was entitled to half the lands in fee, under the governing statute,[2] and said that the homestead act in force at the time of the wife's death, "in express terms exempts the homestead from the laws of conveyance, descent and devise. Under this statute, which must control, the wife had no power to devise the homestead to another, and thus deprive the husband of that estate." [3]

[1] Stat. of Illinois (Starr & C.), p. 1097, Act of 1874.

[2] Dower Act, § 12.

[3] Henson v. Moore, 104 Ill. 403, *407*.

CHAPTER XV.

SALE, WITH HOMESTEAD USE RESERVED.

§ 1. By Owner — Generally.
2. By the Owning Husband's Sole Deed.
3. Reservation of Use Necessary.
4. Restraint and Exemption — When Correlative.
5. Sale by Solvent Owner Before Selection.
6. No Sale by Insolvent Debtor.
7. Sale by Husband and Wife.
8. Execution Sale.
9. Sale of the Reversion.
10. Sale by Administrator.
11. No Sale, During Homestead Occupancy, by Administrator.
12. The Fee of Homestead Not an Asset.
13. Comment.

§ 1. By Owner — Generally.

Since the *jus disponendi* is a common-law right, and any legal restraint upon it must be strictly construed, it follows as a general rule that a homestead, that is, the dwelling and appurtenances occupied by a family and exempt from forced sale, may be freely sold or mortgaged by the owner, except so far as such alienation is validly interdicted.[1] Generally speaking, there is no interdiction respecting the alienation of homesteads by unmarried owners. On the other hand, it is almost as general that a married man cannot dispose of his homestead without the consent of his wife. The inhibition is not limited to those who are insolvent debtors but extends to all husbands, whether indebted or not (though the rule in one state is exceptional in this respect), and, by many statutes, it extends to wives too when they own homesteads.

Where homestead dedication is optional with the owner, and the privilege of exemption is dependent upon his action, his power of alienation of his home property is unrestrained up to the time of his making a valid dedication and thus taking upon himself the onerous conditions of the benefit.[2] Where no formal declaration is required, disability to sell has been imposed by the legislature in conjunction with the grant of the exemption privilege.[3] And exemption has been ac-

[1] Hannon v. Sommer, 10 Fed. 601.
[2] Boreham v. Byrne, 83 Cal. 23, *28*.
[3] Kennedy v. Stacey, 1 Bax. 220.

corded, with the owner left free to alienate without any reservation;[1] and it has been accorded with the owner's selling capacity unaffected though his right to hypothecate was taken away.[2]

There has been an important difference among expositors as to the application of the restraint; as to whether it is a restriction upon the alienation of the exempt realty itself, or of such interest in it as is essential to family protection. The diverging point, whence the holders of opposing views have started on their different roads, is the word *homestead*. Statutes, precisely alike in the employment of the word, have been interpreted differently by the courts: most of them holding that the sale of the exempt realty is restrained, and the others that only the sale of the interest above mentioned is restrained; the former holding that *homestead* means the exempt family dwelling, while the latter treat it as the right or privilege of occupancy.

If *homestead* anywhere does not mean a prescribed quantity of realty (measured by acreage or appraisement), but only the right of occupancy, use and usufruct of such quantity, as some assert, then only that would be affected by the common alienation clause: why then might not the owner alone sell the fee, reserving the *homestead* in that sense? His wife and children would still be sheltered, and all that the law contemplates by exemption, under such a definition of *homestead*, would remain. His wife's joinder would be necessary to sell the *use* and *privilege*, but not to sell the realty with the use reserved. First he could sell the fee, reserving life estate for him and her; then he could sell the life estate, reserving leasehold right at a stipulated rent — and the family would remain with him on the premises with the *homestead* intact. The children have no rights under the homestead laws, generally speaking, which are vested presently in them beyond the control of their parents, their natural guardians. The wife has no rights, under such laws, further than to be protected in her homestead: so, if *homestead* be defined as above mentioned, she can have nothing to say when that is not conveyed by her

[1] Derr v. Wilson, 84 Ky. 14.

[2] Van Wickle v. Landry, 29 La. Ann. 330.

husband who merely sells his own property with that right excepted from the sale. Nobody goes so far as this in claiming the exceptional application of the restraint, but how can these consequences be avoided? They stare the exceptional definition in the face.

Everybody shrinks from such results. After citing several cases of its own, a court said: "These decisions have failed to recognize any distinction between the conveyance of the homestead *premises* and the mere *right* of homestead, which is recognized by some respectable authorities. . It is manifest that if the owner were permitted to incumber the fee or reversion of his homestead, as distinguished from the mere right of undisturbed occupancy — and by a mode of alienation dispensing with the voluntary assent and signature of his wife — the provision of the constitution under discussion [1] would have little more binding efficacy than a rope of sand, and its policy could be evaded by the husband with fatal facility. All that would be necessary, to effect such alienation, would be for the husband to convey or mortgage the premises one day, and abandon them the next; all of which might be done against the most earnest protest of an unwilling wife." [2] Sole sale or mortgage by the husband is void.[3]

If, in a former case, decided by this court, there was any recognition of a distinction between a conveyance of the fee of homestead property, and that of homestead right in such property,[4] the very opposite view is here strongly presented.

A statute which forbade the husband's conveyance of *the homestead or any interest therein* by his sole deed was held to forbid his conveyance of either his own or his family's interest in the homestead. His deed is absolutely void because he has no capacity to make it.[5] He cannot alone sell the homestead

[1] Const. of Alabama (1875), art. X, § 2, which declares that a mortgage or other alienation of a homestead, by the owner, if a married man, "shall not be valid without the voluntary signature and assent of the wife." *See* Ala. Code (1876), § 2822.

[2] Alford v. Lehman, 76 Ala. 526–9.

[3] Hood v. Powell, 73 Ala. 171; Scott v. Simons, 70 Ala. 352; Slaughter v. McBride, 69 Ala. 510; Seaman v. Nolen, 68 Ala. 463; Halso v. Seawright, 65 Ala. 431; Garner v. Bond, 61 Ala. 84; Cahall v. Building Ass'n. 61 Ala. 232; Balkum v. Wood, 58 Ala. 642; McGuire v. Van Pelt, 55 Ala. 344.

[4] Fellows v. Lewis, 65 Ala. 343.

[5] Abell v. Lothrop, 47 Vt. 375.

realty and waive the homestead right.[1] And, with *homestead* meaning the exempt family-home-property, he cannot sell it with the homestead right expressly reserved, without the joinder of his wife in the conveyance.

After fixing the limit of forty acres of land not in any town plat, or a lot in such plat, neither exceeding fifteen hundred dollars in value, as homestead, it is added, in the constitution so restricting it, that a "mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same."[2] It is held under this provision that alienation of the homestead (the land exempt) by the husband alone is void as to both himself and his wife.[3] A contract to sell the exemption right, made by the husband alone, is void.[4] The right is not translatable by both himself and his wife. The husband alone cannot waive this right.[5]

§ 2. By the Owning Husband's Sole Deed.

One state has this provision: "No mortgage or other alienation by a married man, of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead, without the signature of his wife to the same."[6]

The inhibition is not exceptional in form or apparent signification to that which prevails in nearly all the states which restrain the husband from alienating the homestead without his wife's consent, and her signature to the deed. In several, the

[1] Jewett v. Brock, 32 Vt. 65. *See* Davis v. Andrews, 30 Vt. 678; Howe v. Adams, 28 Vt. 541.

[2] Const. of Michigan, art. XVI, § 2.

[3] Dye v. Mann, 10 Mich. 291; McKee v. Wilcox, 11 Mich. 358; Ring v. Burt, 17 Mich. 465; Fisher v. Meister, 24 Mich. 447; Snyder v. People, 26 Mich. 106; Comstock v. Comstock, 27 Mich. 97; Wallace v. Harris, 32 Mich. 380; Amphlett v. Hibbard, 29 Mich. 298; Smith v. Rumsey, 33 Mich. 183; Hanchett v. McQueen, 32 Mich. 22; Phillips v. Stauch, 20 Mich. 369; Watertown Ins. Co. v. G. etc. Co., 41 Mich. 131; Sherrid v. Southwick, 43 Mich. 515; Shoemaker v. Collins, 49 Mich. 597; Griffin v. Johnson, 37 Mich. 92.

[4] Stevenson v. Jackson, 40 Mich. 702; Ring v. Burt, 17 Mich. 465.

[5] King v. Moore, 10 Mich. 538; Beecher v. Baldy, 7 Mich. 488; Snyder v. People, 26 Mich. 106; Sherrid v. Southwick, 43 Mich. 515.

[6] Sanborn & B.'s Annot. Stat. of Wisconsin (1889), § 2203; Wis. Rev. Stat. (1858), ch. 134, § 24; R. S. (1878), § 2203; Laws of 1864, ch. 270, §§ 1, 2. The above extract is the same in all these successive statutes.

language is almost uniform with the provision quoted above. The following specimens will suffice to show this:

". . . Mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same." [1]

"A conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." [2]

"A homestead [describing it] shall not be alienated without the joint consent of husband and wife when that relation exists." [3]

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." [4]

". . . The husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void; . . . *provided, however*, that nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying, mortgaging, alienating or in any other manner disposing of such homestead or any part thereof." [5]

By construction, however, the statute first quoted at the beginning of this section is made exceptional to those verbally like it in other states. The difference turns on the signification given to the word *homestead*. In other states that word usually is held synonymous with the urban or rural *quantum* of land and improvements authorized to be held as exempt, while in this one it is construed to mean the mere right of occupying and enjoying that *quantum* while the married beneficiaries, or either of them, may live. Hence results, in the latter, the conclusion that a married owner of the exempt realty may sell the title in fee without his wife's signature to the deed, if he reserves life-estate interest for himself and her, so that neither can be disturbed in the enjoyment and occu-

[1] Const. Mich., art. XVI, § 2.
[2] McClain's Code of Iowa, § 3165.
[3] Gen. Stat. of Kansas (1889), § 2996; Const. of Kas., art. 15, § 9.
[4] Civil Code California, § 1242.
[5] Rev. Stat. of Missouri (1889), § 5435.

pancy which constitute *homestead* according to this interpretation.

This interpretation was given (the old statute containing precisely the same provision as that quoted above) in a case[1] presenting the following facts:

A married householder conveyed his homestead to his daughter, without his wife's signature, with this reservation: "The party of the first part reserves the sole, free and absolute use and control of all the above described lands so long as he and his wife, or either of them, may live." On the death of both parents the daughter took possession. A son brought a suit of ejectment to recover his portion. The trial court found that the deed did not convey *the homestead*, but reserved and excepted it; that the deed conveyed the remainder over on the expiration of a life estate to the grantor for two lives in being; that the deed was valid, so that, on the death of the grantor and his wife, the grantee took rightful possession of the land in fee simple.

On appeal it was held in general that an owner may convey realty in fee with reservation of life estate; that the common-law rule of invalidity when such conveyance is a feoffment — the freehold estate being created to commence *in futuro* — is inapplicable here where the statute recognizes and defines estates in expectancy as "a future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.[2] By the common law, there could be no remainder conveyed unless a precedent estate was created at the same time; that is, nothing could *remain* without an estate precedent.[3] Under the statute cited, whether that preceding estate be created in the instrument, or be in existence before the conveyance and reserved therein, there may be remainder to commence in future. So the court concluded that homestead land may be conveyed in fee, the conveyance to take ef-

[1] Ferguson v. Mason, 60 Wis. 377.

[2] *Citing* R. S. (1878), § 2034.

[3] *Citing* 2 Washburn, Real Prop. (4th ed.) 592; Barrett v. French, 1 Ct. 362; Fish v. Sawyer, 11 Ct. 545; Bissell v. Grant, 35 Ct. 288: Const. Wis., art. I, § 14: "All lands within the state are declared to be allodial, and feudal tenures are prohibited."

fect at a future time. Had the land conveyed been other than a homestead, its sale, to have effect in future with life estate reserved to the grantor, would have been clearly valid.

The sale of the homestead, as described in the statement of facts, must be tested by the statutory provision relative to such sale, extracted above.

§ 3. Reservation of Use Necessary.

As the court stated, it is as firmly established in this state as in any, that a married man's unqualified deed of the homestead property, without his wife's signature, is an absolute nullity. No reliance is put upon the law's reservation of the homestead as presumably written in the deed, but the statute is taken to be a prohibition of the sale of the exempt *quantum* of realty by the husband-owner alone. It is conceded by the court that such a deed should be held void, and not held as a conveyance of the fee with the life estate reserved to the grantor by law. Holding it void is said to be essential to the protection of the wife in her rights; to save her from litigation; to prevent a "*cloud upon her interest or estate;*" and hence "the better rule is to hold a mortgage or other instrument of alienation of a homestead absolutely void, if in terms it conveys the whole estate and wants the signature of the wife of the grantor."[1]

It will be observed that the nullity of such deed is not inferred from the language of the statute but from reasons *ab inconvenienti* so as not to conflict with the construction given. But it will also be observed that the term *homestead* is employed, in the extract from the opinion in the case cited, in a sense out of harmony with that construction; for to speak of the mortgage of a mere right of occupancy and enjoyment would not be intelligible. The court here evidently meant the exempt realty by the word "homestead."

The point of the decision, after these side concessions, is that the wife need not sign the deed conveying the property if her *homestead rights* be reserved. The statutory term is thus qualified and changed in meaning, apparently. It is made to read as follows: No mortgage or other alienation by a married man, of his homestead (*or limited quantity of*

[1] Ferguson v. Mason, 60 Wis. 377, *390–1.*

realty), exempt by law from execution, shall be valid or of any effect as to (*the right of occupying and enjoying for life*) such homestead, without the signature of his wife to the same.

These parenthetical interpolations are fairly inferred from the construction given by the court, which claims to have departed from the letter of the statute to save its spirit, from the language of the legislator to carry out his intentions.[1]

The application of the rule that the spirit should prevail over the letter — or that what is not within the intention of the makers of the statute is not within the statute — has not been found necessary by the supreme courts of other states when deciding causes turning upon statutory language almost *verbatim* with the one thus interpolated and constructed. This will be seen herein when their deliverances upon void sales of homesteads come under review. They have not considered such provisions ambiguous or needing interpretation. The doctrine in general is that such inhibition renders alienation by the husband without his wife's joinder absolutely void, conveying nothing of his interest or hers in the homestead.[2]

§ 4. Restraint and Exemption — When Correlative.

There is a phrase in the non-alienation provision exceptionally interpreted as above stated, which seems to throw light upon the meaning of the legislator, if any is needed. It is "exempt by law from execution." This phrase qualifies "homestead." The sentence is: "No mortgage or other alienation by a married man, *of his homestead, exempt by law from execution*, shall be valid or of any effect as to *such* homestead [*i. e.*, homestead exempt by law from execution], without the signature of his wife to the same."

What was the homestead thus exempt? What was protected from forced sale? It was land not exceeding forty acres, with improvements, which was exempt. Creditors could not touch the fee nor any less estate in this land. And what they could not reach by forced sale, the husband alone

[1] *Ib.; citing* to support the rule of interpretation, Wilkinson v. Leland, 2 Pet. 627; 7 Bacon's Abr. (Lib. ed.), 458, tit. II, § 5; Holmes v. Carley, 31 N. Y. 289; Riehl v. Bingenheimer, 28 Wis. 84; Wochoska v. Wochoska, 45 Wis. 423.

[2] Cases cited in section 5 of chapter 12.

could not alienate at private sale or in any way. The exemption is made the measure of the restraint upon alienation, by this statute. This is plain upon its face.

It is not everywhere true that exemption and restraint of alienation are correlative, but anywhere the legislator may make it so; and that in the provision above quoted he has made it so, would be said but for the construction of the phrase to the contrary in the case under review. There this point was made by counsel, and the court met it thus: "It has been suggested that the exemption of a homestead from the lien of judgments against the owner, and from sale on execution issued on such judgments, is no broader or more absolute than is the disability of the married owner to alienate the same without the concurrence of his wife. Were this a correct proposition, it would necessarily follow that if the owner, without the concurrence of his wife, could convey the reversionary interest in the homestead property, a judgment against the owner would become a lien on such interest, and the same might be sold on execution to satisfy the judgment. But the proposition is not correct. The statute not only protects the homestead property from such liens and sales while it remains a homestead, but it protects the same therefrom in the hands of the grantee of the owner of such homestead, his devisee and his heirs."[1]

The point made by counsel was not respecting the *duration* of the exemption but its *subject;* it was that the thing exempted from forced sale is precisely the thing restrained from alienation by its owner; that if that thing is nothing more than life estate, the remainder may be executed for debt as readily as it may be alienated by the owner.

Recurring to the position of the court (that reservation of the right of occupancy and enjoyment for life, in the deed conveying the fee, was a reservation of the *homestead* within the meaning of the statute), the reader may ask whether the husband alone could not have sold *more*, under the interpretation of the court. Leasehold title is sufficient for homestead. Could the husband alone have made a further sale — that of his reserved life estate — stipulating that he have a lease of

[1] Ferguson v. Mason, *supra*, at p. 393, *citing* R. S. Wis., §§ 2271, 2280–3.

the premises for his life, and that of his wife after him, and promising to pay an annual rent? It is submitted that the second sale would have been as consonant with the statute as the first. It comes within the reasoning of the court.

Whatever the weight of the reasoning; however exceptional the interpretation to that of similar statutes by the supreme courts of other states, the law in the state where this decision was rendered is necessarily just what the supreme court there has declared it to be. And the decision has been there followed, or cited with approval.[1]

And it had been partially foreshadowed. The conveyance of title had been held ineffectual to destroy homestead when there was no intention of abandoning possession.[2] The wife's acknowledgment to the conveyance of a homestead was not required when she had no estate in the property conveyed.[3] Several deliverances on alienation by one of the marital parties had indicated, to some degree, the conclusion reached in the case above reviewed.[4]

The surviving spouse has been sustained in the alienation of the homestead, with the right of occupancy by members of the family reserved.[5]

§ 5. Sale by Solvent Owner Before Selection.

In one state, however, distinction has been made between solvent and insolvent owners, in a late decision overruling or modifying many previous ones; for it was held that a solvent married man, without joinder by his wife, may convey his homestead when it has not been selected by him, or allotted to him, though the right of selection or allotment exists.[6] The case was in exposition of the following provisions of the constitution of that state: "Every homestead, and the

[1] Newman v. Waterman, 63 Wis. 616; Leach v. Leach, 65 Wis. 292; Albright v. Albright, 70 Wis. 536; Herron v. Knapp, 72 Wis. 555. *See* Keyes v. Scanlan, 63 Wis. 346.

[2] Murphy v. Crouch, 24 Wis. 365.

[3] Godfrey v. Thornton, 46 Wis. 677, *overruling* Hait v. Houle, 9 Wis. 472.

[4] Wochoska v. Wochoska, 45 Wis. 423; Baker v. Dayton, 28 Wis. 367; Campbell v. Babcock, 27 Wis. 512; Green v. Pierce, 60 Wis. 372; Allen v. Perry, 56 Wis. 178; Kent v. Lasley, 48 Wis. 265; Petesch v. Hambach, 48 Wis. 451; Hanson v. Edgar, 34 Wis. 653; Williams v. Starr, 5 Wis. 534.

[5] Hannon v. Sommer, 10 Fed. 601; Constitution of Kansas, art. 15, § 9; Dayton v. Donart, 22 Kas. 256; Catton v. Talley, 22 Kas. 256.

[6] Hughes v. Hodges, 102 N. C. 236.

dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or, in lieu thereof, at the option of the owner, any lot in a town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes or for payment of obligations contracted for the purchase of said premises. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any one of them. If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."[1]

These provisions are not artistically written, but the meaning appears. The term *homestead* is employed throughout to represent the exempt family dwelling of the owner limited in value to $1,000 — not any fanciful "estate," right, incumbrance or privilege. The restraint upon alienation by the owning husband's sole deed is clear. The phrase, "to be selected by the owner," is obscure, but other clauses enlighten it — such as that protecting the homestead, after the owner's death, in favor of his widow or minor children, which is not to be construed as dependent upon his having made any selection during his life-time further than by occupancy.

The restraint upon the husband is not found in the exemption provision, but in that relative to alienation. Only a debtor is benefited by exemption, but a solvent owner is affected by the interdiction to sell without his wife's concurrence. This interdiction, as expressed in the article above

[1] Const. North Carolina, art. X, §§ 2–8.

quoted, is substantially the same as that prevalent in most of the states.

The present writer may be influenced unconsciously by the desire to see the homestead laws of the country harmonized as far as possible, so that a symmetrical system may result; but, guarding against any such predilection, he may look disinterestedly upon the opinion of the court and the dissent, in the case above cited.

The court held that an *unembarrassed owner* of land may sell it free from all *homestead rights*, without his wife's assent, if it has not been allotted to him as a homestead, unless he has mortgaged it with *homestead right* reserved, rendering allotment necessary upon foreclosure. To simplify the point of the decision, take a husband free from debt who owns land, altogether unincumbered, which he occupies with his wife and children as his and their home, but which he has not formally selected as his exempt homestead within the monetary limit of exemption: the deliverance of the court is that he can validly convey it with complete title: without his wife's consent: can he? A line of prior decisions seems to answer in the negative; to hold formal selection by the owner otherwise than by occupancy, or allotment by an officer, not essential to the existence of the exemptions or to the effectuality of the restraint upon alienation.[1]

Several of these decisions were reviewed in the majority opinion, and all cited in the minority one. The former dwelt much on the meaning of *homestead*, and *homestead right*, and may have been influenced by some fanciful definitions which do not include realty as an essential idea in the term. It quotes approvingly, from one of the above cited cases:[2] "It is the settled construction of this court, that the homestead right *is a quality annexed to land* . . . ;" from another,

[1] Abbott v. Cromartie, 72 N. C. 292; Lambert v. Kinnery, 74 N. C. 348; Beavan v. Speed, 74 N. C. 544; Littlejohn v. Egerton, 76 N. C. 468; Bank v. Green, 78 N. C. 247; Wharton v. Leggett, 80 N. C. 169; Gheen v. Summey, 80 N. C. 187; Murphy v. McNeill, 82 N. C. 221; Adrian v. Shaw, 82 N. C. 474; Watkins v. Overby, 83 N. C. 165; Wyche v. Wyche, 85 N. C. 96; Burton v. Spiers, 87 N. C. 87; Cumming v. Bloodworth, 87 N. C. 86; Murchison v. Plyler, 87 N. C. 81; Mebane v. Layton, 89 N. C. 399; Markham v. Hicks, 90 N. C. 204; Castleberry v. Maynard, 95 N. C. 281.

[2] Gheen v. Summey, *supra*.

"the incidental power to have the homestead allotted;"[1] from another, "the right of homestead was *a quality annexed to land* (*like a condition*), *whereby an estate is exempted* from sale under execution."[2]

With a slight modification of the second of the above quotations, the court, accepting these definitions, came to view homestead as an ideal rather than a tangible thing, before its formal allotment, saying: "The *ideal* homestead, created by the constitution and located by proceedings under the statute, *is born of financial embarrassment*, and exists as to any given body of land only when the creditor can arm the sheriff with power to sell it to satisfy a judgment; or a mortgagee, holding subject to an express reservation of the right of homestead in the land mortgaged, has the right to foreclose. . . . The constitution does not *annex the quality* to the land of one who is free from financial embarrassment, for the right, operating as it does to exempt an estate from sale for debt, *must of necessity be the creation of the debt.*"[3] In other words, the debt creates the right.

§ 6. No Sale by Insolvent Debtor.

The doctrine of the court is that there is no homestead in land unless the owner is a debtor and has it allotted to him pending execution; that it is merely ideal before he comes to extremity — not a tangible thing, and therefore the solvent owner may sell the land his family occupies as a home without his wife's concurrence; that he may do so, because his home, though within the monetary limit, is not a homestead in the sense of the constitution.

The constitution means something tangible when treating of homestead: for, a "lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars," is not an ideal thing, not a quality, not an incidental power, not a condition, but a dwelling-house and ground which a family can occupy, selected by using it as a home, by any owner who is a resident whether in debt or not. And it is precisely this exempt realty, susceptible of being

[1] Adrian v. Shaw, *supra*.
[2] Littlejohn v. Edgerton, *supra*.
[3] *Ib.*: Opinion, p. 248.

conveyed by deed (as an ideality, quality, incidental power or condition is not), which the constitution forbids the owner's conveying by deed without the wife's assent.

If there is fallacy in the reasoning of the court it seems attributable to the common source — misuse of terms. Not only the definition of homestead, but the purpose of the constitutional provision under construction appears to have been misapprehended so as to lead to the court's conclusion. Evidently, from bare reading of the article, that purpose was the conservation of homes for the welfare of the state, as the object of like provisions in homestead laws and constitutional ordinances, in other states, is understood to be. But the court, throughout the decision, assumed that the purpose is one conceived in humanity for impecunious debtors, founded in the spirit of charity for insolvent land-owners to the exclusion of all sympathy for the landless, designed to relieve the obligor at the expense of the obligee without cost to the state. The article, apparently, was thought to be classifiable with the poor-laws, though not to benefit the abject poor, or those pecuniarily below the class of freeholders. Hence the court concluded that only owners in debt are entitled to homestead protection; only the wives of debtors have the veto power over the conveyance of the family home.

The principal source of error in the doctrine laid down, if there was error, appears to be in testing the wife's right of defeating the alienation of her home, by the exemption rather than by the non-alienation clause of the article. The restraint is not upon the *debtor* but the *owner* — any owner, whether in debt or not. "No deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife." If he has no wife, the inhibition does not touch him. If he has one, she may aid in the preservation of her home by refusing to sign it away, whether he be rich or poor, creditor or debtor, thrifty or shiftless — so he be merely an "owner" of the "occupied" "lot" and "dwelling," worth no more than a thousand dollars.

It is not to save the home from the hammer only, that she is accorded this right; it is also to save it from the husband's selling it from any motive, wise or unwise. Provident husbands who can sell to advantage are not excepted from this

provision relative to owners any more than indiscreet, drunken and profligate ones are excepted. Husbands must convince their wives that the sale would be good for the family, and thus induce them to join in the conveyance. The law purposely makes the sale of the exempt home difficult in order to conserve it, while it does not interdict alienation absolutely, as there is likely to be good reason for selling when two married beneficiaries concur in the act.

The restraint upon the owner, for these reasons, is sufficiently presented in the dissenting opinion of the case, to which the reader's attention is directed. The decision will speak for itself; it is law in its own state; whether the reasons which underlie it will commend it to the profession beyond that state was a proper subject for inquiry. In justice to it, the cases cited and discussed therein, in addition to those above cited here, should be presented.[1]

The conclusion of the court is that a solvent owner has no exempt homestead which he is restrained from selling by his sole deed; that his residence, like all his other realty may be freely alienated by himself alone; that it does not differ from his other lands in this respect; that the constitution merely gives him the right to claim homestead in case he should become involved in debt; that then he may select a thousand dollars' worth of realty as exempt, or have it allotted to him by the officer in charge of the execution, or by the court; that what he has thus selected or has had allotted becomes inalienable without the assent of his wife, and that what he sells alone while indebted is liable to subsequent homestead claim as it would be to the wife's dower. While this view of homestead may seem different from the prevalent doctrine, it must be respected as the law of the state, construed by a court whose opinions are always learned and exhaustive.

In some respects the doctrine is rather against commerce and *jus disponendi* than favorable. Persons dealing with the seller of lands cannot always know whether he is in such a

[1] Crummen v. Bennett, 68 N. C. 494; Mayho v. Cotten, 69 N. C. 289; Hager v. Nixon, 69 N. C. 108; Bruce v. Strickland, 81 N. C. 267; Sutton v. Askew, 66 N. C. 172; Arnold v. Estis, 92 N. C. 162; Gilmore v. Bright, 101 N. C. 382; Lee v. Mosely, 101 N. C. 311 (cited in Hughes v. Hodges, 102 N. C. 236).

state of indebtedness as to preclude his right to give full title. They have no notice by record. He may seem to be solvent and flourishing, yet be financially *in extremis*. Is not the rule of the other states better? Is it not more conducive to the interests of commerce and the free disposition of property to have the limited home property exempt and inalienable by the husband alone, while he may freely sell or mortgage all the rest of his realty, with notice to the public of the reservation?

It would seem, from the exceptional doctrine laid down, that not only the occupied dwelling or ground constituting the debtor's family residence, but any other land of his, is susceptible of being allotted to him as exempt when execution is pending; that he may then "select" his homestead. This greatly adds to the uncertainty of the public as to what lands may be contracted for without jeopardy, since it cannot be well known whether the seller has yet come into that "condition" of impecuniosity which will enable him to become a beneficiary of the homestead law.

§ 7. Sale by Husband and Wife.

In statutes containing the clause that the owner shall not alien or mortgage the homestead (meaning the prescribed exempt *quantum* of realty), without his wife's joinder or assent, the general rule is that any alienation of the fee by both, which is silent as to reservation or release of the right of use, conveys the entire right, title and interest,[1] so that the grantee is entitled to immediate possession, and may oust the occupying grantors. Express reservation of the right of use, or of life estate, or of anything excepted from such conveyance, is necessary if anything is to be retained by the grantors, as a general rule, in most of the states.

No doubt married grantors acting together, or any unmarried grantor, may thus convey. And, after life estate has been reserved, they may sell that with reservation of the right of use for a term of years within their lives. And after that, they may sell their right to this term, retaining leasehold only, and yet have exemption right in that. Were they to sell the

[1] Weigeman v. Marsot, 13 Mo. App. Kendall v. Powers, 96 Mo. 142; 576; Holland v. Kreider, 86 Mo. 59; Waterman v. Baldwin, 68 Ia. 255.

fee, with express reservation of life estate, and then abandon the premises, what would be the effect? Creditors could proceed against the life interest: for the holder of the fee could not complain, since he would have no right to what he had not bought; and the grantors could not complain, since they would have given up their homestead protection.

Married owners cannot thus sell the fee with reservation of such less title as would preserve the home for the family for a period, where the law invests their children with such "estate of homestead" present or prospective as to render such dispositions as those above mentioned inconsistent with such right; especially, when assent by the owner to such provisions is inferable from the act of homestead dedication.

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."[1]

This section is entirely free from ambiguity unless the word *homestead* is liable to be taken for the mere right of family occupancy instead of the exempt realty. Such misapplication is precluded by the decisions upon this statutory restraint. They treat the word in its palpable sense, as meaning the property itself which is exempt as the family residence within the monetary restriction fixed by another section of the statute. And it matters not whether the physical, tangible, house-and-land *homestead* be owned by one spouse or by both; whether it is the husband's property or the wife's; whether it is community or separate property, both must unite in a joint deed to convey or mortgage it.[2] Separate deeds are insufficient.[3]

Under the section given, and the rest of the statute, there is nothing to authorize the husband alone to alienate the homestead, though the title be wholly in himself, and though he reserved, for himself and wife, life estate therein. Under a former statute, it seems that the rule was different.[4] If the property occupied as a home be worth more than the exempt

[1] Civil Code of California, § 1242.

[2] Building Ass'n v. Chalmers, 75 Cal. 332; Flege v. Harvey, 47 Cal. 371; Barber v. Babel, 36 Cal. 11; Lies v. De Diablar, 12 Cal. 327; Clarkin v. Lewis, 20 Cal. 634; Sears v. Dixon, 33 Cal. 266; Gleason v. Spray, 81 Cal. 217.

[3] Poole v. Gerard, 6 Cal. 72.

[4] Gee v. Moore, 14 Cal. 472; Bow-

value, the excess has been held not subject to the inhibition relative to mortgage by the husband alone.[1]

It has been held that the owner of a homestead (with his wife's concurrence, if he be married) may sell the fee so as to pass it to the grantee subject to the right of occupancy by the grantor; that the effect of such sale would be to leave the right in the grantor though no such reservation be expressed in the conveyance, and that on the termination of the occupancy, the grantee would become vested with all the right, title and interest. If the grantor deed the fee to one grantee without express reservation of homestead use, and afterwards to another with express reservation of it, the first takes the land free from the homestead right after its abandonment, while the second takes nothing.[2]

§ 8. Execution Sale.

The supreme court of the United States inferred, from the doctrine that there may be *voluntary sale* of the fee of the homestead premises, with the right of use remaining in the grantors, that there might also be *forced sale* of it with that right reserved.[3] This was held in a case coming from a state holding to the doctrine of such voluntary conveyance, in which many of the above cited cases were adduced and discussed. It was said: "The only difference between a conveyance made by a judgment debtor who has a homestead and by the sheriff under a sale or execution against his land is, one is the act of the party, the other of the law — one a voluntary, the other an involuntary conveyance. . . . As the land can be sold by the owner subject to the homestead, so a judgment is a lien on the land subject to the homestead, and the land or fee can be sold under execution subject to the homestead, and the purchaser, as in the case of a deed by the debtor without

man v. Norton, 16 Cal. 213; Sears v. Dixon, 33 Cal. 117; McQuade v. Whaley, 31 Cal. 526.

[1] Bowman v. Norton, 16 Cal. 213. But *see* Marbury v. Ruiz, 58 Cal. 11, and Grogan v. Thrift, 58 Cal. 378; Waterloo Turnpike Co. v. Cole, 51 Cal. 381.

[2] Hewitt v. Templeton, 48 Ill. 367; McDonald v. Crandall, 43 Ill. 231; Vasey v. Trustees, 59 Ill. 191; Bliss v. Clark, 39 Ill. 590; Brown v. Coon, 36 Ill. 243; Best v. Allen, 30 Ill. 30; Patterson v. Kreig, 29 Ill. 514; Young v. Graff, 28 Ill. 20; Green v. Marks, 25 Ill. 221. *See* Moore v. Flynn, 135 Ill. 74.

[3] Black v. Curran, 14 Wall. 469.

the waiver, has the absolute title when the homestead right ceases."

But the state supreme court subsequently pointed out that the above deliverance was rendered under a misapprehension of the decisions above cited and commented upon by the federal court. "This court has always made a marked distinction between cases of voluntary conveyance by the homestead occupant and those of compulsory conveyance by the officer of the law." Then the statutory inhibition of forced sale is stated, with the remark: "It is not the mere homestead right of occupancy which is exempted from levy and forced sale, but *it is the lot* of ground occupied as a residence."[1]

Put the exemption clause and the non-alienation clause together:

"There shall be exempt from levy and forced sale . . . *the lot* of ground and buildings thereon occupied as a residence."

"No release or waiver of such exemption shall be valid unless in writing, subscribed by the householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate. . . ."[2]

There is nothing correlative between the two provisions. The lot cannot be sold by the sheriff, but it may be sold by the owner (as any other property of his), with no restraint upon him except that he cannot sell and transfer it alone when he has a wife. The proposition that, if he and she can sell and deliver the lot with full title, they can sell a less title and withhold delivery for a certain time, or until the happening of a future event, is not antagonized by the clause exempting it from forced sale.

There might be good argument on the naked statute, that since waiver of exemption must be expressed in the deed, a conveyance without such waiver is a nullity; but the decisions of the state are otherwise, and such argument would be futile.

Chief Justice Bleckley lucidly explained that under the constitution of his state it is physical property which is exempt as homestead — not something carved out of it, leaving the

[1] Hartwell v. McDonald, 69 Ill. 293.

[2] Extracts from the statute passed upon in Black v. Curran, *supra*.

so-called reversion liable to execution. Nothing of it can be forced to sale during the homestead duration. Upon its termination, the property may be subject to execution. The ownership remains unchanged by the dedication of the property to family use, as it existed before. The two thousand dollars' worth of realty exempt is estimated upon the full title — not upon the owner's life estate, or his and his wife's, with the children's uncertain estate for years added.[1]

Property was bought at the price of $2,500, of which $1,800 were paid from a fund derived from the sale of a homestead. The exemption right in the new purchase was held to be eighteen twenty-fifths of the value of the land. The remaining seven twenty-fifths composed no part of the new homestead. A mortgage having been put upon the whole, it was held not given for purchase-money except to secure the $1,800: so the mortgagee could proceed against seven twenty-fifths of the land at once, and eventually against the reversionary interest in the whole, on termination of the homestead right.[2]

"A homestead exemption, actually and rightly interposed, has the effect in law of dividing the freehold into two *quasi*-ownerships,— the one for life, and the other in remainder. The first, or life ownership, unless forfeited by abandonment of the possession, is as much beyond the influence of the execution as if it was the property of a stranger. Execution in the hands of a sheriff fastens no lien on property so held, either on the life estate or the remainder. The exemptioner may sell the fee of the property so held and vest a good title in the purchaser, to the same extent, and with the same limitations on his powers of disposition, as would be the case if his debt was not in execution, and was not reduced to judgment."[3]

§ 9. Sale of the Reversion.

The fee cannot be sold under execution so as to leave the homestead unsold, when *homestead* means exempt realty.

[1] Van Horn v. McNeill, 79 Ga. 121; Stephenson v. Eberhart, 79 Ga. 116; Jolly v. Lofton, 61 Ga. 154; Haslam v. Campbell, 60 Ga. 650; Heard v. Downing, 47 Ga. 629; Moughon v. Masterson, 59 Ga. 836. *See* City Bank v. Smisson, 73 Ga. 423; Skinner v. Moye, 69 Ga. 476.

[2] Johnson v. Poullain, 62 Ga. 376.

[3] Caldwell v. Pollak, 91 Ala. 353; 8 So. 546.

"It is the *actual homestead* and the dwelling and other buildings *used* therewith, or, in lieu thereof, such portion of the owner's estate as he may elect as is *occupied by him*, that is declared to be exempt from sale under execution. . . . The land shall be set apart by *metes and bounds*, and in case of the debtor's death, leaving a wife and no children, the rents and profits thereof shall inure to the widow during her widowhood. . . . We cannot perceive how these provisions can be made to apply to a mere remainder in lands dependent upon a life estate. . . . There can be no homestead without a home or the immediate possibility of a home upon the land itself."[1] But it is possible to sell the exempt realty with the privilege of occupancy excepted for a stated time.

It was held that when the homestead property was liable to execution for a debt older than the exemption law and therefore not affected by it, but was sold subject to the debtor's homestead right or privilege (as it would exist against a debt subsequent), the purchaser "took the land with the incumbrance; and, the whole tract having been allotted to the debtor, only the reversionary interest passed" to the purchaser.[2] Before the present act which forbids the sale of a reversionary interest in a homestead by a creditor, he could sell to satisfy an antecedent debt, with the debtor's homestead privilege reserved to him; that is, he could sell that interest without exercising his right to sell the whole.[3]

"While the creditor may sell the entire interest of the debtor, passing to the purchaser the fee-simple and driving the debtor from his home [executing on antecedent debt], it is clear that under the rule and reasoning [in the above-cited cases], if he permits the sheriff, as his agent, in mercy to the debtor, to sell 'subject to the homestead' (allotted or unallotted), the sale is valid and passes the reversionary interest only."[4]

"The husband's deed, without the wife's concurrence, is effectual in passing what is called his estate in reversion, or, in other words, the land itself, subject to the burden or incum-

[1] Murchison v. Plyler, 87 N. C. 79.
[2] Wyche v. Wyche, 85 N. C. 96.
[3] Lowdermilk v. Corpening, 92 N. C. 333; Corpening v. Kincaid, 82 N. C. 202; Barrett v. Richardson, 76 N. C. 423.
[4] Long v. Walker, 105 N. C. 90, *108*.

brance of the homestead as defined in the constitution, and the title to this can only be divested in the mode therein pointed out. . . . While the plaintiff cannot deprive the defendant of the possession of the land, he is entitled to a decree of foreclosure and sale of the land charged with the homestead incumbrance."[1]

When the reversion is liable, a pending bill to sell it may be amended so as to pray for the sale of the whole estate, if the exemption has expired and the whole has become susceptible of execution. "By what authority can it be claimed that the property held as a homestead exemption, which remains after the exemption expires, cannot be subjected to the debts of the householder or head of a family? It is by law expressly so provided,"[2] . . . that is, it is provided that the property *can* be so subjected under the state law cited, after the exemption has terminated.[3]

§ 10. Sale by Administrator.

The homestead land is not generally an asset to be sold by the administrator; but it has been held to be: "If necessary to pay the debts of the [deceased] husband, the homestead may be sold, subject to the right of occupancy by the widow and children; but during the life of the husband it cannot be sold by the creditor unless a lien is created upon it in the manner provided by law, or when it ceases to be a homestead by his abandoning the premises. Whether the homestead is regarded as an estate or the mere privilege of occupancy, it is certain that no creditor can acquire a lien upon it unless the *right* is waived in the manner pointed out by statute."[4]

"When the right to the homestead passes to the widow, it may be sold by the creditor, subject to the widow's occupancy and that of the children if necessary to pay the debts of the husband.

"In this case it is not the debt of the husband that is attempted to be made, but that of the widow; and, as far as her right to a homestead out of the proceeds of the sale of her

[1] Jenkins v. Bobbitt, 77 N. C. 385. *See* Hughes v. Hodges, 102 N. C. 236.

[2] Const. of Virginia, art. 11, §§ 1, 5; Code (1873), ch. 183, § 8.

[3] Hanby v. Henritze, 85 Va. 177, 185.

[4] Lear v. Totten, 14 Bush, 104; Evans v. Evans, 13 Bush, 587.

husband's real estate is concerned, it cannot be reached by her own creditors. The chancellor should therefore invest the proceeds in a homestead for the widow; and if the husband's creditors are seeking relief, it can be sold subject to the widow's occupancy, and that of her infant children, if any."[1]

In this extract, the reader will notice that the term *homestead* is used in different senses. In the clause, "When the right to the homestead passes to the widow," the meaning is when the right of use or enjoyment of the property passes; but the pronoun immediately following stands, not for that, but for the property used, since the sale of it by a creditor must be subject to the widow's and children's occupancy. In the clause, "as far as her right to a *homestead*," the term does not mean the exempt realty but her right in it. The last mention of the term: "The chancellor should invest the proceeds in a *homestead*," conveys the idea of realty; the meaning is that he shall invest in a dwelling, which creditors can sell "subject to the widow's occupancy."

"The theory of the homestead exemption is that the debtor requires a prescribed amount in value of land to be set apart for the support of himself and dependent family, but to accomplish such a beneficent object he must have the right to occupy and use it; and hence it is an indispensable requisite that a party claiming the exemption must be in the actual possession. But a party having merely an interest in remainder is without any right to the possession, and, in the meaning of the law, not in possession."[2]

An absolute, unconditional estate for life granted to the widow of a homestead-holder by statute[3] is not subject to the right of occupancy by his minor children. She has the sole use and disposition of her life estate in the premises. Freehold estate, with right of occupancy, is given to the marital survivor, who is protected in its enjoyment as the united head had been before its severance by the death of one spouse. The minor children are not specially provided for, but trusted to the natural instincts of the parent. Abandonment of the homestead, by their widowed mother, leaves them no home-

[1] McTaggert v. Smith, 14 Bush, 414.

[2] Merrifield v. Merrifield, 82 Ky. 526.

[3] Gen. Stat. Minn. (1878), ch. 46, § 2; Holbrook v. Wightman, 31 Minn. 168.

stead rights to be asserted. They cannot claim any as heirs of their deceased father, for a life estate has intervened.[1]

Conveyance of such life estate divests the homestead right, so that the property itself becomes subject to forced sale for debts. It is part of the assets of the decedent's estate, and the fee may be sold to pay his debts. Sale of it by order of court is not void, and therefore it cannot be collaterally assailed even on the ground that the homestead right had not terminated.[2]

Where it is provided that the homestead property shall be subject to the rules of descent and disposable by will, continuing exempt from liability for the debts of the decedent parent or those of his heirs inheriting it; and that it shall be subject to execution for the debts of the decedent only when he or she has left no issue and no marital survivor, the fee cannot be treated as an asset distinguishable from the land itself. Whatever may be said of the constitutionality of such a provision, and of its equitable character with reference to the rights of creditors, the homestead cannot be executed for debt while any heir exists, though the debtor's widow be dead and all his children of age, where this rule prevails.[3]

An order of sale, by a probate court, of land on which the debtor with his family resides, without laying off the quantity exempt and excepting it from the sale, when the court was apprised of the facts by the petition filed and otherwise, is an absolute nullity.[4] And the sale of the reversionary interest, reserving the rights of the widow and children, is held void.[5]

Under a constitutional provision, giving his widow and children the usufruct of a decedent's homestead,[6] the probate court cannot order the sale of the fee of the homestead, for the payment of debts of the estate, on petition of the admin-

[1] McCarthy v. Van Der Mey, 42 Minn. 189.

[2] *Ib.*

[3] McClain's An. Stat. Ia., §§ 3163–3185; Johnson v. Gaylord, 41 Ia. 362.

[4] McCloy v. Arnett, 47 Ark. 445; Ruttenberg v. Pipes, 53 Ala. 452; Yarboro v. Brewster, 38 Tex. 397; Hamblin v. Warnecke, 31 Tex. 91; Hinsdale v. Williams, 75 N. C. 430; Poe v. Hardin, 65 N. C. 447; Wolf v. Ogden, 66 Ill. 224; Estate of Busse, 35 Cal. 310; Schadt v. Heppe, 45 Cal. 433; Tompkins' Estate, 12 Cal. 114; James' Estate, 23 Cal. 415. *See* Judge of Probate v. Simonds, 46 N. H. 363.

[5] McCloy v. Arnett, 47 Ark. 445.

[6] Const. of Arkansas (1874), art. 9, §§ 6, 10.

istrator.[1] When the homestead character has ceased to exist, the property may be liable for the debts of the decedent.[2]

§ 11. No Sale, During Homestead Occupancy, by Administrator.

An administrator, duly licensed by a competent probate court, sold homestead lands subject to the exemption right of the decedent's widow and children, and the widow became the purchaser, and the sale was confirmed by the court. She then sold the property. The heirs at law of the decedent sued the widow's vendee for the land. Judge Cooley, in deciding the case, says that at the time of the death of the householder, "his family were left residing upon the land, and for that reason it is claimed it would not be sold for the payment of debts. But the statute does not exempt the fee in the land as a homestead; it exempts the land only while it is occupied as a homestead by the widow and minor children. Subject to the homestead right, therefore, the lands are assets when needed for the payment of demands against the estate." The widow had sold out and left, and the heirs had become of age before the suit was brought, so there was no one "to raise the question of the homestead."[3] Had there been, perhaps the sale would have proved voidable; for the same learned jurist said of this case, when deciding a later one: "It was not decided . . . nor was it necessary to decide that the course adopted [by the probate court] was the most suitable." . . . "But at most a sale subject to the homestead right would be voidable on appeal; it would not be void."[4] While the constitutional provisions are admitted to continue the exemption after the death of the owner during the minority of his children or during the widowhood of his surviving wife, "they, by implication at least, recognize the estate of the late owner as having an interest in the homestead, which is assets, and which at some time and in some manner must be subject to be applied in the payment of debts, but they do not indicate the time or point out the means of making the application. Neither

[1] Stayton v. Halpern, 50 Ark. 329; Garibaldi v. Jones, 48 Ark. 236.

[2] Nichols v. Shearon, 49 Ark. 75.

[3] Drake v. Kinsell, 38 Mich. 232, 237.

[4] Showers v. Robinson, 43 Mich. 502, 510.

is there any statute that makes provision for the case."[1] And it is *queried* whether lands can be rightfully sold to pay the debts of a decedent, subject to the homestead right. Weight is given to the argument *ab inconvenienti* drawn from the uncertainty of the duration of the homestead right, and the difficulty of estimating the value of the fee subject to that right. "Selling the land under such circumstances is something like selling the contingent interest of the heir expectant, if that were salable," remarked the court. The conclusion seems to be that the course pursued in several other states (from which cases were cited)[2] should be followed: that of holding the fee inalienable by the administrator while the homestead right rests upon the land. In the first case cited above by the court, in which a statute providing for the setting off of a homestead for the widow of a deceased debtor was under construction, it was declared that the legislature had not meant that the land set off to her should be sold subject to her right of exemption, because such a course would be destructive to the creditor's rights, for purchasers would be loath to buy property subject to such an incumbrance.

In the second case cited, it was held that an administrator could not sell the fee of homestead land subject to the widow's exemption right, but must await the termination of that right. In the third, that the administrator must apply for an order of sale soon after the termination, since otherwise license then to sell may be refused by the probate court. In the fourth, homestead lands were treated as assets of the estate after the homestead right had expired, but not liable to sale by the administrator, subject to that right, before the expiration.

§ 12. The Fee of Homestead Not an Asset of the Estate.

The statutory creation, "Every householder having a family shall be entitled to *an estate of homestead*, to the extent in value of one thousand dollars, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be ex-

[1] *Ib.*

[2] Rottenberry v. Pipes, 53 Ala. 452; Burson v. Goodspeed, 60 Ill. 277; Wolf v. Ogden, 66 Ill. 224; Taylor v. Thorn, 29 O. St. 569.

empt,"[1] . . . means that all the right and title which the head of the family has in the premises shall constitute his homestead and be exempt. "It is not the mere right of occupancy which is exempted from forced sale, but it is the lot of ground occupied as a residence."[2] "Plainly, no sale can rightfully be made of the homestead by the administrator to pay debts, where the property does not exceed in value one thousand dollars, until the exemption in favor of the widow and minor children has in some mode terminated.[3] If the homestead exceeds that value, the statute directs how the excess may be sold, or indivisible property sold with the value reserved from the proceeds.[4]

A sale of homestead premises in violation of the statute may be set aside at the instance of the occupying beneficiary.[5] A sale of it by an administrator to pay debts is void.[6]

"This court has never recognized in any of its previous decisions the doctrine, sometimes insisted upon, that there can be a [forced] sale of the property, subject to the right of occupancy by the party entitled to a homestead. Even a sale of the premises, where the homestead exceeds in value one thousand dollars, is invalid unless the provisions of the statute in regard to assigning a homestead, and for a sale where the premises are not susceptible of division, have been substantially complied with."[7] A homestead, consisting of a lot of ground and improvements not exceeding the monetary limit of value, may be sold by the owner (his wife joining if he has one), free from any lien of judgment against him, since such lien does not attach where there is no excess of value.[8] It attaches to any excess.[9]

[1] Starr & C.'s An. Stat. Illinois, p. 1097, same as § 1 of Act of July 1, 1873.

[2] Hartwell v. McDonald, 69 Ill. 293.

[3] Hartman v. Schultz, 101 Ill. 437, *443;* Kingman v. Higgins, 100 Ill. 319; Ano. Stat. Ill., Act 1873, § 2.

[4] Merritt v. Merritt, 97 Ill. 249; Hotchkiss v. Brooks, 93 Ill. 392.

[5] Conklin v. Foster, 57 Ill. 104; Allen v. Hawley, 66 Ill. 164; Hubbell v. Canaday, 58 Ill. 425; Mooers v. Dixon, 35 Ill. 208; Moore v. Titman, 33 Ill. 358.

[6] Rorer on Jud. Sales, § 495.

[7] Hartman v. Schultz, 101 Ill. 437, *441.*

[8] Moriarty v. Galt, 112 Ill. 373, *citing* Hartman v. Schultz, 101 Ill. 437; Kingman v. Higgins, 100 Ill. 437; Haworth v. Travis, 67 Ill. 301; Hubbell v. Canaday, 58 Ill. 425; Wiggins v. Chance, 54 Ill. 175; Stubblefield v. Graves, 50 Ill. 103; Hume v. Gossett, 43 Ill. 297; Bliss v. Clark, 39 Ill. 590; Green v. Marks, 25 Ill. 221.

[9] Eldridge v. Pierce, 90 Ill. 474.

If sale of the so-called reversion could be made before the expiration of the "estate of homestead," it might prove of very little value. In illustration it has been said: "The widow or husband in whose favor the homestead is continued being young, a purchaser buying the property at administrator's sale would consider the probable duration of the estate in such party. The longer it would probably endure, the less would be expected to be bid. Should the estate of homestead be suddenly terminated by death or abandonment, the purchaser could obtain a perfect title to the property, subject to no burden, at vastly less than its real value, to the great prejudice of the creditors of the estate of the householder or the parties entitled to the remainder. It was surely never intended that property should be thus needlessly sacrificed, and any construction of the homestead act that would lead to such a result would be mischievous in the highest degree."[1]

§ 13. Comment.

To sum up the law of sales of home property with homestead use reserved: the right of alienation is perfectly free before the exemption quality has attached. Though the privilege of having it attach may already exist, the right of alienation everywhere remains untrammeled until that privilege has been attached.

In states where there must be something done by the owner (or by his wife or her husband), such as filing a declaration, or having "Homestead" inscribed upon the title, or having the prescribed quantity of realty set apart, the property does not become exempt before compliance with the requisition, and therefore the owner is free to sell.

In several states where family occupancy is deemed notice of the homestead character of the property occupied, the exemption quality attaches by law to homes without any act on the part of the owner or his or her spouse.

The prevalent rule is that there is nothing correlative between exemption and voluntary alienation. The exception is that where an "estate of homestead" is created of such a character as to give the surviving spouse and the children of the owner such rights as are inconsistent with the owner's power of disposition, he has waived the power by dedicating his prop-

[1] Mr. Justice Scott, for the court, in Hartman v. Schultz, 101 Ill. 443.

erty to homestead use and has thus accepted the terms of the law.

Generally speaking, however, restraint upon voluntary alienation is not a corollary of exemption. It is an independent inhibition. It is found in the homestead statutes sometimes coupled with the exemption provision, but usually otherwise, and always unnecessary to the complement of that provision excepting as above shown.

It was not thought necessary, in writing the foregoing sections of this chapter, to present, in detail, the provision of each state for the restraint of the voluntary alienation of homesteads — specimens being considered sufficient. If every point of homestead law were run through all the states, and the judicial deliverances on it discussed, the result would be a volume as massive as any of our lexicons unabridged, and the profession would become bewildered in the luxuriant redundancy. Each specimen will represent its class as a sample speaks for the cotton bale.

The law on the subject may be summarized thus:

(1) In the absence of any restraining clause, the owner may convey his or her homestead, consisting of the prescribed quantity of realty, just as he or she may convey any other property.

(2) The common restraint prescribed is upon married persons, forbidding one spouse to convey the homestead alone. Acting together, married persons may convey their homestead just as they may convey any other property.

(3) The prohibition of the husband's selling without his wife's joinder does not imply prohibition of *her* selling without his joinder, if the homestead is her separate property: so she may freely sell, so far as this prohibition is concerned.

(4) The right to sell a thing includes the right to sell less: so any single owner who has the right to sell his homestead property, or any married couple who have the right of selling theirs by acting together, may sell it with the right of occupancy reserved for a stipulated time or under stipulated conditions. And, as the law confines homestead to no particular title or ownership if there be exclusive right of possession, the reservation may be that of life estate which will form sufficient basis for homestead; and the property right and in-

terest may even be reduced to lease hold with the homestead basis intact.

(5) The right of homestead occupancy cannot be sold, with the fee of the property retained, since that would leave no right of possession in the grantor, and therefore no basis for homestead. It would be abandonment.

(6) Forced sales differ from voluntary sales with respect to reservations. The interdiction of forced sales of homesteads includes not only the property, but everything less: so, the fee cannot be sold with right of occupancy left unsold; and states which permit this (of which specimens are given above) are exceptional to the prevalent homestead system. The exemption of the homestead is the exemption of all the right, title and interest of the homestead holder therein; and it is found in the exemption clause and not the alienation clause of the homestead statute of each state.

(7) The homestead realty is not an asset of a decedent's estate (leaving the right of occupancy in the widow and children), except in states inharmonious with the prevalent homestead system.

(8) It cannot be said that the term, *widow's homestead*, is generally indicative of real estate belonging to a widow; for it is used in such different senses in different states as to preclude any generalization here. And the foregoing seven notes are not meant to apply to that species of homestead.

(9) "Estate of homestead," wherever recognized, has such peculiarities that the above general rules are not meant precisely to apply to it.

CHAPTER XVI.

FRAUD.

§ 1. Fraudulent Acquisition.
2. Buying with Another's Money.
3. Exchanging Goods for a Homestead when They Have Not Been Paid for.
4. Fraudulent Selection from Liable Property.
5. The "Policy" to "Secure" Homesteads.
6. Fraudulent Conveyance — Creditors Disinterested.
7. Remote Interests in Fraudulent Conveyances.
§ 8. Conveyances to Creditors' Prejudice.
9. Liability to Creditors.
10. Selling Liable Property.
11. Fraudulent Liens.
12. Fraudulent Transfer to Wife.
13. Effect of Setting Aside a Fraudulent Transfer.
14. Effect of Forfeiture, as to Creditors.
15. Comment.

§ 1. Fraudulent Acquisition.

Homesteads ought to be honestly acquired. The benefit of exemption is for those who have complied with the conditions upon which it is offered. Ownership under some species of title which carries with it the right of exclusive possession is an indispensable condition. Compliance with it is not rendered unnecessary or dispensable by any rule of liberal construction. However much the law may favor the home when acquired, it never encourages or excuses the rascally procurement of the sacred possession. It would seem superfluous to say this — especially superfluous to prove this — were there no decisions that seem to make the law encourage or excuse such procurement.

Before noticing the few deliverances of that kind, the reader will turn to the many which hold honest purchase and payment for homestead, or lawful inheritance or other acquisition of it, essential to the creation of the exemption character, and therefore necessarily ante-dating the beginning of any liberality of construction as to that character.

No statute exempts homesteads from liability to pay their purchase price. Some expressly provide that no property

shall be exempt from liability "incurred for the purchase" of it. The grantor, who has parted with land, is to be paid the price, without any spell put upon the place by law to render it inviolate. The lender of money to pay the grantor ought to have the right of following it to the farm or town lot bought by it, so that the homestead holder shall not have it for nothing.[1]

Where the statute excepts the homestead from exemption, not in case of debts contracted in making the purchase, but in that of debt for the price due the grantor, the opportunity for fraud in the acquisition of a homestead is greatly enlarged. Especially, when only the vendor's lien is made enforceable, while side obligations (such as those created by borrowing money to pay the vendor's claim after title has passed) are not privileged debts against the property thus paid for, is the field for fraud much widened. In such case, the legislator is responsible for the evil results, and not the expositor.

When, however, the statute leaves the homestead liable for all debts incurred in its purchase or acquisition,— whether they are supported by a conventional lien or not, whether they are due to the vendor or to his assignee, whether they are directly owing to the vendor or were incurred by borrowing money of others to pay him,— then the courts are not excusable if they permit any one to acquire a homestead at the expense of another without his consent.

To repeat the words of Chief Justice Jackson (elsewhere quoted), when speaking of a borrower of money to pay for a homestead: "Shall he not pay the man whose money got him the homestead right out of the property, before he asserts and sets apart right paid for by" the lender? "Justice, equity, law, common sense, all demand that he shall. . . . The sense of right in the heart of an honest man, when a swindler would cheat him, nine times out of ten is the law of the land." And again, in the same case, the righteously indignant judge says that to permit the debtor to perpetuate

[1] Williams v. Jones, 100 Ill. 362; White v. Wheelan, 71 Ga. 533; Zundell v. Gess, 73 Tex. 144; Bentley v. Jordan, 3 Lea, 353; Parrott v. Kumpf, 102 Ill. 427; Purcell v. Dittman, 81 Ky. 148; Thompson v. Sheppard, 85 Ala. 619; Durham v. Bostick, 72 N. C. 356. These, and many other cases, are cited in the chapter on Liability for Purchase-money.

such a fraud as to make a homestead out of money which he begged the lender to lend, "without paying a dollar of it back to him, *would be to sink law and equity into a slough of iniquity and putridity nauseating to every sense of moral purity.*" And again: "While homestead rights are constitutional and favorites of our law, *fraud is not.*" [1]

Contrast this decision with the following: A purchaser bought a house, and gave his note for the price, which note was purchased by a third person at the maker's request. Judgment was obtained on the note, but the court held the house exempt. The debtor's wife had become the owner, but the case did not turn on that circumstance; for it was said in the decision that had she been the maker of the note, the house would have been exempt; that, admitting the acts of husband and wife to have been fraudulent, the holder could not make his money out of the property bought with his money.[2] There seems to be nothing in the statute under which this case was decided to justify a conclusion different from that reached in the preceding case.[3]

Where homestead protection originated it is now said: "The beneficent provisions of our homestead laws have been the occasion of much enthusiastic comment, and of not a few rhetorical flourishes in the opinions of this court. That it is politic and wise is proved by the tendency of the more recent legislation on the subject throughout the states of the Union. But while this court has ever construed, and will continue to construe, our exemption laws liberally in favor of those they were intended to protect, we cannot sanction an interpretation which would make them a mere cover for shielding property from being subjected to the payment of honest debts." [4] And then the court showed how "a wise and humane provision of our organic law is made an instrument of wrong, and a reproach among honest men," by claimants of the benefit who do not desire to use their lots as a part of their homes or the direct comfort and convenience of their families, but merely

[1] Bugg v. Russell, 75 Ga. 837.

[2] Gruhn v. Richardson, 128 Ill. 178.

[3] Starr & C.'s Stat. Ill., p. 1097 *et seq.*; Const. Ga., art. 9, §§ 1, 2. See cases cited § 5, ch. XI, *ante*.

[4] Blum v. Rogers, 78 Tex. 530; 15 S. W. 115; Oppenheimer v. Fritter, 79 Tex. 99; 14 S. W. 1051.

to save them from forced sale, by building houses to be let to tenants, "drawing water from them" occasionally, "sowing the ground in turnips;" and it might have been added (drawing upon instances in other states), planting a tree or two, digging a well, dropping building material upon the ground or building a fence around it. But the building of a stable is deemed better than "sowing the ground with turnips," as creating a homestead.[1] Building *corrals* for stock, buying lumber, purchasing wire for fencing, and planting — not turnips, but *alfalfa* — were held sufficient to show intent of occupancy and to give present exemption.[2]

The liberality of the construction given to the exemption features of the law sometimes tends to the favoring of claims not well founded. The danger has been thus pointed out:

"In avoiding the Scylla of oppression, we must guard against the Charybdis of dishonesty. . . . As the act to prevent frauds and perjuries was once said to be construed in such a way and manner as to promote fraud, so the homestead provision of our constitution is liable to be so construed as to take away the homesteads of honest creditors." [3]

§ 2. Buying with Another's Money.

The purchaser of a homestead paid for it by drafts upon his bank account in excess of his deposits. Afterwards his deposits made a balance in his favor, though the money deposited was not his own, but a trust fund. On settlement, he was found indebted to the bank, and he gave his note for the indebtedness. This note was assigned by the bank to its president, who obtained judgment thereon, and levied upon the homestead. The debtor enjoined — and the question was whether the note represented the purchase-money with which he had obtained his homestead. The court perpetuated the injunction on the ground that between the time he overdrew his account to pay for the property and the time when he gave his note, there had been a balance in his favor.[4] Had he regularly obtained a loan of the bank and bought his home-

[1] Ellerman v. Wurz (Tex.), 14 S. W. 333.

[2] White v. Wadlington (Tex.), 14 S. W. 296.

[3] Walker v. Darst, 31 Tex. 682.

[4] Hale v. Richards, 80 Ia. 164.

stead with it, the debt would not have been paid by depositing money, to his own account, sufficient to make the payment, if he gave no check to the bank for that purpose. Leaving out of the question the fact that the deposit was of trust funds (which, though held by him in a fiduciary capacity, were thus mixed with his own), we may assume that the deposit was that of his own money. If a settlement had then been made, when the balance of his account was in his favor, and he had then paid the loan by giving the bank a check on his account, there would have been no question that the note given on the settlement actually made, which was transferred to the president and sued upon by him, was not for the purchase-money of his homestead.

That the deposit which covered the deficit was not in payment of the loan is clear from the fact that he retained the right of checking upon it, and did check upon it and thus withdrew the money that belonged to the trust fund. Considered as a loan, the debt was unpaid; and the note given on settlement was for purchase-money, and the homestead was liable, and the injunction wrong.

Could he do, by indirection, what could not be done directly? Especially, while seeking to restrain a judgment by an equity remedy, could he deny that he had obtained a loan by asserting that he, while general manager of the bank, took the money without giving the bank his note, or gave the money in his official capacity to himself in his private capacity? He ought not to be heard to say so. The seeker of equity must do equity.

The court discussed banking, and showed that when a depositor's account is in his favor the bank owes him; and when it is against him, he owes the bank. This is true in a sense; but mere deposits are not understood to be payments of debts to a bank unless checks upon them be drawn in favor of the bank. An overdraft is usually met by a deposit only: but an overdraft of a large amount purposely made by one in control of the bank itself, and used to purchase real estate, creates a debt to the bank which cannot be said to be liquidated by a temporary deposit which is withdrawn before settlement.

Viewing the whole transaction in the concrete, what do we

find? A homestead has been bought with the bank's money, and the purchaser holds the real estate, and the bank is unpaid, and a judgment for the debt is enjoined from execution against the homestead thus obtained.

The court said (with respect to the general manager's using the bank's money, without its consent, to buy the homestead) that, if he consequently must be regarded as holding it in trust for the bank, his trust was discharged when he met his overdrafts by deposit of the school fund. But if right of property had vested equitably in the bank upon the purchase of the homestead with its funds, how was that right divested by the trustee's deposit, without any settlement? Certainly, if the bank meanwhile had availed itself of the right to claim the property by its agent, the subsequent deposit would have been no discharge of his assumed trust, in the absence of any agreement to that effect.

It is difficult to infer from the statute of the state where the above noticed case was tried, that the legislator meant that purchase-money should not be collected from the homestead under such circumstances. Neither the letter nor the spirit seems to favor the holding of a homestead with impunity against its unpaid price. The statute is as plain in excepting from exemption when the judgment is for purchase-money, as the statutes of any state. The general rule is that homesteads are liable for purchase-money. The liability cannot be avoided by complications and the substitution of one debt for another while the purchase-money really remains unpaid. *Dolus circuitu non purgatur.*

§ 3. Exchanging Goods for a Homestead when They Have Not Been Paid for.

The humane provisions for the protection of families are liable to great abuse. The establishment of a homestead at the expense of an innocent neighbor, though managed so as to escape the charge of legal fraud, is wrong-doing of the most reprehensible character. To borrow money and invest it in a home, and then defeat the lender's claim for reimbursement by pleading the homestead exemption, would be so manifestly unjust as to be condemned by all men of integrity. To purchase goods on credit; exchange those goods for a farm, and

hold the farm against the vendors of the goods as an exempt homestead, is quite as bad. But what are the courts to do in such cases? A mortgage for the purchase-money may be foreclosed against the homestead, but if the money is one or two removes from the immediate purchasing transaction, and there is no law for the enforcement of the just debt, owed by the householder, against that which the creditor virtually sold him, but, on the contrary, a statute protecting him in his unconscionable claim of exemption, what can courts do but expound and enforce the law as they find it, and give the claimant the homestead?[1]

The law allows it, and the court awards it.

"We know of no rule of law in this state," said the supreme court deciding the case last cited, "that deprives a person, whose indebtedness may be equal to or exceeds his resources, from taking a part of his property to purchase a homestead. This is not a fraud upon creditors. It is not a concealment of his property. He merely puts the property into a shape in which it will be the subject of beneficial provision for himself and his family. . . ."[2] If the law connives at such moral fraud, the court has merely carried out what it understood the law to be. Is it indeed not reprehensible to acquire a homestead at the expense of others without their consent? Is it not to the prejudice of creditors when property already liable for their debts is converted suddenly into property not liable, for the admitted purpose of keeping them out of their dues?

The homestead which the law protects from creditors is the family residence, owned and occupied by the beneficiary with his dependents. The debts from which it is exempt are the ordinary ones created after notice to the world that the family residence thus owned and occupied is not liable for

[1] Meigs v. Dibble, 73 Mich. 101, in which it seems that a stock of goods had been bought on credit, and then sold or exchanged for forty acres of land; and that one of the creditors for the goods was defeated on execution by the setting up of the land as an exempt homestead. But the court drew distinction between this case and that of Pratt v. Burr, 5 Biss. 36, in which the turning of a whole stock of goods into a homestead was held fraudulent as against the vendors of the goods, who had not been paid. In this case the court contended that there was no contemplated fraud when the goods were purchased; in that case, it was thought otherwise.

[2] *Ib.*

those debts. If converting liable property into non-liable property to defeat creditors from collecting debts created on the faith of it is not a fraudulent concealment of it, it yet is the putting of liable property out of their reach. It is the debtor's taking for himself and his what ought, in all simple honesty, to go to others. Doubtless, however, the court considered the creditors notified by the passage of the homestead law.

We must always respect the decision of a capable and conscientious court, whether or not we think it ought to be drawn into precedent. *Res judicata facit ex albo nigrum, ex curvo rectum, ex recto curvum.*

It is a maxim of the civilians that "the law wrongs no man but renders to every one his due:" a sentiment almost equivalent to the Golden Rule. Juridical ethics, both in the civil and the common law, is consonant with the purest morality. Statutory law should conform to it as nearly as possible, by enactment and construction.

In a case very similar to the one last cited, in which goods, not paid for, were exchanged for a homestead, and then exemption claimed for the latter against the vendor of the goods, the judgment was just the reverse. The debtor's course was held frandulent. The fraud was to the prejudice of the creditor. The creditor's goods had gone to buy the property claimed as exempt. It was held that the claim was unconscionable, and that the homestead claimant may cut himself off from all privileges under a homestead statute by his own fraud and crookedness. No protection is extended to one who takes property in exchange of goods for which he owes, and who thus seeks to defraud his creditors.[1]

The law that "a homestead shall not be subject to forced sale on execution or any other final process from a court" is held to have the same force and effect as though thus expressed: "A homestead shall be exempt from sale on execution or any other final process." But the right to waive the exemption privilege by contract, surrender to the officer in charge of a writ, or neglect to claim before sale; and the liability to forfeit the privilege by fraud, is recognized. Controverting the opposite view, it was said by the court making

[1] Pratt v. Burr, 5 Biss. 36.

the exposition above stated: "If such a construction of the law as is contended for in this case should prevail, its title should be read, 'An act for preventing the payment of honest debts, and for the promotion of frauds upon creditors by debtors.'" [1]

The facts on which this exposition was made were stated thus briefly by the court (after having been given in detail in the statement of the case): "The defendants were merchants, in possession of a stock of goods, and in that character, and under those circumstances, replenished their stock by the purchase of goods of the plaintiffs on credit. After acquiring possession of the goods so purchased, they transferred their whole stock in fraud of their creditors, and took, in exchange therefor, these premises [the homestead]. The mere statement of the facts decides this case in the conscience of every honest man: that neither in law nor justice the exemption should be allowed. The defendants cannot expect the court to assist them in consummating the intended fraud." [2]

A bill was filed against a man and wife (who did business as Argo & Co., she being the company) to set aside a sale of goods as fraudulent. Then, under an amended bill, three lots were attached, which belonged to her. The firm answered, admitted the correctness of the account, claimed that the wife alone owned the business carried on in the firm name, and that she was entitled to homestead in the lots attached.

There was judgment for the complainant and an order for the sale of the lots. In affirming the chancellor's decree, the supreme court said:

"The law provides for the exemption of a homestead to each head of a family. In law, *though it may be otherwise in*

[1] Judge Miller in Pratt v. Burr, 5 Biss. 36, citing on the point that exemption laws are grants of personal privileges to debtors which may be waived or forfeited as above stated: Hewes v. Parkman, 20 Pick. (Mass.) 90; McKinney v. Reader, 6 Watts (Pa.), 34; Hutchinson v. Campbell, 1 Casey (Pa.), 273; Lauck's Appeal, 12 Harris (Pa.), 426; Hammer v. Freese, 7 Harris (Pa.), 255; Bowyer's Appeal, 9 Harris (Pa.), 210; Case v. Dunmore, 11 Harris (Pa.), 93; Brackett v. Watkins, 21 Wend. (N. Y.) 68.

[2] Pratt v. Burr, 5 Biss. 36, *38-9:* Miller, J. The spirit of article 15, section 9, of the constitution of Kansas was declared to be that no person shall enjoy property as a homestead, or enjoy improvements made upon it, against the just claim of one who procured the property or the improvements for him. Nichols v. Overbacker, 16 Kas. 54.

fact, the husband is the head of the family. She [the wife] is not therefore entitled to homestead out of her own lands, nor, as contended in argument, is the husband entitled to homestead in lands belonging to the wife."

But the ordered sale was modified so as to be subject to equity of redemption — the bill not having prayed to have it barred.[1]

§ 4. Fraudulent Selection from Liable Property.

The doctrine that homestead may be selected, to defeat creditors, from property liable for debts due them, has been so pointedly laid down that it must be stated here, however antagonistic to just principles it may appear. The profession cannot disregard what rests on the principle of *stare decisis*, even though the courts, in the exposition of statutes, admit that principles of equity have no control. The doctrine has been carried so far as the holding that creditors who have had no notice, who have trusted their debtor on his assurance that certain described property was amenable for the debt, may be defeated by the subsequent selection of that same property as exempt. It is more agreeable to the writer to state the doctrine by excerpts from the reports.

"An insolvent debtor, in contemplation of insolvency, moved into and made his dwelling in property . . . which constituted a large part of his assets, for the express purpose of holding it as a homestead and thereby withdrawing it from the reach of his creditors. . . . In a financial statement made to the defendants, upon the faith of which they gave him credit for the claims upon which their judgments against him were recovered, he had included as part of his assets the property" subsequently set up as his homestead. "It is claimed that the first would render the claim of homestead fraudulent as to creditors, and that the second would estop him from claiming the exemption as against the defendants. There is nothing in either point. A debtor in securing a homestead for himself and family, by purchasing a house with non-exempt assets, or by moving into a house which he already owns, takes nothing from his creditors which the law secures to them, or in which they have any vested right. He merely

[1] Turner v. Argo (Tenn.), 14 S. W. 930.

puts his property into a shape in which it will be the subject of a beneficial provision for himself, which the law recognizes and allows. Even if he disposes of his property subject to execution, for the very purpose of converting the proceeds into exempt property, this will not constitute legal fraud. This he may do at any time before the creditors acquire a lien upon his property. It is a right which the law gives him, subject to which every one gives him credit; and fraud can never be predicated on an act which the law permits. This also disposes of the question of estoppel."[1]

It is added, "Unfortunately our statute fixes no limit as to value upon a homestead exemption. It must be confessed that such a law may be greatly abused, and permit great moral frauds; but it is a question for the legislature, and not for the courts."[2]

"Does it vitiate the homestead character of the property when the designation thereof as a homestead was for the purpose of preventing the creditor from collecting his debt? The purpose of the designation of the property as a homestead is to put it out of the reach of creditors while occupied as a home; and such purpose, and the consequent result of such designation, are warranted by the statute, though occurring after the debt was contracted, and immediately before the creditor had attached or levied upon the property, and though the debtor had no other property liable for his debt.[3] In no way does the statute rest upon the principles of equity, nor in any way yield thereto."[4]

An insolvent woman owned a brick block which was incumbered. She had other property on which she lived, and which she mortgaged to raise money to apply to the removal of the incumbrance on the more valuable property which was not then her homestead but which she designed to make such

[1] Jacoby v. Distilling Co., 41 Minn. 227, *citing* Tucker v. Drake, 11 Allen, 145; O'Donnell v. Segar, 25 Mich. 367; North v. Shearn, 15 Tex. 174; Cipperly v. Rhodes, 53 Ill. 346; Culver v. Rogers, 28 Cal. 520; Randall v. Buffington, 10 Cal. 491. On estoppel: *In re* Henkel, 2 Sawy. 305.

[2] Jacoby v. Distilling Co., 41 Minn. 227. Here, the "homestead" was worth $24,000 less a mortgage of $10,000, consisting of a half interest in a building block, though the "beneficiaries" lived up stairs over one of the stores.

[3] Barnett v. Knight, 7 Colo. 365.

[4] McPhee v. O'Rourke, 10 Colo. 301, *306*.

on abandoning the other after mortgaging it. She succeeded in making the exchange; and these transactions were held to be not in fraud of her creditors, notwithstanding her admitted insolvency.[1]

[1] Palmer v. Hawes (Wis.), 50 N. W. 341. Cole, C. J.: "There is no room to doubt that Mrs. Hawes had the right to abandon the house and lot in the Third ward, where she and her husband had lived for many years, and occupy the brick store on Milwaukee street as and for a homestead. The law would permit her to make that change, and creditors could not object to it, though it might be unfavorable to their interests. True, it appeared that the first floor of this building had been used and occupied as a store, and the third floor as a photograph gallery, but the second floor had been occupied as a residence. The occupation and construction of the building show that it might well have the character of a homestead impressed upon it, and the proof is abundant that Mrs. Hawes had selected and intended to occupy it as her homestead. Since the case of Phelps v. Rooney, 9 Wis. 71, it has been held that the building need not be devoted exclusively to the use of a home for the family in order to retain the character of a homestead, but parts of it might be used for business purposes. Harriman v. Insurance Co., 49 Wis. 71; 5 N. W. Rep. 12. So the fact that portions of the brick store were used for other purposes than as a residence for the family would not deprive it of its homestead character, nor prevent Mrs. Hawes from acquiring homestead rights therein. Of course, when she selected and occupied the store for her homestead, she necessarily abandoned or lost her rights in her former home. A person can have but one home at a time. 'He may have several houses at once, but only one can be his home at a time.' Jarvais v. Moe, 38 Wis. 440. It seems to us equally clear that Mrs. Hawes might have sold her home in the Third ward and applied the proceeds of the sale to the payment of a mortgage on the brick block which B. F. Rexford held, and no creditor could justly complain of such an application of the money. As her counsel says, she had a perfect legal right to prefer one creditor over another, and to pay one just debt in preference to another. Now, suppose Rexford, instead of taking a second mortgage on the Third ward property, had purchased the equity of redemption in that property, and had applied, with the consent of Mrs. Hawes, its value to the reduction of his mortgage on the brick store. Could a creditor complain of such a transaction as a legal fraud upon his rights? We think not. This, in fact, is what the learned circuit court found that the transaction amounted to. The circuit judge states that he finds that the mortgage given, mentioned in the testimony, on or about the 1st of March, 1887, was given for the purpose of reducing the indebtedness upon the homestead,—meaning the store,—and for no other purpose. This finding is amply justified by the evidence, and could not consistently have been otherwise. We see no element of fraud in the transaction, nor anything of which creditors could complain. It is very obvious that when a debtor pays one creditor, his ability or means to pay others is diminished; but that does not make such payment fraudulent in law.

The owner of two tracts of land, either being susceptible of being made his homestead, who conveys one of them by deed of trust, without his wife's concurrence, and afterwards sells the other upon which he had resided, and then moves upon the one conveyed by deed of trust, will not be allowed to hold it against a purchaser at sale under the trust deed. "Homestead rights are to be protected according to law, but are not to be perverted into instruments of fraud."[1]

Selection, from property that would be liable without it, is contemplated by statutes which save to the debtor a certain amount in land, to be selected by him or set apart by the officer charged with the execution. Under such statutes, creditors are deemed to have notice that such setting apart from the general property may be done, and therefore to have trusted their debtor with such understanding. In the selection by the debtor or the officer, therefore, there is no fraud.

It was held not fraudulent for a litigant to declare a homestead on his land during a litigation which resulted in a judgment against him.[2]

Homesteads cannot be carved out of partnership property, to the prejudice of creditors, for the use of members of an insolvent firm.[3]

Therefore we fully agree with the court below in the conclusion that the evidence fails to show that Mrs. Hawes made any transfer of her property with intent to defraud her creditors. The transfer of the shoe stock to Rexford was for the purpose of reducing the incumbrance on the homestead, and so the court finds. This seems to have been an honest and fair transfer. If she had had the money value of that stock, she could so have applied it on the mortgage, and no creditor could object to it. But the plaintiff's counsel says that Mrs. Hawes practically admitted that she made these transfers of her property to defeat the claim of Dr. Palmer. We do not think that this is a fair construction of her testimony. She was greatly embarrassed, and had not the means to pay the debts which were pressing on her. She wished to secure a home, and improve her pecuniary condition. She took advice of counsel as to what she had better do under the circumstances. She changed her homestead, and made the transfers she did, following the advice given her. It is true, she was utterly insolvent at the time, but the evidence fails to show any fraudulent purpose on her part in preferring one creditor to another, or in giving Rexford the security she did for his debt. She was plainly endeavoring to save the store for her homestead. . . ."

[1] Rutherford v. Jamieson, 65 Miss. 219. The rule is that the wife must sign such deed to make it valid. Howell v. Bush, 54 Miss. 487.

[2] Fitzell v. Leaky, 72 Cal. 477.

[3] By the law of Virginia, members

§ 5. The "Policy" to "Secure" Homestead.

While the policy of the law is to protect the owner's homestead from the claims of ordinary creditors who have trusted him after due notice of the exemption, it is not to bestow ownership upon him at the expense of others. The state has no constitutional power to "rob Peter to pay Paul" or to give to Paul. It has no authority to help any man to do this for himself and his family. If it were rich enough, and paternal enough, to bestow homesteads on the poor, the many thousands in abject poverty who have nothing in hand under liability to creditors ought not to be overlooked. If homestead statutes are charity laws, paupers appeal most loudly for recognition. But let the opposite view be presented in judicial language:

"The policy of the law is to secure to the debtor and his family a homestead which shall be beyond the reach of his creditors, however numerous. The statute seems to have been made for those who get in debt, and not for those who always pay their debts. Such need no exemption law, for they are a law unto themselves to that extent. This policy of the statute would certainly be frustrated if none are entitled to the exemption except those who have been so fortunate as to obtain a homestead prior to becoming judgment debtors. There can be no such exemption without ownership. If it is only true that there can be no exemption until there is a dwelling-house upon the premises, actually occupied by the debtor personally, then it would almost be impossible for a homeless debtor, with judgments docketed against him, to get the benefit of the law; for the very instant he acquired title, the judgment lien would attach. Under such a construction, the only possible way of securing such benefit would be to select premises with a dwelling already thereon, and then actually occupy, with the family, prior to the acquisition. But such strict literalism would do violence to the obvious intent of the legislature, and the whole current of authority in this

of an insolvent firm are not entitled to homesteads out of the partnership property, *as such*, against their creditors. Short v. McGruder, 22 Fed. 46; Va. Const., art. 11, § 1; Code, ch. 183, §§ 1, 11, 16, 17. And, in the absence of a constitutional provision, the rule would hold unless there is statutory authorization to the contrary. In partnership lands, no one person has the exclusive title and right of possession.

state upon this subject. It was among the purposes of the statute to enable any one, without a home of his own, to acquire one, even though judgments may be docketed against him when he embarks in the enterprise."[1]

Where does the statute show this purpose? In what section is it either expressed or implied? What is there, either in the letter or spirit of the statute, to justify the statement that it was among its purposes "to enable any one without a home of his own to acquire one, even though judgments may be docketed against him when he embarks in the enterprise?" What "enterprise?" The getting of a homestead at the expense of others. The statute requires that the homestead shall be "owned and occupied" by the householder in order to be exempt from execution. There is nothing to favor its acquisition, nothing to enable the homeless to get homes. The statute is not a charity statute. Certainly it is not one to bestow charity in fraud of creditors. It is not an enabling act. The reader will find it not materially different from most of the statutes in other states on this point.[2]

It is reasonable to conclude, however, that an able court understood the statute of its own state better than a student of general homestead legislation would be likely to do.

Neither this nor any other homestead law attempts to decide whether the debtor or the creditor is the more in need of charity. "It frequently happens that the creditor is more in need of public sympathy than the debtor. When a poor man is unjustly kept out of money due him, the distress arising from the want of it is often greater than that caused to the other party by its collection. If the suffering was but equal, it is plain that one man should not suffer for the follies or misfortunes of another. Every one should bear his own burden."[3]

§ 6. Fraudulent Conveyance — Creditors Disinterested.

Only those affected by fraud have the right to complain of it in a civil action. The rule is not peculiar to creditors with

[1] Scofield v. Hopkins, 61 Wis. 374.

[2] Sanborn & Berryman's Annotated Statutes of Wisconsin, p. 1717, § 2983; p. 1284, § 2203; p. 1298, §§ 2225–6; p. 1318, § 2271; p. 2044, § 3862; p. 1322, § 2280; p. 1796, § 3163; p. 2028, § 3823; p. 2047, § 3873.

[3] Case v. Dunmore, 23 Pa. St. 93, relative to chattel exemption.

respect to fraudulent dispositions of exempt property, but is applicable to all persons with respect to fraudulent dispositions of any property: if they have no interest, they cannot be defrauded and therefore cannot complain. They have no cause of action to bring into court.

The purpose of the debtor may be fraudulent; he may even do acts which would amount to legal fraud but for the exemption law; he may be guilty of moral fraud, yet his creditor may not be defrauded in the eye of the law.

However great may be the moral turpitude of putting property beyond the reach of creditors by a conveyance made by a debtor, it is not technically a legal fraud if the law has withheld them from their remedy by making the property exempt in the hands of the grantor. His object may be to cheat them, but the law looks upon him as conveying that in which the creditors have no concern. The possibility of his dying childless and wifeless, so as to put his homestead into the market, and to remove the shield of homestead protection from it, is too remote to give the creditors any immediate interest. As stated judicially: "Fraud cannot be predicated of a conveyance of the homestead, for the creditor could not have reached that with his exemption if the debtor had retained it. The law excludes the homestead from all remedies of ordinary creditors in all courts. It resolves itself into this: that as to exempt property there are, within the meaning of the statute, no creditors. And as there is no restraint upon the debtor against selling and conveying such property, the motives with which such transfers are made do not concern the creditor. The debtor may sell, exchange or give it away, and his creditor has no just cause of complaint; for, being exempt, it is no more beyond his reach after transfer than it was before. In such alienations there may be bad motive but no illegal act."[1]

[1] Smith, J., for the court, in Stanley v. Snyder, 43 Ark. 429; Credle v. Carrawan, 64 N. C. 422; Duval v. Rollins, 71 N. C. 221; Winchester v. Gaddy, 72 N. C. 115; Smith v. Rumsey, 33 Mich. 191; Cox v. Shropshire, 25 Tex. 113; Martel v. Somers, 26 Tex. 551; Smith v. Allen, 39 Miss. 469; Pennington v. Seal, 40 Miss. 518; O'Conner v. Ward, 60 Miss. 1037; Jones v. Hart, 62 Miss. 13; Legro v. Lord, 10 Me. 165; Rice v. Perry, 61 Me. 145; Shawano Bank v. Koeppen, 78 Wis. 533; Hibbern v. Soyer, 33 Wis. 319; Pike v. Miles, 23 Wis. 168; Bond v. Seymour, 1 Chand. (Wis.) 40; Hixon v. George, 18 Kas. 253; Monroe v. May, 9 Kas. 466; Sproul v.

Exemption laws and the statute of frauds must be construed together as being *in pari materia*, it has been held; and the former is said to control the latter as to the property exempt.[1]

The beneficiary holds his exempt home property in a peculiar way: he can sell it and convey good and unincumbered title to a purchaser, whenever he wills to do so; but the creditor, even at the precise juncture when the beneficiary is concluding to abandon his benefit and is actually bargaining for its transfer to another, cannot set up any claim that would lay hold of the property; cannot attack it on the ground that it is about to be spirited away beyond the reach of ordinary process; cannot exercise any remedy whatever. He is held to have no business to meddle. Even should the homestead holder donate his exempt home to a stranger, instead of letting down the bars to let creditors come in, he would commit no legal fraud, and creditors are told that they have no right to complain.[2] If they have no lien upon it, they are treated as disinterested in such a conveyance.[3]

Whoever enters into a contract is supposed to know of the existence of any exemption law then in force; the extent of the acreage and the value, held by the debtor free from liability to execution; and he is presumed to accept the obligations of the debtor accordingly.[4]

§ 7. Remote Interests in Fraudulent Conveyances.

Though the homestead would cease to be exempt on the death of the beneficiary, if unmarried; or, at the death of the

Atchison N. Bank, 22 Kas. 336; New Orleans v. Morris, 105 U. S. 600; Burns v. Bangert, 92 Mo. 167; Davis v. Land, 88 Mo. 436; Beckmann v. Meyer, 75 Mo. 333; Hartzler v. Tootle, 85 Mo. 23; Abernathy v. Whitehead, 69 Mo. 30; State v. Diveling, 66 Mo. 375; Sumner v. McCray, 60 Mo. 493; Vogler v. Montgomery, 54 Mo. 577; Baldwin v. Rogers, 28 Minn. 544.

[1] Barnett v. Knight, 7 Colo. 365, 374.

[2] Hixon v. George, 18 Kas. 253, *260;* Morris v. Ward, 5 Kas. 239; Monroe v. May, 9 Kas. 476: Moore v. Reeves, 15 Kas. 150; Tarrant v. Swain, 15 Kas. 146; Mitchell v. Skinner, 17 Kas. 565; Randell v. Elder, 12 Kas. 257; Wood v. Chambers, 20 Tex. 247, 254; Sears v. Hanks, 14 Ohio St. 298; Vogler v. Montgomery, 54 Mo. 584; Crummens v. Bennett, 68 N. C. 494.

[3] Delashmut v. Trau, 44 Ia. 613; Officer v. Evans, 48 Ia. 557; Aultman v. Heiney, 57 Ia. 654; Butler v. Nelson, 72 Ia. 732; Williams v. Robbins, 15 Gray, 590.

[4] Kelly v. Garrett, 67 Ala. 304; Smith's Ex. v. Cockrell, 66 Ala. 64; Nelson v. McCrary, 60 Ala. 301.

widow and the completion of the children's minority, if the beneficiary is married, yet it has been frequently held that he may dispose of his property so that it can never go to pay his ordinary debts. Even if he dispose of it fraudulently, his creditors cannot be heard to complain, if it is not a legal fraud upon them.[1]

In the first of the cases in the last note cited, it is said of the voluntary conveyance of the homestead by an insolvent debtor: "This question has been a great many times before the courts of the country, and in a large majority of cases the ruling was against the right of the creditor to subject the homestead, merely because its owner and occupant had conveyed his right to another, even though the conveyance was voluntary, or made under circumstances which would ordinarily stamp it as fraudulent. There can be no fraud unless there are claims and rights which can be delayed and hindered, and which, but for the conveyance, could be asserted. The law takes no cognizance of fraudulent practices that injure no one. Fraud without injury, or injury without fraud, will not support an action. Unless they co-exist, the courts are powerless to render any relief."[2]

The favored homestead holder is thus held happily incapable of committing fraud against his creditors by any disposition he may make of his exempt realty. Unless his voluntary

[1] Fellows v. Lewis, 65 Ala. 343; Crummen v. Bennett, 68 N. C. 494; Dreutzer v. Bell, 11 Wis. 114; Pike v. Miles, 23 Wis. 164; Murphy v. Crouch, 24 Wis. 365; Anthony A. C. Co. v. Wade, 1 Bush (Ky.), 110; Knevan v. Specker, 11 Bush (Ky.), 1; Marton v. Ragan, 5 Bush (Ky.), 334; Lishy v. Perry, 6 Bush (Ky.), 515; Edmonson v. Meacham, 50 Miss. 34; Vogler v. Montgomery, 54 Mo. 577; Sears v. Hanks, 14 Ohio St. 298; Succession of Cottingham, 29 La. Ann. 669; Smith v. Rumsey, 33 Mich. 183; Vaughan v. Thompson, 17 Ill. 78; Muller v. Inderreiden, 79 Ill. 382; Woods v. Chambers, 20 Tex. 247; Legro v. Lord, 10 Me. 161; Hugunin v. Dewey, 20 Ia. 368; Castle v. Palmer, 6 Allen (Mass.), 401; Foster v. McGregor, 11 Vt. 595; Danforth v. Beattie, 43 Vt. 138; McFarland v. Goodman, 6 Biss. 111; Cox v. Wilder, 2 Dill. 45; Smith v. Kerr, 2 Dill. 50; Shawano Bank v. Koeppen, 47 N. W. (Wis.) 723. *See* Phelps v. Springfield, 39 Ill. 86; White v. Clark, 36 Ill. 285. *Contra*, Cassell v. Williams, 12 Ill. 328; Getzler v. Saroni, 18 Ill. 511; Currier v. Sutherland, 54 N. H. 475; Huey's Appeal, 29 Pa. St. 219; Chambers v. Sallie, 29 Ark. 407; Piper v. Johnston, 12 Minn. 60; Herschfeldt v. George, 6 Mich. 456 (since overruled in 33 Mich. 183); Lauck's Appeal, 12 Harris (Pa.), 426.

[2] Fellows v. Lewis, *supra*, Stone, J.

conveyance be made under such circumstances as to be equivalent to a surrender of his exemption right; equivalent to the abandonment of his homestead by non-occupancy, his creditors cannot avail themselves of his act.

In this very case, however, it was held that the homestead holder conveyed to the grantee free from liability to forced sale during his life-time only, since he could transfer no greater rights than he possessed; that, upon the grantor's death, without leaving either a widow or children, the homestead exemption ceased; that the conveyance vested in the grantee all the rights in the homestead which the grantor could assert against his creditors, and nothing more; that the conveyance was voluntary and constructively fraudulent against existing creditors; and that, when the exemption ceased, the homestead was liable for the grantor's debts.[1] And the court quoted the following, with approval:

"The legal effect of the act is to create no new estate, but to protect the occupant of the land in the use and occupancy of the land so set apart as a homestead, during the time of such occupancy; but, if abandoned by removal or death, leaving neither wife or children to succeed to his rights, the rights of the judgment creditor would be fully restored."[2]

The creditor has the right to be heard on the question whether or not he has been injured; whether or not the property, voluntarily conveyed, was exempt.

§ 8. Conveyances to Creditors' Prejudice.

Under some circumstances, a fraudulent conveyance of a homestead may affect the interest of creditors, so that they will have the right of attacking it. Where the statute gives the legal owning householder protection for life or a term of years, but leaves the reversion liable for his debts, the conveyance of the fee by him will not so operate as to cut off the rights of lienholders, whose dormant liens will wake to life at the expiration of the exemption period.

Under statutes which leave the homestead-holding legal owner free to convey the fee (acting alone, or in conjunction

[1] Fellows v. Lewis, 65 Ala. 357, *citing* Bibb v. Freeman, 59 Ala. 612; Sandlin v. Robinson, 62 Ala. 477.

[2] Chambers v. Sallie, 29 Ark. 407; Norris v. Kidd, 28 Ark. 485.

with his wife when he is married, and where her joinder is required), such conveyance, if made by an insolvent without consideration, or under circumstances that would indicate fraud in ordinary transactions, may be such as to give creditors the right to interfere. The remote chance of making their money upon his abandonment of his exemption right, or of his waiver or forfeiture of it, will not warrant their present interference; but suppose he has done what is equivalent to abandonment, or at least a questionable act of that sort, have creditors no interest to inquire into the situation? Have they not standing in court for that purpose? There can be no doubt of this. And in the acquisition of property claimed as homestead, there may be such fraud as will vitiate the claim as to any one having an interest to test it.

"It is well settled that a voluntary conveyance made to hinder, delay or defraud creditors is void as to them, the grantor being insolvent without the property so conveyed."[1] This is the general rule; but a complaining creditor must show himself injured.

The conveyance of the fee of an excessive homestead by the married beneficiaries, in fraud of a creditor, may be set aside after the death of the husband who was the owner, and the excess above the homestead estate may be devoted to the payment of the creditor.[2]

[1] Campbell v. Jones, 52 Ark. 493, *497;* Driggs v. Norwood, 50 Ark. 42; Adams v. Edgerton, 48 Ark. 419; Hershy v. Latham, 46 Ark. 542; Reeves v. Sherwood, 45 Ark. 520; Bennett v. Hutson, 33 Ark. 762; Oliphant v. Hartley, 32 Ark. 465; Massey v. Enyart, 32 Ark. 251; Bertrand v. Elder, 23 Ark. 494; Leach v. Fowler, 22 Ark. 145; Danley v. Rector, 10 Ark. 225.

[2] Schaeffer v. Beldsmeier (Mo.), 17 S. W. 797. Sherwood, J., said for the court: "Under former statutory provisions relating to homesteads, the land covered by a homestead was wholly exempt from all liability for debt, exempt from attachment and execution. The husband took a fee-simple title which passed to his widow and minor heirs. Skouton v. Woods, 57 Mo. 380. This being the case, it was properly ruled that such a thing as a fraudulent conveyance of a homestead could not exist, for the reason that such homestead, being exempt, etc., could not, in the nature of things, be fraudulent as to creditors who had not nor could acquire any interest in such exempt property. Volger v. Montgomery, 54 Mo. 577. But a radical change occurred in the homestead act by reason of the amendment of 1875. Rev. Stat. (1889), § 5439. The fee no longer passes to the original occupant, nor, on his decease, to his wife and his heirs, but an estate limited to the

The rule of fraudulent donations, respecting property not exempt, is thus clearly stated: "It is axiomatic that debts must be paid before gifts can be made; and it is also an established principle that a voluntary conveyance is *prima facie* evidence of a fraudulent intent against creditors, and, if made by a person who is indebted, is a well-recognized badge of fraud; for its natural and probable tendency is to delay, hinder and defraud creditors." [1]

It is fraudulent to sell all one's property without paying debts or providing for their payment, when they exist.[2] It is so, not only in one state, but generally. And if such a fraud has been committed, the administrator of the fraudulent debtor may sue to recover realty thus sold, for the benefit of creditors of the estate. He ought to sue in equity, however, when the debtor had homestead right in indivisible realty, only the excess of which could have been sold in fraud of creditors.[3] They could not be tenants in common with the debtor-homestead-holder.[4] The sale of the homestead was good except as to creditors — and only the excess, as to them, was not.[5]

Exempt property is not subject to this rule. Creditors are held not defrauded by the conveyance of the homestead without consideration. Having no right to make their money by execution against it, they have no cause to complain.[6]

"It is incumbent on the creditor, who complains of a fraudulent conveyance, to show that his debtor has disposed of

death of the widow and the attainment of the majority of the youngest child. And so this point was ruled in Poland v. Vesper, 67 Mo. 727. . . . That case goes far towards being decisive of the one at bar. Here the land alleged to have been fraudulently conveyed by the deceased and his wife in his life-time was the entire fee, but only a homestead estate was exempt from the claims of creditors. . . ." So it was held that the sale of the fee was fraudulent as to the creditor, and could be set aside, and the reversionary interest applied to the satisfaction of the judgment.

[1] Gove v. Campbell, 62 N. H. 401; Bump on Fraud. Con. (2d ed.) 268.

[2] Prout v. Vaughn, 52 Vt. 451; Church v. Chapin, 35 Vt. 223; Foster v. Foster, 56 Vt. 540; Kelsey v. Kelley (Vt.), 22 A. 597.

[3] Pease v. Shirlock, 63 Vt. 622; 22 A. 660; Spaulding v. Warner, 59 Vt. 646.

[4] Lindsey v. Brewer, 60 Vt. 627.

[5] Bassett v. Hotel Co., 47 Vt. 313.

[6] Smith v. Rumsey, 33 Mich. 183; Rhead v. Hounson, 46 Mich. 244; Putte v. Geller, 47 Mich. 560. *See* Hershfeldt v. George, 6 Mich. 468, which was partially overruled in the first case above cited. *See*, also, Wisner v. Farnham, 2 Mich. 472; and Matson v. Melchor, 42 Mich. 477.

property that might otherwise have been subjected to the satisfaction of his debt. Until this is done no injury appears.

"Creditors cannot complain that a conveyance of a homestead is fraudulent as to debts for the payment of which it cannot be taken in execution. They could not reach it, if not conveyed, and hence the motives for the conveyance do not concern them."[1]

The rule that it is incumbent on a party attacking a sale on the ground that it was made to hinder, delay and defraud creditors, to show that if it had not been made the goods would have been subject to seizure and sale upon execution, was not applied, as to sales of personal property, in a subsequent decision.[2]

An unmarried man conveyed his land to his brother, by a deed absolute though without consideration. The purpose was understood, by the court that passed upon the transaction, to be the defrauding of his creditors. There was an understanding between the brothers that the grantee would reconvey to the grantor when requested to do so by the latter. He gave a power of attorney to the grantor at the time, authorizing him to control and even to convey the land. The deed and power of attorney were duly recorded.

Two mortgages were put upon the land by this *agent* of its recorded owner. Actions to foreclose were brought upon them, against that owner, who was not served. Now comes into court the *agent* in the capacity of owner, defendant and homestead claimant, with his wife as co-claimant.

Having become married since his transfer of the land to his brother, he could fill the condition of family headship; repudiating the *bona fides* of his own conveyance, he averred compliance with the condition of ownership; living with his wife upon the property, he met the requirement of occupancy — what lacked he yet?

The court said he lacked the essential — *ownership;* because,

[1] Campbell v. Jones, 52 Ark. 493, *497;* Bogan v. Cleveland, 52 Ark. 101; Stanley v. Snyder, 43 Ark. 430; Erb v. Cole, 31 Ark. 557; Clark v. Anthony, 31 Ark. 546; Sale v. McLean, 29 Ark. 612; Clinton v. Estes, 20 Ark. 216; Hempstead v. Johnson, 18 Ark. 124; Meux v. Anthony, 11 Ark. 411; Story's Eq. Jur. 367.

[2] Blythe v. Jett, 52 Ark. 547, *549,* expressly overruling Erb v. Cole, 31 Ark. 557.

if his conveyance to his brother was made to defraud creditors, as the court believed, the law would not permit him to benefit by his own wrong by compelling a reconveyance. At the time of his marriage he had no interest in the land which the law would enforce, and therefore none to become vested in his wife.

If he and she had any interest at the time of their marriage, they subsequently joined in conveying the land to his brother, professedly to correct and perfect that given to him in the first instance: so she and her husband concurred in the former conveyance, the court said. There was in evidence an unrecorded quitclaim deed, by which the land, or a part, was reconveyed, in terms, to the brother originally owning, and now before the court claiming to own; but the court gave it no weight. Judgment was rendered against the land, foreclosing the mortgages, and the claimant and wife were adjudged to have no property right and therefore no homestead interest.[1]

§ 9. Liability to Creditors.

The impossibility of defrauding creditors by the conveyance of property which is exempt from attachment and levy has been denied judicially. A homestead, occupied by a judgment debtor, was seized in execution. The property was not of value excessive of the monetary limitation of a homestead. The debtor had sold it, and therefore he interposed no claim in the case whence the writ of execution issued, to have homestead assigned him. The writ was executed, and the court sustained the sale on the ground that the debtor's deed to his grantee was fraudulent; that the property had not ceased to belong to the debtor, and that he had lost his exemption by failing to claim it.[2]

A creditor has an interest in the homestead, such as will warrant his interference with any fraudulent disposition of the property by the owner, wherever the law recognizes judgments on ordinary debts as liens against the debtor's homestead property — liens ultimately vindicable, though postponed during an exemption period. When this was the law in a state which has since changed its statute on the subject, a homestead became subject to execution in satisfaction of

[1] Johnston v. McPherran, 87 Ia. 230: 47 N. W. 60

[2] Currier v. Sutherland, 54 N. H. 475.

such a judgment if the debtor removed from it or sold it. A homestead-holder having transferred his home, the court declared the deed fraudulent and prejudicial to the creditor, and within both the letter and spirit of the law which declares such a conveyance void as against those who are hindered, delayed or defrauded. The right to the ultimate enforcement of the lien was pronounced a valuable right secured by law to the creditor, and the attempt to deprive him of it was characterized as fraudulent and prejudicial: so the creditor had such interest as would authorize his interference.[1] This is good reasoning, and therefore good law now, in all states which give the ordinary creditor the right to obtain a judgment which will bear a lien upon the debtor's homestead, however much postponed: provided there be no statute to the contrary. If the debtor's disposition of his homestead is prejudicial to the rights of his creditors in any way, they have the right to interfere.

Wherever the legal effect of the statute is not to create "an estate of homestead" (or anything which that term would imply), but merely to protect the home during occupancy as such, judgment creditors have rights that become enforceable in case of the cessation of occupancy, whether owing to voluntary abandonment or to the death of the beneficiary with no successor. A fraudulent conveyance of the homestead by such a beneficiary was successfully attacked by his creditors after his death.[2]

Gaius Munger and Celia, his wife, conveyed their homestead to Isadore, their daughter. Subsequently the sale was vacated in an equity suit brought by the assignee of Gaius in bankruptcy, against Isadore, on the ground that the conveyance was fraudulent as to creditors. It was held, in a suit by the purchaser of this property at the bankrupt sale, to eject the possessors, that if Gaius and Celia, who had joined in the deed, had been made parties to the suit of the assignee against Isadore, they might have been concluded by decree therein; but that, as they were not, they could claim homestead after their deed had been set aside for fraud as to creditors.[3]

Had no more than the limit of property protected as homestead been conveyed to Isadore, it might have been said that

[1] Piper v. Johnston, 12 Minn. 60, *63*.
[2] Chambers v. Sallie, 29 Ark. 407.
[3] McFarland v. Goodman, 6 Biss. 111, *citing* Cox v. Wilder, 2 Dill. 45;

the creditors had no interest in the conveyance, according to many decisions already adduced; but as much larger property, including the homestead, had been fraudulently conveyed, the whole transaction was set aside at the suit of the assignee. And, in the ejectment suit, the grantors were held not to have lost any exemption rights by their abortive attempt to convey — contrary to the established principle that a conveyance binds the parties to it, though fraudulent as to creditors.[1]

"There is no principle of law more consonant with reason, or better supported by authority, than that a conveyance which is fraudulent as to creditors binds, nevertheless, the parties to it. Through the 'cloud of authorities' of which the counsel speak, this principle shines perpetually, and it guides us to the conclusion that the appellant is here without merits.

"Having caused his house and lot to be conveyed to his wife for the purpose of hindering and delaying his creditors, denying his ownership as long as denial would serve to keep them off, he chops round now, when they have raised $314 out of the property by a sheriff's sale of it, and claims $300 of the proceeds under our exemption statute.

"It would be a perversion of that humane law to apply it to such a case. As to his creditors, the fraudulent deed was void, and he remained the owner of the property; but the deed concluded him for all other purposes. The statute was not made as an instrument of fraud to delay and hinder creditors, but to secure to honest debtors, from the wreck of their fortunes, a subsistence until they can do something for themselves and their families.

"But if the debtor may first convey away his property in fraud of creditors, and then when it is seized or sold come in and take the proceeds, the statute is worse than the fraudulent deed, because more efficacious to cheat the creditor." [2]

§ 10. Selling Liable Property.

A debtor, selling all his liable property, claiming his exempt property as free from his creditors, and paying no debts, is held not to have committed fraud upon his creditors.[3]

Woodworth v. Paige, 5 O. St. 70; *In re* Pratt, 1 Cent. L. J. 290.

[1] Huey's Appeal, 29 Pa. St. 219.

[2] *Ib.*

[3] Wilcox v. Hawley, 31 N. Y. 648; Callaway v. Carpenter, 10 Ala. 500; Mosely v. Anderson, 40 Miss. 49.

It is plainly dishonest for a debtor to dispose of all his liable property and hold his homestead exempt. It has been held fraudulent "in fact and in law," since it is "with the direct intent of benefit or advantage to the seller, to the injury of creditors."[1] This was virtually overruled in a subsequent case,[2] in which a debtor was upheld in appropriating means that should have gone to the payment of his other debts, for the purpose of removing a mortgage on his exempt property — the court looking upon it as merely making a preference among creditors which the law allowed.[3] The preference given here was to himself: he paid what would relieve his homestead and left unpaid all debts which he could neglect with impunity. He could do so under the law, and therefore was not guilty of legal fraud, whatever his act may have been in the court of conscience.

An insolvent debtor, taking the means that ought to go to his creditors, and buying a homestead therewith, has been upheld by the courts in so doing; and the debts antedating the purchase were not allowed to be enforced against such homestead.[4]

"We do not think that a debtor, being absolutely insolvent and having his creditors pressing him for the payment of his claims and fully cognizant of his inability to pay such debts, can, to defraud his creditors, transfer possession of goods purchased by him upon credit, and take in exchange therefor land, either in his own name or in the name of his wife, and then claim the same as exempt as a homestead against such existing creditors. 'A party cannot turn that, which is granted him for the comfort of himself and family, into an instrument of fraud.'"[5]

[1] Riddell v. Shirley, 5 Cal. 488.

[2] Randall v. Buffington, 10 Cal. 491.

[3] *Citing* Dana v. Stanfords, 10 Cal. 269; Nicholson v. Leavitt, 4 Sand. 252; Covanhoven v. Hart, 21 Pa. St. 495; Worland v. Kimberlin, 6 B. Mon. 608; Kennaird v. Adams, 11 B. Mon. 102.

[4] Cipperly v. Rhodes, 53 Ill. 346.

[5] Long v. Murphy, 27 Kas. 375, 380, *citing* Pratt v. Burr, 5 Biss. 26. But where a stock of goods were exchanged for a homestead, and part of them had been recently purchased on credit, and had not been paid for at the time the whole was exchanged for the homestead, it was held to be no fraud, even against the creditors who had not been paid for the last purchased goods. The court, however, said that it did not appear that these last purchased goods, or the

A husband borrowed money, and he and his wife joined in conveying their homestead property (previously set apart to them) to secure the debt. At the same time they took of the lender his bond to reconvey to them the property on their payment of the debt. They remained in possession. The lender obtained judgment, conveyed the land to the husband, and then levied upon it. The husband had died. His widow resisted the levy on the ground that the property was exempt as a homestead: and so the court held.[1] When the deed is absolute as security, subsequent application for homestead will not defeat it.[2]

Though a homestead, not subject to lien or liable to execution, be conveyed with a bad motive, the conveyance is held not fraudulent as to the creditors of the vending householder.[3] But if a debtor exchange his homestead for real estate in quantity beyond the statutory limit, the excess will be liable to creditors.[4] And he cannot avoid this liability by canceling and surrendering his deed.[5] A debtor having acquired sixteen hundred acres of land by such exchange, and having written across the deed his cancellation of it, and then surrendered the deed to the grantor, was held to have failed to put the excess above one hundred and sixty acres beyond the reach of his creditors. Though the land was subsequently deeded by the same grantor to the debtor's children, they acquired no title, since their father's title had not been divested, and all the land but the homestead quantity was open to creditors.[6]

The conveyance of property, including the homestead, is void as to the excess, if made without consideration and in fraud of creditors.[7]

proceeds thereof, were a part of the purchase-money of the homestead — leaving us to infer that there would have been fraud had this been made to appear. Tootle v. Stine, 31 Kas. 66, in which Long v. Murphy is *distinguished.*

[1] Saulsbury v. McCallum, 65 Ga. 102; Ga. Homestead Act of 1868; Trammel v. Roberts, 55 Ga. 383. *See* Gun v. Wades, 65 Ga. 537, and Moore v. Frost, 63 Ga. 296.

[2] Allen v. Frost, 62 Ga. 659.

[3] Bogan v. Cleveland, 52 Ark. 101, relative to a conveyance made in 1884, governed by Const. of 1874, art. 9, § 3; Bump on Fraud. Con., p. 245; Wait on Fraud. Con., § 71; Cammack v. Lovett, 44 Ark. 180.

[4] Campbell v. Jones. 52 Ark. 493.

[5] *Ib.;* Byrd v. Jones, 37 Ark. 194; Talifero v. Rawlton, 34 Ark. 503; Neal v. Seigel, 33 Ark. 63; Strann v. Norris, 21 Ark. 80.

[6] Campbell v. Jones, *supra.*

[7] O'Connor v. Boylan, 49 Mich. 210.

The remainder, after the homestead shall have been reserved according to law, is liable on the foreclosure of any mortgage covering it but not the homestead.[1]

A purchase of land subject to homestead right, but fraudulently deeded in fee by the sheriff to the purchaser, cannot successfully resist a mortgage given by the homestead-holder, who could have the deed reformed or wholly set aside for fraud.[2] The sheriff should have given the title subject to the exemption right.[3] The reversionary interest of the debtor cannot be sold during the existence of the homestead.[4]

§ 11. Fraudulent Liens.

A husband and wife, about to separate, sold their homestead through an agent. The purchaser reconveyed it to the husband in a deed reciting part of the price as paid in cash and part by promissory notes secured upon the property. The matter coming to litigation, the question was whether the sale by the husband and wife had been real or merely an attempt to create a lien on the homestead. The wife contended against the purchaser that the latter was the purpose. The evidence was conflicting, but the sale was sustained.[5]

Liens forbidden by the constitution cannot be fixed upon the homestead, and any declarations of husband and wife, in the instrument purporting to create them, are of no avail.[6]

A husband and wife executed a trust deed upon their rural homestead to secure a loan, in which it was recited that the property was free from incumbrance. There was an existing vendor's lien, however, of which the lenders had knowledge; and they caused it to be discharged before advancing all the loan. After this, the husband and wife sold the land. They had no right to subject it to the mortgage, and they could not change its *status* by their recitals, nor incumber it with liens, in any way, in contravention of the constitution. But it

[1] Herschfeldt v. George, 6 Mich. 468; Comstock v. Comstock, 27 Mich. 103; First National Bank of Constantine v. Jacobs, 50 Mich. 340.

[2] New England Co. v. Robson, 79 Ga. 757.

[3] Robson v. Rawlings, 79 Ga. 354.

[4] Stephenson v. Eberhart, 79 Ga. 116. *Compare* Skinner v. Moye, 69 Ga. 476, and City Bank v. Smisson, 73 Ga. 423; Jolly v. Lofton, 61 Ga. 154.

[5] O'Shaughnessy v. Moore, 76 Tex. 606.

[6] *Ib.*; Kempner v. Comer, 73 Tex. 203; Pellat v. Decker, 72 Tex. 581; Mortgage Co. v. Norton, 71 Tex. 683.

was held that the mortgagees might be subrogated to the rights of the vendor whose valid lien they had caused to be discharged by the loan.[1]

Where no lien can be saddled upon a homestead except for purchase-money and *for work and materials used in constructing improvements on it*, the owner may deceive a creditor by giving him a trust deed on the premises to secure money borrowed to erect a dwelling. When the creditor comes to court with his trust deed, the beneficiary of the law may meet him with the words of the statute, and stand upon the law. There is no lien. The lender whistles for his money while the borrower enjoys the home.[2]

A debtor, buying a homestead, paying for it from the proceeds of his business, and having the title conveyed to his wife, may thus create a statutory resultant trust in favor of his creditors; but this is held no ground for an order granting creditors leave to share in the estate without filing releases, unless they show that the debtor was insolvent when he bought, and that there was fraudulent intent on his part. The act itself was declared to be not a fraudulent disposal of his property, so as to authorize the order, under the statute.[3]

It was recently held, by a federal court, that real estate bought by an insolvent, in his wife's name, and occupied by both as a homestead, is exempt from the claims of his creditors, in spite of the fraud.[4]

A debtor gave a mortgage to secure a simulated debt, to put his land out of the reach of his creditors. At his request, the mortgagee afterwards conveyed the land to a firm which subsequently deeded it to the debtor's wife. She paid nothing to her husband, or for him, as a consideration for the land. Several years later he made a deed to her, apparently to escape an approaching judgment against him for a new debt, as he had come to believe that his first fraudulent essay might prove abortive so far as having the property in his wife's

[1] Loan Co. v. Blalock, 76 Tex. 85; Hicks v. Morris, 57 Tex. 658.

[2] Ellerman v. Wurz (Tex.), 14 S. W. 333, and cases therein cited; Const. Tex., art. 16, § 50; Rev. Stat. Tex., art. 3174.

[3] Gen. Stat. of Minn. of 1878, ch. 43, § 8; *In re* Welch, 43 Minn. 7.

[4] Backer v. Meyer (Ark.), 43 Fed. 702.

name, through it, was concerned. This conveyance was declared fraudulent on its face. The wife was a mere volunteer. She was bound to show valuable consideration, which she did not. The land was liable for the husband's debt.[1]

The trite maxims: "He who seeks equity must do equity;" and "A party must come into a court of equity with clean hands," are applicable to homestead contentions, as well as to any other in equity courts, and have been applied to them.[2]

An exemptionist sold his homestead on credit; and, the proceeds not being exempt, were liable to garnishment by creditors. He, however, took a conveyance of other real estate, to his wife, in satisfaction of the debt. It was held that "a court of chancery should aid the judgment creditors to reach the assets of their debtor and apply them to their judgment uninfluenced by the fact that the debt arose from a sale of the homestead, since the statute did not exempt the proceeds of a homestead."[3]

But when a husband swapped his homestead outright for another to be conveyed to his wife, he was deemed to have kept within the law, so that the new residence was exempt.[4]

The owner of a quarter section of land borrowed money to be secured by a mortgage of the land. The lender, living in a distant city, sent a drawn mortgage and mortgage note by mail, and a draft for the money, to a bank, to be delivered to the borrower upon his signing and duly executing the note and mortgage. Before signing, the borrower became married: a fact unknown to the lender. When the foreclosure was attempted, the wife claimed homestead in the land, and it was awarded her.[5]

An exemption right acquired after the levy of execution upon the property to which it attaches is effective to save the homestead to the occupant and his family. Between execution and sale, such an occupant married; and then, being the head of a family, claimed homestead inviolability, "and had his claim allowed."[6]

[1] Hodges v. Hickey, 67 Miss. 715.

[2] Winslow v. Noble, 101 Ill. 194, 198.

[3] Adams v. Dees, 62 Miss. 354.

[4] Airey v. Buchanan, 64 Miss. 181.

[5] Tolman v. Leathers, 2 Fed. 653.

[6] Jones v. Hart, 62 Miss. 13; Letchford v. Carey, 52 Miss. 791; Irwin v. Lewis, 50 Miss. 363; Lessley v. Phipps, 49 Miss. 796; Trotter v. Dobbs, 38 Miss. 198.

§ 12. Fraudulent Transfer to Wife.

The donation or sale without adequate price of the homestead property, from the husband through a third person to his wife, is held allowable and not in fraud of creditors though the donor be insolvent. Such transaction, in which the wife joins in conveying to a stranger that he may give back to her, is countenanced in the face of the admitted purpose of enabling her to hold the property free from liability to the husband's creditors.[1]

The court so holding, in the first case above cited, on the subject of the transfer, said that whether it was an absolute conveyance of the whole title to the wife, both legal and equitable, "with a fraudulent intent," or was a mere vesting of the naked title in her while the husband held it in trust for his son, "is wholly unimportant," because the homestead interest was not subject to execution in either case. "In the latter case, he still remained the equitable owner of the homestead.[2] . . . If the former was the case, and the absolute title to the property was transferred to the wife through the procurement of her husband, he had a right to cause such transfer, so far as it related to the homestead, to be made, as against this judgment, *even though it was made for a fraudulent purpose;* for . . . . the judgment was no lien upon the homestead for any purpose. . . ."[3]

But such transaction has been declared a fraud, though the creditors were not defrauded. A conveyance from husband to wife "in consideration of love and affection" was stamped with this badge, though creditors could not avail themselves of any benefit by reason of the fraud on the part of the donor and donee. It was said, however, that had both joined in conveying to a third person, and that person had reconveyed to the wife, the exemption right would have been lost.[4] Or, had the husband conveyed directly to her without consideration, while both occupied other property, as their homestead, their creditors could have disregarded the conveyance.[5]

[1] Morrison v. Abbott, 27 Minn. 116; Dreutzer v. Bell, 11 Wis. 119. In Piper v. Johnson, 12 Minn. 60, there were liens which the transfer did not divest.

[2] *Citing* Wilder v. Haughey 21 Minn. 101.

[3] Ferguson v. Kumler 27 Minn. 156; Morrison v. Abbott, 27 Minn. 116.

[4] Ruohs v. Hooke, 3 Lea, 302.

[5] Gibbs v. Patten, 2 Lea, 180.

A debtor, by putting the title of his land in the name of his wife, is not thus estopped from demanding a homestead therein, as against his judgment creditor.[1]

A husband, indebted to his wife, transferred to her the title of the homestead. Afterwards he paid for other real estate deeded to her. It was decided that the first transaction was not in payment of the debt to her (though the value of the title was amply sufficient to satisfy the indebtedness), and that the subsequent payment for the additional property, by the husband for the wife, might be considered a liquidation of his debt to her, and that creditors were not defrauded.[2]

A man and his wife gave their note jointly, and she charged her separate property for its payment. When the payee sought to subject the property to the payment of the note, she claimed homestead in it, and it was awarded her. The judgment lien attaching before the assignment of homestead was said to be not such a lien as precludes such assignment or allowance, and that real estate, about to be levied upon, may be set off for the use of the debtor's family, when it has the *status* of a homestead.[3]

A man and wife occupied their homestead when a debt was contracted by him, and when judgment upon it was rendered. The judgment bore no lien on that property: therefore, he could sell to her without fraud upon creditors.[4] But it has been held that a homestead conveyed by a husband to his wife, not really to pass title but to defraud creditors, will not be protected from them as her property after the homestead immunity has ceased, but will be then liable to them for his debts.[5]

A conveyance to a married woman, in consideration of the

[1] Roig v. Schultz, 42 O. St. 165; Sears v. Hanks, 14 O. St. 298; Tracy v. Cover, 28 O. St. 61. *See* Bills v. Bills, 41 O. St. 206.

[2] Monroe v. May, 9 Kas. 466.

[3] Hill v. Myers, 46 O. St. 183; Wildermuth v. Koenig, 41 O. St. 180. It is said in the Hill case that the woman gave no mortgage or specific lien; that the case came under the principle of the cited cases: Maxon v. Scott, 55 N. Y. 247; Todd v. Lee, 16 Wis. 480.

[4] Beyer v. Thoeming, 81 Ia. 517; 46 N. W. 1074; Delashmut v. Trau, 44 Ia. 613; Officer v. Evans, 48 Ia. 557; Aultman v. Heiney, 59 Ia. 654; Butler v. Nelson, 72 Ia. 732.

[5] Baines v. Baker, 60 Tex. 139; Martel v. Somers, 26 Tex. 554; Cox v. Shropshire, 25 Tex. 123; Wood v. Chambers, 20 Tex. 254.

price paid by the husband, is, in effect, as if the deed were given to him and then a voluntary conveyance made by him to her. Of such a transaction, it was judicially said: "It was done to avoid an existing debt, and must be held, to the extent of the creditor's rights, to be fraudulent and void. The creditor had an equity, by proper proceedings, to subject the land to the payment of his judgment, so far as he might be able to do so without contravening the policy of the homestead laws, in force at that time, and applicable to that debt." [1]

A husband conveyed land to his wife, the consideration being partly a homestead in another state, where the joinder of both was necessary to pass title. This was held to be not fraudulent as to his creditors; and the land so conveyed was declared not liable to pay their claims against him.[2]

The owner and his wife, fraudulently conveying property which included their homestead to a third person to be reconveyed to her, for the purpose of defeating creditors, may succeed in having the title of the homestead made hers while failing to get the liable property out of the reach of execution. In other words, in such a transaction, the conveyance has been held void as to creditors but good as to the homestead against which they had no rights.[3]

§ 13. Effect of Setting Aside a Fraudulent Transfer.

If a conveyance is set aside for fraud upon creditors, the interest of the grantors will not be affected by such conveyance; that is, if the homestead was included with other land, and the fraud was in relation to the latter, the homestead will be in the position it would have been had there been no attempt to convey.[4]

It has been frequently decided that after a debtor has made a fraudulent conveyance of land to cheat his creditors, and

[1] Bennett v. Hutson, 33 Ark. 762.

[2] Stinde v. Behrens, 81 Mo. 254; *overruling* Stinde v. Behrens, 6 Mo. App. 309.

[3] Bell v. Devore, 96 Ill. 217. For conveyance by husband to defraud his wife, see *ante*, chapter on Restraint of Alienation, sec. 8.

[4] Horton v. Kelly, 40 Minn. 193; Wait on Fraud. Conv., §§ 23, 46; Hanson v. Edgar, 34 Wis. 653 (*see* White v. Polleys, 20 Wis. 503); Hatcher v. Crews, 83 Va. 371; Marshall v. Sears, 79 Va. 49; Boynton v. McNeal, 31 Gratt. 459; Shipe v. Repass, 28 Gratt. 734.

they have brought suit to set it aside for fraud, he may yet claim homestead therein in the same proceedings, though the fraud be proven or admitted.[1] But it is said to be too late to claim, after neglecting to do so in such proceedings.[2]

An attempt to defraud creditors by conveying the legal title was held not to prevent the grantor from having homestead subsequently assigned in the property, though the conveyance had been set aside for fraud.[3] But when a judgment debtor had fraudulently deeded his home tract to his son, and other land appraised at less than the homestead maximum was assigned to him as a homestead, he, after accepting the assignment, was estopped from claiming homestead in the home tract after his deed to his son had been set aside for fraud. That tract was now subject to sale by the sheriff to satisfy the judgment.[4]

A conveyance of land with the purpose of defrauding creditors does not work the forfeiture of the fraudulent conveyor's homestead.[5] The reason is found in the creditor's want of interest in that which is not liable for debt.[6]

It has been held that though a man, entitled to one hundred and sixty acres as homestead, conveyed one hundred and twenty of them to his children in fraud of his creditors, he could yet claim the whole as exempt after the conveyance had been set aside as fraudulent.[7] He had retained forty acres as his homestead and meant not to retain the rest. He had abandoned one hundred and twenty acres in his fraudulent attempt to deprive his creditors of recourse against any of his property. Under the authorities, they were not legally defrauded by the attempted disposal of what the law had made exempt; but he had included other lands, besides the one hundred and sixty acres, to his children, without any consideration duly proved, for the manifest purpose of preventing his creditors from making their money out of it. If the re-

[1] Turner v. Vaughan, 33 Ark. 454.

[2] *Ib.;* Norris v. Kidd, 28 Ark. 486; Frits v. Frits, 32 Ark. 327; Larson v. Reynolds, 13 Ia. 57; Haynes v. Meek, 14 Ia. 320; Lee v. Kingsbury, 13 Tex. 68; Tadlock v. Eccles, 20 Tex. 783.

[3] Jaffers v. Aneals, 91 Ill. 488.

[4] Whitehead v. Spivey, 103 N. C. 66.

[5] Dortch v. Benton, 98 N. C. 190; Crummen v. Bennet, 68 N. C. 494.

[6] *Ib.;* Rankin v. Shaw, 94 N. C. 405; Duval v. Rollins, 71 N. C. 218.

[7] Carmack v. Lovett, 44 Ark. 180, *citing* Turner v. Vaughan, 33 Ark. 454.

tention of forty was an abandonment of his homestead right to the one hundred and twenty, the latter should have been considered open to creditors. But the courts do not deem such a transfer as relinquishment of the homestead of which the creditors may avail themselves.

The debtor, after a fraudulent conveyance has been set aside at the suit of his creditor, may yet claim homestead in the property which he has thus sought to convey.[1] This is not universally true, for it has been held that a debtor who sells his land to defraud his creditors before their judgment has been rendered cannot have it reconveyed to him afterwards and then defeat the judgment lien by claiming homestead in the land.[2]

Land was conveyed by a husband to his wife. His homestead right was not lost; and, when the deed had been set aside, he successfully claimed the right.[3]

A husband bought land in his wife's name, but the conveyance to her was set aside for fraud, and the property was sold as his to pay his debts. It was held that there would be no error in allowing him part of the proceeds for the purchase of a homestead if the debts were contracted *subsequently to the passage of the homestead statute.*[4]

The only statutory basis for this rendering is as follows: "Such homestead shall be subject to attachment and levy of execution upon all causes of action *existing at the time of the acquiring of such homestead*, except as herein otherwise provided; and for this purpose *such time shall be the date of the filing*, in the proper office for the records of deeds, the deed of such homestead, when the party holds title under a deed; but when he holds title by descent or devise, *from the time he becomes invested with the title thereto;* and in case of existing estates, such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created."[5]

It has been held that the doctrine of *caveat emptor* is appli-

[1] Marshall v. Sears, 79 Va. 49; Boynton v. McNeal, 31 Gratt. 459; Shipe v. Repass, 28 Gratt. 729; Sears v. Hanks, 14 O. St. 298; Crummen v. Bennet, 68 N. C. 494; Cox v. Wilder, 2 Dill. 45.

[2] Gaines v. Nat. Exch. Bank, 64 Tex. 18.

[3] Wood v. Timmerman, 29 S. C. 175.

[4] Buck v. Ashbrook, 59 Mo. 200.

[5] R. S. Mo. 1889, § 5441; R. S. 1879, § 2695; Laws 1887, p. 197.

cable to a purchaser of a homestead at execution sale, so that when the sale had been vacated he was not entitled to have the judgments assigned to him, which he had satisfied with his money paid as the price of the land;[1] but he should have his money refunded to him by the creditors, with interest.

It has been decided that the purchaser of a widow's homestead, at a sale by the administrator of her husband's estate, is bound to pay the price, though he gets no title, on the principle of *caveat emptor*. To quote the concluding sentence of the decision: "If the sale was ineffective to convey the homestead right, he is liable for the full amount of his bid, because the homestead right is in the nature of a paramount outstanding title, of which he should have taken notice at his peril."[2]

The court erroneously treated the purchaser as if he had bought at a creditor's sale.

When a husband contracted to convey homestead land without his wife's consent, and received part of the price, the purchaser was denied his claim for recovery of the money paid without consideration, though he obtained nothing for it, and though there was no fraud and both the contracting parties had knowledge of all the facts.[3] The doctrine of *caveat emptor* was here carried to an unwarrantable extent. Doubtless there are other cases in the books which go as far, but it must always be repugnant to justice for a man to be denied the recovery of his money honestly put forth to the enrichment of another, when the thing bought has failed through no fault of his, and no neglect or mistake in which the other party was not equally involved.[4]

§ 14. Effect of Forfeiture, as to Creditors.

A creditor, who has no present rights against a homestead, may have an interest in the forfeiture of the exemption privilege on the part of his debtor, or in the surrender of it. While the exemption exists, the creditor cannot employ the usual means of collecting debts against such property, and therefore is said to have no interest to interfere with any dis-

[1] Jones v. Blumenstein, 77 Ia. 361, citing, as to *caveat emptor*, Hamsmith v. Espy, 19 Ia. 444, and Holtzinger v. Edwards, 51 Ia. 384.

[2] Cummings v. Johnson, 65 Miss. 342, 347.

[3] Thimes v. Stumpff, 33 Kas. 53.

[4] See cases cited in Waples on At. and Gar., pp. 535-544.

position his debtor may make of it. But when the latter already has made such disposition as to remove the bar that was in the way of the former, an interest springs into being which may be asserted.

It is true that it has been decided that creditors who had set aside a deed of their debtor on the ground that it was fraudulent as to them could not subsequently interpose the deed against his claim of exemption with reference to the property which he had fraudulently tried to convey.[1] The effect of setting the transfer aside is to leave the property, sought to be conveyed, in the condition it would have been had nothing been done; and the fraudulent grantor is not held to have surrendered or abandoned the exemption right, according to many decisions.[2] They are based on the intent of the grantor, which was to surrender his exemption right (as consequent upon the transfer of the property) in consideration of the price, but not to make a general relinquishment of it independent of the consideration.

There may be a surrender, however, in which all creditors would be interested because it would remove the bar to their remedy: as when, under some statutes, husband and wife filed a relinquishment having all the requisites of a deed as to matter of form. And, without such statutory direction, it would seem that they might surrender in this way, or in any equivalent form. And in a fraudulent transfer, there may be such general relinquishment as would amount to abandonment.

Certainly, creditors who have no present interest in the conveyance of their debtor's homestead would have interest created by abandonment. Are they not so far interested before, as to have the right to assert that certain acts amount

[1] Sears v. Hanks, 14 O. St. 298.

[2] *Ib.;* Smith v. Kehr, 2 Dill. 50; Cox v. Wilder, 2 Dill. 45; McFarland v. Goodman, 6 Biss. 111; Thompson v. Neely, 50 Miss. 210; Shaw v. Millsaps, 50 Miss. 380; Edmonson v. Meacham, 50 Miss. 34; Currier v. Sutherland, 54 N. H. 475, 486–7; Pike v. Miles, 23 Wis. 164; Bolling v. Jones, 67 Ala. 508; Muller v. Indereider, 79 Ill. 382; Ferguson v. Kimber, 27 Minn. 156; Matson v. Melchor, 42 Mich. 477; Marshall v. Sears, 79 Va. 49; Wood v. Chambers, 20 Tex. 247; Vogler v. Montgomery, 54 Mo. 577, *584;* Buck v. Ashbrook, 59 Mo. 200; State v. Diveling, 66 Mo. 375; Danforth v. Beattie, 42 Vt. 138; McCord v. Moore, 5 Heisk. 734; Patten v. Smith, 4 Ct. 450–5; Crummen v. Bennett, 68 N. C. 494. *Compare* Sugg v. Tillman, 2 Swan. 208; Rose v. Sharpless, 33 Gratt. 153, and cases in the next note.

to abandonment? Under doubtful circumstances, ought they not be heard on the question of abandonment?

It is not universally held that a debtor may make a fraudulent transfer of his exempt property with impunity, so that, when it is set aside for fraud, he will be protected from creditors as before.[1]

A sale of land, including the family residence of the grantor, with no reservation of homestead as required by the statute of the state where the conveyance was made, was set aside on the ground that it was in fraud of creditors. The court held that the debtor had abandoned his exemption right, and that it did not revive upon the setting aside of the sale as void and fraudulent.[2] If, however, a sale be invalid, the exemption right of the vendors is held to continue so long as they retain possession.[3]

§ 15. Comment.

The mere right of occupancy with exemption cannot be conveyed by deed. It ceases by being abandoned or by the death of the beneficiary who leaves no legal successor to it.

The palpable solution of the problem: What is the effect of a voluntary transfer of the homestead by a childless and wifeless grantor, where the reversion or fee is liable to creditors? is that the act is abandonment if attended with cessation of occupancy. If the grantor has pocketed the price, his creditors may not reach it; but if it is still due him, why may it not be levied upon, by judgment creditors, in the hands of the purchaser? Why may he not be garnished, when the necessary statutory grounds for attachment exist?

But, the sale being a nullity, the property itself is the thing to which the creditors will look. The attempt to defraud them must prove abortive, where the exemption right is inalienable and the realty itself liable upon the termination of the right.

[1] Emerson v. Smith, 51 Pa. St. 90; Smith v. Emerson, 43 Pa. St. 456; Strouse v. Becker, 38 Pa. St. 190; Gilleland v. Rhoads, 34 Pa. St. 187; Dieffenderfer v. Fisher, 3 Grant's Cases, 30; Cassell v. Williams, 12 Ill. 387.

[2] Nichol v. Davidson, 8 Lea, 389. The same doctrine held relative to personal property exemption. Stevenson v. White, 5 Allen, 148; Nash v. Farrington, 4 Allen, 157. *See* Lehman v. Kelley, 68 Ala. 192.

[3] Richardson v. Woodstock Iron Co., 90 Ala. 266.

If the sale is upon credit, it may be that the grantor intends to buy a new homestead with the proceeds, and the statute of his state may protect the price due him, for a year or more; but suppose, in the deed, or in any way, he has declared a different intent, why may not his creditors attach the price in the hands of the purchaser when ordinarily he would be garnishable?

The profession will understand that, in the present state of the judicial mind of the country, the sale of the homestead for the purpose of applying the price to other objects than the purchase of a new home, attended with delivery to the purchaser and discontinuance of occupancy by the seller, is not held to be fraudulent; that the unpaid price in the hands of the purchaser cannot be reached by creditors; that the price may remain on interest so long as the parties may wish; and that the ex-homestead holder may openly and avowedly apply the price to the expenses of an extended foreign tour, leaving his creditors — not defrauded.

The conservation of the home, as the purpose or policy of the legislator in cutting off creditors, is thwarted by such a proceeding on the part of the beneficiary. Were the question (whether a sale, under the circumstances suggested, is homestead abandonment) a pristine one, it might reasonably be answered in the affirmative; but the decisions must be followed.

Cases will arise, however, with their ever new and curious combination and correlation of facts, touching the rights of creditors relative to fraudulent homestead conveyances, which none of the numerous deliverances heretofore made will be found to govern. New conflicts, between principles long established and those that have sprung to being to meet the exigencies of homestead legislation, will inevitably be precipitated. Some of them will involve the surrender of homestead by sale for other purposes than the furtherance of the legislative policy. The present decisions, holding that homestead sales and delivery, when set aside for fraud, do not divest the beneficiaries of their immunities under the legislative policy — do not inure to the benefit of creditors, but leave the fraudulent grantors with all their original titles and privileges intact — may not prove broad enough to cover every fresh case

hereafter arising and presenting original questions along this line.

Without any change of the statutes as they now stand, the courts will be brought to additional expositions to meet such questions. As the statutes are now, and as the expositions are now, creditors have the right to inquire into transfers of homesteads to see whether their interests are affected or not. Given, that the exemption exists, they have no interest in such a homestead, and therefore cannot be defrauded, it is held — it is settled; but it is open to their inquiry whether exemption does still exist, in any particular case in which they would be interested upon the establishment of the negative. "Fraud without injury will not support an action," it is said; but whether there is injury is an open question. And the investigation may tend, under some combination of circumstances, to impair the theory of the felicitous impossibility of fraud on the part of the exemptionist towards his creditors.[1]

When a question of fraud is involved, the rule of construction is liberal to meet the mischief and advance the remedy.[2] If there are two mischiefs to be met — fraud and family disintegration — the first application of the rule should be to defeat the fraud, since it is manifestly the greater evil.[3] If this order of the application of the rule were invariably observed, there would be fewer attempts on the part of homestead claimants to succeed in doubtful cases, involving questions of fraud, with the hope of having their lacking claims pieced out by liberal construction.

[1] *See* ch. XXVII, sec. 3.

[2] *Ante*, p. 42.

[3] The statement on page 515, from a Colorado case, needs this qualification.

CHAPTER XVII.

WAIVER.

§ 1. Inalienable Rights.
2. Pre-agreement to Waive.
3. Inchoate Rights.
4. Rights of Dower and Homestead.
5. No Waiver of Others' Rights.
6. Optional Exemption.
7. Special Waiver.
§ 8. Absolute Waiver by Mortgage.
9. Lien Not Waived by Taking Security.
10. Usury Affecting Waiver.
11. Mode of Release.
12. Pleading Waiver.

§ 1. Inalienable Rights.

Rights of defense when life, liberty or property are assailed cannot be denied by courts because they have been relinquished anterior to the time of attack. Rights, not only natural but legal, which are given for defense, cannot be abjured by the beneficiary so as to deprive courts of the power to enforce them when subsequently pleaded. Remedies conferred by law cannot be waived, by mere agreement not to claim them, so as to divest courts of the duty of according them if they be afterwards claimed by one of the contracting parties.

"Waiving all defense to this note should it be sued upon:" would that prevent the maker from exercising his law-given right of defense in case of suit? Certainly, his promise not to answer would not authorize the court to disregard his answer when subsequently filed, nor relieve it of the duty of giving the defense all the consideration it would have been entitled to, had no such promise been inserted in the note.

So of any executory agreement to refuse to avail one's self of any right or remedy given by law, when the time to claim it shall arive. The waiver of "any relief whatever from appraisement or valuation laws" is void. An agreement never to take the benefit of the bankrupt law would be void. So, not to redeem forfeited land; not to plead prescription, and the like.[1]

[1] Moxley v. Ragan, 10 Bush, 158 (said in argument by the court); Home Ins. Co. v. Morse, 20 Wall. 451; Hopt v. Utah, 110 U. S. 579;

On the other hand, there are rights which may be waived before the occasion for exercising them has arisen. An indorser may waive notice of protest, in advance.

There are remedies enforceable by courts which may be waived by parties in their conventions, for adequate consideration, so that they cannot be afterwards enforced by courts for the reason that the interested contracting parties are estopped from pleading them. The waiving party has had his equivalent for the surrender of his right. No interest of the state or of others being affected, the agreement will stand and the relinquishment be respected.

No consideration or equivalent can be considered or respected by the court when rights, such as those above instanced (right of defense of life, liberty and property; of defending a suit, pleading prescription, claiming appraisement, redeeming forfeited lands, taking the benefit of a bankrupt law), have been bartered away. Many like illustrations might be adduced. Such waivers are not legalized by any consideration promised to, or received by, the relinquisher. They are against public policy and void.

A general waiver, in a contract of lease, of "all laws or usages exempting any property from distress or execution for rent," was sustained. The court said it was "a waiver as to the debt, not merely the property liable to distress. . . . It would be difficult to frame a broader exemption."[1] It was a waiver of the law as broad as it could be.

§ 2. Pre-agreement to Waive.

The doctrine is largely held, if not fully established, based on public policy, that the right to claim such personal property as the law exempts cannot be waived in an executory contract; that a clause in a promissory note, or other written obligation, in terms waiving the benefit of exemption laws, is entirely nugatory and ineffectual, so far at least as chattel exemption is concerned. The policy of the law, in thus striking such present surrenders of futute protection with nullity, is in consideration of the possible needs of the obligor's family, the

State v. Stewart, 89 N. C. 563; Swart v. Kimball, 43 Mich. 448; Cancemi v. People, 18 N. Y. 135.

(Mitchell v. Coates, 47 Pa. St. 202, *distinguished.*) *See* Hageman v. Salisberry, 74 Pa. St. 280.

[1] Beatty v. Rankin, 139 Pa. St. 358.

improvidence of many persons when making contracts to be consummated in the future, and the interests of the state in obviating pauperism. Such reasons, and perhaps others, are found in the opinions of judges who hold the law settled that though a debtor may suffer his exempt chattels to be sold under execution when the time of sale has arrived, he cannot agree to do so when contracting the debt which may ultimately be prosecuted to judgment.[1]

This doctrine is not universally held. It needs qualification, as stated above, even in states where the waiver of chattel exemption is not allowed. It evidently should be confined to general waiver; and that is doubtless the view of the courts rendering most of the above-cited decisions. The usual exemption statute, with reference to chattels, provides that working utensils to a certain value, or beds and bedding, or a horse or yoke of oxen, or fuel and provisions stored in the dwelling for family use in reasonable quantity, or all of these, or other things generally described, shall be exempt from sale on execution. That the right to claim the benefit cannot be relinquished before the time for claiming it comes, is the purport of those decisions.

There is no prior setting apart of a particular horse or yoke of oxen, or any specified thing to be branded or labeled as exempt. The owner may sell any horse that he has, or pawn or pledge him, or subject anything to a chattel mortgage and thus cut himself off from claiming exemption as to that thing. When the sheriff comes he may have *a* horse, *a* cow, *a* box of tools, *a* bed — whatever the articles exempt — reserved to him. So, it is not wholly true that chattel exemption may not be waived; and there are authorities not only holding this, but favoring general waiver as to such property.[2]

[1] Kneetle v. Newcomb, 22 N. Y. 249; S. C., 78 Am. Dec. 186; Harper v. Leal, 10 How. Pr. (N. Y.) 282; Crawford v. Lockwood, 9 How. Pr. (N. Y.) 547; Carter v. Carter, 20 Fla. 558; Blalock v. Elliott, 59 Ga. 837; Moxley v. Ragan, 10 Bush, 156; Recht v. Kelly, 82 Ill. 147; Phelps v. Phelps, 72 Ill. 545; Van Wickle v. Landry, 29 La. Ann. 330; Hardin v. Wolf, 29 La. Ann. 333; Curtis v. O'Brien, 20 Ia. 376; Branch v. Tomlinson, 77 N. C. 388; Maxwell v. Reed, 7 Wis. 582; Beavan v. Speed, 74 N. C. 544; Denny v. White, 2 Cold. 284; Moran v. Clark, 30 W. Va. 358. (*See* Reed v. Bank, 29 Gratt. 719, on Code 1873, ch. 183, § 3.)

[2] Adams v. Bachert, 83 Pa. St. 524; O'Neil v. Craig, 56 Pa. St. 161; Beegle

The same reasons, which forbid the waiver of the right to claim the legal exemption of personal, will apply to real property. The arguments drawn from public policy, the prevention of pauperism, the protection of the wife and children of the debtor, and the need of guarding the impecunious from their own incaution when giving up rights before the occasion for asserting them arises, will apply to the one class of property as well as to the other.

The doctrine, therefore, is broader than the statement of it made at the beginning of this section. Exempt realty cannot be rendered non-exempt by a general agreement to waive the privilege before the time for claiming it has arisen, and before the right has attached to any particular land. As already said, relative to personalty, there is yet nothing branded or labeled as exempt, and therefore the owner is free to sell or mortgage any particular tract, getting his *quid pro quo* and giving up all right of claiming exemption to the injury of the party with whom he has contracted. In states where no homestead is recognized further than the right of the debtor to claim real or personal property, or both, to a given amount, when execution is pending against his property, there is little or no distinction between the chattel and the real estate exemption.

A husband cannot estop himself from claiming homestead by so stipulating in a *post*-nuptial agreement relative to the land of the wife, entered into with her prior to the existence of the right to claim.[1]

Neither husband nor wife can waive a part of the homestead fixed by law, and take the rest, when by so doing the rights of others would be invaded or destroyed. In illustration, the court, stating this principle in exposition of a statute, held that a widow whose homestead was a life estate in thirty acres could not waive it and take less, when by so doing, she would

v. Wentz, 55 Pa. St. 369; Lauck's Appeal, 44 Pa. St. 395; Shelley's Appeal, 36 Pa. St. 373; Smiley v. Bowman, 3 Grant's Cas. 132; Case v. Dunmore, 23 Pa. St. 93; McKinney v. Reader, 6 Watts, 40; Butt v. Green, 29 O. St. 667; Frost v. Shaw, 3 O. St. 270; Dow v. Cheney, 103 Mass. 181. *See* Bowman v. Smiley, 31 Pa. St. 225; S. C., 72 Am. Dec. 738. And *compare* Firmstone v. Mack, 49 Pa. St. 387; S. C., 88 Am. Dec. 507.

[1] Crum v. Sawyer, 132 Ill. 443.

add to the realty to be distributed, in which she had a third interest in fee, and this would give herself ten acres absolutely to the injury of the distributees.[1]

§ 3. Inchoate Rights.

Suppose an unmarried man owns real estate and has the right of becoming the beneficiary of homestead exemption under an existing law upon complying with the conditions of family headship and occupancy: may he now waive the inchoate right of exemption?

Such an owner mortgaged a thousand acres of land, inserting in the deed: "I hereby waive all right to homestead in the above described land." About two years afterwards he married. Ten years after the waiver, the land was levied upon by the mortgagee and the mortgagor claimed that he had homestead right in it. The claim was made in connection with alleged rights acquired in prior bankrupt proceedings, but the case, so far as useful here for illustration, may be taken free from that complication.

The court answered the above question in the affirmative. It had been urged in argument that the mortgagor, not being the head of a family when the mortgage was executed, had then no homestead right and therefore could waive none. The court admitted that he then had no complete, unconditional right, but insisted that he had an inchoate or contingent right, and that, in waiving "all right," he gave up that, so as to disable himself from perfecting it by subsequent marriage.[2]

In most of the states the mortgage, considered as a species of alienation, made by an owner who had the right to make it, and who had no wife to join with him in the act; made at a time when no homestead right had attached to any part of the large tract, would not so much as require any express waiver to pass the property subject to the right of redemption. Certainly, he could have sold the land unconditionally without any waiver, and would thus have divested himself of all right to or in it, present or future.

[1] Mintzer v. St. Paul Trust Co., 45 Minn. 323. *See* Egbert v. Egbert (Ia.), 52 N. W. 478.

[2] Broach v. Powell, 79 Ga. 79, *83*.

The partial analogy between homestead waiver and quitclaim has been recognized.[1] If we extend the latter to contingent interests, will the analogy still exist? The court, in the case cited above the last, said: "If a quitclaim can operate only where some estate is *in esse* at the time it is executed, then there certainly can be no quitclaim to a homestead by waiver at all; for before the homestead is allowed the homestead estate is not in being, and after it is allowed there can be no waiver. The moment the homestead right becomes a complete vested right, it is no longer waivable, for nothing will vest it short of securing the homestead.[2] Up to that stage the right, no matter how perfect the conditions for its exercise may be, is a mere grace or privilege, and it may be abjured or renounced as well under incomplete conditions as under complete ones."[3] So the court held that homestead waiver by an unmarried man will bar his right to homestead when he afterwards becomes married, and the head of a family, so as to render his inchoate right complete.

It is well settled in the state of this decision, that homestead right may be waived as to specified property when it is subjected to lien, as the court pointed out.[4]

The renunciation of rights *in futuro* has no effect, as a general rule. The right to homestead, dependent upon the conditions of ownership, family headship, occupancy, and dedication, or upon any one of these, can hardly be properly called an existing, inchoate right before compliance with the necessary conditions or condition. A contract, however solemn in form, by which a party should agree to debar himself from claiming exemption in property afterwards to be acquired, would not be worth the wear of his pen point in writing it.

§ 4. Rights of Dower and Homestead.

Though dower may be waived, it has been held that where homestead right vests in the widow by statute on the death of her husband, that right cannot be waived in an ante-nuptial

[1] Tribble v. Anderson, 63 Ga. 54-5.
[2] *Citing* Harris v. Glenn, 56 Ga. 94.
[3] Broach v. Powell, 79 Ga. 84; Boroughs v. White, 69 Ga. 842.
[4] Simmons v. Anderson, 56 Ga. 53; Stafford v. Elliott, 59 Ga. 838; Allen v. Frost, 59 Ga. 558; Flanders v. Wells, 61 Ga. 195; Smith v. Shepherd, 63 Ga. 454; Jackson v. Parrott, 67 Ga. 210.

contract, because it is not existent at the time the contract is made.[1] She is not estopped from asserting a statutory right which arises after such contract, on the ground that she would thus violate an executory covenant.[2] She cannot waive her right, subsequently arising, to a future demand.[3]

A release by a wife of her "rights under the homestead exemption act" is not a renunciation of her dower right. Though she joins her husband in giving a mortgage, and there is no express reservation of the dower right, it will not be presumed that a renunciation of it was designed when there is an expressed purpose: the release of the homestead right. Were she to convey her homestead right of life estate in the premises to the grantee, there would be an inconsistency in the retention of the dower, which is also a life estate. But release on her part of homestead right is not conveyance to the grantee. "The effect of the deed in question" (as was said in an illustrative case) "was to convey to the mortgagee the estate described in it, freed from the right of the grantors to claim it as a homestead; but it did not affect the wife's inchoate right of dower, and does not bar her from claiming dower after her husband's death."[4]

A general conveyance by husband and wife, with dower right released by her, is not a release of the homestead right upon which the deed is silent.[5]

A widow was held to have waived her claim for homestead, when she had applied for and received her dower, but made no application for homestead till five years thereafter.[6]

§ 5. No Waiver of Others' Rights.

The owner cannot waive any vested rights of his wife and children. When by law, through his dedication of his own property as a homestead, they become entitled to certain rights or interests in it, he alone cannot deprive them of it by any agreement to forego claiming exemption. Where "estate of homestead" is created with this effect in favor of the wife,

[1] Mann v. Mann's Estate, 53 Vt. 48.

[2] *Ib.;* Gibson v. Gibson, 15 Mass. 106; Sullings v. Richmond, 5 Allen, 187.

[3] Hastings v. Dickinson, 7 Mass. 153.

[4] Tirrel v. Kenney, 137 Mass. 30, *citing* Greenough v. Turner, 11 Gray, 332; Learned v. Cutler, 18 Pick. 9. *See* Smith v. Carmody, 137 Mass. 126.

[5] Hayden v. Robinson, 83 Ky. 615.

[6] Burch v. Atchison, 82 Ky. 585.

and where beneficiaries other than the owning head of the family have such rights, interests or privileges conferred though there be no such "estate" recognized, the owner alone cannot waive exemption to their injury.

No such act on the part of a husband or father, or of a wife or widow, or of any person, as might estop him or her personally from claiming a homestead right, can possibly debar others, who have rights therein, from their interest. Such rights of others render his own inviolable, since they are inseparable from his. What might be an act *in pais* operating as an estoppel, were he alone concerned, would not be such when the rights of those to be protected through him are involved. He would not be estopped from claiming homestead, though he had solemnly promised not to claim, and had received a consideration equivalent to the value of his right.[1]

A wife may release her homestead interest when joining with her husband in giving a mortgage, deed of trust or absolute conveyance.[2] But without her consent, evidenced by her signature to the deed duly executed, the wife cannot be deprived of her homestead right.[3]

Where the exemption is for the protection and benefit of the wife and children as well as himself, the husband cannot waive the right of homestead.[4]

If the situation were such that he could relinquish his own exemption privilege without impairing that of others, he might be held to his agreement to waive it. There are cases in which the beneficiary may relinquish without affecting others' rights. A widow may release all rights in and to her deceased husband's estate, including that of homestead,[5] but she cannot impair the minor children's rights.[6]

[1] Showers v. Robinson, 43 Mich. 502, *513*.

[2] Atwater v. Butler, 9 Bax. 299; Lover v. Bessenger, 9 Bax. 393.

[3] Williams v. Williams, 7 Bax. 116. But, prior to the adoption of the Tennessee constitution of 1870, the husband alone could alienate the homestead (Bilbrey v. Posten, 4 Bax. 232; Const., art. 11, § 11; Code, § 2114*a*), unless it had been set apart and registered. Kennedy v. Stacy, 1 Bax. 220. Registry not required by latter act. Deatherage v. Walker, 11 Heisk. 45.

[4] Beecher v. Baldy, 7 Mich. 488; Dye v. Mann, 10 Mich. 291; King v. Moore, 10 Mich. 538; Snyder v. People, 26 Mich. 106; Comstock v. Comstock, 27 Mich. 97; Sherrid v. Southwick, 43 Mich. 515.

[5] Mack v. Heiss, 90 Mo. 578.

[6] Rhorer v. Brockhage, 86 Mo. 544;

The rights of minor children are intrusted to the keeping of their natural guardians. Ordinarily, their father can control them, even to the abandonment of them. So, when joinder by the parents is required in the sale or incumbering of the homestead, they represent their children. Both together may waive homestead right so as to cut off their children's benefit, where waiver is permitted. It is not wholly true, therefore, that the rights of all beneficiaries are unaffected by waiver in which they have no voice.[1]

§ 6. Optional Exemption.

A constitutional provision, that "any husband or parent residing in this state, or the infant children of deceased parents, may hold a homestead of the value of one thousand dollars . . . exempt from forced sale, subject to such regulations as shall be prescribed by law,"[2] was held not to confer, *ex proprio vigore*, a right to a homestead. It simply gave the legislature the power to enable the resident husband, parent or minor orphans to claim one.[3]

"Here is clearly no countenance given to the idea that it was the design of the constitution to take away the dominion that the owner himself had over his property, and to deny him the right to sell or incumber the homestead. It gave him the right to hold, as exempt from 'forced sale,' a homestead. . . . It was a *privilege* secured to him, but not putting his property beyond his control."[4]

Exemptions are personal privileges granted to debtors. They may be forfeited by fraud, or waived by contract or neglect to claim them. They may be surrendered by the beneficiaries.[5]

Kochling v. Daniel, 82 Mo. 54; Rogers v. Mayes, 84 Mo. 520; Roberts v. Ware, 80 Mo. 363; Fruend v. McCall, 73 Mo. 343; French v. Stratton, 79 Mo. 560; Skouten v. Wood, 57 Mo. 380; Booth v. Goodwin, 29 Ark. 633; Johnson v. Turner, 29 Ark. 280; Phipps v. Acton, 12 Bush, 375; Plate v. Koehler, 8 Mo. App. 396.

[1] Harpending's Ex'rs v. Wylie, 13 Bush, 158.

[2] Const. W. Va., art. 6, § 48.

[3] Speidel v. Schlosser, 13 W. Va. 686; Holt v. Williams, 13 W. Va. 704.

[4] Moran v. Clark, 30 W. Va. 358, 378.

[5] Bowen v. Bowen, 55 Ga. 182; Pratt v. Burr, 5 Biss. 36; Hewes v. Parkman, 20 Pick. 90; Brackett v. Watkins, 21 Wend. 68; Lauck's Appeal, 12 Harris (Pa.). 426; Case v. Dunmore, 11 Harris (Pa.), 93; Bowyer's Appeal, 9 Harris (Pa.), 210; Hammer v. Freese, 7 Harris (Pa.),

§ 7. Special Waiver.

Where exemption embraces both realty and personalty, the owner may specify certain articles of personalty or portions of the realty as released from the exemption; he may waive his right and allow a lien to be created on the excepted property.[1]

The waiver of the homestead right in favor of a mortgagee is not a general waiver, opening the door to all creditors.[2] The usual release clause is understood to be made with reference only to the mortgagee of the instrument though not confined to him in terms.

The release by the parents binds the children so that they cannot, after foreclosure, claim the homestead right.[3] If the mother has joined the father in the grant and waiver, the homestead relinquishment is complete.[4]

A waiver of homestead immunity with reference to a particular debt cannot be treated as a general waiver.[5] But when the homestead holder has purposely allowed his home to be sold to pay a debt, thus waiving exemption as to that debt, the purchaser cannot set up the grantor's right of exemption. Any third party, not in privity with the grantor who thus waives, is incompetent to claim the benefit of that exemption which has thus been renounced.[6]

255; Hutchinson v. Campbell, 1 Casey (Pa.), 273; McKinney v. Reader, 6 Watts (Pa.), 34.

[1] Broach v. Powell, 79 Ga. 79; Green v. Watson, 75 Ga. 472; Boroughs v. White, 69 Ga. 842; Jackson v. Parrott, 67 Ga. 210; Flemister v. Phillips, 65 Ga. 676; Smith v. Shepherd, 63 Ga. 454; Flanders v. Wells, 61 Ga. 195; Stafford v. Elliott, 59 Ga. 838; Allen v. Frost, 59 Ga. 558; Simmons v. Anderson, 56 Ga. 53; Bowen v. Bowen, 55 Ga. 182. Under the present constitution of Georgia the beneficiary can waive exemption as to all his property (except a small amount therein reserved), by a general act of waiver. Flemister v. Phillips and Boroughs v. White, *supra*. Under the constitution of 1868, he could not do so by general waiver. Stafford v. Elliott and Green v. Watson, *supra*. A waiver in general terms embraces all that is not excepted by law. Wilson v. McMillan, 80 Ga. 733. In a mortgage, the statement that right of homestead is waived is not a general waiver. description of property waived is necessary. Smith v. Shepherd, 63 Ga. 454.

[2] McTaggert v. Smith, 14 Bush, 414.

[3] Harpending's Ex'rs v. Wylie, 13 Bush, 158.

[4] McGrath v. Berry, 13 Bush, 391. The husband alone can convey the fee in Kentucky by voluntary sale. *Ib.*

[5] Hall v. Fulgham, 86 Tenn. 451. *See* Rayburn v. Norton, 85 Tenn. 351; Enochs v. Wilson, 11 Lea, 228; Hildebrand v. Taylor, 6 Lea, 659.

[6] Cumnock v. Wilson (Neb.), 50 N. W. 959.

A husband who legally waives his exemption right, before or after his homestead has been set apart (where he constitutionally can do so), renders his home liable. If he waive it with reference to a particular debt, he cannot, nor his wife, his widow, or his orphan minor children, set up homestead right against that debt.[1]

Waiver may be general or partial. If the beneficiary means to relinquish only part of his homestead, he should specify and describe the part which he relieves from exemption.[2]

Any verbal promise, by one entitled to homestead, that he will not claim it, is void, whatever the consideration promised or paid. Even a sale effected by an administrator, at the instigation of the homestead beneficiary who received the price from one induced to buy on the assurance that the homestead right would not be claimed, was held not to oust the beneficiary (a widow) of her right to claim it subsequently.[3]

§ 8. Absolute Waiver by Mortgage.

The doctrine forbidding the waiver of certain future rights does not affect the power of parties to make a present and complete waiver of exemption by means of a mortgage or other form of creating a lien upon exempt property when there is no legal inhibition. The creation of a present lien, the waiver of a right in this way, when contracting (not a promise to waive when the time for asserting the right may arise), is free from the reasons given for denying waiver by mere promise not to avail one's self of legal rights. Whether chattel exemption or land exemption be waived in this way, the rule is the same. The owner's right to raise money by chattel mortgage would be cut off, if he could subsequently repudiate the lien on the plea that the hypothecated thing is exempt from sale under foreclosure.

Can an exemptionist mortgage his property, which the law frees from liability for his debts, to a particular creditor when

[1] Linkenhoker v. Detrick, 81 Va. 44; Const. Va., art. 11, § 1; Code Va. 1873, ch. 183; Reed v. Union Bank, 29 Gratt. 719; White v. Owen, 30 Gratt. 43. In Virginia, the *jus disponendi* of the property owner extends to his homestead, under the constitution as construed in the decisions above cited, especially the first.

[2] Neely v. Henry, 63 Ala. 261.

[3] Showers v. Robinson, 43 Mich. 502, *512;* Ring v. Burt, 17 Mich. 465; Clark v. Evarts, 46 Ia. 248.

there is no statutory inhibition? That is, can he now agree that such property shall be non-exempt so far as concerns the particular creditor with whom he contracts and the particular debt which he agrees to secure? The answer is in the affirmative, with reference to his homestead. Many statutes forbid such hypothecation, unless the wife join in the deed; some forbid it altogether; but — statutory inhibitions aside — the settled rule is that he can.[1]

The decisions seemingly exceptional to this rule are not all really so, since they are based on peculiar statutes or constitutional provisions.[2] Exemption being waived, and the property mortgaged, the mortgagor cannot afterwards resist foreclosure and sale under bankruptcy proceedings. The mortgage becomes superior to the homestead right by the waiver.[3]

When exemption has been legally waived, and the property sold at the same time or afterwards, the purchaser may

[1] Moran v. Clark, 30 W. Va. 358, 368; Bank v. Lyons, 52 Miss. 181; Wing v. Cropper, 35 Ill. 256; Boyd v. Cudderback, 31 Ill. 113; Smith v. Marc, 26 Ill. 150; Jones v. Yoakam, 5 Neb. 265; Rector v Rotten, 3 Neb. 171; Gaine v. Casey, 10 Bush, 92; Brame v. Craig, 12 Bush, 404; *In re* Cross, 2 Dill. 320; Godfrey v. Thornton, 46 Wis. 677; Stewart v. Mackey, 16 Tex. 56; S. C., 67 Am. Dec. 609; Smith v. Mallone, 10 S. C. 39; Jordan v. Peak, 38 Tex. 429; Dunker v. Chidic, 4 Nev. 823; Wise v. Williams, 88 Cal. 30.

[2] Van Wickle v. Landry, 29 La. Ann. 330; Lanahan v. Sears, 102 U. S. 318; Samson v. Williamson, 6 Tex. 101; Black v. Rockmore, 50 Tex. 95; Jordan v. Peak, 38 Tex. 429.

[3] Broach v. Powell, 79 Ga. 79, 82. The court said: "The exemption in bankruptcy left the title of the debtor to the exempted land precisely as it was before. Bush v. Lester, 55 Ga. 581; Farmer v. Taylor, 56 Ga. 559; Broach v. Barfield, 57 Ga. 604; Burtz v. Robinson, 59 Ga. 763; Laramore v. McKinzie, 60 Ga. 534; Brady v. Brady, 67 Ga. 368; Felker v. Crane, 70 Ga. 484; Anderson v. Brown, 72 Ga. 713. The bankrupt law, in and of itself, afforded the land no protection whatever against the specific lien upon it created by the mortgage, notwithstanding it was duly set apart as the bankrupt's exemption. Long v. Bullard, 112 U. S. 617. This court, however, construing the bankrupt law and the state law together, has, by a very liberal construction, determined that as to exemptions in bankruptcy measured by the latter (and so are all exemptions of land), the due setting apart in bankruptcy has the same effect in holding off prior liens (that is, liens existing at the time of the adjudication), as would a regular setting apart by proceedings before the ordinary in the method prescribed by the homestead statute. Rushing v. Gause, 41 Ga. 180; Bush v. Lester, 55 Ga. 582; Benedict v. Webb, 57 Ga. 348; Ross v. Worsham, 65 Ga. 624; Brady v. Brady, 71 Ga. 71; Collier v. Simpson, 74 Ga. 697."

plead the waiver against a subsequent claim of exemption by the seller or his privies.[1]

The waiver of exemption, in a mortgage, is made with reference to the mortgagee only: so, on foreclosure, if there be a surplus after the satisfaction of the mortgage, it is unaffected by the waiver, and is exempt as the land previously was. It is not open to junior mortgagees or general creditors, since they were not contemplated in the waiver.[2]

Homestead was abandoned. There were two mortgages on the land: the senior, without waiver of homestead right; the junior, with waiver. The senior had preference.[3]

After the foreclosure of a mortgage releasing homestead, made by husband and wife, it is too late for them to set up the nullity of the conveyance on the ground that the wife's acknowledgment was not in accordance with the statute, after they had been parties to the action of foreclosure and failed to plead that ground.[4] Yet "it is well settled that a defendant entitled to a homestead may, by proper proceedings, even after a judicial sale in an action to which he was a party, have it or the proceeds, not exceeding in amount" the monetary limit, "set apart to him."[5]

A purchaser of land at an administrator's sale, who has obligated himself to the administrator for the full price, cannot afterwards claim homestead in the land and have the price of the whole purchase reduced by deducting the value of the homestead.[6]

An act designed to prevent the specific waiver or conveyance of the homestead, for one purpose, from being used for another object, does not affect a judgment-creditor's right to redeem his debtor's homestead from a mortgage sale of it, though the homestead right had been waived by the mort-

[1] Tappan v. Hunt, 74 Ga. 545.

[2] First N. Bank v. Briggs, 22 Ill. App. 228; People v. Stitt, 7 Ill. App. 294; Trogden v. Safford, 21 Ill. App. 240; McTaggart v. Smith, 14 Bush (Ky.), 414; Colby v. Crocker, 17 Kas. 527; Quinn's Appeal, 86 Pa. St. 447; Hill v. Johnston, 29 Pa. St. 362.

[3] Asher v. Mitchell, 9 Bradw. (Ill. App.) 335.

[4] Honaker v. Cecil, 84 Ky. 202. As to nullity on that ground. Wing v. Hayden, 10 Bush, 276; McGrath v. Berry, 13 Bush, 391.

[5] Hayden v. Robinson, 83 Ky. 619; Crout v. Santer, 13 Bush, 442. Limit is $1,000 in Kentucky. *See* ch. XXVIII, § 2.

[6] Lawson v. Pringle, 98 N. C. 450.

gagor. A junior judgment-creditor may redeem and become subrogated to the rights of the purchaser, so that the homestead will pass to him by the sheriff's deed on execution sale in enforcement of his judgment.[1]

§ 9. Lien Not Waived by Taking Security.

Lien for purchase-money is not waived by the assignment of grantee's notes, where it is carried by the assignment under the law of the place of the transaction. The assignee does not waive it by taking personal security, unless his consent to relinquish his lien is made to appear. The civil-law rule is inapplicable. Here, waiver is not inferred from the simple fact of taking other security than the legally hypothecated property, but is a matter of contract and intention to be established by evidence.

The assignee stands in the shoes of the assigning lien-holder, without any formal transfer of the lien; for the mere passage of the note from hand to hand carries along the lien incidentally. With the note goes all the remedies and equitable rights which the original lien-creditor had. The continual existence of his assignor's personal responsibility is not essential. The naked fact of accepting other security than that which came to the assignee with the note is neither a waiver *per se* of the lien on his part, nor is it any indication of intention to waive it. Though the assignee take a new note for the one assigned him, it stands for the debt created by the purchase of the property at the instant of the purchase or prior. No land purchase can be made without the simultaneous or preceding creation of the obligation to pay the price.[2]

"Without reference to liens or their priority, in pursuance of the policy which forbids the assumption of another's substance in procuring a homestead without remunerating him, the law in effect declares that no homestead shall be exempt until the purchase-money therefor be paid.

[1] Smith v. Mace (Ill.), 26 N. E. 1092; Ill. Pub. Laws (1887), p. 178; Ill. Rev. Stat., ch. 77, §§ 20–24.

[2] Bradley v. Curtis, 79 Ky. 327; Genl. Stats. Ky., ch. 38, art. 13, § 9; Ripperdon v. Cozine, 8 B. Mon. 466; Henley v. Stemmons, 4 B. Mon. 132; Honore v. Bakewell, 6 B. Mon. 67; Duncan v. Louisville, 13 Bush, 378; Lusk v. Hopper, 3 Bush, 185; Rennick v. Hendricks, 4 Bibb, 303; Mackreth v. Symmons, 15 Ves. 348.

"And so long as it can be traced, no matter how often the evidence of the liability therefor may be altered, the enforcement of the lien for its payment cannot be defeated by the homestead plea, unless the lien has been waived — which presents a question of intention to be determined by the facts of the case." [1]

No presumption, that the vendor's lien for purchase-money is waived, is created by his taking notes for the price in which the vendee waives the exemption of his personal property. The taking of the notes without security, on the contrary, leaves the vendor's lien on the realty sold by him in full force, unless expressly waived by him. In any state where there is a presumption of waiver on the vendor's part when he takes a mortgage on other property to secure him, or takes third persons as sureties, it is only removed by an agreement to retain the lien.[2]

§ 10. Usury Affecting Waiver.

Execution was issued on a judgment founded on a promissory note containing a waiver of homestead exemption. The defendant had pleaded that the note was usurious and had adduced evidence tending to show it; but on appeal the question was treated as closed by the judgment. There was nothing in the note or the record to show usury.[3]

A woman bought land and gave a mortgage upon it to the grantor to secure the purchase-money and waived homestead exemption. After foreclosure, she sought to show that there was usury in the contract between herself and the grantor. The court denied her. She should have pleaded this before foreclosure. She was precluded doing so subsequently, when alleging no fraud, mistake, accident, or ignorance of the usury; and when the record disclosed no usury. The court applied to her the general doctrine, applicable when homesteads are involved as in other cases: "If a party is sued at law and has a legal defense, he must avail himself of it at law pending the suit, and cannot afterwards ask for relief, unless he was pre-

[1] Brady v. Curtis, *supra.*

[2] Thompson v. Sheppard, 85 Ala. 611, *615;* Woodall v. Kelly, 85 Ala. 368; Chapman v. Peebles, 84 Ala. 283; Tedder v. Steele, 70 Ala. 347.

[3] Stewart v. Stisher, 83 Ga. 297, *300;* McLaws v. Moore, 83 Ga. 177; Owen v. Gibson, 74 Ga. 465; Hightower v. Beall, 66 Ga. 102.

vented from so pleading his defense by fraud, accident, or the act of the adverse party, unmixed with negligence on his part."[1]

Had the judgment shown upon its face that the rate of interest was usurious, the homestead would have been good against the judgment.[2] For, though usury does not so vitiate a mortgage as to destroy the lien, it does have the effect of rendering a waiver of homestead exemption nugatory when made in the mortgage note.[3]

When the usury is pleaded in foreclosure proceedings, and proven, there may be judgment for the lawful sum due with the usury purged out. It was judicially said, when this was done: "This recovery is not inconsistent with the invalidity of the mortgage in so far as it waived homestead, but entirely consistent therewith. Indeed, the invalidity follows as a direct conclusion from the adjudication that the debt and the mortgage security are affected. That a void waiver would become valid by purging out the usury when the judgment of foreclosure was rendered is a proposition than which none could be more unsound. The mortgage is good as a lien, but there has been no adjudication, and can be none, that its lien will prevail over the homestead right. With respect to that right, it stands just as it would had no waiver been inserted in the mortgage deed. Until the right expires or has run out, there can be no enforcement of the lien, but after that event it can be enforced."[4]

§ 11. Mode of Release.

The mode of incumbering a homestead, pointed out by statute, must be substantially followed, under pain of nullity.[5] No mode of conventional mortgage of the homestead can be made effective, though both husband and wife join in its execution, if the law forbids the incumbering of such property.[6]

[1] McLaws v. Moore, 83 Ga. 177-9; Wingfield v. Rhea, 73 Ga. 477; Hightower v. Cravens, 70 Ga. 475; Watkins v. Lawton, 69 Ga. 671; Perry v. McLendon, 62 Ga. 604; Thomason v. Fannin, 54 Ga. 361; Ga. Code, §§ 2897, 3577.

[2] Cleghorn v. Greeson, 77 Ga. 343.

[3] *Ib.;* Small v. Hicks, 81 Ga. 691.

[4] Lowry v. Parker, 83 Ga. 341, Bleckley, C. J.

[5] Boyd v. Cudderback, 31 Ill. 113; Wing v. Cropper, 35 Ill. 256; Richards v. Chase, 2 Gray, 383.

[6] Van Wickle v. Landry, 29 La. Ann. 330; Lanahan v. Sears, 102 U. S. 318; Sampson v. Williams, 6 Tex. 101.

Contractual renunciation of homestead is only effected by sale of the property or some equivalent alienation.[1] A debtor who has made a void agreement to waive exemption may feel bound in conscience to sell his home, where the law allows its alienation, and when the rights of others are not infringed; or to stand by and see it sold, and thus redeem his void promise.

In a deed, duly signed, acknowledged and executed, releasing certain rights, such as that of homestead, it is not sacramental that the names of the grantors signing should be inserted in the body of the instrument.[2]

No express waiver of the homestead right is necessary in a deed of sale, unless required by statute or constitutional provision,[3] if the owner has not given away his ordinary right of alienation in accepting the terms of his exemption privilege.

There is no need of expressly waiving the homestead right in a deed to property on which the grantor does not reside.[4] To avoid the presumption of waiver, or the consequence of actual waiver, the selection should be before sale, and the claim within the law.[5]

Requesting a creditor to attach the homestead estops the beneficiary of exemption from opposing the attachment subsequently by setting up such exemption.[6]

[1] Colvin v. Woodward, 40 La. Ann. 627. The Louisiana constitution, article 222, forbids the mortgaging or waiving of homestead rights, but allows the sale of homestead property. This accords with Hardin v. Wolf, 29 La. Ann. 333, rendered under the former constitution, but overruled in Nugent v. Carruth, 32 La. Ann. 444. *See* Van Wickle v. Landry, 29 La. Ann. 330.

[2] Elliot v. Sleeper, 2 N. H. 525; Woodward v. Seaver, 38 N. H. 29; Lithgow v. Kavenaugh, 9 Mass. 161; Dentzel v. Waldie, 30 Cal. 138; Armstrong v. Stovall, 26 Miss. 275; 3 Wash. Real Prop. 266. In Illinois the release of the homestead right is not dependent upon the insertion of the grantors' names in the body of the deed. Even a wife, by signing and duly acknowledging a deed containing relinquishment, will be bound. Yocum v. Lovell, 111 Ill. 212; Miller v. Shaw, 103 Ill. 277; Johnson v. Montgomery, 51 Ill. 185.

[3] Poole v. Gerrard, 65 Am. Dec. 482, note by Mr. Freeman.

[4] Finlon v. Clark, 118 Ill. 32; Symonds v. Lappin, 82 Ill. 213.

[5] Clark v. Spencer, 75 Ala. 49; Jarrell v. Payne, 75 Ala. 577; Barker v. Williams, 74 Ala. 331; Wright v. Grahfelder, 74 Ala. 460; Henderson v. Tucker, 70 Ala. 381; Martin v. Lile, 63 Ala. 406; Tucker v. Henderson, 63 Ala. 280; Bell v. Davis, 42 Ala. 460; Simpson v. Simpson, 30 Ala. 225.

[6] Parsons v. Cooley, 60 Ia. 268. An

There must be special acknowledgment, by the wife, of her release of the homestead right.[1]

A deed of the homestead in escrow, to be delivered on the grantee's compliance with certain conditions, was held to be a release of homestead rights by the wife who had signed it.[2]

§ 12. Pleading Waiver.

The homestead claim, when not interposed till after judgment and order to sell lands described in the complaint, which include the homestead, has been presumed to be waived.[3]

Leaving the homestead temporarily, even for a year, after it has been duly claimed and recorded, is not a waiver of it, nor will it work forfeiture, when there is no design to abandon it.[4]

If waiver of the exemption right is relied upon by the creditor, he must aver it; and if he has sued out a writ of attachment, the officer in charge of it must indorse the fact of the waiver on it, after having satisfied himself of its truth, it was held.[5]

A promissory note contained the following waiver: "I hereby, for myself and family, expressly waive all homestead rights and exemptions which, by the laws, state and federal, are allowed to me and my family in any of said described property, and all other property, real or personal, which I now own, or may hereafter own or acquire, until this debt is fully paid." This was held operative against all the personal property of the maker. The note was executed in a different

absent wife made such request to a creditor of her husband, and was held estopped from subsequently claiming exemption right, as her act was treated as an abandonment of the homestead on her part.

[1] Warner v. Crosby, 89 Ill. 320; Smith v. Miller, 31 Ill. 157; Boyd v. Cudderback, 31 Ill. 113; Best v. Gholson, 89 Ill. 465; Trustees v. Hovey, 94 Ill. 394.

[2] Knopf v. Hansen, 37 Minn. 215.

[3] Stanley v. Ehrman, 83 Ala. 215; Sherry v. Brown, 66 Ala. 51; Randolph v. Little, 62 Ala. 396; Hines v. Duncan, 79 Ala. 112; Simpson v. Simpson, 30 Ala. 225.

[4] But, in Alabama, it would be deemed an abandonment, were it not for section 2843 of the code. Beckert v. Whitlock, 83 Ala. 123; Scaife v. Argall, 74 Ala. 473.

[5] Held under Alabama Code of 1876, §§ 2849, 2850: Fears v. Thompson, 82 Ala. 296. *See* McCrummen v. Campbell, 82 Ala. 566. In Alabama, waiver must be by a separate instrument. When expressed in a note, it was held insufficient, though the note was witnessed. Baker v. Keith, 72 Ala. 121.

state from that in which the note was sued upon, but the court said: "We are inclined to the view that the waiver would be good against any claim of exemption to personalty in any state of the Union where the debtor might reside and be sued." [1]

Such waiver in a promissory note must be pleaded if the plaintiff would avail himself of it. Upon appeal, it will not be regarded if it is not noticed in the judgment of the court below.[2] "The purpose of the statute requiring a waiver of exemptions to be averred in the complaint is that the defendant may join issue thereon and controvert the fact. If his plea is limited to the mere denial of such averment, and his contestation is sustained, the only consequence is that the judgment will not contain a recital of the fact of waiver; but the plaintiff may, nevertheless, have judgment for the debt and costs." [3]

A bond which does not waive homestead exemption may be insufficient to protect its holder, yet not be void so that the giving of it was non-compliance with the law requiring bond to be given. Since he could have moved to have it made sufficient, the court, in a case where the validity of such a bond was questioned, held it not void but a binding obligation.[4]

A mortgagor may claim his homestead right when he has not released it, though he has not put it at issue in the foreclosure proceedings. He may lie still till the purchaser at the mortgage sale brings an action of ejectment, and not be too late to claim the right, if he has remained in occupancy.[5]

When there has been a waiver of homestead as to some creditors and not as to others, there is no difficulty in marshaling the liens unless there are unwaived ones senior to those waived.[6]

[1] Holland v. Bergen, 89 Ala. 622; Alabama Code (1886), § 2570; Wagnon v. Keenan, 77 Ala. 519; Terrell v. Hurst, 76 Ala. 588.

[2] Courie v. Goodwin, 89 Ala. 569.

[3] Golden v. Conner, 89 Ala. 598; Goetter v. Pickett, 61 Ala. 387.

[4] Acker v. Alex. *etc.* R. Co., 84 Va. 648.

[5] Asher v. Mitchell, 92 Ill. 480. *See* Goltra v. Green, 98 Ill. 317. Mortgage to secure borrowed school fund not good against homestead without release. Board of Trustees v. Beale, 98 Ill. 248.

[6] *See* Scott v. Cheatham, 78 Va. 82; Strange v. Strange, 76 Va. 240.

CHAPTER XVIII.

ABANDONMENT.

§ 1. Permanent Removal.
2. Temporary Removal.
3. Removal to a New Home.
4. Leasing the Premises.
5. Cessation of Ownership.
6. Family Headship Relative to Abandonment.
7. Effect on the Wife's Rights.
8. Effect on the Widow's Rights.

§ 1. Permanent Removal.

The conditions upon which the exemption right is acquired are not all stringently necessary to its retention. Continued occupancy, however, is generally required. The voluntary leaving of the home with no intention of returning to it is an abandonment of the right, though the legal possession of the property be retained. *Aliud est possidere, aliud esse in possessione.* While the owner may legally possess, and even be in possession in a legal sense, he may not be in the actual occupancy of his property as the home of his family in the sense of the homestead statute. To retain the exemption right, the beneficiary must live upon the property as the home of himself and his family; and the property must not share the home character with any other place of residence. It is well settled that permanent removal from the homestead is an abandonment of the exemption right and privilege.[1]

If the homestead consists merely of a farm, would it be abandoned by moving the family from a dwelling situated on

[1] Bradford v. Central Loan Co., 47 Kas. 587; 28 P. 702; Osborne v. Scoonmaker (Kas.), 28 P. 710; Duffy v. Willis, 99 Mo. 132; Smith v. Bunn, 75 Mo. 559; Kaes v. Gross, 92 Mo. 648; Leake v. King, 85 Mo. 413; Jackson v. De Bose, 87 Ga. 761; 13 S. E. 916; Bank v. Smisson, 73 Ga. 422; Bell v. Schwarz, 37 Tex. 572; McMillan v. Warner, 38 Tex. 410; Gouhenant v. Cockrell, 20 Tex. 97; Shepherd v. Cassiday, 20 Tex. 29; Phillips v. Springfield, 39 Ill. 83; Williams v. Moody, 35 Minn. 280; Robertson v. Sullivan, 31 Minn. 197; Campbell v. Adair, 45 Miss. 170; Austin v. Stanley, 46 N. H. 51; Newman v. Franklin, 69 Ia. 244; Gardner v. Baker, 25 Ia. 343; Kimball v. Wilson, 59 Ia. 638; Cotton v. Hamil, 58 Ia. 594; Ross v. Hellyer, 26 Fed. R. 413; Van Bogart v. Van Bogart, 46 Ia. 359; Leonard v. Ingraham, 58 Ia. 406; Baker v. Jamison, 73 Ia. 698.

it to one near by? In answer, it has been held that by moving from his own house to one on an adjoining lot not his, the householder does not abandon his homestead in his own land which he still occupies as a part of his home place.[1] In such case there is no design, on the part of the beneficiary, to expose his farm to creditors. He leaves his accustomed roof for another, but still cultivates his ground as before; still actually occupies the principal part of his homestead.

Subsequent removal from the homestead by both husband and wife, with their family, so as to amount to abandonment, will not cure the effect of a deed of trust given by the husband alone, conveying the property.[2] It will not retroact so as to give validity to the prior transfer of the property by either of them.[3] Though they make a declaration of abandonment for the purpose of validating a mortgage made by him alone, it will not have that effect.[4]

An abandoned home is open to creditors; but, if they do not proceed against it, the owner may return to it and rededicate it as a homestead so that it will be free from his future personal obligations as a debtor.[5]

When there is a question between the grantee of a former homestead and creditors of the grantor, evidence of declarations made in disparagement of the homestead interest by the grantor when in possession, before the grant, is admissible.[6] And the grantee may show that the grantor's wife had abandoned before sale.[7] It has been held that a wife may lose her right by quitting the homestead premises permanently and voluntarily.[8]

Abandonment must be voluntary.[9] It may be accomplished either with or without the acquisition of a new home to which the immunities, privileges and restraints of the discarded one are transferred.[10] Where homestead is held to be a mere right

[1] Nichols v. Nichols, 62 N. H. 621; Cole v. Bank, 59 N. H. 53, 321; Locke v. Rowell, 47 N. H. 46; Buxton v. Dearborn, 46 N. H. 43.

[2] Cummings v. Busby, 62 Wis. 195.

[3] Belden v. Younger, 76 Ia. 567, 570; Alexander v. Vennum, 61 Ia. 160.

[4] Gleason v. Spray, 81 Cal. 217.

[5] Carter v. Goodman, 11 Bush, 228.

[6] Anderson v. Kent, 14 Kas. 207.

[7] *Ib.*

[8] Levison v. Abrahams, 9 Lea, 178; Roach v. Hacker, 2 Lea, 634; Jarman v. Jarman, 4 Lea, 675; Act of 1874: Tenn. Code, § 2114*a*.

[9] Reece v. Renfro, 68 Tex. 192; Moss v. Warner, 10 Cal. 296.

[10] Smith v. Uzzell, 56 Tex. 315;

of occupancy,[1] the surrender of that right exposes the home property to creditors.

Under the provision that no release or waiver of homestead exemption "shall be valid in law, unless by deed acknowledged and recorded as in case of conveyance of real estate," it was held that the exemption right was not lost by the removal of the family from the premises.[2] Under several statutes, abandonment may be by a recorded declaration.[3]

Removal from the state.— Where the homestead beneficiary changes his residence by removing permanently to another state, he abandons his homestead protection. Whether he acquires a new homestead in the state of his adoption or not, the effect is the same.[4]

It has been held (in exposition of a constitutional provision that the homestead-holder must be "a resident of the state") that he must be an actual — not a mere constructive — resident; so definite absence will deprive him of the benefit of homestead exemption, though he have the intention of returning to the state.[5] Leaving, without such intention, is more plainly still, a forfeiture of his right.[6] Upon removal to another state only for a brief period, he may be considered to have abandoned his right of exemption, when the fact is found that he has changed his residence so as to be no longer abiding in the state.[7] A judgment creditor may proceed

Woolfolk v. Ricketts, 48 Tex. 28; Jordan v. Godman, 19 Tex. 273.

[1] Flatt v. Stadler, 16 Lea, 371 (Act of 1879); Howell v. Jones (Tenn.), 19 S. W. 757.

[2] Connor v. McMurray, 2 Allen, 204, in exposition of Mass. Stat. 1857, ch. 298; Doyle v. Coburn, 6 Allen, 71. (*Compare* Lazell v. Lazell, 8 Allen, 575.)

[3] For instances: Rev. Stat. of Idaho, § 3041; Rev. Stat. of Arizona, § 2075; Tipton v. Martin, 71 Cal. 325; Porter v. Chapman, 65 Cal. 365.

[4] Lindsay v. Murphy, 76 Va. 428; Fessler v. Haas, 19 Kas. 216.

[5] Lee v. Moseley, 101 N. C. 311; Const. of N. C., art. 10, § 2: Baker v. Legget, 98 N. C., 304; Munds v. Cassidey, 98 N. C. 558.

[6] Finley v. Saunders, 98 N. C. 462.

[7] A debtor left Alabama for Georgia, where he engaged in business. An execution had been levied. His return was held not to dislodge the lien created by the judgment and levy. McCrary v. Chase, 71 Ala. 540. But a widow was held entitled to homestead when her husband died with only an equitable title — a contract to purchase; and when she had ceased to be a resident of Alabama, the creditors could not levy upon the property. Munchus v. Harris, 69 Ala. 506. But it has been held that a wife's removal to another state forfeited her homestead right. Perry v. Scott, 68 Tex. 208.

against the homestead to make his money.[1] There are decisions, however, which sound to the contrary of the judicial opinion just stated. "Even a removal from the homestead, followed by long-continued residence and the acquirement of citizenship in another state, has been held not to operate as an abandonment."[2]

A widower left his only child, a minor, at his homestead in care of near relatives who came to live there while he went away to better his fortune. He went without design of abandoning his home, though he exercised the rights of a citizen and voted while away in another state. It was decided, upon these facts, that there had been no abandonment, and that his right, as tenant by curtesy, in the homestead which had belonged to his wife, was not subject to execution sale by his creditors.[3]

It is settled as a rule of law that domicile continues till it is left without design of returning to it. It continues until it is succeeded by another.[4] And the homestead right has been so far coupled with domicile that it has been held that one may go to another state — may abscond for fear of arrest — and his wife may follow him; and they may not return till he be brought back by an officer under arrest: yet the domicile and the homestead right will remain unchanged.[5]

Removal to another state and purchase of a homestead there with the proceeds of the homestead owned in the state of the emigrant's former residence, and the subsequent sale of his foreign homestead and the investment of its proceeds in another residence on return to his first state, will not prevent execution for debts contracted before the establishment of the last homestead.[6] Permanent removal from the state is abandonment, whether a new homestead be established in the place to which the emigrant goes or not.[7]

[1] City Bank v. Smisson, 73 Ga. 422; Skinner v. Moye, 69 Ga. 476.

[2] Lubbock v. McMann, 82 Cal. 226, 229 (referring to Porter v. Chapman, 65 Cal. 367; and Tipton v. Martin, 71 Cal. 325). *See* Graves v. Campbell, 74 Tex. 576.

[3] Dennis v. Omaha N. Bank, 19 Neb. 675; McHugh v. Smiley, 17 Neb. 620-6.

[4] State v. Finn, 4 Mo. App. 347; Greene v. Beckwith, 38 Mo. 384; Adams v. Abernathy, 37 Mo. 196.

[5] Griffith v. Bailey, 79 Mo. 472.

[6] Caldwell v. Seivers, 85 Ky. 38.

[7] Jackson v. Du Bose, 87 Ga. 761.

§ 2. Temporary Removal.

The occupancy required is not slavish; it admits of absences from time to time by the head of the family and all of its members; it is in compliance with the law if there is an intention to return on the part of the beneficiary, and if there has been no establishment of a home elsewhere. There are many instances of doubt as to the character of the removal, involving the question of intention; but, when it is made clear that the absence is temporary, and the design of the homestead owner is to resume the actual occupancy with his family, there is no abandonment of the exemption right.[1]

Intent to return, when a husband and wife are away from their homestead, does not mean that both mean to return but that the husband does. The design of the head of the family bears on the question whether there has been aban-

[1] Cooper v. Basham (Tex.), 19 S. W. 704; Feldes v. Duncan, 30 Ill. App. 469, 475; Potts v. Davenport, 79 Ill. 455; Wilkins v. Marshall, 80 Ill. 74; Kenley v. Hudelson, 99 Ill. 493; Cobb v. Smith, 88 Ill. 199; Henson v. Moore, 104 Ill. 403; Shepard v. Brewer, 65 Ill. 383; Brennan v. Wallace, 25 Cal. 108; Dulanty v. Pynchon, 6 Allen, 510; Carrington v. Herrin, 4 Bush, 624; Hansford v. Holdam, 14 Bush, 210; Tumlinson v. Swinney, 22 Ark. 400; Upman v. Bank, 15 Wis. 449; Burch v. Sheriff, 37 La. Ann. 725; Davis v. Kelley, 14 Ia. 523; Fyffe v. Beers, 18 Ia. 4; Morris v. Sargent, 18 Ia. 90; Graves v. Campbell, 74 Tex. 576; McDannell v. Ragsdale, 71 Tex. 23; Cline v. Upton, 59 Tex. 28; McMillan v. Warner, 38 Tex. 411; Kaufman v. Fore, 73 Tex. 308; Parr v. Newby, 73 Tex. 468; Welborne v. Downing, 73 Tex. 527; Weaver v. Nugent, 72 Tex. 272; Sanders v. Sheran, 66 Tex. 655; Shepherd v. Cassiday, 20 Tex. 30; Austin v. Townes, 10 Tex. 24; Thomas v. Williams, 50 Tex. 269; Pierson v. Truax, 15 Colo. 223; 25 Pac. 183; Colo. Gen. Stat., ch. 51, § 3; Griffin v. Sutherland, 14 Barb. 458; Woodward v. Murray, 18 Johns. 400; Orman v. Orman, 26 Ia. 361; Boot v. Brewster, 75 Ia. 631; Robb v. McBride, 28 Ia. 386 (the house rented during the owner's absence); Shirland v. Union Bank, 65 Ia. 96 (farm rented, except a room stored with furniture); Bradshaw v. Hurst, 57 Ia. 745 (both husband and wife temporarily absent); Griffin v. Sheley, 55 Ia. 513, and Savings Bank v. Kennedy, 58 Ia. 454 (husband absent, with intent to return); Lunt v. Neely, 67 Ia. 97 (husband absent with intent to abandon while the wife remained with intent to occupy); Woolcut v. Lerdell, 78 Ia. 668 (leaving home to avoid disagreeable relations with another occupant); Jones v. Blumenstein, 77 Ia. 361; Gates v. Steele, 48 Ark. 539; Euper v. Alkire, 37 Ark. 283; Brown v. Watson, 41 Ark. 309; Curran v. Culp (Ky.), 15 S. W. 657; McFarland v. Washington (Ky.), 14 S. W. 354; Beckman v. Meyer, 75 Mo. 333; Smith v. Bunn, 75 Mo. 559; Kaes v. Gross, 92 Mo. 647; Eckman v. Scott (Neb.), 52 N. W. 822.

donment or not. However influential may be the wife's will, the law must look to that of him who is held responsible as the head of the community, and must take his intent as the proper index of the conjugal design. Rather, it should be said, the law takes his intent as conclusive.[1]

The period of absence is to be considered in determining the intention of the absentee, whether he meant to return or to abandon his habitation.[2] Though the absence may extend through several months or years, with only partial occupancy, the intention to return may have continued all the while to the preservation of the exemption right.[3] It may be perfectly consistent with the legal occupancy required, and may not work the forfeiture of the homestead. The intention may be inferred from circumstances, such as the leaving of furniture within the dwelling, which would be corroborative of the beneficiary's testimony, or of other testimony, as to the intent. Though the beneficiary may have removed into another dwelling rented for the period in which his own exempt home is undergoing repairs, or though he may have vacated his homestead temporarily for the purpose of traveling with his family, or for any other purpose, the exemption remains unaffected.[4]

The time of absence, with intent to return to the home, is no criterion as to whether the exemption right has been forfeited. It may tend to satisfy the court whether or not the beneficiary has kept within the letter and spirit of his granted privilege; but, when no inhibition of absence has been expressed by the legislator and no time fixed as the limit of temporary non-occupancy while intention to return exists, the courts can lay down no precise rule as to the time which shall be applicable to all cases.[5]

[1] Williams v. Moody, 35 Minn. 280; Phillips v. City of Springfield, 39 Ill. 83; Johnston v. Turner, 29 Ill. 280; Brennan v. Wallace, 25 Cal. 108.

[2] Dunton v. Woodbury, 24 Ia. 74; Curran v. Culp (Ky.), 15 S. W. 657.

[3] Repenn v. Davis, 72 Ia. 548; Jones v. Blumenstein, 77 Ia. 361; Mills v. Van Boskirk, 32 Tex. 361; Taylor v. Boulware, 17 Tex. 74; Wiggins v. Chance, 54 Ill. 175.

[4] Bunker v. Paquette, 37 Mich. 79; Earll v. Earll, 60 Mich. 30; Campbell v. Adair, 45 Miss. 170; Wiggins v. Chance, 54 Ill. 175; Howard v. Logan, 81 Ill. 383; Tomlinson v. Swinney, 22 Ark. 400; Moss v. Warner, 10 Cal. 296; Jackson v. Reid, 32 Ohio St. 443.

[5] Bunker v. Paquette, 37 Mich. 79; Griffin v. Sutherland, 14 Barb. (N. Y.) 456.

The premises may be vacant, even at the time of the levy upon them for execution, and the owners may be living at another place at the time. Upon proof that the home was not meant to be permanently abandoned, that the owner's temporary absence was caused by necessity, and that they left part of their property in the house, their claim of homestead was allowed.[1]

"What state of facts shall be deemed to constitute a change of domicile may be considered a mixed question of law and fact, and is one proverbially difficult to determine, owing to the doubtful interpretations of human conduct. It is universally admitted that such a change is never effected by intention alone. It can be accomplished only by a completed act, done with the purpose of consummating a permanent removal from the original domicile, *animo manendi*. The old domicile continues until a new one is acquired *facto et animo*.[2] A change of domicile cannot be inferred from an absence which is shown to be temporary, and attended with the requisite *animus revertendi*.[3] The intention to return is usually the controlling element in the determination of the whole question."[4] But if there has been no declaration of homestead duly filed where the law requires it, even a temporary absence may prove fatal.[5]

The burden of proof is on the beneficiary who, after protracted absence, or any temporary removal from home, with his family, attended with circumstances ordinarily showing abandonment, alleges that he had meant to retain his exemption right and to resume his residence. The presumption is against him under such circumstances.[6]

The declaration of a beneficiary that he intends to return, made at a time not suspicious, may be given in evidence. Declarations to the contrary are admissible against him.[7] And

[1] Karn v. Hanson, 59 Mich. 380.

[2] State v. Hallett, 8 Ala. 159; Glover v. Glover, 18 Ala. 367; Story's Conflict of Laws, § 47; Talmadge v. Talmadge, 66 Ala. 199.

[3] McConnaughy v. Baxter, 55 Ala. 379; Kelly v. Garrett, 67 Ala. 304.

[4] Somerville, J., deciding Murphy v. Hunt, 75 Ala. 438. Lehman v. Bryan, 67 Ala. 558, cited by him on the last point.

[5] Sides v. Schaiff (Ala.), 9 So. 228.

[6] Benson v. Aitken, 17 Cal. 164; Harper v. Forbes, 15 Cal. 202; Cook v. McChristian, 4 Cal. 25; Taylor v. Hargous, 4 Cal. 272; Ives v. Mills, 37 Ill. 75; Kitchell v. Burgwin, 21 Ill. 40; Jarvais v. Moe, 38 Wis. 448.

[7] Anderson v. Kent, 14 Kan. 207;

it has been held that his wife's rights would be concluded by his declarations.[1]

Intention to return after removal, when supported only on the evidence of the beneficiary himself, ought not to have greater weight than that of circumstances showing a contrary design. "I greatly prefer the evidence of facts to the testimony of parties to the record as to their own intentions, when such testimony is given to put money in their own pockets," Judge Love said, when a witness who had abandoned his homestead, removed to another county and voted there, swore in his own case that his intention was to preserve, and return to, his homestead.[2]

A house and lot that had been left by the owner and his wife, and had been sold under execution to pay his debts with his assent, was claimed by him as his homestead three years after the sale; and was sued for, as such, five years after. Though he had left some furniture in the dwelling, he had established another home elsewhere for himself and family. It was a clear case of abandonment, though he swore, on the trial, that it had not been his intention to abandon.[3]

Where temporary absence is so regulated by statute as to permit absence for half a year, without forfeiture, upon the homestead holder's recording a notice of intention to return, the property will be protected for that time, though he never return.[4] The notice, however, would avail nothing if there was abandonment from the day of departure, and that fact established.[5] And, to entitle one to the six months' absence upon recorded notice, it is essential that he shall have acquired the homestead right by actual occupancy.[6] Leaving with intention to return, accompanied with preparation to do so, will be of no avail without the recorded notice.[7]

Batts v. Scott, 37 Tex. 65; Holliman v. Smith, 39 Tex. 357; McMillan v. Warner, 38 Tex. 411; Wright v. Dunning, 46 Ill. 271; Jarvais v. Moe, 38 Wis. 448.

[1] Brennan v. Wallace, 25 Cal. 115.

[2] Ross v. Hellyer, 26 Fed. 413, U. S. Circuit Ct., Ia., Love, J.

[3] Wilson v. Daniels, 79 Ia. 132.

[4] Russell v. Speedy, 38 Minn. 303.

[5] Donaldson v. Lamprey, 29 Minn. 18.

[6] Baillif v. Gerhard, 40 Minn. 172; Minn. Gen. Stat. (1878), ch. 68, § 9.

[7] In the case of Quehl v. Peterson (Minn.), 49 N. W. 391, the court said, with reference to the statute requiring notice: "That this court has always construed the statute as meaning that the homestead exemption

It surely was never contemplated that all the family should be always at home. All the family may be away at once, yet there would not be necessarily a cessation of occupancy by the family. Creditors are not at liberty to pounce upon the home because its fires are out and its inmates gone. If a member of the family remains in charge, creditors would be yet less excusable for levying upon the premises. But the presence of a subordinate member would not neutralize the effect of the absence of the head of the family under circumstances indicating abandonment. A husband and wife both leaving their homestead, it was open to creditors though his mother had remained upon it, and though his wife declared her intention to return when the question of abandonment had been brought into litigation.[1] Had both really meant to

would be lost by removing from or ceasing to actually occupy the premises as a residence for more than six months (unless notice was filed), even although there was an intention to return, is evident from Russell v. Speedy, 38 Minn. 303, 37 N. W. Rep. 340, and Baillif v. Gerhard, 40 Minn. 172, 41 N. W. Rep. 1059. And exactly in the same line we have held that a man acquires no homestead exemption by purchasing property with the intention of occupying it as a homestead until and unless followed by actual occupancy and residence thereon. Kelly v. Dill, 23 Minn. 435; Liebetrau v. Goodsell, 26 Minn. 417, 4 N. W. Rep. 813. As showing the construction which has been uniformly placed upon the terms used in the homestead exemption statutes, see, also, Folsom v. Carli, 5 Minn. 333 (Gil. 264); Tillotson v. Millard, 7 Minn. 513 (Gil. 419); Kelly v. Baker, 10 Minn. 154 (Gil. 124); Kresin v. Mau, 15 Minn. 116 (Gil. 87); Stewart v. Rhoades, 39 Minn. 193, 39 N. W. Rep. 141; Neumaier v. Vincent, 41 Minn. 481, 43 N. W. Rep. 376. Of course, the statute is to receive a reasonable construction, and we are not to be understood as meaning that it requires constant personal presence so as to make a man's residence his prison, or that an enforced temporary leaving of the premises from accidental causes such as fire or flood, or that a temporary absence for purposes of business or pleasure, not amounting to a change of actual residence, would constitute a removal, or ceasing to occupy, within the meaning of the statute. But we hold that upon the facts of this case the defendant had removed from and ceased to occupy the premises as a homestead, within the meaning of the statute, for more than six months prior to March 15, 1890, and, not having filed the notice required by law, his right of homestead exemption had been lost, and that it was not regained by his mere intention and preparation to return. Of course, the title which vested in the plaintiff under the assignment could not be divested by the subsequent occupancy of the premises by the defendant."

[1] Roach v. Hacker, 2 Lea, 633; Act 1870, ch. 80, § 1; Code, § 2114*a* (T. & S.). Even the minor's interest may be

return from the time of their removal, the fact that the mother had been left in charge would have rendered it certain that no right had been forfeited; for it is held: "The homestead right is not lost by a temporary removal with an intention to return and make the premises a home again, when accompanied with an actual keeping for that purpose."[1]

If the husband had remained at home and all the rest of the family had gone away for a long period but not permanently, he would have retained the homestead right with its restraint, and his wife would have had the same interest as though living with him at home. A wife and children moved to a town that the children might be educated, while the head of the family still occupied their rural home. He alone mortgaged his homestead, but the act was held void.[2] The homestead had not been abandoned, since the absence of the family was temporary.[3] But when both husband and wife left their homestead, and he then conveyed it by deed, these facts were evidence of abandonment.[4]

Temporary absence, by a widow, is not a relinquishment of her right.[5] She is not everywhere required to occupy her homestead. Where occupancy is required, her permanent removal would be abandonment, as in the case of other beneficiaries.[6]

§ 3. Removal to a New Home.

No question of intent to return can be entertained when a new homestead has been selected and occupied by the owner and his family. Whatever he may profess relative to his old quarters with a view to the retention of the exemption privilege, it must go for naught in the face of the fact that he has acquired and occupied new quarters and made them exempt.

lost by his removing with his mother, a widow, from the homestead, under the act of 1870. Hicks v. Pepper, 1 Bax. 42. *See* Dickinson v. Mayer, 11 Heisk. 515.

[1] Keyes v. Bump, 59 Vt. 396; Rice v. Rudd, 57 Vt. 11; Whiteman v. Field, 53 Vt. 557; Vasey v. Trustees, 59 Ill. 188; Schaife v. Argall, 74 Ala. 473; Lehman v. Bryan, 67 Ala. 558; Brettun v. Fox, 100 Mass. 234.

[2] Reinstein v. Daniels, 75 Tex. 640.

[3] *Ib.;* Mills v. Von Boskirk, 32 Tex. 361; Cross v. Everts, 28 Tex. 524; Gouhenant v. Cockrell, 20 Tex. 96; Shepherd v. Cassiday, 20 Tex. 24.

[4] Portwood v. Newberry, 79 Tex. 337.

[5] Deering v. Beard (Kan.), 28 P. 981.

[6] Craddock v. Edwards, 81 Tex. 609.

"Actions speak louder than words." The occupied dwelling is the exempt one to the exclusion of a dwelling previously occupied. The establishment of a new homestead is the abandonment of the former one,[1] It overcomes all considerations in favor of the exemptionist, based on his intention to return to his old quarters; for his ultimate design is nothing when he has established a new home exempt under the law in the stead of the old one. He may mean to sell the new one, or turn it over to his creditors within a year or two, and then move back to the old mansion; but such design will not preserve the latter inviolate meanwhile. Suppose he should carry out such design; should really sell the new residence: what would be the effect as to the old? He would have no special privilege as to that. At his death, the widow would not be entitled to homestead rights in it.[2] It would be precisely like other real estate out of which she could have her widow's homestead laid off, under the law of several states.

If a citizen is elected to a public office requiring him to live at the county seat, or at the state capital, he certainly may remove his family thither, without incurring the loss of his special privilege in his homestead temporarily left; but, if he vote in the town and make a new domicile there, he will forfeit the former privilege.[3] It has been held, however, that he would not lose his exemption by voting where he holds office, if his family should continue to live at the old home, and he intend to return on the termination of his official service.[4]

One who mortgages his homestead after acquiring a new one is deemed to have abandoned his exemption.[5] The motive of the beneficiary is often the turning point of inquiry, and the fact that he has dedicated a new home is conclusive.

[1] Davis v. Kelly, 14 Ia. 523, 526; Woodworth v. Comstock, 10 Allen, 425; Carr v. Rising, 62 Ill. 14; Cahill v. Wilson, 62 Ill. 137; Wright v. Dunning, 46 Ill. 271; Titman v. Moore, 43 Ill. 170; Woolfolk v. Ricketts, 41 Tex. 358; Holliman v. Smith, 39 Tex. 362; Cross v. Everts, 28 Tex. 533; Allison v. Shilling, 27 Tex. 450; Brewer v. Wall, 23 Tex. 585; Gouhenant v. Cockrill, 20 Tex. 96; Stewart v. Mackey, 16 Tex. 56; Trawick v. Harris, 8 Tex. 312. See Rix v. Capitol Bank, 2 Dill. 370.

[2] Mayors v. Mayors, 58 Miss. 806; Thompson v. Tillotson, 56 Miss. 36.

[3] Atchison Bank v. Wheeler's Adm'r, 20 Kas. 625; Cabeen v. Mulligan, 37 Ill. 230; Titman v. Moore, 43 Ill. 170.

[4] Moline Plow Co. v. Vanderhoof, 36 Ill. App. 26; McInturf v. Woodruff, 9 Lea, 671.

[5] Carter v. Hawkins, 62 Tex. 393.

But preparation to move into a new home, without actual occupancy, is not sufficient;[1] for the statutory requirement of occupancy has been held subject to strict construction.[2]

Taking measures to acquire a federal homestead is held not an abandonment of the state homestead already occupied. But, as in the case in which it was so held, the owner of the latter made the necessary affidavit required by the act of congress, at the time of entry; erected a house on the government land selected; moved his office furniture and a bed for himself into the house; slept there, and doubtless meant to hold out to the government that he made his home there, it cannot be said truthfully that he "occupied" his other homestead, at the same time, in the sense in which the law requires it to be "occupied," by a beneficiary of the homestead law. His wife remained on the state homestead already acquired: he on the federal one to be acquired. He had two strings to his bow. It is said that both he and his wife claimed the former as their homestead, but his entry and subsequent attitude was that of a man holding out to the government that he was living on public land to acquire it as his home. His domicile, not the residence of his wife, is that of her and the family.

When ready to sell the old homestead and occupy the new, they made the change. Was not the prior double-dealing meant to hold the former exempt from creditors till they could get the price of it in their own pockets; and, at the same time, to count the husband's occupancy of the new quarters on the period of probation necessary to acquire the congressional homestead?

The court, which sanctioned this course of the "settler" and state homestead-holder, said that "the fact (if it be one) that the federal government may have cause of complaint on account of the use made of the United States homestead law" does not affect the proposition that the first home was not abandoned while the second was being acquired.[3] But the "settler" in making his application under the law of congress swore that he took the quarter section for the purpose of

[1] Sharp v. Johnston (Tex.), 19 S. W. 259.

[2] Tromans v. Mahlman, 92 Cal. 1.

[3] Robertson v. Sullivan, 31 Minn. 197, 200.

actual settlement and cultivation, and he entered upon the occupancy, real or feigned, which he meant to have counted in his favor as compliance with that law. Are his affidavit and conduct consistent with the claim that he yet continued to be an actual occupant of his former home so as to hold it exempt while his new home was so? His sworn declaration was evidence of his election to take the new home in lieu of the old.[1] He could not hold both homesteads exempt.[2] His declaration by affidavit and his personal and permanent act of removal, in accordance with that sworn declaration, ought to have been treated as an abandonment of his state homestead.[3] His wife's waiting upon the latter till a purchaser could be found was not occupancy by the owner and his family, such as the law requires; her domicile was legally on the quarter section where the husband's was. For the wife's home is that of her husband.[4]

As the husband's domicile is the wife's domicile too, so his homestead and hers are identical. If he changes his old homestead for a new one and moves upon the latter, his wife cannot remain upon and occupy the former so as to allow the married couple to have two exempt residences at the same time. If his transition carries the homestead right, her lingering will avail nothing. His home becomes hers at once.[5]

There may be instances when the purpose of leaving the wife behind, while the husband goes to another state to settle, is merely to keep off creditors — not to preserve a home for the family. In such case, if the holding is only colorable, and really a fraud upon creditors, the property ought not to be protected as a homestead.[6]

As the adoption of a new home is the abandonment of the

[1] Lyman v. Fiske, 17 Pick. 231.

[2] Opinion of Judges, 5 Met. 587.

[3] Donaldson v. Lamprey, 29 Minn. 18; Jarvais v. Moe, 38 Wis. 440.

[4] Brewer v. Linnaus, 36 Me. 428; Greene v. Greene, 11 Pick. 410; McAfee v. Ky. University, 7 Bush, 135; Hairston v. Hairston, 27 Miss. 704; Hair v. Hair, 10 Rich. (S. C.) Eq. 163; Babbitt v. Babbitt, 69 Ill. 277; Angier v. Angier, 7 Phila. 305.

[5] Wynne v. Hudson, 66 Tex. 1; Slavin v. Wheeler, 61 Tex. 658; Shryock v. Latimer, 57 Tex. 675; Smith v. Uzzell, 56 Tex. 318; Pepper v. Smith, 54 Tex. 115; Ranney v. Miller, 51 Tex. 269; Clements v. Lacy, 51 Tex. 157; Woolfolk v. Rickets, 48 Tex. 37; Holliman v. Smith, 39 Tex. 361; Jordan v. Godman, 19 Tex. 273.

[6] *See* Baines v. Baker, 60 Tex. 140; Jones v. Trammell, 27 Tex. 133.

old, an heir of deceased parents who have united in making such change cannot claim any homestead right in the first as inherited from them.[1]

Joinder by husband and wife in mortgaging the homestead (where that is allowed) results in abandonment of it on foreclosure. The purchaser at the sale takes the property free from any homestead claim by the mortgagors — wife and husband. The exemption right does not cease, *ipso facto*, upon the making of the mortgage, except in relation to the mortgagee. As to others, it remains good till the foreclosure.[2]

In a case of conflicting testimony as to which of two places is the homestead of a party, involving the question of the abandonment of the place first occupied, the verdict of a jury ought not to be disturbed.[3]

In changing homes, selling one and fitting up another bought with the proceeds of the first, the family head is allowed reasonable time for the transition. If his intention is to occupy his new home as soon as he can have a dwelling erected upon the land, and if he is building with ordinary celerity, and if he does occupy it actually and permanently, with his family, as soon as it is completed, he will be considered as never having abandoned his homestead right from the time he acquired his first homestead.[4]

When the home buildings had been destroyed by fire, and it was shown that the owner meant to rebuild, no abandonment was incurred by his forced absence from it meanwhile.[5]

Actual occupancy cannot be rendered ineffectual to support the exemption right by evidence tending to show that the occupants had designated other land as their homestead. Such evidence is not even admissible against the fact of long occupancy duly established.[6]

§ 4. Leasing the Premises.

Whether the homestead may be leased for a limited time consistently with the rule of continued occupancy depends

[1] Wheeler v. Smith, 62 Mich. 373.

[2] Chamberlain v. Lyell, 3 Mich. 448.

[3] Kutch v. Holly, 77 Tex. 220; 14 S. W. 32.

[4] Boyd v. Fullerton, 125 Ill. 437; Crawford v. Richeson, 101 Ill. 351; Cowgell v. Warrington, 66 Ia. 666; Neal v. Coe, 35 Ia. 410; Edwards v. Fry, 9 Kan. 417.

[5] Howard v. Logan, 81 Ill. 383.

[6] Pellat v. Decker, 72 Tex. 578; Radford v. Lyon, 65 Tex. 471; Stringer v. Swenson, 63 Tex. 7; Jacobs v. Hawkins, 63 Tex. 1.

upon the circumstances attending the transaction and the *animus* of the beneficiary respecting the retention or renunciation of his family residence. Ordinarily, the leasing of his place to become the home of another family is a renunciation of it as that of his own. The governing statutory imposition of the condition of occupancy, as means of preserving the exemption privilege, may not be inconsistent with temporary leasing. Temporary absence, with intent to return, is not abandonment, though part of the homestead premises be leased to a tenant during the absence of the householder.[1] Indeed, the leasing of the whole premises for a limited time is not conclusive against the beneficiary as to the fact of abandonment;[2] but the question would turn on the owner's design to resume his home.[3]

It would seem that when a beneficiary leases his homestead for the period of his natural life, he could not more effectually abandon it; yet it is held that if the right to return and resume his home on the leased premises was reserved, and if the absence was involuntary, the homestead exemption may continue in his favor.[4]

Under the provision requiring actual occupancy, it was held that one who left his home by advice of his doctor, and rented it out for a year but averred his intent to return and re-occupy at the expiration of his lease, forfeited his right of exemption.[5] But this is different where homestead declaration has been filed. Where there is no record notice to the public, leaving the premises under a tenant is abandonment, notwithstanding an intention to resume occupancy.[6]

It is said, in defense of temporary leasing: "The homestead may be, as is sometimes the case, the only means of maintenance; and it may happen that, in order to rent it and derive from it any means of support, the dwelling must be

[1] Guy v. Downs, 12 Neb. 532; West River Bank v. Gale, 42 Vt. 27; Pardo v. Bittorf, 48 Mich. 275.

[2] Dunn v. Tozer, 10 Cal. 171; Austin v. Stanley, 46 N. H. 51; Wetz v. Beard, 12 O. St. 431; Stewart v. Brand, 23 Ia. 477; Robb v. McBride, 28 Ia. 386; Herrick v. Graves, 16 Wis. 157, 163; Stat. of Oklohama, § 2861.

[3] Fisher v. Cornell, 70 Ill. 216; Phelan's Estate, 16 Wis. 76, 79; Davis v. Andrews, 30 Vt. 678.

[4] Gates v. Steele, 48 Ark. 539.

[5] Stow v. Lillie, 63 Ala. 257.

[6] Pollak v. Caldwell, 91 Ala. 353; 10 So. 266; Ala. Code, §§ 2515, 2516, 2539; Stow v. Lillie, 63 Ala. 259; Scaife v. Argall, 74 Ala. 473; Murphy v. Hunt, 75 Ala. 438.

temporarily given up to the tenant. 'Thus the family might — sometimes from necessity, sometimes for convenience — be locally absent from the homestead for years without in any degree affecting their rights. The law is not concerned about the precise locality of the family at any time; but it is concerned that, wherever they may be carried by convenience, chance or misfortune, there shall be a place, a sanctuary, to which they may return to find the shelter, comfort and security of a home.'" [1]

In many states the law is "concerned about the precise locality of the family" so far as to require it to be on the place claimed as exempt. The policy of the law is not to feed families but to shelter them; rather, to protect the shelter which they have. To "be locally absent from the homestead for years," "for convenience," is hardly consistent with this policy, when the beneficiaries do not really hold the place as their home but as something screened from creditors.

A widow, devoting her house to the uses of a liquor saloon and dancing hall, lived in the upper story with her daughters. Then, renting out the whole building and moving away with her family and remaining away seven years, she sold the property to secure borrowed money, and gave an absolute deed. After all this, she successfully claimed homestead in the property, averring that she had intended to return to it.[2] But, by the law of one of the most liberal of the homestead states, her claim would have been denied; for the rule is that, if a part of the homestead is permanently devoted to a use inconsistent with that of family residence, it loses its exempt character.[3] In that state, where "business homesteads" are allowed, if the beneficiary leases his store-house from year to year, he thus abandons the benefit.[4] But it was permitted in another state for a dweller in his homestead to have a building on his

[1] Garibaldi v. Jones, 48 Ark. 230, *citing* Foreman v. Meroney, 62 Tex. 726; Walters v. People, 21 Ill. 178; Phipps v. Acton, 12 Bush, 375; Davenport v. Devereaux, 45 Ark. 343.

[2] McDermott v. Kernan, 72 Wis. 268, in exposition of statute: "Exemption shall not be impaired by temporary removal with the intention to re-occupy the same as a homestead, nor by a sale thereof." Sanborn & B.'s An. Stat. of Wis., § 2983. Jarvais v. Moe, 38 Wis. 440; Phillips v. Root, 68 Wis. 128; Zimmer v. Pauley, 51 Wis. 282.

[3] Langston v. Maxey, 74 Tex. 155; Newton v. Calhoun, 68 Tex. 451.

[4] Oppenheimer v. Fritter, 79 Tex. 99; *ante*, ch. VIII.

premises, in the rear of his residence, occupied by another, who there pursued his trade of carpentry; and no part of the premises were treated as having its homestead character relinquished.[1] However, in another state, one who slept upon his premises, but devoted most of them to business uses, was denied homestead exemption in any part of them. He had no family living on the property which he claimed as exempt, and perhaps he would have been denied homestead protection, under the circumstances, in almost every state.[2]

A widow, by leasing the home property to the heirs, then canceling the lease and conveying the property to them, abandoned her homestead right in it.[3] A widowed occupant of a homestead left it, after a year's residence, and leased it for nine years. On the ground that she meant to return as soon as the growth of the city should be such as to enable her to carry on dress-making on the premises, the court held that she had not lost her homestead right by abandonment.[4] So, when a home was rented out for a year, with the intention of returning at the expiration of the lease, but was sold, upon change of mind — the purchaser to have possession at the end of the year, when the lease would be out — it was held that there had been no abandonment. A judgment rendered against the owner was held to bear no lien upon the homestead thus left and sold.[5]

An infant claimed homestead in premises that had been occupied by its father, who died when the child was a year and a half old — his only heir. The guardian of the child leased the premises for its benefit and took it to live with her. The home of the deceased was sold under a mortgage from which there was a surplus of proceeds which creditors claimed. The guardian claimed that the property was homestead, and that the surplus belonged to her ward. After contest, the court recognized the property as homestead, and held that the child's removal from it was not abandonment.[6]

[1] Layon v. Grange (Kan.), 29 P. 585.
[2] Garrett v. Jones (Ala.), 10 So. 702.
[3] Ditson v. Ditson (Ia.), 52 N. W. 203.
[4] Reilly v. Reilly (Ill.), 26 N. E. 604.
[5] Moore v. Flynn, 135 Ill. 74; 25 N. E. 844.
[6] Shirack v. Shirack (Kas.), 24 Pac. 1107; Hixon *v.* George, 18 Kas. 253; Brinkerhoff v. Everett, 38 Ill. 263; Rhorer v. Brockhage, 86 Mo. 544; Johnston v. Turner, 29 Ark. 280.

A homestead was rented to a tenant by a surviving husband while he ceased to occupy it. Holding legal possession, and intending to return to the place in case he could not sell it, and finally returning and re-occupying, he was held not to have abandoned or forfeited the homestead right, though he had offered the property for sale.[1]

The owner of a hotel rented to a landlord, to be occupied exclusively as a hotel, is not an occupant in the sense of the homestead statute: so he may sell without his wife's joinder, though both board in the hotel.[2] But the landlord who owns his hotel and keeps the home of himself and his family in it may hold it exempt.[3] And it has been held that the owner of a hotel may rent it to another and yet retain the homestead exemption, if he continues to live in it with his family — he and they being boarders.[4]

Where the condition of the benefit is actual occupancy by the resident owner and his family, it is not observed by renting the premises to a tenant to be occupied by him.[5] The lessor must resume possession before levy if he wishes to hold his home as exempt.[6] And when the question of his exemption right turns upon occupancy, the burden of proof is upon him.[7]

§ 5. Cessation of Ownership.

It seems needless to say that when the condition of ownership no longer is observed, there can be no continuance of the exemption right. There are circumstances, however, occurring from time to time with reference to homestead sales and transfers, which require a passing notice. A surrender under misapprehension may lack the voluntary purpose necessary to constitute abandonment. If a debtor has given up his premises to a purchaser at an execution sale when such sale was

[1] Gregory v. Oates (Ky.), 18 S. W. 231.

[2] Green v. Pierce, 60 Wis. 372; Wis. Anno. Stat., § 2983.

[3] Harriman v. Queen Ins. Co., 49 Wis. 71; Phelps v. Rooney, 9 Wis. 70.

[4] Myers v. Ford, 22 Wis. 134.

[5] Martin v. Lile, 63 Ala. 406; Preiss v. Campbell, 59 Ala. 635; Boyle v. Shulman, 59 Ala. 566; Stow v. Lillie, 63 Ala. 257; Kaster v. McWilliams, 41 Ala. 302.

[6] Hines v. Duncan, 79 Ala. 112.

[7] Lyne v. Wann, 72 Ala. 43; Waugh v. Montgomery, 67 Ala. 573; Blum v. Carter, 63 Ala. 235.

void, his act is not a relinquishment of his exemption right.[1] When a part of the homestead came into the possession of a transferee under a void title, there was no legal abandonment of it.[2] But when the part sold included the family dwelling, and was legally conveyed, the rest lost its exempt character in the absence of any design to erect a dwelling upon it and use it in preservation of the right.[3] Where the husband is divested of no vested right, and none is vested in his wife by the homestead law, he can exercise the *jus disponendi* by changing his home before its sale.[4]

A nice question of abandonment was presented on the following facts: Taylor verbally agreed to sell his homestead to De Arman, and gave him possession of his dwelling and land, except three rooms which he still occupied with his family. De Arman and his family occupied all the rest of the house and the land. Two weeks later, Taylor gave De Arman his conveyance of the property; and, so long as he remained afterward, he paid rent to the vendee for the three rooms; but he soon vacated the premises altogether, taking his family away with him. The conveyance purported to be by both Taylor and his wife; the receipt of the price was averred, and the deed was acknowledged by both, but the certificate of the wife's separate examination merely stated that she signed "without fear, constraint or persuasion" of her husband. More than four years after this title had been given, and full possession thereunder, suit was brought by Pierce to recover this property, as its purchaser at judicial sale, in a suit against Taylor instituted about a year after he had made his private sale to De Arman. Pierce sued to eject Smith, who was the grantee of De Arman and now in possession.

Did Taylor own and occupy the property as a homestead when he and his wife made the written conveyance? If so, he continued to own, for the defect in the wife's acknowledgment was fatal.[5] He could not convey without her legal signature and acknowledgment, if the property was still a homestead. The conveyance being void, the property became subject to

[1] Waggle v. Worthy, 74 Cal. 266.
[2] Stinson v. Richardson, 44 Ia. 373.
[3] Givans v. Dewey, 47 Ia. 414; Windle v. Brandt, 55 Ia. 221.
[4] Massey v. Womble (Miss.), 11 So. 188.
[5] Motes v. Carter, 73 Ala. 553; Code of 1876 (then in force), § 2822.

execution for Taylor's debts as soon as he and his wife left it.[1] It was levied upon and sold under a creditor's judgment and bought by Pierce, as above stated. After this judicial sale, Mrs. Taylor made due acknowledgment of the deed to De Arman, to cure the defect of the prior one, but it did not affect the validity of the judicial sale since it could not act retrospectively.

The turning point is upon the *status* of the property after De Arman had come into possession of all but three rooms. Was the whole dwelling, with the land, still a homestead,— the deed needing the wife's signature and acknowledgment to effect its valid conveyance? The court said it was. The verbal agreement to sell was void though part or all of the purchase-money had been paid. The ownership remained in Taylor, and the court thought his occupancy of the rooms under agreement with De Arman was the same as if he had had no such agreement but had rented all the homestead to De Arman except the three rooms. The letting of a part would not have been an abandonment of the whole.[2] The court said: "The renting of the premises by Taylor from De Arman did not operate either to create an abandonment or to estop him from showing that in reality the relation of landlord and tenant did not exist between them." The verbal promise of a homestead owner to pay rent to a grantee, when the conveyance lacked the wife's signature, was held not to defeat the policy of the homestead law.[3] If a homestead can be rented to a lessee and possession given to a part of it, and the husband alone can then sell it, "it would enable husbands easily to do by indirection, without the knowledge or even suspicion of the wife, what they are prohibited positively by law from doing directly."[4] So it was held the Taylors never had sold their homestead, but that when they moved wholly from the premises, leaving De Arman in full possession under his void deed, they had abandoned it so that subsequently it was validly sold under judgment and execution; and Pierce, the

[1] Striplin v. Cooper, 80 Ala. 256; Alford v. Lehman, 76 Ala. 526.

[2] Pryor v. Stone, 19 Tex. 371; S. C., 70 Am. Dec. 350; Phelps v. Rooney, 9 Wis. 70; S. C., 76 Am. Dec. 244.

[3] Crim v. Nelms, 78 Ala. 604.

[4] Alford v. Lehman, 76 Ala. 529; Taylor v. Hargous, 4 Cal. 268; S. C., 60 Am. Dec. 606, and *note*.

purchaser, obtained good title, and possession was given to him by the court.[1]

The case was close. It might plausibly be contended that De Arman was the occupant of the premises (or nearly the whole of them) from the time he entered with the consent of the Taylors. *Quoad* them, he had not the exclusive right of possession, since he had no legal title, though he had their consent to occupy as owner; but, *quoad* all the rest of the world, he had such occupancy as would have enabled him to claim homestead in the premises. Now, both he and Taylor could not rightfully be each entitled to homestead protection in the same property at the same time. Leaving the three reserved rooms out of the question, who was the occupant of the rest of the premises from the date of De Arman's entry to the final evacuation of the reserved rooms by the Taylors, when their abandonment became complete? If De Arman was, and the Taylors were not, then the sale of all but the three rooms could have been made without Mrs. Taylor's signature or acknowledgment. If, on the other hand, the Taylors remained in legal occupancy of the whole, the sale was a nullity, and the property remained liable to creditors after it had been clearly abandoned by the Taylors moving away from it.

They had no intention of abandoning it to their creditors. There are many decisions to the effect that abortive attempts to sell the homestead to defraud creditors do not operate as abandonment on the part of the vendors, when the conveyance has been set aside. This decision looks in an opposite direction (though no question of fraud is involved), and may lead to better deliverances on the element of intention, as affecting action, when homesteads are really evacuated. The Taylors had no intention of retaining their homestead. They meant that their occupancy of it should cease. They took the price. But they moved away under the mistaken belief that they had legally sold their homestead. The following proposition may be deduced from the decision, though the court may not have meant that it should be stated so broadly: Moving from a homestead, without design of returning, is

[1] Smith v. Pearce, 85 Ala. 264, from which the above quotations and citations are drawn.

abandonment, though done under the erroneous impression on the part of the owners that they have sold it and have no right to remain.[1]

Where a quitclaim deed is a grant under the statute, such deed of the homestead is abandonment.[2] Though the homestead right be not expressly waived with due acknowledgment by husband and wife, their surrender of the property, after giving deed, may be considered an abandonment of the homestead estate, so that the purchaser and possessor may get good title.[3] Taking a lease from the purchaser is evidence of abandonment on the part of the vendors, under such circumstances.[4]

Abandonment, as a question of fact, is for the jury. It should be established with reasonable certainty, and it has been held not error for the court to charge the jury that it must be *clearly* proven.[5] The fact that the householder requested a witness to point out for execution the land he had held as a homestead may be proven as tending to show abandonment.[6]

Homestead cannot be set up to defeat an action brought for the purchase price by the seller or by one from whom the defendant obtained the property, if the title had its inception in fraud.[7]

[1] Decisions of the state, favoring the position of the court: Striplin v. Cooper, 80 Ala. 256; Motes v. Carter, 73 Ala. 553; Hood v. Powell, 73 Ala. 171; Scott v. Simons, 70 Ala. 352: Allen v. Kellam, 69 Ala. 447; Scarborough v. Malone, 67 Ala. 570; March v. England, 65 Ala. 275; Halso v. Seawright, 65 Ala. 431; Dooley v. Villalonga, 61 Ala. 129; Balkum v. Wood, 58 Ala. 644; Miller v. Marx, 55 Ala. 322; McGuire v. Van Pelt, 55 Ala. 344; McConnaughy v. Baxter, 55 Ala. 381; Hendon v. White, 52 Ala. 597; Boynton v. Sawyer, 35 Ala. 500; Rainey v. Capps, 22 Ala. 288; Shelton v. Carrol, 16 Ala. 148. *Compare* with the foregoing cases: Bailey v. Campbell, 82 Ala. 343; Tyler v. Jewett, 82 Ala. 98; Gates v. Hester, 81 Ala. 359; Murphy v. Hunt, 75 Ala. 440; Scaife v. Argall, 74 Ala. 473; Lehman v. Bryan, 67 Ala. 558; Boyle v. Shulman, 59 Ala. 569; Preiss v. Campbell, 59 Ala. 637; Gafford v. Stearns, 51 Ala. 434.

[2] Faivre v. Daily (Cal.), 29 P. 256; Cal. Civ. Code, § 1243.

[3] Winslow v. Noble, 101 Ill. 194; Brown v. Coon, 36 Ill. 243.

[4] Winslow v. Noble, *supra;* Eldridge v. Pierce, 90 Ill. 474. (*See* Booker v. Anderson, 35 Ill. 66, rendered under a statute since repealed.)

[5] Rollins v. O'Farrel, 77 Tex. 90; Langston v. Maxey, 74 Tex. 161; Newton v. Calhoun, 68 Tex. 451; Cox v. Shropshire, 25 Tex. 113; Gouhenant v. Cockrell, 20 Tex. 98. See cases cited, in the first of these, by counsel to sustain the opposite.

[6] Holloway v. McIlhenny, 77 Tex. 657.

[7] Muir v. Bozarth, 44 Ia. 499.

It has been held that an attempted assignment of homestead, in favor of a particular creditor or other person, though abortive, is an abandonment of the exemption right on the part of the beneficiary, which opens the way to all creditors.[1]

§ 6. Family Headship, Relative to Abandonment.

It is not in the power of the head of the family to destroy the homestead rights of the other beneficiaries, by his personal desertion of the home, under the statutes of some states. The public welfare, subserved by the conservation of homes, is paramount to any interest, adverse to that of the family, which he may claim, according to the spirit of those statutes. Not only the good of his wife and children, but his own homestead privilege, is tenderly cared for by the legislator; for, assuming that he is the owner, we see that their rights cannot be preserved without the preservation of his also. The courts have held that his rights and theirs remain intact; that desertion of the family by its head does not have the effect of forfeiting either his exemption right or that of his wife and children.[2]

On the other hand, his loss of family has been held not to terminate his exemption privilege.[3] He could not acquire homestead without a family; for the having of it is one of the conditions; but, once acquired, it does not necessarily go from him on the loss of every member of his household, according to the decisions cited. There is no universal rule on this subject; there are authorities to the contrary of the doctrine of the cases above adduced.[4]

Exemption is not affected by the action of a wife in quitting the home against the will of her husband, and residing else-

[1] Bowyer's Appeal, 21 Pa. St. 214. So formerly held in Mississippi. Whitworth v. Lyons, 39 Miss. 467.

[2] Dearing v. Thomas, 25 Ga. 223; Bonnel v. Dunn, 28 N. J. L. 155; 29 id. 435; Cadwalader v. Howell, 18 N. J. L. 138; White v. Clark, 36 Ill. 285; Moore v. Dunning, 29 Ill. 135; Drury v. Bachelder, 11 Gray, 214; Gambette v. Brock, 41 Cal. 78; Benson v. Aitken, 17 Cal. 163; Benedict v. Bunnell, 7 Cal. 245; Cary v. Tice, 6 Cal. 626.

[3] Silloway v. Brown, 12 Allen, 34; Woodbury v. Luddy, 14 Allen, 1; Woodworth v. Comstock, 10 Allen, 425; Doyle v. Coburn, 6 Allen, 71; Stanley v. Snyder, 43 Ark. 429; Beckman v. Meyer, 75 Mo. 333; Kimbrell v. Willis, 97 Ill. 494. (*See* similar cases in chapter on Family Headship.)

[4] Santa Cruz v. Cooper, 56 Cal. 339; Cooper v. Cooper, 24 O. St. 488; Gallighar v. Payne, 34 La. Ann. 1057, and others cited in chapter 3 of this work, where the subject is discussed.

where. If he remain, keeping house to which she may return at will, the homestead right continues intact.[1]

If his children remain with him, the purpose of homestead legislation is answered by maintaining him in his exemption privilege. He preserves the home to which the wife and mother may return. If, on the other hand, his children have been taken from him against his will, he is not in fault.

The law is that the temporary, or even permanent, abandonment of the home by the wife does not affect the husband's exemption right. It might affect that right, if she should live apart from him permanently, having all the children with her, while he should keep bachelor's hall in the homestead, if such family arrangement were *by his consent.* But if, against his will, she desert the home, even though she succeed in taking some or all of the children with her, his homestead right will not be lost while he remains under the roof tree and keeps a home to which his family may return.[2] Though she may have instituted divorce proceedings against him, if he still keeps up the home, though temporarily absent, his exemption right will remain unaffected. His family may have been so far broken up that he has found it expedient to sell his furniture and admit other occupants to his house, yet those circumstances will not operate to destroy the exemption while he retains possession and control as the head of his scattered household.[3]

The wife's desertion of the husband because of his violation of marriage vows, or his ill-treatment of her in other respects, does not necessarily operate as a forfeiture of her rights in the homestead which he still occupies.[4]

It has been held, however, that a wife who has abandoned her husband and habitually resided with another man in a different state from that of her lawful husband's domicile, forfeits her right to claim homestead in his estate after his

[1] Pardo v. Bittorff, 48 Mich. 275; Gates v. Steele, 48 Ark. 539; Whitehead v. Tapp, 69 Mo. 415; Brown v. Brown's Adm'r, 68 Mo. 388.

[2] Pardo v. Bittorf, 48 Mich. 275; Earll v. Earll, 60 Mich. 30.

[3] Griffin v. Nichols, 51 Mich. 575.

[4] Wood v. Lord, 51 N. H. 448; Barney v. Leeds, 51 N. H. 253; Meader v. Place, 43 N. H. 307; Atkinson v. Atkinson, 40 N. H. 249; Barker v. Dayton, 28 Wis. 367; Silloway v. Brown, 12 Allen, 30; Doyle v. Coburn, 6 Allen, 71; Welch v. Rice, 31 Tex. 689.

death.[1] And when she has been deserted by her husband, she has no right to homestead in lands acquired by him in a state where she has never resided.[2]

The position is maintained that a wife, not divorced, who deserts her husband, abandons his home, and buys and occupies a home of her own, is not entitled to any homestead right in his estate at his death, as she is to dower right.[3] And when she is divorced, she is no longer entitled to homestead in her late husband's property.[4]

§ 7. Effect on the Wife's Rights.

Since the homestead estate is the creature of statute, and since the family of the owner have rights in it, the legal owner cannot divest them in any other way than that authorized by statute. He may abandon the right which he shares with his wife and children.[5] So, if not restrained by statutory provisions, he may defeat the wife's rights in the homestead by abandoning it.[6]

But if the husband is restrained by statute, her interests cannot be thus disposed of without her consent.[7] He may change his domicile and cause her to follow, yet the law may preserve her homestead rights.

The sale of the homestead by the husband alone, and his removal therefrom necessitating his wife to follow him, do not deprive her of her homestead right in the property sold. She does not abandon her right by doing her conjugal duty in following her husband to another residence. "The wife cannot be compelled to elect between her husband and homestead."[8]

[1] Prater v. Prater, 87 Tenn. 78; Lacey v. Clements, 36 Tex. 661.

[2] Stanton v. Hitchcock (Mich.), 31 N. W. 395; Emmett v. Emmett, 14 Lea, 369.

[3] Dickman v. Birkhauser, 16 Neb. 686; Farwell Brick Co. v. McKenna, 86 Mich. 283.

[4] Burns v. Lewis, 86 Ga. 591.

[5] Johnston v. Dunavan, 17 Brad. (Ill. App.) 59; McMahill v. McMahill, 105 Ill. 601; Trustees v. Hovey, 94 Ill. 394; McGee v. McGee, 91 Ill. 548; Haskins v. Litchfield, 31 Ill. 137.

[6] Guiod v. Guiod, 14 Cal. 506 (*compare* Dunn v. Tozer, 10 Cal. 171); Foss v. Strachn, 42 N. H. 40; Brown v. Coon, 36 Ill. 243; Titman v. Moore, 43 Ill. 174; Vasey v. Trustees, 59 Ill. 191; Burson v. Fowler, 65 Ill. 146; Hall v. Fullerton, 69 Ill. 448; Finley v. McConnell, 60 Ill. 263; Hewitt v. Templeton, 48 Ill. 367; McDonald v. Crandall, 43 Ill. 231; Fishback v. Lane, 36 Ill. 437; Jordan v. Godman, 19 Tex. 273; Hand v. Winn, 52 Miss. 788.

[7] Allison v. Shilling, 27 Tex. 450.

[8] Collins v. Boyett, 87 Tenn. 334; Jarman v. Jarman, 4 Lea, 675; Roach

If the husband alone sells the property on which he lives when it is greater in quantity and value than the amount allowed as homestead, and surrenders it to the purchaser, it is held that his devisees cannot successfully contest the contract of sale, after his death, on the ground that the homestead portion was illegally alienated.[1] The wife, however, who does not join in such sale, would not have her rights defeated under the operation of most of the statutes. A husband conveyed his old homestead, after having acquired a new one. The wife brought ejectment against the purchaser, but did not succeed, as she had consented to the abandonment of the old homestead by accepting the new one.[2] She is bound by her own voluntary act, done under the provisions of law. If she relinquish all claims on her husband's estate, by articles of agreement duly executed, she cannot claim homestead in it afterwards.[3]

When the title is in the wife while the homestead interest is enjoyed by both her and her husband, the abandonment of that interest by both will not expose the property to liability for the husband's debts.[4]

If the wife may convey the homestead separately owned by her, without her husband's assent, it has been said that "there would seem to be no legal principle which would prevent her from voluntarily deserting her husband and abandoning her homestead. She is in no sense the slave of her husband, and is so far the master of her own will that she has liberty to remain with her husband, or go from him, as she pleases; and he has no legal remedy to compel her to return. A homestead is an artificial estate in land, devised to protect the possession of the owner against the claims of creditors while the land is occupied as a home. It does not protect a person in possession against the claims of the legal owner of the land.

"If the defendant in the suit had such an occupancy under his wife as to raise the relation of tenancy at will on her aban-

v. Hacker, 2 Lea, 634; Mash v. Russell, 1 Lea, 544; Williams v. Williams, 7 Bax. 118; Const. Tenn., art. 11, § 11; Code, § 2114*a*, T. & S. *Contra:* Levison v. Abrahams, 14 Lea, 336. *See* Creath v. Creath, 86 Tenn. 659; Parr v. Fumbanks, 11 Lea, 398; Gwynne v. Estes, 14 Lea, 662.

[1] Lamore v. Frisbie, 42 Mich. 186; Wallace v. Harris, 32 Mich. 380.

[2] Wheeler v. Smith, 62 Mich. 373.

[3] Cilinger's Appeal, 35 Pa. St. 537.

[4] Hixon v. George, 18 Kas. 253.

donment of the premises, it has been duly terminated by notice to quit."[1]

The wife had deserted her husband and given him "notice to quit" their homestead on her separate property. She then brought an action of ejectment to oust him — and this was the case. The court ousted him.

This case seems to overlook the policy of home conservation, and thus to make a law designed to foster families operate to their disintegration. For, while it is true that the governing statute does not require the husband's joinder to an act of homestead sale when the wife is the owner; and while it is true that a purchaser from her is entitled to possession, it does not follow that she can eject her husband. Once ejected, can she enjoin his return? Most assuredly she cannot. With deference to the court, the profession may not all agree in thinking its position tenable.

A wife who has obtained a divorce and has left the home is not debarred from claiming her estate of homestead in the property which is occupied by the husband, it has been held.[2] *Aliter*, when the divorce is obtained by the husband;[3] but this may not be true in every state.

Occupancy by the owner's wife and minor children is sufficient to retain the homestead immunity. Her husband's request that she join him beyond the bounds of the state where the home is situated, and her attempt to sell the premises for that purpose, do not neutralize the effect of her actual occupancy with the infant children.[4] And the homestead may be valid when the wife has never lived upon it.[5]

§ 8. Effect on the Widow's Rights.

Where the continuance of the homestead right and privilege depends upon the occupancy of the home by some one of

[1] Buckingham v. Buckingham, 81 Mich. 89, *92*. *Compare* Trout v. Rumble, 82 Mich. 202.

[2] Dunham v. Dunham, 128 Mass. 34.

[3] Burns v. Lewis, 86 Ga. 581.

[4] McDannell v. Ragsdale, 71 Tex. 23. In this case the husband, and insolvent debtor, left the state of Texas permanently, while his wife remained to sell the property and then join him in New Mexico with the proceeds. He had rented land there, and owned an adobe house upon it, on which he resided. Under such circumstances the Texas home was held exempt.

[5] Moores v. Wills, 69 Tex. 109; Henderson v. Ford, 46 Tex. 628. In

his family after the householder's death,[1] his widow loses her right of possession by removing permanently away. Whether the wife leave during her husband's life-time, or his widow quits the premises after his demise, the voluntary abandonment estops subsequent claiming.[2] Her voluntary removal and establishment of a permanent home elsewhere is abandonment, though she may have been ignorant of her right to retain the homestead for life.[3]

Under a law continuing the homestead to the widow and children provided some one of them remain in occupancy, it was held that her retention of a room for storing the furniture sufficiently complied with the requirement while she had acquired no other homestead.[4] Her taking others into the family is not a relinquishment of its headship so as to be an abandonment of the homestead right.[5]

The assignment of homestead to a widow is a judicial recognition of the fact that she has not abandoned her right. She may then sell it, and the grantee will hold against the heir, since alienation is not abandonment, it is said.[6] That it is not an abandonment, in such case, of the exemption privilege attached to the property, seems the meaning. There is abandonment of occupancy by the widow.

A childless widow forfeits the homestead right derived from her first husband, by marrying a second one, when widowhood is the condition on which the right is granted, and limitation to the period of widowhood is expressed. Though there may have been a minor child of the deceased husband living with her when the homestead right came to her as the survivor of the late owner of the property, yet that fact can-

Missouri the husband and father does not lose his homestead by the death of his wife and the completion of his children's minority, if he continues to occupy the premises. Beckman v. Meyer, 7 Mo. App. 576.

[1] Mass. Stat. 1851, ch. 340, § 2.

[2] Foster v. Leland, 141 Mass. 187; Paul v. Paul, 136 Mass. 286; Brettun v. Fox, 100 Mass. 234; Abbott v. Abbott, 97 Mass. 136. The cases do not cover the case of a wife who is involuntarily driven from her home by her husband, and kept out by a tenant after her husband's death.

[3] Paul v. Paul, 136 Mass. 286.

[4] Brettun v. Fox, 100 Mass. 234, on Stat. Mass. 1855, ch. 238.

[5] A widow took her married daughter and son-in-law to her home as residents, but did not therefore cease to be the head of the family. Jones v. Blumenstein, 77 Ia. 361.

[6] Plummer v. White, 101 Ill. 474. *See* White v. Plummer, 96 Ill. 394.

not avail her after the death of the child and her own re-marriage.[1]

A lost homestead right, though the loss be wholly attributable to the neglect of the husband to file a notice of temporary removal when that is required by statute, cuts his widow off from claiming the right as survivor after his death; cuts off either from claiming on surviving the other.[2]

Long absence by a widow without settled home anywhere, with no definite time fixed for returning to the homestead but professed intention to settle in it ultimately, was held to be abandonment.[3] It was said, however, that the intention of returning was not clearly shown by the circumstances.[4] The courts hold a widow less strictly to actual occupancy than they hold other homestead claimants; but she is capable of abandoning.[5] She would not necessarily be deemed to have abandoned by renting the premises to a tenant and living elsewhere with her children for months and even years, yet retaining the home and meaning to re-occupy it personally. In some sense, the tenant's occupancy is treated as hers.[6]

In the absence of statutory rule to that effect, her right is not terminated by remarriage.[7] Nor by ceasing to have a family.[8] Nor by her late husband's deserting her and absconding.[9] But when the children's rights are not from their father but through her, her permanent removal, with them, from the homestead, is said to be abandonment of both her rights and theirs. She has the rightful custody of her own children; it is argued she is their legal and natural representative; she may conclude them by her acts in this respect. Not so, as regards her step-children. Her relation to them is so different that their rights of homestead remain in their deceased father's

[1] Dei v. Habel, 41 Mich. 88.

[2] Baillif v. Gerhard, 40 Minn. 172. Minn. Gen. Stat. (1878), ch. 68, §§ 1, 8, 9; ch. 46, § 2.

[3] Farnan v. Borders, 119 Ill. 228.

[4] *Ib.;* Titman v. Moore, 43 Ill. 170; Howard v. Logan, 81 Ill. 383.

[5] Wright v. Dunning, 46 Ill. 272; Kingman v. Higgins, 100 Ill. 319; Shepard v. Brewer, 65 Ill. 383; Clubb v. Wise, 64 Ill. 157; Brown v. Coon, 36 Ill. 243; McCormack v. Kimmel, 4 Bradw. 121.

[6] Kenley v. Hudelson, 99 Ill. 493; Browning v. Harris, 99 Ill. 456; Buck v. Conlogue, 49 Ill. 395; Brinkerhoff v. Everett, 38 Ill. 263; Walters v. People, 21 Ill. 178.

[7] Yeates v. Briggs, 95 Ill. 79.

[8] Kimbrel v. Willis, 97 Ill. 494.

[9] People v. Stitt, 7 Bradw. 294. *See* p. 580; Dykes v. O'Connor, 18 S. W. 490.

property though she should permanently remove.[1] This ability of the mother to deprive the children of homestead rights is not to be received as a rule. It is not so under all homestead systems.[2]

When homestead immunity is bestowed upon real estate belonging to a husband and father, with the accompanying provision that it "shall inure to the benefit of his widow and children, and shall be exempt from sale in any way at the instance of any creditor or creditors," there is a right and interest conferred upon the widow and children without power of disposition unless all join. Neither the widow alone, nor the children alone, can abandon such homestead, though doubtless either could abandon right in it without prejudice to the other.[3] The minor children's rights are not lost because the widow of the owner from whom the homestead was derived has abandoned her own interest in it. They may still occupy the home. If they have been removed from it by the mother, they may return to it. If she unite with the administrator of their father's estate in executing a mortgage on the homestead, the children's rights will remain unaffected. Certainly, when their interests are meant to be sacrificed; when the transaction is not for their welfare, any act or omission of those who should rightly represent them will prove inoperative to divest them of their homestead rights.[4]

It has been held, in exposition of statute, that a homestead derived from a deceased husband cannot be forfeited by abandonment so as to divest the children of their right in it; but that if derived from a deceased wife, the children's right may be abandoned by the surviving husband — just as he might have abandoned it in her life-time.[5] However, the widow's right (being to remain for life on the homestead left her by her husband) may be abandoned by her by alienation to another person, which will hold good as against the heir, it has been held;[6] *her* heir would better express the meaning, perhaps.

[1] Kingman v. Higgins, 100 Ill. 319, 327.

[2] *See* McDonald v. Logan Co. (Ark.), 18 S. W. 1047.

[3] Shelton v. Hurst, 16 Lea, 470; Tenn. Rev. Code, § 2114; Acts 1879, p. 214; Hicks v. Pepper, 1 Bax. 42.

[4] Showers v. Robinson, 43 Mich. 502, *513;* Griffin v. Johnson, 37 Mich. 87, *92;* Allen v. Shields, 72 N. C. 504.

[5] Little's Guardian v. Woodward, 14 Bush, 585; Genl. Stat. Ky., ch. 38, art. 13, § 15.

[6] Barber v. Williams, 74 Ala. 331;

A widow was not actually occupying the property she claimed as a homestead, at the time of its sale under execution against her. She had resided with her niece, a mile distant, for four years; but she visited the land occasionally, as the guest of her married daughter who occupied it as her home. She had not acted as housekeeper or head of family there, during the period mentioned. She had divided the land among her children — all adults. The facts showed abandonment.[1]

But absence from the homestead for several successive seasons to raise crops elsewhere, with the intention of retaining the home, is not abandonment.[2]

Miller v. Marx, 55 Ala. 341; Wallace v. Hall, 19 Ala. 367.

[1] Crabb v. Potter (Ky.), 14 S. W. 501.

[2] McFarland v. Washington (Ky.), 14 S. W. 354.

CHAPTER XIX.

RIGHTS OF THE SURVIVING SPOUSE.

§ 1. Continued Right of Occupancy.
2. Distributive Share.
3. Community Property.
4. Title Vested in Survivor.
5. Separate Property.
§ 6. Widower's Rights in General.
7. Widow's Rights as to Conveyance.
8. Relative to Insurance on Homesteads.

§ 1. Continued Right of Occupancy.

The statutes of the different states are not uniform as to the respective rights of widows and widowers. All aim to conserve the home but all do not give rights to marital survivors without partiality as to sex. Ordinarily, the surviving husband who has minor children with him continues to live on the homestead as the head of the family, just as he did before the loss of his wife. On the other hand, the surviving wife has her portion laid off as homestead, much in the same way that dower is assigned, in some of the states. There is a variety of provision for her presented by all the statutes. Equality between the widower's and the widow's right is recognized in some states. The statutes of these states vary in their provisions: the survivor "shall be entitled to the homestead;" "the exemption shall continue to the survivor;" "the homestead shall be for the use of the widow . . . and in like manner for the use of the surviving husband."[1]

The law providing: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead and until it is otherwise disposed of according to law;"[2] and declaring that the setting off of the distributive share of the survivor shall be such disposal, and that he or she may elect between the share and homestead, and that the homestead shall descend to heirs, when not devised, and be exempt in their hands from their parents' debts,[3] it is held that on the

[1] Stats. Colo., § 1634; Wy., § 2782; Ky., § 577; Ok., 1375; Arizona, § 2077; Wash. Code, § 342; Stats. of Ill., Nev., Ia., Cal., Idaho, etc.

[2] Iowa Code, § 2007; McClain's Ia. Code, § 3182.

[3] *Ib.*, § 2008.

death of the owning spouse the homestead descends to heirs subject to the occupancy of the surviving spouse,[1] free from the personal debts of the ancestor,[2] and from their own, contracted prior to his death.[3] On the sale of indivisible realty including the homestead, the widow has a third of the proceeds — not merely the proceeds of the homestead portion.[4]

Under the above quoted statutory provision, it is immaterial which of the marital parties owns the fee,[5] or whether there are children or not,[6] or whether the survivor remarry or not.[7] Though the survivor should agree to take the homestead instead of the distributive share, such election would not secure title in it beyond the right to use and occupy during life.[8]

A surviving occupant cannot change the homestead to another residence so as to retain the exempt character;[9] but, while retaining possession of the homestead left on the death of the husband or wife, he may control the rents and profits,[10] and even sue for injuries which molest the enjoyment of the property, notwithstanding the absence of title and the liability of being divested of the right of possession.[11] The survivor's right of possession, occupancy and enjoyment of the usufruct of the property confers no title susceptible of conveyance or subjection to judgment liens.[12] If the survivor be a widow, her homestead right is free from the effect of a judgment rendered after the husband's death.[13]

Under the provisions above stated, the surviving wife has no estate in the homestead which she is privileged to convey; her right is merely personal; she does not inherit it but accepts a privilege accorded by law — a privilege which would

[1] Johnson v. Gaylord, 41 Ia. 366.

[2] Moninger v. Ramsey, 48 Ia. 368.

[3] Baker v. Jamison, 73 Ia. 699; Kite v. Kite, 79 Ia. 491; Johnson v. Gaylord, *supra*.

[4] Kite v. Kite, *supra*.

[5] Burns v. Keas, 21 Ia. 257.

[6] *Ib.*

[7] Nicholas v. Purczell, 21 Ia. 265; Stewart v. Brand, 23 Ia. 481; Stanley v. Snyder, 43 Ark. 429; Dodds v. Dodds, 26 Ia. 310.

[8] Stevens v. Stevens, 50 Ia. 491.

[9] Size v. Size, 24 Ia. 580. *See* Palmer v. Blair, 25 Ia. 230.

[10] Floyd v. Mosier, 1 Ia. 512.

[11] Cain v. Chicago R. Co. 54 Ia. 255.

[12] Meyer v. Meyer, 23 Ia. 359; Butterfield v. Wicks, 44 Ia. 310; Smith v. Eaton, 50 Ia. 488.

[13] Briggs v. Briggs, 45 Ia. 318; Nye v. Walliker, 46 Ia. 306.

not be denied her, though she should have agreed, in an antenuptial contract, to relinquish her right of dower and inheritance.[1] The survivor may abandon this privilege so as to leave the estate open to partition;[2] but while it is maintained by occupancy, there can be no partition among heirs, and no interference of any kind by them.[3] Their legal title, descending to them as heirs immediately on the death of the owner, is thus subject to the right of the surviving husband or wife to retain it as a homestead and continue to occupy it as such.[4] And while the survivor lives, and occupies it, the minor children cannot enforce any right or interest in it, as above stated.[5] As the legal owner, whether wife or husband, may dispose of the homestead by will, subject to the right of the survivor, above expressed,[6] it will be understood that the devisees of the testament would occupy the same position as that above described respecting heirs.

Where the statute continues the homestead to the widow during her occupancy of it, it has been inferred that a widower has the same right; that the right is derivative, independent of continued family relation, resultant from survivorship. Though the law may not expressly name the husband, his right has been implied by construction of the following: "Exemption in favor of an execution debtor, or one against whom judgment has been rendered, shall continue after his death for the benefit of his widow and children, but shall be estimated in allotting dower. The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age. But the termination of the widow's occupancy shall not affect the right of the children. . . . . The homestead of a woman shall in like manner be for the use of her surviving husband and her children, situated as above; and when his and their interest ceases, it shall be disposed of in like manner, and the proceeds applied on the same terms

[1] Mahaffy v. Mahaffy, 63 Ia. 55.

[2] Orman v. Orman, 26 Ia. 361; Size v. Size, 24 Ia. 580. *See* Johnson v. Gaylord, 41 Ia. 366.

[3] Dodds v. Dodds, 26 Ia. 311.

[4] Burns v. Keas, 21 Ia. 257; Cotton v. Wood, 25 Ia. 43.

[5] Collins v. Chantland, 48 Ia. 241.

[6] Stewart v. Brand, 23 Ia. 477.

to her debts; if none, divided among the children."[1] The court, after citing authorities settling the right of the surviving widow,[2] argued that by parity of reason, a like right must be accorded to the husband; that such was the legislative intent.[3]

The person originally claiming homestead must own the property dedicated, and have the right to dispose of it. Those who derive homestead right from him must be occupants, while the legal title is in his heirs.[4] The homestead derived from her deceased husband, by a widow, who occupies it, is not allowed her because of her need; she may be otherwise rich in her own right.[5]

The rule is pretty general that the survivor has exemption during occupancy,[6] and some statutes make the continuance of the privilege dependent upon occupancy;[7] but the requirement that the widow must live upon her homestead is not made in all the states.

§ 2. Distributive Share.

Where "the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be . . . a disposal of the homestead," but "the survivor may elect to retain it for life in lieu of such share,"[8] it is held that no part of the homestead can be retained in addition to the distributive share,[9] though the whole may be enjoyed up to the time when such share is set off.[10] And the share will not be treated as legally set apart, so as to be a disposal of the homestead right in the survivor of the married beneficiaries, by the beginning of a suit by the heirs for a partition of the estate; or even by the willing of her share by a widow, and the subsequent death of the testator.[11]

[1] Gen. Stat. Ky., ch. 38, §§ 13, 14, 15.

[2] Gasaway v. Woods, 9 Bush, 72; Eustache v. Rodaquest, 11 Bush, 42; Gay v. Hanks, 81 Ky. 552.

[3] Ellis v. Davis (Ky.), 14 S. W. 74.

[4] Allensworth v. Kimbrough, 79 Ky. 332.

[5] Sansberry v. Simms, 79 Ky. 527.

[6] Eubank v. Landram, 59 Tex. 247; Schneider v. Bray, 59 Tex. 668; Blum v. Gaines, 57 Tex. 119; Kessler v. Draub, 52 Tex. 575. *Compare* Wolfe v. Buckley, 52 Tex. 641, and Whittenberg v. Lloyd, 49 Tex. 633.

[7] Tidd v. Quinn, 52 N. H. 341. *See* Locke v. Rowell, 47 N. H. 46.

[8] McC.'s Ia. Code, § 3183.

[9] Meyer v. Meyer, 23 Ia. 359; Butterfield v. Wicks, 44 Ia. 310; Whitehead v. Conklin, 48 Ia. 478. *See* Nicholas v. Purczell, 21 Ia. 265.

[10] Burdick v. Kent, 52 Ia. 583.

[11] Mobley v. Mobley, 73 Ia. 654. The occupancy of a homestead under a

Where dower and homestead right are made incompatible but the surviving husband or wife may elect either, reasonable time for election is allowed; and during that time the survivor may still occupy the homestead and enjoy its fruits;[1] but when the decision is much delayed, especially when the life enjoyment of the property is more valuable than dower in the estate would be, the survivor may be presumed to have chosen the former.[2] The acceptance of the homestead for life is not a relinquishment of the distributive share otherwise coming to the survivor, when there are no children or other descendants and that share is more than one-third of the estate. Whatever may be coming, beyond the one-third by dower right, may be accepted with the homestead.[3]

When the widow heirs half her late husband's estate, she cannot be forced to include the homestead therein.[4] But if she choose to take her distributive share and have the homestead laid off to her, it will continue to remain inviolable as to debts antecedent to its first dedication.[5]

Where the homestead descends to heirs exempt from their "antecedent debts" or those of their parents, the quoted words mean debts prior to the descent — not prior to the original dedication of the homestead.[6] And, in the hands of the heirs, it is not essential that it be occupied by them as a homestead in order to retain its inviolability from such anterior indebtedness.[7] Abandonment of her rights to the homestead, by the widow, leaves the property in the hands of the heirs perfectly free from the debts of the ancestor not antedating

devise of a life estate of land including the homestead, *held* not an election defeating the widow's dower right. Blair v. Wilson, 57 Ia. 177. The widow does not lose her right of homestead in the husband's estate by accepting his will, unless so intended by him. *Re* Wells' Estate, 63 Vt. 116.

[1] Cunningham v. Gamble, 57 Ia. 46.

[2] Conn v. Conn, 58 Ia. 747, where a widow delayed ten years; Butterfield v. Wicks, 44 Ia. 310; Stevens v. Stevens, 50 Ia. 491; Thomas v. Thomas, 73 Ia. 657; Holbrook v. Perry, 66 Ia. 286.

[3] Smith v. Zuckmeyer, 53 Ia. 14.

[4] Nicholas v. Purczell, 21 Ia. 265.

[5] Briggs v. Briggs, 45 Ia. 318; Knox v. Hanlon, 48 Ia. 252.

[6] Moninger v. Ramsey, 48 Ia. 368; McC.'s Ia. Code, § 3183 (2008). Not even liable for the funeral expenses of the deceased homestead holder. Knox v. Hanlon, 48 Ia. 252.

[7] Johnson v. Gaylord, 41 Ia. 362; Baker v. Jamison, 73 Ia. 698.

the dedication.[1] The method of abandonment by the survivor of a married pair, when the deceased was owner of the fee in the homestead, is by electing to accept the distributive share;[2] but if such survivor die in possession of the homestead and the share has not been set off, the heirs take free from his or her debts.[3] If conveyed by both husband and wife, subject to their occupancy and that of the survivor during life, it was held that the grantee (who was their son) did not succeed them to the homestead exemption right. It was liable to forced sale for his debts.[4] The homestead of a decedent is liable for his debts to the same degree as when he was living.[5]

§ 3. Community Property.

The community property created by marriage is not a partnership.[6] It resembles one; but the husband, as head of the community, manages the property at will, alienates it at pleasure and incumbers it without the wife's joinder. He cannot devise more than his *residuum* beyond the community debts; cannot devise his wife's half interest. He is personally responsible for the debts which do not have to look alone to community assets.

In the civil law state, homestead is exceptional. It is not assigned to a surviving wife if she is worth the sum of two thousand dollars in her own right — that sum being the exemption limit. It is only to poor debtors and needy widows and orphans that the benefit is given. And the rights of the widow and minor children of a deceased householder are considered in view of their condition when he died — not when his estate was settled.[7]

[1] Johnson v. Gaylord, 41 Ia. 362; Bradshaw v. Hurst, 57 Ia. 745.

[2] Darrah v. Cunningham, 72 Ia. 123.

[3] Burdick v. Kent, 52 Ia. 583.

[4] Reifenstahl v. Osborne, 66 Ia. 567.

[5] White's Adm'r v. White, 63 Vt. 577.

[6] La. Civil Code, art. 2807.

[7] Succession of Lessassier, 34 La. Ann. 1066, in exposition of Louisiana Act of 1852 relative to homestead. Succession of Wellmeyer, 34 La. Ann. 819; Succession of Marx, 27 La. Ann. 99; Succession of Norton, 18 La. Ann. 38; Gimble v. Goode, 13 La. Ann. 352; Succession of Edwards, 32 La. Ann. 457. Article 3552 of the Civil Code of Louisiana (revised) makes only necessitous widows and minors entitled to privilege as creditors for their homestead allowance. But articles 219 and 223 of the present constitution govern. *See* State v. Judges, 37 La. Ann. 109. In Louisiana it was held that minors, under

A necessitous widow of a second marriage was held entitled to the full amount of homestead exemption from the acquets and gains constituting the community property of her deceased husband and his first wife. Her privilege was ranked above a mortgage given by them — the deceased husband and wife as partners of that community — to their creditors.[1] And a case somewhat similar is reported from another state which has adopted some of the principles of the civil law, and which has what her courts have characterized as a "mixed system of jurisprudence." There the homestead law is not a mere charitable provision for the impecunious but a means of enabling the owner to dedicate property to the extent of five thousand dollars in value, and to hold it exempt from liability for his debts. There, a husband and wife had declared their homestead upon their community property. He proved to be the survivor. He married a second time and then died, leaving a widow. She and the step-children caused the property, that had been held in community under the first marriage, to be partitioned: half to the heirs of the deceased wife; the other half to herself to be held as her homestead during her occupancy of it as such. No offspring had resulted from the second marriage: so the children of the first inherited all the property, but subject to the widow's homestead right of occupancy of one-half the property.[2]

A husband and wife owned land which was not homestead. She died and left children. He remarried, and then died insolvent, leaving children by both marriages, and a widow. The county court set off homestead to the widow and both sets of children. On appeal, it was held that the first wife's interest was inherited by her children, and therefore could

the tutorship (guardianship) of their father, are not beneficiaries of the homestead provisions. Greig v. Eastin, 30 La. Ann. 1130. Necessitous grandchildren who are minors took a deceased widow's unpaid homestead amount of exemption, instead of major children, under the Louisiana Act of 1852. Succession of Durkin, 30 La. Ann. 669. The widow is entitled to half the community property by the civil law, and has it in Louisiana, but not as homestead. She has it by right as equal partner in the community.

[1] Succession of Cason, 32 La. Ann. 790.

[2] Gilliam v. Null, 58 Tex. 298; Pressley's Heirs v. Robinson, 57 Tex. 453; Texas Const. of 1876, art. 16, § 52.

not be set off to the widow and both sets of children; and that upon the husband's death the statute gave homestead to the widow and children who were occupying the home.[1]

A homestead should not be partitioned among heirs while minor children with their father, or he alone, may be actually occupying it, nor while the probate court recognizes its occupancy by the minors' guardian as valid within the provisions of the homestead law. This is held, though the deceased mother of the minors and other heirs may have community interest in the property.[2] "The homestead is preserved in entirety for the use of the widow during her life, and the children during their minority, and cannot be partitioned until after her death; . . but as to common property other than the homestead, it is subject to partition at the suit of any one or more of the tenants in common."[3]

The surviving father or mother cannot sell community property so as to divest the heirs of the deceased of their half of it — not even to support the family. A probate court could order the sale of their interest for their support, if necessity should demand it. All the community may be sold to pay community debts.[4] It is held that a widow, clothed with homestead protection to her separate property, may burden it with a deed of trust which will pass title; but if community property be thus burdened, or conveyed in terms, her interest only — the half — is really affected.[5]

The law which suspends the operation of prescription against a wife during coverture does not apply to actions involving the homestead designated upon the husband's separate property or upon community property. She can sue during coverture, in her own name, in either case.[6]

If the husband has sold community property constituting the homestead, without joinder by his wife, she may recover

[1] McDougal v. Bradford, 80 Tex. 558.

[2] Adair v. Hare, 73 Tex. 273; Hudgins v. Sansom, 72 Tex. 229. *See* Watson v. Rainey, 69 Tex. 319.

[3] Linch v. Broad, 70 Tex. 96.

[4] Bell v. Schwarz, 56 Tex. 353; Thompson v. Cragg, 24 Tex. 597.

[5] Grothaus *v.* De Lopez, 57 Tex. 670.

[6] Hussey v. Moser, 70 Tex. 42 (distinguished from Simonton v. Mayblum, 59 Tex. 7, and Smith v. Uzzel, 61 Tex. 221); Rev. Stat. Tex. 3201, construed; Kelly v. Whitmore, 41 Tex. 647. *See* Rogers v. Trevathan, 67 Tex. 406.

it of the purchaser after the husband's death, and it will go to her and to his heirs — she taking half.[1]

The homestead, being on community property, the surviving wife has such estate in it as will enable her to maintain suit in her own name for damages done to it.[2] The heirs may be made parties, since they inherit their father's half interest, all subject to community debts and the homestead rights of the surviving parent.[3] But when a community homestead was sold to pay a community debt evidenced by deed of trust made by both husband and wife — the sale made after the husband had died insolvent — the purchaser was held to have no title as against the widow's homestead rights.[4]

The husband, surviving his wife, may sell community property to pay community debts, though it be the homestead and though a minor child of their marriage be living.[5] The purchaser, with notice, cannot resist the claim for purchase-money under such circumstances.[6]

A widower mortgaged the homestead, giving power to sell it, partly to secure a community debt. After the sale, letters of administration on the deceased wife's estate were issued, and a guardian appointed to his and her minor child. The probate court ordered the sale of the homestead (after having set it apart to the minor as the homestead of his deceased mother), to apply the proceeds as an allowance to the minor in lieu of exempt property and of the year's supply due him. The purchaser at the mortgage sale came into litigation with the purchaser at the probate sale, quite inevitably. He was successful, since the husband had the right to dispose of community property to pay community debts, while the probate court had no right to give to the minor the homestead of his parents while the father yet lived.[7]

[1] Hair v. Wood, 58 Tex. 77; Sossaman v. Powell, 21 Tex. 664; Williams v. Wethered, 37 Tex. 132.

[2] Railroad Co. v. Knapp, 51 Tex. 592.

[3] Wright v. Doherty, 50 Tex. 34.

[4] Black v. Rockmore, 50 Tex. 88 (on Paschal's Dig., arts. 4710, 5023, 5494, 5497, Act of 1870); Thornton v. Murray, 50 Tex. 161.

[5] Fagan v. McWhirter, 71 Tex. 567; Ashe v. Yungst, 65 Tex. 635.

[6] *Ib.;* Neyland v. Neyland, 70 Tex. 24; Carson v. Kelly, 57 Tex. 380; Cooper v. Singleton, 19 Tex. 260; Brock v. Southwick, 10 Tex. 65.

[7] Watts v. Miller, 76 Tex. 13; Ashe v. Yungst, 65 Tex. 631; Fagan v. McWhirter, 71 Tex. 567; Lacy v. Rollins, 74 Tex. 566; Smith v. Von Hut-

As the husband has disposition of the community, as its head, while his equally interested wife is still living, so he as survivor, on becoming the partner in community existing between him and the equally interested children, may have the right of disposal continued by compliance with whatever may be statutorily required when this power is conferred (such as filing inventory, etc.).[1] His right might be suspended, however, for homestead purposes or lost by remarriage.[2] The general rule is, however, that the homestead benefit is not lost by remarriage unless there is a statute so providing.[3]

§ 4. Title Vested in Survivor.

Under a statute vesting the homestead wholly and absolutely in the surviving husband or wife, when it has been carved out of the community property,[4] it has been held that though the dedicated property be above the monetary limit of five thousand dollars, the surviving spouse may take the whole absolutely if it was within the limit when selected.[5] The rule is different, if the homestead was excessive in value at the time of the selection.[6] In the case last cited, it was said by a dissenting judge that the homestead held to descend absolutely to the survivor was worth forty-five thousand dollars. He construed the code to limit homestead to five thousand dollars in all cases, and contended that the overplus — forty thousand dollars — ought to go to the creditors or to the legal heirs.

ton, 75 Tex. 625. Even in case of a divorce, while the district court decreeing it may dispose of the homestead to protect the wife and minor children, it cannot deprive the husband of his half of the community property. Kirkwood v. Domnau, 80 Tex. 645. If the divorce is against the wife, she cannot have homestead set off to her from the family homestead property belonging to the husband; but, as guardian of minor children, she may claim their rights. Hall v. Fields, 81 Tex. 553. If the divorced husband still supports the children, he is the head of the family, though the custody of the children may have been awarded to the wife. Roberts v. Mondy, 30 Neb. 685.

[1] Johnson v. Taylor, 43 Tex. 121; Clark v. Nolan, 38 Tex. 416; Cordier v. Cage, 44 Tex. 532; Dawson v. Holt, 44 Tex. 174; Jones v. Jones, 15 Tex. 147.

[2] Kirkland v. Little, 41 Tex. 460.

[3] Miles v. Miles, 46 N. H. 261; Nichols v. Purczell, 21 Ia. 265. *See* Brigham v. Bush, 33 Barb. 596.

[4] California Code of Civil Proc., §§ 1265, 1465; Estate of Crogan, 92 Cal. 370.

[5] Estate of Burdick, 76 Cal. 639; Cal. Code Civ. Proc., § 1474.

[6] *Ib.*, § 1476.

Under a prior law, the widow's probate homestead, carved out of community property, became hers in fee only in case there were no minor children,[1] but under the articles of the code above cited she takes absolutely on her husband's death, and he so takes upon her death.[2] As the property is still exempt in her hands, it cannot be sold by foreclosure of a mortgage given by both him and her, unless the claim be presented against his estate within the time allowed for the presentation of claims.[3] Either spouse, surviving, may have a homestead declared on community property which will be exempt yet be vested absolutely in the survivor.[4] A homestead, carved from community property, conveyed to the wife in consideration of her consenting that it be sold free from her right of homestead therein, may be sold without rendering the proceeds liable for the husband's debts.[5]

Community property was made the homestead. Upon the death of the wife, the widower remarried; and upon his death, the heirs of the first wife had half the homestead accorded to them, and the other half was decreed to the widow (the second wife), for life. Upon her remarriage, and her permanent removal from the homestead, it was decided that her life estate in the half-homestead depended upon her occupancy of it. It was a life-estate determinable by marriage and removal.[6]

Homestead community property, under a constitutional provision giving it to the survivor, was held to be taken absolutely, on the death of one spouse, by the other, so that a widow, thus taking, was not a life-estate holder merely. The property could not be applied to the deceased husband's debts at her death.[7] Such property is not reckoned among the as-

[1] McKinnie v. Shaffer, 74 Cal. 614. The law existing in 1879.

[2] Building Ass'n v. King, 83 Cal. 440; Estate of Ackerman, 80 Cal. 209; Cal. Civ. Code, § 1265; Code Civ. Proc., §§ 1474-5.

[3] Camp v. Grider, 62 Cal. 20; Bollinger v. Manning, 79 Cal. 7; Building Ass'n v. King, 83 Cal. 440.

[4] Estate of Ackerman, 80 Cal. 208; Herrold v. Reen, 58 Cal. 443; Gagliardo v. Dumont, 54 Cal. 496; Estate of Headen, 52 Cal. 295; Mawson v. Mawson, 50 Cal. 539.

[5] Blum v. Light, 81 Tex. 415; 16 S. W. 1090.

[6] Craddock v. Edwards (Tex.), 17 S. W. 228.

[7] Const. Texas, art. 16, § 52; Cameron v. Morris (Tex.), 18 S. W. 422; Zwernemann v. Von Rosenberg, 76 Tex. 522; Childers v. Henderson, 76 Tex. 664. It was held in an early case that the survivor became tenant

sets of the decedent's estate. It is not to be administered or distributed. The order, setting it apart from community property, does not affect the title. It reserves the property set apart during the time it is used for homestead purposes, but the title vests at once.[1]

The decisions cited in this section seem to have been rendered with reference to community property considered as property held in joint-tenancy by husband and wife rather than as community property under the civil law. In an early case, it was denied that the surviving wife took the homestead by right of survivorship arising from joint-tenancy, but held that she took it as property set apart from her husband's estate for the benefit of herself and the children.[2]

§ 5. Separate Property.

The policy of the homestead laws being to conserve the family institution for the good of the commonwealth, it would fall short of this end if protection were not vouchsafed to a marital survivor with dependent children. Chief Justice Hemphill said of a constitutional provision (since superseded), which authorized the protection of the homesteads of families but was silent as to the rights of the surviving spouse, that the object would be defeated if property, exempt during coverture, should become liable on the death of husband or wife.[3] In his state, the survivor of a marriage holds despite heirs, creditors or lack of children, under the constitution; and it is immaterial whether the title was previously vested in the survivor or the deceased spouse, or was community property.[4] But the survivor cannot successfully claim homestead when

in common with the children of the deceased. Cooper v. Singleton, 19 Tex. 269.

[1] Estate of Gilmore, 81 Cal. 240; Estate of Hardwick, 59 Cal. 292; Harrold v. Reen, 58 Cal. 443; Watson v. His Creditors, 58 Cal. 556; Estate of Burton, 63 Cal. 36. The homestead set apart by the probate court may exceed $5,000 in value. Estate of Walkerly, 81 Cal. 579.

[2] Gee v. Moore, 14 Cal. 472, under a statute since superseded. The governing law, as to the rights of the survivor, is that existing at the death of the decedent spouse. Gruwell v. Seybolt, 82 Cal. 7; Tyrrell v. Baldwin, 78 Cal. 470; Johnston v. Savings Union, 75 Cal. 134.

[3] Wood v. Wheeler, 7 Tex. 21.

[4] Eubank v. Landram, 59 Tex. 247; Carter v. Randolph, 47 Tex. 380; Bremer v. Wall, 33 Tex. 585.

the title of her deceased husband is barred by statute, since there is no estate to support it.[1]

By the provision: "The homestead property selected by the husband and wife, or either of them, . . . shall, upon the death of the husband or wife, vest absolutely in the survivor," after the demise of either, the power to mortgage is in the widow or widower as the case may be. The title is not changed by the probate court's setting out a homestead for the benefit of the survivor and the children of the deceased.[2] This provision, which declares that property selected by the husband from his separate property, or by the wife from hers, shall vest absolutely in the survivor,[3] does not prevent the heirs or devisees from taking if, without his consent, property of his estate be set apart as a family homestead by the court.[4] It can be made a homestead only of a limited period.[5]

[1] Smith v. Uzzell, 61 Tex. 220.

[2] Estate of Crogan, 92 Cal. 370; Herrold v. Reen, 58 Cal. 443; distinguishing between Estate of Headen, 52 Cal. 295, and Rich v. Tubbs, 41 Cal. 34; Estate of Delaney, 37 Cal. 176; Taylor v. Hargons, 4 Cal. 268.

[3] Cal. Civ. Code of Proc., § 1474.

[4] *Id.*, § 1468.

[5] Estate of Croghan, 92 Cal. 370; 28 P. 570. McFarland, J.: "This is an appeal by certain brothers and sisters and children of deceased brothers and sisters of the deceased from an order setting aside absolutely to the surviving wife a certain homestead. There is no attack made on the general validity of the homestead in question. It was the family residence, was not of greater value than $5,000, a proper declaration had been made and recorded, and it was in all respects in law a valid homestead. But the contention of appellants is that it should have been set apart to the widow only for a limited period, after which it should go, by operation of law, to the appellants as heirs. The facts upon which this contention arises are these: (1) The said homestead was the separate property of the deceased; and (2) the declaration of homestead was made by the deceased himself. Upon these facts we are clear that the homestead vested absolutely in the widow as survivor, and that the order appealed from was right. It is impossible for a state of facts to be more completely covered by a statutory provision than are the facts in this case covered by section 1474 of the Code of Civil Procedure. That section provides as follows: 'If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the

As the code vests the homestead absolutely in the survivor, he or she takes by descent: so there is no necessity for having the property set apart by the probate court.[1] Whether the title vests absolutely or for life, the conditions may be changed by the death of husband or wife. As it was said under a statute different from that above noticed: "During the life of the owner of the fee, the exempt character of the property was to depend upon the occupancy as a homestead. But, upon his or her death, a new title is created which vests in the survivor for life, unconditionally."[2]

A statute provides that a homestead shall descend to the children of a first marriage if there are none by a second, when the surviving spouse owns a place equal to the homestead in value. The term "children" was construed to exclude grandchildren who had been dependents of the decedent and members of the family. As against them, the second wife in her widowhood could claim the homestead while owning an equally valuable real property.[3]

Widows have been allowed life-estate homesteads when the

superior court to assign it, for a limited period, to the family of the deceased.' The contention is that section 1265 of the Civil Code and section 1468 of the Code of Civil Procedure are in conflict with said section 1474; and a good deal of reasoning is indulged in by counsel to show what the rule is when two different sections of the codes are contradictory, and irreconcilably conflicting. But such is not the case here. The clear and explicit language of section 1474 deals in detail with the very identical case of a homestead on separate property, created by the owner of such property. The legislative mind, when enacting it, was directed specially to that particular kind of homestead; and its intent, thus directly and clearly expressed, is not to be taken as changed by other sections which use general language, and in which there is no direct reference made to a homestead carved out of separate property by the will of its owner. All the sections cited, when read together, clearly mean that when a homestead has been selected by one spouse out of the separate property of the other without the consent of the latter, then, upon the death of the one from whose property it was selected, it vests in his or her heirs, subject to the power of the court to assign it for a limited period to the family of the decedent; but when the selection has been 'from the separate property of the person selecting or joining in the selection of the same,' then it goes absolutely to the survivor. The cases cited by appellant do not establish any other doctrine. Order affirmed."

[1] Baker v. Brickell, 87 Cal. 329; Herrold v. Reen, 58 Cal. 445–7.

[2] Durland v. Seiler, 27 Neb. 33; Neb. Com. Stat., ch. 36, § 17.

[3] Peeler v. Peeler (Miss.), 8 So. 392; Miss. Code, 1880, § 1277.

estates of the deceased husbands were solvent,[1] while they had absolute title in fee when the estates were insolvent.[2] When the estates were solvent, there was distribution among the heirs on the expiration of the exemption period; when not, there was nothing to be distributed among them. If the homestead has been abandoned, distribution takes place at once; if not, half of the community property goes to the heirs of the deceased, and half to the survivor of the community as in the civil law,[3] while all of the separate property of a solvent decedent is distributable upon termination of the exemption period of suspension and protection.[4] The homestead of a decedent is so far removed from his general estate as to be usually excepted from probate administration.[5]

Where the surviving wife takes an absolute, fee-simple title of the homestead held by her late husband,[6] her heirs inherit it from her, and her husband's heirs are excluded.[7] If the homestead was carved from her separate property, and enjoyed by the family during her life, it does not retain its exempt character as the homestead of the husband and children after her death.[8] The fact of the title being in her does not prevent the husband from having homestead in it while she is living,[9] and to estate by curtesy, for life, after her death.[10] Property received in exchange for a homestead belonging to the wife is her separate estate and is not liable for her hus-

[1] Singletary v. Hill, 43 Tex. 590.

[2] Hoffman v. Neuhaus, 30 Tex. 633; Green v. Crow, 17 Tex. 180.

[3] Bell v. Schwarz, 37 Tex. 574; Sossaman v. Powell, 21 Tex. 665; Walker v. Young, 37 Tex. 519; Hartman v. Thomas, 37 Tex. 90; Magee v. Rice, 37 Tex. 483; Pryor v. Stone, 19 Tex. 374. *Compare* Wright v. Hays, 34 Tex. 260.

[4] Brewer v. Wall, 23 Tex. 585.

[5] Estate of James, 23 Cal. 416; Estate of Tompkins, 12 Cal. 114; Carter v. Randolph, 47 Tex. 379; Sossaman v. Powell, 21 Tex. 665.

[6] Revised Stat. of Missouri (1879), § 2693. Amended in 1889, § 5439.

[7] Skouten v. Wood, 57 Mo. 380, rendered before the amendment.

[8] Keyte v. Peery, 25 Mo. App. 394.

[9] Kendall v. Powers, 96 Mo. 142.

[10] *Ib.;* Moore v. Ivers, 83 Mo. 29; Stephens v. Hume, 25 Mo. 349; Kyte v. Peery, 25 Mo. App. 394; Reaume v. Chambers, 22 Mo. 36; Alexander v. Warrance, 17 Mo. 228. Under Wagner's Stat. (Mo.), 698, § 5, the homestead was absolutely exempt, not being liable for the debts of the husband and father, even after the death of his widow and the ending of his children's minority. French v. Stratton, 79 Mo. 560; Canole v. Hurt, 78 Mo. 649. *See* Davis v. Land, 88 Mo. 436.

band's debts; nor is it liable for community debts.[1] There may be an exception, in case the wife purposely allowed creditors to be deceived and led to trust the husband in the belief that the property was his. On this subject it is said: "Honesty and fair dealing require, where the wife permits her husband to use her money or property as his own and to incur obligations upon the faith that the property belongs to him, that, as against creditors, their rights are superior to hers." In other words, under such circumstances, the husband's obligations bind the wife.[2] But, even when the wife knew the husband was making debts on credit gained by means of her money, only the excess above her homestead was held liable, though that homestead had been paid for partly by money borrowed by the husband.[3]

That the homestead was bought with the wife's money and was her separate property which her children inherit must be clearly established by evidence before a second wife can be denied homestead therein.[4]

"If the owner of a homestead dies leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life. If the owner leaves children, one or more, said child or children shall share with said widow, . . each child's rights to cease at twenty-one years of age, . . and in case of the death of the widow, all of said homestead shall be vested in the minor children of the testator or intestate."[5] In construing this constitutional provision, it was said that no provision is made for the surviving husband as to the homestead of his deceased wife. Her minor children succeed during their minority. The husband's "right to curtesy must yield to the superior right guarantied to the minor children by the constitution." The court, in exposition of the section above cited and quoted, said of the minor children: "We think that this section was never intended to make their right to occupy the homestead depend

[1] Blum v. Light, 81 Tex. 414.

[2] Swartz v. McClelland (Neb.), 48 N. W. 461; Early v. Wilson (Neb.), 48 N. W. 148; Roy v. McPherson, 11 Neb. 197.

[3] Swartz v. McClelland, *supra*.

[4] King v. Gilleland, 60 Tex. 271.

[5] Const. of Ark. (1874), art. 9, § 6.

on the owner leaving a widow at the time of his death; and that the minor children of a deceased owner are solely entitled to the homestead, during their minority, in all cases where there is no widow surviving."[1]

§ 6. Widower's Rights in General.

Which is superior — the right of tenancy by curtesy conveyed to a third person, or the right of homestead in minor children?

The surviving husband's life estate by curtesy is qualified by homestead exemption and must yield when there is conflict. The legislative purpose, in making the exemption, is to protect the wife and children rather than the husband and father; to secure a home for them of which he cannot deprive them. In only two ways can they be deprived of it; abandonment or release by both husband and wife. The homestead right, and that of dower, are equally sacred: so treated from considerations of public policy. From these premises it has been inferred that the provision continuing the homestead right to the family after the death of its head, through the minority of the children, is paramount to that of tenancy by curtesy conveyed by the husband to a stranger, when asserted by the latter against such right of homestead. In other words, a husband's life estate in the separate property of a first wife, sold to a third person, is to be postponed to the home right of a second wife and minor children in the same property.[2]

Homestead was accorded to the head of a family consisting of a husband, wife and children. There were two adult daughters and two minor children. The application was treated as having been for the benefit of them all — the adults

[1] Thompson v. King (Ark.), 14 S. W. 925.

[2] Loeb v. McMahon, 89 Ill. 487; Hoskins v. Litchfield, 31 Ill. 143. *See* Fight v. Holt, 80 Ill. 84; Sontag v. Schmisseur, 76 Ill. 541; Wolf v. Wolf, 67 Ill. 55. Formerly, in Illinois, a widower who succeeded his deceased wife in her estate by curtesy could eject an heir occupant, though he had previously deserted his wife and children. Wolf v. Wolf, 67 Ill. 55. This course has been rendered illegal by a statute subsequently passed. Act of Illinois, 1871–2, p. 478: Acts 1877, ch. 52, § 1. *See* Eggleston v. Eggleston, 72 Ill. 24; Turner v. Bennett, 70 Ill. 263; Fight v. Holt, 80 Ill. 84: Sontag v. Schmisseur, 76 Ill. 541; Deltzer v. Scheuster, 37 Ill. 301. See the present law. Starr & Curtis' An. Stat. of Ill., pp. 1097–1111.

being dependent. When the wife had died and children grown and married and gone, the husband was allowed still to hold the homestead in behalf of the adult daughter beneficiaries. Upon remarriage he was denied a second homestead on the ground that the first was still intact.[1] On the same principle, an unmarried man who supports his mother and sisters may have homestead — they constituting his family.[2] The head of a family consisting of his wife and a dependent grandchild under age was recognized as entitled to his homestead, after his wife's death, during the minority of the grandchild.[3] In some states, if the wife outlive the husband she is entitled to homestead; but, if he survive, he is not so entitled unless he have children.[4] Where there are children, the surviving husband holds for them; or, the surviving wife holds for them and herself.[5] Thus the rights of a widower are not always the same as those of a widow; they do not depend on the same conditions.[6] His rights, by statute, may be as sacred as hers; the following case is an illustration. A testatrix willed the homestead, her only property (which she and her husband had long occupied), to be sold and the proceeds distributed to the legatees named in her will. The surviving husband was entitled to it, nevertheless, as his homestead for the period limited by law. This was accorded him, notwithstanding the fact that the executor had negotiated a sale of the property prior to the survivor's application for homestead.[7] None had been selected and recorded during her life, but it was the duty of the court to set apart a homestead from her estate for the survivor out of her property when there was no community property,[8] or from any real property suitable for it;[9] and to do this for the husband alone, when there were no children.[10] During the wife's life-time, the

[1] Torrance v. Boyd, 63 Ga. 22.

[2] Marsh v. Lazenby, 41 Ga. 154.

[3] Hall v. Matthews, 68 Ga. 490; *See* Hodo v. Johnson, 40 Ga. 439; Roff v. Johnson, 40 Ga. 555; Van Dyke v. Kilgo, 54 Ga. 551.

[4] Revalk v. Kraemer, 8 Cal. 71; Gee v. Moore, 14 Cal. 476; Bowman v. Norton, 16 Cal. 217; Estate of Busse, 35 Cal. 310.

[5] Estate of Wixom, 35 Cal. 320; Higgins v. Higgins, 46 Cal. 259; Rich v. Tubbs, 41 Cal. 34.

[6] Allen v. Russell, 39 O. St. 336.

[7] Lahiff's Estate, 86 Cal. 151.

[8] Cal. Code Civil Proc., § 1465.

[9] *In re* Sharp, 78 Cal. 483.

[10] Code Civ. Proc., § 1468.

husband could not have had homestead carved from her separate property without her assent,[1] but afterwards the court could designate it.[2]

§ 7. Widow's Rights as to Conveyances, etc.

The reservation of life estate in a husband's land deeded by both him and his wife to a purchaser was treated as a conveyance of such estate to the wife so that she, as survivor, was entitled to it at her husband's death.[3] By operation of law the husband's interest in the reservation did not descend to his heirs but ceased at his demise. Her right to it then did not preclude that of dower.[4] If there is no reservation, the sale of the property by husband and wife (or by either, if either has the sole right to sell) conveys the homestead.[5]

It has been held that a quitclaim deed of a widow is no impediment to the granting of homestead to her out of the very land she has conveyed.[6] She is not estopped by her deed from applying to have homestead assigned her in the same realty she has conveyed, it is said. She may have the price to keep forever, and the land to keep for life. It would seem that the character of the deed is not to blame for this; the estoppel by it is as effective ordinarily as that by warranty deed, as counsel showed in this case.[7] They supported by authority the well known doctrine that the right of property and of its exclusive possession passes by a quitclaim deed.[8] The court said that the right to a probate homestead is not the subject of sale and is not an estate either in law or equity. This is doubtless true; yet there must be estate upon which to hitch the right. The title of the estate of a decedent may be in his heirs, yet his widow's homestead may be carved upon it. It is not necessary that she should have any

[1] Civ. Code, § 1239.

[2] Code Civ. Proc., §§ 1465, 1468.

[3] McRoberts v. Copeland, 85 Tenn. 211.

[4] *Ib.*

[5] Nichol v. County of Davidson, 8 Lea, 389; Kincaid v. Burem, 9 Lea, 553; Bilbrey v. Poston, 4 Bax. 232; Daly v. Willis, 5 Lea, 100; Gibbs v. Patten, 2 Lea, 183.

[6] Estate of Moore, 57 Cal. 437.

[7] Sullivan v. Davis, 4 Cal. 291; Carpentier v. Williamson, 25 Cal. 154; Downer v. Smith, 24 Cal. 114; Crane v. Salmon, 41 Cal. 63, and others.

[8] Gazley v. Price, 16 Johns. 267; Ketchum v. Evertson, 13 Johns. 359; Potter v. Tuttle, 22 Ct. 512; Kyle v. Kavenagh, 103 Mass. 356.

estate in the land, in the sense of title, in order to the probate assignment of her life home upon it. But, after these concessions, may it not be reasonably asked: Can one have homestead laid off to him upon land after he has conveyed it to a stranger? Or can a widow have her life-home assigned her by a court upon land which she has owned and conveyed? In justice to the court rendering the decision, the following extract from the opinion is given: "The deed of Mrs. Moore is silent upon the subject of homestead: whatever its effect as a conveyance, it was no more than to convey the interest in the property of the deceased, which she received upon his death, by succession. A homestead right, or a right to have a homestead, is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family."[1]

Husband and wife having conveyed land, and having subsequently lived upon it as tenants till his death, she cannot then take a reconveyance from their grantee so as to set up homestead to the prejudice of creditors of the deceased who have recovered judgment against them prior to the reconveyance.[2]

§ 8. Relative to Insurance on Homesteads.

Did the interest in a policy of insurance devolve on the survivor, the owner of the homestead estate, when the home building was insured, and when loss followed the death of the insured — the insurance being to him and his legal representatives? Would the widow and minor children be entitled to the damages paid on the policy for the loss, and be entitled to its interest — she for life and they during minority? This question has been affirmatively answered in an able decision.[3]

[1] Estate of Moore, *supra*, p. 442. A surviving wife, sued as executrix of her husband's estate, to foreclose a mortgage given by him, is not affected in her right of homestead in the property proceeded against, by the judgment of foreclosure, since she was not personally a party to the action. Building Ass'n v. Chalmers, 75 Cal. 332; Stoops v. Woods, 45 Cal. 439; Revalk v. Kraemer, 8 Cal. 65, 75; S. C., 68 Am. Dec. 308; Van Reynegan v. Revalk, 8 Cal. 76; Cook v. Klink, 8 Cal. 347; Blakey v. Newby, 6 Munf. 64. But, though sued as executrix, if she voluntarily make herself a party personally, she could be bound. Dissenting opinion in case first cited above. 1 Herman on Estoppel, § 94; Corcoran v. Canal Co., 94 U. S. 741.

[2] Berry v. Dobson, 68 Miss. 483.

[3] Culbertson v. Cox, 29 Minn. 309.

The doctrine is that the proceeds of the policy do not go to the administrator of the deceased as assets of his estate, resulting from a merely personal contract, but to the widow and minor children who are beneficially interested in the property. The personal representatives of the deceased who insured can recover on the policy as their trustee.[1] For the contract of insurance, though personal in some respects, has such reference to property that the party to it who is to be remunerated in case of loss must continue to be the owner of the insured property in order to retain his right under the contract. When, upon his death, his widow and minor children succeed to his insured homestead, the property right is so far lodged in them that they may claim the insurance money (in case of loss by fire), instead of the administrator who would have the only rightful claim were the insurance contract a purely personal one.

Where no question of homestead right intervenes, and the estate of the insured is insolvent, it well may be that the administrator has the right to the insurance money rather than the heir, because it must go to pay debts.[2]

Homestead aside, it has been thought that insurance money on a fire policy belongs to the personal estate of the deceased insurer, after loss; that it has nothing of the nature of realty, or of a substitute for the consumed property, and therefore does not go directly to the heir or devisee.[3] Much depends upon the terms of the contract — whether the loss is to be made up to the insured, "his executors, administrators or assigns;" or to him, "his heirs or assigns."

That the contract of insurance is merely a personal one, not running with the land, has been held repeatedly.[4] But homestead laws conflict with many ordinary rules of jurisprudence. The protection of homes — the security of shelter for widows

[1] *Ib.;* Herkimer v. Rice, 27 N. Y. 163; Wyman v. Wyman, 26 N. Y. 253.

[2] Wyman v. Prosser, 36 Barb. 368.

[3] Mildmay v. Folgham, 3 Ves. Jr. 471.

[4] Lynch v. Dalzell, 4 Brown (Par. Cas.), 431; Saddlers' Co. v. Badcock, 2 Atkyns, 554; Powles v. Innes, 11 M. & W. 10; Carpenter v. Providence Ins. Co., 16 Pet. 495; Columbia Ins. Co. v. Lawrence, 10 Pet. 507; McIntire v. Plaisted, 68 Me. 363; Cummings v. Cheshire Ins. Co., 55 N. H. 457; Carroll v. Boston Ins. Co., 8 Mass. 515; Etna Fire Ins. Co., v. Tyler, 16 Wend. 386; Newman v. Home Ins. Co., 20 Minn. 422.

and orphans — would be greatly imperiled if the money, standing in lieu of a family home destroyed by fire, could not go to the rebuilding of it for their benefit. The spirit of homestead legislation favors the saving of such money for them rather than the passing of it to the administrator to be paid over to creditors who had no claim on the exempt property destroyed.

A householder had his homestead dwelling-house insured against fire. The contract is assumed to have been to him, his executors, administrators and assigns. After his death, and while his widow and children occupied the insured dwelling, it was burned. A contest arose between her and the administrator for the money paid into court by the insurance company. She won: the court holding that "the proceeds of the policy partook of the character of real estate," and that she was entitled to the same amount of interest in them that that she had had in the property destroyed; that is, to the usufruct for life.[1]

[1] Culbertson v. Cox, *supra*.

CHAPTER XX.

THE WIDOW'S HOMESTEAD.

§ 1. Characteristics.
2. Ante-nuptial Contract.
3. Dower *and* Homestead.
4. Dower *or* Homestead.
5. The Widow's Occupancy.
6. Relative to Heirs.
7. Relative to Alienation.
8. Money or Realty in Lieu of Homestead.
9. In General.

§ 1. Characteristics.

The term *homestead* means something different from the word as hereinbefore defined, when it is used to express the widow's portion of her deceased husband's estate, distinguished from her dower. It is not necessarily a dwelling-house, not always dependent upon occupancy, not invariably subject to restraint of alienation. It is allotted by the probate court, or such court as has jurisdiction to allot it, under the statute of any state so directing, and therefore does not need to have been dedicated or set apart before. It is not always consequent upon her husband's having had the exemption right, nor need the court confine itself to property previously set apart to him, or by him, when it is assigning the widow's homestead, under the law of several states.

There is no reason why a widow, who is the head of a family, may not dedicate a homestead upon her own real estate occupied by her as a home, when she has derived none from her husband. She would be entitled to do this under any homestead law, but property thus selected and dedicated by her would not constitute what is understood as "the *widow's* homestead." It would be like any other, subject to the same rules, bearing no analogy to dower, coming under the common definition. The widow, in establishing such homestead, would do so as the head of a family. The statutes do not require male headship. It has been held that the wife of an absconding husband is the head of the family.[1]

[1] State v. Wilson, 31 Neb. 464, Neb. Code, § 521.

The widow's homestead, under the statutes of the different states, varies much in character. It may be compatible with dower or incompatible; it may be absolute or conditional; if conditional, it may be made dependent on occupancy or widowhood. It is, in any particular state, just what the statute there makes it: so no universally applicable definition or description of it can be given. It presents a much greater variety of form than the ordinary homestead exhibits: so, though the latter is in each state what the statute there makes it, it is more easily defined.

The homestead of a decedent, descending to his widow and children, is not an asset of his estate to be administered; but there is often occasion for the action of the probate courts.

§ 2. Ante-nuptial Contract.

The effect of a contract between parties in view of matrimony, by which the wife waives her prospective homestead right, when solely dependent upon statute, necessarily differs as the statutes differ. On general principles, one cannot cut himself off by contract from the right to assert legal rights subsequently arising. Decisions based on statutory provisions and their construction are severally *pro* or *con:* so an example of those favoring the waiver, and one or two of those denying it, may suffice.

Under a statute which gave homestead to the widow of a beneficiary in common with his minor children during their minority, and precluded partition while they were minors unless she should remarry, and which gave half to her and half to them on partition,[1] it was held that the widow had no claim to homestead because she had signed it away by her ante-nuptial contract. Nothing expressly so holding was found in the statute, but such was the inference drawn by the court. Admitting that the statute was to preserve a home for the family against the claims of creditors, the court said that, when the widow remarries, the children reach their majority, or the homestead is abandoned, the premises may be divided precisely as other property. Then (of the claimant for petition in the case under consideration), the court said that, in a contract fairly made and for a valuable considera-

[1] Comp. Laws of 1879, Kas., ch. 33, § 5. *See* Gen. Stat. (1889), §§ 2593–7.

tion, she had "disclaimed any share she might possibly have in the future in the homestead, and agreed to take in lieu thereof the property stipulated for in the contract. This contract was made in prospect of marriage and as a condition of the same. The interests and rights she now claims arose wholly because of the marriage so contracted under those conditions, and she obtained them subject to the express contract she had voluntarily entered into. . . . We believe the rule laid down for the division of other property should be applied to a homestead also when it is to be divided."[1]

This decision was rendered in view of one in another state holding the negative position; and the statutory difference between the two states was pointed out: the statute above cited terminating the widow's right upon her remarriage, while that of the other state made it dependent upon occupancy only. Turning to the case, we find that waiver by ante-nuptial contract was denied as to homestead while it was upheld as to dower; and the principal reason was found in the want of statutory provision for terminating homestead in that way. The court enumerates the methods of extinguishment and declares that ante-nuptial renunciation is not one. Public policy is also assigned as a reason; and it is doubtless the stronger.[2] This reason has been given due prominence by the same court, in a prior case cited in this, to support the doctrine (still maintained) that homestead cannot be waived by an ante-nuptial agreement, as that right rests on public policy, while the dower right does not and may therefore be waived by such contract.[3] Suppose, however, the homestead right of the widow is as strictly personal to herself as her dower right; that neither minor children's benefit nor the state's interest in the preservation of homes is involved; that she takes her homestead portion as an estate as she does her dower portion: what reason then exists for differentiating the two rights with respect to the validity of their ante-nuptial disposition for

[1] Hafer v. Hafer, 36 Kas. 524. *See* same title, 33 Kas. 449.

[2] McMahill v. McMahill, 105 Ill. 596, on the Homestead Act in force in 1873, Stat. Ill., ch. 52, § 2. Three judges dissented.

[3] Phelps v. Phelps, 72 Ill. 545. So in McGee v. McGee, 91 Ill. 548, also cited by the court in the McMahill Case. Boyd v. Cudderback, 31 Ill. 119; Jordan v. Clark, 81 Ill. 465.

consideration received or promised? If, shorn of connection with minor children, and with the state as an interested party, the widow pleads (at the time when all heirs are of age) that she, having taken the consideration, may now repudiate her marriage contract for her own selfish ends, it would seem that she ought to be held to the rule governing her waiver of dower.

The position that only the methods prescribed for the termination of the homestead right must be followed is doubtless right in itself, and has been repeatedly asserted.[1]

When the law points out the method or methods by which an *acquired* homestead may be abandoned, forfeited, relinquished or terminated, it does not have reference to contracts preceding the acquisition: so the waiver in an ante-nuptial contract, of the prospective right of homestead benefit on the part of a party about to be married, ought not to be classed with those methods. The nullity of it is not deducible from any of the exemption statutes except from their policy and spirit; and these accord with the general principle that legal rights and remedies cannot be rendered unavailing by stipulation to forego them before they arise. While dower and some other future interests may be given up for a consideration, it does not follow that the right of homestead can be bartered away in advance. The state is an interested party, and its policy ought not to be defeated by contract between other parties.

§ 3. Dower and Homestead.

The compatibility of dower and homestead is recognized in several states. By the statutes and statutory construction of some, both may be granted on the same land; of others, on different lands: that is, the widow may have her homestead laid off to her, and also have her dower assigned on other premises of the estate. If dower has been first accorded to her, that is no bar to the allotment of homestead; or if homestead has been assigned to her, she may yet claim dower,

[1] Beavan v. Speed, 74 N. C. 548; Abbott v. Cromartie, 72 N. C. 292; Kingman v. Higgins, 100 Ill. 319; Black v. Lusk, 69 Ill. 70. By an ante-nuptial contract in which the prospective wife agreed to accept certain sums in full for "dower" and for services "rendered," she was held concluded as to homestead. Ditson v. Ditson (Ia.), 52 N. W. 203.

under the last mentioned policy. Since dower is for the widow only, while homestead is not always exclusively for her, but usually for the minor children too, the one is not inconsistent with the other.[1]

On the death of a husband, the allotment of homestead to his widow involves no question of title. It is merely a separation of the exempt land from that which is subject to administration.[2] It does not raise the question of title any more than does the laying off of the widow's third. But her right to have such allotment made may be questioned, so that her title to any homestead at all, or to any in the particular land in which she claims it, may be disputed by either heirs or creditors. The legality of the decedent's title is not involved in the separation of his real estate into the part to be administered by the executor or administrator, and the part exempt as the widow's homestead.

Where the right to dower and that to homestead are distinct, a widow may claim and receive both without inconsistency. The two differ in several respects. Dower is for life, while homestead may endure only during her widowhood. Dower may be sold to anybody, while the homestead right can be alienated to no one but the owner of the fee. Were both homestead and dower to be laid off on the same land, and the homestead quantity overlap the portion carved out as dower, the excess would not be affected in character. It would still remain dedicated to the support of the widow and children.[3] Where, in addition to her estate of homestead, the widow is entitled to dower out of her husband's entire estate,[4] if the whole is not sufficient to give her the full extent of the homestead allowed by law, she is entitled to all that remains after having received her dower.[5] But by taking one-third of the

[1] McCuan v. Turrentine, 48 Ala. 70; Jordan v. Strickland, 42 Ala. 315; Chisholm v. Chisholm, 41 Ala. 327. *See* Hudson v. Stewart, 48 Ala. 206: Thornton v. Thornton, 45 Ala. 274.

[2] Coffey v. Joseph, 74 Ala. 271. *See* Cochran's Adm. v. Sorrell, 74 Ala. 310.

[3] Showers v. Robinson, 43 Mich. 502, *511;* Dei v. Habel, 41 Mich. 88; Wallace v. Harris, 32 Mich. 380; West River Bank v. Gale, 42 Vt. 27; Buxton v. Dearborn, 46 N. H. 43; Perkins v. Quigley, 62 Mo. 498; Bresee v. Stiles, 22 Wis. 120; Merriman v. Lacefield; 4 Heisk. 222.

[4] Cowdrey v. Cowdrey, 131 Mass. 186.

[5] Mercier v. Chace, 11 Allen, 194; Monk v. Capen, 5 Allen, 146.

income of the whole estate instead of having dower laid off, and then selling her right to it, she was held to have waived her homestead right.[1] However, the assignment of dower to a widow consisting of specified rooms in the dwelling-house, parcels of land and rights of way over other parts of the house and other land, was held not to render her a tenant in common with the legal heir of her deceased husband, so as to deprive her of homestead.[2] If the law gives the widow a designated sum from her husband's estate, it does not therefore deprive her of dower.[3]

The wife's alienation and the widow's are held subject to different rules. While the latter cannot sell her homestead as above stated, the former can expressly release her right in a mortgage given by the husband on their homestead.[4] While the widow cannot alienate, she can abandon her individual rights in her homestead by ceasing to occupy it, wherever occupancy is essential to its maintenance. While the widow cannot sell her personal right of quarantine, it may be forfeited or abandoned. A widow conveyed her dower interest and removed from the homestead. It was held, in exposition of the governing statute, that the grantee was entitled merely to the gains and profits which she would have had if she had left the homestead without conveying her dower interest.[5] To this reason, another has been added: that the statute giving homestead does not provide that it shall be in the place of

[1] Bates v. Bates, 97 Mass. 392.

[2] Weller v. Weller, 131 Mass. 446, on Stat. of 1855, ch. 238.

[3] The Statute of Mass. (1880), ch. 211, § 1, allows the widow of an intestate $5,000 worth of real estate in fee. This is not in lieu of dower. Elliot v. Elliot, 137 Mass. 116. The assignment of dower does not affect the estate of homestead, in Massachusetts. Weller v. Weller, 131 Mass. 446; Paul v. Paul, 136 Mass. 286; Cowdrey v. Cowdrey, 131 Mass. 186; Bates v. Bates, 97 Mass. 392; Silloway v. Brown, 12 Allen, 30; Mercier v. Chace, 11 Allen, 194; Monk v. Capen, 5 Allen, 146. In New Hampshire the widow has been allowed dower without contributing to the payment of a mortgage on the estate, if the administrator redeems the property by applying assets of the estate to that purpose. Norris v. Morrison, 45 N. H. 498; Norris v. Moulton, 34 N. H. 392, *399;* Woods v. Wallace, 30 N. H. 384; Hastings v. Stevens, 29 N. H. 564; Rossiter v. Cossit, 15 N. H. 38; Robinson v. Leavitt, 7 N. H. 102; Cass v. Martin, 6 N. H. 25.

[4] Swan v. Stephens, 99 Mass. 9.

[5] Ala. Code, §§ 1892, 1900, 2543; Norton v. Norton (Ala.), 10 So. 436; Barber v. Williams, 74 Ala. 331.

dower.[1] The widow's right to homestead, when accorded by law, is much like that to dower, with respect to a devise by her husband. If the devise is in lieu of either, the intention of the testator must be so expressed. Doubt will be construed in favor of according her the dower or homestead (or both), in addition to the devise.[2] The widow may have homestead, after dower out of the same lands has been accepted by her;[3] yet if her homestead is greater in value than her dower, the latter has been held to be waived by the acceptance of the former. If less, she is entitled to the difference, which may be set off to her in another part of the landed estate.[4] The homestead must be set off before the dower, so as to ascertain what amount remains to be assigned as dower. One proceeding may suffice for having both assignments ordered.[5] Before any estate of dower has been set apart to the widow, she may have homestead in the realty which is afterwards so set apart.[6]

Dower and homestead being recovered by a widow at her own suit, she should contribute, in the proportion which the value of her life interests therein bears to the fee, towards reimbursing the opposite party for removing incumbrances.[7] But would this rule apply when her homestead and dower are upon the same property? And when the dower is not identical with the homestead but is laid out upon other realty, should she contribute if the acceptance of it is a forfeiture of the homestead benefit?[8]

A wife's right of dower and homestead may be transferred from one piece of real estate to another. It is held that "a wife who releases her right to homestead and dower in the family home, in consideration of being paid an adequate share of the purchase-money, is reinvested with such rights upon

[1] Chaplin v. Sawyer, 35 Vt. 290; Doane v. Doane, 33 Vt. 649; West River Bank v. Gale, 42 Vt. 27. Missouri formerly followed Vermont. Skouten v. Wood, 57 Mo. 380; Gragg v. Gragg, 65 Mo. 343.

[2] In Vermont, both. *In re* Hatch's Estate, 62 Vt. 300; many cases cited, Tyler, J.

[3] Gragg v. Gragg, 65 Mo. 343. *See* Seek v. Haynes, 68 Mo. 13.

[4] Bryan v. Rhoades, 96 Mo. 485.

[5] *Ib.*

[6] Murdock v. Dalby, 13 Mo. App. 41.

[7] Selb v. Mabee, 14 Brad. (Ill. App.) 574. *See* Selb v. Montague, 102 Ill. 446.

[8] Walker v. Doane. 108 Ill. 236.

the application of such share in part payment of a new one."[1] Both rights are based on public policy and are equally sacred.[2] But the widow's homestead right, coupled with that of her minor children, is so hedged in that she cannot dispose of it (nor can any other holder of such right), without compliance with all the legal requisites for the alienation of homesteads.[3]

A widow, entitled to both homestead and dower in the decedent's land, on which she had removed an incumbrance by payment, was not subrogated to the entire right of the prior holder of the incumbrance. Her interests in the estate should bear their share of the obligation. If the whole landed estate of the deceased was worth no more than a thousand dollars (the homestead limitation), and the widow was entitled to both homestead and dower, the latter is subject to the former. "So much of the widow's dower as is represented in the homestead is not assigned her, but is in abeyance until the homestead estate is extinguished; and, when that occurs, the right of action revives."[4]

§ 4. Dower or Homestead.

Homestead and dower are incompatible in several states. The widow may be required to elect which she will accept.[5] She may enjoy the homestead benefit till her dower is assigned.[6] Even where entitled to both on the same land, she has

[1] Nance v. Nance, 28 Ill. App. 587.

[2] Hoskins v. Litchfield, 31 Ill. 143; Lœb v. McMahon, 89 Ill. 487; Regan v. Zeeb, 28 Ohio St. 483.

[3] Abbott v. Cromartie, 72 N. C. 292; McAfee v. Bettis, 72 N. C. 29; Littlejohn v. Egerton. 76 N. C. 468. *See* Watts v. Leggett, 66 N. C. 197; Warner v. Crosby, 89 Ill. 320; Beecher v. Baldy, 7 Mich. 488; Dye v. Mand, 10 Mich. 291.

[4] Jones v. Gilbert (Ill.), 25 N. E. 566. Merritt v. Merritt, 97 Ill. 243, *distinguished.* The foreclosure of a mortgage by sale under a decree, and the satisfaction of the lien by application of the proceeds to that purpose, does not deprive the mortgagor's wife of her eventual dower in the land. Dillman v. Will County Bank (Ill.), 29 N. E. 1090.

[5] In Florida, the widow elects, whether to accept dower or homestead, when the estate is testate. Brokaw v. McDougall, 20 Fla. 212. But is restricted to dower, when children also survive the decedent, and the exemption inures to their benefit, if the estate be intestate. Wilson v. Fridenburg, 19 Fla. 461. In Mississippi it was held that when the estate is intestate, and the deceased husband was childless, the widow could not have half the estate and her homestead in addition; but half, including the homestead. Glover v. Hill, 57 Miss. 240.

[6] By the Arkansas constitution of

been denied homestead when her dower had been laid off in other land of her husband's estate.[1]

By the provision of a constitution, the wife's homestead right is merely that of preventing her husband's sole disposal of the home. By a statute thereunder, she is entitled to dower, at his death, out of his lands, not excepting his homestead. His heirs inherit their portions with the exempt character attached. The widow has only dower if the estate is intestate and there are children.[2] Where the insolvency of the estate is necessary to the assignment of homestead to the widow and minor children, solvent estates go directly to the heirs and the widow has her dower only.[3]

Though homestead was subject to dower, but not in addition to it, it was yet decided that the widow might apply for homestead for the children, while she had her own dower assigned.[4] Under a statute allowing her a year's support from the estate, and those giving dower and homestead, it was held that these benefits could not be cumulated.[5] But, if she choose

1868, the widow had a right in the rents and profits of her deceased husband's homestead so long as she had no homestead in her own right. When her dower was laid off and assigned her, the right in the homestead ceased. Const. (1868), XII, 4; Mansf. Rev. St. §§ 2587–8; Padgett v. Norman, 44 Ark. 490; Trimble v. James, 40 Ark. 393; Mock v. Pleasants, 34 Ark. 63. She has possession of the principal residence, though not necessarily occupying it. till dower is assigned. Carnall v. Wilson, 21 Ark. 62.

[1] In Illinois it has been held that the acceptance of dower by a widow in other lands than the homestead is a relinquishment of homestead; in exposition of the Dower Act, sec. 37, Rev. Stat. (1874), ch. 11. Walker v. Doane, 108 Ill. 236. Homestead and dower rights may both exist in the same real estate. Peyton v. Jeffries, 50 Ill. 148; Walsh v. Reis, 50 Ill. 477; Bursen v. Goodspeed, 60 Ill. 281. The widow is not entitled to both homestead and dower, laid off separately in her late husband's estate. Knapp v. Gass, 63 Ill. 492. But the acceptance of a sum in lieu of dower, and the subsequent sale of the land, at the widow's instigation, subject to its liability for this sum, cut her off from homestead as against the purchaser. Wright v. Dunning, 46 Ill. 272.

[2] Wilson v. Fridenburg, 19 Fla. 461; Const. Fla., art. 10, § 1; McClellan's Dig. pp. 528–9. The widow's dower extends to the right of way granted by her late husband to a railroad company, though no homestead has been set off to her, it is held. Venable v. Wabash R'y Co. (Mo.), 19 S. W. 45.

[3] Zoellner v. Zoellner, 53 Mich. 620; Const. Mich., art. 16, § 2; Howell's Stat., § 7721.

[4] Adams v. Adams, 46 Ga. 630; Robson v. Lindrum, 47 Ga. 252.

[5] *Ib.;* Singleton v. Huff, 49 Ga. 584; Roff v. Johnson, 40 Ga. 555; Blassingame v. Rose, 34 Ga. 418.

homestead under an unconstitutional statute, she may yet claim dower when that has proved unavailing.[1]

Where the homestead goes to the surviving spouse for life, who elects to take it instead of the distributive share of the estate that would otherwise be his or her portion,[2] it has been decided that a widow cannot have both dower and homestead, but may elect.[3] She may have a third of her late husband's real estate set off to her in fee as her distributive share, or she may take the homestead for life in lieu of it.[4] Her election to take the latter is not inferable from the fact that she has retained the family residence for a brief period after her husband's death.[5]

A widow, entitled to dower in land constituting the homestead of her husband at the time of his death, or set aside as homestead after his death, cannot be disturbed in her possession of it when it has been legally assigned to her as dower. She may hold it for life against the heirs.[6] The rights of the heirs remain in abeyance till her death.[7]

If the land is within the quantitative limit, and not within a municipal corporation, the heirs may recover what has not been assigned as dower — the land having been the actual family homestead of their father at the time of his death. The administrator has no right of possession as against them. Their right is not dependent upon the filing of a description of the homestead for record, by their father. His right to the homestead acreage exempt was inherited by them. As to any excess of this acreage and of the dower, an administrator may be called to settlement by the heirs, and be required to turn over the estate after settling claims against it.[8]

If the provision made for the widow, in her husband's will, is inconsistent with the homestead estate to which she is en-

[1] Page v. Page, 50 Ga. 597.

[2] McClain's Iowa Code, §§ 3163–3185.

[3] Butterfield v. Wicks, 44 Ia. 310; Meyer v. Meyer, 23 Ia. 359. When the widow's only right of possession was under the law of dower, she could not claim possession by homestead right. Cavender v. Smith, 8 Ia. 360.

[4] Iowa Code, §§ 2007–8, 2440.

[5] Egbert v. Egbert (Ia.), 52 N. W. 478, *qualifying* McDonald v. McDonald, 76 Ia. 137, and *distinguishing* Mobley v. Mobley, 73 Ia. 654.

[6] Wilson v. Fridenburg, 19 Fla. 461; same title, 21 Fla. 386; Fla. Const. of 1868.

[7] Baker v. State, 17 Fla. 406; Wilson v. Fridenburg, 19 Fla. 461.

[8] Barco v. Fennell, 24 Fla. 378, sustaining the foregoing decisions.

titled by law, and she elects to take under the will, she cannot have homestead under the statute.[1] A widow, by remarrying, may lose her homestead, yet retain her dower right in it.[2]

§ 5. The Widow's Occupancy.

The widow may be entitled to the possession of the homestead, though not necessarily occupying it by living upon it, or making her home thereon. It need not be her place of residence, even constructively, under some provisions of law, while she is legally the possessor, and may enjoy the revenues till dower has been assigned her, or till she has obtained a home in her own right, or till her widowhood has ceased, or till her right has been terminated by death — according to different provisions under different homestead systems. The point is that she may have such right and possession without occupancy.[3] Such right and possession, without ownership or actual occupancy, carries with it the legal ability to sue and recover for damage done to her interest in the homestead.[4]

The requirement of occupancy by the widow, as a condition to her enjoyment of the homestead, is made in some of the states.[5] The position of the widow-occupant is set forth at length in a decision[6] under a statute which gives her the

[1] Stunz v. Stunz, 131 Ill. 210; Cowdrey v. Hitchcock, 103 Ill. 262; Vanzant v. Vanzant, 23 Ill. 485.

[2] Bresee v. Stiles, 22 Wis. 120.

[3] Davenport v. Devenaux, 45 Ark. 341; Carnall v. Wilson, 21 Ark. 62; Benaugh v. Turrentine, 60 Ala. 557; McClurg v. Turner, 74 Mo. 45; Gorham v. Daniels, 23 Vt. 600; Burk v. Osborn, 9 B. Mon. 579; Clark v. Burnside, 15 Ill. 62; McReynolds v. Counts, 9 Gratt. 242; Brown v. Brown, 33 Miss. 39 (Miss. Stat. of 1865).

[4] Gilbert v. Kennedy, 22 Mich. 5; Foster v. Elliott, 33 Ia. 216; Davenport v. Devenaux, 45 Ark. 341; Bentonville R. Co. v. Baker, 45 Ark. 252; Cooley on Torts, 326.

[5] Carter v. Randolph, 47 Tex. 376; Runnels v. Runnels, 27 Tex. 519; O'Docherty v. McGloin, 25 Tex. 72; Green v. Crow, 17 Tex. 180; Succession of Hunter, 13 La. An. 257; Hicks v. Pepper, 1 Bax. 42; Johnson v. Gaylord, 41 Ia. 366; Orman v. Orman, 26 Ia. 361.

[6] Fore v. Fore's Estate (N. D.), 50 N. W. 712. After discussing other points, the court, through Bartholomew, J., said: "The respondent contends that upon the husband's death, his widow surviving him, and he being seized in fee of the land then occupied by himself and his family as a homestead, and dying intestate, the fee to the homestead goes to his heirs at law, under the statute of descent; but that the homestead right, including the right to possession, whether the husband died testate or intestate, survives, and passes to his widow, to be enjoyed by her so long as she continues to occupy the premises as a homestead. Appellant takes

right of occupancy of the entire homestead of her husband, who was seized in fee of his homestead. She can enjoy the exempt property only on condition that she continue to maintain her home thereon; and this, whether she lives in widow-

issue upon the last proposition, and claims that the homestead right of the widow, including the possession and usufruct, ceases and determines at the final settlement and distribution of the estate. The decision of the issue involves a construction of that portion of the statute which reads: 'Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law.' This . . . was taken from the statutes of Iowa. . . . Code Iowa, § 2007. The context, however, was changed to conform to our different policy. In Iowa, the next following section (2008) provides that the 'setting off of the distributive share . . . shall be such a disposal . . . as is contemplated in the preceding section. But the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased.' The distributive share thus spoken of is one-third in value of all the legal or equitable estate possessed by the deceased at any time during marriage, and which has not been sold on judicial sale, and to which the survivor has relinquished no rights. See Id., § 2440. And this share is not affected by will, unless the survivor consents thereto. Id., § 2452. There is nothing in our law corresponding with sections 2008, 2440 and 2452 of the Iowa Code. Under those statutes the right of the survivor to possess and occupy the homestead for life has been repeatedly declared. Floyd v. Mosier, 1 Iowa, 512; Burns v. Keas, 21 Iowa, 257; Size v. Size, 24 Iowa, 580; Meyer v. Meyer, 23 Iowa, 359; Butterfield v. Wicks, 44 Iowa, 310; Mahaffy v. Mahaffy, 63 Iowa, 55, 18 N. W. Rep. 685. And it has also been held that during such occupancy the heirs cannot interfere therewith, nor claim partition. Nicholas v. Purczell, 21 Iowa, 265; Dodds v. Dodds, 26 Iowa, 311. But it has also been held that such occupancy cannot be claimed in addition to the distributive share. Meyer v. Meyer, *supra;* Butterfield v. Wicks, *supra;* Smith v. Zuckmeyer, 53 Iowa, 14, 3 N. W. Rep. 782. The survivor holds this distributive share exempt from the debts of the decedent. Mock v. Watson, 41 Iowa, 244: Kendall v. Kendall, 42 Iowa, 464; Thomas v. Thomas, 73 Iowa, 657, 35 N. W. Rep. 693. The supreme court of Iowa, under these statutes, hold that, while the survivor is entitled to occupy the homestead for a reasonable time in which to make a selection between a life estate in the homestead and the distributive share provided by law (Cunningham v. Gamble, 57 Iowa, 46, 10 N. W. Rep. 278), yet continued occupancy of the homestead will be held an election to take the homestead for life. Conn v. Conn, 58 Iowa, 747, 13 N. W. Rep. 51; Butterfield v. Wicks, *supra;* Holbrook v. Perry, 66 Iowa, 286, 23 N. W. 671. By section 2455, Code Iowa, it is provided that, if the intestate leave no issue, one-half of his estate shall go to his family and the other half to his widow. In Burns v. Keas, *supra*, it was held that in such case the widow takes one-third as her distributive share and one-sixth as heir; and in Smith v. Zuckmeyer, *supra*, it is held that

hood or remarries. This right of occupancy she is entitled to enjoy as surviving spouse, against the heirs and devisees of the deceased.

While a widow has her household furniture stored in her home, she cannot be treated as a non-occupant.[1] But her removal terminates her homestead right when she does not retain such hold of her house, even though abandonment is not intended by her.[2] Though the homestead be in excess of the statutory limitation, the widow may hold it all till partition made between the exempt and the liable portions.[3]

A husband and wife lived three years on their homestead, then sold it,— she expressly relinquishing her dower right. Both voluntarily surrendered the premises. Upon his death, she could not maintain a writ of entry to recover the property.[4]

A beneficiary in occupancy of her homestead with her sec-

in such case, where the survivor elects to hold the homestead for life, he thereby surrendered the one-third or distributive share only, and that, as to the fraction which he took as heir, it was not affected by his continuous possession of the homestead." After an extended exposition of the North Dakota homestead statute, the court concluded: "Keeping in mind the entire statute and the undoubted policy of our laws, it seems clear that the purpose of this law is that, upon the death of the husband and father, the widow should continue to possess and occupy the homestead with the children, during her entire life, if she so elect, and upon her death the children may continue so to possess and occupy the homestead until the youngest child becomes of age, so that at no time, until the youngest child reaches the period when the law declares him able to care for himself, shall this family be without a home, or — in case the homestead be a farm — without the means of obtaining a livelihood. But this occupancy, either of the surviving widow or children, would be terminated by any disposition of the homestead according to law, as hereinbefore indicated. In view of the facts of this case we deem it proper to add that the statutes will be searched in vain for any intimation that the widow's rights as survivor are affected in any manner by the absence of issue or by the fact of a second marriage. This last point is directly ruled in Nicholas v. Purczell, *supra*. To the point made by appellant that a homestead interest cannot attach to property owned in common, we reply that such is the case only where the common ownership is prior in point of time to the initiation of the homestead right. In this case the homestead right existed before descent cast. It existed in the lifetime of the decedent, and he was powerless to destroy it. The subsequent ownership in common of the fee cannot affect the prior right."

[1] Brettner v. Fox, 100 Mass. 234.

[2] Paul v. Paul, 136 Mass. 286; Foster v. Leland, 141 Mass. 187.

[3] Parks v. Reilly, 5 Allen, 77.

[4] Foster v. Leland, 141 Mass. 187.

ond husband cannot be ejected under a judgment against her first husband from whom she derived the homestead,— who had title claim.[1]

Upon their father's remarriage, his children lived with him and their step-mother till his death, and then ceased to be members of the family. A homestead was set apart by the county court for the widow and her children by him. She married again, and removed to another county, intending not to return unless compelled to do so by unavoidable circumstances, but she acquired title to no other home. Under these circumstances, the first set of children were denied partition of the homestead which had been acquired by their father's separate means.[2] Not only occupancy but continued widowhood is required in several states for the retention of the homestead;[3] but the remarriage of a widow does not affect her right of homestead in the estate of her first husband, as an invariable rule.[4]

The widow and heirs of the occupant of a homestead may hold it as tenants in common till partition, though it be in excess of the statutory limitation. Should the administrator sell the inheritance to pay debts of the deceased, the purchaser, taking the place of the heirs in relation to the widow, becomes a tenant in common with her in the homestead estate.[5] If the widow has a homestead estate in the equity of redemption, the purchaser cannot defeat it by buying a certificate of purchase given on a sale to execute a judgment of mortgage foreclosure — the mortgage having been executed by both the deceased husband and his wife with homestead release by her — and by taking a master's deed for the land, while he and the widow of the deceased are tenants in common in the homestead estate. The position of the two is this: He holds his subsequently acquired title in trust for the estate

[1] Morrissey v. Stephenson, 86 Ill. 344.

[2] Foreman v. Meroney, 62 Tex. 723.

[3] § 5437 of Ohio Rev. Stat. was amended June 22, 1889, so that homestead continues "so long as the widow, if she remains unmarried, resides thereon." Ohio Gen. Laws, 1889, p. 6; Const. Michigan, art. XVI, §§ 1–4; Howell's Annot. Stat. of Mich., § 7721 *et seq.;* Const. Nor. Car., art. X, § 2; S. & B.'s Stat. of Wis., § 2271, p. 1318. There are like provisions in some other statutes, but these will suffice for illustration.

[4] Miles v. Miles, 46 N. H. 261; Yeates v. Briggs, 95 Ill. 79.

[5] Montague v. Selb, 106 Ill. 49.

in common; she, by paying her part of what he gave for it, may avail herself of an equal interest with him. For one co-tenant cannot purchase an outstanding title, interest or incumbrance to the prejudice of another one. The purchase will be deemed to inure to the common benefit, though not so designed by the purchaser. This rule applies whether title accrues under an instrument or by operation of law, because it rests on the mutual duty of co-tenants.[1]

The inchoate right of homestead becomes a vested one when it is set out in specific property. The widow's right thus assigned is an estate for life, and it does not depend upon her occupancy of the premises. It is much like dower. She may sell her estate in either.[2] When the homestead is a life estate, the reversion may be levied upon.[3] But her right, whatever its duration, holds good against her late husband's heirs, grantees and creditors.[4]

§ 6. Relative to Heirs.

Heirs at law may have their rights assigned, in the estate of the deceased owner of a homestead, subject to the rights of the widow and those specially appertaining to minor co-heirs by reason of their minority, wherever the law grants exemption provisions to widows and minors in such sense as not to render the homestead right an estate. When not an estate, it yet secures the privilege of possession and enjoyment against creditors: not against lawful heirs. The purpose of the homestead provision is to protect against execution for debt: not against a partition of the decedent's estate. Legislation would be necessary, beyond the mere exemption provision, if partition among heirs is to be inhibited.[5]

[1] *Ib.*

[2] Lake v. Page, 63 N. H. 318; Gen. Stat., ch. 138, § 1; ch. 202, § 2. Formerly, occupancy was essential on the part of the widow. Judge of Probate v. Simonds, 46 N. H. 363; Norris v. Moulton, 34 N. H. 392.

[3] Cross v. Weare, 62 N. H. 125.

[4] Gen. Stat. of N. H., ch. 124, § 1; Bachelder v. Fottler, 62 N. H. 445, *overruling* Spaulding's Appeal, 52 N. H. 336. She is so entitled though she own land in her own right. Nichols v. Nichols, 62 N. H. 621. On the death of a wife leaving no minor children, or on completion of the children's minority, the husband surviving is entitled to the homestead they have enjoyed. N. H. Gen. L., ch. 138, §§ 1, 5, 6; Squire v. Mudgett, 61 N. H. 149.

[5] Patterson v. Patterson, 49 Mich. 176; Robinson v. Baker, 47 Mich. 619; Turner v. Bennett, 70 Ill. 263.

If the exemption is given only to affect creditors, heirs may claim not only the partition of the decedent's estate, but also have the homestead itself divided. But adult heirs cannot disturb the widow who is in possession of the family residence during the pendency of the estate's administration. They may take means to expedite the probate proceedings and settlement of the estate when such course becomes necessary to prevent unreasonable delay. But the right to claim partition does not imply the right to disturb the possession granted to the widow and minor children under the homestead-protection legislation and constitutional provisions.[1]

Probate courts have original jurisdiction, in may states, in adjusting the rights of widows and children relative to homestead when the administration of the estate involves those rights; in making allotment of homestead when none was set apart by the decedent, and the like.[2]

Compare Eggleston v. Eggleston, 72 Ill. 24; Sontag v. Schmisseur, 76 Ill. 541; Fight v. Holt, 80 Ill. 84. But see, on this subject, Freeman on Cotenancy, § 60; Nicholas v. Purczell, 21 Ia. 265; Dodds v. Dodds, 26 Ia. 311; Hoffman v. Neuhaus, 30 Tex. 633. And see, in states where the widow has the fee in a homestead, Doane v. Doane, 33 Vt. 652; Day v. Adams, 42 Vt. 517; Estate of Delaney, 37 Cal. 180. The constitutional provisions of Michigan, which give the homestead right, are "exemption provisions strictly, and give the right only as against creditors. In that respect, they differ from provisions existing in some other states. In Massachusetts, the widow's homestead right is not only entirely independent of any question of indebtedness, but she is by statute expressly empowered to sell and convey it. It is not therefore a mere right to occupy, but an estate. Mercier v. Chace, 11 Allen, 194; Monk v. Capear, 5 Allen, 146. In New Hampshire the statute expressly gives a homestead to the widow as against heirs as well as creditors. Spaulding's Appeal, 52 N. H. 336. In Vermont, the homestead passes by statute to the widow and children 'in due course of descent.' Keyes v. Hill, 30 Vt. 760, 768. In Iowa, by statute, 'upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law.' Nicholas v. Purczell, 21 Ia. 265; Dodds v. Dodds, 26 Ia. 312. And see Eustache v. Rodaquest, 11 Rush, 42. No one can fail to see that these provisions differ essentially from those contained in the constitution of this state; and, as was said in Robinson v. Baker, *supra*, the statutes have not enlarged the right in this particular." Opinion by Judge Cooley in Patterson v. Patterson, 49 Mich. 176. All the justices concurred.

[1] Patterson v. Patterson, 49 Mich. 176. A widow was held to have waived her right by failing to claim the benefit of partition. Chilson v. Reeves, 29 Tex. 276.

[2] Dolan v. Dolan, 91 Ala. 152;

A widow brought an action in ejectment and introduced probate court proceedings setting apart to her one hundred and sixty acres of land, as her homestead, out of two hundred and forty of which her husband died possessed, which he had occupied as his homestead, and which she, in the probate court, had alleged to not exceed in value one thousand dollars — the monetary limit in her state. On appeal, the supreme court said that the probate court had no jurisdiction; that it is only where the real property left by the decedent *does not exceed in amount one hundred and sixty acres* that such court can order the widow's homestead. The reason is that in such case there is no need of selection, and, *prima facie*, no occasion for contest on the part of creditors, heirs, devisees or others interested in the estate subject to administration.[1] When the homestead exceeds the monetary limit, the widow may select other land; and the heirs cannot deny her the right of homestead because the value is excessive and also deny her the right to select other land to the allowable amount.[2] Though too much be awarded her, a probate order setting apart a homestead for a widow and children cannot be assailed collaterally, but stands unless regularly vacated.[3] The probate jurisdiction cannot always cover every case involving homestead right — such, for instance, as the foreclosure of a mortgage.[4]

A probate court having assigned a homestead to a widow,

Thompson v. Thompson, 51 Ala. 493; Turner v. Whitten, 40 Ala. 530; Andrews v. Melton, 51 Ala. 400; Rottenberry v. Pipes, 53 Ala. 447; Hudson v. Stewart, 48 Ala. 209; Booth v. Goodwin, 29 Ark. 633; Smith's Estate, 51 Cal. 564: Mawson v. Mawson, 50 Cal. 539; McCauley's Estate, 50 Cal. 544; Camento v. Dupuy, 47 Cal. 79; Estate of Orr, 29 Cal. 102; Holden v. Pinney, 6 Cal. 234; Dease v. Cooper, 40 Miss. 114; Cannon v. Bonner, 38 Tex. 491; Hamblin v. Warnecke, 31 Tex. 91; Little v. Birdwell, 27 Tex. 690; Runnels v. Runnels, 27 Tex. 515; Connell v. Chandler, 11 Tex. 249; Byram v. Byram, 27 Vt. 295.

[1] James v. Clark, 89 Ala. 606; Alabama Code (1886), §§ 2550–2, 2562–5; Acts 1886–7, p. 112, amending §§ 2562–2564.

[2] Dolan v. Dolan, 91 Ala. 152; Alabama Code, § 2544.

[3] Fossett v. McMahan, 74 Tex. 546.

[4] Coffey v. Joseph, 74 Ala. 271; Willis v. Farley, 24 Cal. 491; Fallon v. Butler, 21 Cal. 30; Heutsch v. Porter, 10 Cal. 559; Belloe v. Rogers, 9 Cal. 126; Falkner v. Folsom, 6 Cal. 412. (*See* Ellisson v. Halleck, 6 Cal. 392, overruled in Belloe v. Rogers, *supra*.)

out of the estate of her late husband, without notice to the heirs, they brought an action to have the order set aside on the ground that the realty thus assigned was of value beyond the monetary limitation of five thousand dollars. They proved the homestead assigned her to be worth twice that sum; but the court sustained the probate decree on the ground that the judge making it had jurisdiction and that the value was proved before him to be not in excess of the statutory restriction.[1]

When a probate court, disregarding the widow's claim, ordered the homestead of the decedent to be sold for the payment of his debts, it was held that the purchaser obtained no title as against her rights; that he took nothing for his money.[2]

A deceased husband having left no debts, the widow claimed the homestead, which he had held, as against the heirs. This was denied — the court holding that she could not claim as against the heirs because homestead is a protection from creditors only; that, as there were no creditors, the homestead was terminated at the death of her husband — the estate passing at once to the heirs by the statute of descents, subject only to the widow's dower.[3] But heirs cannot divest a homestead right, already vested in the widow, by paying off all the debts of the estate.[4]

Where constitution provisions for homestead, in favor of the widow and minor heirs, are not supplemented by statute giving them effect in case of indivisible estates exceeding the homestead limit, the administrator of the decedent owner may hold possession and pay the claim of the widow, if she is the only creditor. Unless the estate is insolvent and indebted, the homestead right does not attach, in such case; and the estate goes to the heirs, subject to the widow's dower.[5]

[1] Kearney v. Kearney, 72 Cal. 591; Cal. Civ. Code of Proc., § 1465. *Compare* Williams v. Whitaker (N. C.), 14 S. E. 924.

[2] Anthony v. Rice (Mo.), 19 S. W. 423.

[3] Barker v. Jenkins, 84 Va. 895; Helm v. Helm, 30 Gratt. 404.

[4] Tucker v. Tucker, 103 N. C. 170. By the act of February, 1876, in Alabama, the widow has absolute estate in the homestead of her deceased husband, when his estate has been declared insolvent. McDonald v. Berry, 90 Ala. 464.

[5] Zoellner v. Zoellner, 53 Mich. 621.

Inheritance is governed by the law existing at the time of the death of the owner.[1] When the homestead descends to the heirs at law, freed from the claims of the decedent's creditors, it is to be estimated at its worth when he died. Subsequent advance in value does not render any excess of the monetary homestead limit liable to creditors at the time the heirs come into actual possession, if there was no excess when their right vested on the death of their ancestor.[2] Homestead exemption passes to the heirs of the homestead, being incident to the inheritance of the land; it passes "to whomsoever the title descends," though the heirs be adults, and they need not occupy.[3]

A decedent left a widow and eight children, all majors. The husband of one of them bought the interests of the others, and then sued the mother for rent for all but her share — she occupying the whole premises. He failed on the ground that she had her homestead right in the whole.[4] The widow is not liable for the rents and profits of her homestead to any of the heirs of the deceased, when she rightly holds it; but if the probate court has erroneously set apart a homestead to her, and the order is subsequently vacated or corrected by direct proceedings, she may be called to account to the minor heirs for rents received while unduly holding the property as her homestead.[5] A homestead assigned to the widow carries with it the crops growing upon it when her husband died, and which still remain upon it. She is entitled to them as against both heirs and creditors.[6]

[1] Burleson v. Burleson, 28 Tex. 418.

[2] Parisot v. Tucker, 65 Miss. 439.

[3] Miller's Ex'r v. Finnegan, 26 Fla. 29.

[4] Keyes v. Hill, 30 Vt. 759.

[5] Linch v. Broad, 70 Tex. 92, 96. When there are no community debts, community property is inherited directly by the children of the decedent — that is, the decedent's interest in it. Clark v. Nolan, 38 Tex. 416. As to the effect of increase in the value of the wife's separate property, in relation to community property and community debts, *see* Stringfellow v. Sorrels (Tex.), 18 S. W. 689.

[6] Vaughn v. Vaughn, 88 Tenn. 742; Edwards v. Thompson, 85 Tenn. 721; Carson v. Browder, 2 Lea, 701; Shofner v. Shofner, 5 Sneed, 95; Pickens v. Reed, 1 Swan, 80; Tenn. Code, §§ 3250, 2943–4 (2119*a*, 2119*b*, Ad. M. & V.). In Tennessee, the widow was held to have no right to homestead in property of her deceased husband when it consisted of a remainder on the death of his mother who held as his father's widow. As he had no right of possession, he had no home-

Heirs having prayed for partition, and alleged that the widow was entitled to homestead in the estate which they sought to have divided, the court took the allegation as an admission of her right on their part, after default had been decreed.[1] When partition is impracticable, and sale necessary, to which the widow consents on being promised an equivalent in money for her dower interest, she is not necessarily entitled to a thousand dollars from the proceeds of the sale; for her homestead interest might not have been worth so much had her dower been first laid off. In a case presenting this situation, the homestead was a life-estate with the remainder in the heirs. The widow was entitled to her life-occupancy in one thousand dollars' worth of the estate. She was entitled to the value of that interest from the proceeds of the sale, or to a thousand dollars of it invested and the interest paid to her during her life, and the principal paid to the heirs at her death.[2] When homestead has been assigned to a widow, she has been held entitled to hold it though it appreciate afterwards in value beyond the monetary limitation.[3]

§ 7. Relative to Alienation.

When the widow and heirs of a deceased householder sell the homestead property while it is yet exempt and not abandoned, the grantee takes it free from the ordinary debts of the decedent; free from debts not secured by valid liens on the homestead property.[4] But abandonment of the homestead protection, by the widow and the heirs when all are of age, would be its exposure to the creditors of the decedent. No length of time will give the homestead such immunity from ordinary debt as to bar creditors after the exemption

stead: so his widow could derive none from him. Howel v. Jones (Tenn.), 19 S. W. 757.

[1] Schaefer v. Kienzel, 123 Ill. 430; S. C., 15 N. E. Rep. 164; Knapp v. Gass, 63 Ill. 495.

[2] Merritt v. Merritt, 97 Ill. 243. *See* Allen v. Russell, 39 Ohio, 336.

[3] In declining to make a re-assignment of homestead to a widow because of the alleged change of its value, the court said: "If, because the land assigned for homestead has increased in value, a new assignment may be had to reduce the quantity, it would seem that, when it has depreciated in value, for the same reason a new assignment might be had to increase the quantity." Kenley v. Bryan, 110 Ill. 652.

[4] Dayton v. Donart, 22 Kas. 256; Morris v. Ward, 5 Kas. 239; Hixon v. George, 18 Kas. 254, *260*.

right has expired. In the first case above cited, it is said: "When a man dies intestate, leaving a widow and children, the ultimate title to his homestead descends to his widow and children just the same as the title to all his other real estate does, except that it descends to them subject to a homestead interest vested in the widow and such of the children as occupy the homestead at the time of the intestate's death. The construction of the statutes is in harmony with justice and with all our statutes and with every portion thereof, except perhaps with the word 'absolute' contained in section 2 of the act relating to descents and distribution.[1] But the word 'absolute,' as used in said section 2, evidently does not mean what it would in some other cases. It, together with the words used in connection therewith, simply means that so long as the widow and children continue to occupy the homestead, and the widow does not marry again, and one or more of the children still remain minors, they may hold the property as their homestead as though it were their absolute property, free from all debts (except incumbrances given by husband and wife, and taxes, and debts for purchase-money and improvements), and free from division or distribution. But evidently from the statutes they hold the property as their absolute property, free from debts and division only while some of them occupy the same as their homestead. If they all abandon the property as a homestead, it then becomes subject to debts and division the same as though it never was a homestead. . . . If the property or any interest therein is sold and conveyed while the property is still occupied as a homestead by the widow or any one or more of the minor children, the title to such property or interest passes to the purchaser free from all debts, except prior incumbrances given by the intestate and wife, or grantor and wife or husband, and taxes, and debts for purchase-money and improvements, although the property may afterward be abandoned as a homestead by the widow and children." The idea seems to be that the title is "absolute" but defeasible by abandonment of residence on the premises, so that the occupying widow and minor may sell it, despite the adult heir, and give full title. Ordinarily where, on the death of the husband insolvent and

[1] Gen. Stat. of Kansas, 392, cited by the court.

childless, the homestead vests absolutely in the widow, she can convey title to a purchaser.[1] It seems needless to say that she can sell and convey only what she owns. When the title of the decedent vests in his heirs immediately upon his death, she cannot divest them by any act of hers. When it vests in them and her, she cannot divest them of their property right and interest though she may sell her own. She cannot have homestead set apart to her from property which has vested in the heirs.[2] She cannot sell her homestead to the prejudice of the rights of minor heirs, or those of creditors entitled to make their money out of the remainder.[3] A purchaser of a homestead sold by order of court, on the application of the widow, is not deemed to have had notice that the decedent was free from debt, when there was no record evidence of it. He is not presumed to know that the judgment was void. In such case it is only voidable.[4] Though a widow give a quit-claim deed of her late husband's separate property, it is said that she may yet have homestead set apart to her in the same property by the probate court.[5]

A man and wife gave a deed of trust on their homestead. Ejectment against her, when she had become a widow, was brought by the grantee for the recovery of the property deeded, which she held as her homestead. The court found the fee to be in the plaintiff subject to her right of homestead during the minority of her youngest child. At the termination of this period, he again brought ejectment, and the first judgment was pleaded as a bar to her further claim. But the

[1] Rainey v. Chambers, 56 Tex. 17. *See* Alabama act of February, 1876, giving widow absolute title to the homestead when the estate of her deceased husband has been declared insolvent. McDonald v. Berry, 90 Ala. 464. And *see* Norton v. Norton (Ala.), 10 So. 436, in which it is held that the widow's rights of quarantine and homestead are personal rights, forfeitable but not alienable. These rights are when the estate is solvent.

[2] In Georgia, when the title of a decedent has vested in his heirs, a homestead for the widow cannot be set apart from the shares of those heirs; and the sale of property of theirs set apart thus illegally, made by the widow, would convey no interest but her own. Madden v. Jones, 75 Ga. 680.

[3] Whittle v. Samuels, 54 Ga. 548.

[4] Deyton v. Bell, 81 Ga. 370.

[5] Estate of Moore, 57 Cal. 437. *Compare* Bates v. Bates, 97 Mass. 392. *See* Morrison v. Wilson, 30 Cal. 344; McDonald v. Edmonds, 44 Cal. 328; M'Crakin v. Wright, 14 Johns. 193; Etcheborne v. Auzerais, 45 Cal. 121.

court now ignored the first finding, declaring it a nullity because not involved in the issue then joined. Her right of occupancy was still maintained.[1]

Under laws giving the widow only the usufruct of her homestead with right of occupancy, obviously she cannot sell the realty which she enjoys. An attempt to sell, or rather a form of sale and transfer under the circumstances, would convey no title to the purchaser; and, under some statutes, would be deemed abandonment so as to expose the property to forced sale by creditors.[2]

A childless wife, surviving her husband, is entitled to have her homestead free from forced sale while she lives upon it. She may exchange it for another, and have the second protected. If she sell the first for money to be invested in a new home, the price before payment to her cannot be garnished in the purchaser's hands for the payment of debts.[3]

If the homestead may be mortgaged by the joint act of the owner's widow and his administrator, nothing more of the decedent's estate can be affected; and the mortgage must be confined to the amount and value of land prescribed by law as the exempt portion. If any wrong is done, only the heirs have interest to complain.[4] Should the husband and wife join in mortgaging land including their homestead, the lien would attach to the whole; but a widow does not waive her right to the proceeds by consenting that the administrator of her husband's estate may sell land in which she has a homestead right.[5]

A widow who occupied a homestead with her children gave a trust deed of it to secure a creditor. The property was sold, and the purchaser brought an action of trespass against her

[1] Yeates v. Briggs, 95 Ill. 79. The deed of trust was given while the homestead acts of 1851–7 were in force in Illinois.

[2] Garabaldi v. Jones, 48 Ark. 230; Gates v. Steele, 48 Ark. 539 (case of a lease). In Illinois, sale of her homestead by the widow is not abandonment. Plummer v. White, 101 Ill. 474.

[3] Watkins v. Davis, 61 Tex. 414.

[4] Griffin v. Johnson, 37 Mich. 87.

[5] *In re* Worcester's Estate, 60 Vt. 420; Goodenough v. Fellows, 53 Vt. 108; Probate Court v. Winch, 57 Vt. 282; Lamb v. Mason, 50 Vt. 345; Deverest v. Fairbanks, 50 Vt. 700; Day v. Adams, 42 Vt. 516. In Vermont, an administrator, with the consent of the guardian, may have possession of the homestead in which a ward has an interest. Farr v. Putnam, 60 Vt. 54.

to test the title. If she was sole owner, she conveyed by the deed; if partner in community with the children, the deed conveyed her interest, and the purchaser obtained equal title and possessory right with the children.[1]

§ 8. Money or Realty in Lieu of Homestead.

Under a statute providing that a widow may have life estate in a homestead not exceeding a thousand dollars in value, out of her husband's estate, if occupied by her, but which makes no provision for the sale of it for her benefit even when it is a part of other property and the whole is indivisible,[2] it was held that she is entitled to this homestead though she may own other real estate in her own right; that property deeded to her by her husband cannot be estimated in fixing the value of her homestead out of the realty of which he died possessed so as to lessen her allowance; that at her instance, sale of the homestead with other inseparable realty was rightly made, without express statutory warrant, as there was no objection by any interested party; but that she was not absolutely entitled to a thousand dollars of the proceeds — only to the interest or usufruct of it during her life. The fact that she had moved away from the homestead to her own property, leaving the former with a tenant, was not treated as abandonment, as she subsequently returned to it.

Regarding the sale the court said: "It is true the homestead is only for the use of the widow so long as she occupies it, and no express provision is made for the sale of it for her benefit. And, on the other hand, if it is not divisible, however valuable, the law makes no provision for the sale of it, except subject to her right of occupancy, even for the payment of debts against the estate of her deceased husband. If, therefore, the strict letter of the law is adhered to, cases of extreme hardship to creditors and heirs, as well as to the widow, may arise, requiring relief by courts of equity. . . . [The heirs at law] having consented to a judgment for the sale which the court had no authority to render without, [they] cannot be heard in this court to object to the payment to [the widow] the value of her homestead exemption out of the

[1] Grothaus v. De Lopez, 57 Tex. 670. §§ 9–14. *See* Gen. Stat. 1888, pp. 574–
[2] Gen. Stat. Ky., ch. 38, art. 13, 578.

money arising from the sale," to which she would have the use for life, as above stated, upon giving bond, with security, for the principal.[1]

Bond and security are not necessary, however, when there is no one to whom the principal will descend at her death. An act "to provide a homestead for the widow and children of deceased persons," [2] which was a charitable provision for necessitous widows and orphans (in this respect unlike the statute above considered), gave the widow only the usufruct of a thousand dollars' worth of realty or its equivalent in money. Nothing was said about her giving security, but the courts required it so as to make the act conform to statutes *in pari materia*,[3] which supported the general rule that usufructuaries must give security. But, the object of the rule being the protection of those entitled to the remainder on the termination of the life tenure, it manifestly should not be invoked when there are no persons to be secured. A widow, being placed on the tableau of the administrator of her husband's estate as a creditor for a thousand dollars, under the above entitled act, and being required to give security, filed her opposition and claimed the amount free from the requirement. There were no minor children by a previous marriage of her late husband to whom the money would have gone on the cessation of the usufruct. Major heirs of the deceased had no ultimate rights to the money, under the act. The provision is a charitable one, and the act does not contemplate its return to the estate or succession, after the death of the widow. The act gives it to the widow and minor children; the usufruct to her and the ownership to them. If they are *non est*, it is held that she alone takes. Deciding upon the opposition above mentioned, the court said: "In the instant case there is no one to whom the money descends, and as the law, in its humane provisions, intended to provide for the destitute out of the fund of the succession, it is not unreasonable to interpret it to mean that when it provided for the widow and the minor, that its intention was that in the absence of the minors it should go to the widow to enjoy the

[1] Sansberry v. Simms, 79 Ky. 527; Phipps v. Acton, 12 Bush, 377; Hansford v. Holdam, 14 Bush, 210.

[2] La. Rev. Stat., § 2885.

[3] Suc. of Tassin, 12 La. Ann. 885.

whole amount. But as there is no one to whom the amount descends, it would be an idle thing for the widow to give security for its return to an imaginary claimant who can never appear."[1]

It is not usual to bestow the homestead privilege on widows only in case of their need; but there is an exceptional limitation of that kind, by which widows who have property, in their own right, sufficient to support them, are denied homestead provision from their deceased husbands' estates.[2]

When an allowance, instead of homestead, had been made for a widow, and she had claimed a balance of it twenty-five years after, her demand was rejected as that of a stale claim. An agreement by which she had consented to appropriate assets in her hands in lieu of the allowance was pleaded in opposition to her claim; and the court held it a good defense.[3]

In a partition, if the widow's homestead cannot be set off so that she can enjoy it or its usufruct for life; and she is paid in money instead of land, she is not entitled to receive the value of the homestead, but only the value of her right in it. That is to say, if a thousand dollars' worth of realty is exempt, the life interest in it should be ascertained and paid to her, or the whole sum should be invested, and the interest or income of it should be paid to her during her life-time.[4]

§ 9. In General.

A widow's petition for allotment of homestead may be contested by any one setting up an adverse interest. The object of the petition is to have her homestead set apart from the realty that is subject to administration. No title is involved. A mortgagee cannot appear in the contest to have the rank and validity of his mortgage adjudicated against the widow's claim. He cannot do it either in the probate or in the circuit court.[5] If a widow die without claiming homestead in her

[1] Welsh v. Welsh, 41 La. Ann. 717. *See* Corner v. Bourg, 26 La. Ann. 615.

[2] This rule in Louisiana. Succession of Marc, 29 La. Ann. 41; Succession of Cottingham, 29 La. Ann. 669; Bryant v. Lyons, 29 La. Ann. 64; Succession of Drum, 26 La. Ann. 539; Succession of Cooley, 26 La. Ann. 166; Succession of Robertson, 28 La. Ann. 832; Murphy v. Rulh, 24 La. Ann. 74.

[3] Tiebout v. Millican, 61 Tex. 514.

[4] Stunz v. Stunz, 131 Ill. 210.

[5] Coffey v. Joseph, 74 Ala. 271; Ala. Code, § 2841.

husband's estate, her executor cannot claim it for her.[1] She must claim personally and within reasonable time.[2] In a state where the quantitative limitation had been extended from eighty to one hundred and twenty acres, it was held that the widow must make selection of the allowed portion when the home property that had been occupied by her husband was in excess of the limit, if she would save her homestead from a debt of her husband contracted before the change in the law.[3]

In an application of the widow of a homestead holder to have it allotted to her, the title by which her husband held is not drawn in question, nor is the indebtedness of the estate any obstacle.[4] If she ask for other lands in lieu of the homestead after they have been decreed to be sold for the decedent's debts, it is held questionable whether she would be too late.[5] The law governing when her husband died fixes the widow's homestead rights.[6] As to debts, the law governing when they were contracted must determine whether the homestead is exempt from them when it has passed to the widow. Exemption can be claimed only in realty in which the deceased had any interest that might be applied by the administrator to the payment of his debts, if not exempt.[7] Liens, or property debts, or any liabilities of the homestead existing during the life-time of the husband-owner, are not canceled or removed by the descent of the homestead to his widow and children, who can take no greater estate than he had when he died. The homestead continues subject to all its former liabilities.[8] It must ever be borne in mind that

[1] Machemer's Estate, 140 Pa. St. 544.

[2] Burke v. Gleason, 46 Pa. St. 297.

[3] Clancy v. Stephens, 92 Ala. 577. It is added that if the widow be insane she cannot make the selection.

[4] Cox v. Bridges, 84 Ala. 553; Coffey v. Joseph, 74 Ala. 271.

[5] Seals v. Pheiffer, 84 Ala. 359. (*See* same parties, 77 Ala. 278.) Toenes v. Moog, 78 Ala. 558; Randolph v. Little, 62 Ala. 396.

[6] Burgess v. Bowles, 99 Mo. 543. So a widow, whose husband died in 1872, took the estate owned by her deceased husband in the homestead. Register v. Hensley, 70 Mo. 189; Davidson v. Davis, 86 Mo. 440; Daudt v. Musick, 9 Mo. App. 169; Skouteu v. Wood, 57 Mo. 380; Rottenberry v. Pipes, 53 Ala. 447; Taylor v. Taylor, 53 Ala. 135; Taylor v. Pettus, 52 Ala. 287; Sluder v. Rogers, 64 N. C. 289.

[7] Bolling v. Jones, 67 Ala. 508.

[8] McAllister v. White (Vt.), 22 A. 602. Ross, J.: "Upon the agreed case the debt due from the estate to

homestead exemption has bearing only on the personal debts of the property-owner, and not upon his property debts; that is, not upon those which may be enforced specifically against the property itself. It is the personal debts, contracted after

M. B. Hall was contracted before the intestate purchased the claimed homestead. It is conceded that Mr. Hall would have had the right to take the claimed homestead to satisfy his debt at any time during the life of the intestate. But it is contended that the right expired with the death of the intestate, and that his widow, the appellant, has the right to the homestead against the debt of Mr. Hall. This is the only question for consideration. A homestead exemption was first given in 1850. Comp. St., p. 390, § 4. This section read: 'If any such housekeeper or head of a family shall decease leaving a widow, his homestead, of the value aforesaid, shall wholly pass to his widow and children, if any there be, in due course of descent, without being subject to the payment of the debts of the deceased, unless made specially chargeable thereon,' etc. Another section of the act made the homestead subject to attachment and execution upon all contracts, matters and causes of action which might accrue previous to or at the time of acquiring the homestead. Under this act the question arose in regard to the meaning of 'without being subject to the payment of the debts of the deceased, unless made specially chargeable thereon.' It was held in Simonds v. Estate of Bowers, 28 Vt. 354, decided in 1856, Bennett, J., delivering the opinion, and in Perrin v. Sargeant, 33 Vt. 84, decided in 1860, Poland, J., delivering the opinion, that the homestead of a deceased person was holden and liable for the same debts which it was before his decease. Various changes were made in reference to the interest of the children in such homestead, but with reference to the debts for the payment of which it could be taken the statute remained unchanged until the General Statutes took effect in 1863. The phraseology of section 4 of the act of 1850, last quoted, was then changed so that it read: 'Without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime; and such widow and children respectively shall take the same estate therein of which the deceased died seised,' etc. This is the language of the law now in force on this branch of the subject. R. L., § 1898. The appellant contends that this change in the language of the statute manifests an intention on the part of the legislature to change the law upon this subject, and that 'legally charged thereon in his lifetime' means that the creditor who has the right to take the homestead in satisfaction of his debt during the life of the husband must during that time do some act legally to take it in such satisfaction, and, if the creditor fails to perform such act before the decease of the husband, the widow takes the homestead freed from liability to pay his debt. The appellant urges that force should be given to the clause 'in her life-time;' that at the decease of the husband all right to charge the debt upon the homestead ceases. It is apparent that at his decease, under the act of 1850, all right to make the debt specially chargeable ceased. The language there used, 'made specially charge-

notice to the creditor that the homestead is not to stand as security, which are affected by the statutory exemption. And the homestead, descending to the widow and heirs in the same condition in which the former owner held it, remains liable for liens (property debts), but free from the merely personal debts of the decedent which were contracted after notice to creditors.

A purchaser of title warranted, subsequently evicted by the holder of a paramount title, is the creditor of the vendor for the price paid, and may recover it with damages from the date of purchase; and he is not to be hindered by the intervention of the vendor's widow's homestead claim. A statute favoring her, passed after the date of the deed, but before the purchaser's eviction, will not avail her.[1]

The monetary limit of the homestead having been reduced

able,' apparently imported that the creditor had done or should do something in the direction of making the homestead holden for the payment of his debt before the homestead vested in the widow and children. The language, 'legally charged' and 'made specially chargeable,' are of quite similar legal import or signification. Both clauses are to be read keeping in view both the language which precedes and follows. Both clauses are preceded by the statement that the homestead shall vest 'without being subject to the payment of the debts of the deceased.' This refers to a payment to be made after the decease of the husband. The clause commencing with 'unless' states what debts it may be taken in payment of. 'Unless' here is the equivalent of 'except.' The decisions in 28 Vt. and 33 Vt. hold that the language of the act of 1850 means no more than that the homestead should remain liable for the payment of the same debts after it descended to the widow and children that it was liable for when the title stood in the husband. We think the change in the phraseology of this provision in the General Laws of 1863 did not intend to change the settled law on this subject. It is followed by the declaration that the widow and children shall take the same estate of which the deceased died seised. The deceased died seised of the homestead premises, subject to the right of Mr. Hall to take them in payment of his debt. This language, while it may also have reference to the particular estate, either legal or equitable, held by the husband, has reference to the extent to which it shall be free from the payment of his debts; for that was the subject-matter under consideration. The change in the language used, in reference to this subject, in Gen. St. 1863, does not, to our minds, manifest any clear intention of the legislature to change the law. The judgment is reversed, and judgment rendered, with costs, that the defendant is not entitled to a homestead in the premises against the debt due Mr. Hall. Judgment ordered to be certified in the probate court."

[1] Corr v. Shackelford, 68 Ala. 241.

by a new constitution to one thousand dollars of realty, a widow applied for one of double that value, as was permissible under the old constitution. Under a saving clause of the new instrument, and under the circumstances of the case which brought her within it, she was allowed two thousand dollars of realty.[1]

A widow was deemed both a beneficiary and a *quasi*-trustee when she had applied for homestead for herself and minors, to be set apart out of the estate of the deceased husband and father: so the homestead estate was not extinguished by the minors becoming of age, but continued during her widowhood.[2]

By some provisions, the husband's homestead passes intact to his widow and minor children at his death, to be for their benefit during the time of its further exemption,[3] and is not allotted out of his estate in general, unless that is good reason for assigning other realty to the widow in lieu of it.[4] Where her homestead is derived only from the husband's, she cannot have one created out of his general real estate when he has died without having created one.[5] As against his heirs, she is entitled to none, unless she claimed one as his wife during his life-time, though he died without children and without debts.[6] But the contrary rule has authority to support it, and perhaps equal reason: The failure of a husband to have a homestead allotted is no detriment to his widow's right to have it done, when she has none of her own.[7] However, it has been held, under constitutional provision, that this is only when her husband has left no children.[8] A widower with children can

[1] Gerding v. Beall, 63 Ga. 561; Georgia Constitutions of 1868 and 1877.

[2] Groover v. Brown, 69 Ga. 60.

[3] Hendrix v. Hendrix, 46 Tex. 8; Rogers v. Ragland, 42 Tex. 444; Sossaman v. Powell, 21 Tex. 665.

[4] McAllister v. Farley, 39 Tex. 561. *Compare* Ragland v. Rogers, 34 Tex. 622; overruled in 42 Tex. 444; Mabry v. Harrison, 44 Tex. 286.

[5] Johnson v. Turner, 29 Ark. 280; Hoback v. Hoback, 33 Ark. 399. In Arkansas, if there are no children, and the estate is worth no more than $300, the whole vests absolutely in the widow. Const. of Ark., ix, 6; Mansf. Dig., § 3; Sansom v. Harrell, 51 Ark. 429.

[6] Helm v. Helm's Adm'r, 30 Gratt. 404, *distinguishing* Hatorff v. Wellford, 27 Gratt. 356; Kemp v. Kemp, 42 Ga. 523. *See* Hager v. Nixon, 69 N. C. 108.

[7] Smith v. McDonald, 95 N. C. 163; Branch, *Ex parte*, 72 N. C. 106.

[8] Saylor v. Powell, 90 N. C. 202; Wharton v. Leggett, 80 N. C. 169;

create and retain homestead only while they are minors;[1] but this is not a general rule as to retention.

The homestead benefit accorded to a widow is not a charity bestowed only upon the needy, in most of the states. Whatever her wealth in her own right, the law gives her homestead in her deceased husband's estate, to be hers so long as she may occupy it personally, or (in some states) merely possess it by an agent or a tenant; and property given to her by her husband before his death, or acquired by her from any source, does not affect her right to homestead.[2] She cannot have homestead out of land derived from her husband, if she already has one in her own right. But the fact that she owns land in her own right does not interfere.[3]

Children, permanently residing in another state from that in which their mother claims homestead as the head of a family, are not deemed to compose her family in the sense of a household entitled to the homestead protection.[4] Children, however, are not everywhere essential accompaniments to a widow's application.[5] They may be impediments.[6] The adoption of a child has been held to give her no additional right.[7] She, when living without a family, does not continue to enjoy the exemption privilege as the head of a household which no longer exists. She is thus privileged in another capacity.

Const. N. C., art. 10, sec. 5; Acts of 1877, ch. 253. Declared contrary to constitution. Wharton v. Taylor, 88 N. C. 230.

[1] Santa Cruz Bank v. Cooper, 56 Cal. 339.

[2] Sansberry v. Simms' Adm'x, 79 Ky. 527. But in Louisiana the widow's need is the occasion of assigning her homestead out of her husband's estate.

[3] In South Carolina, after the widow is admitted to be entitled to both homestead and dower, she cannot be denied the latter because she owns land in her own right. Jefferies v. Allen, 29 S. C. 501; Hosford v. Wynn, 22 S. C. 311; Bradley v. Rodelsperger, 17 S. C. 11; Moore v. Parker, 13 S. C. 489. In New Hampshire, a married woman is entitled to homestead in her husband's estate but not in her own. So, there (Gove v. Campbell, 62 N. H. 401), if a husband without valuable consideration pays part of the price of real estate conveyed to his wife without fraud on her part, his creditors can levy only on his interest subject to the wife's homestead right in it. *Ib.* The widow's dower and homestead estate are included in half of the real estate of her husband which she takes with fee-simple title. Gen. Stat., ch. 183, § 8; Burt v. Randlett, 59 N. H. 130.

[4] Rock v. Haas, 110 Ill. 528.

[5] Estate of Walley, 11 Nev. 260; Moore v. Parker, 13 S. C. 486.

[6] Saylor v. Powell, 90 N. C. 202.

[7] *Re* Lambson, 2 Hughes, 233.

The homestead of her husband does not devolve upon her as the head of the family, but as his widow *eo nomine*.[1]

The widow and children of a debtor owing more than his estate is worth take the estate subject to the liens and equities existing against it. Her declaration of homestead for herself, and as the guardian of the children, does not relieve any part of the estate from liability for debts contracted by the husband and due from him.[2]

[1] Guthman v. Guthman, 18 Neb. 76; Neb. Com. Stat., ch. 36, § 17.

[2] Reinhardt v. Reinhardt, 21 W. Va. 98, 106; Speidel v. Schlosser, 13 W. Va. 686; W. Va. Acts, 1872–3, ch. 193, § 10.

CHAPTER XXI.

THE CHILDREN'S HOMESTEAD.

§ 1. The Nature of the Benefit.
2. Selection after the Father's Death.
3. Minors as Litigants.
§ 4. Rents and Profits.
5. Relative to Indebtedness.
6. Necessitous Children.
7. Partition.

§ 1. The Nature of the Benefit.

The minor children are beneficiaries of the homestead provision for them; they are vitally interested in it; but they have no independent rights while their parents live. Their parents may dispose of the homestead at pleasure, may sell it, incumber it or abandon it. Their father, when he is the sole owner, may make any disposition of it after the death of their mother. Their widowed mother has the same right when she is the sole owner. Were the law to give minor children any adverse interest to be asserted against their parents who own the property, it would tend rather to the disruption of families than to their conservation, and thus defeat the very purpose of homestead legislation.

Effect of the father's death: When the children become orphans, the effect of granting them direct homestead protection tends rather to the preservation of the family than otherwise. As heirs of the home property, they share alike with their adult co-heirs: but, as beneficiaries of the homestead provision, they have what resembles an estate for years, which is inalienable by them or by creditors. The purpose, and generally the effect, of conferring this benefit upon them, is to preserve the family, keep its members together, and thus promote the welfare of society and the state. Before the death of the father, this purpose was better served by giving the children no independent rights: now it is advanced by the bestowal of such rights upon them.

The homestead privilege of the father does not necessarily descend to his children. His title to the property is inherited by his heirs, both minor and major, while the exemption priv-

ilege and *quasi*-estate for years of the minor heirs is grafted on the fee by statute,[1] with the assent of the owner by dedication. The orphans under age do not lose the benefit, which they enjoyed with their father, by reason of his death,[2] though they may inherit from him no more property right than the adult heirs receive. May they have the benefit of home protection during minority when they have no heirship in the decedent's estate? Some statutes confer the benefit so broadly as to include step-children when the legally-owning family head is *in loco parentis* to them.[3] Adopted children may enable an owner, who is without other family members, to claim homestead protection,[4] but it cannot be laid down as a rule that minor members of a decedent's late family, who are not his heirs, are entitled to homestead protection during their minority, to the postponement of partition among the adult legal heirs. It is certain that when the parental relation does not exist either naturally or by adoption, minor children cannot have homestead set apart to them, from the estate of decedent, simply because they have lived with him.[5]

The mother's control: Upon the death of the father the mother succeeds to the headship of the family; but since the "estate" of the minor children has vested, she cannot dispose of their interest derived from their father, or of their right of occupancy bestowed by law with his assent. She cannot dispose of their homestead property; she cannot sell or incumber it;[6] she can neither waive nor abandon it.[7] Should she attempt to convey their home by deed to a purchaser, they may maintain their occupancy against the grantee.[8] They may eject a purchaser who has come into possession, though he bought on the foreclosure of a mortgage given by the widow.[9] They, having inherited their home property from

[1] Shannon v. Gray, 59 Tex. 251; Johnson v. Taylor, 43 Tex. 121.

[2] Hubbell v. Canaday, 58 Ill. 427; Pardee v. Lindley, 31 Ill. 187; *Re* Kennedy, 2 S. C. 227; *Ex parte* Strobel, 2 S. C. 309; Howze v. Howze, 2 S. C. 229.

[3] Capek v. Kropik, 129 Ill. 509.

[4] *Re* Sambson, 2 Hughes, 233.

[5] Estate of Romeo, 75 Cal. 379.

[6] Rhorer v. Brockhage, 86 Mo. 544 (same title, 15 Mo. App. 16, and 13 id. 397); Rogers v. Mayes, 84 Mo. 520; White v. Samuels, 54 Ga. 548.

[7] Showers v. Robinson, 43 Mich. 502; Roberts v. Ware, 80 Mo. 363; Wagner's Stat., p. 698, § 5.

[8] *Id.*

[9] Kockling v. Daniel, 82 Mo. 54.

their deceased father, and having had the home clothed by law with the exempt character, cannot be concluded by any act of their mother.[1] They owe her filial duty and must follow her when she removes from the homestead; but though she removes permanently, with the design of abandonment, they will not thus be bereft of their homestead protection.[2] That protection is vouchsafed to them till the end of their minority irrespective of the mother's right. She may have remarried and lost her exemption right in consequence, according to the law of some states; or she may have died and thus lost it — yet the rights of the minor beneficiaries will not be affected.[3] Conversely, the widow's right does not depend upon the continuance of the lives of the children.[4]

The mother, however, is the legal representative of her fatherless children, and as such she may conclude them in litigation when her interests and theirs are not adverse and she is the proper party to appear for all.[5] They may be concluded as privies, by her action, as they are when their father pleads his homestead in litigation;[6] but, as before remarked, she cannot conclude them by waiver, or by the relinquishment of her own rights, unless she owns the property in her own right and the dedication was by her, so that she has the position that a widower has over his own homestead property. But if the homestead was carved out of the father's property after his death, she cannot alienate it to the prejudice of the children.[7]

§ 2. Selection after the Father's Death.

If no selection has been made by the decedent, his widow and children should have it carved out of the real estate unless the whole is not in excess of the exemption quantity.[8] If their portion is laid out by appraisers, it should be shown by a report duly filed of record and passed upon by the court.[9]

[1] Miller v. Marckle, 27 Ill. 405.

[2] Watters v. The People, 21 Ill. 178; Harmon v. Bynum, 40 Tex. 324; Johnson v. Turner, 29 Ark. 280; Rogers v. Mayes, 84 Mo. 520.

[3] Loyd v. Loyd, 82 Ky. 521; Canole v. Hurt, 78 Mo. 649; Keyte v. Perry, 25 Mo. App. 394; Missouri Homestead Acts of 1865 and 1874.

[4] Gay v. Hanks, 81 Ky. 552.

[5] Burt v. Box, 36 Tex. 114.

[6] Tadlock v. Eccles, 20 Tex. 792.

[7] Roff v. Johnson, 40 Ga. 555.

[8] Jarrell v. Payne, 75 Ala. 577.

[9] Turnipseed v. Fitzpatrick, 75 Ala. 297.

Assignment to a widow and children may involve no question of execution and sale; yet if the decedent was involved in debt, and creditors aim to reach his real estate by execution, the appearance of regular assignment to the widow and children by record will become important.

If the widow and children take possession of a homestead and all the estate real and personal of the decedent, without administration, and the property exceeds, in value and extent, the exemption limit, they hold it as a trust for the payment of debts, which a creditor may reach by bill in equity.[1] When the legal title is in the trustee, it has been held that the statute of limitations runs against the minor *cestui que trust* in favor of a stranger.[2]

A widow filed her claim for homestead exemption within the statutory time after her husband's death. An appraisement was had, and the report duly filed though not marked "filed." It was held that a second appraisement three years afterwards was not too late, since the delay had not worked to the prejudice of any interested party.[3] Had the delay been attributable to her, and been productive of injury to others, the ruling would probably have been different.[4]

It is held in one state that, no homestead having been allotted to the decedent, and dower having been assigned to his widow, there can be no homestead set apart to the minor children from the rest of the estate.[5] But when homestead had been allotted to a widow by a justice of the peace, it was held by the supreme court that the rights of the decedent's children were not affected by it because they were without notice of the proceeding.[6]

[1] So held in Alabama. Cameron v. Cameron, 82 Ala. 392, *citing* Dunlap v. Newman, 47 Ala. 429; Adams v. Holcombe, 1 Harper Eq. 202; S. C., 14 Am. Dec. 719; Shannon v. Dillon, 8 B. Mon. 389; S. C., 48 Am. Dec. 394; 3 Pom. Eq., § 1154, p. 119.

[2] Williams v. Otey, 8 Humph. 569; Smiley v. Biffle, 2 Barr, 52.

[3] *In re* Williams' Estate (Pa.), 21 Atlan. 673.

[4] Kern's Appeal, 120 Pa. St. 523; Burk v. Gleason, 46 Pa. St. 297; Vandevort's Appeal, 43 Pa. St. 462.

[5] Graves v. Hines, 108 N. C. 262; 13 S. E. 15; Gregory v. Ellis, 86 N. C. 579; Watts v. Leggett, 66 N. C. 197; McAfee v. Bettis, 72 N. C. 28; Const. of N. C., art. 10, §§ 2, 3.

[6] Williams v. Whitaker (N. C.), 14 S. E. 924. In North Carolina, as to the law assigning dower to the widow and allotting homestead to minor heirs, *see* Graves v. Hines, 108 N. C.

Setting apart a homestead to the widow and minor children may not be necessary when the residence that was occupied by the husband and father is within the statutory limitations as to both extent and value. Such estate vests in them immediately upon his death.[1]

If action of commissioners is necessary, and application of the debtor is prevented by his death, the widow may claim the assignment of homestead, or the reservation of its value to the amount of the monetary limit.[2]

An allowance in lieu of homestead has been accorded to widows and minor children from the estates of husband-fathers who left no homestead distinct from their other realty.[3]

Necessary parties: The widow and children of a decedent are necessary parties to a proceeding for setting out homestead to them from his estate.[4] Whosever interest is to be affected is a necessary party.[5] But, whether minors should be made parties, in an application for leave to sell the homestead, may depend upon the question whether they are likely to suffer in their interests, if not made parties. If the mother is making application, and her interest is not adverse to theirs, she may be presumed to care for their rights.[6] But children whose homestead rights conflict with that of the widow should be made parties in any litigation affecting their interests, if they are to be concluded.[7]

Two debtors gave a deed of trust, on land which they owned jointly, to secure their debt. Afterwards, one bought the other's interest. Upon his death, his widow claimed home-

262. Affirms Watts v. Leggett, 66 N. C. 197; McAfee v. Bettis, 72 N. C. 28; Gregory v. Ellis, 86 N. C. 579. Aliens are not entitled to homestead in North Carolina. Burgwyn v. Hall, 108 N. C. 489.

[1] Rogers v. Marsh, 73 Mo. 64.

[2] Manning v. Dove, 10 Rich. 403.

[3] Terry v. Terry, 39 Tex. 310; Moore v. Owsley, 37 Tex. 603; Ross v. Smith, 44 Tex. 398.

[4] Murphy v. De France, 105 Mo. 53; 15 S. W. 949.

[5] Miller v. Schnebly (Mo.), 15 S. W. 435; Cloud v. Inhabitants, 86 Mo. 357.

[6] The children must be made parties, in Georgia, when the guardian or trustee applies for leave to sell the homestead. They need not be when the widow is the applicant. When the husband applies, the wife must join. Dayton v. Bell, 81 Ga. 370. When a claim for a homestead is filed by the head of a family, the beneficiaries are parties (King v. Skellie, 79 Ga. 149), though not formally so, necessarily.

[7] Griffie v. Macey, 58 Tex. 210.

stead in the land. She was allowed only to have right to her husband's interest at the date of the deed, and to improvements so far as they were made with her money. In an action to enforce the trust, the children of the deceased were necessary parties. The equal division of the property between the creditor and the widow, saving to her the benefit of her money put into the improvements, was considered just. If this was not practicable, she should be assigned the dwelling-house for herself and her husband's children with the part of the land on which it was situated, reserving their right to the subsequent adjustment of any inequality, while the rest of the land should be sold to satisfy the debt secured by the trust deed.[1]

§ 3. Minors as Litigants.

The head of the family is the one to bring suit to recover a homestead unless there are good reasons to show why another has become the plaintiff for such purpose. Though others be beneficiaries, they should not usurp the position of their head without any reason assigned.[2] A widow and children were allowed to proceed by bill to have themselves subrogated to the rights of the deceased husband and father who had died pending his application for homestead, and during litigation between him and purchasers at a judicial sale which had taken place after his application. The bill was to have them subrogated, to enforce their rights to the homestead and to compel the purchasers to account for rents and profits.[3]

[1] *Id.*

[2] In Georgia the statute (1876) governs. Shattles v. Melton, 65 Ga. 464; Zellers v. Beckman, 64 Ga. 747. The head of the family need not name the members of it in his pleading. Horton v. Summers, 62 Ga. 302. A stepmother may be the head of the family on the death of her husband while she cares for his children. Holloway v. Holloway, 86 Ga. 576. And so may an unmarried woman who supports an invalid sister residing with her, in South Carolina. Chamberlain v. Brown, 33 S. C. 597.

[3] Hodges v. Hightower, 68 Ga. 281. The delivery of a homestead after sale has been enjoined till the rights of minors have been ascertained. Colley v. Duncan, 47 Ga. 668. A widow, in Georgia, sold her homestead as the head of a family consisting of herself and her minor son. It had been regularly set apart to them out of the lands of her late husband, without objection on the part of the major heirs. She sold pursuant to judicial order, made under § 2025 of the Georgia Code. The purchaser was held to have obtained a title good against the heirs of age and their privies, who had no resort but against

A widow's possession of a homestead is sufficient title to enable her to sue for damages to the property;[1] and she may represent the children in their claim.

It is thought that a wife may sue to recover a homestead, for herself and her minor children, when it has been set apart as a homestead to her husband, and they have been dispossessed. The husband's being joined with them, as a party plaintiff, is not considered absolutely essential.[2]

The transfer of landed property, including an unselected homestead, by a husband without his wife's consent by signature, will not estop her from claiming the rights of herself and children, though a suit in ejectment, brought by a purchaser at execution sale, may have ousted the husband's grantee. Not being a party to the ejectment suit, she is not concluded by it, and may subsequently assert her right, and that of her children, to have a homestead carved out of the land to the value and quantity limited by law.[3]

No sale, under foreclosure of a mortgage given by a husband alone, can be had after his death without the prior assignment of homestead to the widow from the mortgaged realty which includes the home place.[4] She has been held not prejudiced by the act of her husband in leasing the homestead from a purchaser of it at a tax sale. She may plead the statute of limitations against the tax deed just as though the leasing had not taken place.[5]

the property in which the price had been invested. The purchaser acquired both the title of the estate and that of the beneficiaries. Fleetwood v. Lord, 87 Ga. 592; 13 S. E. 374. The widow retains life estate in use which her husband had held. Lowe v. Webb, 85 Ga. 731. In South Carolina, the court of common pleas will not entertain an original proceeding by a widow for homestead in her deceased husband's land. Scruggs v. Foot, 19 S. C. 274; *Ex parte* Lewie, 17 S. C. 153. But the fact that sale has been ordered will not prevent a widow, for herself and the minor children, from claiming homestead, when otherwise entitled to do so in the proper court. McMaster v. Arthur, 33 S. C. 512.

[1] Int. etc. R. Co. v. Timmermann, 61 Tex. 660; Tex. etc. R. Co. v. Levi, 59 Tex. 674. *Compare* May v. Slade, 24 Tex. 205, and Miller v. Brownson, 50 Tex. 592.

[2] Eve v. Cross, 76 Ga. 693; Braswell v. McDaniel, 74 Ga. 319; Glover v. Stamps, 73 Ga. 209.

[3] First Nat. Bank of C. v. Jacobs, 50 Mich. 340.

[4] Hall v. Harris, 113 Ill. 410.

[5] Beedle v. Cowley (Ia.), 52 N. W. 493.

§ 4. Rents and Profits.

Minor children do not forfeit their exemption right by moving from the homestead after such right has once vested in them. If they are occupants when the right accrues, they do not lose their benefit by going away from the homestead or by being taken away from it. They may even remove or be removed permanently without endangering their rights as beneficiaries.[1] They cannot waive their rights. Purchasers are deemed to have notice of such rights, and to buy at their peril. They are accountable for rents and profits from the homestead of a minor, purchased without right.[2] They cannot disturb the family's possession.[3]

A widow removed with her own children from the homestead. Her step-daughter's husband administered on the estate and collected the rents. After some years, the children who, with their mother, had left the premises as above stated, sued the administrator for their share of the rents, and recovered.[4] The renting of minor orphans' homestead by their guardian, who removes them to his own residence, does not operate the forfeiture of their exemption right.[5]

Where minor heirs have the right conferred upon them, by constitutional provision, to share with the widow of the decedent the rents and profits of the homestead, she cannot debar them from it on the plea that her dower has not been assigned.[6] There the children share equally with the widow while they are minors.[7]

Where homestead is expressly for the benefit of widows and minor children of householders,[8] a childless widow has life-estate in that of her late husband, not conditioned upon her occupancy of it. If he left children by a former wife, they share

[1] Farrow v. Farrow, 13 Lea, 120.

[2] Altheimer v. Davis, 37 Ark. 316.

[3] Gatton v. Tolley, 22 Kas. 678; Dayton v. Donart, 22 Kas. 256.

[4] Harmon v. Bynum, 40 Tex. 324.

[5] Brinkerhoff v. Everett, 38 Ill. 265; Shirack v. Shirack, 44 Kas. 653.

[6] Winters v. Davis, 51 Ark. 335; Const. Kas., ix, § 6; Mansfield's Dig., § 2588.

[7] Under these constitutional and statutory provisions, in Arkansas, the children have a vested interest in the rents and profits, during their minority, after the death of their father The widow's rights in the homestead cease by abandonment or by the acquisition of a home of her own. She cannot alienate it. Garibaldi v. Jones, 48 Ark. 230.

[8] Const. of Arkansas, art. IX, §§ 6, 10; Dig. of Stat., §§ 3590–1; Gainus v. Cannon, 42 Ark. 503.

the rents and profits with their step-mother during their minority but need not live upon the premises. In case of the widow's death while they are under age, they continue to enjoy the fruits of the property till they reach their majority.[1] A reason for giving non-occupant parentless minors the usufruct of the homestead is found in their want of the capacity of claiming or deciding upon their rights. Their guardian may apply the income to their benefit, and they would not lose any right by his not making a specific claim for them.[2] This reasoning would not apply to the widow.

§ 5. Relative to Indebtedness.

A statute, providing that the homestead shall vest in the widow and minor children of a deceased head of the family, free from his debts except those validly put upon it during his life; and that they shall succeed to the same estate which he had,[3] was construed to give the widow the homestead subject to no other debts of the late husband than those for which it was bound before his death. The question was whether a creditor whose claim antedated the purchase of the homestead, and who therefore could have made his money out of it during the husband's life, could do so after his death; that is, whether the right expired with his life. The question was settled in favor of the continuance of the creditor's right. The widow took subject to the debt.[4]

If the court has no authority to lay off a homestead, the right of a widow and children to one is not barred by its order to sell the lands of the decedent to pay his debts. Though they may have been parties to the proceeding in which the order is issued, they are not concluded by it, so far as their homestead rights are concerned, since it would be futile for them to assert what the court has no jurisdiction to grant.

Under such order, homestead should be set off to the widow and minor children before sale. An adjudication that the sale

[1] Klenk v. Knoble, 37 Ark. 298; Lindsay v. Norrill, 36 Ark. 545; Turner v. Vaughan, 33 Ark. 454; Johnston v. Turner, 29 Ark. 280.

[2] Booth v. Goodwin, 29 Ark. 633; Gould's Dig., ch. 68, § 30.

[3] Rev. Laws of Vt., § 1898.

[4] McAlister v. White, 13 Atlan. (Vt.) 602; Simonds v. Powers, 28 Vt. 354; Perrin v. Sargeant, 33 Vt. 84.

is subject to their right was held illegal, and the purchaser not bound to pay, by statute construction.[1]

Homestead property, descending to a widow and minor children, is not an asset of the decedent's estate to be subjected to administration.[2] Though the family residence of the deceased be liable to be taken in execution under a judgment against an heir who has inherited it as property, so that the purchaser at the judicial sale would get title, yet the possession of the widow who holds homestead right of occupancy cannot be disturbed.[3] The case would be different if an adult heir has established his own homestead on the inherited property so as to protect it from execution.[4]

Property that was homestead descends to adult heirs subject to creditors' claims against their ancestor, where the homestead provisions do not interfere.[5] So, after the rights of the widow and minor heirs have terminated, the homestead property, in the absence of any statutory inhibition, is liable for the debts of the deceased husband and father. Where the reversion may be sold to satisfy his debts before the termination of their right, the purchaser cannot get possession before.[6]

Minor children hold the homestead of their deceased father as co-tenants. When all become of age, the late homestead may be sold to pay their father's debts, where there is no absolute exemption. Sale before would be void. But any heir, being adult at the time of such previous sale, would have to wait till the youngest heir should become of age, before bringing action for possession against the purchaser under void title, as his right of entry does not accrue before.[7]

An act which provided that property exempted therein should descend to the widow of the decedent for herself and the

[1] McMaster v. Arthur, 33 S. C. 512; 12 S. E. 308; Gen. Stat. S. C., §§ 1994, 1997; Munro v. Jeter, 24 S. C. 29; *Ex parte* Lewie, 17 S. C. 153; Myers v. Ham, 20 S. C. 522. *See* Swandale v. Swandale, 25 S. C. 389; Bridgers v. Howell, 27 S. C. 425.

[2] Hanks v. Crosby, 64 Tex. 483; O'Docherty v. McGloin, 25 Tex. 72; Sossaman v. Powell, 21 Tex. 664.

[3] Harris v. Seinsheimer, 67 Tex. 356.

[4] Shay v. Wheeler, 69 Mich. 254.

[5] Jackson v. Bowles, 67 Mo. 609, in exposition of Gen. Stat. Mo., p. 450, § 5.

[6] Polan v. Vesper, 67 Mo. 727; Kaes v. Gross, 92 Mo. 647; Rhorer v. Brockhage, 13 Mo. App. 397.

[7] Kessinger v. Wilson, 53 Ark. 402 (Eng. Dig. Ark., ch. 99, § 6, inapplicable); Nichols v. Shearon, 49 Ark. 75; Kirksey v. Cole, 47 Ark. 504.

children was construed to make her and them co-tenants in the homestead; and it was held that their interest, during her widowhood, might be sold by order of the probate court, just as any other property derived from their father might be sold.[1] As the children owned the fee and the mother only an estate terminable by either her widowhood or her life, there was tenancy in common.

Absolute title: Where the title, taken by the widow and the minor children, is absolute, it cannot be divested by the probate court or affected by the claims of the deceased husband's creditors.[2] The indebtedness of his general estate does not everywhere make any difference as to whether such title be absolute or qualified.[3] The widow and minor take the homestead absolutely, in some states, when the decedent's estate is insolvent;[4] but she takes only a life tenure, and they an estate for years, when it is otherwise, since in the latter case the heirs inherit so that their title cannot be divested by law.

[1] **Morton v. McCanless,** 68 Miss. 810; 10 So. 72. Campbell., C. J.: "The only question in this case different from those decided in Morton v. Carroll, 68 Miss. 699, 9 South. Rep. 896, is as to the validity of an order of the probate court to sell what is alleged and proved to have been the exempt property of the father of the plaintiffs, held under the act entitled 'An act to amend the exemption laws of this state,' approved November 28, 1865 (Acts, p. 137). The children and their mother were co-tenants of this land, the mother having an interest terminable by her marriage or death, and the children having the fee. Hardin v. Osborne, 43 Miss. 532. The interest of the children was subject to sale as any other land owned by them. McCaleb v. Burnett, 55 Miss. 83; Code 1857, art. 151, p. 463. The whole object of the exemption law of 1865 was to preserve the property from creditors, and not to affect the power of the courts to deal with the property as that of the children and heirs of the exemptionist. In the probate court proceedings resulting in the sale of the lands sued for here, there was no mention of the land being homestead or exempt property. The contrary is rather suggested by treating the land as subject to the widow's dower, but the blundering ignorance on this subject did not affect the power of the court to deal with it, and fortunately the proceeding was so conducted as to result in a valid order of sale, whereby the wicked and shameful scheme which the then guardian now swears she had in view was effectually defeated. We are constrained to believe that her memory is at fault, and that she does great injustice to honorable counselors when she states that this scheme was with the knowledge and advice of her lawyers. The result in this case was right."

[2] Plate v. Koehler, 8 Mo. App. 396.

[3] Freund v. McCall, 73 Mo. 343.

[4] Hager v. Nixon, 69 N. C. 112; Allen v. Shields, 72 N. C. 506.

Exemption was held to have vested absolutely in the widow and minor children of an insolvent, though he had had no homestead set apart or dedicated or occupied. He lived in a rented house up to the date of his death. His real estate consisted of a store-house and lot, and it was assigned to his widow and children.[1] But when the estate of a widower was not reported insolvent till his son had finished his minority and the homestead right had thus expired, it did not vest absolutely by reason of the subsequent ascertainment of the insolvency.[2]

If the widow and minor children are left in possession, and continue to occupy the homestead of the husband and father who died intestate, they cannot be disturbed by distribution of the estate or sale to pay debts, where they hold the homestead by absolute title;[3] and if she remarry, one-half of that property is hers and the other belongs to the children.[4] The statute was construed to mean that if the widow remarry and yet continue to reside on the homestead, the exemption would still hold good notwithstanding partition between her and the children.[5]

Under another statute the homestead that was owned *in fee* by the deceased head of his family, his widow is entitled to occupy; and she does not forfeit the right by remarriage.[6] When both parents are dead, the right of occupancy continues in the minor children.[7]

§ 6. Necessitous Children.

Homestead laws are not for the benefit of orphans, as such, since they do not provide for all orphans. The parentless children among the abject poor have no part nor lot in the statutory provisions. Only the children of property-holders are interested. And they are beneficiaries whether they be orphans or not. If their parents have deserted them in a way that would not amount to an abandonment of the homestead,

[1] Hartsfield v. Harvoley, 71 Ala. 231; Ala. Code of 1876, §§ 2827, 2840.

[2] Baker v. Keith, 72 Ala. 121.

[3] Gen. Stat. of Kansas (1889), § 2593.

[4] *Id.*, § 2596.

[5] Brady v. Banta, 46 Kas. 131; 26 Pac. 441.

[6] Fore v. Fore's Est. (N. D.), 50 N. W. 712; Com. Laws of North Dakota. §§ 2450–1, 5778, 5781.

[7] § 5778.

the minor children remaining on it would be protected in its enjoyment.

The rule, that the children's homestead is given without regard to their necessities, is not without exception.[1]

Minority, not necessity, is generally the condition on which the children's homestead is conferred.[2] The whole homestead of the father vests in one minor child for the years of its minority if all the other children are adults.[3]

The children's homestead right is not extended beyond their minority because of their need. The imbecility of one of the children, of a mother who had been accorded homestead as the head of a family when her children were under age, was held to be not a sufficient reason for prolonging the homestead right beyond the minority of the imbecile child and the death of the mother. The malady, though contracted in childhood and after the granting of the homestead, did not have the effect of extending the duration of the homestead.[4]

§ 7. Partition.

Immediate partition of the homestead between the widow and minor children of the householder, upon his death, is not usually authorized. The contemplation of the legislator is that they should live together preserving the home which the policy of the law seeks to conserve and protect. It is subject to exceptions, but such contemplation extensively prevails. Partition is deferred till the children reach their majority. The remarriage of the widow terminates the commune and gives occasion for partition under some statutes. While she remains single and occupies the premises, she is entitled to her complete homestead privilege, even though the minor

[1] In Louisiana, minors must be "persons dependent" to become beneficiaries. Woods v. Perkins, 43 La. An. 347; Briant v. Lyons, 29 La. An. 64; Succession of Robertson, 28 La. An. 832; McCoy v. McCoy, 26 La. An. 686; Succession of Melançon, 25 La. An. 535; Burnett v. Walker, 23 La. An. 335; Succession of Norton, 18 La. An. 36; McCall v. McCall, 15 La. An. 527; Stewart v. Stewart, 13 La. An. 398; Const. of La., art. 219.

[2] Tate v. Goff (Ga.), 15 S. E. 30.

[3] Simpson v. Wallace, 83 N. C. 477; Wharton v. Leggett, 80 N. C. 169; Hager v. Nixon, 69 N. C. 108. By art. 10, § 5, Const. N. C. (1868), the widow was excluded from homestead if there were minor children.

[4] Neal v. Brockhan, 87 Ga. 130; 13 S. E. 283; Vanberg v. Owens (Ga.), 14 S. E. 562.

beneficiaries may have left their home.[1] But, when they were living permanently out of the state, she was denied homestead.[2]

When the homestead period has expired, the partition may take place between the remarried widow and the heirs now all adult, just as any other real estate of the decedent might be divided. The difference between partition of the latter and of homestead is that in one case it may be immediate upon the death of the owner, while in the other it is postponed.

When the minor children of a deceased homestead-holder have had their portion of the homestead assigned to them, and no objection to the partition and assignment was made by the widow at the time, and they have enjoyed possession for years, she cannot be heard to dispute their title. There is a case in which this was held, where the partition had been made on the application of the children's guardian without any objection being interposed. After they had been in the enjoyment of their portion for twelve years, the widow attacked their title in vain.[3]

The homestead is not usually partitioned between the widow and minor:[4] the policy of the law is to keep them together in the family home. This policy is such that in a partition suit, instituted by the adult heirs of a deceased mortgagor of a homestead occupied by his widow and minor heirs, the plaintiffs cannot compel foreclosure if the interest is promptly paid by the widow and the mortgagee does not desire that the mortgage be foreclosed.[5]

Whether adult heirs have the right of partition while there are minor heirs and a widow depends, of course, upon the statute of each state. Unless restrained by statute, they

[1] Hafer v. Hafer, 36 Kas. 524; Vandiver v. Vandiver, 20 Kas. 501; in exposition of Comp. Laws of 1879, ch. 33, § 5: "If the intestate left a widow and children, and the widow again marry, or when all of said children arrive at the age of majority, said homestead shall be divided, one-half in value to the widow and the other one-half to the children." And the statute declares the homestead to be the absolute property of the widow and children.

[2] Rock v. Haas, 110 Ill. 528.

[3] Crimmins v. Morrisey, 36 Kas. 447.

[4] Trotter v. Trotter, 31 Ark. 145; Nicholas v. Purczell, 21 Ia. 265.

[5] Hannah v. Hannah (Mo.), 19 S. W. 87.

would have such right as a general rule.[1] They are not accorded it, however, in all the states.[2] Wherever it is accorded, if the interest of the widow is adverse to that of the minor heirs, they must be represented by a guardian or other disinterested representative.[3] Adult heirs cannot have the homestead of the widow of an intestate partitioned as a part of the estate, when she is possessed in conformity to the law of the state, whether she has children of her own living with her or not.[4]

Insolvent estates: Under a constitutional provision giving to the surviving spouse the use of the homestead for life, and to the guardian of minor children such use as long as may be permitted by the court having jurisdiction,[5] there can be no partition of the property while so used, in order to give adult heirs their portion, though the law of descent is not otherwise affected. By the article of the constitution, above cited, which leaves even the homestead of an insolvent to descend like other property, subject to the suspense above indicated in favor of the surviving spouse and minor children, it is held not liable for the debts of the deceased family head. A statutory provision in contravention of this constitutional rule of descent is void so far, and only so far, as it contravenes the rule.[6] But this holding, that the homestead is not liable in the hands of adult heirs for the debts of the deceased householder, did not have the concurrence of the whole court. It was ably contended by the chief justice that the constitution does not warrant this doctrine, and that the statute assailed is not in contravention.[7]

[1] Kemp v. Kemp, 42 Ga. 523; Hager v. Nixon, 69 N. C. 108; Fight v. Holt, 80 Ill. 84; Spaulding's Appeal, 52 N. H. 336. (*See* Tidd v. Quinn, 52 N. H. 344, and Barney v. Leeds, 51 N. H. 253.)

[2] Nicholas v. Purczell, 21 Ia. 265; Heard v. Downer, 47 Ga. 631; Booth v. Goodwin, 29 Ark. 636; Day v. Adams, 42 Vt. 517; Sheehy v. Miles (Cal.), 28 Pac. 1046; Estate of James, 23 Cal. 415.

[3] Osborne v. Osborne, 76 Tex. 494; Hudgins v. Sansom, 72 Tex. 229, quoted and approved in Adair v. Hare, 73 Tex. 273.

[4] Yoe v. Hanvey, 25 S. C. 94; Moore v. Parker, 13 S. C. 486; Bradley v. Rodelsperger, 3 S. C. 227, and 17 S. C. 9. *Compare* Elliott v. Mackorell, 19 S. C. 242; *Ex parte* Ray, 20 S. C. 246; Chalmers v. Turnipseed, 21 S. C. 136; Act of 1873, 15 Stat. 371.

[5] Const. Texas, art. 16, § 52; Rev. Stat. of Texas, art. 1996, § 4.

[6] Zwernemann v. Von Rosenberg, 76 Tex. 522, and cases cited.

[7] Dissent by Stayton, C. J.; *Ib.*, p. 528, and many cases cited.

Again the question came up at the same term in which the last cited case was decided, and the deliverance was in accord; and again the chief justice dissented.[1]

A statute provides that in partition suits in case of sale, the court may order the sale of property in which one is entitled to claim an estate of homestead, if the person so entitled consent to have such property sold with the rest of the realty involved in the suit. The necessity of the sale of the latter must first have been found.

If a party to the partition suit is decreed to be entitled to an estate of homestead in the land to be divided, it must be set off by commissioners before the sale of the rest, when he has not consented to have it all sold together. A partition without such setting off would be illegal; and an order for it would be reversible error. The setting apart is imperative if it can be done without injury to the parties in interest.[2]

The homestead of an insolvent was set apart to his widow. Their adult daughter inherited the homestead (which had been community property of her parents), upon the death of her mother, with absolute title, exempt from the claims of creditors and not subject to administration. It was held that a statutory provision conferring the title of the homestead absolutely upon the widow and minor children is unconstitutional because divesting the rights of adult heirs.[3] The

[1] Childers v. Henderson, 76 Tex. 664.

[2] Cribben v. Cribben (Ill.), 27 N. E. 70; Ill. Rev. Stat., ch. 106, § 32.

[3] Lacy v. Lockett (Tex.), 17 S. W. 916; Const. of Texas, art. 16, § 52; Rev. Stat., arts. 1817, 1993, 2002, 2007; Zwernemann v. Von Rosenberg, 76 Tex. 522; Scott v. Cunningham, 60 Tex. 566; Rainey v. Chambers, 56 Tex. 20. Formerly the widow took in fee, in case of insolvency. Horn v. Arnold, 52 Tex. 161, under probate law of 1848; Reeves v. Petty, 44 Tex. 249; Green v. Crow, 17 Tex. 188. In the case of Lacy v. Lockett, *supra*, the court, after stating the facts at length, delivered the following opinion: We regard the question here presented as determined in accordance with appellants' contention by the decision of the supreme court in the case of Zwernemann v. Von Rosenberg, 76 Tex. 522, 13 S. W. Rep. 485, and that, therefore, the judgment rendered in favor of the administrator is incorrect, and ought to be reversed. Rev. St., arts. 1817, 2002. Under article 1817, the administrator is not entitled to the possession of the exempted property. The estate of N. H. Cook being insolvent, and the homestead having been "set apart," in accordance with the provisions of law in such case, by the county court to Mrs. Cook as the surviving widow and constituent of the family, she took the same unburdened with any debts of the husband, and free from the claims of his

doctrine enounced is that the rights of adult heirs cannot be divested; but that creditors have no right to look to the homestead, and therefore they are not injured by the grant of an absolute title to the widow and minor children. If there be

debtors. *Id.*, art. 2002; Childers v. Henderson, 76 Tex. 664, 13 S. W. Rep. 481. This exemption, under such circumstances, was a continuing and a permanent one, and "adhered to the land," not merely to the homestead right in the land. This results from the terms of the present statutes on the subject, and was the rule under former laws. Articles 1817, 1993, 2002, 2005, 2007; Zwernemann v. Von Rosenberg, *supra;* Scott v. Cunningham, 60 Tex. 566; Rainey v. Chambers, 56 Tex. 20; Reeves v. Petty, 44 Tex. 249; Horn v. Arnold, 52 Tex. 161; Green v. Crow, 17 Tex. 188. Article 2002 is unconstitutional only in so far as it attempts to vest the fee in the homestead in the widow, another surviving constituent of the family, absolutely, to the exclusion of the adult sons or married daughters, contrary to the mode of descent prescribed in the constitution. Case first cited, and article 16, § 52, Const. The balance of this provision of law is operative. *Id.* The remaining part, which does not conflict with the constitution, plainly declares that the homestead set apart to the widow and children, "as provided by law, and, when the estate proves to be insolvent," "shall not be taken for any debts of the estate," except for the purchase money thereof, taxes thereon, and for improvements. Article 2007. As construed in the opinion of the majority of the court in the foregoing case, this provision of law has the effect of removing the property set apart to the surviving wife from the assets of the estate of the decedent, and of permanently protecting the property from the claims of the creditors. Of course, if both husband and wife die, leaving no constituent of the family, the homestead could not be "set apart," but would be assets in the hands of the administrator for the payment of debts. Givens v. Hudson, 64 Tex. 471. Upon the death of N. H. Cook his wife and daughter inherited or took the title to the land composing the homestead in equal portions, and upon the decease of Mrs. Cook the title to the whole property (except that part already sold) vested in the appellant Mrs. Annie G. Lacy. As the exemption from forced sale continued from the time it was set apart to her mother, and as it was thereafter not liable for the debts of the deceased father, as we have seen, it follows that she inherited the property absolutely, and free from the claims of the creditors or the administrator. See, also, 76 Tex, 664, 13 S. W. Rep. 481, and Hoffman v. Hoffman, 79 Tex. 189, 14 S. W. Rep. 915, and 15 S. W. Rep. 471. These conclusions, we think, necessarily result from the opinion of the court in Zwernemann v. Von Rosenberg, *supra*, and we content ourselves, therefore, with resting the decision now made upon the authority of that case. See dissenting opinion of Chief Justice Stayton. This also determines the question in favor of Mrs. Anderson. The Bouldins were protected by the judgment below upon the ground that the purchase money paid by J. W. Bouldin was expended by Mrs. Cook in improving the land in dispute. No one complains of that on this appeal. We

anything inheritable, in the estate of a decedent, it seems clear that the heirs cannot constitutionally be cut off; but what is there for them in an insolvent estate? If any wrong is done by the enactment of the provision above mentioned, it was rather done to the creditors than to the heirs — one might say — if the principle were not well established that creditors who are notified before giving trust cannot look to the debtor's homestead as any part of the common pledge for the security of the debt. Under some statutes, the creditor's remedy is not denied, but merely postponed, so that when the minor children of a debtor had had homestead in their father's estate which was insufficient to pay his debts without it, the homestead was applied to the payment on the expiration of the children's right by reaching their majority.[1]

conclude that, as between appellee and the Bouldins, the judgment in their favor ought to be affirmed, but that as between appellants Mrs. Diana Anderson and Mrs. Annie G. Lacy and her husband and the appellee the judgment in her favor should be reversed, and here rendered in favor of the appellants, so that appellee shall take nothing by the suit, but that the appellants be dismissed with their costs, and that appellee, as administrator, etc., shall be adjudged to pay in due course of administration all costs of the district court and of this appeal.

PER CURIAM. Affirmed and reversed and remanded, as per report of the commission of appeals.

STAYTON, C. J. (*dissenting*). I do not concur in the opinion of this case, for the reasons given in dissenting opinion in Zwernemann v. Von Rosenberg, 76 Tex. 528, 13 S. W. Rep. 485.

[1] Taylor v. Thorn, 29 O. St. 569.

CHAPTER XXII.

ALLOTMENT TO THE DEBTOR.

§ 1. Statutory Provisions.
2. The Debtor's Application.
3. The Sheriff's Duty before Sale.
4. The Creditor's Contesting Affidavit.
5. Confirmation by the Court.
6. Costs Impairing Contract.

§ 1. Statutory Provisions.

When judgment has been rendered against a debtor entitled to homestead, and execution has been issued or is about to be issued against property in which his homestead interest lies, it becomes necessary to allot to him what the law allows him to hold exempt from execution. This is necessary,

1. When the property occupied by the debtor as his homestead is charged by the creditor to be in excess of the statutory limitation.

2. When no homestead has been declared, selected or dedicated by the debtor, so that his exemption right must be claimed by him and awarded by the court.

3. When the married debtor has mortgaged his homestead with other property connected therewith, without his wife's consent, so that, upon foreclosure of the mortgage, the liable portion must be separated from that which is exempt.

Application for the allotment is made by the party interested. The debtor is that party in states where his silence would be taken as assent to the execution; where he is required to claim his right, if he does not mean to forfeit it. Under such rule, it is usually allowable for his wife to claim in his stead, if he neglects or refuses to act. Even minor beneficiaries of exemption may claim through their guardian, under circumstances rendering such action necessary for the maintenance of their rights.

The tender solicitude of the legislator for the interests of wives and minor children, and his policy of conserving homes for the public welfare, cause the rule allowing their intervention to be liberally extended to them. And the widow of a

debtor who has died at the juncture when application was to be made, if made at all, may act in his stead. It is her place, not that of the executor or administrator, to apply for the allotment, when the homestead constitutes no part of the estate that is administrable by him. The debtor may make the application through an agent or attorney.

The creditor is the party to make application for allotment to the debtor where presumption is in favor of the latter as to the extent and value of the homestead occupied by him; and where the debtor would be guilty of no *laches*, and would forfeit no right, by failure to claim. If the law strikes the sale of a homestead with nullity when it is sold with liable property, without segregation, it is manifestly to the interest of the creditor to have the exempt portion set apart to the debtor, so that the liable portion may be validly subjected to execution.

The application should state the facts, name the parties, describe the property, and pray for appraisement and for the allotment of the homestead. If the debtor's wife be the applicant, she should aver her relation, and it is generally required that she declare that her husband has neglected or refused to apply, as the case may be. If a guardian is the applicant, he should aver his position and the circumstances justifying his appearance and application.

The most important allegations of the debtor (or of any one representing his and his family's interest) are the facts of ownership, occupancy, family headship and whatever the statute imposes as conditions to the right of homestead. And if the whole of the property occupied is claimed as exempt, the quantity and value ought to be asserted as not exceeding the statutory limit.

The appraisement is made by appraisers, commissioners or jurors, as they are differently called in different states. There are usually three or more. It is a provision not unusual that the plaintiff may nominate one; the defendant, another; and the sheriff, the third. The court appoints; in some states, the officer charged with the execution appoints the appraisers. When it is made his duty to set apart the statutory homestead to the debtor before or at the time of making his levy, he is aided in doing so by appraisers, usually those of

his own appointment, though two may be nominated by the parties. Some statutes require that appraisers shall be freeholders or householders.

The duty of the appraisers is not only to estimate the homestead but to ascertain whether it is susceptible of division if found in excess of the limit as to quantity or value.

The report must be reduced to writing, duly returned and filed in the record of the case. Either party may oppose it by the ordinary legal methods of opposition to awards of auditors and the like. If there is a statutory method prescribed, that should be observed. In some states, there are such. The following is a sample:

The creditor, as plaintiff in execution, may file an affidavit in the case, before the return of the writ, declaring that he verily believes the allotment made to the debtor by the persons appointed for the purpose "is not correct, and that the land so allotted, or some part of it, is liable to sale under his execution." Then a summons must be issued for the defendant, returnable to the next term of court. On its return, issue is made under the direction of the court, and tried "as in the case of the trial of the right of property levied on by execution or attachment and claimed by a third person; and if the issue be found for plaintiff, a *venditioni exponas* shall be issued for the sale of such of said land as may have been found liable to sale."[1]

On the other hand, a dissatisfied debtor-defendant may make affidavit of the incorrectness of the award to him, cause summons to be issued to the plaintiff, and have the matter judicially settled.[2]

If the report of the appraisers favors division, and is such as the court will adopt and act upon, the reservation of the exempt portion will be ordered, and the execution will operate upon the rest. If the report shows that the property is indivisible, yet excessive, the court will allow the whole to be sold, and will have the value of the homestead reserved for the debtor, out of the proceeds, in accordance with law. The sum thus reserved is exempt in the hands of the debtor for such period as the statute of the state prescribes: six months,

[1] Miss. Rev. Code, 1880, § 1253. *See* Miss. Code of 1892.

[2] *Ib.*, § 1254.

one year, or two years, as the limit may be; one year is the usual term.

If, at the offering at public auction, no bid exceeds the homestead limit of value, there can be no adjudication.

It is a provision not unusual that the debtor may save his indivisible and excessive homestead from execution by paying the excess into court for the use of the creditor. If the creditor gets out of the debtor all that he could make out of the property, justice is satisfied. Can this be done in the absence of such a provision? There is nothing to hinder the debtor from paying, but the release of the excess from execution would not attend the payment, without such provision, unless he should pay enough to satisfy the whole debt. For it is his duty to pay all, if he can; and his payment of a part would not relieve his property exceeding the homestead from liability to pay the balance of the debt.

Under such statutory provision is the excess, thus relieved by payment, liable to a second execution? Clearly. To a second by the same creditor? Yes; for it has not been rendered exempt as a part of the homestead. It has only been relieved from the first execution by statutory provision. Attacked again, it may be relieved again, under the same provision, by payment of so much of the debt as its execution would satisfy. Here is no hardship to the debtor. He has his exempt portion and is entitled to no more; and he is not made to pay for it twice, but to pay two different debts which he ought to pay.

On the other hand, by a provision not so common, the creditor may pay the value of the exempt portion of an indivisible and excessive homestead, into court for the use of the debtor, and then go on and have the whole property sold under his execution.

By a provision still less common, the homestead of a debtor, when it cannot be segregated from its excess without injury, is rented for the benefit of the creditor, who is paid the rental excessive of one hundred dollars per annum, in lieu of the proceeds of sale, if the debtor will agree. But if he will not, the homestead is sold at not less than its appraised value.[1]

[1] In Ohio, Giouque's Rev. Stat., § 5439. While in this state, one thousand dollars' worth of realty may be set off to the debtor (§ 5438), only five

§ 2. The Debtor's Application.

The debtor against whose realty execution is about to be directed may then claim homestead therein, if he has not already selected one and had it set apart to him. He may make his claim at any time before the order of sale has been granted.[1]

The proper time for a debtor to claim exemption is when the writ for execution goes into the officer's hands. It is not allowable for him to move upon premises afterwards and then claim them on the plea of occupancy.[2] If he is already in occupancy, and has his homestead rights established, he is not invariably required to make claim against an execution at that juncture, under penalty of forfeiting his right. In several states, he may make his application at any time before the sale. And, where his homestead rights are vested, they cannot be divested by the sale itself. He may, under certain circumstances, be presumed to have voluntarily relinquished his right by failure to assert it. As in ordinary cases, it has been held that the judgment lien attaches when the order of sale is made.[3]

An exemptionist cannot stand silent and see his homestead sold under a chancery decree in a case in which he is a party, and afterwards claim the property. He must claim his exemption right before sale, if he would do so effectually. If he stands silent and lets a bidder buy the property, he cannot plead the immunity of the property when that purchaser seeks

hundred dollars' worth may be saved to him when the homestead is sold to enforce liens (§ 5440). Persons entitled to homestead may take five hundred dollars' worth of personal property in place of it (§ 5440). How homestead of an insolvent debtor is exempted, see §§ 6348, 6351.

[1] Toenes v. Moog, 78 Ala. 558. In Alabama, the statutory method of claiming homestead by declaration and recordation is not exclusive. Failure to declare and file is not a waiver of the right, which may be set up against a levy or other process though not previously claimed in the way pointed out by statute; for the statute itself makes this reservation. Under various circumstances, the claim has its full effect though no formal declaration may have been recorded. Jarrell v. Payne, 75 Ala. 577; Zelnicker v. Brigham, 74 Ala. 598; Keel v. Larkin, 72 Ala. 493, *503;* Farley v. Riordon, 72 Ala. 128; Shirley v. Teal, 67 Ala. 449; Fellows v. Lewis, 65 Ala. 343; Randolph v. Little, 62 Ala. 396; Wilson v. Brown, 58 Ala. 62; McGuire v. Van Pelt, 55 Ala. 344.

[2] Freeman v. Stewart, 5 Biss. 19; Stat. of Wis., § 2983.

[3] Dickerson v. Carroll, 76 Ala. 377.

to eject him. He cannot attack the judgment collaterally. Even should he attack it directly, and get it reversed on appeal, "the reversal would not affect a title acquired under it while it was in force." [1]

The debtor is entitled to opportunity for selecting his homestead when execution is levied against his property.[2] The issue of the order of sale, when he has not had such opportunity, for any reason, ought not to fix the judgment lien irremovably upon all his real estate. The want of opportunity should be received by the court as good ground for vacating the order, on rule. The homestead right is not necessarily lost, even by sale without allotment; but failure to allot is not everywhere fatal to the sale.[3] But if there are objections to proceedings had in setting a homestead apart in view of an execution sale, they should be made before the execution of the judgment. They cannot be tolerated as a collateral attack upon the judgment.[4]

Though the debtor's failure to select homestead before execution may not be considered everywhere as a waiver of his privilege, he may be confined afterwards, in his selection, to the legal subdivision of land which includes his dwelling.[5]

When the debtor claimed too much, it was not held fatal, but the court could compel him to confine himself to the legal quantity, and could order the sale of the balance. The exempt portion should be adequately described. It is erroneous to describe the whole tract, less the homestead, without specification.[6]

Under a statute according exemption to a certain amount in case of execution pending, but providing for no dedication or recordation of homestead to families irrespective of indebtedness, the debtor is required to furnish a list of his property to the officer in charge of the execution, if he means to avail himself of the exemption. His wife may furnish it, and point

[1] Miller v. Sherry, 2 Wall. 237, 248, Swayne, J., case from Illinois.

[2] Shacklett v. Scott, 23 Mo. App. 322 (execution quashed for the failure of the sheriff to comply with statute — Rev. Stat. of Mo., §§ 2689, 2690); State v. Emmerson, 74 Mo. 607; Hombs v. Corbin, 20 Mo. App. 497; Vogler v. Montgomery, 54 Mo. 577; Lallement v. Poupeny, 15 Mo. App. 577.

[3] Crisp v. Crisp, 86 Mo. 630.

[4] Lallemont v. Detert, 96 Mo. 182.

[5] Martin v. Aultman, 80 Wis. 150.

[6] Hardy v. Sulzbacher, 62 Ala. 44.

out the property to be exempted as a homestead, if he be absent.[1]

A petition for homestead need not aver the acquisition and occupancy of the premises (sought to be set apart) before the debt arose against which the exemption is claimed, where the statute does not require such allegation. Where it does, either expressly or impliedly, the declarant should aver present occupancy and the nature of his possession.[2] An overestimate of the value of the property declared upon is not fatal, if the real value is within the monetary limit.[3]

Lost claim: After a general assignment by a debtor, he cannot move upon part of the property which he had never occupied as a home, and then successfully claim it as his homestead, in an attack upon the assignment made several months after its date. The creditor's rights relate to the time of the assignment, when there was no reservation of homestead.[4] Assignment, or conveyance to preferred creditors without reservation, will be treated as a general assignment, with its consequence — the loss of the homestead — where preferences are disallowed.[5]

Creditors, asserting that their debtor's land had been fraudulently conveyed, subjected it to execution. The debtor and the grantee afterwards sued to set the execution and sheriff's sale aside, and homestead right in the land was now set up — too late, the court said, since the property had been surrendered.[6]

In a suit to recover land, the defendant should claim his homestead in his pleadings if he wishes to retain his right to it.[7] It is too late to claim exemption after the law creating it has been repealed.[8]

[1] State v. Melogue, 9 Ind. 196; Austin v. Swank, 9 Ind. 109.

[2] Boreham v. Byrne, 83 Cal. 23.

[3] King v. Gotz, 70 Cal. 236.

[4] McCann v. Hill, 85 Ky. 574; Nichols v. Sennitt, 78 Ky. 630.

[5] As in Kentucky: Gideon v. Struve, 78 Ky. 134; Wing v. Haydon, 10 Bush, 280; Robbins v. Cookendorfer, 10 Bush, 631; Lisky v. Perry, 6 Bush, 515; Cantrill v. Risk, 7 Bush, 159.

[6] Snapp v. Snapp, 87 Ky. 554.

[7] Wilson v. Taylor, 98 N. C. 275; Hinson v. Adrian, 92 N. C. 121. *See* Hartman v. Spiers, 94 N. C. 150; Flora v. Robbins, 93 N. C. 38.

[8] Clark v. Snodgrass, 66 Ala. 233; Giddens v. Williamson, 65 Ala. 439; Jenkins v. Lovelace, 62 Ala. 271.

§ 3. The Sheriff's Duty before Sale.

The claim having been duly made, the sheriff cannot proceed with the execution until he shall have complied with the law requiring him to ascertain the value and extent of the property subjected to the levy.[1] If he should proceed without doing so, however, he would be liable to no damages in case the claim prove to be untenable.[2] For instance, if the deed declaring homestead was filed for record after judgment had been rendered against the declarant which was a lien on the property, a homestead claim by the defendant in execution would be of no avail as to that judgment; and no damages would accrue by reason of the sheriff's failure to regard the claim.[3] If the officer in charge of the execution should set off a homestead to a debtor whose claim was groundless, his return showing such action may be quashed upon motion.[4]

Whether the sheriff or other officer, charged with the duty of setting off the homestead, be liable to damages or not for neglecting to do so, his neglect may affect the validity of the subsequent proceedings when no discretion has been given him by statute. For, the law requiring the homestead to be marked out, platted and recorded, it is the duty of an officer in charge of an execution against the owner's property to have the marking, platting and recording done, if the owner has not done so already. His neglect to do so will invalidate the sale made without such compliance with the law.[5] But it will not prejudice the beneficiaries in their right.[6] Where by law the sheriff should cause the exempt part of property (which has been levied upon for debt) to be set apart to the debtor,[7] the debtor may compel him to do so;[8] and when segregation is impracticable, the debtor is entitled to the proceeds of the sale to the value of the legal homestead.[9]

[1] Vogler v. Montgomery, 54 Mo. 577; Shacklett v. Scott, 23 Mo. App. 322. *Compare* Casebolt v. Donaldson, 67 Mo. 308.

[2] Shindler v. Givens, 63 Mo. 394.

[3] *Ib.;* Lincoln v. Rowe, 64 Mo. 138; State v. Diveling, 66 Mo. 375.

[4] Creath v. Dale, 69 Mo. 41. *See* Straat v. Rinkle, 16 Mo. App. 115.

[5] Aultman v. Howe, 10 Neb. 8; Linscott v. Lamart, 46 Ia. 312; White v. Rowley, 46 Ia. 680.

[6] Gray v. Baird, 4 Lea, 212.

[7] Tucker v. Kenniston, 47 N. H. 267.

[8] Barney v. Leeds, 51 N. H. 253.

[9] Norris v. Moulton, 34 N. H. 392; Fogg v. Fogg, 40 N. H. 289; Bowman v. Smiley, 31 Pa. St. 225; Miller's Appeal, 16 Pa. St. 300; Dodson's Appeal, 25 Pa. St. 234; Line's Appeal, 2

Pending an execution, the sheriff caused a homestead to be set apart to the debtor, which was immediately found, by a jury, to exceed by one-third the constitutional limit of a thousand dollars. The realty, including the homestead, was then sold, and a thousand dollars reserved to the debtor out of the proceeds. But, on appeal, the sale was held erroneous. There should have been a re-allotment.[1] If the property was not susceptible of division so as to assign precisely property enough to give homestead to the limit prescribed, how would re-allotment be practicable?

It is the right of a debtor, when execution is to be levied upon his land, to have existing incumbrances taken into account when appraisers are locating the exempt portion to which he is entitled, for his homestead, and fixing its dimensions.[2]

To avail himself of this right, he should proceed by motion in the case giving rise to the execution. He cannot afterwards attack the apportionment in a collateral proceeding.[3] The setting apart by the appraisers can be done only when he has neglected to select the homestead himself.[4] After selection by appraisers has been confirmed and the cause closed, their action is final.[5]

If the valuation of the homestead (set apart for the debtor, preliminary to execution of his other property) is erroneous but not fraudulent, a creditor who participates in the proceeds of the sale of the other property cannot be heard afterwards to deny the validity of the sale on that account.[6] But the valuation is not conclusive upon the debtor and therefore he cannot quash the execution on the ground of erroneous valuation.[7] The report of the appraisers, pending execution,

Grant's Cas. (Pa.) 198. The Pennsylvania cases hold that the debtor must claim his rights, as otherwise he will forfeit them; but the claim is in time, even on the day of sale. Seibert's Appeal, 73 Pa. St. 361.

[1] Oakley v. Van Noppen, 96 N. C. 247; Campbell v. White, 95 N. C. 491.

[2] Rev. Stat. of Missouri (1889), §§ 5436-7; Russell v. Place, 94 U. S. 606.

[3] Meyer v. Nickerson, 101 Mo. 184.

[4] Same parties, 100 Mo. 599.

[5] Lallement v. Detert, 96 Mo. 182.

[6] Fenwick v. Wheatley, 23 Mo. App. 641; Rev. Stat. Mo., § 2698; Austin v. Loring, 63 Mo. 19; Slagel v. Murdock, 65 Mo. 522; Barney v. Leeds, 54 N. H. 128.

[7] Straat v. Rinkle, 16 Mo. App. 115; Mo. Rev. Stat., § 2698.

may be set aside in a direct proceeding.[1] It has been held that it cannot affect the rights of those entitled to exemption by statute, nor can its absence defeat the right.[2]

An order setting aside an appraisement and directing another does not exhaust the court's power to correct an erroneous assignment of homestead.[3] A new set of appraisers may be appointed; and it has been held that those suggested by one party may be selected by the court without notice to the other.[4] The report of appraisers may be set aside by a direct proceeding, as already stated; but it cannot be done on motion to quash when the statute points out a different way.[5] The court cannot vacate an appraisement unless the pleadings and the proof bring the case within the statute prescribing the procedure to set it aside and appoint new appraisers.[6]

An erroneous return of the sheriff, relative to the setting of a homestead apart, may be quashed on motion, when the exemption cannot be claimed legally against the judgment whence the execution was issued.[7] After the debtor has claimed, the sheriff cannot proceed upon the execution before having the property appraised to see whether there is anything non-exempt to be sold.[8] But, failing to claim homestead in the land against which the execution is levied, the debtor has been held not entitled to claim any part of the proceeds of sale, under a statute which authorized homestead in realty but not in its proceeds.[9]

When there is no just ground for a homestead claim, the sheriff's disregard of the debtor's application will not vitiate the sale.[10] And if there is just ground, and the claim be disregarded by him, the sale is not necessarily void, since the court, in a suit on that ground to eject the purchaser, may cause homestead to be assigned to the complainant.[11]

Claiming homestead is the proper remedy for contesting a levy and sale made under an insufficient affidavit of the attor-

[1] Schæffer v. Beldsmeier, 9 Mo. App. 438.

[2] Hill v. Johnston, 29 Pa. St. 362; Peddle v. Hollinshead, 9 Serg. & R. 277.

[3] Kercher v. Singletary, 15 S. C. 535.

[4] *Ex parte* Ellis, 20 S. C. 344.

[5] Straat v. Rinkle, 16 Mo. App. 115.

[6] Fenwick v. Wheatley, 23 Mo. App. 641.

[7] Creath v. Dale, 69 Mo. 41.

[8] Vogler v. Montgomery, 54 Mo. 578; Shacklett v. Scott, 23 Mo. App. 322.

[9] Casebolt v. Donaldson, 67 Mo. 308.

[10] Shindler v. Gibbons, 63 Mo. 394.

[11] Crisp v. Crisp, 86 Mo. 630.

ney directing the execution.[1] Neglect to point out the property which the debtor claims as his homestead, or refusal on his part to select any, will preclude him from being entitled to notice of his right by the sheriff, and deprive him of ground for quashing the levy for lack of notice.[2]

If a homestead increase in value beyond the statutory limit, it may be appraised, re-assigned, and the excess exposed to creditors; if it decrease, the owner may petition for a re-valuation and have an addition to reach the statutory limit.[3] A petition for appraisement may be passed upon without issue formally joined thereon.[4]

Distinction has been drawn between the levy of an execution after judgment, and that of attachment (which is a preliminary levy of execution, if the attachment be sustained on trial), in regard to the officer's duty to set apart a homestead for the debtor.[5] When the contingent lien, created by attaching, has been matured to a perfect lien by judgment, so that the property liable may be sold under a *venditioni exponas*, the court may then separate the exempt portion from that which has been subjected to the attachment lien.[6]

The quantity and value may be ascertained by appraisers,

[1] Brantley v. Stephens, 77 Ga. 467.

[2] Meyer v. Nickerson, 100 Mo. 599.

[3] Beckner v. Rule, 91 Mo. 62; Stubblefield v. Graves, 50 Ill. 110; Walters v. People, 21 Ill. 178; Estate of Delaney, 37 Cal. 180; McDonald v. Badger, 23 Cal. 393. *Contra:* Richards v. Nelms, 38 Tex. 447; Walker v. Darst, 31 Tex. 686.

[4] By the California Civil Code, there is no authorization for demurring to or answering a petition for the appraisement of a homestead. When a copy has been served on the claimant of the homestead two days before the hearing, proof of notice and of the facts alleged by the petitioner may be made, and the appraisers appointed. The claimant may oppose but should not file pleadings. Final hearing is upon the report of the appraisers, as to the value and divisibility of the homestead property. Stone v. McCann, 79 Cal. 460.

[5] State v. Mason, 15 Mo. App. 141, in exposition of Mo. Rev. Stat., §§ 2689 to 2692, held that the sheriff is not authorized to set homestead apart on attaching. State v. Shacklett, 37 Mo. 284; State v. Moore, 19 Mo. 371; State v. Powell, 44 Mo. 438; Berry v. Buckhart, 1 Mo. 418, *margin;* Kean v. Newell, 1 Mo. 754, *margin.*

[6] Homestead may be claimed by the debtor after judgment, in Arkansas (Irwin v. Taylor, 48 Ark. 224), when the case was one of attachment before a justice of the peace who had no jurisdiction to allow homestead. The property attached was actually occupied by the debtor, and held not affected by the levy of attachment. Patrick v. Baxter, 42 Ark. 175; Richardson v. Adler, 46 Ark. 43.

and the exempt property duly marked by commissioners, when the bounds have not been previously defined, though the right has been reserved in a contract.[1]

When homestead has been set apart by the court, on application, it is still liable to a proceeding by creditors to have it appraised to ascertain whether its value exceeds the legal restriction.[2] If found excessive and indivisible, the court may order its sale that the proceeds to the extent of the statutory limit may be invested in a new homestead. Several scattered lots, worth together no more than the law exempts, may be sold under judicial order, and the proceeds invested in a compact home.[3] This is when the homestead beneficiary is a debtor. When his homestead is plainly within the monetary limit, judicial designation is not essential to exemption.[4] This is ascertained by appraisement. An under-valuation of land (whether done fraudulently or ignorantly) by appraisers setting it apart as homestead to a debtor may be corrected at the instance of a subsequent creditor who was not a party to the proceeding. He may have every excess, above the allowed maximum, subjected to his claim.[5]

When it is the duty of appraisers to make allowance for incumbrances in estimating and laying off homestead, and they neglect this duty, the proper remedy of the debtor is by motion to have the allowance made. He cannot attack the appraisers' return collaterally.[6] But it is not always the duty of appraisers to make such allowance. The following case is illustrative: A homestead was allotted by appraisers. There was a judgment docketed against it, several subsequent mortgages recorded, and a bond for title covering the homestead allotment. The excess above the legal maximum of exemption was levied upon. Exceptions to the allotment were filed some three weeks after it had been made, which did not raise the question whether the value exceeded the maximum. The

[1] Crockett v. Gray, 31 Kas. 346.

[2] Davenport v. Alston, 14 Ga. 271.

[3] Georgia Code, § 5135; Harris v. Colquit, 44 Ga. 663; Blivins v. Johnson, 40 Ga. 297; Cohen v. Davis, 20 Cal. 187.

[4] Dearing v. Thomas, 25 Ga. 224; Pinkerton v. Tumlin, 22 Ga. 165.

[5] London v. Yeager (Ky.), 14 S. W. 966; Gen. Stat. Ky., ch. 38, art. 13, §§ 9, 10. The monetary limit is $1,000.

[6] Meyer v. Nickerson (Mo.), 14 S. W. 188; Rev. Stat. Mo. (1889), §§ 5436–7; Lallement v. Detert, 96 Mo. 182; State v. Mason, 88 Mo. 222.

exceptions were in time, but there was no issue for the court to determine. As the duty of the appraisers was confined to the estimation and allotment, the rights of lienholders could not be passed upon in an appeal from the award of the appraisers.[1] There cannot be a second allotment, after the appraisers' return has been registered and the time for excepting has expired, even under a judgment docketed after the first allotment was made.[2]

The affidavit of the judgment debtor, to contradict the sheriff's return that the commissioners summoned to lay off the homestead were freeholders, is not sufficient to overcome the return. Presumption favors the sworn officer's act done in the line of his duty. To remove it, there must be something more than the affidavit of an interested party; there must be satisfactory proof of the falsity of the return.[3]

§ 4. The Creditor's Contesting Affidavit.

The sheriff in charge of an execution is not bound to regard a recorded claim for exemption, though there be no affidavit contesting it, if the writ shows it to be invalid.[4] But if such claim be *prima facie* valid, the creditor must make the contesting affidavit, for it will prevent execution while remaining unchallenged.[5] Should the sheriff not levy the execution after the creditor has made his affidavit to contest the validity of the debtor's claim of intervention, he will not impair the creditor's judgment lien.[6] Simply pleading denial of homestead, with the affidavit, raises the issue between the creditor and the debtor; the contest is between the execution and the exemption; and, under such issue, without more formal or minute pleading, evidence may be introduced to determine the contest.[7] When the contest has been raised, the defend-

[1] Aiken v. Gardner, 107 N. C. 236; Thornton v. Vanstory, 107 N. C. 331; Gulley v. Cole, 102 N. C. 333.

[2] Thornton v. Vanstory, *supra;* Ray v. Thornton, 95 N. C. 571; Gulley v. Cole, *supra*, and 96 N. C. 447.

[3] Mooney v. Moriarty, 36 Ill. Ap. 175.

[4] *Ex parte* Barnes, 84 Ala. 540; McLaren v. Anderson, 81 Ala. 106; Sheffey v. Davis, 60 Ala. 548.

[5] Block v. George, 83 Ala. 178; Same parties, 70 Ala. 409; Clark v. Spencer, 75 Ala. 49; Abbott v. Gillespy, 75 Ala. 180; Block v. Bragg, 68 Ala. 291.

[6] Beckert v. Whitlock, 83 Ala. 123.

[7] Lehman v. Warren, 53 Ala. 535; Planters', etc. Bank v. Willis, 5 Ala. 770; Beckert v. Whitlock, 83 Ala. 123.

ant is entitled to notice.[1] If, without waiving this right, he appear to ask judgment on his claim of exemption, the plaintiff may demand a nonsuit.[2] The contest must be decided before the sheriff can go on with the sale. If the party seeking to subject the homestead to execution does not answer the claim of intervention within the legal delay, he loses his right and the levy must be discharged.[3]

Burden of proof: Where the legal presumption favors exemption, the creditor seeking to subject real property to execution must show that his claim is an exceptional one to those which exemption affects, and that the property levied upon is necessary to the satisfaction of the debt because of the debtor's lack of other liable property.[4] But, as a general rule, the party claiming exemption assumes the burden of proof. If he attack a sale on the ground that his exemption right is involved, he must make such allegations as to the value of the property as are necessary to show its exemption as a homestead.[5] And what is necessary to be alleged by him must be proven by him, as a matter of course. Not only the value of the property, but all other facts essential to the support of his claim to homestead, must be set forth and established.

Even where his homestead right is set up by him when he is in the capacity of defendant, he bears the *onus* of proving his rights against presumptions to the contrary. For instance, the burden is on the defendant to show that no homestead was allotted before sale under execution, after the plaintiff has shown his title by the sheriff's deed as purchaser at such sale, in his suit to recover possession, unless the fact of non-allotment otherwise appears;[6] as by admission of parties.[7]

[1] Mead v. Larkin, 66 Ala. 87.

[2] McAbee v. Parker, 83 Ala. 169, in exposition of §§ 2830, 2836, 2838, of Alabama Code of 1876. In Alabama the contest must be tried in the circuit court. Farley v. Riordon, 72 Ala. 128.

[3] Block v. Bragg, 68 Ala. 291.

[4] A plaintiff, before having a homestead levied upon in Georgia, must make affidavit that the debtor has no other property subject to levy, and that it is liable to execution because the debt is of a class excepted from exemption by the constitution. And he must specify the class. It is too late to make the oath after the levy. Brantley v. Stephens, 77 Ga. 467; Ga. Code, § 2028.

[5] Helfenstein v. Cane, 3 Ia. 287, and 6 Ia. 374; Boot v. Brewster, 75 Ia. 631.

[6] Mobley v. Griffin, 104 N. C. 112; Wilson v. Taylor, 98 N. C. 275.

[7] McCracken v. Adler, 98 N. C. 400.

The fact may not appear of record, nor the contrary; the record may disclose nothing, *pro* or *con;* presumption would favor the legality of the sale: therefore, the defendant who has pleaded the omission to allot homestead must support his plea by testimony. The *onus* is on the homestead-holder to prove such facts as certainly bring him within the protection of the law, when he sets up his homestead exemption against the foreclosure of a mortgage which he has given.[1]

Evidence *aliunde* is admissible to show that the debt was contracted before homestead acquisition, when the judgment itself does not show that fact.[2] The proof of the antecedency is essential to the fastening of the judgment lien upon the homestead as against a purchaser without notice.[3] Any purchaser takes free from judgment lien when the debt is neither antecedent nor otherwise affected by exemption, since no lien attaches to the homestead.[4]

§ 5. Confirmation by the Court.

The debtor, being entitled to a certain exemption of realty as the homestead of himself and family; and having failed to select it and have it set apart before judgment, and now claiming it in court, is entitled to have judicial action upon his claim when it is disputed. While it is the sheriff's duty to see to the matter as an executive officer charged with the execution; and while it is the appraisers' or commissioners' duty to lay off the lands in proper quantity and to the ultimate of the value permissible, it remains for the court to decide any controverted matter duly brought before it, and to confirm the allotment made. The court may assign the homestead.[5] A homestead assigned by the court for the defendant and his family, in a suit involving land which included the residence occupied by him, must be to the full quantitative limit if the land equals or exceeds that amount.[6] To that ex-

[1] Symonds v. Lappin, 82 Ill. 213; Asher v. Mitchell, 92 Ill. 480.

[2] Delavan v. Pratt, 19 Ia. 429; Phelps v. Finn, 45 Ia. 447.

[3] Higley v. Millard, 45 Ia. 586; Kimball v. Nilson, 59 Ia. 638.

[4] Cummings v. Long, 16 Ia. 41; Lamb v. Shays, 14 Ia. 567.

[5] Crisp v. Crisp, 86 Mo. 630.

[6] Talbot v. Barager, 37 Minn. 208; Coles v. Yorks, 36 Minn. 388; Coles v. Yorks, 31 Minn. 213; North Star Iron Co. v. Strong, 33 Minn. 1. The limit is eighty acres in Minnesota.

tent, a mortgage nominally covering the whole property is inoperative.[1] But, though signed by the husband alone, it is good for the rest;[2] yet the setting apart of the exempt portion is essential to the validity of the foreclosure.[3] The right of the owner to select his exempt portion from a tract larger than that, and including it, does not leave the whole open to exemption.[4]

A homestead allotment, made in a bankrupt court, was held to be efficacious; it being in value and extent such as is prescribed by state law where the allotment was made.[5] After a discharge in bankruptcy, a new promise to pay may be sued upon and prosecuted to judgment; but the judgment would not bear a lien on the homestead.[6]

When the debtor is entitled to have a homestead of a thousand dollars' worth of realty allotted to him before the sale of his lands under execution[7] (subject to be set aside, however, for fraud or irregularity),[8] such allotment legally made and confirmed becomes final. It cannot be re-allotted at the instigation of another judgment creditor who was a creditor when the homestead was thus set apart, unless for the causes above mentioned. It is intimated that creditors may have some equitable remedy, however, if the property should subsequently appreciate in value above the monetary homestead limit.[9]

By the statute above cited, exceptions to the allotment must be filed in the clerk's office of the superior where the allotment was made,[10] for it cannot be collaterally attacked.[11] Omission of the date of the allotment, in the report of the appraisers, is not a fatal error.[12] Allotment should be specific

[1] Coles v. Yorks, 28 Minn. 464. Sale void. Mohan v. Smith, 30 Minn. 259.

[2] Wallace v. Harris, 32 Mich. 380; Van Horn v. Bell, 11 Ia. 465.

[3] Kipp v. Bullard, 30 Minn. 84; Black v. Lusk, 69 Ill. 70; Bolton v. Landers, 27 Cal. 104; Ferguson v. Kumler, 27 Minn. 156.

[4] Ferguson v. Kumler, 27 Minn. 156.

[5] Windley v. Tankard, 88 N. C. 223; Lamb v. Chamness, 84 N. C. 379.

[6] Fraley v. Kelly, 88 N. C. 227; Henly v. Lanier, 75 N. C. 172; Hornthal v. McRae, 67 N. C. 21.

[7] Const. of North Carolina, art. IV; Code of North Carolina, §§ 501–524.

[8] *Ib.*, § 523.

[9] Gulley v. Cole, 96 N. C. 447.

[10] McAuley v. Morris, 101 N. C. 369; Code North Carolina, §§ 504–507.

[11] Code, § 519; Welch v. Welch, 101 N. C. 565; Burton v. Spiers, 87 N. C. 87; Spoon v. Reid, 78 N. C. 244.

[12] Beavans v. Goodrich, 98 N. C. 217.

and in severalty.[1] Bounds need not be laid off by course and distance.[2]

When allotment has been legally made, and the time for objection has expired, and the appraisers' return registered, no second allotment made by another appraisal (at the instance of a judgment creditor) can be allowed. His judgment may have been rendered and docketed after the homestead was laid off, but the circumstance will not alter the case. By filing his objections to the appraisers' return, and tendering evidence to prove that the land assigned by them to the debtor exceeds a thousand dollars in value (the maximum in the state), he cannot raise an issue for the jury.[3]

An appeal from appraisers (whose duties are confined to valuation and allotment and fixing bounds) does not take up the equities of the contending parties with it; and the court cannot pass upon them.[4] But an order setting aside a homestead is applicable; and it is held that appeal is the only remedy when the order is wrongful, in the absence of fraud.[5]

§ 6. Costs Impairing Contract.

A debt was contracted prior to the enactment of a statute requiring the allotment of homestead out of property exceeding the debt in value, before execution sale of the debtor's real estate could be had. It was held that, as the expense of the allotment diminished the value of the creditor's right, the statute impaired his remedy.[6] The right of a creditor by contract to the remedy for the recovery of the debt due him, existing at the time of contract, is a vested right. It cannot be constitutionally taken from him without the substitution of another remedy equally efficacious; and the substituted one would not be so, if tending to diminish the value of the debt

[1] Campbell v. White, 95 N. C. 491.

[2] Ray v. Thornton, 95 N. C. 571.

[3] Thornton v. Vanstory, 107 N. C. 331; Gulley v. Cole, 102 N. C. 333; Ray v. Thornton, 95 N. C. 571; Code of N. C., ch. 10.

[4] Aiken v. Gardner, 107 N. C. 236; Gulley v. Cole, 102 N. C. 333.

[5] Gruwell v. Seybolt, 82 Cal. 7; Estate of Burns, 54 Cal. 223; Code Civ. Proc. (Cal.), § 963 (3); Kearney v. Kearney, 72 Cal. 591.

[6] Long v. Walker, 105 N. C. 99 (*citing* Bronson v. Kinzie, 1 How. (U. S.) 311; Carson v. Arkansas, 15 How. (U. S.) 513; Evans v. Montgomery, 4 Watts & S. (Pa.) 218; Oatman v. Bond, 15 Wis. 28; Mundy v. Munroe, 1 Mich. 76), and differing from Morrison v. Watson, 101 N. C. 340.

due him. It was inferred from these premises that the requirement that homestead should be allotted before execution, with liability to have the sale of real estate worth more than the homestead limit declared void in the absence of such prior allotment (which requirement was made after the contract), was an impairment of the creditor's remedy by reason of the additional burden of costs that it imposed.[1]

"The touchstone, for testing the constitutionality of a statute requiring a pre-existing creditor to pay for the appraisement and allotment of exemptions to his debtor before he can cause a levy to be made upon the property of the latter, is found in the question whether the enforcement of the law throws the slightest impediment in the way of the collection, or in the slightest degree diminishes the value of the claim below what it would have been if no such trouble and expense were incident to the sale."[2] "One of the tests that a contract has been impaired is that its value has by legislation been diminished."[3] "The rule seems to be that in modes of proceeding and forms to enforce the contract, the legislature has control and may enlarge, limit or alter them, provided it does not deny a remedy or so embarrass it with conditions and restrictions as seriously to impair the value of the right."[4]

The creditor's right to the existing remedy at the time the debtor takes the obligation is a vested right which the legislature may modify but cannot take away or impair.[5] The unconstitutionality of exempting homesteads from debts anterior to the passage of the exemption law being because of its impairment of contracts, the courts came to hold that anything which renders the debt less valuable is unconstitutional.[6]

[1] Long v. Walker, 105 N. C. 90, *reviewing* Morrison v. Watson, 101 N. C. 340; McCanless v. Flinchum, 98 N. C. 358; Arnold v. Estes, 92 N. C. 162; Lowdermilk v. Corpening, 92 N. C. 333; Albright v. Albright, 88 N. C. 238; Wyche v. Wyche, 85 N. C. 96; Grant v. Edwards, 86 N. C. 513; Wilson v. Patton, 87 N. C. 318; Mebane v. Layton, 89 N. C. 396; Miller v. Miller, 89 N. C. 402; Corpening v. Kincaid, 82 N. C. 202; Carlton v. Watts, 82 N. C. 212; Gamble v. Rhyne, 80 N. C. 183; Earle v. Hardie, 80 N. C. 177; Barrett v. Richardson, 76 N. C. 429.

[2] Long v. Walker, *supra.*

[3] Edward v. Kearsey, 96 U. S. 600.

[4] Tennessee v. Sneed, 96 U. S. 69.

[5] Memphis v. United States, 97 U. S. 295; Const. U. S., art. 1, § 10.

[6] The section 2, article 10, of the North Carolina constitution of 1868 was declared void (and the statutory method of carrying it out fell with it), so far as exemption from debts

There is danger that the doctrine of impairing contracts by rendering remedies more costly than they were when the contracts were made, may be whittled to a point too fine. The "touchstone" given us in the latest of the above cited cases: "Whether the enforcement of the law throws the *slightest* impediment in the way of the collection, or *in the slightest degree* diminishes the value of the claim?" may sometimes be found too sensitive for practical purposes of business. Legislatures have the right to change remedies; and a change, which makes but a slight difference to the creditor whose claim is for thousands of dollars, ought not to affect the statutory modification of remedy with unconstitutionality. Statutes should be understood with reference to business habits, and the usual margin given for unforeseen expenses when contracts are made. No investment can be made with prior calculation of profit to a penny. The impairment of a contract must be *material* to render it void, as the highest court has repeatedly held.[1] When costs are trifling in amount so that they do not affect the creditor's remedy materially, they are not an unreasonable incident of the modification of it.[2]

In the case prescribing the test-rule, judgment was obtained for a hundred and fifty dollars, with ten more for costs, against a householder and his wife, on a debt antedating the time of exemption, and therefore it could be executed against their homestead. The defendants paid the judgment, less the costs. Therefore, their land, found by the jury to be worth $1,900, was sold to pay the costs; and it was bought at $20. This resulted from the refusal of the court to enforce the statute requiring allotment, on the ground that the expense of allotting might impair the creditor's remedy. The dissenting

antecedent to the homestead act and allotment of homestead before execution sale were authorized. This was to conform to the decision of Edward v. Kearsey, *supra*, on the impairing of remedies. Earle v. Hardie, 80 N. C. 177; Gheen v. Summer, 80 N. C. 187; Cheatham v. Jones, 68 N. C. 153; Burton v. Spiers, 87 N. C. 87; Cobb v. Halyburton, 92 N. C. 652; Butler v. Stainback, 87 N. C. 216; Keener v. Goodson, 89 N. C. 273; McCracken v. Adler, 98 N. C. 400; N. C. Code, §§ 502, 524; Acts of 1879, ch. 256; Const., art. 4, § 8.

[1] Allen v. Louisiana, 103 U. S. 80; Packet Co. v. Keokuk, 95 U. S. 80; Austin v. Aldermen, 7 Wall. 694.

[2] Louisiana v. New Orleans, 102 U. S. 203.

opinion in the case is elaborate.[1] Without controverting the decision, and without questioning that it makes law in the state where it was rendered, the profession in other states may reasonably inquire whether this test, to determine the constitutionality of statutes affecting remedies, is not too nice and exacting. We may not find a flaw in the severe logic of the court, yet we may remember that we ought not always to reason as minutely in law as in an exact science.

[1] Long v. Walker, 105 N. C. 90; Dissent of Merrimon, C. J., at p. 110.

CHAPTER XXIII.

PLEADING AND PRACTICE.

§ 1. Ordinary Remedies.
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5. Minor Children as Parties.
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§ 1. Ordinary Remedies.

Pleading and practice in homestead cases differ little from general forms and usages. There is no special system; no actions and defenses peculiar to those cases; no writs, and few forms, prescribed especially for the acquisition and maintenance of the exemption right. With the exception of statutory directions for the declaration of homestead, and its recordation and notification; for allotment to the debtor, the report of commissioners and appraisers in laying off the exempt portion, for partition, and a few other things, there is little departure from the general practice.

Homestead legislation, however, has made innovations upon previously established jurisprudence which affect litigation and render a chapter necessary in addition to the frequent touching upon pleading and practice in the foregoing chapters. Among these innovations is the giving to the wife a present interest in her husband's dedicated home, which enlarges her rights as a litigant; the restraints put upon, or assumed by, the owner, which diminishes his lordship over such property;

the privilege bestowed upon widows and minors which postpones partition among heirs and the final settlement of estates; the restrictions which partially take homesteads out of commerce and affect the rights of purchasers; and other peculiarities which have consequences upon homestead transactions and judicial proceedings concerning them.

The principal innovations which affect the usual course of pleading and practice are the statutory denial of jurisdiction to the courts, in some states, as to the attachment and execution of homesteads, and the judicial rulings, in others, that pleading homestead is unnecessary when the exemption is made absolute by statute. Such departure from the beaten track, like all other attempts to reach the goal of justice by a royal road, leads ultimately to more roundabout avenues of litigation. The householder who stands by while his house is attacked as non-exempt property is likely to be obliged to vindicate his right ultimately by resort to some form of action, or to defend against ejectment. Where his neglect to plead till after judgment and the maturity of process against his home will be deemed acquiescence on his part and a waiver of his exemption right, he will not have the trouble of asserting his claim subsequently by an original action, or of defending against ejectment, for his homestead will have been lost.

Whether the exemption be absolute or not; whether failure to plead will prove fatal or not, the better and simpler practice is to set up the defense whenever the court has entertained an action against the homestead. In other words, the right of homestead ought to be pleaded, as any other right, when it is assailed in a court of justice and the beneficiary is cited to defend. It will not be better for him to stand silent, folding his hands supinely, relying upon the absoluteness of his right. The theory somewhat advocated, that he may remain passive yet not be affected by the decree; that the court is bound to protect him whether he plead or not; that he may lie dormant till the plaintiff has obtained judgment and has executed the homestead under it, will not work well in practice — certainly not in all cases. Take the case of ejectment. Passivity on the part of the homestead-holding defendant would result in his being put out of doors. Take the case of mortgage foreclosure. Non-resistance to the alleged lien would result

in valid sale of the homestead and its delivery to the purchaser. Take the case of levy under *fi. fa.* to enforce an ordinary judgment lien. Unless the defendant claims his right before sale (or when the officer denies it), and resists the execution by injunction or some other remedy, and thus avails himself of the protection which the law offers to his family home, he may soon find that home sold; and he will be obliged to acquiesce, or to defend against ejectment, or he will be driven to bring an independent action to save his right. In the last case — sale under *fi. fa.* — the officer is presumed to know the records, or the open occupancy of the property by the householder, or whatever else the law deems notice; and therefore he may be amenable to the householder. But in the other cases, the attack upon the homestead is made in court. Does the judge know the records? Is he charged with notice of the homestead character? He is the only person presumed ignorant of notice and of the records. In his judicial capacity he knows nothing of them till they have been proved after issue joined. The absoluteness of the homestead right relative to any particular property does not appear to him till he has been duly informed by evidence. The most direct way, therefore, for the exemptionist to maintain his right is by pleading or claiming it, even in states where neglect would not be waiver.

The plea in defense may be in a word, yet sufficiently explicit. A general denial may suffice. If the defendant has nothing to allege affirmatively — merely appears to deny and join issue — such a brief plea may do; and there is nothing for him to prove thereunder.[1] If he has affirmatively pleaded homestead in his answer, he is not obliged to meet the plaintiff's rejoinder by anticipation. For instance, if the plaintiff, as to the defendant's plea of homestead, sets up abandonment, or that the debt sued upon is for improvements upon the homestead or for the purchase-price (against which debts there is no homestead), the defendant may then deny such allegations; but he is not obliged to do so in advance.[2]

§ 2. Parties — Husband and Wife.

All persons who are to be concluded by the decree, in cases involving homestead, should be made parties, excepting the

[1] Johnson v. Adleman, 35 Ill. 265. [2] Stevenson v. Marony, 29 Ill. 532.

mere privies of parties. If persons to be concluded are incompetent to appear in court by reason of their minority, coverture, insanity or any other cause, they should be represented by their guardians, curators, tutors or next friends, as the statute of the state where the proceedings are had may provide.

Parents represent their children in homestead legislation, when there is no adverse interest preventing it; and the husband represents both his wife and children, in many states. In some, the wife must be joined with him as defendant in homestead litigation; and it is held that if a homestead be occupied by two men and their wives, all four must be made parties to an action of ejectment to recover the property.[1] Each husband might assume that he is the head of the family, so as to render it necessary for the plaintiff in ejectment to make both, with their wives, parties to the suit, though the law does not contemplate two families upon one homestead. The spirit of the law is against the crowding of tenements with several families in each; and the letter of no statute warrants either two homesteads ("business homesteads" aside) to one family, or two families to one homestead.

The wife is properly associated with her husband as a party plaintiff praying injunction against the collection of an illegal tax upon land occupied by them as their homestead.[2] She may join him in a bill to redeem the homestead from a tax sale.[3] If the husband is the sole owner, and should sue alone as plaintiff for either of these or any purpose, the rights of the wife would be secured by his success. She does not seem, therefore, to be a necessary party plaintiff in such suits, so far as the reason of the matter is concerned. The husband in whom the title is lodged cannot prejudice his wife's homestead interest in that property by any action to vindicate that title, or to protect it from burdens.

The case is quite different when a suit involving the homestead is brought against the husband. The plaintiff should make the wife a party defendant with her husband. Such an action against him alone cannot divest the wife of her *quasi*-estate in the homestead wholly owned by her husband; for it

[1] Stoinski v. Pulte, 77 Mich. 322.
[2] Henry v. Gregory, 29 Mich. 68.
[3] Adams v. Beale, 19 Ia. 61.

is a present interest — not merely a latent one — and so resembles an estate as to rightly be called one with the qualification above given; and it can no more be divested by a judgment against the husband alone than an incumbrance upon the property, held by her, could thus be divested. It is as important (considered as a matter of pleading) that the plaintiff should make her a defendant as it is when she holds the title. There can be no doubt that the wife of the homestead-holder should be made a party defendant to an action of ejectment in which his conveyance of the homestead to her is brought into question to test its validity.[1] And she has been held a necessary party to any action to eject her husband and herself from premises occupied by them as their homestead.[2] In such an action, were she not made a party, what would be the effect of a judgment against the husband alone, even if he is sole owner? Should he be ejected and removed from the premises, would her right of asylum there be cut off? The very object of giving her a present interest in the home would be defeated by such a result. If she would have the right to stay, it would be strange indeed if her husband could not remain with her; the very purpose of the homestead legislation — to conserve homes and protect families — to foster the conjugal and parental relations — would be defeated. But would not the judgment establish the fact that the property is not the homestead? It would establish that fact *as to him* — not as to her. The situation would be novel: so, to avoid such, the wife should be made a party defendant with her husband, in an ejectment suit, whether the title of the homestead be in him or her, so that they would both stay in their home, or both go out together. If they are joint tenants, there is additional reason why they should join in actions brought by them or be joined in actions brought against them. There is the same reason as would be apparent in litigation respecting title in joint tenancy when the holders are not man and wife.[3] A complaint by one spouse has been held demurrable.[4] The wife of one who holds land in common with

[1] Hodson v. Van Fossen, 26 Mich. 68.

[2] Cleaver v. Bigelow, 61 Mich. 47; Davis *etc.* Co. v. Whitney, 61 Mich. 518; First N. Bank v. Jacobs, 50 Mich. 340.

[3] Dunn v. Tozer, 10 Cal. 170; Cook v. Klink, 8 Cal. 353.

[4] Guiod v. Guiod, 14 Cal. 506–7.

others, who has a homestead interest thereon, must be made a party to any suit for partition and recognition of liens on the land.[1]

Where it is necessary that the wife be made a party to a foreclosure upon the homestead, the court will not give judgment for the plaintiff where the husband has appeared alone and pleaded homestead in defense. It has been held that the court, in such case, will order that she be made a party.[2] She may voluntarily intervene and join in the answer of her husband, or plead separately.[3] So, if the wife, owning the homestead, is sued alone in a foreclosure proceeding against it, the husband must become a party; and the rule is the same as that above stated relative to the wife.[4] It does not matter what is the form of suit which seeks to subject the homestead property to forced sale. If the occupants of such property be threatened by ejectment, writ of entry, or any other form of attack, the homestead may be defended in such way as the governing statute points out, or by answer as in any ordinary case requiring answer, or by equitable plea; and the family head alone, or the husband and wife together, or the wife alone when her interest requires her to act solely and where her coverture is no disability, may plead homestead in defense.[5]

In an attachment suit, when the homestead has come into the legal possession of the officer charged with the writ, both husband and wife should be made parties defendant if the rights of both are to be concluded, and if the judgment is to perfect the lien and retroact to the date of the seizure so as to render the lien a perfect one from its incipiency. The reason is that her *quasi*-estate would not otherwise be affected by the judgment — the proceeding being only a limited one *in rem* — the *res* being only his property when her interests are not reached.

Where, under the theory that absolute exemption relieves

[1] Wheat v. Burgess, 21 Kas. 407.

[2] Marks v. Marsh, 9 Cal. 96.

[3] Moss v. Warner, 10 Cal. 296; Lyon v. Welsh, 20 Ia. 578.

[4] Thorn v. Darlington, 6 Bush, 448.

[5] Williams v. Young, 17 Cal. 403; McDonald v. Badger, 23 Cal. 393; Hughes v. Watt, 26 Ark. 228; Pardee v. Lindley, 31 Ill. 174; Patterson v. Kreig, 29 Ill. 518; Swan v. Stephens, 99 Mass. 7 (and cases there cited); Letchford v. Cary, 52 Miss. 791.

from the need of defense and that the result of judgment is a mock lien to be disregarded with impunity, it is of no importance whether the wife is made a party or not.[1]

Where disability of the wife exists, and no rule requires homestead actions and defenses to be by both, the husband is the proper party to litigate for the interests of the family and the homestead.[2] Whether a wife can sue or defend alone depends upon the further question whether coverture imposes disability; and this, in homestead litigation as well as in any other. Each state settles the question for itself.

§ 3. The Wife as Sole Plaintiff.

Where the statute requires the action of a court in the establishment of an original homestead, a wife may be the petitioner for such judicial action.[3] Her petition must contain all the averments necessary to the effectiveness of the husband's petition when he makes application, and she must also aver ownership, since that would not be presumed in her case.[4] And she must show from whose property she prays to have the homestead carved[5] — whether her own or that of her husband; whether separately or jointly held. And she should state why her husband does not apply or join her in the application.

A wife filed a declaration of homestead, upon property long occupied by her husband and herself as their family residence, *five days after he had confessed judgment* in favor of a creditor. When the sheriff came to enforce the judgment lien, she alone brought action against that officer to compel him to exhaust all her husband's other property, personal and real, before selling the homestead; and her action was sustained.[6] She could have defended the homestead from any sale at all under an ordinary judgment — she not having been a party. And, under a judgment on a privileged debt, she may repre-

[1] In Nebraska under a former statute, the wife was held not a necessary party defendant in an attachment suit; but the rule has been changed by a later law. Spitley v. Frost (Neb.), 15 Fed. 299; Rector v. Rotton, 3 Neb. 171; State Bank v. Carson, 4 Neb. 501.

[2] Mallon v. Gates, 26 La. Ann. 610; Thoms v. Thoms, 45 Miss. 272.

[3] Bowen v. Bowen, 55 Ga. 182; Cheney v. Rogers, 54 Ga. 168; Smith v. Ezell, 51 Ga. 570; Larence v. Evans, 50 Ga. 216.

[4] Wilder v. Frederick, 67 Ga. 669.

[5] Langford v. Driver, 70 Ga. 588.

[6] Bartholomew v. Hook, 23 Cal. 277.

sent her interest so far as to have other property exhausted before the homestead, under the statutes of several states.

A wife alone may file a bill in equity to have homestead set off. Her action is not premature because no execution is pending; and her right to file such bill has been held not affected by the fact that her husband is providing a home for her.[1] If he has had a homestead set off, she would not have the right to file such bill. She may have a bill in equity to compel the specific performance of an executory agreement made by her husband to purchase a homestead, when she has performed the contract. "The wife of a husband, who refuses or neglects to perform his contract, should be permitted to do it for him to save her interest in the homestead, as she may redeem a mortgage to save her right of dower in an equity of redemption."[2]

The wife is a proper party to a bill filed by her husband against a mortgage of the homestead which she has not signed.[3] Or she may sue alone, by the same form of pleading, under the same circumstances, when it is necessary for her protection; and it is held necessary when the foreclosure of a mortgage, executed by the husband alone, is pending.[4] And she may sue alone for the protection of the homestead when her rights are in jeopardy by the neglect or refusal of her husband to act; and when he is absent, or has absconded.[5] This rule (where it prevails) is not peculiar to homestead litigation.[6] But it has not always prevailed when the home was endangered from such causes.[7] She may bring trespass against an officer for a wrongful levy upon the homestead without being joined by her husband, the debtor;[8] but her husband, as the head of the family and the debtor, is ordinarily the proper plaintiff in such case.[9] The wife may act, in the

[1] Comstock v. Comstock, 27 Mich. 97.

[2] McKee v. Wilcox, 11 Mich. 358, *361.*

[3] Shoemaker v. Gardner, 19 Mich. 96; Shoemaker v. Collins, 49 Mich. 595.

[4] Comstock v. Comstock, *supra;* Allen v. Hawley, 66 Ill. 169; Silsbe v. Lucas, 36 Ill. 462; Wing v. Cropper, 35 Ill. 256.

[5] Kelley v. Whitmore, 41 Tex. 647.

[6] Fullerton v. Doyle, 18 Tex. 14; O'Brien v. Hilburn, 9 Tex. 297.

[7] Murphy v. Coffey, 33 Tex. 508; Green v. Lyndes, 12 Wis. 450; Thoms v. Thoms, 45 Miss. 263.

[8] McWilliams v. Anderson, 68 Ga. 772.

[9] Zellers v. Beckman, 64 Ga. 747.

absence of the husband, to save the homestead when execution is pending, under the authorization of some statutes.[1]

Even when homestead has not been pleaded in foreclosure proceedings, a wife who was not a party to the mortgage may protect the homestead by an original bill in equity, it has been held.[2] She may file a cross-bill against a bill filed by the plaintiff in aid of execution brought against her husband, to protect a homestead on the ground that she did not sign the mortgage which her husband gave, and which the plaintiff is proceeding to enforce.[3]

Abandoned by her husband, she has been accorded standing in court to recover possession of her homestead after having been ousted.[4] Compelled by her husband to sign an act of alienation, she has been accorded standing in court to recover the homestead thus unwillingly conveyed by her.[5] But it has been held that a bill in equity by a married woman to set aside a homestead conveyance, on the ground of duress by which her husband obtained her signature, could not be maintained against a purchaser for value without notice of the duress.[6] The implication is that, with notice, the purchaser would have been liable to have such an action brought against him by the wife as sole oratrix.

Under a deed to a wife, with the stipulation that the property was to be held by the husband as a homestead, containing the *habendum*, "to her and her heirs and assigns, to her and their use and behoof forever," it was held that, upon ob-

[1] For instance, it is provided in the Comp. Stat. of Oklahoma (1890), § 4738, that "in any case when the execution defendant is absent from this territory, or shall absent himself from his home, and attachment or execution shall be directed against his property, his wife may make out and verify the schedule of his property, and claim and receive for him the exemption provided in this act, and claim and exercise all rights which would belong to the husband were he present." The homestead is limited to one hundred and sixty acres in the country or one acre in town (§ 2861) without monetary restriction, and the chattel exemptions are liberal (§ 2860). The wife, in thus acting, represents her absent husband with respect to either kind of homestead or to chattel exemption.

[2] Allen v. Hawley, *supra;* Mooers v. Dixon, 35 Ill. 208; Hoskins v. Litchfield, 31 Ill. 137.

[3] Wisner v. Farnham, 2 Mich. 472.

[4] Love v. Moynehan, 16 Ill. 277; Mix v. King, 55 Ill. 438.

[5] Helm v. Helm, 11 Kas. 21; Mix v. King, 66 Ill. 145.

[6] Vancleave v. Wilson, 73 Ala. 387.

taining a divorce from him, she was entitled to a writ of entry and could recover possession from her husband thereunder.[1]

Though the husband be the sole owner of the homestead title, his wife's right of asylum, or her estate of homestead, is a real interest, notwithstanding her inability to transfer it as property;[2] and she will be allowed to protect it. It has been held on the other hand, however, that her right to litigate as sole party depends upon her ownership of the homestead in her own right.[3] This view does not now have wide prevalence. When the homestead was on community property, it was objected (to a judgment recognizing it) that it could not be awarded to the wife alone; but the objection was overruled — the court assigning as a reason that the wife, as plaintiff, was joined by her husband, and that the judgment recited that "*plaintiffs* are entitled to recover."[4] But for this reason the objection probably would have been sustained.

§ 4. The Wife as Sole Defendant.

The common-law rule, that a wife has the disability of coverture, is less relaxed when suits are to be defended than when they are to be prosecuted. The husband represents her in defenses, so far as her good is concerned; that is, she has the benefit of results in his favor. It is when her interests are adverse to his that she may defend alone, or when he fails to act for both and she is authorized by court or by statute to appear alone, or when she is a sole trader, or when she is sued alone.

If the homestead, in which she has her *quasi*-estate, is put in jeopardy under circumstances which require her interference to save it, she alone may defend it when her husband will not, or when his and her interests are adverse.

Pending divorce proceedings, the homestead is sometimes imperiled so as to warrant the wife's sole action.

A wife, suing for divorce and alimony, holding the family homestead in her exclusive possession while her suit is pending, and having her prospective estate of dower and her pres-

[1] Dunham v. Dunham, 128 Mass. 34.
[2] Jenness v. Cutler, 12 Kas. 516.
[3] Moss v. Warner, 10 Cal. 296; Marks v. Marsh, 9 Cal. 96.
[4] Paris, etc. Ry. Co. v. Greiner (Tex.), 19 S. W. 564.

ent right of homestead, may be authorized to act independently in a suit to vindicate a mechanic's lien upon the family homestead. If such suit be first instituted against the husband, and prosecuted to judgment by default against him — obtained by collusion with him — his wife may become a party to have the default set aside and to defend against the lien. The judgment may be opened to admit her as a new party who is affected by it.[1]

[1] Weston v. Weston (Wis.), 49 N. W. 834, Lyon, J.: "While it may be true that the statute does not make the wife a joint tenant with her husband of the homestead, or vest in her an interest in the fee, yet it does confer upon her valuable rights therein. It gives her the right of occupancy and enjoyment thereof with her husband as against his creditors, and an absolute veto on his power to alienate it. In case the husband dies intestate, the homestead descends to his widow absolutely, if he leaves no children surviving him, and during her widowhood if he does. Taylor, St. 1171, § 5. These are additional to her dower right, which manifestly is not merged in the homestead right. Should the husband lawfully devise the homestead to another, or should he die leaving children, and his widow marry, she may assert her dower right, notwithstanding the premises were once the homestead of her husband. In Madigan v. Walsh, 22 Wis. 501, this court found no difficulty in holding that an inchoate right of dower is such an interest in lands as will enable a married woman to maintain an action to set aside a deed thereof to which her signature has been fraudulently obtained. That decision, we think, disposes of the objection that Mrs. Weston has no such interest in the premises affected by the lien judgment as gives her a standing in court to resist such judgment. In addition to her rights under the homestead laws and her inchoate right of dower, she alleges that she is entitled to the possession of the premises pursuant to an interlocutory order of the court in the divorce suit. We infer that she is in possession by virtue of the order, and that such possession is exclusive of her husband. Having these various interests and rights in the premises, it would be a reproach to the law were she denied a standing in court to defend them when they are fraudulently and collusively assailed by her husband and his kindred. We hold, therefore, that Mrs. Weston is a proper party to the lien suit. If not made a party, probably she might maintain an action against the plaintiffs in the nature of a suit to redeem, in which she could contest the right of the plaintiffs to a specific lien for any sum, or show that the judgment is for too large a sum. McCoy v. Quick, 30 Wis. 521. The learned counsel for the plaintiffs claim that the judgment should not be opened to allow Mrs. Weston to defend the action if she is not bound by the judgment; and they cite in support of their position, Bean v. Fisher, 14 Wis. 57, and Gray v. Gates, 37 Wis. 614. Bean v. Fisher merely holds that a judgment should not be opened to let in a new party whose interests are not affected by it; as, for example, a prior incumbrancer in an

The court, treating her as in possession of the homestead under judicial order, while the husband was excluded, allowed her to combat the lien which he had allowed to be prosecuted to judgment by his default. It is intimated that she would have had standing in court in a bill to redeem the property, had she not appeared in defense of the suit. Even if her homestead right was not concluded by the judgment against her husband alone, she would be put to inconvenience by it; she might be driven to defend a subsequent action of ejectment, or, if obliged to sue for her rights, would be required to give security. If the lien sued upon was a lawful property debt, doubtless the homestead was bound for it; but the very question was whether the lien was such; and, on that question, she had a right to be heard when her husband had collusively permitted default.

Though the husband has done some act which would operate as estoppel to him — such as signing a mortgage note alone to bind the homestead — an act that would estop him in some states, though not in all,— his wife may yet defend against the act, plead usury or any other proper defense against the note, and thus save the homestead to the family.[1] Though he may have recognized ownership in another, she is not necessarily concluded. In an ejectment suit against a wife, who claims the property sued for as her homestead, she cannot be denied her claim on the ground that her husband has acknowledged himself to be the plaintiff's tenant, in a lease, if she has shown all the facts necessary to establish her right.[2]

§ 5. Minor Children as Parties.

Minor children are represented by their father, or by both father and mother when they are joint-parties, in litigation

action to foreclose a junior mortgage. The same rule was stated hypothetically in Gray v. Gates, but the case turned upon a special statute of limitations relative to opening judgments. We think the interests of Mrs. Weston may be affected by this judgment, if it is allowed to stand. On a sale under it she is liable to be excluded from the possession of the premises, at least she may be so excluded unless she bring an action promptly, and obtain an injunction to protect her possession. This would or might require the giving of security, which she cannot be required to give if allowed to defend the lien suit. . . . *See* Read v. Sang, 21 Wis. 678."

[1] Thompson v. Pickel, 20 Ia. 490; Campbell v. Babcock, 27 Wis. 512.

[2] Dykes v. O'Connor (Tex.), 18 S. W. 490.

affecting the homestead as in that relative to other property in which they are concerned, and in which their interest is not adverse to that of their parents. They are beneficiaries of the homestead, but not independent of their parents, and not in the same sense in which their mother is a beneficiary. They have no interest resembling an estate, or an incumbrance upon the householder's title, such as she has. They have no veto upon the alienation of the homestead as she has. They are bound by the action of their father and mother.

The law, however, zealously guards their homestead interest; and, upon the death of their father, gives them standing in court to assert it through proper representatives.

Minor children may make application, through their guardian, to have homestead set off to them.[1] He must aver his official capacity and make all the allegations necessary to show the character of the property, and also aver the rights of his wards. If no guardian has been appointed, a trustee may be designated to make the application.[2] If one of the parents is surviving, and the children are living with him or her as members of the family, such survivor is the proper person to make application for an original homestead, or to regain a lost one. A bill filed by beneficiaries to recover homestead, without any showing why the head of the family was not a party, was held demurrable.[3] If the wife alone is the applicant, she should make an averment of the reason why her husband did not apply; and there is greater reason why an application by children, through a representative other than a parent, should show why he takes the place of their natural guardian.

All persons interested should be made parties to a proceeding for partition, since otherwise they would not be bound by it.[4] There may be partition of the homestead between the deceased householder's widow and his minor children, when

[1] Fountain v. Hendley, 82 Ga. 616; Roff v. Johnson, 40 Ga. 555; Ga. Const. of 1868.

[2] Roff v. Johnson, 40 Ga. 555. The appointment of the trustee is by the superior court; the application by him is to the ordinary or probate judge, in Georgia.

[3] Shattless v. Melton, 65 Ga. 464.

[4] Ketchin v. Patrick, 32 S. C. 443. In South Carolina, both partition and homestead cannot be claimed in the same proceedings. Williams v. Mallory, 33 S. C. 601.

she remarries and does not thus forfeit the right under the statute;[1] and in such case the children are parties to be properly represented.

A decree by consent is not void between the parties consenting because somebody else should have been made a party, or because it does not conform to the distribution asked in the petition, or because it joins causes which should have been kept separate, or because some of the parties are minors represented by a guardian who also represents a party whose interests are adverse to theirs. At least, it has been held so; and also, that such a decree is not void for fraud as against one not guilty of fraud who gets less by the decree than he would have been entitled to in its absence.[2]

When a petition for the setting-off of a homestead is made to the court by an attorney, it must be verified by the affidavit of his client who is the applicant;[3] and if the applicant is a minor, his guardian should make the affidavit.

In states where real estate descends to heirs, and is not administrable, they — not the executor or administrator — are the proper parties defendant, in a suit by a vendor of the decedent to recover homestead purchase-money.[4] For, as against such suit, there is no homestead, and the question is one of property only. True, the character of the claim may be denied in the defense; and if the debt is not shown to be purchase-money, the homestead interest is at stake. Still, the heirs, adult and minor, are the parties interested as defendants.

The widow should make the heirs parties to a suit brought by her for damages done to community property when half the interest is in her and half in them.[5]

If the widow has illegally conveyed the children's homestead, ejectment will lie, in their behalf, to recover it after her death;[6] and why not before?

[1] Brady v. Banta, 46 Kas. 131; Miles v. Miles, 46 N. H. 261. The widow and all the heirs are necessary parties to a proceeding for a homestead, under the Missouri act of 1865. Murphy v. De France, 105 Mo. 53.

[2] Schermerhorn v. Mahaffie, 34 Kas. 108.

[3] Roberts v. Cook, 68 Ga. 324.

[4] Buckingham v. Nelson, 42 Miss. 417.

[5] Wright v. Doherty, 50 Tex. 34.

[6] Rogers v. Mayes, 84 Mo. 520. Further as to minor children, as parties, *ante*, p. 648.

§ 6. The Widow as a Party.

The proper remedy, for either the assignment or the recovery of a widow's homestead, is a bill in equity where none has been provided by law. She is not to suffer from the failure of the legislature to give her a legal remedy when the right of homestead has been accorded her by statute. And when she has come into the enjoyment of her homestead, she may protect it by bill in the absence of a legal remedy. Having the right, and the property to which the right relates, she is entitled to relief when either is assailed. Homestead statutes prescribe no particular form of bill for such emergencies: so she may avail herself of any proper pleading usual in chancery practice which will lead to equitable relief.[1] If she is denied her homestead right in her late husband's property, by his heirs, her remedy is by writ of entry,[2] or by such equivalent writ as the law of any state has authorized for her relief. Though the guardian of minor heirs may have held, for three years, the possession adverse to her, she will not be debarred thereby from claiming her life estate of one-third. But if she permanently left her husband without cause, that fact may be set up successfully by the heirs against any homestead claim on her part.[3]

When a bill for partition and assignment of dower had been pending for several years, and evidence had been adduced showing that the widow was entitled to homestead as well as dower, it was held discretionary with the court to allow the bill to be dismissed.[4]

When the widow is in possession of community property, she is the proper party to institute a suit for damages done to it; but the heirs, owning half of such property, are proper parties.[5]

As a widow has all the rights of litigation appertaining to any *feme sole*, it is unnecessary to dwell upon them here. Her suits relative to homestead are usually with heirs or creditors

[1] Miles v. Miles, 46 N. H. 261; Atkinson v. Atkinson, 40 N. H. 252.

[2] Mercier v. Chace, 9 Allen, 242; Woodward v. Lincoln, 9 Allen, 239; Lazell v. Lazell, 8 Allen, 575; Searle v. Chapman, 121 Mass. 19.

[3] Cockrell v. Curtis (Tex.), 18 S. W. 436; Newland v. Holland, 45 Tex. 589; Sears v. Sears, 45 Tex. 557.

[4] Reilly v. Reilly (Ill.), 26 N. E. 604.

[5] Wright v. Doherty, 50 Tex. 34.

of the deceased husband's estate. Her rights and remedies have been treated in previous chapters.[1] There is, however, a case out of the ordinary which may be of interest. The owner of a hundred and twenty-two acres of land, occupied as his residence, died in 1876, leaving an insane widow, who was placed in a hospital within two or three months after his death. She, by her guardian, claimed the land as her homestead, and brought ejectment against the possessor who had bought it at a sale to satisfy a debt which had been reduced to judgment six years before the husband's death. The court treated the date of the judgment as the time of the contraction of the debt, in the absence of any evidence of the date of contract.[2] At that time, the constitution of the state fixed the homestead maximum at eighty acres: so the widow was held entitled to no more, and that quantity should have been set apart to her before the sale; but it was not done. She was incapable of making selection, owing to her insanity.[3] So the court, as to the homestead claimed, denied the ejectment, but held that her insanity and her absence from the home before and after her husband's death from this cause did not bar her claim to possession of the tract till the assignment of dower, nor bar her right of dower; and it recognized the right of ejectment on that ground.[4] But, pending the appeal from the lower to the supreme court, the insane widow died; and there could be no revival by the heirs at law, since her right of possession (called quarantine) died with her. But her personal

[1] Chs. 19, 20, 21.

[2] On the authority of Gordon v. McIlwain, 82 Ala. 247.

[3] The court cites on this point: Clark v. Spencer, 75 Ala. 49; Turnipseed v. Fitzpatrick, 75 Ala. 297; Dossey v. Pitman, 81 Ala. 381; Block v. George, 83 Ala. 178; 2 Scrib. Dower, 500.

[4] Clancy v. Stephens, 9 So. (Ala.) 522. The court said that the widow's insanity furnished additional reason for allowing her possession under the statute [Code of 1886, § 1900], citing Eslava v. Lepretre, 21 Ala. 504. "Having the statutory right to the possession, she could either maintain or defend that possession by suit against any and all persons not showing a better title, and could sue and recover the rents and profits against any one coming into possession of them without right. Benagh v. Turrentine, 60 Ala. 557; Inge v. Murphy, 14 Ala. 289; Shelton v. Carrol, 16 Ala. 148; Cook v. Webb, 18 Ala. 810; McLaughlin v. Godwin, 23 Ala. 846; Oakley v. Oakley, 30 Ala. 131; Boynton v. Sawyer, 35 Ala. 497; Slatter v. Meek, 35 Ala. 538; Perrine v. Perrine, 35 Ala. 644."

representatives could claim successfully the rents and profits, because these are personalty, and the right to them survives.[1]

§ 7. Application for Homestead.

Householders ordinarily declare upon their own homes and have them recorded as exempt, or simply occupy them as family residences where the statute of their state requires nothing more to constitute a homestead; but where the statute provides for judicial action in order to constitute it, there must be an application to the court. Such application should contain all the averments which the court must know in order to grant the petition.

Family headship is one of the necessary allegations. It may be averred of the husband, when the application is by the wife, with the additional averment that he has neglected or refused to apply. It has been held that an omission to allege family headship is incurable by parol evidence on the trial of a case based on the application.[2] An equitable action to recover a homestead was held demurrable because the plaintiffs, claiming to be beneficiaries of the exemption, had failed to show why the head of the family did not join in the bill.[3]

[1] Clancy v. Stephens, *supra*, citing 1 Brick. Dig., p. 12, §§ 181, 183; Hairston v. Dobbs, 80 Ala. 589; Chandler v. Jost, 81 Ala. 411; Davis v. Curry, 85 Ala. 133. Further as to the widow's claiming rents, *see* Mobley v. Andrews, 55 Ark. 222. Further as to the widow as a party, *see* ch. XX.

[2] Clark v. Bell, 67 Ga. 728, under the Constitution of Georgia (1877). *See* Hardin v. McCord, 72 Ga. 239; Walker v. Thomason, 77 Ga. 682. The application of a wife for a homestead donation under the laws of Texas (Sayles' Civil St., art. 3924) was held to be substantially the application of her husband as head of the family. McCarthy v. Gomez (Tex.), 19 S. W. 999. The claim may be by the husband *or wife*, showing that he or she is the head of the family. Rev. Stat. of Arizona (1887), §§ 2072–3. The declarant must be the head of a family or the wife who declares for the benefit of herself and her husband. Deering's Code and Stat. of Cal., § 1237 *et seq.;* Rev. Stat. of Idaho, § 3035 *et seq.;* Gen. Stat. of Colorado (1883), § 1631 *et seq.;* Col. Acts of 1889, p. 463. The selection of the homestead may be by the owner, husband or wife, *etc.* Code of Ia., § 3163 *et seq.* *See* Comp. Stat. Montana (1887), §§ 324, 330; Comp. Stat. of Neb. (1889), ch. 36, §§ 1–8; Gen. Stat. Nev., § 539 *et seq.;* Code of Washington, § 342; Rev. Stat. Wyoming (1887), § 2780; and the statutes of other states and territories. The provision as to head of family is almost general.

[3] Shattless v. Melton, 65 Ga. 464.

The applicant to have homestead accorded should aver the fact of his having a family, though he need not particularize as to the number of the members or their respective ages. The only necessary averment as to the ages of his children is that they are in their minority; and that is important when the applicant has no wife and he and his children compose the family.[1] The necessary fact, as to the family averment, is that he has a family such as entitles him to the homestead privilege. This is essential because the protection of families is the object of the exemption. It was judicially said of a homestead law: "The statute is founded upon considerations of public policy, and has introduced a new rule in regard to the extent of property which shall be liable for a man's debts. The legislature were of opinion, looking to the advantages belonging to the family state in the preservation of morals, the education of children, and possibly even in the encouragement of hope in unfortunate debtors, that this degree of exemption would promote the public welfare."[2] Certainly, family headship is a condition of homestead exemption imposed by almost every state. And the applicant, to have an original homestead set out from his property by the court, should make allegation of the fact that the condition has been observed.[3]

Ownership: Allegation of ownership is proper but not essential when the husband is the applicant, since that has been held presumable; but it is necessary when the wife is the applicant.[4] If the husband has no creditors, his averment of ownership is immaterial where it might be required of a debtor.[5] The title must be so alleged (when necessary) as to show possessory right, though it may be of the highest or lowest grade, in fee-simple or merely leasehold. The vital thing is to show the property such as the family may enjoy without disturbance.[6]

[1] Wilder v. Frederick, 67 Ga. 669; Bechtoldt v. Fain, 71 Ala. 495.

[2] Robinson v. Wiley, 15 N. Y. 494.

[3] *Ante*, pp. 60–65.

[4] Wilder v. Frederick, 67 Ga. 669.

[5] Bechtoldt v. Fain, 71 Ala. 495.

[6] Kitchell v. Burgwin, 21 Ill. 45; Hughes v. Watt, 26 Ark. 228. *See* ch. 4. A wife's homestead right acquired after the sale of partnership property by one partner, with the consent of his copartner, was held not to affect the validity of the deed. Ferguson v. Hanauer (Ark.), 19 S. W. 749. So, an application by her for homestead in that property would not hold upon allegation by her of the state of facts, in Arkansas.

The allegation of *residence* in the state, where the homestead benefit is confined to residents, has been held necessary; and even that the applicant's residence in the county should be averred.[1] A court was asked to charge the jury that the applicant, as the head of a family, was entitled to homestead. This being refused, the appellate court sustained the ruling, and said that it is not every head of a family, but the head of a family *residing in this state*, who is entitled to exemption.[2]

There is no presumption that the applicant is a foreigner, when his petition is silent as to residence; but the fact of residence should be averred when the statute makes that a condition to the granting of the homestead immunity, and when the courts require it.[3]

Occupancy by the householder and his family, at the time of the claim and at the time an alleged disputed lien was put upon the homestead, is a necessary averment (though there need not be further particularization), when setting up homestead, in litigation.[4] So, in litigation, when record notice is among the conditions, the claimant of homestead must aver that he has had his declaration recorded, or has caused the word *Homestead* to be inscribed on the margin of his recorded title, or has done whatever the statute required to be done as notice.[5]

In some forms of application, there should be a description of the land from which the exempt portion is to be carved, or of the portion claimed. If a form is prescribed by statute, it is better to follow it whether it be mandatory or merely directory.[6]

[1] Wilder v. Frederick, *supra*.

[2] Post v. Bird (Fla.), 9 So. 888; Const. Florida (1885), art. 10, § 1; Wabash R. Co. v. Dougan, 41 Ill. App. 543.

[3] So, when chattel exemption is pleaded. Mansf. Dig. of Ark., § 3006; Felner v. Bumgarner (Ark.), 17 S. W. 709.

[4] Paris, *etc.* Ry. Co. v. Greiner (Tex.), 19 S. W. 564; Symonds v. Lappin, 82 Ill. 213; Harper v. Forbes, 15 Cal. 202. *See* Orman v. Orman, 26 Ia. 361. *See* ch. 6.

[5] *Ante*, p. 169.

[6] In the Mississippi Code of 1892, the following form is given, though not made obligatory:

"The State of Mississippi, }
County of ——. }

"*Homestead Declaration.*

"I, John Doe (*or*, Nancy Roe), a citizen of said state and county, do declare that I am entitled to a home-

Description: In any application for original homestead, there should be such description of the property as to enable the court to grant the prayer.[1] If a town lot (the site of the applicant's dwelling-house) is what he asks to have assigned as his homestead, the petition should show that it is within the statutory limitations as to quantity and value. If it is a town lot exceeding the limitation, or a farm of excessive size and value, the prayer should be that a homestead be carved out of it.

The petition of a widow, to have homestead set out to her in the decedent husband's lands, is fatally defective when there is no description of the lands.[2]

In litigation: In homestead litigation, particularity of pleading, as to the conditions, is seldom exacted. The allegation that the claimant's property in question is his homestead constituted according to the statute, and that he has complied with all the conditions, would be sufficient in most courts.

The *onus* is upon the claimant of homestead in litigation to establish by evidence all allegations necessary to the claiming of his right. He is not called upon to prove a negative, but he should show that his homestead is within the statutory limit, which, expressed in another form, is to show that it is not in excess.[3] But it has been held that when the quantitative limit has been alleged, and also that the property was *homestead*, the court would presume that there was no excess

stead in said county, and that I have selected the same as follows: [*Here describe the land and premises. Append plat, if desired.*]

"Witness my signature this —— day of ——, A. D. ——.

"—— ——."

The statute prescribes: "The declaration shall be acknowledged or proved as a deed is required to be, and deposited in the office of the clerk of the chancery court for record in a book to be kept for that purpose, and styled 'Homestead Record.'"

While it is optional for the householder to make and record such a declaration or not, there is inducement held out to him by the new code in favor of the declaration. An additional thousand dollars' worth of property is made exempt, if the owner declares upon it. In other words, the monetary limit is $2,000 without declaration, and $3,000 with it.

For advanced sheets of the yet unpublished new code of Mississippi, the writer acknowledges his indebtedness to the kindness of E. E. Baldwin, Esq., of the Bar of Jackson, Miss.

[1] Ch. 7.

[2] Tanner v. Thomas, 71 Ala. 233.

[3] Lozo v. Sutherland, 38 Mich. 168; Shoemaker v. Gardner, 19 Mich. 96; Meyers v. Pfeiffer, 50 Ill. 485.

of the monetary limitation.[1] That the value is not in excess of the monetary limit is a proper subject of proof, when drawn in question; and it is error to deny the admission of evidence tending to establish the fact.[2] If the value is greater than the limit, the owner may ask for segregation or partition, that the statutory homestead may be assigned to him and marked off to the maximum value.[3]

Particular averments of facts, as to the value of a homestead and the impracticability of carving out the widow's dower from an excessive one, should be made in a bill designed to take the administration of a decedent's estate out of the hands of the administrator and put it into a chancery court.[4]

The successful claiming of homestead is of the nature of a recovery by the claimant for the benefit of his family: so, after the enjoyment of the benefit for several years, neither he nor his privies can be deprived of it because of failure to allege his family headship, or his county residence, in the application.[5] The presumption of ownership, after the application for homestead has been granted and enjoyed, is strengthened by the fact that the applicant was a resident of the place he applied to have set apart.

If a bill in chancery, asking relief against the occupant of homestead premises, discloses the fact that the question of homestead right is involved, the answer need not contain the same averment of fact.[6] The petition of a widow, to have a conveyance of the homestead by herself and husband declared a mortgage, and to recover the mortgaged property as her homestead, need not contain the averment that she had acquired no homestead since the date of the deed, and has none now.[7]

A judgment sustaining homestead cannot successfully be pleaded as *res judicata* when another suit affecting the *status*

[1] Evans v. Grand Rapids R. Co., 68 Mich. 602.

[2] Hill v. Bacon, 43 Ill. 477.

[3] Helfenstein v. Cave, 6 Ia. 374.

[4] Jackson v. Rowell, 87 Ala. 685; Code of Ala. (1886), §§ 2543–4.

[5] Torrence v. Boyd, 63 Ga. 22.

[6] Lenpold v. Krause, 95 Ill. 440.

[7] Hays v. Hays, 66 Tex. 606. She is held not estopped from denying the validity of a mortgage on the homestead given by herself. Planters' Bank v. Dickinson, 83 Ga. 711.

of the property is instituted under changed conditions which have been duly alleged.[1]

When homestead is allotted to debtors only, to save it from execution, there is no restraint upon the sale of real estate by the owner when it is free from liens, though it may be his family residence. It may be susceptible of being assigned him as his homestead, were an execution pending; but that fact is no bar to his alienation of it, by his sole act — the wife having only the prospective dower.[2] It follows that (where such is the law) an application for the allotment of homestead should contain the allegation of the pending execution or of the judgment, if the record itself does not show the state of things. He must specifically aver the facts on which his right to the apportionment of homestead depends.[3]

§ 8. Probate Orders Setting Off Homestead.

The probate judge may assign homestead to the widow out of land which her husband sold without her joinder.[4] He cannot set out an estate of homestead when heirs or devisees dispute the right of the claimant.[5] That right may be passed upon in the proper court, notwithstanding its denial by the probate court at the instance of such disputants.[6] By an *ex parte* proceeding, a probate court allotted homestead to a widow. On appeal it was said that the allotment did not rise to the dignity of a judicial determination against the rights of creditors, nor preclude them from urging their claims against the portion thus set apart to her.[7] Creditors are persons in adverse interest, when the probate court is setting apart homestead to a widow or minor children. They have the right to oppose. They may file written exceptions to the report of commissioners charged with laying off the homestead, and to the claim itself. The confirmation of the report of commissioners, when creditors have had no opportunity to

[1] Martin v. Walker, 43 La. Ann. 1019.

[2] Scott v. Lane, 109 N. C. 154; Fleming v. Graham, 110 N. C. 374.

[3] Dickens v. Long, 109 N. C. 165.

[4] Atkinson v. Atkinson, 37 N. H. 434; Gunnison v. Twitchel, 38 N. H. 67.

[5] Lazell v. Lazell, 8 Allen, 575; Woodward v. Lincoln, 9 Allen, 239; McManany v. Sheridan (Wis.), 51 N. W. 1011.

[6] Mercier v. Chace, 9 Allen, 242.

[7] Corr v. Shackelford, 68 Ala. 241.

oppose, may be vacated on motion. Where the duty of the probate judge is to certify exceptions to the circuit court for trial, his own adjudication of them is *coram non judice*.[1] The circuit court is the proper one in which a claim of homestead should be filed by a widow, when her husband died before execution was levied against his land. If filed in the probate court, the claim should be returned, with the execution, to the circuit court. It is not proper that the issue should be made in the probate court and then certified to the circuit for trial.[2]

When execution has been levied and homestead claim filed by the debtor, the creditor's affidavit of contest must be filed within ten days after notice (when the statute so provides), to save his right of opposition.[3] The purpose of the statutory contest is to divide the homestead from the other lands of the estate. This does not involve any question of title: so a mortgagee cannot propound his interest and have the validity of his claim adjudged as against the widow's homestead claim either in the probate or circuit court. Her right may be contested by the representative of the deceased husband or by any person in adverse interest.[4] If exceptions be not filed within the time prescribed they cannot be allowed later.[5]

Presumption is in favor of the sworn return of an officer relative to laying off a homestead under judicial order.[6] Premature action by the court in setting out the homestead before the filing of the officer's return, when exhibited by bill for the recovery of the land thus set apart, gives ground for demurrer to the bill.[7] The court cannot act on an unsworn return, or one without an affidavit attached.[8]

A creditor may prove that his credit is privileged against the homestead, in an appeal from a probate decree to his prej-

[1] Kelly v. Garrett, 67 Ala. 304.

[2] Keel v. Larkin, 72 Ala. 493.

[3] Ala. Code, § 2834; Block v. George, 70 Ala. 409.

[4] Ala. Code, § 2841; Coffey v. Joseph, 74 Ala. 271.

[5] Farley v. Riordon, 72 Ala. 128.

[6] Timothy v. Chambers, 85 Ga. 257; 11 S. E. 598.

[7] Falls v. Crawford, 76 Ga. 35.

[8] Mabry v. Johnson, 85 Ga. 340; 11 S. E. 771. *See* Larey v. Baker, 85 Ga. 687. In Georgia, where judicial action is necessary in setting out a homestead, there must be leave of court before a homestead can be sold, though both husband and wife join in a warranty deed; and after a sale with warranty, it may be recovered if sold without leave of court. Timothy v. Chambers, 85 Ga. 267.

udice; and he is held not confined to the evidence of the record, as to the time when the debt accrued.[1] If it is within the knowledge of the probate judge that certain property of the decedent is liable for a debt antecedent to the homestead right, or otherwise liable to forced sale, he ought not to set it apart to the widow and minors as their homestead. So, if purchase-money for the property has been unpaid.[2]

If the probate court makes an order against the estate of a deceased wife who had outlived her husband, allowing debts contracted by him while holding their property in community, the order is erroneous. It is not absolutely void, however. The administrator of her estate would not be liable to her heirs for paying such debts pursuant to the order, in an action brought by her heirs after his discharge.[3] A probate order is absolutely void, however, when the court is without jurisdiction (as is any judicial mandate), though made by consent of parties. An order setting off a homestead to the widow and minor children of a decedent, made on the application of the widow herself, was held inoperative to divest her of the title to community property already vested in her as the surviving spouse. The probate court (Harrison, J., said) "had no jurisdiction of the subject-matter with which it purported to deal, and its order thereon was without any effect upon the title thus held by the surviving widow. . . ."[4]

If there is a question before the probate court which cannot be determined there, the cause in which the matter has arisen must be removed to a competent court, when the question so bears upon the cause as to render its solution essential. "When a special equity exists, there can be no sufficient rea-

[1] Perrin v. Sargeant, 33 Vt. 84. *See* Delavan v. Pratt, 19 Ia. 432; Patterson v. Linder, 14 Ia. 414. *Compare* Redfield v. Hart, 12 Ia. 355.

[2] McCreery v. Fortson, 35 Tex. 641. But *see* Harrison v. Oberthier, 40 Tex. 385.

[3] Cameron v. Morris (Tex.), 18 S. W. 422. In Texas, on the death of one spouse or both, the homestead vests in the heirs of the decedent, just as other property does. Const., art. 16, § 52. And, by statute, community property (real and personal) passes to the surviving wife, when her husband dies childless and insolvent, free from community debts. Upon her death, it goes to her heirs exempt from such debts. Cameron v. Morris, *supra;* Zwerneman v. Von Rosenberg, 76 Tex. 522; Childers v. Henderson, 76 Tex. 664.

[4] Sheehy v. Miles, 93 Cal. 228; 28 P. 1046; Cal. Code Civ. Proc., § 1468.

son why the final settlement of a removed administrator may not, on his application, be transferred to and made in the chancery court. Though his office and functions as administrator are terminated by removal, he is required to make final settlement of his administration, which should be made in a court having jurisdiction and power to determine and adjust all the equities arising thereon."[1]

Where the decree confirming the report of appraisers who have set apart a homestead to the widow is appealable by the heirs of the decedent, they lose their right to have it set aside, if, after receiving notice of the application for homestead, they stand by and see the estate administered, and if they are not prevented by fraud from proving that the decedent held the property in his separate right. So held, when the decree had given the homestead to the widow absolutely.[2] And when there is an allowance to children in lieu of homestead, the court's award cannot be set aside on appeal when there is no evidence showing the order to be erroneous.[3] An appeal will not lie from an interlocutory judgment re-assigning a homestead and appointing commissioners to measure it.[4]

A homestead right, though not an estate, may involve a question of title to land; and such a question cannot be tried by a summary proceeding before a circuit court commissioner to recover possession of real estate.[5] But the title itself must not be confounded with the right. Title is not changed by the designation of land as a homestead.[6] If it was in fee-simple before, it remains so after the designation. If it was less than a fee before, it is not raised in character because the ground to which it relates has taken on the homestead character.

[1] Norton v. Norton (Ala.), 10 So. 436. *See* Wood v. Morgan, 56 Ala. 397.

[2] Gruwell v. Seybolt, 82 Cal. 7.

[3] Ross v. Smith, 44 Tex. 398.

[4] Macke v. Byrd (Mo.), 19 S. W. 70. By Mo. Rev. Stat. (1879), § 2694, the commissioners to set apart homestead make the apportionment of dower when the widow's right to the latter exists. What she gets of homestead is in diminution of dower. Bryan v. Rhoades, 96 Mo. 485. If her interest in the homestead is less than her dower, she has the difference set off to her in dower from the property of the estate. Graves v. Cochran, 68 Mo. 76. If land exceeds the homestead limitation, and has been divided among heirs who hold subject to the widow's right, they are entitled to notice of any probate proceeding to set off her homestead. Miller v. Schnebly, 103 Mo. 368.

[5] Riggs v. Sterling, 51 Mich. 157.

[6] *Ex parte* Ray, 20 S. C. 246.

§ 9. Probate Orders to Sell Homestead.

Though the probate court has no authority to order the sale of a homestead of a decedent during the minority of any of his children,[1] yet if it be sold with other lands, in a body, under probate order, and the sale be confirmed, the circuit court cannot quash the confirmation on *certiorari;* for it has no guide by such writ to separate the homestead from the other land sold with it. An heir, wronged by such sale, must seek redress by action at law to recover possession of the homestead portion of the land sold.[2]

Partition is necessary when realty including the homestead is sold with the homestead excepted. There must be segregation of the alienated portion from that which remains unsold. There is no co-tenancy existing between the purchaser and the homestead-holder, for either does not have an interest in all the tract. The householder has the whole and exclusive interest in the homestead; the purchaser has the whole and exclusive interest in the rest; both interests to be set out. And, in the absence of a legal remedy, partition may be made by order of a court of equity on the application of either party.[3] A probate court may order it when the homestead is to be segregated from administrable property with which it is conjoined.[4]

There may be co-tenancy resultant from sale when, instead of a homestead, *an exempt interest* is intermingled with other real interests sold, so that the purchaser and the householder owning such interest "hold by several and distinct titles but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously"—to quote from Blackstone.[5]

Such exempt interest may be ascertained before or after sale, and partition may be made and the co-tenancy destroyed: but it is not *homestead.* Though often called so, neither decision nor statute can change its nature and make it so. By judicial

[1] Stayton v. Halpern, 50 Ark. 329; Nichols v. Shearon, 49 Ark. 75; McCloy v. Arnett, 47 Ark. 445; Cannon v. Bonner, 38 Tex. 487.

[2] Burgett v. Apperson, 52 Ark. 213.

[3] *See* Ketchum v. Patrick, 32 S. C. 443; Barney v. Leeds, 51 N. H. 278, and cases there cited.

[4] Coffey v. Joseph, 74 Ala. 271; Freeman on C. & P., § 528.

[5] 2 Black. Com. 191.

or legislative action, such intangible interest can no more be made a physical family residence than it can be transformed to a church or theatre.

When an administrator had sold land of the decedent to pay debts, with the widower's homestead right reserved, it was too late for a creditor to compel him to sell her reserved interest to pay a balance on his debt, which accrued before the passage of the homestead statute — he having taken his dividend as creditor of the insolvent estate without objection to the allowance of the widow's homestead. He was held concluded by his own action.[1]

The judgments and orders of probate courts have been accorded the same presumptions in their favor as those of the circuit courts.[2] So, where this usage prevails, when such a court orders real estate to be sold for debts, the presumption is that it is liable to sale. The burden is on the opponent to remove the presumption. The burden is on the claimant, who avers that the property subject to the order is exempt, to establish his position.[3] It was held to be on the party denying the right of a widow and minor children to homestead in property sold by an administrator of the estate of the deceased husband and father, unless the sale was made to pay debts from which the homestead was not exempt.[4]

In a suit and sale to effect partition, in which the widow is plaintiff and the minor heirs, duly represented, are parties defendant, the title passes shorn of its homestead character if no exemption right is claimed during the proceedings.[5] But the right, if claimed, is reserved and satisfied out of the proceeds.[6]

Quitclaim title was held to pass homestead[7] when given by a widow to the executor of her late husband's estate. She released all her right, title and interest, "whether of dower or otherwise, including every claim and demand," which she might have "against the estate for allowance as widow or

[1] Judge of Probate v. Simonds, 46 N. H. 363.

[2] Murphy v. De France, 105 Mo. 53, 15 S. W. 949; Price v. Ass'n, 101 Mo. 107.

[3] *Id.* *Compare* Daudt v. Harmon, 16 Mo. App. 203.

[4] Rogers v. Marsh, 73 Mo. 64.

[5] Rolf v. Timmermeister, 15 Mo. App. 249.

[6] Graves v. Cochran, 68 Mo. 74.

[7] Mack v. Heiss, 90 Mo. 578.

otherwise." There seems to have been no minor to delay partition. There is no reason why partition should be delayed when no homestead right retards it.

A community homestead had an execution levied upon it on a judgment rendered against the surviving wife. Upon her death the judgment creditor instituted proceedings to have the property appraised, and the excess above five thousand dollars (if any) applied to the satisfaction of his judgment.[1] The court ruled that the judgment against the decedent should be presented to the executor like any other claim, since the levy had created no lien upon the homestead.[2] The death of the husband had not affected the character of the homestead.[3] The property vested in the surviving wife at his death.[4]

The creditor's claim was therefore to be presented to the executor or administrator of the estate of the widow as a common claim. His judgment and levy simply made a foundation for statutory proceedings to ascertain the value of the property and for an order of court for partition or sale, that the excess might be applied to the judgment.[5]

Indivisible property, appraised beyond the amount of homestead exemption, may be sold at execution sale when the debtor has given notice to the officer in charge that he will pay the debt less the exemption sum.[6]

Insolvency: In insolvency proceedings, an order to sell the homestead of the debtor was held void.[7] Had the court possessed jurisdiction over the property and subject-matter as well as over the parties it would have been voidable but not absolutely void. If home property be sold under execution without setting off the homestead when the statute directs it to be done, the irregularity will not prevent the purchaser from recovering possession by action of ejectment. The sale will not be void, unless the requirement that the homestead

[1] Cal. Civ. Code, § 1245.

[2] Sanders v. Russell, 86 Cal. 119; Cal. Code Civ. Proc., §§ 1475, 1505.

[3] *Id.;* Tyrrell v. Baldwin, 78 Cal. 470.

[4] *Id.;* Mawson v. Mawson, 50 Cal. 539; Estate of Headen, 52 Cal. 295; Gagliardo v. Dumont, 54 Cal. 496; Herrold v. Reen, 58 Cal. 443.

[5] Cal. Civ. Code, § 1245 *et seq.;* Barrett v. Sims, 59 Cal. 618; Lubbock v. McMann, 82 Cal. 230.

[6] Hall v. Johnson, 64 N. H. 481; N. H. Gen. Laws, ch. 138, § 13.

[7] Barrett v. Simms, 62 Cal. 440.

be set off is prohibitory of sale made without compliance. A court of chancery may adjust the rights of the parties concerned.[1]

A court of bankruptcy or insolvency has nothing to do with exempt property beyond the segregation of it from what is liable for debt; and it can do that only by virtue of statute when its jurisdiction is limited, as it ordinarily is. Such court cannot even order the segregation after an illegal and void sale of the homestead, by the assignee, in block with liable property, by virtue of any equitable power. By statute, there may be partition when the sale is not void.

An insolvent, after assignment for the benefit of his creditors, may protect his homestead, displace an intruder by writ of ejectment, and employ any proper remedies, legal or equitable, which a solvent man may use — for his homestead was not surrendered, and the assignee has no authority over it or charge concerning it.[2] The assignment transfers the excess.[3] The reservation of exempt property from general assignment does not vitiate the assignment.[4]

A purchaser, from a bankrupt, of property excepted from sale by a bankrupt court, gets title free from the demands of the creditors; and the widow of the bankrupt has been held not entitled to homestead in it.[5]

[1] Leupold v. Krause, 95 Ill. 440.

[2] Moore v. Morrow, 28 Cal. 551.

[3] Copeland v. Sturtevant (Mass.), 30 N. E. 475. The homestead was subject to partition, under the probate law of Texas of 1848, when the wife survived the husband and the estate was solvent. In a proceeding for partition, a judgment determining the interests of the parties to the suit relative to the title to land is admissible in evidence, though the wife was not a party, if she then had no homestead rights involved in that action, though she is now claiming them in community property affected by the judgment. Jergens v. Schiele, 61 Tex. 255. *See* Putnam v. Young, 57 Tex. 464. But a party who might have claimed homestead in a litigation cannot do so afterwards against the other party who was successful in the first suit. He and his privies are concluded. Nichols v. Dibrell, 61 Tex. 539. It has been held that a widow's failure to claim partition is a waiver. Chilson v. Reeves, 29 Tex. 276.

[4] Bradley v. Bischel, 81 Ia. 80.

[5] Youngblood v. Lathen, 20 S. C. 370. Section 5057 of the United States Revised Statutes limits a suit by the assignee against the bankrupt to recover land which the latter fraudulently retains as his homestead. Leech v. Dawson, 23 Fed. 624; Phelps v. McDonald, 99 U. S. 306; Clark v. Clark, 17 How. (U. S.) 315. *See* Jenkins v. Bank. 106 U. S. 574.

§ 10. Suit by Administrator Relative to Creditors.

A statute authorized an administrator of an estate to prosecute, at law or in equity, in behalf of creditors, when there is deficiency in his hands and a fraudulent conveyance of realty has been made by the decedent: the action being to recover the property.[1] In a proceeding by virtue of this statute, it was held that the decedent debtor's conveyance of all his property with the homestead was fraudulent only as to creditors not provided for. So far as necessary to pay their claims, the conveyance was liable to be set aside. But the administrator, under that statute, cannot recover, by action of ejectment, an undivided interest in the fraudulently conveyed realty, regardless of the homestead; for the exempt portion of the land sold cannot have been conveyed in fraud of creditors.[2] He must proceed by bill in equity.[3]

[1] R. L. of Vermont, § 2162.

[2] *Id.*, § 1894.

[3] Pease v. Shirlock, 63 Vt. 622; 22 A. 661. Tyler, J.: "The defendants' counsel insisted, on the trial of the court below, that the plaintiff, when he rested, had not made a *prima facie* case, and moved for a nonsuit, which motion was denied. The first question presented by the exceptions is whether the conveyance by William Shirlock and wife of their farm to their son, the defendant Frank Shirlock, was fraudulent and void as to the grantor's creditors. The farm conveyed was worth from $1,700 to $2,200, of which from $700 to $800 was in the dwelling-house and shed attached. The grantor's debts at the time of the conveyance, as subsequently shown by the report of commissioners, amounted to about $1,200, for the payment of which he reserved property to the amount of only $81. The grantor took a mortgage back, conditioned for the support of himself and wife during their lives, which support the defendant furnished. The deed and mortgage were executed February 29, 1888. William Shirlock died April 17th following, and his wife, August 11, 1890. On the 21st day of August, 1889, Frank Shirlock executed and delivered a mortgage of the premises to William Martin as security for a debt due from him to Martin. This action was brought May 15, 1890, by the administrator of William Shirlock in behalf of his creditors, under section 2162, R. L., which is as follows: 'When there is a deficiency of assets in the hands of the executor or administrator, and when the deceased person made such fraudulent conveyance of real estate in his life-time, the executor or administrator may commence and prosecute to final judgment any proper action or suit, in law or equity, for the recovery of, and may recover for the benefit of such creditors, such real estate; and may also, for the benefit of the creditors, sue and recover for goods, chattels, rights, or credits fraudulently conveyed by the deceased in his life-time.' That the conveyauce falls within the provision of this section, and of sections 1955 and 4155, that the deed and mortgage were fraudu-

That the decedent and his wife (in the case cited) had acquired their limited homestead right in the property, prior to the creation of the debts; and that the homestead had never been segregated from the rest of the farm, was conceded in

lent and void as to William Shirlock's creditors, and that in a proper action the administrator may recover a part of the land sufficient to pay the debts, admits of no serious doubt, for the reason that the conveyance was operative to place substantially all the grantor's property beyond the reach of his creditors. That this was done with such intention on the part of the grantor, and that that intent was known to the grantee, must have been found by the jury, under the charge of the court; for the exceptions state that the jury were fully instructed, and in a manner to which no exception was taken, concerning the facts they must find, and the law governing the plaintiff's right of recovery. It was decided in Crane v. Stickles, 15 Vt. 252, that a conveyance of all the debtor's property, without making provision for the payment of debts, was fraudulent and void as to creditors. Prout v. Vaughn, 52 Vt. 451. It is well settled that a debtor is bound to reserve from a conveyance of this kind ample property for the payment of his debts. Church v. Chapin, 35 Vt. 223; Foster v. Foster, 56 Vt. 540. Kelsey v. Kelley, 22 Atl. Rep. 597, heard at the last general term, and referred to by counsel, is in line with these cases.

"The second question is whether, in an action of ejectment, the plaintiff could recover an undivided interest in the entire premises, irrespective of the homestead. The arguments of counsel on both sides have proceeded upon the ground that there was a homestead interest in this farm, exempt from attachment when the action was commenced, and there was no exception to the charge of the court on this subject. . . . William Shirlock's creditors had no interest. Neither they nor the plaintiff, as the representative of their interests, could be tenants in common with the defendant in the homestead. Lindsey v. Brewer, 60 Vt. 627, 15 Atl. Rep. 329. On this ground, the defendant's motion for a nonsuit should have been granted. By the terms of the statute under which this action is brought, the conveyance was fraudulent and void only as to the grantor's creditors, and should be disturbed only so far as is necessary to satisfy their claims. In a case where the estate thus conveyed was worth, say, $5,000, and the debts of the grantor were but a few hundred dollars in amount, it would be a severe construction of the statute to hold the whole conveyance void. If William Shirlock had owed no debts, the conveyance of his farm to his son would have been valid, and in the circumstances of this case no reason can be assigned why the conveyance should not be held valid except as to creditors. Bassett v. Hotel Co., 47 Vt. 313. Then, was the interest which the plaintiff was entitled to recover in the demanded premises such as could be reached by means of an action at law? The statute provides that the administrator may have any proper action or suit in law or equity for a recovery of the real estate fraudulently conveyed. A case can readily be conceived of in which an action at law would be the appropriate remedy, as where the estate conveyed

the trial court. Their right to have had the exempt portion laid off so as to give them a real, tangible, habitable homestead, was beyond dispute. Their right to sell it, if thus laid off, was unquestionable. But the contention by counsel that the purchaser became a co-tenant with the vendors, who were supposed to have held an ideal homestead after the nominal conveyance of the whole farm, was manifestly untenable; because no such ideal has a hearth-stone or anything habitable; the decedent and wife could not have that exclusive possession which is essential to homestead if the purchaser was a tenant-in-common with them. Clearly then, a bill in equity, to ascertain the creditors' rights in the unsold interest, and to accord justice to them by segregating the homestead from the rest of the farm and giving them satisfaction out of the balance, was the proper remedy.

The whole sale was not a nullity because in fraud of the creditors; the unknown portion non-liable (because the homestead right was in it) was sold without fraud of creditors; but that portion was not homestead when so intermixed with liable realty as to be undistinguishable. It was an interest — not land itself.

The language of the statute was, not that an administrator should have an action at law merely in behalf of defrauded creditors, but "any proper action;" and since the statute provided no adequate legal remedy, resort should have been had to an equitable one, as the court ably pointed out.

The homestead is not generally administered by the administrator as an asset of the decedent's estate, and is not usually subject to the orders of the court of probate when settling the estate.[1] But when it is an undivided part of other realty which is subject to that court and is to be administered, it may be segregated by order of the court.[2] If it is not thus con-

was unincumbered by a homestead and the whole was insufficient to pay the debt of the grantor; but here, the homestead being unelimi-nated from the other real estate, we are unable to see how ejectment or any other action at law can meet the exigencies of the case. By a proceeding in equity a part of the land, sufficient to pay the debts, could be sequestered and sold, and the title to the remainder rest undisturbed in the hands of the defendant. Spaulding v. Warner, 59 Vt. 646, 11 Atl. Rep. 186; Lindsey v. Brewer, *supra*."

[1] Estate of Tompkins, 12 Cal. 114: Carter v. Randolph, 47 Tex. 379.

[2] *Id.;* Pease v. Shirlock, *supra*.

nected with the realty so as to be merely an ideal homestead, or non-habitable interest, but is a house-and-land family residence well rounded and needing no segregation, the administrator has nothing to do with it. If such a real homestead has been sold by the sheriff on judgment for debt, and the debtor-owner sues to recover, and dies pending the action, his administrator cannot take his shoes to go on and prosecute:[1] it is the business of those to whom the homestead will come, if the suit be gained. No doubt the administrator can take part in any suit in which the homestead is incidentally involved, if it is necessary to protect the rights of creditors and prevent fraud upon them. If the question is whether homestead shall be apportioned from other land which is administrable, he has a voice.

When a probate court orders land to be sold to pay debts of the decedent, and the land, or a part of it, is claimed as exempt because it is a homestead, the burden of proof to establish the plea is on the claimant.[2]

The husband's giving to his wife the proceeds of the sale of their homestead is not fraudulent *per se* as to creditors.[3] It is different from the conveyance of the homestead itself to her, when both he and she continue to enjoy it; for then it is plainly a change of ownership which does not affect the policy of the law to protect families. In a sale for money not held for re-investment in a new home, the homestead is no longer enjoyed and the policy of the law no longer carried out: so the creditors would ordinarily have the right to execute their judgments against ordinary property bought by the debtor with the proceeds of the homestead. If the money is not invested in liable property, but is donated by the debtor to his wife, there would seem to be plausibility in the proposition that it would be liable to creditors; but this is not generally held, and, as above shown, such disposition of the proceeds of the homestead is not fraudulent in itself as to creditors. The doctrine is settled that creditors have nothing to do with exempt property, except that they may question the exemption;

[1] Bassett v. Messner, 30 Tex. 604.

[2] Murphy v. De France, 105 Mo. 53 (overruling Daudt v. Harmon, 16 Mo. App. 203). By the act of 1865, the widow and all the heirs were made necessary parties to a proceeding for a homestead. *Id.*

[3] Wetherly v. Straus, 93 Cal. 283.

that they are not defrauded by any disposition the owner may make of it; but when it is converted into ordinary property, the latter is liable to creditors.[1]

§ 11. Relative to Foreclosure.

Manifestly, if the homestead has been duly mortgaged by man and wife, they can have nothing to say, against its foreclosure, on the ground of any remaining homestead rights. All those rights went when they made the mortgage, and the mortgagors are presumed to have had the *quid pro quo*.[2] But suppose the wife did not join in making it, and therefore the mortgage was void as to the homestead: there would be occasion for allotment if there was other realty mortgaged in the same act, and that other realty was subject to the husband's disposal. An attempt by the mortgagee to foreclose against the exempt property, as well as the non-exempt, would render necessary a separation of the two. It would become necessary, in some states, for the debtor to plead his exemption.

The adult heirs of a deceased homestead-holder who mortgaged the premises cannot compel foreclosure, in a partition suit instituted by them, if the widow and minor heirs are in occupancy, and she promptly pays the interest on the mortgage, and the mortgagee does not desire to foreclose.[3]

Redemption: A homestead subject to a judgment lien may be redeemed by the lien-holder after its foreclosure as part of a larger property by a mortgagee, if he was not a party to the foreclosure. To redeem, he must pay the sum bidden at the public sale for the whole property, less the value of the homestead.[4] In a bill to redeem land from mortgage, if the plaintiff claims redemption on the ground that he holds an estate of

[1] *See* generally for administrator's sale of homestead, pages 490, 493.

[2] Exception to this statement may be found in statutes where mortgage is prohibited. In Oklahoma, eighty of the one hundred and sixty acres, allowed as a rural homestead, cannot be subjected to mortgage, either legal or equitable. Though both husband and wife execute the act in due form, it is void. Comp. Stat. Oklahoma, § 2861. And in Texas, the mortgage or trust deed of the homestead is inhibited, except when given to secure purchase-money, debt for improvements, *etc.* Sayles' Tex. Stat. (1888); Const. of Tex., art. XVI, §§ 50–52.

[3] Hannah v. Hannah (Mo.), 19 S. W. 87.

[4] Sutherland v. Tyner, 72 Ia. 232.

homestead in the property, and alleges that the mortgaged premises are a part of his homestead though separated from his dwelling place, his bill is not liable to demurrer on the ground that it shows no estate of homestead in the property.[1] Under such a bill, when the plaintiff has right of homestead, the exempt portion may be set off by commissioners.[2]

The sheriff's sale of property on part of which the homestead right rests is not necessarily void because it was not made expressly subject to the homestead estate.[3]

A senior mortgagee, whose lien was privileged against his debtor's homestead and other realty, took possession of the property to foreclose for breach of condition. A junior mortgagee, whose lien was subject to the debtor's homestead right, filed a bill to redeem; and it was held that he could compel his senior to account to him for rents and profits received, or which might have been recovered by him, as possessor of the whole property.[4]

If, at a sale on execution of an equity of redemption of property on which rests a homestead right, that right be demanded by the beneficiary and disregarded by the officer, the purchaser cannot oust the homestead-holder, for he gets no title.[5]

Exhausting other property: The right to make the mortgage creditor exhaust other property before the homestead does not belong to a third person who has bought the homestead after the execution of the mortgage under which the sale is had.[6] If such creditor has exhausted such other property, he cannot have it proceeded against in the hands of a third person before the selling of the homestead.[7] One who holds a claim antecedent to homestead acquisition will not be affected by his delay till other property has been exhausted by other creditors.[8] A third person, purchasing the homestead under a mortgage sale, has no right to compel a creditor

[1] Davis v. Wetherell, 13 Allen, 60.
[2] Pittsfield Bank v. Howk, 4 Allen, 347; Silloway v. Brown, 12 Allen, 30.
[3] Swan v. Stephens, 99 Mass. 7.
[4] Richardson v. Wallis, 5 Allen, 78.
[5] Laconia Bank v. Rollins, 63 N. H. 66; Kensell v. Cobleigh, 62 N. H. 298; Tucker v. Kenniston, 47 N. H. 267; Fogg v. Fogg, 40 N. H. 288.
[6] Barker v. Rollins, 30 Ia. 412; Kemerer v. Bournes, 53 Ia. 172.
[7] Dilger v. Palmer, 60 Ia. 117.
[8] Denegre v. Hawn, 14 Ia. 240.

of the mortgagor to exhaust other property before the homestead.[1] It cannot be done by a cross-action, when the right to compel the exhaustion of other property exists: the method is by special direction in the execution.[2]

Because the homestead interest is favored by the constitution of a state, a mortgagor was accorded the right of demanding that his homestead be discharged from mortgage incumbrance by the application of proceeds in excess of what was necessary to satisfy the debt on which the property had been sold. Judgment creditors, whose inoperative liens antedated the mortgage, thought themselves entitled to the excess of proceeds — *i. e.*, those remaining from a sale made to satisfy a debt for which the homestead was indisputably liable. But the court applied the money to the extinguishment of the lien immediately operative.[3]

After a mortgage given, a creditor obtained judgment against the mortgagor; and, pending execution, the defendant had a part of what he had mortgaged set apart as his homestead. It was held that the judgment creditor could compel the mortgagee to exhaust the homestead portion first.[4]

A senior mortgage covered land including the homestead. A junior mortgage covered the same, except the homestead. The holder of the latter foreclosed, and he bought the land at the judgment sale. The senior mortgagee sat by, relying upon his seniority of lien. When he came to foreclose, the late junior, who was now the owner, claimed that the senior must make his money on what remained — the homestead. But the senior insisted that he must first exhaust the other property liable under his mortgage — that is, the land just sold and bought in by the junior — and so the court said.[5]

Where a mortgage is upon exempt property with other property not exempt, and it is held to be a general assignment, creditors cannot share in the proceeds of the sale unless there has been a waiver of exemption in their favor.[6]

[1] Barker v. Rollins, 30 Ia. 412; Kemerer v. Bournes, 53 Ia. 172.

[2] *Ib.*

[3] Leak v. Gay, 107 N. C. 468; Code N. C., §§ 501, 3766; Wilson v. Patton, 87 N. C. 318; Butler v. Stainback, 87 N. C. 216; Curlee v. Thomas, 74 N. C. 51.

[4] State Savings Bank v. Harbin, 18 S. C. 425.

[5] Equitable Ins. Co. v. Gleason, 62 Ia. 277; Grant v. Parsons, 67 Ia. 31.

[6] Collier v. Wood, 85 Ala. 91.

If a tract be sold, except a homestead carved out of it under an order of court; and if the proceeds be sufficient to satisfy a senior judgment on a debt antedating the exemption law; and if the equities of parties are not reserved in the order of sale,— may a junior judgment creditor provoke the sale of the homestead to pay the senior? No; for the sale of the tract, less the homestead, would have already paid him.[1]

The finding of the trial court that the plaintiff furnished the material with which the defendant built his dwelling-house, and that the note (sued upon) was given for the material, was held conclusive on appeal. So, the homestead was liable to execution when the judgment on the note could not be satisfied by the sale of personalty.[2]

Ejectment: The purchaser of a homestead at a sale under a mortgage given by the debtor for purchase-money is entitled to possession; and he may eject the occupant. He is entitled to a writ of assistance upon satisfying the court that the sale was to foreclose a purchase-money mortgage executed by the debtor.[3]

The plaintiff, in a suit to eject a widow from land assigned her as a homestead, should aver the character of the title under which it was assigned — whether in fee or for life; for, if the former, the assignment is conclusive unless reversed by a higher court on appeal.[4]

In an ejectment suit, there was a motion to dismiss the plaintiff's appeal, on the ground that the judgment had been satisfied. The defendant, in possession of property claimed as homestead, under contract to purchase, had been adjudged entitled to it, by the lower court, on her payment of the balance due on the contract. She had neither paid nor offered to pay; nor had she so pleaded as to warrant that court to make such ruling. The pleading merely put at issue the right of possession. The judgment, so far as this ruling was con-

[1] Shell v. Young, 32 S. C. 462, distinguishing State Bank v. Harbin, 18 S. C. 425.

[2] Tyler v. Johnson, 47 Kas. 410. On exhausting the excess when the homestead exceeds the legal limit, *see* p. 410.

[3] Skinner v. Beatty, 16 Cal. 156. *Compare* Montgomery v. Tutt, 11 Cal. 190. *See* Dillon v. Byrne, 5 Cal. 455.

[4] Hutchinson v. McNally (Cal.), 23 Pac. 132. *See* 85 Cal. 619; 24 Pac. 1071.

cerned, "was entirely outside of any issue joined in the cause before the court. It was entirely foreign to anything set forth in either complaint or answer. There was nothing in the case on which to base it. It is suspended, as it were, in mid-air, without support of any kind or description, and is entirely irregular and erroneous."[1]

In an action of ejectment for two tracts, of eighty acres each, the plaintiff relied upon a mortgage given by the husband without his wife's assent. The defense was that the two tracts were homestead and the mortgage thereon void. The jury allowed the defendant to retain one tract as his homestead, on which he resided. He had refused to elect between the two.[2]

When land (including the homestead not selected) is sold all together without the wife's joining the husband-vendor in the deed; and is subsequently subjected to an execution levied before the transaction mentioned, the purchaser at the private sale may be ejected by the purchaser at the public sale under the execution. The suit to eject cannot be successfully resisted on the grounds that the wife did not sign the deed given and that the land sold under execution included the homestead of the vendor at public sale.[3]

Pleading homestead against foreclosure: Homestead should be pleaded in a foreclosure proceeding, if the defendant does not mean to waive exemption.[4] A junior mortgagee may intervene in an action to foreclose, brought by his senior, to show that the homestead proceeded against is exempt from the plaintiff's claim while liable for his.[5]

The burden of proof is on the defendant who pleads homestead against a mortgage in an action brought to foreclose.[6] For it is not to be assumed that he has hypothecated property for a consideration which he has enjoyed, if he had no right

[1] Alexander v. Jackson (Cal.), 25 Pac. 415.

[2] De Graffenried v. Clark, 75 Ala. 425. In Mississippi, in an action of ejectment, homestead cannot be allotted. Lazar v. Caston, 7 So. 321.

[3] First Nat. Bank of Constantine v. Jacobs, 50 Mich. 340.

[4] Larson v. Reynolds, 13 Ia. 579; Haynes v. Meek, 14 Ia. 320; Collins v. Chantland, 48 Ia. 241; Brumbaugh v. Zollinger, 59 Ia. 384; Hemenway v. Wood, 53 Ia. 21.

[5] Alley v. Bay, 9 Ia. 509.

[6] Webb v. Davis, 37 Ark. 551, as to a mortgage executed when the Arkansas constitution of 1868 was in force.

to do so. The invalidity of his act is not a matter of presumption.

It has been held that the householder, after having been a party defendant to foreclosure proceedings against his homestead, cannot afterwards recover from the purchaser on the ground that the homestead was exempt and therefore the mortgage invalid. He should have pleaded such ground in the foreclosure suit, to make it available.[1] If he has any remedy, it is in equity, to set aside the sale.[2]

There are many cases in which householders have denied the validity of mortgages executed by themselves on the ground that their wives did not sign. They are not estopped from setting up this ground, if the statute renders such forms of mortgage null. Frequently the wife joins the husband in setting up this ground, or she appears alone to do so.[3] Even though she has signed, she may repudiate her act if there was not the required acknowledgment.[4] If, however, she should plead the want of acknowledgment, in some states her defense would be of no avail, if she has freely joined in giving and signing the mortgage, acting as though she were a *feme sole*.[5]

In a foreclosure against land, of which the defendant claims an undivided interest, he may state facts, in his plea setting up his interest, tending to show his inability to designate his homestead boundaries before the partition, and thus make valid defense to the suit to foreclose the mortgage.[6]

In a foreclosure suit, those should properly be made parties defendant who have issued executions against the mortgaged property. They may be charged with the conversion of such property though it be in the custody of the sheriff, as he holds subject to their judgment and execution lien.[7]

Receiver: Under some circumstances, a receiver may be appointed, in an action to foreclose a mortgage, though the property is a homestead. It may be hotel property about to be diminished in value by being closed, so that such appoint-

[1] Haynes v. Meek, 14 Ia. 320.
[2] Coon v. Jones, 10 Ia. 132.
[3] *Ante*, ch. XII, §§ 3-20; Hancock v. Herrick (Arizona), 29 P. 13.
[4] Phillips v. Bishop, 31 Neb. 863.
[5] Sandwich Co. v. Zellmer (Minn.), 51 N. W. 379.
[6] Jenkins v. Volz, 54 Tex. 636.
[7] Silberberg v. Trilling (Tex.), 18 S. W. 591.

ment would be advisable. The court has equitable jurisdiction to make the appointment when its exercise becomes necessary to protect the rights of a mortgagee not resting on the common-law principle of a legal estate transferred to him by the mortgage.[1] In an action for forcible detainer, in which the defendant claimed homestead, a receiver was appointed.[2] But it is questionable whether it is ever proper to take possession of a mortgagor's homestead while proceedings to foreclose are pending. Certainly it is not proper practice, as a general rule. An application for such an appointment should always be refused when the amount of the mortgage debt is a subject of contention in the case.[3]

When an executor is ordered by the court to turn over property to a receiver, he cannot continue to hold it on the ground that it is homestead.[4] In administering his deceased wife's estate, he cannot set up an original claim of homestead exemption against her creditors, in his return to a rule to show cause why he should not turn over the property of the estate to a receiver.[5]

Marshaling liens: It is necessary that the court determine the rank of liens, in a foreclosure suit upon notes and advancements secured by mortgage, when a third person, cited as a defendant, claims a lien upon the land as prior to that of the mortgagee. The court may decree the payment of such person from the proceeds of the sale, when he has been made a party defendant (though he has filed no cross-bill), when he has set up his lien, as paramount, in his answer to the plaintiff's bill.[6] Greater particularity of pleading would be required

[1] Lowell v. Doe, 44 Minn. 144; Finch v. Houghton, 19 Wis. 163; Schreiber v. Carey, 48 Wis. 208; Hyman v. Kelly, 1 Nev. 148; Pasco v. Gamble, 15 Fla. 562; Hollenbeck v. Donnell, 94 N. Y. 342.

[2] Bromley v. McCall (Ky.), 18 S. W. 1916.

[3] Callanan v. Shaw, 19 Ia. 183.

[4] Harmon v. Wagener, 33 S. C. 488.

[5] Harmon v. Wagener, 33 S. C. 488; 12 S. E. 98; Code S. C., §§ 265, 360.

[6] Dillman v. Will Co. N. Bank (Ill.), 27 N. E. 1090. Scholfield, C. J.: "The Will County National Bank had a mortgage on real estate belonging to Andrew Dillman, and occupied by him as a homestead, to secure the payment of promissory notes for $9,493.87, and an advance to the amount of $5,830.29. John W. Nadelhoffer had a judgment lien against the same real estate for $8,647.49. Bill in chancery was filed by the bank in the circuit court of Will county against Dillman and his

in some states. It will be noticed, in the case cited, that the court confined its authorities to its own state, but the principle would be recognized in many others. Had the contesting lien-holder come voluntarily into court, his pleading should have been by cross-bill; but as he was made a party defendant by the mortgagee for the purpose of having the question of priority settled, it was clearly proper that he should state his case and make his prayer in his answer.[1]

wife and Nadelhoffer, praying for a foreclosure of its mortgage, the setting off of homestead, and a sale of the mortgaged premises. Nadelhoffer answered, claiming that his lien was paramount to that of the bank. On the hearing, decree was rendered that the mortgage be foreclosed, appointing commissioners to set off homestead, directing a sale of the mortgaged property after homestead should be set off, and that the proceeds of the sale be applied, after payment of costs, (1) to the payment of the amount due upon the notes secured in the mortgage; (2) to the payment of the amount due Nadelhoffer upon his judgment; and (3) to the payment of the amount due for the advances secured by the mortgage. The appellate court of the second district affirmed this decree. It is now contended here, as it was contended in the appellate court, and the same arguments that were filed there are refiled here in support of the contention, (1) that it was error to grant Nadelhoffer affirmative relief on his answer alone, he having filed no cross-bill in the case; (2) that the commissioners to assign homestead were not sworn before a proper officer; (3) that the decree erroneously cuts off the right of dower of Dillman's wife. We concur in the judgment of the appellate court, and refer to the reasoning in support thereof, as found in the opinion filed in the case, as a sufficient answer to the arguments by appellants' counsel (Dillman v. Bank, 36 Ill. App. 272); and we deem it necessary to add only: (1) The bank was entitled to have its mortgage foreclosed and the priority of the liens upon the property determined under the bill which it filed. Ellis v. Southwell, 29 Ill. 549; Soles v. Sheppard, 99 Ill. 616. The relief to Nadelhoffer was only incidental to and inseparable from the relief to appellee, and was therefore necessarily allowable upon his answer alone. See cases *supra*. (2) These commissioners were appointed by the court of equity, and not by an officer having an execution, as provided by sec. 10, ch. 52, Rev. St. 1874; and they were therefore not required to take an oath before the person therein designated. The court of equity unquestionably had power to direct that they take an oath for the performance of their duties before any officers empowered by law to administer oaths generally, and notaries public are thus empowered. Sec. 2, ch. 101, Id. (3) The decree does not assume to divest the wife of Dillman of her inchoate right of dower, and it is impossible that it can have that effect. The other objections in the arguments to the decree below are, in our opinion, trivial, and demand no answer. The judgment is affirmed."

[1] *See* generally, as to determining

Ordinarily, no form of action is peculiar to homestead litigation; "the test of exemption or non-exemption is not the form of action pursued, but the consideration of the debt due;" that is, whether the suit is for purchase-money or like claim not affected by exemption, or is for something not collectible from the homestead.[1]

Married homestead beneficiaries sold and conveyed their homestead, taking the grantee's note secured by lien on the property. This divested the property of its homestead character. The grantors cannot plead that the land is their homestead against the right of indorsees to whom they have transferred the note to establish a lien against the land. They do not occupy the position of one having made an executory agreement to sell homestead. Had they any right left after giving the deed of sale, on the ground that the grantee had not paid the price, they parted with that when they transferred the note given for the price. The part of the answer, setting up homestead right in bar of the foreclosure of the lien, was met by demurrer which was sustained.[2]

Sureties: A husband and wife each owned eighty acres, and the homestead was upon half of his tract. All was mortgaged together by them, and subsequently the mortgagee released the wife's land. The wife was surety for the debt. It was decided that the homestead could not be sold till all the other land that had been mortgaged should be exhausted; that prior to such exhaustion, the homestead could not be sold even to protect the wife as surety; that the rule above stated takes precedence of the rule that the surety may have the principal's property exhausted before his own.[3] In thus holding, it was said by the court: "The plaintiff in this case, by voluntarily releasing a part of the land mortgaged, cannot defeat the beneficent purpose of the statute to secure a home for the family, and cause the home to be sold which the statute declares shall be exempt. The rules prevail in all cases of sureties for homestead owners. In the case of the wife who becomes the surety for her husband, there are persuasive equities

the rank of liens and assets, Wood v. Wheeler, 7 Tex. 13; Webster v. Bronstow, 5 Bush, 522.

[1] Ransom v. Duff, 60 Miss. 901.

[2] De Hymel v. Mortgage Co., 80 Tex. 493; 16 S. W. 311.

[3] Bockholt v. Kraft, 78 Ia. 661; Ia. Code, § 3168.

which require her to stand by the contract which the law made for her. She ought not to be a party to an attempt to rob her husband and her family of their home. Her duty to her family demands that she should preserve her home, rather than her individual property." [1]

Sureties on a collector's bond, who had been compelled to pay, asked to be subrogated to a lien resting on land which the collector had acquired and exchanged for the land which he held as his homestead. It was held that they should be subrogated to the right to the land last acquired, but only so far as it was in excess of the monetary homestead limit.[2]

The sureties on the bond of a deceased guardian, forced to repair his default, are entitled to subrogation to the remedy against the deceased's homestead which the wards have.[3] The general rule, that payment must precede subrogation,[4] finds an exception here (as the court mentions), since the only means by which the sureties could reimburse themselves after payment would be by the sale of the homestead. "It would be unreasonable to require the sureties first to pay the plaintiffs the debt their father owed them, and then sue them to have the money back again." [5]

§ 12. Equity Rule as to Order of Sale.

The equity rule which saves the property subject to a junior lien till the senior has first exhausted property not subject to it, when the senior lien covers both, is applicable to liens upon homesteads.[6] So far as that rule is concerned, there is no difference between a homestead and other property. Duly mortgaged by husband and wife, or subjected to a valid lien

[1] *Ib.* A dissenting opinion, by Robinson, J., takes the view that the section cited refers to the rights of the debtor and creditor, not those of principal and surety; and that "the right of parties to a contract of payment, to fix the order in which the mortgaged property shall be sold to pay the debt, is unimpaired. . . As between the right of the debtor, who has voluntarily pledged his homestead for the payment of the debt, to hold it as against his surety; and the right of the surety to have it appropriated to repay the money he has paid for his principal, the equities, it seems to me, are with the surety."

[2] Crawford v. Richeson, 101 Ill. 351.

[3] State v. Atkins, 53 Ark. 303.

[4] McConnell v. Beattie, 34 Ark. 113.

[5] State v. Atkins, *supra;* Dugger v. Wright, 51 Ark. 235.

[6] Myers' Appeal, 78 Pa. St. 452; Pittman's Appeal, 48 Pa. St. 315; Shelly's Appeal, 36 Pa. St. 373; Jones v. Dow, 18 Wis. 253.

of any sort, it is as liable to forced sale as any other; and it cannot be favored to the prejudice of a junior mortgagee or other junior lien-holder, any more than other realty so situated, if the junior claims the benefit of the rule. In the absence of any statutory inhibition of the exhaustion of the homestead before other property, when both are subject to a valid lien or liens, there is no difference between the two, except with reference to the wife's interest.

Manifestly, the owner's homestead right is no lien or incumbrance on his own property to be marshaled with liens held by others. To hold that he can be the owner and yet the holder of an incumbrance on what he owns is absurd. Were he to purchase an outstanding lien against his own property, it would be lost by confusion; canceled, as though paid. His right, therefore, to compel a mortgagee to exhaust other property before touching the homestead is not that which a junior mortgagee may exercise under the equity rule. It is statutory — not equitable — wherever it exists.

The opposite idea has had some judicial sanction. It has been given as a reason for the exhaustion of other property before touching the liable homestead, that the "homestead right is equal, if not superior, in dignity to any other legal or vested right, and should not be disturbed short of a fair sale, to the highest bidder, of all other property."[1] Similar expressions are found in several cases scattered through the books. One would like to know definitely whether the owner's incumbrance on his own is to be ranked as equal to any held by others, or is superior. There seems to be a confusing distinction between the owner's homestead right and his property right in the same homestead, in the above extract.

The *quasi*-estate of the wife, in the homestead, when she does not own the property, is in the nature of an incumbrance. While she cannot claim her prospective estate of dower as a present incumbrance to be brought into competition with conventional and other liens, she may urge her present *quasi*-estate of homestead as possessing the character of an incumbrance upon her husband's title, and perhaps she may invoke

[1] Twogood v. Stephens, 19 Ia. 412; Colby v. Crocker, 17 Kas. 527; Ray v. Adams, 45 Ala. 168.

the equity rule.[1] Her right to interfere, however, is usually protected by statute so that she need not resort to that rule. If the mortgage or other lien with which she would compete is not one validly created without her agency (as it may be in some states under certain circumstances), but is one which she helped to put upon the homestead, it would be relieved from her competition, so far as concerns the equity rule. Neither she nor her husband, after having waived all homestead right by virtue of the mortgage given by them, has any sort of incumbrance which can be set up in competition with the mortgage lien.[2] In the absence of express waiver, it has been allowed the beneficiaries to have the homestead reserved from sale till other property was exhausted.[3]

It is misleading to say unqualifiedly that homestead is an incumbrance upon land, to be marshaled in competition with the vendor's lien and other liens. An incumbrance upon what? Upon itself? The vendor's lien is upon the homestead: can there be a homestead lien upon the homestead? Does the owner owe anything to himself, and does he have the debt secured upon his own property? The contradictory character of the affirmation is apparent.

It is never allowable to treat homestead as an incumbrance, unless we have reference to the right of occupancy or usufruct held by some one who does not hold the title — some such right resting on the fee of the land. With reference to such rights, it may be said that one who buys land at a judicial sale, "subject to homestead," takes it subject thereto as an incumbrance.[4]

It is frequently said that the right of the debtor to a homestead is superior to that of his creditor to have his debt paid by sale of the land.[5] These two rights cannot properly be brought into competition. The debtor, owning his homestead, has a right *to* it; the creditor, having a lien, has a right *in* it.

[1] *See* McLaughlin v. Hart, 46 Cal. 639; Hanson v. Edgar, 34 Wis. 653.

[2] Searle v. Chapman, 121 Mass. 19.

[3] Brown v. Cozard, 68 Ill. 178; McArthur v. Martin, 23 Minn. 80.

[4] Wyche v. Wyche, 85 N. C. 96; Barrett v. Richardson, 76 N. C. 429. *See* Knight v. Leak, 2 Dev. & Bat. 133; Sheppard v. Simpson, 1 Dev. 244; Jackson v. Jackson, 13 Ired. 159; Hodge v. Houston, 12 Ired. 108; Clarke v. Trawick, 56 Ga. 359.

[5] Pope v. Harris, 94 N. C. 62; Butler v. Stainback, 87 N. C. 216.

There is confusion when we attempt to marshal a *jus in re* with a *jus ad rem.* One who has the right to a thing may have that thing incumbered by a right in it held by another. Many rights in it may be held by many other persons, and there may be differences of rank in these rights; but the ownership of the property on which all these incumbrances rest does not have his right *to* it marshaled with the rest.

We cannot consistently say that the right of exemption is higher or lower than the vendor's lien. It is not a lien. It is not a privilege in the ordinary sense. True, courts often speak of it as a lien[1] or privilege. It is a privilege, certainly, to be allowed to hold property free from liability to execution, but not such a privilege as may be marshaled with "liens and privileges" within the meaning in law when these are thus yoked together, as commonly found.

The incumbrance is relative. Among heirs, adults may have their interest incumbered (in a sense) by the minors' *quasi*-estate in the homestead during minority; but the latter, having equal rights in the fee, cannot be said to have their own interests incumbered by their own present right of occupancy. So, a purchaser of the homestead fee may find the right of occupancy to be an incumbrance, as to himself; but the occupant is not like a mortgagee so as to be considered the holder of an incumbrance.

It is not strictly correct, therefore, to say that one entitled to exemption may lose his *rank* and privilege by his own *laches.*[2] He may forfeit his exemption right by *laches*, but it is not a matter of rank between liens and privileges. It is quite common, however, to find homestead classed among incumbrances, in decisions; and if it is convenient and helpful to do so, the practice will be continued; but the evident difference between this and other incumbrances should be kept in view.

§ 13. Statutory Rule as to Order of Sale.

The statutes, much alike in several states, on the subject of rendering liable homestead property the last exhaustable, may be illustrated by one. This statutory rule is expressed in the

[1] Alexander v. Jackson, 92 Cal. 514. [2] Lawler v. Yeatman, 37 Tex. 669; Rogers v. Green, 35 Tex. 735.

provision that the homestead shall not be sold "except to supply the deficiency remaining after exhausting the other property of the debtor liable to execution."[1]

If, upon exposure of the other property to sale, there be no bids, that is "exhausting" so as to justify offering the homestead with it.[2] If, contrary to the inhibition, the homestead be prematurely sold, the sale may be set aside till all the other liable property shall have been exhausted; and then a resale may be directed by the court, if still found necessary.[3] Sale is void while there is valid homestead occupancy.[4] But there is not valid *homestead* occupancy, if upon a lawful lien there has been a lawful levy and sale. The claimant must show that his right existed when the decree against him was made.[5]

There is no presumption of the existence of any other property. He who complains that it was not first exhausted must first allege and prove that such property exists.[6] On such showing before sale, there will be special direction given by the court in the execution that the "other property" be first offered for sale.[7] But if the defendant does not allege and prove the existence of such property, or point it out to the officer, but stands by and sees the homestead sold without interfering or objecting, he has waived his rights.[8]

One who has prosecuted his privileged claim to judgment may stand back and see all the other property but the homestead exhausted by other creditors, and be guilty of no *laches* and lose no right against the homestead on which his lien rests.[9]

In a suit of the nature of a creditor's bill to satisfy a judgment on a homestead worth more than the maximum, a decree

[1] McClain's Iowa Code, § 3167 (1992); Code of 1873, § 1992; Lambert v. Powers, 36 Ia. 18; Foley v. Cooper, 43 Ia. 376.

[2] Burmeister v. Dewey, 27 Ia. 468; Eggers v. Redwood, 50 Ia. 289; Brumbaugh v. Shoemaker, 51 Ia. 148. Sale below value. *See* Sigerson v. Sigerson, 71 Ia. 476.

[3] Lay v. Gibbons, 14 Ia. 377; Bradford v. Limpus, 13 Ia. 424; Burmeister v. Dewey, 27 Ia. 468; Stewart v. Croes, 10 Ill. 442; Mitchell v. Hay, 37 Ga. 581; Tucker v. Kenniston, 47 N. H. 267.

[4] Green v. Marks, 25 Ill. 204.

[5] Reinback v. Walter, 27 Ill. 393; Pratt v. Delevan, 17 Ia. 307.

[6] Stevens v. Myers, 11 Ia. 183; Owens v. Hart, 62 Ia. 620.

[7] Barker v. Rollins, 30 Ia. 412.

[8] Foley v. Cooper, 43 Ia. 376. *See* McCleary v. Ellis, 54 Ia. 311.

[9] Denegre v. Haun, 14 Ia. 240.

applying the excess was sustained.[1] Liens, which had attached before the rendition of the judgment, were accorded the higher rank, as a matter of course.

To prevent the sale of a homestead under execution when it is ultimately liable, there must be a schedule, showing what other property the defendant has which is liable to forced sale, when the statute exacts it, as in some states it does.[2] Without such disclosure, he cannot have a *supersedeas* to stay the sale. Failure to disclose is not necessarily a forfeiture of the homestead right; but, after sale and delivery, he would recover only by bringing an action for possession. If he permits his homestead to be sold, by failing to file the required schedule, he imperils his homestead right and "takes the chances of defeat" upon the issue made by him thereafter.[3] If he claims after levy and before sale, and notice is given to the executive officer, the sale must be subject to his claim.[4]

Where homestead property is liable for purchase-money only after all other property of the debtor has been exhausted, it is held that a judgment on a claim for such money should be a personal one against the debtor without any special lien against the homestead.[5] The general lien created by the judgment would cover the homestead, however, with all the other property of the debtor. The judgment, however, should not be merely personal, if the claim for purchase-money was not merely personal but was secured by the vendor's lien or by a conventional lien.

It has been held that, after a homestead has been sold under execution in a suit at law, and the owner has moved to set the sale aside on the ground that the property was exempt, it cannot be shown by the adverse party that the judgment was for purchase-money; for the plaintiff should have proceeded in equity.[6] This seems to be altogether too nice. The motion having been made, it was certainly competent for the adverse property to deny its ground, that the sold property was ex-

[1] Tingley v. Gregory (Neb.), 46 N. W. 419.

[2] Ark. Act of March 18, 1887; Mansf. Dig., § 3006.

[3] Brown v. Peters, 53 Ark. 182; Chambers v. Perry, 47 Ark. 400.

[4] Blivens v. Johnson, 40 Ga. 297.

[5] Greeno v. Barnard, 18 Kas. 518, *distinguishing* Pratt v. Topeka Bank, 12 Kas. 570.

[6] Tunstall v. Jones, 25 Ark. 272.

empt, and the defense — that the sale was under a judgment for purchase-money — was equivalent to the answer that the property was not exempt as to that debt. And it was a good answer in a suit at law — it may be thought, by one who has studied the case less than the court did. The proper and usual method of enforcing the lien for purchase-money is by a proceeding in equity,[1] though it is not invariably adopted.[2] The vendor may choose to sue at law and take his chances of making his money out of any liable property of his debtor. But his safer course is to enforce his lien directly upon the indebted property,[3] unless his state statute makes provision for a suit at law with a saving of his lien right.[4] The homestead is liable, under the vendor's lien for purchase-money, so long as any portion of the debt remains unpaid.[5]

§ 14. Claiming Before Execution Sale.

Whether the judgment debtor must claim his homestead of the officer in charge of an execution, before sale, to save his right from being considered as waived or lost by his *laches*, is a question that has been answered by the courts of some states in the affirmative, and of others in the negative. The affirmative answer is based on the general rule that one must assert his right, however absolute, when it is attacked; that any right of property may be waived, even passively; that, at least, the officer is not bound to set off homestead when it has not been claimed.[6] The negative answers are based on the

[1] Williams v. Young, 17 Cal. 403; Pinchain v. Collard, 13 Tex. 333.

[2] Durham v. Bostick, 72 N. C. 357; McAlpin v. Burnett, 19 Tex. 497; Chambliss v. Phelps, 39 Ga. 386.

[3] Lawler v. Yeatman, 37 Tex. 669; Rogers v. Green, 35 Tex. 735.

[4] Redfield v. Hart, 12 Ia. 355.

[5] Bush v. Scott, 76 Ill. 525; Harris v. Glenn, 56 Ga. 94; Cook v. Crocker, 53 Ga. 66.

[6] Brumbaugh v. Zollinger, 59 Ia. 384; Herschfeldt v. George, 6 Mich. 468; Melton v. Andrews, 45 Ala. 454; Bell v. Davis, 42 Ala. 460; Crow v. Whitworth. 20 Ga. 38 (*see* Ragland v. Moore, 51 Ga. 476; Burns v. Lewis (Ga.), 13 S. E. 123); Taffts v. Man'ove, 14 Cal. 47; Kelly v. Dill, 23 Minn. 435; Sullivan v. Lafayette County, 61 Miss. 271; Perkins v. Bragg, 29 Ind. 507; State v. Manly, 15 Ind. 8; Nash v. Farrington, 4 Allen, 157; Colson v. Wilson, 58 Me. 416; Smith v. Chadwick, 51 Me. 515; Behymer v. Cook, 5 Colo. 395; Caldwell v. Truesdale (Ky.), 13 S. W. 101; Kirk v. Cassady (Ky.), 12 S. W. 1039; Choice v. Charles. 7 S. C. 171; Ryan v. Pettigrew, 7 S. C. 146; Norris v. Kidd, 28 Ark. 485 (under Const. of 1868); Chambers v. Perry, 47 Ark. 400 (under Const. of 1874); Currier v. Sutherland, 54 N. H. 475; Lidd v. Quinn, 52 N. H. 344; Barney

absolute character of the right.[1] There is a middle ground: a sale of a homestead made in the absence of a claim, when void as to the quantity and value exempt, may be good as to any excess.[2] A bid for the whole, however, could not be collected of the bidder who gets only a part. The sale would be voidable at his instance, but not on the motion of the homestead beneficiary as judgment debtor, or on that of the judgment creditor. In other words, where failure of the beneficiary to claim before sale is not waiver, there is no impediment thrown in the way of the sale of the excess by the homestead law.

If an indivisible homestead be sold, the proceeds may be adjusted between the creditor and the beneficiary.[3]

v. Leeds, 51 N. H. 253; Barney v. Keniston, 58 N. H. 168; Buzzell v. Hardy, 58 N. H. 331; Butt v. Green, 29 O. St. 667 (*compare* Sears v. Hanks, 14 O. St. 298); Frost v. Shaw, 3 O. St. 270; Kahoon v. Krumpus, 13 Neb. 321; Spitley v. Frost (Neb.), 15 Fed. 299; Williston v. Schmidt, 28 La. Ann. 416; Kuntz v. Baehr, 28 La. Ann. 90; Miller v. Sherry, 2 Wall. 237; Black v. Curran, 14 Wall. 463 (*criticised* in Hartwell v. McDonald, 69 Ill. 293). In Illinois, where the rule is that the homestead-holder forfeits nothing by not claiming of the officer before sale, it was yet held that a widow who does not claim but allows the estate to be partitioned and sold, thus loses her right. Wright v. Dunning, 46 Ill. 271. In Alabama, the homestead character attaches only during the life of the owner who leaves neither widow nor children. Code, § 2507. When his claim of homestead has been rightly made, an execution creates no lien on the homestead property — life-estate or remainder — and the owner may sell the fee. Caldwell v. Pollak, 91 Ala. 353.

[1] Snider v. Martin, 55 Ark. 139; 17 S. W. 712; Robinson v. Swearingin (Ark.), 17 S. W. 365; Hughes v. Watt, 26 Ark. 228 (*see* Chambers v. Perry, 47 Ark. 400); Goldman v. Clark, 1 Nev. 516; Helfenstein v. Cave, 3 Ia. 287; Ray v. Yarnell, 118 Ind. 112; Vogler v. Montgomery, 54 Mo. 584 (*see* Shindler v. Givens, 63 Mo. 394); Smith v. Rumsey, 33 Mich. 184; Beecher v. Baldy, 7 Mich. 488; Willis v. Matthews, 46 Tex. 483; Seligson v. Collins, 64 Tex. 314; Pierson v. Truax, 15 Colo. 223; 25 Pac. 183; Pardee v. Lindley, 31 Ill. 187; Hoskins v. Litchfield, 31 Ill. 137; Moore v. Titman, 33 Ill. 368; Conklin v. Foster, 57 Ill. 104; Newman v. Willitts, 78 Ill. 397; Barrett v. Wilson, 102 Ill. 302; Nichols v. Spremont, 111 Ill. 631; Moriarty v. Galt, 112 Ill. 373; Mitchell v. Sawyer, 115 Ill. 650; Burns v. Lewis (Ga.), 13 S. E. 123; Lessley v. Phipps, 49 Miss. 790; Trotter v. Dobbs, 38 Miss. 198; Lambert v. Kinnery, 74 N. C. 350; Abbott v. Cromartie, 72 N. C. 292; Vannoy v. Hagmore, 71 N. C. 128; Taylor v. Rhyne, 65 N. C. 531; Lute v. Reilly, 65 N. C. 20.

[2] Leupold v. Krause, 95 Ill. 440; Stevens v. Hollingsworth, 74 Ill. 202; Loomis v. Gerson, 62 Ill. 11.

[3] Wood v. Wheeler, 7 Tex. 13; North v. Shearn, 15 Tex. 174. *Compare* Paschal v. Cushman, 26 Tex. 75.

There is universally applicable reason for treating the sale of the homestead, in execution of an ordinary judgment under which it is not liable, as void when the officer has given the judgment debtor no opportunity of claiming, and when the latter could not assert his right for any cause. Ordinarily, he is presumed to know of the levy, to read the advertisement, to have notice; but, when it is the duty of the officer either to set off homestead before sale or to give special notice to the judgment debtor that he may take the necessary steps if he desires to withhold his homestead from his creditors, such presumption would not prejudice him. He may be really in ignorance of what is going on, because of his absence, sickness, deception practiced upon him, or any one of a hundred concatenations of circumstances difficult to preconceive.

The officer knows that what he sells is homestead. He knows the records — the registered declaration — the inscription of *Homestead* in the margin of the defendant's recorded title — whatever the law requires to be done and has been done, he knows;[1] that is, he is presumed to know. If no homestead has been dedicated, platted, recorded or in anywise specially designated by the beneficiary, still the officer is presumed to know the law which gives the defendant the right of homestead in some of his realty; and in the very piece which he is about to sell if that is all the debtor has. It may be larger than what the law exempts, or the debtor may have more than one piece: yet the officer knows that there is a legal right of homestead wrapped up in the debtor's real property. There is nothing to relieve the presumption of knowledge in his case. If the statute imposes upon him the duty of giving the debtor special notice of the levy, and of the proposed sale of the homestead; or if it requires him to cause homestead to be set off before sale, he cannot disregard it with impunity and save the sale from nullity and himself from liability to damages.

On the other hand, there is such a thing as a debtor desirous of paying his debts, and willing that his home should go for the purpose. May he not waive his right to claim exemption? May he not waive his absolute right? If the statute, providing for his notification, imposes upon him the task of looking

[1] Ray v. Yarnell, 118 Ind. 112.

after his right, and does not strike with nullity a homestead sale when unclaimed, shall we say that the purchaser of an unclaimed homestead gets no title?

The judgment for ordinary debt contracted after notice bears no lien upon the homestead; it creates a general lien upon all the defendant's property except the exempt portion; its general lien becomes special upon a particular piece of liable property by levy upon it. The question is whether such judgment and such levy may affect a homestead if the owner consents. There seems no reason to the contrary, if he is an unmarried owner, and if the policy of the law to conserve family homes is not disregarded. If he has a wife, or a wife and children, in the enjoyment of the home, there may be good reason for keeping a shelter over his and their heads despite himself. While the law favors the payment of debts as much as the saving of homes, there is a difference between statutes of different states as to whether the judgment debtor may successfully waive not only his own rights but those of his family. A universally applicable rule, therefore, cannot be laid down. It cannot be doubted, however, that the judgment debtor and his wife, representing their children if they have any, may notify the officer of their relinquishment of the homestead right, however absolute it may be; and that the policy of the state would have it yield to such relinquishment, since it allows the beneficiaries to abandon; and that thereafter the officer may go on and sell and give good title to the purchaser.

When homestead has not been previously declared, dedicated and recorded; and when the occupied home property exceeds the statutory limitation and is yet indivisible; and when a certain sum is exempt to the debtor,— the rules are somewhat different from those governing previously established homesteads. The claim of a sum from the proceeds may be made after sale.

If application has been made for the setting off of a homestead, and notice given to the officer before sale, the purchaser takes subject to the homestead.[1] The sheriff must give notice — written notice is required by some statutes — to the

[1] Kilgore v. Beck, 40 Ga. 296. *See*, as to allotment by the court, *In re* Schmidt's Estate (Cal.), 29 Pac. 714.

plaintiff or his attorney that homestead has been claimed by the defendant. If he fails to do so, and the plaintiff becomes the purchaser, the sale may be set aside on motion.[1] Even the private purchaser of homestead property which was afterwards sold by the sheriff under execution against the vendor, who attorned to the successful bidder at the sheriff's sale and thus recognized that sale, was held to be not estopped from bringing an action to set the sheriff's sale aside.[2]

§ 15. The Preferable Practice as to Claiming.

What is the proper practice as to claiming? Whether the exemption is absolute or not; whether the courts in any state hold claiming before sale essential or not, the better rule may be expressed in a monosyllable: *Claim.* To follow this rule is to do no harm even when claiming is not necessary to avoid the presumption of waiver. Its positive good lies in the prevention of future litigation. No true lawyer will seek unnecessarily to precipitate his client into the vortex of a law-suit. How much better to obey the simple rule than await the purchaser's suit of ejectment and be obliged to defend! How much better than to resort to an injunction to prevent the sale, if mere claiming will suffice!

Where non-claiming (after the levy has been made which brings home to the debtor knowledge that his exempt property is imperiled) is deemed waiver, no argument is necessary to show the importance of the rule: *Claim.* So, whatever the effect of claiming upon the validity of the sale, it is always better to take the simpler course.

Where the exemptionist is not affected by the sale, but may prosecute his right after his home has gone into the hands of a purchaser, how long may he wait? May he lie still for years, till the purchaser has improved it, enhanced its value, paid the taxes, and expended upon it much of his time and money? May the exemptionist then come in and claim it all, under the theory that the purchaser bought under notice — not special — but that general notice which the statute and the householder's occupancy gave him?

A statute, providing that the right of exemption shall not

[1] Allen v. Towns, 90 Ala. 479; Ala. Code, § 2521.

[2] Beckmann v. Meyer, 75 Mo. 333. For allotment to debtor, *see* ch. 22.

be lost by omitting to select and claim homestead before the sale of the debtor's property under execution, was so construed, in a case involving it, as to leave the purchaser in a quandary for an indefinite time, not knowing whether the defendant would claim or waive; and, because of this very uncertainty — the possibility of this eventual waiver — the purchaser was held to have bought something which was the object of the price paid, so long as the debtor should stand silent.[1] He was held to have obtained, by his purchase at the

[1] Snider v. Martin, 55 Ark. 139; 17 S. W. 712. Hemingway, J.: "Under the constitution of 1868, it was held that the right of a debtor to hold a homestead exempt from sale under execution was a personal privilege which the debtor might waive, and that he would be held to have waived it by failure to claim it in the manner provided by law before sale under execution. Norris v. Kidd, 28 Ark. 485. It has been held that the same rule obtained under the constitution of 1874. Chambers v. Perry, 47 Ark. 400; 1 S. W. Rep. 700. The act of March 18, 1887, does not enlarge or in any manner change the character of the right; but, leaving the right as it had previously existed, this act provides that the right shall not be lost or forfeited by the debtor's omission to select and claim his homestead before sale under execution, nor by his failure to file a description or schedule of the same in the office of the recorder, and, by the terms of a proviso, cases coming within its provisions are left subject to prior laws in all respects. The extent of the change thus made is that a debtor shall not be considered to have waived his right to exemptions, in cases not within the proviso, by his failure to select and claim them before sale. It does not provide that the right shall not be a privilege, or that it may not be waived by the debtor. To this extent the rule as formerly announced is maintained. If this case comes within the proviso, the sale under execution carried the defendant's title, he having omitted to select and claim it before sale, and the purchaser would be bound upon his note for the purchase-money. But it is insisted that this case comes within the rule, and not within the exception, and that the debtor was not prejudiced by omitting to select and claim his homestead before sale; that, the homestead being exempt from sale, nothing passed to the purchaser; and that the note for the purchase-money was therefore without consideration and void. If the premises are true, the conclusion is correct, and the question is, are they true? Herm. Ex'ns, pp. 320, 321, 424, note 4; Freem. Ex'ns, § 313. Is it a fact that, if the homestead right was not forfeited by sale under execution, nothing passed by the sale? We think not. Before the act of 1887 the right was a privilege, and it is still a privilege. It could then be waived and it may yet be waived. As against all the world except the debtor and his wife, the sale is valid, and it is valid against them, unless they or one of them elect to defeat it. If they neglect or refrain from asserting such right, the debtor's title vests in the purchaser. It cannot be said, therefore, that nothing passes. It is more nearly correct to

sheriff's sale, a defeasible estate which was a legal equivalent for the price bidden — a sufficient consideration for the note given for the purchase-money. He was held bound by his bid, and unable to resist the payment of his note on the ground that he had not obtained what he had bought or meant to buy. Yet, on the other hand, the judgment-debtor had it left in his power to claim and take back the homestead at any time, according to this decision. In case the debtor, at any future time, should take the property from the purchaser (who paid for it and got *quid pro quo* in the shape of the defeasible title), the court queried, or rather expressly withheld opinion, whether the purchaser would be entitled to any relief.

Whence could relief come? The judicial sale was not provoked by an owner, but by a creditor. The creditor is not presumed to know the title of his debtor, but the owner does know his own title; he does know whether he has what he sells, whether he sells privately or through a court.

In the case above mentioned, the judgment creditor did not warrant the title to the homestead: so the purchaser can certainly get no relief from him. The maxim, *caveat emptor*, is clearly applicable. The purchaser can get no relief from the judgment debtor, for he did not buy of him or pay him any money. Though he paid his debt, it was not done at the debtor's request. There seems to be no conceivable way in which the purchaser can find legal relief, if the now-sleeping exemptionist should ever awake and divest him. What better illustration of the pernicious effect of the doctrine that the debtor need not claim when his property is levied upon, can be imagined! Courts must follow statutes, and the gov-

say that the purchaser takes a defeasible estate, and it is sufficient to constitute a valuable consideration. Whether the debtor will claim his exemption in this case is uncertain. He may choose to have his estate applied to the payment of his debts rather than enjoy the benefit of his exemptions. If he should do so, the purchaser would acquire all that he expected, and should be required to pay his bid. Until the purchase has been defeated by an assertion of homestead rights, it is too early to consider the relief to which the purchaser may then be entitled, or whether he will be entitled to any. For the reason above indicated, the finding was contrary to the evidence, and the judgment must be reversed and the cause remanded."

erning law in this case may justify the deliverance; but there ought to be some time fixed beyond which claim cannot be made.

Though the purchaser may have no relief at law, in the case above presented, since the rendition of the decision against him, yet may he not find it in equity? The debtor had his debt paid with the purchaser's money; and, though not paid at his request so as to give ground for legal relief, it seems unconscionable that he should be allowed to divest the purchaser of the property without reimbursing him. Sheer justice requires that the debtor should not be profited at the expense of the purchaser, when, by his own passivity at the time of the levy and sale, he caused the present state of things.

There is no disposition to submit argument after judgment, or to criticise the opinion in the case last cited, so far as concerns the state in which it was delivered; but as like cases may arise in other states under similar statutes where this decision is not authoritative — only influential so far as its reasoning is sound — a word further may not be amiss.

What title did the purchaser get? Was he a mere tenant-at-will? Was he even that? A tenant-at-will is "one who holds lands as tenant at the will of the lessor." [1] The tenancy may be terminated at the option of either the lessor or lessee.[2]

The tenant-at-will has "nothing that he can assign." [3] He has nothing that can be called property when his hold upon it is not for a day or for a moment, if some one else may terminate his possession at pleasure. In the case of lessor and lessee, the tenant-at-will has some protection against sudden divestment to his prejudice; as, when he has planted a crop, he may retain the land till he gathers it or recover for being summarily ousted before. But in the case under consideration the purchaser was declared to hold subject momentarily to defeasance. There was no mutuality of will, but the termination of the tenancy was within the sole behest of the judgment debtor. The purchaser had no life estate, no estate for years, no estate for an hour: he was an occupant by suf-

[1] Anderson's Law Dict., p. 1018, *verbo* "Tenant at Will."

[2] Davis v. Murphy, 126 Mass. 145; Johnson v. Johnson, 13 R. I. 468; 2 Bl. Com. 145–7; 4 Kent's Com. 111–116.

[3] *Ib.*

ferance. The only estate he had was an estate-at-sufferance; a holding by toleration, allowance or "negative permission" of another. His position was like that of "a tenant for years whose term has expired;" a mortgagor "in possession after foreclosure;" a grantor, bound to deliver at a stated time, who "holds over without authority from the grantee;" a tenant, "for the life of another, after the death of that other."[1]

The purchaser held by the sufferance of the judgment debtor, but under such color of title that he might acquire ultimately by prescription, if the debtor should forbear to claim long enough. Ought he not have been allowed to defend at law against a suit on this note for the purchase-money, by pleading want of consideration? If he had bought at a judicial sale provoked by the owner; at a sale, for instance, under an order of court at the instance of partners to effect a partition; or at a sale made by a government, through the agency of a court, to dispose, at auction, of property which it owned, there would seem to be no reason why he might not plead want of consideration for a purchase-money note, if he did not get what he had promised to pay for. Of the selling owner, he may get back the paid price.[2] There is a marked difference where a creditor has his debtor's property sold in execution of a judgment, since *caveat emptor* then applies: so the purchaser could not recover of the creditor the price already paid. But if it had not been paid, it would seem that the purchaser may resist the suit of the sheriff for the unpaid purchase-money, if he has given his note therefor without consideration.

A purchaser, sued by persons claiming that the land purchased was their homestead, proved that he had paid for the land at a judicial sale, and prayed that if the plaintiffs should be adjudged the owners of it, he be accorded judgment for recovery of the price he had paid. The court refused to charge

[1] Anderson's Law Dict., p. 988, *verbo*, "Estate at Sufferance," *citing* 2 Bl. Com. 150; Cook v. Norton, 48 Ill. 26; Anderson v. Brewster, 44 O. St. 580, and other cases.

[2] *See* authorities in Waples on Att. & Gar., pp. 535–544, where distinction is drawn between judicial sales provoked by owners and such sales provoked by creditors, as to the recovery of the purchase price paid without consideration.

the jury to this effect. On appeal, the refusal was declared to be error, and the judgment against the purchaser was reversed.[1]

A purchaser, who was also the plaintiff in the suit whence the execution was issued, sought to set the sale aside by bill in equity, because of the defendant's unsalable homestead right. The bill was dismissed upon the defendant's disclaimer of such right.[2]

§ 16. Execution as to Occupancy.

Execution cannot be effected to the destruction of the family home and the defeat of the policy of the law to conserve it. Though there be no title left in the family head but a right to possess during the exemption period, he is protected from eviction. In some states the fee may be subjected to forced sale with his home right reserved; in others, it cannot while that right endures. He, with his wife's consent and joinder when that is required, or he alone when it is not required or when he is unmarried, may dispose of all his exempt realty except his right of occupancy during the exempt period, and yet be protected in what he retains. While the law would protect the fee, it will protect less — since it is not concerned about the title so long as possession is retained. So it has been held that upon execution of the family residence, before there has been application for homestead, the purchaser gets the fee, but not the possession before the termination of the homestead privilege of the occupants subsequently allowed.[3]

Judgment having been rendered against a homestead-holder, he donated his homestead, retained possession, and successfully resisted the execution. The appellate court, passing upon his right, held that he need not have any present interest or estate in the land beyond what is implied by possession, "to sustain the claim of exemption as against a debt or lien inferior to the exemption right." This was thus expressed in the syllabus of the decision, prepared by the court. The chief justice said, for the court, that the homestead claimant, who had donated his homestead, "retained the very thing which the law of exemption is solicitous to protect. It cares not how little in-

[1] Cline v. Upton, 59 Tex. 27.

[2] Mead v. Finley, 47 Ill. 406.

[3] Grace v. Kezar, 86 Ga. 697.

terest the debtor may have, so long as he remains in its actual enjoyment. The exempt land is 'for the use and benefit of the family of the debtor;' so says the code. The exemption does not depend on the quality or duration of the estate which the debtor has in the land. A tenancy at will or at sufferance will protect it from levy and sale as his property, equally with an estate in fee-simple. The exemption attaches to the land, not merely to his estate in it. Our exemption laws do not cut up exempt property into divers estates, but protect the physical thing as a whole from levy and sale, so long as the exemption continues."[1]

The title of land is not involved in a question of the land's exemption as a homestead from levy and sale.[2] But it has been held, under circumstances stated in the case, that a levy may be upon the husband's separate interest.[3] Judgment having been obtained jointly against a husband and wife, execution was directed against eighty acres belonging to her. She lived with her husband on his adjoining eighty. Both tracts together did not exceed either the quantitative or monetary limitation. Her tract was cultivated as a part of the home farm. The court held that the execution could not be consummated, because it did not matter to which spouse the title belonged. Either might own half the homestead. "If the title to both tracts of land had been in the husband or wife singly, the exemption would have been recognized; and it cannot be that the fact that each owned part of the land affects prejudicially their claim to exemption,"[4]

After a decree in an action of ejectment, that the fee was in the plaintiff subject to the right of homestead in the defendant till her youngest child should reach majority, the defendant was not precluded by it from claiming her homestead in a second action brought to eject her after the child became of age. The reason is that so much of the decree as went to fix the duration of her homestead right was a nullity.[5] The

[1] Pendleton v. Hooper, 87 Ga. 108; 13 S. E. 313; *citing* Vanhorn v. McNeill, 79 Ga. 122.

[2] Moore v. O'Barr, 87 Ga. 205; 13 S. E. 464.

[3] Vining v. Officers, 86 Ga. 128.

[4] Powers v. Sample (Miss.), 11 So. —; *citing* Partee v. Stewart, 50 Miss. 717; Lowell v. Shannon, 60 Ia. 713; Crane v. Waggoner, 33 Ind. 83; Orr v. Shraft, 22 Mich. 260; Stout v. Rapp, 17 Neb. 462.

[5] Yeates v. Briggs, 95 Ill. 79.

decree properly passed upon the fee, and properly held it subject to the homestead right; but there was no issue as to the time when that right should be terminated. The statute fixed the duration. The children's right ended with their minority, but the widow's right was not wholly dependent on theirs — she had an independent right of homestead.

Land, including homestead, was sold under execution to pay a debt not privileged against the homestead. Subsequently, the debtor and his wife conveyed it; and their purchaser sought, by bill in equity, to remove the cloud cast upon his title by the execution sale. He failed to have that sale annulled — the court holding it good except as to the debtor's homestead interest, limited to a thousand dollars by statute. By paying that sum, the purchaser at the execution sale could hold the land.[1]

When the sheriff's deed is a cloud upon the homestead title, the remedy to remove it is a bill in equity.[2]

A purchaser at execution sale was denied relief by injunction to prevent a judgment debtor from claiming homestead in the land he had purchased. The ground of the denial was that he had no greater rights than the judgment creditor, and might have opposed the homestead claim before the ordinary (probate judge), and could have appealed from his decree.[3] He had bidden off the property before the court had assigned the homestead; and the decision was as to his remedy. As he might have made himself a party before the probate court and opposed the debtor's claim, yet did not avail himself of the right, he was denied the equitable remedy of injunction.

When the execution is after the debtor has preferred his claim, and the statute allows the sale of the property to pay the judgment creditor but reserves the right of occupancy to the debtor, the writ and the sheriff's advertisement should show just what title is to be sold. The purchaser is thus informed that the debtor claims: so he gets title subject to the homestead occupancy of the debtor. His title will hold good, but his right to possession will be postponed till the expiration of the homestead right, if the debtor's petition to have

[1] Loomis v. Gerson, 62 Ill. 11.

[2] Deffeliz v. Pico, 46 Cal. 289; Kendall v. Clark, 10 Cal. 17.

[3] Zorn v. Walker, 43 Ga. 418.

that right accorded be allowed by the court.[1] If, however, the debtor is not in actual occupancy but has let out his home to a tenant, he cannot treat a levy upon it as void on the ground that he intended to re-occupy at some time in the future.[2] Even when occupancy is not a condition in the case of a widow who has derived a homestead from her deceased husband, so far as exemption from his debts are concerned, it has been held that her actual occupancy is essential to save it from execution for her own debts.[3] Actual occupancy, as to portions of the premises claimed as exempt, may be inferred when they are not put to any foreign use and when they form part of what is really in use as a homestead; and thus they may be free from liability to execution.[4] But if land is put to other use, such as the continuous renting of it to a tenant, it will not be saved to the owner, from execution, though he may live upon it and thus protect his dwelling.[5]

In some states, after occupancy as a condition to the acquisition of homestead has been observed, there is no abandonment recognized except by the grant of the premises or a declaration of abandonment duly executed and filed. Any conveyance by quitclaim or other form of title is abandonment.[6] In such case, when execution is pending, constructive occupancy may be sufficient to save the homestead — the question being not whether there is actual occupancy but whether there has been an abandonment of the homestead.[7]

§ 17. Pleading in Attachment Suits.

A homestead was attached. The owner should have set up his exemption in defense of the attachment suit; "it would,

[1] Jackson v. Du Bose, 87 Ga. 761; 13 S. E. 916; Grace v. Kezar, 86 Ga. 697. *See* Moore v. O'Barr, 87 Ga. 206.

[2] Evans v. Calman (Mich.), 52 N. W. 787; Hill v. Hill's Estate (Tex.), 19 S. W. 1016.

[3] Gowan v. Fountain (Minn.), 52 N. W. 862.

[4] Leavell v. Lapowski (Tex.), 19 S. W. 1004, concerning a "business homestead."

[5] McDonald v. Clark (Tex.), 19 S. W. 1023.

[6] Faivre v. Daley, 93 Cal. 664; Cal. Code of Civ. Proc., § 1243; Sansom v. Harrell, 55 Ark. 572.

[7] In Texas, if there is not actual occupancy where execution is levied, the property is considered as abandoned, though formerly a homestead. Wilson v. Swasey (Tex.), 20 S. W. 48. But if the property is then in occupancy by the debtor, it is held exempt, though the title was acquired after the judgment sued upon had been recorded. Frieberg v. Walzerin (Tex.), 20 S. W. 60. For abandonment in general, *see* ch. 18.

without doubt, have been the better practice," the court said, when passing upon an injunction against sale under the attachment judgment. The ground for the injunction was that the sale and transfer thereby would becloud the plaintiff's title. There was record evidence of the exemption; the declaration had been duly made; the word *Homestead* had been inscribed in the margin of the plaintiff's recorded title; the plaintiff had ownership of the property: all duly alleged in the plaintiff's petition or affidavit. Taking the allegations as true, the levy upon the homestead was held wrongful; the sale would be a further wrong, and injunction was sustained, since the plaintiff's allegations were not controverted.[1]

When a homestead had been sold in an attachment suit, the defendant and his wife moved to set the sale aside on the ground that the property was exempt by statute. The motion was overruled and the sale confirmed. Was the question of homestead finally adjudicated by the orders thus overruling and confirming? Whether it was or not depended upon the further question whether the wife should have been made a party in the attachment proceeding. And this depended upon what statute governed. It was finally decided that she was not a necessary party: so the sale was sustained, because governed by a statute which did not inhibit a sale of the homestead without the wife's consent, though the present statute does.[2]

A purchaser, who bought land after it had been attached, sued out an injunction against the attachment on the ground that the property was his vendor's homestead when the attachment was laid. But, it appearing upon the trial that the vendor had previously abandoned his homestead privilege, and that his purchaser had waived all claims for damages on account of any liens upon the land, the injunction was denied.[3] This case seems to imply that if there had been no abandonment by the vendor and no waiver by the purchaser, the at-

[1] Pierson v. Truax, 15 Colo. 223; 25 Pac. 183.

[2] Spitley v. Frost, 15 Fed. (Neb.) 299; Rector v. Rotton, 3 Neb. 171; State Bank v. Carson, 4 Neb. 501. In Nebraska, questions of this character are disposed of when motions to confirm execution sales by sheriffs are heard. Rulings of inferior courts on such questions have been treated as final judgments reviewable on writ of error or appeal. *Ib.;* Bowker v. Collins, 4 Neb. 494; Eaton v. Ryan, 5 Neb. 47.

[3] Warren v. Peterson (Neb.), 49 N. W. 703.

tachment sale would have been enjoined, notwithstanding the neglect to plead homestead in defense of the attachment suit, and the acquiescence of the owner in the officer's seizing and taking legal possession.

That an abandoned homestead may be attached, and that sale after attachment does not affect the lien, no one will question;[1] nor will any dispute the liability before abandonment, when the suit is upon antecedent or other debts not cut off by the exemption.[2] How is the court to know that there has been abandonment, or that there is any fact to take the attached property out of the rule of immunity, unless there be proper pleading, answer, and evidence?

Abandonment may be effected in different ways; and often it is questionable whether an act or omission ought to be adjudged to amount to abandonment. If the homestead, or a part of it, has been long devoted to other than family use, it may have lost its exempt character, though the owner did not mean that it should. When a strip of land, crossing a homestead, has been used as a public road, and the conduct of the owner has been such as to induce the public to use it and the township officers to improve it as a highway, he is estopped from setting up his homestead right as to the road, though he has never formally relinquished it.[3]

Whenever abandonment is questionable, and the creditor attaches, there is something for the court to determine upon issue joined; and it would seem erroneous to assume that property held as homestead is to be known as such by a sort of intuition, because the statute makes homestead absolutely exempt. Whether it is such property as the law makes absolutely exempt is a fact to be judicially determined.

After an attachment judgment, a homestead, which was the subject of the attachment, and which had not been claimed as exempt in the proceedings, was successfully claimed by the debtor, in a separate action.[4] It has been held that the householder as defendant is not bound to set up his right of exemp-

[1] Labaree v. Wood, 54 Vt. 452; Godall v. Boardman, 53 Vt. 92.

[2] Gilson v. Parkhurst, 53 Vt. 384; West River Bank v. Gale, 42 Vt. 27. *See* Lamb v. Mason, 50 Vt. 345.

[3] Griswold v. Huffaker (Kan.), 28 P. 696.

[4] Seligson v. Collins, 64 Tex. 314.

tion, when the plaintiff has made no allegations relative to his homestead which require an answer.[1] No reference to particular property is made in the creditor's petition for the writ of attachment; it is the actual attachment of the homestead under the writ which brings the notice to the householder that lien-making upon it is being attempted. If his silence then is acquiescence, it is waiver of the homestead right as to the attachment. But, as it is not universally held to be waiver, it seems that there must be other attending circumstances to create the presumption of waiver, in several states.

Where, by statute, attaching does not create a lien before the recording of a judgment sustaining it, property attached may be dedicated as homestead before the recordation of the judgment, and be thus saved from lien and liability to execution.[2] The doctrine is that the inchoate lien cannot be perfected by judgment and recordation, if the property which it threatens becomes exempt before the recording — since exempt property is not subject to attachment.[3] The doctrine has been carried so far that even after the lien has been matured in the regular course of attachment proceeding, upon liable property, the defendant may dedicate the *res* as a homestead, between judgment and sale, and save it as exempt.[4]

While it is true as above stated (and true everywhere), that the attachment defendant is not bound to plead homestead in his answer when there is nothing in the plaintiff's allegations requiring it by way of response; when, for instance, the suit is on a promissory note with nothing more than the usual averments, yet he ought to meet the attachment itself by a rule to dissolve it. He has perfect ground for the rule when the *res* is exempt by statute; and if he does not mean to waive his right, or subject it to question of waiver, or expose himself to future litigation, he ought to have the attachment dissolved so that the inchoate lien may never assume perfect form. Certainly this would be judicious pleading in every

[1] Willis v. Matthews, 46 Tex. 483; Tadlock v. Eccles, 20 Tex. 790.

[2] Wilson v. Madison, 58 Cal. 1; McCracken v. Harris, 54 Cal. 81; Sullivan v. Hendrickson, 54 Cal. 258; Hawthorne v. Smith, 3 Nev. 164.

[3] Ackley v. Chamberlain, 16 Cal. 181; Bowman v. Norton. 16 Cal. 220.

[4] Lessley v. Phipps, 49 Miss. 790; Trotter v. Dobbs, 38 Miss. 198.

state, whether suffering the lien to ripen be deemed waiver or otherwise.

Attachment is not a general proceeding against property, to conclude all the world; but it is a limited one having reference only to the debtor's property right, to conclude only him and his privies. So, as the attachment of property not his would amount to nothing, so the attachment of his exempt property would create no lien if he would show the court its non-liability. It would be as idle for the creditor to attach exempt property as to attach that which his debtor does not own, if he knows that it is exempt and that the debtor will not waive exemption. Mostly when such property is attached, the creditor thinks it liable. He believes it not homestead, or that it has been abandoned as such.[1]

An answer, in an attachment suit, which sets up homestead in land attached, must allege its acquisition before the creation of the debt sued upon, and also family headship and occupancy when the attachment was laid.[2] Failure to set up homestead in defense of an attachment suit has been held to preclude the defendant from the right to maintain an action to have homestead set apart to him, after the confirmation of the attachment sale.[3]

A judgment for alimony may be made to bear lien on the homestead.[4] But if the custody of the children is given to the defendant (their father), who continues to occupy the homestead with them, attachment of the premises to enforce a general judgment for alimony has been denied.[5] It is better

[1] In Arkansas, it has lately been decided that after a debtor's property has been attached, and the contingent lien ripened into judgment, the debtor may, at any time before the sale, claim his homestead in it. And this ruling was made in a case in which a debtor claimed homestead in property upon which he had not lived for six years, having a home elsewhere, though it was on the theory that he meant to go back. Robinson v. Swearingin, 55 Ark. 55, 17 S. W. 365. The court said such conclusion relative to attachment had never before been declared in the state, but referred to the following cases in which it had been "adverted to:" Irwin v. Taylor, 48 Ark. 226; Reynolds v. Tenant, 51 Ark. 87; Richardson v. Adler, 46 Ark. 43.

[2] Caldwell v. Truesdale (Ky.), 13 S. W. 101. *See* Stewart v. Stisher, 83 Ga. 297.

[3] Kirk v. Cassady (Ky.), 12 S. W. 1039.

[4] Wilson v. Wilson, 40 Ia. 230.

[5] Byers v. Byers, 21 Ia. 268; Whitcomb v. Whitcomb, 52 Ia. 715; Stanley v. Sullivan, 71 Wis. 585.

for the defendant to set up his homestead before the decree, when the plaintiff has prayed for judgment bearing on specific property, for alimony.[1]

Damages, even nominal, should not be allowed for a wrongful attachment of a homestead, if no injury has resulted.[2]

§ 18. Effect of Not Pleading.

Not pleading in an attachment suit has been likened to non-claiming when an execution is levied in an ordinary suit. Where the homestead, by the policy of the law conserving homes for the good of the state, is made secure to the beneficiary whether he defend against execution levied upon it or not, it was held that there can be no such thing as fixing a valid attachment lien upon it in a suit upon a debt not privileged against it; that should it be sold on judgment for such a debt, in an attachment proceeding, no title would be conveyed.[3]

Is there not a difference? The ordinary suit offers no opportunity to raise the question of homestead; not till the levy is it known what property will be taken in execution; and then the defendant can oppose only as an actor — as plaintiff in injunction or some other proceeding. But the attachment suit with affidavit, or (to make the matter plainer) the petition containing all the averments necessary to both and duly sworn, charges some ground for attachment which is inconsistent with the defendant's homestead inviolability. For instance, the plaintiff alleges the ground of non-residency: a non-resident can have no homestead. Or, he alleges that the debtor has absconded: an absconded debtor has, or may have, abandoned his homestead. Or, he alleges that the debtor has made fraudulent disposition of his property: this may give rise to the question whether he has relinquished his homestead right. The defendant, by his answer, puts these allegations at issue. He sees his property taken by the sheriff. If his household goods are attached, they are under the charge of a keeper; his corn is locked up in the officer's warehouse. If his town

[1] Hemenway v. Wood, 53 Ia. 21. *See* as to attachment of homestead for alimony, Daniels v. Morris, 54 Ia. 369; Van Duzer v. Van Duzer, 65 Ia. 625.

[2] State v. Springer, 45 Mo. App. 252.

[3] Burns v. Lewis, 86 Ga. 591; 13 S. E. 123.

dwelling or his home farm has been attached, it is in the legal possession of the sheriff, and in court, while he remains the occupant by sufferance. He knows that his right is at stake; and, content to await the trial of the issues joined, he becomes plaintiff-in-rule to have the attachment dissolved. Now suppose him to set up every conceivable ground for dissolution except his incontrovertible one of exemption; and suppose he suffers defeat upon the rule, and defeat upon the trial of the main cause, without pleading homestead at all: would not he have waived it? Could a stronger presumption of waiver be imagined?[1]

The defenses pleaded, and all defenses that might have been pleaded, have passed beyond his recall. The rule is in all suits *in personam* or *in rem*, including attachment suits and suits involving homesteads as any other, that adjudication is a bar to subsequent litigation as to all matters which might have been tried under the issue as well as to those actually tried. Whatever is within the proper scope of the pleadings is deemed to be passed upon by the judgment which becomes *res judicata* as to all such matters; and the fact, that any particular thing was not urged when it might have been, creates no exception to the general rule. It is considered as passed *in rem judicatam*, and therefore cannot be urged afterwards between the same parties.[2]

A plaintiff in error moved to set aside a sale of his land, claimed as homestead and sold by him with warranty before the levy and judicial sale. The motion was overruled; and he was held bound by a decree in a suit to enjoin the sale, brought by his grantee and prosecuted in the joint interest of both. "Nothing that was involved in, and adjudicated in, that suit, in relation to this sale and assignment of homestead,

[1] *Ante*, p. 556, on pleading waiver.

[2] Aurora City v. West, 7 Wall. 82, 102; Beloit v. Morgan, 7 Wall. 619–623; Green v. Van Buskirk, 7 Wall. 139; Foster v. Milliner, 50 Barb. 393; Davis v. Tallot, 12 N. Y. 184; Canfield v. Monger, 12 Johns. 347; Le Guen v. Gouverneur, 1 John. Cas. 436; Comparet v. Hanna, 34 Ind. 74–8; Hereth v. Yandes, 34 Ind. 102; Danaher v. Prentiss, 22 Wis. 299; Rector v. Rotton, 3 Neb. 178; Miller v. Sherry, 2 Wall. 237; Chilson v. Reeves, 29 Tex. 276; Tadlock v. Eccles, 20 Tex. 791; Lee v. Kingsbury, 13 Tex. 70; Baxter v. Dear, 24 Tex. 17; Larson v. Reynolds, 13 Ia. 582; Wright v. Dunning, 46 Ill. 275.

can now be again litigated in this motion by any one that was a party or privy to that suit."[1]

Are defenses of homestead, which are withheld when they might be urged under the pleadings in attachment litigations, to be considered as out of the general rule where the statute makes homestead exemption absolute? Is the absoluteness a logical reason for making such defenses exceptional? It is not so as to other things. The solvent man who does not owe a cent, and is under no pecuniary obligation of any sort, holds all his property exempt; absolutely exempt from forced sale. Yet he must plead when his property is at issue, or take the result of the rule. The innocent man must plead for his life when it is at stake in court, and meet false evidence with the true, or he may be hanged though, upon proper showing, he will be found absolutely exempt from the halter; so exempt from the beginning.

There are statutes which positively declare that homesteads shall not be subject to execution or attachment except for purchase-money, taxes, antecedent debts, and sometimes one or two other things. Where they exist, and are construed by the courts to render writs of *fi. fa.* and attachment nugatory, the profession is doubtless to heed them in pleading and practice; and it would be idle to oppose them by argument drawn from the weight of authority in other states. It is the preponderance of authority in the state, where the pending issue is to be tried, which alone controls. The reasoning of outside decisions may have influence when those at home are not conclusive, but authority they have none. Does it follow that where homestead attachment is inhibited, and the courts therefore hold it an absolute nullity, the defendant's counsel may not move to dissolve one? Is he bound to disregard it and resort only to later remedies? Suppose his client's goods have been illegally taken by an officer under an illegal writ — must he avoid a motion to dissolve for illegality, and recover the goods by replevin? The latter would be the more onerous, since he would have to give security. Or, if the home-

[1] Mooney v. Moriarty, 36 Ill. App. 175; Cole v. Favorite, 69 Ill. 457; Freeman on Judgments, §§ 162, 174–6. *Compare:* Mix v. King, 55 Ill. 434; Wing v. Cropper, 35 Ill. 256; Mooers v. Dixon, 35 Ill. 208; Moore v. Titmun, 33 Ill. 358; Hoskins v. Litchfield, 31 Ill. 137.

stead has been attached in contravention of a statute inhibiting the process — must he abstain from the simple motion to dissolve the attachment, and wait till his client is about to be ousted, and then sue out an injunction and give security? Doubtless the better practice is to employ the simpler and less onerous remedy in order to avail his client of the statutory inhibition.

Where the statute takes jurisdiction from the courts with reference to the attachment and execution of homesteads, it is manifestly idle for the creditor's lawyer to attempt the creation of a lien by levy either before or after judgment when the fact of the existence of the homestead is conceded; unless he sees ground for assailing the statute itself as to its constitutionality. There is an undefined limit beyond which the legislator cannot go in cutting off the jurisdiction of courts — else the judicial department might be wholly destroyed by the legislative, to the contravention of the constitutional distribution of powers.

These stringent statutes ought to be read with some qualification understood. Governments are not to be debarred from the exercise of any of their proper functions because of the statutory inviolability of homesteads. Such property, as well as any other, when forfeited for contravention of law, may have judgment of condemnation pronounced in direct proceedings against it, as suggested in the first chapter of this treatise.

§ 19. Rulings on Questions of Evidence.

Papers filed in court, by an applicant, to obtain a homestead, are admissible in evidence against him in a contest with one of adverse interest, to show admissions relative to the property sought to be dedicated.[1] The declarations of a husband and wife, tending to show the ownership of their claimed homestead in another, thus denying their own right to it, may be shown by an adverse party who has an interest to do so.[2] If they have pleaded that the homestead is hers, they are estopped from proving it his.[3]

When it is necessary to prove filed declarations, a duly certified transcript from the record is sufficient.[4]

[1] Huntington v. Chisholm, 61 Ga. 270.
[2] Hickey v. Behrens, 75 Tex. 488.
[3] Bergsma v. Dewey, 46 Minn. 357.
[4] Stevenson v. Moody, 85 Ala. 83

Plaintiffs sued upon a deed of trust to land, executed to their agent for their use by the defendant and his wife. The land was sold, by the agent as trustee, to the plaintiffs, and deed given them conveying good title, if the land was not the homestead of the defendants when they gave the trust deed. The plaintiffs brought an action of trespass to try title. The trustee testified that the husband told him, before he took the trust deed, that the land was not homestead. On the other hand, it was in evidence that the plaintiffs knew of the defendants' occupancy of the land, as their homestead, at the time. The supreme court held that it was error for the lower court to admit the testimony as to the husband's declaration. The plaintiffs' title was held void because the land was homestead when the trust deed was given.[1]

In a suit by a wife charging collusion between her husband and his vendee of land on which she claims homestead, evidence of the husband's declarations respecting his residence, without accompanying evidence of the circumstances under which he made the declarations and without showing that they were made in her presence, was held inadmissible.[2]

And the declarations of the wife may be admissible against her, under certain circumstances. If, free from restraint and with full knowledge of her rights, she should "represent that a certain tract of land was not her homestead, and then cause a person to purchase it, she would be concluded by her acts; but if the party purchasing should know all the facts, or by reasonable diligence could know, and it should be apparent that the married woman was not entirely free from restraint, or was not cognizant of her rights, whatever admissions might be made under these or similar circumstances could not, with any propriety, be said to influence the purchaser or to estop the married woman from asserting her rights." [3]

In homestead litigation, as in any other, the *onus* is usually on the declarant to prove his allegations. If a defendant pleads homestead, he must show himself to be within the statute both by his plea and his evidence. The bare assertion

(withdrawing same titled case, 83 Ala. 418); Ala. Code, § 2788.

[1] Rose v. Blankenship (Tex.), 18 S. W. 101; Jacobs v. Hawkins, 63 Tex. 2.

[2] Newman v. Farquhar, 60 Tex. 640.

[3] Welch v. Rice, 31 Tex. 688.

that his lot or farm is his homestead is not usually enough, though it has been held, as before stated, that the use of the technical term implies the value accorded by law as exempt.[1] The rule is that there be allegations sufficient to inform the court, and the opposite party of the grounds of the claim or defense, when homestead is put at issue.

A plea that the homestead belonged to the wife, filed by both husband and wife, will not admit of proof that he is the sole owner.[2] There must be consistency. A defendant in ejectment, after maintaining successfully that the property in question was homestead, was estopped from denying it in further proceedings in the same case.[3]

A wife, having a homestead right to premises derived from her former husband, may prove that fact in an action of forcible entry and detainer against her, after the record of the ejectment suit (in which she and her present husband were ousted from the premises) has been admitted in evidence against her objection.[4]

The husband is a competent witness when he is joined with his wife in a suit concerning their homestead owned by her.[5]

The statement of an attorney at law, made at a judicial sale, that the property offered was a homestead and exempt, could not be received as competent to prove notice to the purchaser when his title was subsequently drawn in question.[6]

The *onus* of proving that a homestead, purchased at execution sale, was rightly sold under judgment upon a mechanic's lien, has been held to be upon the purchaser. And proof that the action was for work, and that the writ commanded the officer to sell the property owned by the debtor when the plaintiffs "filed their lien," was held insufficient. The court said: "Where it is admitted . . . that the sale under the execution was made to satisfy a debt contracted since the homestead provision of the constitution became operative,

[1] Symonds v. Lappin, 82 Ill. 213 (and cases cited therein); Struble v. Nodwift, 11 Ind. 64; Amphlett v. Hibbard, 29 Mich. 304; Daudt v. Harmon, 16 Mo. App. 203.

[2] Bergsma v. Dewey, 46 Minn. 357.

[3] Shubert v. Winston (Ala.), 11 So. 200.

[4] Morrissey v. Stephenson, 86 Ill. 344.

[5] Kas. Civ. Code, § 323; Chicago, etc. R. Co. v. Anderson, 42 Kas. 297.

[6] Morris v. Balkham, 75 Tex. 111; Mooring v. McBride, 62 Tex. 309.

and without assigning a homestead to the defendant in execution, when he did not hold one under a previous allotment, . . . the *onus* is on the plaintiff to show the liability of the land to be sold to satisfy the debt."[1]

When the court has found that the debt was created for homestead improvements, and has given judgment upon the finding, the homestead may be sold under such judgment in the absence of leviable chattels or other personalty. In a case brought on a promissory note, it was proved that the note was given by the defendant for material used in building his dwelling-house, and the court so found. Judgment following, the house was not exempt as a homestead against such debt.[2]

§ 20. Injunction Against Sale.

The sale of a homestead under execution may be enjoined when the property is exempt. Though the sale would be inoperative — not passing the title — yet if it would cast a cloud upon the title it may be prevented by injunction. The question of exemption may be raised on a motion to dissolve the injunction when it has been temporarily granted. There is a case where a son, having his mother living with him, made declaration of homestead as the head of a family. Upon her death, execution was levied upon it on a judgment against him for his debt. Whether exemption ceased at her death, when his family headship ceased, was the question. The court found that it did not, but rested the opinion on a peculiar provision of statute.[3]

The next question in the case was whether the title was liable to be beclouded by sale under the execution. If the sheriff's deed were given to the purchaser at the sale, and if it should be followed by action to eject the homestead-holder, the muniments of title which the purchaser (as plaintiff in the

[1] McMillan v. Parker, 109 N. C. 252; 13 S. E. 764; Long v. Walker, 105 N. C. 90; Mobley v. Griffin, 104 N. C. 112; McCracken v. Adler, 98 N. C. 400; Const. N. C., art. 10, § 4; Code, ch. 41.

[2] Tyler v. Johnson (Kas.), 28 P. 198. A wind-mill is a homestead appurtenance, within the meaning of Neb. Comp. Stat. ch. 54, § 1: so the person erecting it is entitled to his lien on the homestead, if the work was done under contract with the owner, and the claim sworn and recorded. Phelps v. Shay (Neb.), 48 N. W. 896.

[3] Roth v. Insley, 86 Cal. 134; Cal. Civ. Code, §§ 1261, 1265; Revalk v. Kraemer, 8 Cal. 73, and Bank v. Cooper, 56 Cal. 340, *distinguished.*

ejectment suit) would produce, would render it necessary that the homestead-holder produce extrinsic evidence to defeat the ejectment action: such as his declaration of homestead, his occupancy and his family relation at the time of dedication. Whatever creates the necessity for such evidence would cast a cloud upon his title and give him the right to an injunction.[1]

Could not the execution have been recalled by the court that issued it? And if the homestead-holder had failed to ask this remedy, was he entitled to have an injunction? This question was raised in the appellate court, which answered that the court which issued the execution would not have been bound to recall it upon such application; and that that court appears from the record to have been clothed with jurisdiction, and its judgment and execution was binding upon the defendant's property except what was exempt.[2] The issue of the execution was right, but the levy upon the homestead was wrong: hence, injunction of that levy was proper.

Petitioners, praying to enjoin the execution of a judgment on a community debt of an insolvent decedent, may show that their title was derived from a grantor who had it from the widow of the decedent through a partition proceeding — not from him as heir of the deceased.[3]

Injunction is the proper remedy to prevent the illegal execution of a homestead. Though the sale would be voidable, and would be absolutely void where the statute positively inhibits the forced sale of homesteads on judgments against owners for ordinary debts sub-dating the exemption — when such execution sale is in contravention of such law — yet it would tend to obscure the title and to breed litigation. The beneficiary of the homestead immunity therefore needs relief, and may find it in equity by enjoining the sale to prevent the casting of a cloud upon his title.[4] He may also have equi-

[1] *Id.; citing* Pixley v. Higgins, 15 Cal. 127; Culver v. Rogers, 28 Cal. 527; Cohen v. Sharp, 44 Cal. 29; Porter v. Pico, 55 Cal. 176.

[2] Roth v. Insley, *supra.* It was added by Beatty, C. J.: "I think it ought not to be intimated that the homestead of a head of a family remains exempt in his hands to any greater extent than $1,000 after he has ceased to be the head of a family."

[3] Watson v. Rainy, 69 Tex. 319; 6 S. W. 840.

[4] Tucker v. Kenniston, 47 N. H. 267.

table remedy for the removal of a cloud already overshadowing his title. Injunction is also the proper remedy to prevent a purchaser from taking possession after such illegal sale.[1] A wife may enjoin the sheriff to prevent his selling the homestead under execution.[2]

Sale may be restrained by injunction if it would throw a cloud upon the title of the petitioner, even though no valid title can pass by the sale because of its invalidity.[3] A purchaser may enjoin the levy of an execution upon the homestead of the judgment debtor which is exempt from the lien of judgment rendered before his purchase, as it would otherwise be a cloud upon his title.[4] After purchase, a cloud upon the title may be removed by a bill in equity.[5]

The levy of an execution was held not dismissible on the ground that the property subjected to it was homestead, when the jury had found only the defendant's aliquot part of it (which was not affected by the homestead) subject to the execution — not the whole property.[6] It has been held that the creditor's proceeding must be in equity, and not by execution, when liable property is attached to a homestead and makes it excessive.[7]

A homestead was duly mortgaged, and there was a valid judgment recorded against it. The debtor sold the property, the purchaser assuming the obligation of the judgment, the amount of which was withheld by him in making payment. The purchaser then sold the property to another, who had notice of the agreement in the first sale relative to the judgment; so he was held to have purchased subject to the judgment and therefore without equity to enjoin the sale of the property by the judgment creditor of the original owner. He could not claim the benefit of exemption.[8]

In an injunction suit to restrain the trustee sale of a home-

[1] Harrington v. Utterback, 57 Mo. 519.

[2] Bartholomew v. Hook, 23 Cal. 278.

[3] Vogler v. Montgomery, 54 Mo. 578; Harrington v. Utterback, 57 Mo. 519.

[4] Ketchin v. McCarley, 26 S. C. 1; Wilson v. Hyatt, 4 S. C. 369, *distinguished;* High on Injunctions, § 275.

[5] Harrington v. Utterback, 57 Mo. 519.

[6] Vining v. Officers, 86 Ga. 127; 12 S. E. 298; Same parties, 82 Ga. 222.

[7] Vanstory v. Thornton, 110 N. C. 10; 14 S. E. 637.

[8] Cumnock v. Wilson (Neb.), 50 N. W. 959.

stead (when the property was liable under a deed of trust) because other property of the householder had not been exhausted as the statute required, it was held that he should have alleged and proved that he had such other property subject to execution.[1]

Sale under execution is void if the advertisement by the sheriff was fraudulent. Collusion by him with the plaintiff in making such advertisement strikes the sale with nullity; and a purchaser at such sale is affected by the guilty knowledge of his attorney.[2]

On application to enjoin a sheriff from selling a homestead, a temporary injunction was granted, with refusal to pass upon a dispute upon facts set forth in the affidavits of the parties as to whether the homestead property included the upper story of the dwelling.[3]

One who was in the enjoyment of a homestead, in the country, sued out an injunction to prevent the execution of a judgment against his town property which he claimed as his "business homestead." He could not have both, so the injunction was dissolved.[4]

A plaintiff attached land of the defendant situated out of the county. Judgment by default was entered and sale ordered. The defendant claimed the land as his homestead, and enjoined the sale in the county where the land was situated. He was held not concluded by the judgment. The sale was suspended by the injunction till the settlement of the homestead question, though the writ of injunction should have been returned to the court whence the order of sale had issued.[5] If the rights of minors have not been ascertained, the delivery of the homestead to a purchaser may be enjoined.[6]

§ 21. Segregation and Other Proceedings Before Sale.

A rule by a creditor, as plaintiff, for the sheriff to show cause why he should not proceed to levy execution upon judg-

[1] Stevens v. Myers, 11 Ia. 185. Sale was restrained in Iowa because the land on which the homestead stood had not been platted after its incorporation into the town limits, though it was alleged to be in excess of the urban quantitative limitation. Frost v. Rainbow (Ia.), 52 N. W. 198.

[2] Jennings v. Carter, 53 Ark. 242.

[3] Farley v. Hopkins, 79 Cal. 203.

[4] Williams v. Wills (Tex.), 19 S. W. 683.

[5] Seligson v. Collins, 64 Tex. 314.

[6] Colley v. Duncan, 47 Ga. 668.

ment obtained, must be discharged when it appears that the debtor has no property but his homestead which is within the statutory limit and therefore not subject to the lien of the judgment.[1] But the officer is liable for not selling liable property. Upon refusal to proceed, after a claimant, who was not the defendant in the suit, had given notice that the property levied upon was his homestead, the sheriff, upon sale, was compelled to pay the value of the land, or the amount of the judgment.[2] Thus the officer stands between two fires.

If the homestead be wrongfully levied upon for a debt for which it is not liable, an action of trespass against the officer and the judgment creditor will lie. There may be choice between that and a statutory remedy and an action in damages after the illegal sale has been consummated.[3]

A part of the realty, segregated from the rest, may be liable to seizure and sale by creditors, though the whole was the debtor's homestead before the separation, and the major part still remains such.[4] On the other hand, the less part may be segregated from the greater, and the greater be no longer protected as homestead, while the less continues exempt.[5] If there are disputes respecting land — whether it is a part of the homestead — they may be settled by referees when there is authorization to that effect.[6]

When the property occupied by the debtor is greater in extent or value than that which is exempt by law as his homestead, the excess is liable to execution. It then becomes necessary to segregate the exempt from the liable portion, if an execution is pending. This is usually done on application (either of the creditor or the debtor) for the court to appoint appraisers or commissioners. If by the former, he must allege

[1] King v. McCarley, 32 S. C. 264. In South Carolina, the right of homestead may be determined by rule against the sheriff. Charles v. Charles, 13 S. C. 385.

[2] Blackman v. Clements, 45 Ga. 292.

[3] Bartlett v. Russell, 41 Ga. 196.

[4] Felner v. Bumgarner (Ark.), 17 S. W. 709.

[5] Blackburn v. Knight, 81 Tex. 391; 16 S. W. 1075; Curtis v. Des Jardins, 55 Ark. 126.

[6] McC.'s Ia. Code, § 3177 (2002); White v. Rowley, 46 Ia. 680; McCracken v. Weitzell, 70 Ia. 723. In Iowa, the referees are called jurors; nine are summoned, but six are to be struck off by the parties, or by the sheriff when they do not. The three remaining make their report to the court, which decides. McC.'s Ia. Code, §§ 3177–3180.

that he has caused execution to be levied and that the value of the property exceeds the homestead limit; and he should state who is the claimant of the exemption. Whether the defendant be the claimant, or his wife, or any member of the family entitled to hold for all, the name should be stated.

It is rather the debtor's business, than the creditor's, to make the application for division when execution has been levied against an excessive homestead. First he may apply to the sheriff, or other officer in charge of the execution, to have the homestead set off. On the officer's compliance, the creditor may complain that too much has been accorded to the debtor. If so, the officer may have the land surveyed to ascertain the statutory quantity exempt.[1]

An excessive homestead, which is not susceptible of division, may all be retained by the debtor so far as the pending execution is concerned, if he will pay the excess into court for the use of the creditor. This is provided by statute in several states; and it is proper in the absence of any legislative authorization; for, if the creditor gets out of the debtor all that he could make out of the property, justice is satisfied. On the other hand, the creditor may pay the value of the exempt portion into court for the use of the debtor, and then go on and sell the whole of the indivisible property, under some provisions.

In states where there is no homestead selection, declaration or dedication of homestead by the head of a family irrespective of his pecuniary condition; and where there is no technical *homestead* except the exemption allowed a debtor when execution is pending (which, when consisting of realty, is sometimes called by the name), the officer, charged with an execution against the property of a husband, is required, by some statutes, to set off a certain value of realty to the debtor when application therefor has been made by him. The officer, in doing this, has the aid of appraisers — one of them selected by the applicant — whose report must be filed in the case whence the execution issued. A notary, or any officer who is authorized to administer oaths, may swear in the appraisers, as he

[1] In Mississippi, if a town homestead is worth more than the statute exempts, it has been held that the officer may sell a part of it. Rhyne v. Guerara, 67 Miss. 139.

may qualify commissioners appointed to lay off homestead pursuant to a decree of foreclosure.[1]

The appraisers must ascertain the value; and, if it is in excess of the monetary limit, they must next decide whether the property can be divided, without injury, so that the exempt portion may be reserved to the debtor (or the claimant, if other than the debtor), and the liable portion subjected to the operation of the writ. They must report to the court; but the report is not conclusive.[2] If the report favors division, and is such as the court will adopt and act upon, the court will order the reservation of the exempt part of the property and permit the execution to be consummated as to the rest. If the property is reported to be indivisible and excessive, the court will allow the whole to be sold, and will have the value of the homestead reserved for the claimant out of the proceeds. The amount reserved will be exempt for such time as the statute provides, which varies in different states from six months to two years.

A sheriff, who had sold land, including homestead, under execution; and, instead of paying over the value of the homestead to the householder out of the surplus proceeds, had applied them to the satisfaction of other executions against him, was held not answerable to him when he had stood by and seen the surplus thus distributed without interposing objection.[3]

If a homestead, reported as excessive and indivisible, be offered at public sale under the writ, and no bid greater than the monetary homestead limit be offered, there can be no adjudication.

§ 22. Judgment and Costs an Entirety.

As exemption is in relation to debt in most of the states, and not to other pecuniary liabilities, it follows that judgments may be executed against any property when they are not for debt. Damages recovered for other liabilities may be collected from it, and it is held that the costs of a suit may

[1] Dillman v. Will County Bank (Ill.), 27 N. E. 1090; Same title, 36 Ill. App. 272.

[2] Schaeffer v. Beldsmeier, 9 Mo. App. 438.

[3] Brumbaugh v. Zollinger, 59 Ia. 384; Elliott v. Mackorell, 19 S. C. 238.

also; the plea of exemption would not avail against an execution for costs in a state which limits its application to debt "founded upon contract, express or implied."[1] The liability of a plaintiff or defendant for costs taxed against him is not a debt so founded, and it cannot be said to have grown out of a contract, when the judgment itself is not upon contract. Costs are incidental; and they take the character of the judgment when it is for the plaintiff. If he is cast in his suit, and the defendant recovers costs, what is the rule, when there is no principal money judgment to give character to the costs? It is held, in the case last cited (with cases therein cited), that no exemption bars the defendant from collecting his adjudged costs in an action *ex delicto*, and the doctrine is extended to include his costs in an action *ex contractu*.

[1] Donaldson v. Banta (Ind.), 29 N. E. 362. Crumpacker, J.: "The controlling question in this case is, does the right of exemption exist against an execution issued upon a judgment for costs in favor of the defendant against an unsuccessful plaintiff in an action founded upon or growing out of contract? If such right exists, it is conferred by section 703, Rev. St. 1881, which provides that an amount of property not exceeding $600 in value shall be exempt from sale upon execution or other final process 'for any debt growing out of or founded upon contract, express or implied.' No exemption is allowed under this statute unless the debt under which it is claimed was founded upon or grew out of a contract, express or implied. The right does not exist against judgments in actions for tort. Nowling v. McIntosh, 89 Ind. 593; Thompson v. Ross, 87 Ind. 156; Gentry v. Purcell, 84 Ind. 83; Smith v. Wood, 83 Ind. 522; Dorrell v. Hannah, 80 Ind. 497. Where a suitor obtains a judgment for damages in an action for tort, or a money recovery in an action upon contract, and is awarded costs, the judgment is an entirety, and must be collected according to the laws for the collection of the judgment for damages or the money recovery upon contract. In other words, the judgment for costs is an incident to, and must be controlled in its collection by, the principal judgment. This is so even where the principal judgment is only for a nominal amount. This was decided in the case of Church v. Hay, 93 Ind. 323, wherein the court said: 'The costs recovered by the judgment plaintiffs constituted a part of the judgment on the cause of action. The judgment was an entirety, and belonged to the judgment plaintiffs upon the theory that they had paid them as they accrued or are liable for their payment; and no contract, express or implied, existed between the judgment plaintiffs and the judgment defendants in relation to them. The law requires them to be paid by the judgment defendant, not because they are paid for his use, but because he had caused the plaintiffs to pay them to protect their own rights.' The doctrine that a judgment for damages and costs is an entirety, and the cost shall be collected in the

In the state of the above cited case, where there is exemption but no homestead law, a debtor was allowed exemption in a case brought against him upon three causes of action — two in tort and one on contract — the court giving him the privilege as though the action had been solely on contract.[1] Had the action been wholly in tort, no exemption could have been allowed under the statute.[2] If the amount recovered on contract can be segregated from that in tort,

same manner as the judgment to which they are incidental, was declared in the case of Martindale v. Tibbetts, 16 Ind. 200. In deciding the question the court said: 'The judgment for the debt and costs is an entirety; the costs following as an incident to the judgment for the debt, and to be collected in the same manner.' Where costs are recovered independent of any other judgment, they do not constitute a debt founded upon contract. There is no contract, express or implied, that an unsuccessful plaintiff will indemnify the defendant for the costs occasioned by the litigation, but the right to recover costs is purely statutory, and, in the absence of a statute authorizing it, they could not be recovered as such by the prevailing party. Alexander v. Harrison, 2 Ind. App. —, 28 N. E. Rep. 119. In an action *ex delicto*, if the plaintiff is unsuccessful, and the defendant recovers costs, no exemption is allowed against such judgment; not because the costs partake of the nature of the subject-matter of the action, but because the right thereto is statutory, and not a matter of contract. Russell v. Cleary, 105 Ind. 502, 5 N. E. Rep. 414. The same principle was applied in the case of State v. McIntosh, 100 Ind. 439, wherein the court said: 'Costs are not matter of contract, but they are given or withheld by statute.' Whether the right of exemption exists against a judgment for costs rendered against an unsuccessful plaintiff in an action founded upon contract has never been expressly decided by the supreme court in this state, but we can see no good reason for the application of a different rule in such cases from that applied to a judgment under like conditions in an action for tort. Because in the one instance the suit is *ex contractu*, it cannot impart to an independent judgment for costs the qualities of a contractual obligation. The right to recover costs is conferred by the very same statute in both cases, and must, upon the clearest principles of jurisprudence, be the same. It was held in Lane v. Baker, 2 Grant, Cas. 424, that costs do not partake of the nature of the action. The court, by Black, C. J., said: 'A party is not a trespasser because he sues another for trespass.' We can perceive ample reasons for the rule requiring costs to be collected by the same law as the principal judgment where they are awarded as part of and incidental thereto, but these reasons do not apply to independent judgments for costs."

[1] Ries v. McClatchey, 128 Ind. 125; 27 N. E. 349.

[2] De Hart v. Haun, 126 Ind. 378; 26 N. E. 61; Nowling v. McIntosh, 89 Ind. 593; Gentry v. Purcell, 84 Ind. 83.

when the cause of action is mixed, the defendant may claim exemption as to the former.[1] No exemption when the judgment is for tort is a rule extensively followed.[2]

Where the statute exempts not only from any debt contracted but also from any liability contracted, the latter has been held to cover torts, so that the defendant had his property protected when execution followed a judgment against him for assault and battery.[3] Not only in actions for tort, but in actions to recover debts antecedent to the homestead, the costs partake of the nature of the judgment, and may be collected of the homestead.[4]

On a judgment for the recovery of land and for damages for its wrongful detention, the execution is not for the collection of a debt. The sheriff, when the writ itself evinces its character, may levy upon chattels and disregard any claim of exemption based upon a law that grants it only in case of "execution or other process for the collection of debts."[5] In the case cited, the court said: "Such exemptions may not be claimed against process generally. A writ of possession for land and for the collection of damages assessed for the wrongful detention thereof, and the costs of the suit, is not, as to the damages and costs, subject to the claim of exemption of personal property allowed by our laws, as it is not process for the collection of a debt contracted; and . . . the sheriff had a right to . . . sell the property levied on as if no such claim" had been presented.

The executor of a wife's will, having negotiated the sale of real estate pursuant to its provisions, petitioned for the confirmation of the sale. Pending the hearing, the surviving husband made application to have the property set off to him as homestead. To this application the legatee, whose money bequests were to be paid out of the proceeds of the sale according to the will, demurred. The demurrer was overruled. Is-

[1] Keller v. McMahan, 77 Ind. 62.

[2] Stuckey v. McGibbon, 92 Ala. 622; 8 So. 379; Davis v. Henson, 29 Ga. 345; Kenyon v. Gould, 61 Pa. 292; Lathrop v. Singer, 39 Barb. 396; Schouton v. Kilmer, 8 How. (N. Y.) 527. *Contra:* Dellinger v. Tweed, 66 N. C. 206; Conroy v. Sullivan, 44 Ill. 451; Robinson v. Wiley, 15 N. Y. 489. *See* Warner v. Cammack, 37 Ia. 642.

[3] Smith v. Omans, 17 Wis. 406.

[4] Knight v. Whitman, 6 Bush, 51.

[5] Penton v. Diamond, 92 Ala. 610; 9 So. 175; Ala. Code, 2511; Const. Ala., art. 10, § 1.

sue was then joined: the legatees setting up the will and its probate in defense. The husband was decreed to be entitled to the property for life, as the surviving spouse's homestead, but to pay the expenses of the administration in the absence of any assets for the purpose.[1] Had he applied immediately upon her death, the expenses might have been avoided.

It has been held that "costs on a junior judgment which could not be defeated by the homestead must be postponed to a senior judgment on a debt against which a homestead could be claimed."[2]

[1] Lahiff's Estate, 86 Cal. 151; Cal. Civ. Code, § 1265; Code Civ. Proc. 1474; Sulzberger v. Sulzberger, 50 Cal. 385; Maloney v. Hefer, 75 Cal. 422, *distinguished.*

[2] Bank v. Goodman, 33 S. C. 601.

CHAPTER XXIV.

EXEMPTION OF PERSONALTY.

§ 1. Differentiation of Homestead and Chattel Exemption.
2. Interpretation of Statutes.
3. What Law Applicable.
4. The Right Absolute or Conditional.
5. Who May Claim.
§ 6. How to Claim.
7. When to Claim.
8. The Officer's Duty.
9. Limitations.
10. Money in Lieu of Chattels.
11. Chattels in Lieu of Homestead.
12. Chattel Exemption to Widows.

§ 1. Differentiation of Homestead and Chattel Exemption.

The exemption of personalty is often called chattel exemption, and it relates not only to ordinary movables but also to money and credits. It is more general than homestead exemption; every state accords it, and there is an approach towards uniformity in the statutes. In some respects the two kinds of exemption are alike; in others, they are different. Homestead exemption need not have its features here again exhibited; but, as chattel exemption is portrayed, the resemblances and diversities will appear. It is a privilege granted to the debtor when execution is pending against his property. By some statutes it is granted to him as a debtor simply; by others, as a debtor who is a resident — a householder — the head of a family; by yet other statutes, as a debtor who is the follower of a specified vocation. The things exempt are not rendered sacramental by any dedication or recordation so as to save them specially from any forced sale, but are usually selected with regard to the pending execution. They mix with the mass afterwards, and a second selection at the time of a second execution may or may not include the same goods. In other words, there is no dedication in chattel exemption. If the debtor has possession of the articles which he claims as exempt, the ownership is presumed: so, in the absence of evidence to the contrary, he need show no title. Occupancy — rather should we say *use* — is not essential to the exemption

of personalty, except that it may be necessary with respect to farmers' and mechanics' tools under some statutes. Family headship is not nearly so general a requirement as in homestead exemption.

The policy of the law is alike in both classes of exemption, so far as both agree; that is, when both are accorded to heads of families only, the policy is plainly to conserve families. When tools are specifically exempted in favor of artisans, whether married or single, the policy of the law is evidently to encourage their calling. Such protection may keep them from being virtually maimed by having their artificial additions to hands and feet cut off. When goods to a given amount are secured to any debtor, the policy is more apparently beneficent. In any case, it is for the welfare of the state and the good of society and of the beneficiaries.

§ 2. Interpretation of Statutes.

The applicable rules of construction are the same as those appertaining to homestead exemption, so far as the purpose or policy of the legislation is alike in both. When a provision is ambiguous, it is generally construed liberally to effect the legislator's intention to provide exemption in favor of the debtor. Strict construction applies when there is any derogation of common right, and when it would be applicable, for any reason, under the established rules of interpretation governing legislation on any subject. The decisions are numerous which favor liberal construction of laws providing for chattel exemption — only a few of which need be cited.[1]

If the privilege is granted on conditions to be observed by the applicant, it ought not to be denied because he has failed to comply in some immaterial particular;[2] but non-compli-

[1] Rutter v. Shumway, 16 Colo. 95; 26 P. 321; Brown v. Balfour, 46 Minn. 68; 48 N. W. 604; State v. Boulden, 57 Md. 318; Kestler v. Kern, 2 Ind. App. 488; Pickrell v. Jerauld, 1 Ind. App. 10; 27 N. E. 433; Junker v. Hustes, 113 Ind. 524; Butner v. Bowser, 104 Ind. 255; Kelley v. McFadden, 80 Ind. 536; Finlen v. Howard, 126 Ill. 259; Good v. Fogg, 61 Ill. 449; 14 Am. R. 71; St. Louis Type Foundry v. Publication Co., 74 Tex. 651; Allison v. Brookshire, 38 Tex. 199; Byous v. Mount, 89 Tenn. 361; Wolfenbarger v. Standifer, 3 Sneed, 659; Carty v. Drew, 46 Vt. 346; Seeley v. Gwillim, 40 Ct. 106; Kuntz v. Kinney, 33 Wis. 510.

[2] Haas v. Shaw, 91 Ind. 384; 46 Am. R. 607.

ance with essential conditions precedent on the part of the beneficiary should not be overlooked.[1] When they are set forth plainly, there is nothing for the courts to construe. There must be a performance of the conditions.

There may be implications, either favoring the debtor or otherwise, which the courts ought to regard. There may be no express words of inhibition, yet the spirit of the statute may deny exemption. It was said of an absconding debtor: "Refusing to remain within our jurisdiction to answer its liabilities, he ought not to be permitted to come within it to appropriate its bounties."[2] Again it was said: "It cannot be presumed that the legislature intended to extend the benefits of the exemption laws to this class of persons" [*i. e.*, absconding debtors].[3] The spirit of the legislation, however, while not favoring an application from an absconded debtor, may allow his wife or some other member of his family to make the claim in behalf of the beneficiaries whom he has deserted.[4]

The doctrine of liberal construction has been applied to the rules of benevolent societies where the statute of the state exempted a benefaction of such a society to a specified amount.[5]

When an exemption provision is minutely incorporated into the organic law of a state it does not become more entitled to liberal interpretation than it would be in a statute. It is thus better secured, as to permanency, but no better entitled to favorable construction. That an exemption law is imbedded in a constitution is no reason for liberal interpretation, but it gives the beneficiary a right which the legislature cannot impair.[6]

Exemptions from taxes are less liberally construed than

[1] Stallings v. Read, 94 Ind. 103; Smith v. Slade, 57 Barb. 641.

[2] Yelverton v. Burton, 26 Pa. St. 351.

[3] Orr v. Box, 22 Minn. 485. By Revised Statutes of Missouri (1879), section 416, as construed in Durner v. Kingsbury, 33 Mo. App. 519, even wages may be attached if the debtor has absconded.

[4] *Post*, § 5.

[5] By General Statutes of Minnesota, section 369, a beneficiary fund to the amount of $5,000 is exempt to the family of the debtor free from his debts and theirs. Brown v. Balfour, 46 Minn. 68; Jewell v. Grand Lodge, 41 Minn. 405; Supreme Council v. Perry, 140 Mass. 580; Ballou v. Gile, 50 Wis. 614.

[6] *Ante*, p. 52.

others. It was said in a tax case (following others that contained like deliverances) in a state which treats all exemptions as subject to strict construction as being in derogation of common right: "The well known and universally prevailing principle of interpretation, that statutes comprising exemptions should be strictly construed, is specially emphasized in the jurisprudence of this state. 'In such case, doubt is fatal.'"[1] "Plausible hesitation warrants an adverse finding."[2]

In no class of exemptions should statutory interpretation, either strict or liberal, be allowed to relieve the claimant from the burden of making out his case. In other words, a case of doubtful facts is not to be helped or hindered by it. It is not for courts to extend the statute to cover a claimant who has not brought himself under it. If the facts show a state of things which render it questionable whether the statute gives exemption in such case, then there must be such interpretation as will decide the question, not as to the case at bar merely but as to all like cases.

§ 3. What Law Applicable.

The law existing relative to exemptions, at the time of a change in the constitution on that subject, is the one applicable to questions arising thereunder.[3] The constitution cannot be made to increase the amount, without doing injustice to the creditor. A legislature cannot enlarge it, with reference to the existing obligations of the debtor. If he acquired the property he claims, after the new enactment, his position is not better, since the date of the debt fixes the exemption right, and points to the statute then existing. For illustration: a statute exempted one horse; a later statute exempted two; the debt was contracted under the first one: *held*, that the first law governed, and the defendant could not claim two.[4]

[1] Gast v. Board of Assessors, 43 La. Ann. 1105.

[2] City of New Orleans v. Robira, 42 La. Ann. 1102. Like renderings and expressions in Carre v. City, 41 La. Ann. 998 and 42 id. 1121; Dennis v. Railroad Co., 34 La. Ann. 958.

[3] Moore v. Boozier, 42 Ark. 385.

[4] Johnson v. Fletcher, 54 Miss. 628. Chalmers, J., for the court, put the decision on the ground that to exempt more than what the creditor knew to be exempt, when he trusted the debtor, would be to impair the contract, *citing* Lessley v Phipps, 49 Miss. 790; Gunn v. Barry, 15 Wall. 610; Homestead Cases, 22 Gratt. 266. He argued that, to poor people, the

Under a statute which made certain absolute exemptions, and certain ones subject to selection and claim, the same principle, as to the governing statute, was clearly elucidated.[1]

A bankrupt, who gave a note subsequently to his discharge for the discharged debt, when sued upon the note, was allowed to claim his exemption of six hundred dollars under the statute exempting that amount from execution for "any debt growing out of, or founded upon, a contract expressed or implied."[2] In so allowing, the court said that the debtor's discharge in bankruptcy did not pay his debt but left him morally bound to pay it if able to do so at some future time; that this moral obligation constituted a sufficient consideration for the note; that the new note revived the original debt.[3] But the repealed laws governing the original debt were not also revived; the rights and remedies of the parties, respecting the new note, must be governed by the laws in force when the remedy is sought.[4] This is the general rule as to contracts, and it is applicable to both classes of exemptions.[5]

A statute of limitation should not too suddenly cut off remedy.[6]

The contract is governed by the statute in force when it was made.[7] The repeal of the statute does not affect the contract.[8] The remedy may be altered if the contract is not thereby impaired.[9] But there is impairment if the object of the contract

increase from one horse to two is as great a change as the increase of homestead exemption from an eighth to a quarter section would be to men of means. The case allowing the latter, Stephenson v. Osbore, 41 Miss. 119, was overruled in Lessley v. Phipps, *supra*, as the court showed.

[1] Carlton v. Watts, 82 N. C. 212; Gamble v. Rhyne, 80 N. C. 183; Earle v. Hardie, 80 N. C. 177.

[2] Ind. Rev. Stat. (1881), § 703.

[3] Willis v. Cushman, 115 Ind. 100, *105; citing* Carey v. Hess, 112 Ind. 398.

[4] *Ib.; citing* Davis v. Rupe, 114 Ind. 588.

[5] Auld v. Butcher, 2 Kas. 155; Berthold v. Holman, 12 Minn. 335; Billings v. Hall, 7 Cal. 1; Bumgardner v. Circuit Court, 4 Mo. 50; Butler v. Pennsylvania, 10 How. (U. S.) 416; Bronson v. Newberry, 2 Doug. (Mich.) 38; Billmeyer v. Evans. 40 Pa. St. 324; Coriell v. Ham, 4 Greene (Ia.), 458.

[6] Call v. Hagger, 8 Mass. 423.

[7] *Ante*, p. 19; Cornell v. Hitchens, 11 Wis. 368; Coosa River Steamboat Co. v. Barclay, 30 Ala. 120.

[8] Commonwealth v. New Bedford Bridge, 2 Gray, 339; Conant v. Van Schaick, 24 Barb. 87; Cook v. Moffat, 5 How. (U. S.) 316; Atwater v. Woodbridge, 6 Ct. 223.

[9] Garrett v. Beaumont, 24 Miss. 337; Cox v. Berry, 13 Ga. 306; Griffin v. McKenzie, 7 Ga. 163; Cutts v. Hardee,

is defeated by the change in the statute.[1] The logic is the same, as to impairment, whether personalty or realty be exempted; but the rigorous test, prescribed in some decisions,[2] would work hardship in many cases involving small chattel exemptions. The creditor is doubtless entitled to notice of exemption before giving credit, as a general rule; that is, he should have the advisement which the passage of an exemption law gives him before he trusts his debtor on account of the latter's chattel means of payment. Where the law gives large exemptions to the debtor — a thousand dollars' worth of personalty or more — there is no good reason why the rule of notice should not be applied; but the usual and almost universally authorized exemptions of bed and bedding to families, tools to artisans, and the like, ought not to be subjected to the test so strictly as to make them dependent upon their antedating the debt, prior notice to creditors and other particulars. For creditors and the public may be presumed to know that such exemptions are usual everywhere; and it may be said that contracts are made with knowledge of this fact. Such exemptions are allowed throughout the civilized world, and there were exemptions of necessary articles even among the ancients. There was statutory exemption of agricultural implements, wearing apparel and some other necessary articles, over five hundred years ago in England; and there has been similar provision in this country through all its history.

§ 4. The Right Absolute or Conditional.

Exemption is *absolute* or *conditional.* It relates to property *specific* or *selectable:* the former being *exempt* while the latter is *exemptible.* The absolute exemption of specific things is made complete by statute, while the conditional exemption of things selectible leaves something for the beneficiary to do. The condition is that he must claim his privilege by compli-

38 Ga. 350; Coach v. McKee, 6 Ark. 484; Walker v. Bank, 7 Ark. 484; Waltermire v. Westover, 14 N. Y. 16; Morse v. Goold, 11 N. Y. 281.

[1] Curran v. Arkansas, 15 How. (U. S.) 304. *See* generally, as to statutes impairing contract: King v. Dedham Bank, 15 Mass. 447; Maysville Turnpike Co. v. How, 14 B. Mon. 342; Damman v. Com. School Lands, 4 Wis. [*414], 432; Grogan v. San Francisco, 18 Cal. 590; Montgomery v. Casson, 16 Cal. 189; McCauley v. Brooks, 16 Cal. 11. *See* Charles River Bridge Case, 11 Pet. 538.

[2] *Ante,* pp. 677-9.

ance with the statute. When execution is pending, he must file his schedule, select and point out the chattels which he is allowed to save from the sale, and claim his privilege in the mode and within the time prescribed by the statute.

Specific property, absolutely exempt, may be mortgaged, assigned, sold, or subjected to any disposition by the debtor without injury or loss to his creditor who has no right to look to it for satisfaction; but property is not thus at the debtor's disposal when it is merely exemptible upon compliance with conditions. When there is no absolute exemption, all the debtor's property is liable under a general judgment, and any of it may be seized in execution. The officer does not know that the defendant will avail himself of the privilege of selecting and claiming anything under the statute which merely accords the right. He is not bound, or even permitted, to set off any unclaimed chattels to the notified debtor, under such circumstances, but must levy upon that which the plaintiff points out, or on what he finds, if nothing be pointed out; and he must go on and sell, if no claim of exemption intervenes before the sale.

While the debtor may dispose of specific property absolutely exempt, he cannot convey that which is merely susceptible of being made exempt without forfeiting his right to claim. He cannot transfer to another this right. A debtor's interest in a fund was assigned by him to his children after proceedings had been instituted to subject it to the satisfaction of his debt. Then he claimed exemption in behalf of his children. He was held incompetent to claim, in an able opinion which makes the distinction between *exempt* and *exemptible* property very lucid.[1]

[1] Stotesbury v. Kirtland, 35 Mo. App. 148.

Judge Thompson said for the court:

"The distinction which our courts take between these two sections (Mo. R. S., §§ 2343, 2346) is that the specific chattels exempt under the first section are exempt whether selected or not; and consequently, if the debtor sells them, the right of exemption will attach to them in the hands of the vendee, in the sense that his vendee may, as against his creditors, set up his right of exemption; as is shown by Stone v. Spencer, 77 Mo. 356, and as is recognized in Hombs v. Corbin, 20 Mo. App. 507. But, as held in this last named case, this is true only of property which is thus specifically made exempt, and is not true of property which the debtor may select, under section 2346, in lieu of

§ 5. Who May Claim.

Possessor: The claiming of exemptible personalty, by householders, to save it from execution, will now be considered. The defendant is the proper claimant of property in which he has the exemption right. It is levied upon as his property, or about to be, and he seeks to defeat the levy, or to prevent its being made, because he is interested as owner. But it is not essential that he have title of any sort, beyond possession, to enable him to set up the exemption privilege. He is not bound to show title as against the creditor and officer who have just seized the goods as his property. It is even held that exempt movables, owned by the debtor's wife but seized

the specified property exempt under the section previously cited. The reason given by the court for this conclusion was thus stated by Judge Hall: 'As to the right of selection, this is purely a personal privilege conferred upon the debtor, which he alone can exercise and which he cannot transfer to another. Exempt property the debtor can sell, and it remains exempt after the sale, as it was before, unaffected thereby. Or, if the property be not exempt, the debtor may select it in lieu of that which is exempt, and, after the selection, sell it, as he may sell the exempt property. But the right to make the selection the debtor cannot sell; he alone can exercise it. As the debtor can alone make such selection, he alone can avoid a levy on account of a failure of the officer to give him an opportunity to make it. The right to make the selection the debtor may waive, just as he may waive his right to all exemptions.' Hombs v. Corbin, *supra.*

"The question is thrown into clearer light by the decision of this court in Alt v. Lafayette Bank, 9 Mo. App. 91. That case affords a distinct authority for the decision of the case before us against the claim of exemption set up by the defendants. It had previously been held by this court in Kulage v. Schueler, 7 Mo. App. 250, that there can be no fraudulent conveyance of property which has already acquired the *status* of being exempt from execution. In the later case of Alt v. Lafayette Bank, it was held that where property has not acquired the *status* of exempt property at the time when it is conveyed in fraud of creditors, a right of exemption in respect of it cannot afterwards be claimed. . . . In the present case, it was earnestly argued that, until the time came to file his answer, the debtor had been afforded no opportunity of setting up his claim. . . . We apprehend that this view is not tenable. . . . He might have claimed as was done by an insolvent debtor, in the case of Weinrich v. Koelling, 21 Mo. App. 133–5. He should have set up his right of exemption first, in his answer to the petition, and then we think he might have conveyed his interest in the fund, to the extent of his exemption, to his children. . . .

"The right of exemption, as we have seen, cannot, except in the case of specific chattels, be asserted by any one save the debtor himself, as was said by the supreme court in Osborne v. Schutt, 67 Mo. 714."

for his debts and adjudged liable therefor, may yet be rescued by him from the grasp of his creditors. And this, too, after he has denied ownership and declared it to be in his wife.[1] But the bailee of the beneficiary of exemption cannot be heard to claim the exemption in behalf of the beneficiary.[2] And as the claim should be by the debtor himself (though other beneficiaries, such as a wife and it may be other members of his family, may act in his absence or upon his neglect), he cannot appoint an agent to claim for him when there is no reason or necessity for doing so. He cannot transfer his claiming right to a vendee so as to enable the latter to claim the exemption of the article bought on grounds personal to the vendor.[3]

Family head: The claimant who relies upon a statute giving exemption to the head of a family dependent upon him and living with him as members of his household must prove that he occupies that position, when the fact is drawn in question.[4]

The husband's headship of the family, when his wife and children compose the household, though always presumed when the fact of family existence has been established, may be disproved, and the wife shown to occupy that position, it has been decided; and, when she takes charge of the duties usually appertaining to him, that fact may be proved; and the court will recognize her as entitled to claim exemption in his stead, it is further held.[5] "Ordinarily, at least, where the wife lives with the husband, he must be regarded as the head of the family. If, in fact, he has not control of the family and is not the head thereof, such fact must be shown by proof."[6] When, by reason of continued sickness, or disability of any kind, he has habitually intrusted his business matters to his wife, she may claim the statutory exemption.[7]

[1] Steen v. Hamblet, 66 Miss. 112; King v. Sturges, 56 Miss. 606; McGrath v. Sinclair, 55 Miss. 89. *See* Chamberlain v. Darrow, 46 Hun, 48. *Contra:* Huey's Appeal, 29 Pa. St. 219; Miles v. The State (Md.), 21 A. 51.

[2] Mickles v. Tousley, 1 Cow. 114.

[3] Howland v. Fuller, 8 Minn. 30.

[4] Boykin v. Edwards, 21 Ala. 261; Bonnell v. Dunn (4 Dutch.), 28 N. J. L. 153; Woodward v. Murray, 18 Johns. 400; Griffin v. Sutherland, 14 Barb. 456; Pollard v. Thomason, 5 Humph. 56; Gunn v. Gudehus, 15 B. Mon. 447. In a homestead case, a widower was held to be a family. *In re* Lamb's Estate (Cal.), 30 P. 508; *ante*, p. 85.

[5] Temple v. Freed, 21 Ill. App. 238.

[6] *Ib.;* Clinton v. Kidwell, 82 Ill. 429.

[7] State v. Houck (Neb.), 49 N. W. 462.

The husband who lives apart from his family and does not contribute to their support may be considered as having abdicated his authority and headship, and to have lost his right to claim chattel exemption as head of the family.[1] So also a divorced husband who is childless.[2] But when the husband had children, he was allowed such exemption, though not living with his wife.[3] Even when he has been divorced at the suit of his wife, he has been allowed to claim exemption, in

[1] Linton v. Crosby, 56 Ia. 386; 41 Am. Rep. 107.

[2] Spangler v. Kaufman, 43 Mo. App. 5, *distinguishing* Whitehead v. Tapp, 69 Mo. 415, and Brown v. Brown, 68 Mo. 388.

[3] Rogers v. Fox (Tex.), 16 S. W. 781. Hurt, J.: "Appellee, Fox, sued appellant upon an open account, and caused a writ of attachment to be issued, and levied upon a horse and wagon. In the justice court Fox recovered a judgment for the sum of $22.60, with a foreclosure of the attachment lien upon the horse, the justice holding that the wagon was exempt. Rogers appealed to the county court, and in that court Fox had a judgment for the sum of $21.94, with foreclosure of the lien on both horse and wagon, and from that judgment Rogers appeals to this court. Rogers claimed that the horse and wagon levied on were exempt property, for the reason that he was a married man and head of a family. The agreed statement of the facts shows that Rogers is a married man, having married in Tennessee about twelve years ago, and that he has a wife and five children living in Montague county, Texas. He has not been living with his wife since January, 1887, but is not divorced. He has not contributed anything to her support since January, 1887. Rogers is a resident citizen of Cooke county. The writ was levied in January, 1888. The court charged the jury to find in favor of Rogers on his claim that the property was exempt if he 'was a married man with a family dependent upon him, and that he was a consistent part of said family,' etc. We are of the opinion that the court erred in this charge, and that the charge requested by appellant should have been given, that he was entitled to recover on his plea that he was a married man and the head of a family. We see nothing in the agreed facts in this case to warrant any further qualification of his right to have the law protect his exemption. As will be seen, the judgment in the justice court is for $22.60, and that in the county court was for $21.94. The court taxed the costs of the county court against defendant. This was error. Art. 1432, Rev. St. The statute gave defendant his costs in the county court, as the judgment there recovered against him was for less than the judgment in the justice court. It is true that the court is authorized, for good cause stated in the record, to adjudge the costs otherwise, but none appears here. There is found in the record what appears to be sworn statements of jurors who tried the case that they intended to give the plaintiff a larger verdict. This cannot serve a good cause or any other purpose. Reversed and remanded."

the capacity of head of a family, because he still continued to support his children.[1] He would then have as good a claim as an unmarried man who supports his mother.[2] It was held under a statute allowing six hundred dollars to every resident householder, that a debtor who was unmarried when his property was levied upon, but who took a wife and went to housekeeping before the sale was consummated, was entitled to claim exemption.[3] The court said: "The debtor is entitled to select the property he desires to exempt from execution and sale, and he may file his schedule and make such selection at any time before sale. . . . The contention of the appellants, that because the levy in this case satisfied the execution they are therefore entitled to sell the property, cannot be maintained." Many authorities were collected, *pro* and *con*, on the question of the debtor's defeat of the execution by his marriage, but the court found the solution in construing the statute of its own state. "An examination of these authorities will reveal the fact that the question always depends upon the construction to be given to the numerous statutes upon the subject of exemption, all in some respects differing." Doubtless this observation of the court could be profitably applied to many questions on which reconciliation of decisions is otherwise impossible.

A husband having absconded, and his personal property having been attached, his wife claimed four hundred dollars' worth of it as exempt. The property was appraised, and the portion awarded to her, though it proved afterwards to be worth a thousand dollars at auctioneer's sale; and the auctioneer was garnished for the money. The court said there was no statutory warrant for placing the limit of four hundred dollars upon the property which a wife ordinarily may claim; that "no right of substitution seems to be given to the wife, under a literal reading of the statute, except to the extent of three hundred dollars; but judicial construction and usage [?] seem to have placed it at four hundred dollars, including one hundred dollars given in lieu of the article men-

[1] Roberts v. Moudy, 30 Neb. 683; 46 N. W. 1013.

[2] State v. Kane, 42 Mo. App. 253.

[3] Robinson v. Hughes, 117 Ind. 293; State v. Read, 94 Ind. 103; Eltsroth v. Webster, 15 Ind. 21; Pate v. Swann, 7 Blackf. 500.

tioned in subdivision 6 of section 2343."[1] But the title to the property claimed by the wife, under the circumstances, did not vest in her. She acquired only the right of possession in behalf of the family. The exempt chattels having been converted into money, the garnishment was sustained.[2]

There being no realty, and the husband having absconded, personalty may be claimed by the wife, in lieu of homestead: she acting as the head of the family.[3]

When a childless, deserted wife had sold four hundred dollars' worth of her husband's property, which was afterwards seized for his debts — and when she took it back after the levy — she was awarded the exemption as though at the head of a family.[4]

Resident: Where exemption was a privilege accorded only to residents, a question arose whether a claimant who had domicile where he claimed, but who was living in another state, was entitled? The court, because the law conferring the privilege was remedial and to be liberally construed, allowed the claim. And it should be added that the absence was considered temporary.[5] Domicile, without actual residency, has been held insufficient.[6] Where the absence was probably permanent, the wife of the absentee was allowed to claim household goods, she being deemed the head of the family under the circumstances. She had averred herself to be such head, and a resident and not a homestead-holder, thus bringing herself within the list of those entitled to claim. The court recognized her right, and said that "to hold that by the departure of the husband the family would be deprived of the right to hold such property, would in effect destroy the beneficent purpose of the exemption laws."[7] But an intention to leave the state, suspension of business, and the taking of machinery (claimed as exempt) to a railroad station

[1] Steele v. Leonori, 28 Mo. App. 675, *682; citing* Mahan v. Scruggs, 29 Mo. 283; State v. Kurtzeborn, 2 Mo. App. 337.

[2] *Ib.*

[3] State v. Wilson, 31 Neb. 462; 48 N. W. 147.

[4] Berry v. Hanks, 28 Ill. App. 51.

[5] Birdsong v. Tuttle, 52 Ark. 91.

[6] Munds v. Cassidey, 98 N. C. 558. *See* Post v. Bird (Fla.), 9 So. 888.

[7] Hamilton v. Fleming, 26 Neb. 240, *citing* Frazier v. Syas, 10 Neb. 115. *See* Schaller v. Kurtz, 25 Neb. 655; State v. Wilson, 31 Neb. 462; 48 N. W. 147; Freehling v. Bresnahan, 61 Mich. 540.

for shipment to a place beyond the state, do not make the debtor a non-resident or affect his exemption privilege.[1]

When exemption is confined to residents, an applicant must allege himself to be such, and he must prove it unless relieved by presumption.[2] It has been held in some states that the residency need not be permanent,[3] while in others the decisions have been otherwise.[4] It must be actual — not constructive.[5]

Alienation or abandonment: When a husband has legally sold or mortgaged his exempt personal property, such as a stock of goods, to enable himself to carry on his business, his wife cannot interfere, or subsequently claim that property. If attached, or levied upon under execution, and the husband releases his exemption right where he alone may legally do so, the wife cannot set it up.[6]

Can one claim after an abortive attempt to convey? A debtor gave his wife a bill of sale, and notified the seizing officer of the fact when submitting his schedule. As the bill proved defective, the court required the officer to hold the conveyed property. The debtor could yet make his selection from that property — the court holding that, though the title had passed from him to his wife "as between themselves," it had not, "as against the rights and interests of third persons." Creditors, therefore, could look to the property if not claimed as exempt by the debtor.[7]

If property has been abandoned by the husband, it is held that the wife cannot claim exemption.[8] This may be modified by circumstances. If the household goods, necessary to the family life, be wantonly abandoned by the husband, the spirit of many statutes would allow her to interpose a claim in behalf of herself and her children.

Artisans and debtors without families: This section does not include all classes who may claim exemption. Mechanics and

[1] Wood v. Bresnahan, 63 Mich. 614, *distinguishing* McHugh v. Curtis, 48 Mich. 262.

[2] McKenzie v. Murphy, 24 Ark. 155.

[3] Abercrombie v. Alderson, 9 Ala. 981; Lowe v. Stringham, 14 Wis. [*222], 241; Hill v. Loomis, 6 N. H. 263; Haskill v. Andros, 4 Vt. 609.

[4] Hawkins v. Pearce, 11 Humph. 44; Finley v. Sly, 44 Ind. 266.

[5] Bramble v. State, 41 Md. 435, 441.

[6] Charpentier v. Bresnahan, 62 Mich. 360; Howell's Stat., § 7686, par. 8, 9.

[7] Houk v. Newman, 26 Ill. App. 238.

[8] McNair v. Reisher, 8 Pa. Co. Ct. 494.

others, and all debtors who may claim as such without regard to family headship under some statutes, will be sufficiently noticed in the four following chapters.

§ 6. How to Claim.

When execution is pending, the debtor may select his exemptions and claim them in any way that is intelligible to the officer.[1] Whatever words convey the meaning as to what is claimed will be sufficient. Designating the selected chattels as "free property" to distinguish it from what had been mortgaged and assigned was held sufficiently explicit when the sheriff already had a list with some chattels marked as "mortgaged," and some as "assigned" and others not qualified.[2] The claim, however, must be made intelligible to the officer.[3] When two claimants of exemption signed one petition, the claim was held good as to each.[4]

It must not be inferred, from the rule that any substantial compliance with the law requiring the application will suffice, that a prescribed method of procedure is unimportant. The claimant must fulfill all the conditions precedent to the awarding of his exemption, and he is not relieved therefrom by a liberal construction of the statutory requirement.[5]

The making of a selection, filing a schedule of property, making oath to the schedule, and doing what is essential to enable the officer to have appraisement made, are indispensable requisites to the setting apart of the exempt portion; are conditions precedent to the granting of the exemption; and the courts require strict compliance on the part of the debtor.[6] There is an exception to this strict rule: if the debtor's whole possessions are less than the exemption, and he claims, the other conditions need not be observed.[7]

The claim, or demand upon the officer, must be in writing, if the statute requires it; and it must be signed by the appli-

[1] Northup v. Cross (N. D.), 51 N. W. 718; Comp. Laws, §§ 5128–5132.

[2] *Id.*

[3] Zielke v. Morgan, 50 Wis. 560.

[4] Stanton v. French, 83 Cal. 194; 23 P. 355.

[5] Stallings v. Read, 94 Ind. 103; Smith v. Slade, 57 Barb. 641.

[6] *Ib.;* Amend v. Smith, 87 Ill. 198; Biggs v. McKenzie, 16 Ill. App. 286; Menzie v. Kelly, 8 Ill. App. 259.

[7] Cole v. Green, 21 Ill. 103; Howard v. Rugland, 35 Minn. 388; McAbe v. Thompson, 27 Minn. 134; Murphy v. Sherman, 25 Minn. 196; Lynd v. Picket, 7 Minn. 128.

cant or his agent, and delivered to the officer — though leaving it with the officer's wife has been held sufficient.[1] The exemption may be orally claimed, when there is no particular method prescribed.[2] But if the article thus claimed should be afterwards sold, it will not be exempt, in the purchaser's hands, from execution against the vendor; and the claimant cannot recover damages if an officer who goes on to sell regardless of his claim, unless there has been an affidavit of it made,[3] or there is some means of proving that the claim was demanded. Failure to claim, in some form, before execution sale, is a forfeiture of the exemption privilege;[4] but almost any means of conveyance to the officer, of the fact that the privilege is asserted, will suffice. It is not essential that the applicant admit himself to be indebted. When the head of a family applies, he need not aver ownership in himself.[5] So, a wife applying, need not aver that the ownership is in her husband, though such be the case; the application for personal property exemption will hold good without such averment in her petition, if the fact appears in her affidavit and list of creditors making parts of the record.[6]

Exempt property loses its character, as such, by being transferred; a note, by being assigned, for instance.[7] If the character depends upon its owner's pursuit of a mechanic art, the abandonment of the pursuit destroys the right of exemption.[8]

§ 7. When to Claim.

The *time* of claiming is far more important than the manner of it. It has been held that selection must be made and exemption demanded before suit is brought, when the suit is for rent and the property is distrained.[9] Ordinarily, however, claiming is in time if made before the levy. It may be made afterwards if the officer failed to give the debtor notice be-

[1] Bryan v. Kelly, 85 Ala. 569.

[2] McCluskey v. McNeely, 8 Ill. 578; People v. Palmer, 46 Ill. 402; Cook v. Scott, 6 Ill. 333.

[3] Simpson v. Simpson, 30 Ala. 225.

[4] Gresham v. Walker, 10 Ala. 370.

[5] Braswell v. McDaniel, 74 Ga. 319; Gen. Code, § 2040+.

[6] Cartwright v. Bessman, 73 Ga. 189; Coffee v. Adams, 65 Ga. 347 (a homestead case). *See* Jones v. Crumley, 61 Ga. 105.

[7] Lane v. Richardson, 104 N. C. 642.

[8] Willis v. Morris, 66 Tex. 628.

[9] Lindley v. Miller, 67 Ill. 244.

fore. The debtor must not delay for an unreasonable time after knowing, or having notice, that execution is pending against his property. What is reasonable time? That often depends upon circumstances. Waiting a month, after notice, has been held fatal to his privilege.[1] The claim need not always be before the levy. Usually it may be at any time before the sale. Either before or after the levy, the debtor may file the schedule of his property and claim, of the officer, the release of his exempt portion.[2] At any time before the beginning of the sale, he is allowed to claim in some states.[3] Even after the beginning, he has been permitted to claim.[4] It is better for him, however, to remember the legal maxim: "The law favors the vigilant," and the common adage: "Delays are dangerous," if he wishes to avoid the question of waiver on his part.[5]

The applicant may withdraw his claim.[6]

In exposition of a statute it is held that chattels which are exempt not absolutely, but qualifiedly, must be claimed before any suit for conversion will lie against the sheriff for selling them under execution, or to recover from him the identical articles. The claim, if not made to that officer directly, must

[1] Griffin v. Maxwell, 23 Ill. App. 405.

[2] Daniels v. Hamilton, 52 Ala. 108; Jordan v. Autrey, 10 Ala. 226.

[3] Miles v. State, 73 Md. 398; State v. Boulden, 57 Md. 320; Commonwealth v. Boyd, 56 Pa. St. 402; Bair v. Steinman, 52 Pa. St. 423; Diehl v. Halben, 39 Pa. St. 213; Rogers v. Waterman, 25 Pa. St. 184; Diffendorfer v. Fisher, 3 Grant, 30; Bowyer's Appeal, 21 Pa. St. 210; Weaver's Appeal, 18 Pa. St. 307; Miller's Appeal, 16 Pa. St. 300; Hammer v. Freese, 19 Pa. St. 255; Wright v. Deyoe, 86 Ill. 490; People v. Palmer, 46 Ill. 398; Butt v. Green, 29 O. St. 667. *See* Morris v. Shafer, 93 Pa. St. 489. In Appeal of Williamson, 132 Pa. St. 455, a claim made sixteen days after the writ had issued was held to be in time, as no day of sale had been let, no advertisement made and no costs incurred.

[4] State v. Emmerson, 74 Mo. 607.

[5] A right to claim may be lost by *laches*. Burk v. Gleason, 46 Pa. St. 297; Alden v. Yeoman, 29 Ill. App. 53, in which there was failure to claim within ten days after notice of execution, Act of 1887; Griffin v. Maxwell, 23 Ill. App. 405, in which the delay of a month proved fatal. The creditor must claim in time and comply with all the conditions. *Ib.* In Wright v. Deyoe, 86 Ill. 490, it was held too late to claim on the day after levy, when the debtor was duly notified before. The officer may sell unclaimed property with impunity, when it is not specifically exempt. *Ib.;* Bingham v. Maxcy, 15 Ill. 290; People v. Palmer, 46 Ill. 398; Cook v. Scott, 1 Gilm. 333.

[6] Appeal of Overseers, 95 Pa. St. 191.

be notified to him by the debtor, before bringing either of the actions mentioned.[1]

§ 8. The Officer's Duty.

The question generally is, when there is a contest between the debtor and the officer relative to exemption, whether the former was at fault for not claiming, or the latter at fault for selling without setting absolutely exempt property apart, or selling without giving opportunity for selection when the exemption was conditioned upon its being claimed. The officer in charge of an exemption must go on with it, leaving the exemptionist to claim his privilege or let it alone; he is not required to risk a suit against him by the creditor for not doing his best to collect the money due under the judgment; and he is not obliged to stand between two fires, liable to receive the shot of one while dodging that of the other. The true rule seems to be that he must take note of the absolute exemptions, and that he can disregard them only at his peril; that he must afford what facilities the law requires him to give, when the exemption is subject to the debtor's claim; that beyond this, he may not go without incurring the just charge of failing to execute the writ in the interest of the judgment creditor.[2] But he is not bound to heed the statements of the creditor. When there has been no waiver, and the sheriff knows that exemption is claimed, he cannot disregard the debtor's rights on the assertion of the creditor that those rights have been forfeited.[3]

When the officer, by any means, disallows the debtor's right and opportunity of claiming, the debtor may follow the goods into the hands of the purchaser at the sale and recover them, or he may recover their value of the officer — especially when the goods consist of provisions for the six months ensuing, which the law protects for the benefit of the family.[4] If

[1] Wilcox v. Howe, 59 Hun, 268, 271; N. Y. Code Civ. Proc., §§ 1390, 1391; Russell v. Dean, 30 Hun, 242; Turner v. Borthwick, 20 Hun, 119; Baker v. Brintnall, 52 Barb. 188; Anderson v. Ege, 44 Minn. 216; Longley v. Daly (S. D.), 46 N. W. 247; Comp. Laws of Dak., § 5126.

[2] *See* generally on this subject, Dains v. Prosser, 32 Barb. 291; Baker v. Brintnall, 52 Barb. 188; Smith v. Hill, 22 Barb. 656.

[3] Williamson v. Krumbhaar, 132 Pa. St. 455. *See* Larkin's Estate, 132 Pa. St. 554.

[4] Stillson v. Gibbs, 53 Mich. 280, Cooley, C. J.; Town v. Elmore, 38 Mich. 305; Wyckoff v. Wyllis, 8 Mich. 48.

the officer makes selection for the debtor, preventing the latter from choosing for himself, he is responsible. Where, in making the selection himself, he set apart to the debtor certain mortgaged property which was worth nothing beyond the mortgage, he was held to have defrauded the debtor.[1] The officer is bound to give the debtor opportunity to make his own selection, whether the property be levied upon, attached or subjected to garnishment.[2] "He must apprise the defendant of his rights. He must yield to the defendant's selection, and release to him the property selected up to a prescribed limit of value. He is invested with authority to ascertain the value by appraisement, and to give full efficacy to the law's bounty. He must pay over to the defendant his share out of the proceeds of a sale. In short, the whole subject-matter of the debtor's protection seems committed to the officer, and none other is designated for any step in the process."[3] If, in the exercise of these powers, the officer go wrong, the parties may correct him by resort to the court. For instance, the defendant may take from an officer, by replevin, personal property which is exempt, when no opportunity to claim has been given him, and the execution is premature.[4] Or, under some circumstances, a levying officer may be prosecuted criminally for the contravention of a statute imposing duties upon him relative to absolute exemption — the act being made a misdemeanor.[5] It would be otherwise when exemption is not absolute.[6]

The officer is none the less bound to do his duty towards the defendant, in respect to the exemption claimed, though he

[1] Bayne v. Patterson, 40 Mich. 658, Campbell, C. J.

[2] State v. Barada, 57 Mo. 562; State v. Romer, 44 Mo. 99; Mahan v. Scruggs, 29 Mo. 282; Garrett v. Farmer, 21 Mo. 160. *See* Gregory v. Evans, 19 Mo. 261; Gordon v. McCurdy, 26 Mo. 304; Wimer v. Pritchartt, 16 Mo. 252; State v. Kane, 42 Mo. App. 253.

[3] State v. Barada, *supra*.

[4] Clark v. Bond, 7 Bax. 288.

[5] State v. Haggard, 20 Tenn. 390. Haggard was indicted for selling a horse belonging to one Boyd, the head of a family, who was a farmer. He sold under a writ in his official capacity as constable. The act positively exempted "one farm horse," etc. The prisoner was found guilty and fined.

[6] When one of several articles is exempt, and the defendant has not chosen till the levy, he has been allowed to take one levied upon by replacing it with another which he does not choose to retain. Pyett v. Rhea, 6 Heisk. 137.

holds an indemnity bond from the plaintiff who urged him to go on and sell.[1] He must inform the debtor of his exemption rights, unless the debtor claims all the property levied upon as exempt.[2]

The owner himself is the only proper party to proceed against an officer to recover for the conversion of his property. It is a good defense to deny the plaintiff's ownership or legal right of possession. The officer, in levying upon property under the writ, does not thus so affirm it to belong to the defendant as to preclude himself from denying the ownership when sued for false levy. The officer is not estopped by his official act.[3]

Until the debtor has claimed exemption in seized property, he cannot take it from the officer by replevin; for the officer had the right to seize, though no right to hold after claim duly made, when the property belongs to a class from which selection is to be made.[4] It is true that the officer is presumed to know the law and is bound to respect it, in relation to exemption as well as to any other matter;[5] and there is a presumption that the debtor will claim;[6] yet he cannot know assuredly that he will when the exemption is not absolute. Though the debtor may have claimed generally "the exemption allowed by law," the officer is not to blame for going on with the sale when the debtor failed to appear at the time appointed to make his selection.[7] The unavoidable absence of the debtor may excuse his failure to claim such necessary household goods as beds and bedding, especially when the officer knew of their exempt character from their being claimed in a former suit.[8]

In a suit against a sheriff for refusing to allow the debtor to select personal property exempt by statute, the allegation that the sheriff by his deputy did convert it to his own use is

[1] Coville v. Bentley, 76 Mich. 248.

[2] Smythe v. Kane, 42 Mo. App. 253; Brown v. Hoffmeister, 71 Mo. 411.

[3] Cassell v. Williams, 12 Ill. 387; Ice v. McLain, 14 Ill. 64; Cook v. Scott, 1 Gil. 344. *See* Arenz v. Reihle, 1 Scam. 340.

[4] Tullis v. Orthwein, 5 Minn. 305.

[5] Maxwell v. Reed, 7 Wis. 493.

[6] State v. Harper, 120 Ind. 23.

[7] Butt v. Green, 29 O. St. 667; Frost v. Shaw, 3 O. St. 270; Twinam v. Swart, 4 Lansing, 263.

[8] Haswell v. Parsons, 15 Cal. 266.

sufficient averment that the deputy was acting under the defendant as sheriff.[1]

An officer, who departs from his line of duty, is liable at every step, but he is not to be denied his proper defenses.[2]

§ 9. Limitations.

The debtor is not entitled to two or more exemptions because two or more executions are pending against him. If specified chattels, or a sum of money to be reserved him from the proceeds of executed property, be saved to him by the statute, he can get no more because several different creditors have brought separate suits against him. If his horse is exempt, he may claim the exemption of that one horse against each attack, and have his horse after all the execution sales are over, and only that one horse.[3] Two exemptions are "quite contrary to the spirit of the statute" granting one;[4] rather, the exemption of two things, when the statute authorizes that of one, would be contrary. It does not matter if, in-

[1] Hutchinson v. Whitmore (Mich.), 51 N. W. 451, *distinguishing*, as to right of selection, McCoy v. Brennan, 61 Mich. 362. How. Stat., ch. 266, § 27 (8).

[2] An officer charged with making an unlawful levy upon a horse was denied the right to prove that the debtor had other horses, which denial was held, on appeal, to have been error. Gass v. Van Wagner, 63 Mich. 610. An officer was declared a *tort-feasor* for selling exempt property that had been duly claimed by the debtor. McCoy v. Brennan, 61 Mich. 362. But if the debtor, claiming exempt property from that which is non-exempt, do not turn over the latter to the officer, he cannot recover the statutory penalty from him for disregarding the claim, in Illinois. Udell v. Howard, 28 Ill. App. 124; McMasters v. Alsop, 85 Ill. 157. An officer, who has levied upon a debtor's property from which the latter selects as exempt what he is privileged to choose under the law, becomes a trespasser if he continues to hold the exempt portion after the selection and demand of surrender. Hombs v. Corbin, 34 Mo. App. 393, *399;* Baily v. Wade, 24 Mo. App. 190; State v. Barada, 57 Mo. 562. If the selection be delayed till the very eve of the sale, the officer must heed it. State v. Emmerson, 74 Mo. 607. If the property claimed be indivisible and excessive, the officer must have an appraisement made; and, were he to go on and sell without it, he would lay himself liable. Glendon v. Harrington, 33 Mo. App. 476; State v. Kurtzeborn, 2 Mo. App. 335; State v. Finn, 8 Mo. App. 261; State v. Carroll, 9 Mo. App. 275. If all the property levied upon is absolutely exempt, the officer is not to await the claiming, but surrender it. Harrington v. Smith, 14 Colo. 376. It is only in case of excess that the debtor must claim. Behymer v. Cook, 5 Colo. 399.

[3] McCreary's Appeal, 74 Pa. St. 194.

[4] Eberhart's Appeal, 39 Pa. St. 512.

stead of two executions of the same sort, one is under an attachment: the rule that the one exemption cannot be allowed in each (so that the debtor would retain six hundred dollars instead of the statutory three hundred) is the same.[1] Were the rule otherwise, the debtor might grow rich upon his exemptions, if daily executions were leveled against his property. But the debtor is entitled to his one exemption every time he is sued. One horse might run through twenty lawsuits. The fact that wages have been held exempt in the suit of Green against Blue does not prevent the same sum from being held exempt in the several suits of White, Black and Gray against Blue. It has been held that where thirty dollars are exempt when due as the wages of a mechanic, and he has already been allowed small sums, in small suits, amounting to the maximum, he yet may successfully plead exemption in another suit.[2]

Exemption has been allowed when claimed under an *alias* execution, after allowance under the first writ.[3]

The right to claim to a certain amount, or to a certain number of things, includes the right to claim less.[4] A statute exempted one horse not exceeding a hundred dollars in value, but allowed other personalty to be selected to the amount of an additional, equal sum. The debtor claimed a horse worth more than the sum named, but less than that of the whole allowable chattel exemption. The provision was construed favorably to the claim. The court said: "A thing named in a statute is not within its provisions unless it be within the intention of the framers of the act. . . . Unless this claim is sanctioned, then we find a person with property not within the letter . . . but within the spirit and reason . . . who could have no benefit. . . . To hold that he cannot claim this property is to hold that he may be stripped of all the property of this class that the lawmaker intended he should hold."[5]

If the debtor select indivisible property worth more than the

[1] Vogelsong v. Beltzhoover, 59 Pa. St. 57. *Compare* Chatten v. Snider (Ind.), 26 N. E. 166.

[2] Waite v. Fransiola, 90 Tenn. 191; 16 S. W. 116.

[3] Chatten v. Snider, 126 Ind. 387; 26 N. E. 166.

[4] Cornelia v. Ellis, 11 Ill. 584.

[5] *Ib.*; Good v. Fogg, 61 Ill. 449.

amount exempted, he cannot retain it by paying the excess, it has been held in exposition of a statute specifying certain classes of articles of stated value as susceptible of selection and claim by the debtor.[1]

§ 10. Money in Lieu of Chattels.

It has been held that a debtor entitled to retain a certain amount of goods estimated by money cannot claim the money itself in lieu of the goods.[2] Where three hundred dollars' worth of property was allowed by law, in a case involving this point the court said: "We are of the opinion that a debtor cannot, under any circumstances, entitle himself to the $300 of the money for which his personal property sells at sheriff's sale. The act speaks of property, not money. It requires him to elect the goods he wishes to retain and have them appraised; and property thus chosen and appraised shall be exempt from levy and sale. This excludes the idea that he is to have his choice between retaining the property and demanding money out of the proceeds. There are sound reasons why he should take the goods or take nothing. The law was made for the benefit of the families of debtors rather than for the debtors themselves; and a family stripped of every comfort might not be much better of $300 in the pocket of a shiftless father. Property which appraisers would value at $300 might not sell for the half of it; and if debtors had this choice it would deprive the creditors of twice as much property as the law intended to take from them." This argument may be easily turned around so as to act like a boomerang; for the property might sell for twice as much as the appraisement, and thus the creditors might be benefited by allowing the cash claim. But finally, the true reason appears: the law says so. "The act . . . gives the right of designating [the articles] to the debtor himself, fixes the quantity of them by their value and points out the mode of ascertaining that value."[3] The statute referred to exempted three hundred dollars' worth of *property;* not movables merely. If indivisible real estate is to be sold, must a piece of that value be cut off for the debtor before sale?

[1] Cook v. Scott, 6 Ill. 333; Waldo v. Gray, 14 Ill. 184.

[2] Young v. Boulden, 57 Md. 314.

[3] Hammer v. Freese, 19 Pa. St. 255.

No — he is allowed that sum from the proceeds of the sale of the whole, provided he put in his claim in due time. This is expressly required by the statute[1] Even movables sold by execution under such circumstances as to deprive the exemptionist of his opportunity of claiming the allowed portion of the things themselves may be substituted by their value in money from the proceeds of the sale,[2] and if the debtor's property, seized under execution and sold, be not susceptible of division, he ought to be allowed the value of his exemption from the proceeds of the sale. This has been allowed under statute,[3] but may be understood when the statute is silent on the point, yet not inhibitory; for he is entitled to his slice from the indivisible lump, and the only practical way of giving it to him is to transform the article to cash and give him his portion. This is in case of forced sale. When exempt chattels are voluntarily sold by their owner the proceeds are not exempt unless the statute makes them so.[4] If chattels specifically exempt have been sold under execution and the proceeds are in the sheriff's hands, the money cannot be reached by creditors.[5] But it has been held that money due for damage to exempt property is subject to a different rule, and is not exempt.[6]

§ 11. Chattels in Lieu of Homestead.

When the statute gives chattel exemption only to those not entitled to homestead, curious situations sometimes are presented; as, for instance, a claimant denied because he did not prove himself an unmarried man. He had labored in the production of a crop, and claimed a third part of it, under statute. The court said that the express object of the pro-

[1] Miller's Appeal, 16 Pa. St. 300.

[2] Smith v. Slade, 57 Barb. 637. This decision was under a statute not quite like that under which those of Pennsylvania were rendered. *See* Seaman v. Luce, 23 Barb. 242; Lockwood v. Younglove, 27 Barb. 506. The $1,000 exemption, under the Georgia constitution of 1877, could not be claimed in money. Johnson v. Dobbs, 69 Ga. 605. So under Georgia constitution of 1868 and Code, § 2016. Jones v. Ehrlisch, 65 Ga. 546. *See* Moultrie v. Elrod, 23 Ga. 393.

[3] Bramble v. State, 41 Md. 435; State v. Boulden, 57 Md. 318; Md. Code, art. 83, § 10.

[4] Harrier v. Fassett, 56 Iowa, 264; Friedlander v. Mahoney, 31 Ia. 311; Carty v. Drew, 46 Vt. 346; Knabb v. Drake, 23 Pa. St. 489.

[5] Howard v Tandy, 79 Tex. 450; Cone v. Lewis, 64 Tex. 332.

[6] Johnson v. Edde, 58 Miss. 664.

vision invoked was "to secure exemption *in the nature of a homestead*, of one-third of the yearly 'products or earnings,' to every person 'not being the head of a family,' and not to persons who are heads of families, as they have the right to the homestead exemption, in a proper case, by laying claim thereto as provided by law. In order to obtain the benefit [of one-third the crop] . . . it devolves upon the respondent to show that he 'is not the head of a family.'"[1]

The usual ground for granting chattel exemption in lieu of homestead, under the few statutes providing for such substitution, is not that the condition of family headship is wanting but that another condition is lacking — ownership of realty.[2] In such case, having a wife is no obstacle to the substitution; she may even be the claimant of the benefit when she, as well as her husband, is landless.[3] A tenant by the year was allowed chattel exemption, under such a statute, on the ground that his leasehold was not such ownership as the legislator contemplated when cutting off land-holders from the benefit of the special provision made for those not entitled to homestead.[4] Ordinarily, leasehold title is sufficient to support homestead, as has been shown;[5] but the construction above given was that of the statute providing for the granting of chattel exemption as a substitute for homestead.[6] Thus while leasehold title is ownership under homestead law, it is not under the statute mentioned; but both are *in pari materia* relative to the exemptionist, and therefore he cannot have both exemptions on the paradoxical grounds that he is the owner of real estate and is not the owner of real estate.

One may own or not, in different relations. And the same property may be realty in one relation and personalty in another. Fixtures, for illustration, may take on either character. A wind-mill having been attached to a homestead, the

[1] Prince v. Nance, 7 S. C. 351.

[2] In Nebraska, $500 of personal exemption is allowed in lieu of homestead to the landless. Cunningham v. Conway, 25 Neb. 615; Desmond v. State, 15 Neb. 438; Swaney v. Hutchins, 13 Neb. 266; Williams v. Golden, 10 Neb. 432; Chesney v. Francisco, 12 Neb. 626; State v. Cunningham, 6 Neb. 90; Mann v. Welton, 21 Neb. 541; Nebraska Civ. Code Proc., § 521.

[3] Regan v. Zeeb, 28 O. St. 483; State v. Wilson (Neb.), 48 N. W. 147. *See* Slanker *v.* Beardsley, 9 O. St. 589.

[4] Colwell v. Carper, 15 O. St. 279.

[5] *Ante*, pp. 108, 113.

[6] Ch. 66, Ohio Laws, 48, 50.

vendor sued for the price on notes given therefor, obtained judgment, issued execution and levied upon the homestead, treating the mill as an improvement and the debt therefore not affected by exemption. The defendant to this suit became plaintiff in an injunction suit to restrain the execution. The court said, in the injunction case (after stating the general rule that the character of a fixture, as personalty, depends upon its separability from the real estate to which it is attached, without injury to the latter):[1] "In the sale of personal property that is to be affixed to realty, the contracting parties at the time of the sale have the power, as between themselves at least, to fix the *status* of such property, and to say whether, when affixed to the realty of the vendee, it shall remain personal property or become part of the realty."[2] And the court found that by the agreement of the contracting parties the wind-mill had remained personalty, and so the injunction was sustained.[3]

§ 12. Chattel Exemption to Widows.

The exemption right of a husband descends to his widow, when she continues to live at the family home and provides for the children. A widow sued for, and recovered, a team of horses and a wagon which had been seized in execution in a suit against her husband while he was living.[4] She is entitled absolutely to the exempt personalty of her late husband, for herself and the children, by some states;[5] while by others, she has the use of the personal property though it is

[1] *Citing* Walker v. Sherman, 20 Wend. 636.

[2] Marshall v. Bacheldor, 47 Kan. 442; 28 P. 169; Fortman v. Geopper, 14 O. St. 558; Benj. on Sales, § 425; Tied. on Sales, §§ 83, 85.

[3] The opinion concludes as follows: "If said property did not constitute an improvement upon the realty, the homestead would be exempt from the payment of the debt contracted therefor, and the sale of the homestead to satisfy such debt should be enjoined." Eaves v. Estes, 10 Kan. 314; Railroad Co. v. Morgan, 42 Kan. 23, 21 Pac. Rep. 809, 22 Pac. Rep. 995; Ford v. Cobb, 20 N. Y. 344; Holmes v. Tremper, 20 Johns. 29.

[4] Becker v. Becker, 47 Barb. 497; Brigham v. Bush, 33 Barb. 596; Van Buren v. Loper, 29 Barb. 389; Wilcox v. Hawley, 31 N. Y. 648; Kneettle v. Newcomb, 22 N. Y. 249; Woodward v. Murray, 18 Johns. 400; Thompson v. Ogle (Ark.), 17 S. W. 593 (Act of 1887, p. 207).

[5] Gen. Stat. Kansas (1889), ch 38, § 3; Donmeyer v. Donmeyer, 43 Kan. 444; Thompson v. Alexander, 11 Heisk. 313; Merriman v. Lacefield, 4 Heisk. 209, 220; Vincent v. Vincent, 1 Heisk. 343; Bayless v. Bayless, 4

not absolutely at her disposal.[1] Her right to the exemption does not depend upon need, as a general rule.[2]

When there is a specific sum exempt by statute in favor of the widow, she takes it absolutely from her husband's estate; and should she die before receiving it, her administrator may recover it.[3] In a state where she may claim money, instead of specific chattels, from her husband's estate,[4] she must claim before the property of the estate has been sold by the administrator to pay debts.[5] As the privilege of claiming is personal, she must exercise it promptly;[6] and her failure to claim, or to demand an appraisement, is waiver.[7] Her right does not always depend upon the solvency or insolvency of the estate,[8] but the time of claiming the exemption may depend upon it. If the estate is solvent, claim may be made at any time before the administrator's final settlement.[9] The widow's right to her exemption vests immediately upon the death of her husband, as to his specifically exempt chattels,[10] so that her heirs would inherit them from her if she should die before receiving them.[11] In one state, she takes her exemption amount absolutely, as to the creditors of the estate, but not as to the children of the deceased. Whether she must give security or not depends upon the existence of such chil-

Coldwell, 359; Myers v. Forsythe, 10 Bush, 394; York v. York, 38 Ill. 522; Jordan v. Strickland, 42 Ala. 315; Fowler v. Gilmore, 30 Tex. 433; Paschal's Dig., art. 3798. *See* Longley v. Daily (S. D.), 46 N. W. 247.

[1] Meyer v. Meyer, 23 Ia. 359, 377; Paup v. Sylvester, 22 Ia. 371; Geskell v. Case, 18 Ia. 147; Wilmington v. Sutton, 6 Ia. 44. *See* Van Doran v. Marden, 48 Ia. 186, as to the difference between homestead and chattels in respect to the exemption claim of the widow. Wally v. Wally, 41 Miss. 648 (Act of 1860); Whitley v. Stephenson, 38 Miss. 115; Coleman v. Brooke, 37 Miss. 71.

[2] Chism v. Chism, 41 Ala. 327; Johnston v. Davenport, 42 Ala. 317.

[3] Hastings v. Myers, 21 Mo. 519, under Mo. R. S. of 1845, p. 77.

[4] Pa. Stats. of 1851, 1859; Seller's Estate, 82 Pa. St. 153; Peterman's Appeal, 26 P. F. Smith, 116; Baldy's Appeal, 4 Wright, 328. *Compare* Hufman's Appeal, 81 Pa. St. 329.

[5] Lyman v. Byam, 38 Pa. St. 475.

[6] Burk v. Gleason, 46 Pa. St. 297.

[7] Davis' Appeal, 34 Pa. St. 256; Neff's Appeal, 9 Harris (Pa.), 247; Weaver's Appeal, 6 Harris (Pa.), 309.

[8] Compher v. Compher, 25 Pa. St. 31; Mason v. O'Brien, 42 Miss. 420, 427.

[9] Thompson v. Thompson, 51 Ala. 493.

[10] York v. York, 38 Ill. 522.

[11] *Ib.;* Hastings v. Myers, 21 Mo. 519. *See* Kellogg v. Graves, 5 Ind. 509; Downs v. Downs, 17 Ind. 95; Sheldon v. Bliss, 4 Seld. (N. Y.) 34.

dren.[1] If the decedent has left children but no widow, they take the exempt property.[2] But it does not follow, from the right of the children to claim exempt personal property from the estate of their father, that they may also claim it from the estate of their mother.[3]

It was held, where the widow has her election between chattels and the money allowed by statute, and allotment to her has been made, the probate court cannot set the award aside *ex mero motu*.[4]

It is the duty of the executor or administrator of the estate of her deceased husband to set it apart to her, upon her demand, without unnecessary delay; but if she has helped herself to it, she cannot hold his administrator in damages for not having set it apart to her.[5]

Where it is the duty of the probate court to set apart personal property, for the use of the widow and children of a decedent, to an amount not exceeding fifteen hundred dollars in addition to specific chattel exemptions, in obedience to statute, it is held that this additional property is not to be administered as assets of the decedent's estate, nor distributed to his heirs. It becomes the absolute property of the widow when there is no minor child.[6]

The probate court's allowance for the support of the widow, from the estate of the decedent, is not attachable for her debts.[7] The purpose is to provide for her personal wants and those of the bereft family.[8] It has been held that she was entitled to nothing as the widow, when she had deserted her husband and was living apart from him when he died.[9] *Aliter*, when he had deserted her.[10]

[1] Succession of Hunter, 13 La. Ann. 257; Succession of Tassin, 12 La. Ann. 885.

[2] Whitcomb v. Reid, 31 Miss. 567; Edwards v. McGee, 27 Miss. 92; Lowry v. Herbert, 25 Miss. 101.

[3] Davenport v. Brooks, 92 Ala. 627; 9 So. 153.

[4] *Ex parte* Reavis, 50 Ala. 210; Carter v. Hinkle, 13 Ala. 529; Ala. Act of 1872.

[5] Lyman v. Byam, 38 Pa. St. 475, relative to the exempt $300 to the widow.

[6] North Dakota Comp. L., §§ 5778-9, 5784; Fore v. Fore's Est. (N. D.), 50 N. W. 712; Rank v. Freeman, 1 N. D. ——. 46 N. W. 36. *See* Mann v. Welton, 21 Neb. 541.

[7] Barnum v. Boughton, 55 Ct. 117.

[8] Hettrick v. Hettrick, 55 Pa. St. 292; Spier's Appeal, 26 Pa. St. 234.

[9] Ordiorne's Appeal, 54 Pa. St. 175; Dillinger's Appeal, 35 Pa. St. 357.

[10] Terry's Appeal, 55 Pa. St. 344.

When chattel exemption is given to a widow and orphan children, as such, it is not meant to inure to the benefit of her second husband.[1]

If a widow is entitled to a specific sum from her husband's estate, exempt from liability for his debts, she must claim the right and claim it in due time. Three years' neglect has been held fatal to her privilege. If, by direct waiver (or by such laches as will be equivalent to it), the widow gives up her exemption, her executor cannot claim it for her after her death.[2]

A widow having claimed exemption from her deceased husband's estate in due time should not have the neglect of the proper officer imputed to her. She is guilty of no laches; so, a second appraisement of the estate may be made as late as three years after the death of the decedent, when no interests have intervened to be affected by it. Confirmation of the appraisement, under such circumstances, may be made *nunc pro tunc*.[3] *

[1] Tenn. Code (M. & V.), § 3128; (T. & S.), § 2288; Sneed *v.* Jenkins, 90 Tenn. 137.

[2] Machemer's Estate, 140 Pa. St. 544; Kerns' Appeal, 120 Pa. St. 523.

[3] Williams' Estate, 141 Pa. St. 436.

* For further as to chattel exemption to widows in Alabama, *see* generally, Chandler v. Chandler, 87 Ala. 300; Little v. McPherson, 76 Ala. 552; *Ex parte* Pearson, 76 Ala. 521; Mitcham v. Moore, 73 Ala. 54; Henderson's Adm'r v. Tucker, 70 Ala. 381; Hunter v. Law, 68 Ala. 365; Darden v. Reese, 62 Ala. 34.

CHAPTER XXV.

THINGS EXEMPT.

§ 1. Household Goods.
2. Furniture of Hotels, Boarding-houses, etc.
3. Clothing, etc., Worn on the Person.
4. Tools of Mechanics and Others.
5. Machinery.
6. Printing Presses, Types and Material.
7. Wagons and Other Vehicles.
§ 8. Domestic Animals.
9. Things Needed in Business; Stock in Trade.
10. Merchants' Stock in Trade.
11. Crops and Provisions.
12. Books, Pictures, Musical Instruments, etc., Outfits of Fishermen and Miners, etc., Specially Exempted.

§ 1. Household Goods.

Necessary articles: The furniture necessary to family comfort is exempted to some extent in every state. . Articles are specified as exempt, or goods to a stated value made exemptible, by different statutes with varying liberality. Such things as beds and bedding, tables, chairs, stoves and kitchen utensils are everywhere necessary: so, when a statute exempts "furniture necessary for the debtor and his family," such articles are always understood. There may be a question as to the number of such articles to be allowed as necessary; and also whether carpets, curtains and other things not absolutely essential to sustenance are included in the exemption of merely necessary household goods; but the legislator, when not specifying the articles, doubtless means to protect from forced sale the usual furniture of all housekeepers whether essential or only conducing to comfort. Ordinarily, the provision is not made in detail, but is meant to embrace any proper outfit of a dwelling-house to meet the needs and conveniences of a family.

In some states the exempted articles are specified minutely;[1]

[1] New York Code, § 1390 (5): "—— beds, bedsteads and bedding necessary for the judgment debtor and the family, all necessary cooking utensils, one table, six chairs, six knives, six forks, six spoons, six plates, six tea-cups, six saucers, one sugar dish, one milk pot, one tea pot,

while in most of the others, there are a few specific exemptions and then a general clause allowing the debtor to select up to a given sum. This sum varies greatly in the several states.

Notwithstanding the general plainness of most of the provisions, there is room for explanation in some of them.[1] Where strictness is applied in construing the word *necessary* as it occurs in statutes relative to household and kitchen furniture, articles of mere convenience, however useful, have been subjected to execution. Articles not coming under the designation of furniture, though commonly found in every dwelling house, are not included in the exemption of household goods.

When the exemption is specific, the articles specified in the statute (as three beds, twelve chairs, two bureaus, etc.) are not dependent upon their value, whether they be costly or cheap; but when there is monetary limitation only (as household goods to the value of one hundred or one thousand dollars), the householder may select many articles or few — even one piece of furniture worth the maximum — but must keep within the restriction.

Articles of convenience: The statutes do not all require that the protected furniture must be necessary to family use. It has been held that when a debtor's household effects are worth no more than the exemption maximum, and he is the head of a family, they cannot be attached whether they be essential to family use and comfort or not; so, when the household goods were used to furnish a hotel kept by the householder, they were held exempt.[2]

Not only when execution is pending, but at all times the householder is privileged to hold the exempted amount free from liability; and it has been held that where he had had a thousand dollars' worth of personalty set off to him, under

one crane and its appendages, one pair of andirons, one coal scuttle, one pair of tongs, one lamp and one candlestick." The household and kitchen exemptions of Kentucky, Tennessee, Virginia and some other states are also quite minute.

[1] Campbell v. White, 95 N. C. 344; Vanderhorst v. Bacon, 38 Mich. 669; Alsup v. Jordan, 69 Tex. 300; Davlin v. Stone, 4 Cush. 359; Copp v. Williams, 135 Mass. 401; Hitchcock v. Holmes, 43 Ct. 528; Seely v. Gwillim, 40 Ct. 293; Van Sickler v. Jacobs, 14 Johns. 434.

[2] Rasure v. Hart, 18 Kan. 340; Mannan v. Merritt, 11 Allen (Mass.), 582.

the governing statute, he was yet privileged to claim again when that allowance had been consumed or paid away for debt under judicial process or otherwise, or exhausted in the support of his family, or had been lost in any way without his fault.[1]

Ornamental articles: The phrase "household and kitchen furniture" is not narrowly understood. It is not everywhere confined to articles of necessity, but instruments of music, ornamental furniture,[2] statues and pictures,[3] have been included. This latitude of rendering has not been universal, however.[4] It cannot be laid down as a rule, in the absence of statutory enactment, that all articles of taste and *vertu* shall be saved from the official auctioneer's hammer. It would not do to allow a debtor, in insolvent circumstances, to invest all he has in a painting by one of the old masters. It would not accord with justice to his creditors, to allow him to keep such an article of great value, though he had acquired it when in affluent circumstances. Whatever deference we pay to his rank in life and the high social *status* of his family, we must not carry it to the point of injustice to others. The creditor may have rank and station to support as well as the debtor.

To a reasonable extent (whatever that may mean), pictures, musical instruments, books and various refined and elegant things are necessary to the well-being of some families; but, whether such property can honestly be saved to them as household furniture must depend upon the letter and spirit of the governing statute.

§ 2. Furniture of Hotels, Boarding-houses, etc.

Usually it is the furniture of a dwelling-house occupied by a family as its home and owned by the head of the family

[1] Weis v. Levy, 69 Ala. 209; Ala. Conference v. Vaughan, 54 Ala. 443; Campbell v. White, 95 N. C. 344; Citizens' Bank v. Green, 78 N. C. 247.

[2] In Texas, household and kitchen furniture is exempted regardless of value, and it may include a piano and ornamental articles. Alsup v. Jordan, 69 Tex. 300; Tex. Rev. Stat., art. 2335.

[3] The words *household furniture* were treated as including pictures, statues and bronzes, when employed in a will. Richardson v. Hall, 124 Mass. 237.

[4] A piano was held to be not exempt in Wisconsin, because not used for a livelihood. Tanner v. Billings, 18 Wis. 175. So also in Vermont. Dunlap v. Edgerton, 30 Vt. 224. But a

which the law exempts; yet a boarding-house, being kept by a widow with children, has had its furniture declared exempt, including that of the boarders' rooms.[1] But, in the same jurisdiction where this was held, the furniture of a restaurant kept by the head of a family was liable to attachment.[2] The costly outfit of a large hotel not kept by the owner and not occupied by his family would certainly be liable to attachment and execution; and that of any hotel or restaurant which is conducted for profit by the owner or his tenant, when it is not the family home of the claimant, would be liable;[3] and if occupied by his family while the business of entertaining for profit is the principal use, the furniture would be liable in most states. But it has been held in other jurisdictions that a boarding-house keeper is entitled to the exemption of household goods just as the head of a private family is allowed it, even though the business of keeping boarders has been abandoned,[4] or the furniture of a family is stored for future use.[5] An outfit, consisting of the various articles necessary to such business in excess of the needs of a private family, would not be protected in most of the states where the exemption is that of household furniture owned by the head of a family. It would be required, in most of them, that the claimant show some statutory authorization, other than this, to sustain his claim to his business furnishings. When, however, the statute exempts household and kitchen furniture to a stated value, it would seem a matter of indifference whether the goods be used by a private family or by boarders. The limitation prevents any abuse of the privilege.

Where the money limit is the only check upon the exemption, it makes no difference whether the household and kitchen furniture be used in a private or a public house; but articles which do not answer the statutory description of "household goods," "kitchen furniture," "cooking utensils,"

brass clock was exempt. Leavitt v. Metcalf, 2 Vt. 342. *See* Hart v. Hyde, 5 Vt. 328, and Freeman v. Carpenter, 10 Vt. 434.

[1] Mueller v. Richardson (Tex. Sup.), 18 S. W. 693; Texas Rev. Stat., art. 2335; Race v. Oldridge, 90 Ill. 250.

[2] Dodge v. Knight (Tex.), 16 S. W. 626.

[3] Heidenheimer v. Blumenkron, 56 Tex. 308.

[4] Vanderhorst v. Bacon, 38 Mich. 669.

[5] Cantrell v. Connor, 6 Daly (N. Y.), 224.

etc., are not protected from forced sale though within the monetary limitation. A pool table, for instance, is not to be classed with such articles; and it has been held not a necessary adjunct to a saloon.[1] A trunk, a jewel box, and the like, are not articles of household furniture.[2]

§ 3. Clothing, etc., Worn on the Person.

Nothing is more generally exempted from execution than the clothes of the debtor and his family. What amount is free from liability is not fixed and uniform throughout the states. The common-law limitation, to the clothes actually worn by the debtor and his family at the time of the levy,[3] does not now prevail. The clothing requisite for different kinds of weather, different seasons of the year, work days and holidays; for presentable appearance as well as for comfort and decency, used by the debtor and the members of his family, is now generally exempt.[4]

In the absence of restriction, men may have their heavy and light overcoats, their business and dress suits; women may have extensive wardrobes, brides their elegant and variegated *trousseaux;* any one may wear and keep for wearing what the exigencies of the society in which he moves may require. Clothing which is laid away in bureaus, wardrobes or trunks, if worn from time to time, is not liable under most of the statutes.[5]

It would be proper to inquire whether clothing of unusual quantity and of costly quality is worn as apparel, in good faith, or was purchased to defeat creditors. Here the true equitable distinction is suggested. If a debtor should attempt to keep a wardrobe equal to that of the late Empress of France, she would doubtless find herself beyond the bounds of judicial toleration; for, though there be no express statutory

[1] Goozen v. Phillips, 49 Mich. 7.

[2] Towns v. Pratt, 33 N. H. 345.

[3] Sunbolf v. Alford, 3 M. & W. 248; Wolff v. Summers, 2 Camp. 631; Bumpus v. Maynard, 38 Barb. 626; Bowne v. Witt, 19 Wend. 475; Cooke v. Gibbs, 3 Mass. 193.

[4] Frazier v. Barnum, 19 N. J. Eq. 216; Peverly v. Sayles, 10 N. H. 356; Deposit Bank v. Wickham, 44 How. 421; Smith v. Rogers, 16 Ga. 479; Rothschild v. Boelter, 18 Minn. 361.

[5] The case of Towns v. Pratt, 33 N. H. 345, holding a trunk of clothes liable, would not be respected as precedent everywhere. In Alabama, the wearing apparel of a deceased householder is exempt by statute.

limitation, the spirit of the exemption provision would doubtless be invoked. If the object of the debtor, in providing such an extensive and extravagant outfit, is to defeat creditors, exemption may be denied on the ground of fraud.

Not only clothing, but watches, spectacles, canes, umbrellas, pocket-knives, purses, pocket-books, and similar articles habitually used and carried about the person, may be exempt under unrestricted and general designations. Watches, at common law, could not be taken in execution from the wearers,[1] but they, as well as rings and jewels worn upon the person, have not invariably been held exempt.[2] Manifestly, the indiscriminate exemption of articles personally worn might lead to great abuse. While a watch and chain and a pair of spectacles may be both useful and ornamental, and properly exempt, there certainly is a limit (by the spirit of the exemption laws, at least) to unusual and extravagant adornment. A watch, when it is the mere setting of costly jewels; a finger-ring supporting a diamond, worth a fortune; any ornament employed as a mere holder of something more valuable than itself, may serve as illustration. Whether jewels worn on the person are exempt may depend upon circumstances. If they have been worn habitually by their owner when he was not indebted, they would be entitled to more favor at a time of his misfortune than they would if he has bought them, after becoming embarrassed, for the purpose of defeating creditors.

§ 4. Tools of Mechanics and Others.

Perhaps, after household goods and apparel, there is nothing more generally exempt throughout the Union than tools. They are readily understood to be the implements by which a workman works, whether he be a farmer or a mechanic. They are instruments with which their owners pursue a calling to make a livelihood. There would seem at first view to be no latitude for construction as to the meaning of the simple word. Yet, as employed in the numerous exemption statutes in various connections, with reference to different avocations, there have been many decisions upon questions

[1] Frazier v. Barnum, *supra*. *See* Commercial Bank v. McLeod, 65 Ia. 665; 54 Am. Rep. 36.

[2] Shaw v. Davis, 55 Barb. 389; Sawyer v. Heirs, etc., 28 Vt. 249.

as to whether the articles claimed by debtors as tools were really such within the letter and intendment of the law. The decisions, not always harmonious as a whole, may be given as expressing the law, each for its own state.[1]

The avocation of the owner, and the use to which a thing may be put, sometimes determines the character of the article and its right to exemption as a tool. The article may not be (like a plow, a saw or a hammer) a tool under all circumstances, yet it may be held such under the provisions of the statute. Ordinarily, a carriage, a sleigh, a horse, is not a tool, but when owned and used by one whose calling requires it, each of these has been given the benefit of the provision exempting the tools by which the debtor gains his livelihood.[2]

On the other hand, when specified implements are exempt without reference to their owner, they are protected in the hands of persons who do not use them. Thus a "mower" was held exempt, though the owner was not a farmer.[3]

The implements of a farmer or an artisan do not lose their exempt character because he is temporarily out of work, and

[1] Richards v. Hubbard, 59 N. H. 158; 47 Am. Rep. 188; Gen. Laws of N. H., ch. 224, § 2. In this case there is the following summary of things, all held exempt as *tools*, though some are household furniture and not tools: A milliner's clock and stove. Woods v. Keyes, 14 Allen, 236. A sewing machine. Rayner v. Whicher, 6 Allen, 292. A musician's cornet. Baker v. Willis, 123 Mass. 194. A fisherman's net and bolt. Sammis v. Smith, 1 N. Y. Sup. 444. A copper kettle. Van Sickler v. Jacobs, 14 Johns. 434. A watch. Bitting v. Vandenburgh, 17 How. Pr. 80. To this summary many other things might be added. A grindstone was properly exempted as a tool. White v. Capron, 52 Vt. 634. The lamp of a watchmaker. Bequillard v. Bartlett, 19 Kan. 382. The piano of a musician. Amend v. Murphy, 69 Ill. 337.

[2] Though a debtor's carriage was held exempt as a "tool" (Richard v. Hubbard, *supra*), that of a non-professional person, used for conveyance, was held liable by the same court. Parshley v. Green, 58 N. H. 271; Gen. Stat. N. H., ch. 205, § 2. A horse and wagon held to be mechanic's *tools*. Perkins v. Wisner, 9 Ia. 320. *Contra*, Wallace v. Collins, 5 Ark. 41. A sled for drawing wood to market was held exempt as a tool. *Ib.* A hotel omnibus was exempted as a "tool" of the hotel-keeper. White v. Gemeny (Kan.), 28 P. 1011; Wilhite v. Williams, 41 Kan. 288; Davidson v. Sechrist, 28 Kan. 324. A whip not exempt. Savage v. Davis, 134 Mass. 401. A mill-saw not a tool. Batchelder v. Shapleigh, 10 Me. 135. A grain-drill was not exempt to a hotel-keeper. Reed v. Cooper, 30 Kan. 574.

[3] Humphrey v. Taylor, 45 Wis. 251; Knapp v. Bartlett, 23 Wis. 68.

they consequently idle. A farmer's ploughs and harrows are *laid by* half the year; a mechanic's tools may be rusting in his chest while he is waiting for a job; a farmer, artisan or any other worker may choose not to work for a period, yet his tools will remain exempt, since he has not abandoned his calling.[1]

If a mechanic's tool or agricultural implement, or the like, is owned and possessed by one who has no use for it in his calling — a calling altogether different from that in which the tool is meant to be employed — it is not exempt as a tool; and, in the hands of his widow, it would not be exempt.[2]

When, in one section of an act, certain kinds of property, such as the tools of a mechanic, are exempted, while in another section certain property belonging to a family man is exempted, the two provisions were held cumulative, so that the tools could be held, and the other things too, by the mechanic married and having a family.[3] The words of a statute are usually employed in their ordinary sense; so the tools of a mechanic are those of a working artisan used by his own hands in plying his calling.[4] Articles claimed as exempt may be *tools*, yet not the "tools of a mechanic." A photographer's instruments were held not exempt on the ground that he was not a mechanic and that they were not mechanic's tools;[5] but dental instruments have been exempted as tools of the operator.[6] The dentist is a professional man as much as a pho-

[1] Caswell v. Keith, 12 Gray, 351; Dailey v. May, 5 Mass. 313; Pierce v. Gray, 7 Gray, 68; Hickman v. Cruise, 72 Ia. 528; Wilkinson v. Alley, 45 N. H. 551; Harris v. Haynes, 30 Mich. 140; Kenyon v. Baker, 16 Mich. 373; Wood v. Bresnahan, *supra*. *Compare* Willis v. Morris, 66 Tex. 628.

[2] Reed v. Cooper, 30 Kan. 574; Jenkins v. McNall, 27 Kan. 532; Gordon v. Shields, 7 Kan. 320; Robert v. Adams, 38 Cal. 382; Knapp v. Bartlett, 23 Wis. 68. *Compare* Humphrey v. Taylor, 45 Wis. 251.

[3] Harrison v. Martin, 7 Mo. 287, under the old act of R. S. of 1835, p. 265. Exemption of tools of trade do not allow a mechanic, who has two trades, to claim cumulatively. Smalley v. Masten, 8 Mich. 529; Bevitt v. Crandall, 19 Wis. 610; Morrill v. Seymour, 3 Mich. 64. *Contra:* Harrison v. Martin, 7 Mo. 286; Howard v. Williams, 2 Pick. 80.

[4] Parkerson v. Wightman, 4 Strob. (S. C.) 363; Willis v. Morris, 66 Tex. 269; Abercrombie v. Alderson, 9 Ala. 981.

[5] Story v. Walker, 11 Lea, 515; 47 Am. Rep. 305; Tenn. Rev. Code, § 553*a* (29).

[6] Maxon v. Perrott, 17 Mich. 336.

tographer is an artist; and, on the ground that he is not a mechanic, exemption of his dental instruments has been denied.[1] Both callings are somewhat mechanical, and it should be remembered, in the construction of statutes exempting the "tools of a mechanic," that there is not always a distinct line of separation between a profession and a manual art. No one would rank a surgeon as a mechanic, yet his instruments and their application may be readily classified with dental tools and their use; and whether either are exempt depends, of course, upon the terms of the statute in any case. Formerly some barbers used to add tooth-drawing, cupping and bleeding to shaving and hair-cutting; but as they had no professional knowledge, no one thought of calling them dental surgeons or doctors. Yet the professional dentist's plate-making and tooth-filling and extracting is not the less mechanical because more scientific; for many purely mechanical operations depend upon knowledge of science. So, though the professionally educated dentist should be ranked as a surgeon, there are others little more entitled to that rank than the man who works with both razor and forceps.

A contractor by profession, building houses or ships, is not deemed a mechanic whose tools are exempt when acting in his capacity of contractor, though he really may be a mechanic.[2] If exemption is with reference to a particular avocation, the claimant must be pursuing it at the time of the levy.[3]

Instruments may be habitually used in connection with an avocation, yet not be necessary to its conduct.[4]

Office furniture is necessary, and it has been included in the terms "tools and instruments" necessary to the carrying on of a lawyer's profession, so that his landlord could not attach it.[5] This liberal inclusion would not be extended to the taking-in of the office or building in which a profession is practiced or a trade exercised (however necessary it might be to

[1] Whitcomb v. Reid, 31 Miss. 567.

[2] *Re* Wetmore, Deady, 585.

[3] Ray v. Hayes, 28 La. Ann. 641.

[4] Pool tables, for instance, are not essential to the saloon or restaurant business. Goozen v. Phillips, 49 Mich. 7. *See* Maxon v. Perrott, 17 Mich. 332.

[5] Abraham v. Davenport, 73 Ia. 111; Ia. Code, § 3072. *Contra: Re* Church, 15 R. I. 245; Pub. Stat. R. I., ch. 209, § 4.

the prosecution of the business) though the shop, office or building be personal property.[1]

Where the statute broadly exempts all instruments necessary to the conduct of one's business, without confining the benefit to any particular calling, not only the office furniture but the business papers of an insurance agent were held to be instruments.[2]

While a law library is necessary to the lawyer's business, and may be exempt on other grounds, the books cannot be on the assumption that they are "tools," under a statute exempting chattels by that designation merely.[3] So, a merchant's usual articles of outfit are not *tools;*[4] yet an article, proven to be necessary to a particular calling which united both the mercantile and mechanical character, was protected from execution.[5] Stamping blocks for printing oil-cloth were held to be not "necessary tools of a tradesman."[6] Doubtless they were tools which would have been exempt if owned and used by one whose calling was that of an oil-cloth printer or stamper. There is the case of a hardware dealer who, upon making an assignment, was allowed to retain a set of tinner's tools and material from his general stock in trade. They certainly were not necessary to the hardware business, and were not exempt as so; but, the assignor having proved that he was using such instruments and maintaining his family with them since his embarrassment, and that they were his only source of support, was allowed to hold them exempt.[7]

[1] Holden v. Stranahan, 48 Ia. 70; Ia. Code, § 3072. (A photographer claimed his saloon building.)

[2] In Kansas, an insurance agent and abstracter of titles successfully claimed not only his office furniture and iron safe but also *his abstracts* as "instruments," under the statute exempting "the necessary tools and instruments of any mechanic, miner, or *other person*, used and kept for the purpose of carrying on his trade or business." Davidson v. Sechrist, 28 Kan. 324; Kan. Comp. L. (1879), p. 438.

[3] Law books are not exempt as "tools," though they may be as belonging to some other class of protected property. Lenoir v. Weeks, 20 Ga. 596; Fowler v. Gilmore, 30 Tex. 432; Brown v. Hoffmeister, 71 Mo. 411.

[4] A merchant's counter, desk, barrels and boxes are not exempt as "tools." Guptil v. McFee, 9 Kan. 30.

[5] A jeweler's safe, proved to be necessary to his business, was held to be exempt. McManus' Estate (Cal.), 25 P. 413; Cal. Civ. Code Proc., § 690 (4).

[6] Richie v. McCauley, 4 Pa. St. 471.

[7] Miller v. Weeks, 46 Kan. 307.

The products of mechanical labor and skill, within reasonable limits, have been protected from execution.[1]

The abandonment of a trade or profession is the renunciation of any exemption right incident to, or dependent upon, such avocation.[2]

§ 5. Machinery.

A valuable threshing machine with its outfit, owned by two or more farmers, and used by them on their own farms and also used in threshing for others, for hire, was held not exempt under the statutory exemption of "farming utensils or implements of husbandry of the judgment debtor."[3] The implements protected are those used by the farmer in cultivating his own farm and caring for its products; not those mainly used to derive income by renting them out.[4]

What value in machinery may be exempt, and to what uses the machinery must be confined, and what class of persons may be beneficiaries of the exemption, all depend upon the statute governing the case; and therefore cases on the subject differ in different states. Machinery, used in the sawing of lumber into boards and the making of shingles, is held to be included in the terms "tools," "implements," etc., used "to enable a person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value $250."[5] A part of a complex machine may be separated from the rest (when the whole exceeds the allowable exemption in value), if it be susceptible of being worked alone so as to become exempt.[6] A steam-engine may be exempt within the meaning of a statute protecting tools and instruments, it has been held.[7]

The term *tool* is inapplicable to large establishments, mills, portable housed machinery, steam-engines, threshing machines and apparatus, or anything not understood as a tool in common parlance, though many tools may be embraced and used

[1] Stewart v. Welton, 32 Mich. 56.

[2] Willis v. Morris, 66 Tex. 628; McDonald v. Campbell, 57 Tex. 614; Miller v. Menke, 56 Tex. 539.

[3] Cal. Code Civ. Proc. § 690, par. 3.

[4] *In re* Baldwin, 71 Cal. 74; Roberts v. Adams, 38 Cal. 383. *See* Brusie v. Griffith, 34 Cal. 302; Ford v. Johnson, 34 Barb. 364; Meyer v. Meyer, 23 Ia. 375.

[5] Wood v. Bresnahan, 63 Mich. 614.

[6] Ramsey v. Barnabee, 88 Ill. 135.

[7] Wood v. Bresnahan, 63 Mich. 614.

in milling, machine-running and other works. Unless there is language in the statute applicable to the case which shows that the legislator meant something different from the ordinary meaning, his use of the word would not convey the idea that he meant to include portable mills, engines or machines, such as are above mentioned.[1] Even though there be no question as to the term, yet the tools of a corporation engaged in a large business requiring many hands have been held not exempt within the intendment of the legislator.[2]

Articles which are not specifically exempt, but which are subject to selection by the debtor as implements used or necessary for the conduct of his business, or as stock in trade, have not the exempt character in the absence of selection.[3] It is held that machinery is embraced in the exemption of implements necessary to conduct the debtor's business, when it is within the allowable value and is duly selected and claimed.[4]

§ 6. Printing Presses, Types and Material.

Under the statutory exemption of *tools necessary for upholding life*, a printing press, with cases and types, was claimed by the debtor as free from execution. The court thought the press and the cases and types were tools, but whether they were essential to the life of the debtor was declared a question for a jury.[5] But under different statutes, such printing articles have been held not tools.[6]

The editor and publisher of a newspaper was engaged with a partner in job printing, and also in the insurance business. He was not a printer but he used his press and types, work-

[1] *In re* Baldwin, 71 Cal. 74; Batchelder v. Shapleigh, 10 Me. 135; Smith v. Gibbs, 6 Gray, 298; Kilburn v. Demming, 2 Vt. 404.

[2] Boston Belting Co. v. Ivens, 28 La. Ann. 695.

[3] Behymer v. Cook, 5 Colo. 395 (coffins and undertaker's implements).

[4] Wood v. Bresnahan, 63 Mich. 614 (machinery for shingle making); Howell's Stat. Mich., § 7686. In this case, the debtor claiming the machinery had quit business in Michigan and was about to leave the state, but being still a resident the claim of exemption was allowed. *See* McHugh v. Curtis, 48 Mich. 262; O'Donnell v. Segar, 25 Mich. 367.

[5] Patten v. Smith, 4 Ct. 450. *See* same case in 5 Ct. 197. Jenkins v. McNall, 27 Kan. 532; 41 Am. Rep. 422; Sallee v. Waters, 17 Ala. 482.

[6] Buckingham v. Billings, 13 Mass. 82; Danforth v. Woodward, 27 Mass. 423; Frantz v. Dobson, 64 Miss. 631; Spooner v. Fletcher, 3 Vt. 133.

ing himself but mostly through others — yet he was allowed to claim them as his exempt tools.[1]

It was held that the press, type and *material*, belonging to a printing office, were exempt under a statute exempting "all tools, apparatus and books belonging to any trade or profession," though they were partnership property.[2] It does not seem clear how materials, such as paper, ink and like things to be worked up, can be classed under the head of "tools," or "apparatus" or "books."

In an earlier case it was held, under the same statute, that a printing press, types, etc., were exempt when owned by the editor and publisher of a newspaper.[3] It will be noticed that, in the later case, such articles were exempted though belonging to a firm. In some states, printing presses and necessary accompaniments are expressly exempted by statute.[4]

§ 7. Wagons and Other Vehicles.

Whether or not the exemption of a wagon includes that of a buggy, family carriage, barouche or other vehicle used for pleasure or convenience, depends upon the connection of the word *wagon* with other words, and the general tenor of the statutory provision. If, in the enumeration of agricultural implements, the legislator should provide that ploughs, harrows, carts, wagons, shovels, hoes, etc., shall be exempt, no casual reader would understand that a buggy was meant by the word *wagon;* he would think that a farm wagon was meant. What the casual reader would understand is likely to be the real meaning.[5]

[1] Bliss v. Vedder, 34 Kan. 57; 55 Am. Rep. 237; Raynor v. Whicher, 88 Mass. 292; Howard v. Williams, 19 Mass. 80.

[2] Type Foundry Co. v. Live Stock, etc. Co., 74 Tex. 651.

[3] Green v. Raymond, 58 Tex. 80; 44 Am. Rep. 601.

[4] In Michigan a printing press and types are exempt to the value of $2,000; and printer's stock-in-trade to $400 more. In Mississippi, printing material is exempt to $250.

[5] It has been held that a buggy is exempt where the statute exempts wagons, because, in a sense, it is a wagon. Allen v. Coates, 29 Minn. 46. (*See* many cases, cited by counsel, to the contrary.) Kimball v. Jones, 41 Minn. 318. *Compare* Dingman v. Raymond, 27 Minn. 507. A debtor had two wagons for hauling purposes, and a buggy, and he was allowed to select any of *the three wagons.* Parker v. Haley, 60 Ia. 325. *See,* as to physician's buggy as a wagon, Corp v. Griswold, 27 Ia. 379; Farner v. Turner, 1 Ia. 63; Nichols v.

A statute exempted "one cart or truck-wagon." A peddler had a vehicle on four wheels, with a dasher in front, railing round the top, doors on each side and drawers behind. To assist the court in the construction of the words "cart or truck-wagon," the plaintiff's counsel derived *truck-wagon* or rather *truck*, from the French, and the defendant's counsel got it from the Greek, while both appealed to Webster. The court, however, looked at the associated articles exempt by the statute: oxen, horses, mules, ox sled or horse sled, *a cart or truck-wagon;* and said that the vehicles were "intended to correspond with the animals used, and all designed as aids to labor rather than traffic." And so the peddler's shop on wheels was not favored.[1]

Another statute exempted "one *wagon*, cart or dray, one sleigh, one plow, one drag, and *other farming utensils*, including tackle for teams, not exceeding two hundred dollars in value."[2] Under this, a debtor claimed a hearse. By the reasoning of the foregoing case, he should have been denied; for the association of mentioned articles with each other, and the exemption of *other* farming utensils, exclude the idea that the legislator meant to include the hearse in the word "wagon" or any other that was employed. But by liberal construction, as the court said, the exemption was allowed.[3] Webster had defined *hearse* as "a carriage for conveying the dead to the grave," and that was another reason assigned. And authority favored; for the same statute had been construed to exempt a physician's horse and sleigh;[4] and also a mowing machine claimed by a debtor who was not a farmer and who did not use it.[5]

Without the mention of any wagon of any kind; without

Claiborne, 39 Tex. 363. A grocer's delivery wagon was exempt. Baker v. Hayzlett, 53 Ia. 18. A farmer's four-wheeled wagon was exempt as an ox-cart. Favers v. Glass, 22 Ala. 624. An insurance agent's horse and buggy were exempt. Wilhite v. Williams, 41 Kan. 288. A hack sometimes carrying passengers and sometimes wood was exempt. Rodgers v. Ferguson, 32 Tex. 533. A hackney coach solely for passengers was non-exempt. Quigley v. Gorham, 5 Cal. 418.

[1] Smith v. Chase, 71 Me. 164.

[2] Wisconsin Laws of 1882, sec. 2982 (6).

[3] Spikes v. Burgess, 65 Wis. 428.

[4] Knapp v. Bartlett, 29 Wis. 68.

[5] Humphrey v. Taylor, 45 Wis. 251. *See* Van Buren v. Loper, 29 Barb. 389.

naming truck, horse or wheel-barrow, a statute exempted a wagon by exempting a team, the court held.[1] A team is usually attached to a wagon of some sort; but that the word "team," in a statute, implies the thing drawn by it, seems novel; and there is a case contrary to those last cited.[2]

The principal business of the debtor, who has more than one occupation, is understood, when he claims "things to enable him to carry on the profession, trade, occupation or business in which he is wholly or principally engaged;" and the things need not be absolutely necessary to the prosecution of his calling.[3]

Livery-stable-keeping being the claimant's principal business, he could not claim exemption as a teamster, or as a laborer.[4] The principal business of the claimant being that of a peddler, its prosecution required a wagon and team; and they were held exempt though somewhat employed for other purposes than the main one. But a bread-box, which was also used in the peddler's calling, was held liable to execution because it had been omitted from the list of chattels made exempt by the statute.[5]

A teamster need not drive his own team to become the beneficiary of an act exempting a wagon and two horses to a teamster; he is entitled to exemption if he owns teams and employs them in hauling to support himself and family; he need neither hold nor drive; he need only to give his personal attention to *teaming* in order to be a teamster — so it is held.[6] It is not every one who drives a team that is a teamster; and every teamster is not a driver necessarily.[7] The teamster may have many teams and wagons, driven by employees: he is entitled to select one team and wagon, according to the decisions cited.

The fact that the claimant of the team is himself the driver may be a circumstance, however, on which the question of exemption will hinge. An oil-dealer, who was rather a merchant

[1] Dains v. Prosser, 32 Barb. 290; Brown v. Davis, 9 Hun, 43; Van Buren v. Loper, 29 Barb. 388; Eastman v. Caswell, 8 How. Pr. 75.

[2] Morse v. Keyes, 6 How. Pr. 18.

[3] Kenyon v. Baker, 16 Mich. 373.

[4] Edgcomb v. His Creditors, 19 Nev. 149.

[5] Stanton v. French, 91 Cal. 274; 27 P. 657.

[6] Elder v. Williams, 16 Nev. 416.

[7] Brusie v. Griffith, 34 Cal. 306.

than a teamster so far as his principal business character was concerned, was shown to have an oil-tank upon wheels which was drawn by a team sometimes driven by himself, and used in delivering oil to his customers. His team and tank, or wagon, were held exempt as property with which he habitually earned his livelihood.[1]

Where there is special exemption of certain kinds of chattels, such as a team to a teamster, it does not matter how much the debtor is worth beyond such article in other species of property. He may be worth many thousands of dollars yet be entitled to have one team exempt.[2] Such special exemptions are found in many statutes, as to agricultural implements, mechanics' tools, and those of other employments, manual and professional.

A statute exempting one "wagon, cart or dray, two plows, one drag, and other farming utensils, including harness and tackle for teams, not exceeding in value three hundred dollars," was construed to exempt the articles specified *and* "three hundred dollars' worth of property in addition." The last clause was held to refer only to the "other farming utensils," so that there were exempted the articles first named, and also three hundred dollars' worth of "other farming utensils, including harness and tackle for teams."[3]

§ 8. Domestic Animals.

The absolute exemption of specified things relieves from the necessity of choice when the debtor has only that which is thus exempted. If he has more, *he* makes the selection — not the officer.[4] If he neglects to do so, it seems that the officer should look to the debtor's interest,[5] though there is

[1] Consolidation Tank Co. v. Hunt (Ia.), 48 N. W. 1057.

[2] Smith v. Slade, 57 Barb. 637, *citing* Wilcox v. Hawley, 31 N. Y. 658, and other cases.

[3] Donmyer v. Donmyer, 43 Kan. 444.

[4] One of two animals being exempt, the debtor may elect which he will retain. Savage v. Davis, 134 Mass. 401; Everett v. Herrin, 46 Me. 357. He may have a half-interest in one horse exempted. Rutledge v. Rutledge, 8 Bax. 33.

[5] The debtor owning two animals and entitled to save one from execution may select the one free from mortgage if the other is mortgaged and out of his possession. Without selection, it seems that the former would be deemed the exempt one. Tayon v. Mansir, 2 Allen (Mass.), 219; Cooper v. Neumans, 45 N. H. 339.

no invariable rule.[1] The officer does not always know whether one of the two animals is mortgaged, or is a borrowed one; and he is not responsible for levying upon either when the debtor has failed to inform him.[2] The debtor, selecting a horse, is not bound to bring other horses from another county for the sheriff to levy upon.[3]

When the exemption of domestic animals is made to depend upon the avocation of the owner, he is not denied the benefit because, though needing them in one calling, he also follows another in which they are not necessary.[4] He may employ the same animal in different capacities, though in only one is it exempt by the statute.[5] If the employment must be that by which the owner makes his living, he cannot hold a team exempt which is wholly used in a secondary calling.[6]

A team may be kept for hire, and thus serve in the making

[1] The debtor being entitled to retain a horse or yoke of oxen, and the latter being mortgaged, the officer was not liable for levying upon the horse when the fact of the mortgage of the oxen had not been communicated to him. McCoy v. Dail, 6 Bax. 137.

[2] So, though the debtor own one cow and have a hired one, and the officer took the one owned, the levy was held not trespass. *Ib.;* Lindsey v. Fuller, 10 Watts, 144.

[3] Anderson v. Ege, 44 Minn. 216; 46 N. W. 362.

[4] A pair of horses were claimed as exempt by the debtor in his capacity of peddler and huckster. He was shown to be also a publisher of county directories and hand-books, but this did not disprove his other calliug: so he held his horses. Paulson v. Nunan, 72 Cal. 243.

[5] Two horses were exempt by law to each farmer. A farmer, in his capacity as such, worked his horse on his farm, but he, in another capacity, employed the same horse; he claimed exemption and had his claim allowed. McCue v. Tunstead, 65 Cal. 506. *See* Robert v. Adams, 68 Cal. 383.

[6] Two horses and a wagon were claimed by debtors in their capacity as teamsters, though they were also coal-dealers. The court said: "In order to entitle a party to claim as exempt from execution, two horses, etc., under the sixth subdivision of § 690 [of the Code of Civil Procedure], he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster or other laborer, *and that he habitually earns his living* by the use of such horses, etc. C. C. P., § 690; Brusie v. Griffith, 34 Cal. 302. The findings in this case do not show that state of facts." So exemption was denied. Dove v. Nunan, 62 Cal. 399; Calhoun v. Knight, 10 Cal. 393. So, a physician, who claims two horses, must show that he uses both in the prosecution of his profession to earn his living. Corp v. Griswold, 27 Ia. 379. But a teamster need not drive his own team. Elder v. Williams, 16 Nev. 416.

of a livelihood, and therefore be exempt.[1] It may not be hired out at the time a levy is about to be made, for there are always intervals of non-employment in such business; yet the team would not be liable. Even if the owner's right of exemption depends upon his own personal use of his team, he would not forfeit the right because temporarily resting from his calling, with his horses turned out to grass.[2] Horses may be work-horses, carriage-horses or plough-horses, within the meaning of a statute, though not actually employed as such at the time of levy.[3] Such horses always require harness when they are used: does the description of these as "work-horses," etc. in the statute, imply the exemption of the necessary trappings?[4]

Having claimed, the debtor must stand to his choice. He cannot, as a matter of right, change his selection; and if he has chosen an idle "work-horse," it must be one fit for use in his calling, and designed for such use.[5] If he has declined to choose, he cannot complain of the levy upon either of two, each of which had been subject to his own selection.[6]

The making of a livelihood is not the only use to which domestic animals may be put, that they may be rendered inviolable when the sheriff comes. They may be employed for

[1] A team let for hire was used to earn money for the family, and so the owner held them exempt. Washburn v. Goodheart, 88 Ill. 229. A widow had a horse, cow and calf exempted, though they were hired out. Collier v. Latimer, 8 Bax. 420.

[2] Two horses and a hack, belonging to a hackman who earned his living with them, were levied upon when the horses were at pasture and the hack at shop to be painted: held exempt. C. C. P. 290; Forsyth v. Bower, 54 Cal. 639.

[3] Work-horse described. Noland v. Wickham, 9 Ala. 169; Allman v. Gann, 29 Ala. 240. A horse presumed to be a *plough-horse*, because fit for the plough. Matthews v. Redwine, 25 Miss. 99.

[4] The exemption of a horse for farming or teaming is held not to include harness. Somers v. Emerson, 58 N. H. 48. *Contra*, Cobbs v. Coleman, 14 Tex. 594.

[5] One having claimed a horse cannot afterwards take oxen instead, under a statute exempting either, though he may not have owned the horse. Barney v. Keniston, 58 N. H. 168. Either, when selected, must be required for present or early use, to save it from liability to attachment. Jaquith v. Scott, 63 N. H. 5; S. C., 56 Am. Rep. 476; Cutting v. Tappan, 59 N. H. 562.

[6] If the debtor refuse to elect between a yoke of oxen and a horse, he cannot afterwards be heard to complain that either is attached. Davis v. Webster, 59 N. H. 471.

convenience, for social, educational and religious purposes, when the statute enumerates one object or more, and then adds "other uses." [1]

Domestic animals are often exempted without any qualification as to their uses; [2] and, as above remarked, even where there is such qualification, the use need not be immediate if there is fitness for use and design to use.[3]

The debtor cannot, at the juncture when his property is about to be levied upon, swap off liable property for an animal specified by statute as exempt, with the view of foiling the creditor. A liable thing is not changed in character by exchange for an exempt one: so, after the transaction, it may be attached or levied upon in the hands of the debtor.[4]

The general rule is (though not in every state) that the exemptionist must have the exclusive right of possession of the chattel he claims as free from execution. The owner of a half interest in two things cannot claim the whole of one of those things.[5] He has not the exclusive ownership and possession of either. A married couple, however, may be tenants in common, or joint tenants, and still have exemption in the thing held without doing violence to any principle. She may interpose the exemption claim when he is away [6] or has failed to do so.

[1] The family use of the horse selected may be that of taking children to school and church. George v. Fellows, 59 N. H. 206. The language of the statute, as to use, is "farming or teaming purposes or *other actual use*." Gen. Laws, New Hampshire, ch. 224, sec. 2. A horse used in collecting accounts was exempt. Knapp v. O'Neill, 46 Hun, 317.

[2] Two cows, not used for the family, nor necessary for them, were held exempt in Kansas, under Comp. L. (1879), ch. 58, § 3; Nuzman v. Schooley, 36 Kan. 177. A yoke of oxen being exempt, one ox is. Wolfenbarger v. Standifer, 35 Tenn. 659. And so is one horse when a pair is exempt by law. Dearborn v. Phillips, 21 Tex. 449.

[3] The use required, for the exemption of domestic animals, is not always to be understood as present use; it may be a keeping for use in the near future. Steele v. Lyford, 59 Vt. 230; George v. Bassett, 54 Vt. 217; Rowell v. Powell, 53 Vt. 302; Freeman v. Carpenter, 10 Vt. 433; Dow v. Smith, 7 Vt. 465. Whether a race-horse is exempt — *quere?* Anderson v. Ege, 44 Minn. 216.

[4] A non-exempt animal does not become exempt by being exchanged for one that is so. Connell v. Fisk, 54 Vt. 381.

[5] If a certain number of specified things is exempt, the debtor who owns an undivided half of each cannot therefore claim twice the number, or half of twice the number. White v. Capron, 52 Vt. 634.

[6] The wife of an absconding farmer

There is no straining or extension of a statute when less is asked and given under it than it authorizes; thus an ox may be claimed when a yoke of oxen is exempt; a horse, when a pair or a team is so;[1] but the animal claimed should be of the same kind as the two or more that might have been claimed; and the article chosen should be included in the description of articles exempted by the statute. While a mule may be respected properly as a statutory horse, and while young calves, though not cows and oxen, eventually may grow to such estate, it would seem that the judicial transformation of several legislative creations has been effected with almost too free a hand.[2]

who was privileged to claim two horses as exempt in his avocation was held entitled to hold them against his creditors, as she was carrying on the farm. Frazier v. Syas, 10 Neb. 115.

[1] An exempt team may consist of but one horse. Wilcox v. Hawley, 31 N. Y. 648; Harthouse v. Rikers, 1 Duer, 606; Lockwood v. Younglove, 27 Barb. 505; Wheeler v. Cropsey, 5 How. Pr. 288; Finnin v. Malloy, 33 N. Y. Superior, 382. A mare and her colt four months old were held exempt under the statutory description, "a span of horses." Ames v. Martin, 6 Wis. 359, 361. Instead of pork and hogs one may take pigs, etc. Byous v. Mount, 89 Tenn. 361; Tenn. Code, §§ 2931–2.

[2] "In Mundell v. Hammond, 40 Vt. 641, two calves nine months old were saved to the debtor under a statute exempting 'a yoke of oxen or steers.' In Mallory v. Berry, 16 Kan. 293, a wild, unbroken steer, twenty months old, was held exempt under a statute exempting 'a yoke of oxen.' In Favors v. Glass, 22 Ala. 624 [58 Am. Dec. 272], a cart was held to include a four-wheeled wagon. In Texas, under a statute exempting 'two horses,' a horse and mule are exempt. Allison v. Brookshire, 38 Tex. 200. In Tennessee, a jackass is exempt under a statute exempting 'a horse, mule or yoke of oxen.' Richardson v. Duncan, 2 Heisk. 220; and see Webb v. Brandon, 4 Heisk. 288; Freeman v. Carpenter, 10 Vt. 433. [S. C., 33 Am. Dec. 210]; Wilcox v. Hawley, 31 N. Y. 655." *Dissenting opinion of Judge Leonard in Edgcomb v. His Creditors, 19 Nev. 156.* A yearling heifer was not included in "two cows and a calf." Mitchell v. Joyce, 69 Ia. 121; Ia Code, § 3072. A pair of cattle, two years old, not broken to the yoke, were held to answer the statute description, "a yoke of oxen." And the court, in so holding, said: "The general tendency of the courts is to hold that where a statute exempts 'horses,' 'oxen' or 'cows,' young animals of the species and description that by time and subsequent growth would become such, in the popular sense, are within the meaning and import of these terms as used in the statute. Dow v. Smith, 7 Vt. 405; Freeman v. Carpenter, 10 Vt. 433; Carruth v. Grassie, 11 Gray, 211;" and other cases were cited. Berg v. Baldwin, 31 Minn. 541. Some of the constructions are more cautious — not to say more reasonable. A horse, used by a tanner, is held not exempt as a *tool or imple-*

If the claimant's privilege depends upon his avocation, he cannot claim property belonging jointly to himself and his wife. The interest of his wife may be sold under execution, leaving him powerless to recover it. Were the property hers separately, he could not claim exemption. So the rulings have been, under statutory direction.[1] A peddler claimed a pair of horses and a wagon, alleged to be used in his business, and was denied the right of holding them exempt, because his wife was half owner — the above cited case. The debtor should show that the live-stock, or other property claimed, belongs to his wife, if that is the case.[2]

If the debtor claims a horse when he owns none, he cannot hold one subsequently purchased, by virtue of that claim.[3]

A livery-stable keeper claimed the exemption of his span of horses and carriage, contending that his calling was included in the enumeration of peddlers, cartmen, hucksters, teamsters and laborers recited in the statute; but his claim was denied.[4] The claim of the debtor should be within the law.

§ 9. Things Needed in Business; Stock in Trade.

The provision that "the tools, implements, working animals, and stock in trade not exceeding three hundred dollars in value, of any mechanic, miner or *other person* not being the

ment of the tanner's trade (Wallace v. Collins, 5 Ark. 41), though we have seen that a doctor's buggy-horse has been exempted as a tool. Ordinarily it is as a domestic animal that the physician holds his horses. If entitled to an exempt horse or pair, used by himself to make his living, he may use two horses together or separately. Corp. v. Griswold, 27 Ia. 379. *Habitual use:* Bevan v. Hayden, 13 Ia. 122; Whicher v. Long, 11 Ia. 48; Parkins v. Wisner, 9 Ia. 320; Farner v. Turner, 1 Ia. 54. *Other cases* relative to physician's horse and buggy: Van Buren v. Loper, 29 Barb. 388; Eastman v. Caswell, 8 How. Pr. 75; Wheeler v. Cropsey, 5 How. Pr. 288.

[1] Stanton v. French, 83 Cal. 194; Cal. Code Civ. Proc., § 690, par. 6.

[2] Coffee v. Adams, 65 Ga. 349.

[3] Smith v. Eckels, 65 Ga. 326.

[4] Edgcomb v. His Creditors, 19 Nev. 149; Brusie v. Griffith, 34 Cal. 306; Dove v. Nunan, 62 Cal. 400. Judge Leonard, dissenting from the decision in Edgcomb v. His Creditors, said: "I have no doubt that the legislature intended to exempt two animals, with their harness and other equipments, and any suitable vehicle, by the use of which any person habitually earns his living, and to the exercise of whose business such animals, etc., are necessary." The act qualified the exempt articles by the words, "by the use of which a cartman . . . or other laborer habitually earns his living."

head of a family, used and kept for the purpose of carrying on his trade and business, shall be exempt" while such person is a resident of the state,[1] was held to exempt a bachelor's buckboard and horse used in his business of assaying ores and sampling them. The claimant was neither mechanic nor miner, but he was an "other person:" was he using and keeping his horse and buggy for the purpose of prosecuting his business as a sampler and assayer? Does the statute mean *necessarily* using for such purpose? The court said that the "clear intention" of the framers of the statute seems to have been to exempt "those articles of personal property commonly and *necessarily* used . . . in carrying on the various avocations." The buckboard, horse and harness were thought necessary by the court (since this assayer was itinerant), and so the statute covered him and his business.[2]

It has been held too narrow to construe the phrase *used to carry on business* as meaning *necessarily used;*[3] and that the use need not be in the principal business of the beneficiary.[4] However, the principal business, or that by which livelihood is made, is usually meant by the exemption statutes which favor certain avocations.[5] In a claimant's capacity as a carpenter, building material to be worked up by him was exempted to the amount of one hundred dollars.[6] And unfinished burial cases were exempted to the maker.[7]

A farmer who has his agricultural implements free from execution, in his capacity as farmer, cannot claim other property under the term "other person," occurring in the statute, in the phrase the "tools and implements, or stock in trade, of any mechanic, miner or *other person*, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value."[8] A claimant in the capacity of a farmer claimed agricultural implements to the value fixed;

[1] Colo. Gen. Stat., p. 602.

[2] Watson v. Lederer, 11 Colo. 577. *See* Bevitt v. Crandall, 19 Wis. 610.

[3] Stewart v. Welton, 32 Mich. 56.

[4] *Ib.;* Kenyon v. Baker, 16 Mich. 376. *Compare* O'Donnell v. Segar, 25 Mich. 367.

[5] Smalley v. Masten, 8 Mich. 528; Morrill v. Seymour, 3 Mich. 64.

[6] Hutchinson v. Roe, 44 Mich. 389.

[7] McAbe v. Thompson, 27 Minn. 134.

[8] This was in § 31, ch. 134 of Rev. Stat. of Wis., which is like the Colorado provision above cited.

and then in the capacity of an "other person," he claimed a grain drill in addition. This was refused.[1]

§ 10. Merchants' Stock in Trade.

Whether a merchant may claim his goods, to the amount limited in the statutes above cited, has been carefully discussed. The phrase, "other person not being the head of a family," has been held applicable to a merchant without family. In a case in which the question was well considered and decided, it was said: "There is nothing in the general scope of the section which sustains the appellants' proposition that the proviso relating to those who are not heads of families is to be limited to any particular class of debtors. Unless, therefore, the language of the proviso has the effect of excluding the merchant, he must be held to be included within its provisions. That its language cannot have this effect is clear. The articles enumerated are practically the same as those mentioned in other subdivisions, except the furniture, the animals, food, supplies, etc., ordinarily kept by the head of a family. These articles are 'tools, implements, working animals, books and stock in trade.' This description of exempt property is quite broad enough to show that it was the intention of the legislature to extend to this class of debtors the same protection that is offered by the statute to heads of families. And this intention is manifested as well by the description contained in the proviso of the persons who are declared to be entitled to its benefits — 'mechanics, miners or other persons.' That these general words may include the merchant cannot be doubted; and, inasmuch as the entire statute reveals an intention on the part of the legislature to protect all citizens alike, effect should be given to such intention by extending its provisions to the shopkeeper as well as the mechanic."[2]

[1] Bevitt v. Crandall, 19 Wis. 610. One may be a tailor, tavern-keeper, or the follower of any other avocation, and yet be "actually engaged in the science of agriculture." Springer *v.* Lewis, 22 Pa. St. 191. *Compare* Simons v. Lovell, 7 Heisk. 510.

[2] Martin v. Bond, 14 Colo. 466, *471.* The court pointed out that in the case of Watson (above cited) the particular question relative to merchants was expressly excepted. The Wisconsin statute is held to include merchants. Wicker v. Comstock, 52 Wis. 315. In this, the court said: "We find no adequate provision in favor of merchants or shopkeepers as a class, unless it is contained in the statute

A similar statutory provision[1] was held not applicable to merchants. The term *stock-in-trade* was understood not to cover merchandise bought and sold for profit. While articles manufactured for sale, such as watches and jewelry, were included in the articles exempted, goods bought to be sold were excluded.[2] Similar statutory provision is found, and the construction is against the merchant.[3]

Though goods kept for sale by merchants (even millinery and fancy articles and the stock-in-trade of small dealers) are not exempt in every state, there is an exemption of such articles as the owner himself has made, by some statutes; and, where such statutes exist, the exemption is not lost by the placing of such articles on sale with the rest of the stock.[4] This is not such mingling of stock as would render the whole non-exempt,[5] if the home manufactured articles can be segregated from the non-exempt goods.

The exchange of a stock of goods, which has been set apart as exempt, for other goods of like character and value; or its sale in due course of trade, followed by other stock purchased with the proceeds, would not forfeit the exemption.[6] If the stock exceeds the value allowed by statute as exempt, the merchant should make a selection.[7]

under consideration. Their little stocks in trade may be as indispensable to the support of their families as are the tools of a mechanic or miner, the press and types of the printer, or the library of the lawyer. Why should they not have the same protection as the others? And, when we find language in a statute which may fairly be construed as giving them the same protection extended to other classes of debtors, why should not that construction be adopted?"

[1] Gen. Stat. of Kansas, pp. 473-4.

[2] Bequillard v. Bartlett, 19 Kan. 382. This case was criticised in the last one cited, in a paragraph ending: "So nice a distinction is hardly consonant with the elementary principle of construction that exemption statutes should be construed liberally." This reference to liberality of construction is not so convincing, perhaps, as the argument in the Colorado case of Martin v. Bond, *supra*, preceding the quoted remark.

[3] Grimes v. Bryne, 2 Minn. 72.

[4] Hillyer v. Remore, 42 Minn. 254; Gen. Stat. Minn. (1878), ch. 66, § 310, cl. 8; Laws of 1881, ch. 25, § 1; *Re* Jones, 2 Dill. 343. *See* Grimes v. Bryne, 2 Minn. 72; Prosser v. Hartley, 35 Minn. 340; Bequillard v. Bartlett, 19 Kan. 382; Guptil v. McFee, 9 Kan. 30.

[5] Zielke v. Morgan, 50 Wis. 560; Smith v. Turnley, 44 Ga. 243.

[6] Dodd v. Thompson, 63 Ga. 393; Johnson v. Franklin, 63 Ga. 378; Rosenthal v. Scott, 41 Mich. 632; O'Donnell v. Segar, 25 Mich. 367.

[7] Wicker v. Comstock, 52 Wis. 315;

When a statute exempts stock in trade or business to a given amount, it should not be construed to favor unlawful business.[1] It does not exempt burglars' tools, kit and outfit; lottery wheels and stock of tickets on hand, or any paraphernalia of a prohibited company; illicit distillery stock and machinery, and the like.

When the debtor has promised to turn his stock of goods over to his creditor, has he thereby waived his exemption privilege? This question has been answered in the negative.[2] But there is waiver when a merchant fails to select his allowed portion from a larger stock. Thus, when two hundred dollars' worth of goods were selectable as exempt, and the debtor neither selected nor claimed, he lost his privilege.[3]

§ 11. Crops and Provisions.

Courts have been so liberal to debtors in the exemption of crops that they have intimated and even held that the crops used for the family by the head of it, and for seeding and making the next crop, are exempt even though they somewhat exceed in value the original exemption.[4]

The statutes, in some instances, exempt whatever is neces-

Fick v. Mulholland, 48 Wis. 413; Fowler v. Hunt, 48 Wis. 345; Russell v. Lennon, 39 Wis. 570; Walsch v. Call, 32 Wis. 159; Behymer v. Cook, 5 Colo. 395.

[1] Walsch v. Call, *supra*.

[2] Washburn v. Goodheart, 88 Ill. 229.

[3] Zielke v. Morgan, 50 Wis. 560.

[4] The language of a court so holding (speaking of a prior case, Johnson v. Franklin, 63 Ga. 378) is: "It was held that when farm products were set apart as an exemption and used in the support of the family and in making the next year's crop, the crop so made would be exempt, especially if not greater than the original exemption. . . . Here, what was left to make the next crop, after paying for the rent of the land and the support of the family, was scarcely, if at all, more than the original exemption; and *if more*, the spirit and indeed the very words of the case [Wade v. Weslow], 62 Ga. 562, would cover the case. A little exemption, like this, should it enlarge into an improved means of livelihood, may all, as the fruit of what was set apart, be well held not liable to seizure to pay old debts." Kupferman v. Buckholts, 73 Ga. 778. Growing crops are not subject to levy in Georgia. Scolley v. Pollock, 65 Ga. 339. In Alabama, the landlord's lien, for rent and advances on the crop, is not liable to levy or attachment. Starnes v. Allen, 58 Ala. 316. But the landlord may subject the growing crop of his tenant, for rent due, by attachment, when the conditions are such that such remedy may be invoked, under Missouri statute. Crawford v. Coil, 69 Mo. 588; Hubbard v. Moss, 65 Mo. 647.

sary as provisions for the support of the family and the seeding of the next crop, fixing no sum as the *ultimatum:* so, in cases of dispute, the jury decides how much is requisite. The growing crop may be levied upon, so far as it is not exempt, but its maturity must be awaited before sale.[1] The value at the date of sale, when the crop is ripe, is that which is reckoned in a claim for damages for wrongful seizure or conversion.[2]

It does not follow that, because a farm is exempt as homestead, its products are so; for instance, grain produced upon such a farm, and harvested, was held to derive no exemption character from its homestead origin.[3]

Crops are not everywhere exempted to heads of families exclusively.[4]

It was said respecting the attachment of a crop: "It is well settled that the lien of a landlord for rent and advances is superior to all other liens, and will prevail against a claim of exemption, as regards the crops grown on the rented premises. The declaration of exemption not only makes a general claim, but also recites the attachment and its levy, and claims the property levied upon as exempt particularly from attachment. If the relation of landlord and tenant in fact existed between the plaintiffs and defendant in the attachment, and the indebtedness is for rent and advances, and the attachment was issued for the enforcement of the landlord's lien, and the crops levied on were grown on the rented premises, they are subject to the attachment, and the claim of exemption is frivolous and unavailing." [5]

Where exemption prevails even against the landlord's claim, it may be waived expressly, in such broad terms as these: "The benefit of all laws or usages exempting any property

[1] Howard v. Rugland, 35 Minn. 388; McAbe v. Thompson, 27 Minn. 134; Murphy v. Sherman, 25 Minn. 196; Lynd v. Picket, 7 Minn. 128.

[2] Sherman v. Clark, 24 Minn. 37; Hossfeldt v. Dill, 28 Minn. 469; Howard v. R., *supra.* Farm products to the value of $250 are exempt by Howell's Stat. Mich., ch. 266, § 27 (8). Hutchinson v. Whitmore (Mich.), 51 N. W. 451, *distinguishing* McCoy v. Brennan, 61 Mich. 362.

[3] Horgan v. Amick, 62 Cal. 401.

[4] A third of his crop was exempted to a laborer who was not the head of a family. Prince v. Nance, 7 S. C. 351.

[5] Bryan v. Kelly, 85 Ala. 569, 576; *Ex parte* Barnes, 84 Ala. 540.

from distress or execution for rent is hereby waived."[1] On the other hand, the landlord's lien on household goods may be dislodged by sale by the tenant, if notice be given him and he assents to the sale; or if the circumstances be such that his assent may be presumed.[2]

Whether a tenant or other claimant is entitled to the benefit of an exemption law has been held not a proper question to be submitted to the jury, because the statute did not authorize such reference.[3]

There have been many decisions relative to crops and provisions.[4]

[1] Beatty v. Rankin, 139 Pa. St. 358; *distinguishing* Mitchell v. Coates, 47 Pa. St. 202.

[2] Rohrer v. Cunningham, 138 Pa. St. 162.

[3] Swope v. Ross, 29 Ark. 370.

[4] Provender for live-stock has been held to depend for its exemption upon its owner's having such stock. King v. Moore, 10 Mich. 538; Cowan v. Main, 24 Wis. 569. *Contra*, Kimball v. Woodruff, 55 Vt. 229. *See* Farrell v. Higley, Hill & D. 87, and Atkinson v. Gatcher, 23 Ark. 103. A farmer's produce, consisting of potatoes, apples, cabbage, etc., which he was hauling to market to be exchanged for goods of family necessity, was held exempt. Shaw v. Davis, 55 Barb. 389. *See* Hall v. Penney, 11 Wend. 44. A statute, exempting all necessary meat, fish, flour and vegetables actually provided for family use, was held not to include wheat. Salsbury v. Parsons, 36 Hun, 12. But *meal* is included under the statutory exemption of *flour*. Lashaway v. Tucker, 61 Hun, 6. When there is a question as to the necessity of provisions, seed-wheat, etc., it should be given to the jury. Howard v. Rugland, 35 Minn. 388. *See* Murphy v. Sherman, 25 Minn. 196. If the statute points out the thing exempt, there is no need of the debtor to select. Zielke v. Morgan, 50 Wis. 560. As to seed-wheat, *see* Stilson v. Gibbs, 46 Mich. 215. As to garden vegetables: Carpenter v. Herrington, 25 Wend. 370. As to fruit upon trees. Roe v. Gemmill, 1 Houston (Del.), 9. Waiver of exemption is forbidden in some states with respect to certain classes of articles — such as clothes, provisions and household goods. Butler v. Shiver, 79 Ga. 172. *See* Sasser v. Roberts, 68 Ga. 252. Also, corn unhusked. Cochran v. Harvey (Ga.), 14 S. E. 580. "Provisions:" something edible, food, or raw material needing only cooking. A cow is not included. Wilson v. McMillan, 80 Ga. 733. *See* Clement v. Lee, 47 Ga. 626. Food prepared, not for the debtor's private family merely, but for his boarders, was held not exempt. Coffey v. Wilson, 65 Ia. 270; Iowa Code, § 3072. Groceries in stock for sale are not exempt as for family use. Nussberger v. Conner, 73 Mo. 572; Nash v. Farrington, 4 Allen, 157. Judgment had been recovered for necessaries of life furnished to the defendant; and then an action was brought on the judgment, which included the costs of the first suit with the amount adjudicated. *Held*, that the latter was not a suit for "necessaries furnished" the defendant's family, in the sense of the stat-

Provisions furnished for a boarding-house are not contemplated under the phrase "actual necessities of life" for a family. So, a debt contracted for them was held to be not governed by the statute relative to such "necessities." The statute (the court construing, said) "has reference to debts contracted for the necessities for the debtor and his family, and not for debts incurred in carrying on a hotel or boarding-house business."[1]

§ 12. Books, Pictures, Musical Instruments, etc., Outfits of Fishermen and Miners, etc., Specially Exempted.

Books: Special designation of the family bible is made in several states; and, in one or two, a prayer-book and a hymn-book are also exempted. School books and books in family use are also specified in several.[2] The libraries of professional men are exempt, as such, in some statutes, while in others they are protected as implements with which the debtor earns

ute. Brown v. West, 73 Me. 23; Bicknell v. Trickey, 34 Me. 273; Uran v. Houdlette, 36 Me. 15; Bangs v. Watson, 9 Gray, 211. Statutes exempting *necessary* provisions, etc., are construed so as to include things not absolutely essential to life. Montague v. Richardson, 24 Ct. 338; Croker v. Spencer, 2 D. Chip. 68. Perishable articles. Dean v. King, 13 Ired. 20, 24. Stock-hogs, pork and bacon. Byons v. Mount, 89 Tenn. 361; 17 S. W. 1037. Cloth left with a tailor has been exempted as clothing, perhaps ill-advisedly; it might more plausibly be classed with family supplies. *See* Richardson v. Buswell, 10 Met. (Mass.) 506.

[1] Lenhoff v. Fisher (Neb.), 48 N. W. 821: Neb. Civ. Code Proc., § 531.

[2] In Wisconsin the family bible, school books and "the library of the debtor and every part thereof." Rev. Stat., §§ 2982–4. In Oregon "books, pictures and musical instruments owned by any person, to the value of $75." Code, p. 613. In New York books and pictures to the value of $50. Code, § 1390 (2). Massachusetts has the same limit as to books. In Missouri the bible and other books used in the family. In Michigan "the library and school books of every individual and family, not exceeding $150 in value." Maine exempts a family library worth $150, besides school books and bibles. Kansas exempts the same, without that limitation. Iowa, "all private libraries." Illinois, bibles and school books of any person, in addition to other property to be selected within a limitation. In Delaware the family bible, family library and school books are exempt. In Ohio "family books." In Colorado school books and library. In Arizona school books and family library, to $150. And in almost every state there are provisions for exempting such books.

his livelihood.[1] There is a limit of value placed upon such libraries in some states.[2]

One state specially exempts books presented by congress, or the legislature of any state.[3] In that state, circulating libraries are excepted; but, in another, books belonging to public libraries are expressly exempted.[4] Books and papers pertaining to public offices are protected in one state by express provision,[5] while in others they doubtless are covered by general provisions. Manuscripts have been held exempt.[6]

Pictures: Family portraits, pictures and drawings are extensively protected. They are exempted unqualifiedly by some statutes; limited in value, by others; confined to a particular description, in a few. "Hanging pictures, oil paintings and drawings drawn or painted by any member of the family; family portraits and their frames;"[7] "family pictures;"[8] "portraits, pictures . . and paintings not kept for sale;"[9] pictures which, with books and musical instruments, are limited to $75.[10] These will serve to show the usual provisions.

It has already been mentioned that pictures are sometimes classified with household goods or furniture; and doubtless they may be selected and claimed as such by the debtor in making up his list within his monetary limitation of such goods. Where he has the specific exemption of his pictures he would be relieved from selection unless there is limitation as to them in his state and he has more in value than the law allows him to keep. It has been observed that oil paintings and drawings are designated in a statute, while nothing is said of water colors and other kinds of painting. To save the latter, it might be convenient to select them as part of the

[1] Roberts v. Moudy (Neb.), 46 N. W. 1013.

[2] Illustrations: In California, $300; District of Columbia, $300; Idaho, no limit; Vermont, $200 (including instruments); Mississippi, $250. In Missouri professional persons may select books necessary to their calling, in lieu of other things. Several other states exempt professional libraries, some with and some without restrictions.

[3] Rev. Stat. Wis., § 2983.

[4] Texas.

[5] Nevada.

[6] Dart v. Woodhouse, 40 Mich. 399.

[7] Cal. Code of Prac., § 600; Idaho Rev. Stat., 1887.

[8] Colorado, Delaware, Kansas, Minnesota, New Mexico, New York, Ohio, Texas, Wisconsin, etc.

[9] Iowa.

[10] Oregon Code, p. 613.

furniture when that course is allowable. Whether "family pictures" is a phrase broad enough to include a painting by any great artist whose works are very valuable, *quere*.

Musical instruments: A musical instrument may be also an article of furniture; a piano, for instance; and it may be selected as furniture when it is not expressly exempt as such instrument. Musical instruments which do not serve to furnish a parlor or the room, such as violins, harps, etc., have not the double means of escaping execution.

Sewing-machines, etc.: Looms, sewing-machines, knitting-machines and spinning-wheels are frequently found among specific exemptions, while they are also tools or instruments susceptible of being selected and claimed under general exemptions of chattels to a given amount.

Pews, etc.: Pews in churches, used by debtors and their families, are specifically exempted in many states. It has been held that the communion service belonging to a church was not liable to execution under a judgment obtained against the trustees for the pastor's salary.[1] Lettered gravestones are specially exempt in one state.[2] Tombs are so in several.

Fire-arms: Arms are enumerated among the specific exemptions in some statutes; as "one musket or rifle, or a shot gun;"[3] "all arms and accoutrements;"[4] "all arms and military equipments required by law to be kept;"[5] "a sword, horse, medal, emblem or device of any kind, presented as a testimonial for service rendered in the military or naval service of the United States; and the uniforms, arms and equipments which were used by a person in that service."[6] When arms are not specifically exempt, they are liable, unless selected as part of the personalty under a statute allowing the debtor to chose from any kind of it, to a given value. If one kind of arm is expressly exempted another kind is excluded by omission.[7]

Boats: Fishermen and others requiring the use of boats, and their accompanying trappings, are favored by the statutes of several states. A few examples may suffice, as follows: "There is exempted to a person engaged in lightering for his

[1] Lord v. Hardie, 82 N. C. 241; Stith v. Lookabill, 76 N. C. 465.
[2] Missouri.
[3] Iowa, Oregon.
[4] Michigan.
[5] Missouri.
[6] N. Y. Code, § 1393.
[7] Choate v. Redding, 18 Tex. 579.

support, one or more lighters, barges or scows, and a small boat with oars, sails or rigging, not exceeding in the aggregate $250 coin value; and to all persons, a canoe, skiff or small boat, with its oars, sails and rigging, not exceeding $50 in coin;"[1] "the boat, fishing tackle and nets of fishermen actually used by them in the prosecution of their business, to the value of $100;"[2] "one boat not exceeding two tons burden;"[3] "one boat used in fishing, not exceeding $200 in value."[4]

Miners' outfit: In some of the mining states not only the cabin of the miner to the value of $500 is protected but also his necessary apparatus to a like sum, together with the horses needed, and provender for them for a given time. Among the implements enumerated as necessary are a windlass, derrick, car, pump or hoisting gear and hose.[5]

Public personalty: The chattels of municipal and other public corporations, such as books, furniture, etc., are rendered exempt by some of the state statutes. In the absence of express statutory exemption, they may be protected from forced sale because necessary for governmental purposes.

There is exemption of other personalty, such as wages, insurance money, choses in action and interests, which are relegated to the next chapter.

[1] Code of Washington, § 342 *et seq.*

[2] Massachusetts.

[3] R. S. Me., ch. 81.

[4] Connecticut.

[5] *See* Comp. State of Montana, 1887; R. S. of Idaho, 1887, which limits the tools to $200; Gen. Stat. of Nev.; Deering's Code & Stat. Cal., in which, besides $500 for the cabin, and $500 for the tools, there is an additional $1,000 exempted as the maximum value of the miner's derrick worked by himself.

CHAPTER XXVI.

INCORPOREAL THINGS AND MONEY.

§ 1. Exemptible Interests.
2. Wages of Laborers and Others.
3. Wages, Salaries and Earnings.
4. Choses in Action.
5. Set-off Against Exempt Choses in Action.
6. Money Deposited.
7. Fire Insurance Money.
§ 8. Life Insurance Money.
9. Pension Money and Its Investment.
10. Pension Money in Transit.
11. The United States Pension Act: Whether it Exempts Accumulations from the Money.

§ 1. Exemptible Interests.

While there can be no incorporeal homestead, there may be exemption of interests in realty.[1] Whatever may be subjected to execution is susceptible of exemption. There are many intangible things which may be subjected to execution: credits, stock in banks and other corporations, shares in partnership property, rights in an estate, and generally all legal claims. There are some such things which cannot be subjected to execution: rights of way, servitudes of various sorts, all proprietary rights which are inalienable. In the civil law, *res incorporales* are those which are apprehended mentally — not by the touch or by ocular inspection; and the examples above given will illustrate the class. But the Roman jurists carried their idea of such things to a degree of refinement not necessary to the present purpose.

Because execution and exemption are correlative, it must not be inferred that the legislator has exempted all impalpable property which is liable to execution, or has rendered it exemptible to a degree. We must look to the statutes to find what he has done in this respect — not to theories or to what he may do consistently with legal philosophy. With the exception of wages, there is scarcely any incorporeal thing which is actually made specifically exempt in the statutes generally; and this exemption is always under limitation of time or

[1] *Ante*, pp. 6, 121, 131–140.

amount. Other such things are exemptible, upon selection, under the privilege of retaining personalty to a certain value. They are so not merely when mentioned in the statute — a rare occurrence — but when covered by a provision of general tenor which fairly may be construed to include them. There is no reason why a debtor may not claim his interest in a business venture, his shares in a corporation, his claims and credits due him by others, as well as he may claim any *res corporalis*, under such general provision. There is no reason why his interest in a partnership may not be selected as the personal property which he wishes to save when execution is pending and that interest is liable to forced sale. Hereafter it will be shown that partnership property is neither exempt nor exemptible, upon the claim of a member of the firm or of the firm itself; but the interest which a member has in the partnership is his own personal property, and may be claimed by him as exempt, under the general provision above mentioned, whenever that interest is about to be subjected to forced sale. If it is all he has; or if it is a part of what he may select from, there seems to be no obstacle to his having it exempted, upon claim and selection, to the degree of value fixed by the statute of his state.

§ 2. Wages of Laborers and Others.

It is common, in the several states, to exempt the sum due for wages of laborers for the last month or more prior to attachment or the levy of execution. Some of the states have statutes broader than others with respect to this species of exemption; some include the personal earnings of the debtor though they may not come under the denomination of wages, but the common laborer's daily, weekly or monthly moil is generally protected in all.[1]

The word *laborers* designates large classes of persons, en-

[1] Wages are usually exempt either up to a certain sum, or back to a certain date or for a certain time; as, one month, or three months before the levy, attachment or garnishment, or before the date of collection, as the statute may provide. Haynes v. Hussey, 72 Me. 448; Seymour v. Cooper, 26 Kan. 539; Harding v. Hendrix, 26 Kan. 583; Enzor v. Hurt, 76 Ala. 595. The last month's wages being exempt, they were kept within the time and amount by the garnishee's paying to the employé after garnishment, which the court did not disapprove. Davis v. Meredith, 48 Mo. 263; Bliss v. Smith, 78 Ill. 359; Hoffman v. Fitzwilliam, 81 Ill. 521.

gaged in a great variety of employments; such as farm hands, wood choppers, coal heavers, hod carriers, team drivers, cooks, chamber maids, sailors, roustabouts, and the like.[1] There are many other classes composed of men who work with their hands for a living, but whose right to the privileges of a laborer — when the sheriff comes — is sometimes questioned.[2] Ordinarily, the manual worker is a laborer; and the sense in which the word *laborer* is employed in conversational English is that which it has in the more stilted verbiage of statutes. This use would cut off many industrious and deserving claimants of exemption for personal earnings, where the statute favors only the *wages of laborers*.[3]

There has been a disposition to favor railroad and steamboat engineers, traveling merchants, clerks, and many others in responsible and genteel employments, by drawing a line between them and persons in kindred employments who work under contract. Clerks, book-keepers, secretaries, *amanuenses*, typewriters and other like employés whose pay is periodical, and whose service is not rendered under contract of such a character as to take them out of the class of wage-earners, have been accorded the benefit of laws saving wages from the process of garnishment.[4]

[1] Seamen, on an Atlantic coasting voyage, cannot claim the exemption of their wages from garnishment or trustee process, in Massachusetts and Maine. White v. Dunn, 134 Mass. 271; Eddy v. O'Hara, 132 Mass. 56; Ayer v. Brown, 77 Me. 195; Staples v. Staples, 4 Me. 532. *Compare* McCarty v. Steamer New Bedford, 4 Fed. 818. This rule does not prevail in New York. *See* Ross v. Bourne, 14 Fed. 858.

[2] Whether one is a "laboring man" within the meaning of the phrase is a question of law after the character of the service done has been established by evidence. Wildner v. Ferguson, 42 Minn. 112. A "laboring man" is one engaged in manual work. Wakefield v. Fargo, 90 N. Y. 213; Williams v. Link, 64 Miss. 641.

[3] In this sense, livery-stable keepers, itinerant agents, commercial travelers, engineers, clerks in stores, etc., are not "laboring" men. Epps v. Epps, 17 Ill. App. 196; Jones v. Avery, 50 Mich. 326; Powell v. Eldred, 39 Mich. 552; Dove v. Nunan, 62 Cal. 399; Brusie v. Griffith, 34 Cal. 202; S. C., 91 Am. Dec. 695; Coffin v. Reynolds, 37 N. Y. 640; Aikin v. Wasson, 24 N. Y. 482; Short v. Medberry, 29 Hun, 39; Dean v. De Wolf, 16 Hun, 186; Krauser v. Ruckel, 17 Hun, 463; Eviesson v. Brown, 38 Barb. 390. *Contra:* Williams v. Link, 64 Miss. 641. In Minnesota, the title of an act to exempt the wages of laborers was held to include those of a telegraph operator. Boyle v. Vanderhoof, 45 Minn. 31.

[4] Abrahams v. Anderson, 80 Ga.

§ 3. Wages, Salaries and Earnings.

The existence of a contract, or not, is no criterion by which to determine whether one is a laborer working for wages. A common scavenger may operate under a contract to have a daily stipend; a "railroad king" may work hard manually without a contract. Why not construe the words *laborer* and *wages* as they are always understood in common parlance? So understanding, the clerk, book-keeper, commercial traveler, typewriter, telegraph operator, and the like, are not laborers, and their pay not wages, whether working under contract or not. Therefore, to save them something of their earnings from execution, other expressions should be found in the statute than those above noticed. Why not say clerk's wages? Or, better, employ a term that will include all the wage-earners who are not manual workers? Or cover it all under *laborers and other wage-earners.* A term of that kind would not include one working for a share of profits under a contract to that effect, since he could not be called properly the clerk of the other contracting party,[1] nor a wage-earner. It would include one traveling for a firm for monthly pay, by

570, *citing* Lemar v. Chisholm, 77 Ga. 306; Sanner v. Shivers, 76 Ga. 335; Smith v. Johnston, 71 Ga. 748; Hightower v. Slaton, 54 Ga. 108; Claghorn v. Saussy, 51 Ga. 576; Butler v. Clark, 46 Ga. 466; Caraker v. Matthews, 25 Ga. 571. *Compare* Kyle v. Montgomery, 73 Ga. 337, in which the court declared that it would hesitate to hold that clerks in stores, overseers, etc., are to be classed with wage-earners whose wages are protected from garnishment, were the question new; and that it would not further extend the rulings already made on this subject in previous cases. A boarding-house keeper, by his personal service in his business, does not become a wage-earner so as to be entitled to have dues for board exempt. Shelley v. Smith, 59 Ia. 453. *See* Smith v. Brooke, 49 Pa. St. 147. In Iowa, however, dues for personal earnings have been held exempt when not wages. Banks v. Rodenbach, 54 Ia. 695. One's wages may be attached in a suit against him for his own board. Smith v. McGinty, 101 Pa. St. 402. *See* Raschert v. Kunz, 9 Mo. App. 283. As to according exemption to the debtor in Illinois from any money, salary or *wages* due him or her from any person or persons or corporations, *see* Illinois act of May 24, 1877, § 1; Finlen v. Howard, 126 Ill. 259; *distinguishing* Fanning v. Nat. Bank, 76 Ill. 53.

[1] A salesman, paid a share of the net profits and bearing half the losses, by contract with the firm for which he sold, was not a clerk entitled to the benefits of a statute exempting clerk's wages from execution, and the wages of "other persons of that kind." Brierre v. Creditors, 43 La. Ann. 423.

agreement, on a contract to pay a debt to his employers in this way.[1]

Wages and *salary* are terms never confounded with each other when the pay for earnings of manual laborers is meant on the one hand, and that of clergymen and officials on the other. But there is a middle line of money-earners, such as clerks, book-keepers, and salesmen, whose pay is sometimes called *wages* and sometimes *salary*. We would not understand the former term, used in a statute, as including the salaries of preachers, professors, corporation officers and public officials, nor would we ever apply the latter to the compensation of a farm hand or mechanic's employé. The salary of a teacher has been held exempt, under different views (some scarcely tenable),[2] but it ought not to be so held under the phrase "laborer's wages" unqualified.

When the legislator means *salary* he should say so; when he means *wages* he should say so, as the words are understood well enough; but he should qualify when he has reference to the compensation of that class above mentioned which often has either term used to express it. With such legislation, there would be no need of the unsatisfactory rule dependent upon the terms of employment.

Either wages or salary may be exempt under certain circumstances and liable under others.[3] Sometimes they turn upon a question of residence;[4] sometimes upon family head-

[1] A debtor, the head of a family, owing seven hundred dollars to a firm, agreed to travel for them in consideration of a hundred dollars *per* month and his expenses — half of the salary to count on the debt. He served two months, then sued his creditors and recovered $100. Deering v. Ruffner (Neb.), 49 N. W. 771.

[2] Teacher's salary likened to that of a public officer, and held exempt. Allen v. Russell, 78 Ky. 105. *See* Schwacke v. Langton, 12 Phila. 402.

[3] The salary of a husband without children, who was separated from his wife, was not exempt as against her judgment against him for support. Spengler v. Kaufman, 43 Mo. App. 5; *distinguishing* Whitehead v. Tapp, 69 Mo. 415, and Brown v. Brown, 68 Mo. 388. Even the wages of a laborer, though exempt generally, may be attached for his board-bill, under some statutes. Weisman v. Weisman, 133 Pa. St. 89; Pa. Act April 4, 1889, P. L. 23.

[4] In Illinois the wages due a non-resident head of family were held exempt. Mineral Point R. Co. v. Barron, 83 Ill. 365; Ill. Glass Co. v. Holman, 19 Ill. App. 30; Buckingham v. Fisher, 70 Ill. 121. And in Alabama it was held that the removal of a resident to another state did not

ship, though the head of the body be abroad;[1] sometimes upon recording, when the laborer is a commorant.[2] Persons making their livelihood and supporting their families by personal exertions are accorded exemption under various forms of expression giving rise to no discussion as to the terms above discussed. For instance, the earnings of a photographer, by his own hands, during sixty days preceding suit against him, were saved to him from execution on his showing them to be necessary to his family's support.[3] Earnings of other debtors have been protected under statutes saving them for family maintenance.[4]

It has been held, under statute construction, that in a suit by a laborer to recover wages, the defendant (who was his employer) could not have a judgment against the plaintiff, which had been assigned to him before the laborer's suit was instituted, allowed as a set-off.[5]

While wages are thus highly favored by the law when creditors seek to subject them to the payment of the laborer's debts, they are no less so when the suit is by him to recover the price of his labor. The statutes of some states inhibit exemption to defeat a claim for wages. And such a statute has been held constitutional. Personal property of a certain description may be generally exempt, yet liable to execution under a judgment in a suit for wages. This does not violate the requirement of uniformity, and is not class legislation.[6]

work the loss of his right to chattel exemption, if his claim was pleaded before he left. McCrary v. Chase, 71 Ala. 540.

[1] The laborer may be supporting his family in Canada, yet be the head of it in the sense necessary to entitle him to the exemption of his wages in Michigan. Pettit v. Booming Co., 74 Mich. 214.

[2] A laborer, temporarily residing at his working place, is a commorant in the sense of the statute which requires commorants to have their claim to wages recorded at such place to make their assignment of it good against attachment. Pullen v. Monk, 82 Me. 412; Me. R. S., ch. 111, § 6. *See* Wright v. Smith, 74 Me. 495; Ames v. Winson, 19 Pick. 248.

[3] McSkimin v. Knowlton, 14 N. Y. S. 283.

[4] Exempting the earnings of a debtor was held to include the earnings of his team, wages, dray, etc. Kuntz v. Kinney, 33 Wis. 510. Net proceeds of business held to be "earnings." Brown v. Hebard, 20 Wis. 344. The statute extends to the earnings of professional men. McCoy v. Cornell, 40 Ia. 457.

[5] *Post*, § 5.

[6] McBride v. Reitz, 19 Kan. 123.

§ 4. Choses in Action.

A chose in action may be exempted by law. "An exemption can be set apart to a debtor in choses in action as well as any other species of property, . . . and, when so set apart, is free from judicial interference."[1] Under the exemption of personal property, is a chose in action included? That is, does the term *personal property* embrace choses in action? Generally speaking, it does, unquestionably; but the question was raised whether a constitutional provision, that "the personal property . . . to the value of $1,000 . . . shall be exempted from sale on execution . . ." embraced a chose in action not subject to levy and execution. There was no answer by the court, because money — not a chose in action — was the thing sought to be subjected to the satisfaction of the judgment in the case at bar.[2] But the question does not seem difficult; for, though choses in action, considered as property, are certainly personal, only those kinds of personalty which would otherwise be liable to execution can be meant when their exemption is provided for in a constitution or statute.[3] When a chose in action has been set apart

[1] Leggett v. Van Horn, 76 Ga. 795; Jolly v. Lofton, 61 Ga. 154; Frost v. Naylor, 68 N. C. 325; Ballard v. Waller, 7 Jones (N. C.), 84.

[2] Leggett v. Van Horn, *supra*. Money and credits were held exempt as personal property under Ohio Stat. (S. & C.) 1146, in the case of Chilcote v. Conley, 36 O. Stat. 545.

[3] The supreme court of Alabama, in discussing the question whether the phrase *personal property*, as used in the constitution and statute of that state, can be construed to embrace choses in action, said that the question "has been many times decided in the affirmative by the court. In Williamson v. Harris, 57 Ala. 40, it was said that the phrase was used 'in its broadest and largest sense,' and included money in the hands of a garnishee. In Darden v. Reese, 62 Ala. 311, it was construed to embrace promissory notes belonging to a decedent, which the widow was allowed to select under a statute exempting personal property not exceeding in value one thousand dollars; the court observing that there was 'no indication of a purpose to confine her to any kind or species of personal property.' And in Borden v. Bradshaw, 68 Ala. 362, it was held to include a chose in action for damages resulting from negligence in the conduct of a ferry. We have often decided that our exemption laws . . . were to be liberally construed; and such a rule of construction necessarily induces us to attach to the phrase 'personal property,' as used in those laws, a comprehensive signification. It was, in our judgment, intended to embrace everything which is the subject of ownership, not being realty or an interest in realty. The words are

as exempt (as a sum bequeathed to the debtor by his father), it is free from administration and judicial disposition. Of such a bequest it was judicially said: "The court had no jurisdiction under the allegations of the bill to interpose by injunction or receiver. The exemption was allowed for the benefit of the debtor and to the detriment of the creditors; and when properly set apart the courts have no jurisdiction to interfere therewith at the instance of creditors. . . ."[1]

§ 5. Set-off Against Exempt Choses in Action.

In a suit upon a promissory note, the defendant pleaded, as set-off, a debt due to him by the plaintiff. The plaintiff replied by claiming that the note was exempt. There was judgment for the plaintiff; the note was held exempt, and the set-off was not allowed.[2] This decision was rendered under the general statutory provision: "Property, not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution or any other final process."[3] A later decision under this provision, accordant with that above cited, contains the following statement of the question at issue, by the court: "The principal matter in dispute between the parties is whether or not the appellee, under the pleadings and proof, was legally entitled to claim the benefit of the statutory exemption of $600 as against the judgment pleaded by the administrator, as a set-off, in the third paragraph of the answer. The question presented is this: Where an action is brought on an open account, for work and labor, or for goods sold and delivered, or for money loaned, and the defendant in his own name pleads a set-off to the account, in the form of a judgment previously obtained by the said defendant against said plaintiff, can the plaintiff, . . . who would be entitled to the benefit of the exemption on execution, legally plead the same in his reply, and have the claim

declared by the Code to include 'money, goods, chattels, things in action and evidence of debt, deeds and conveyances.' Code, 1876, §§ 1, 2." Enzor v. Hurt, 76 Ala. 595. In Swandale v. Swandale, 25 S. C. 389, the head of a family who was entitled to exemption to the amount of $500 was allowed to claim it out of his share of an intestate's personal estate.

[1] Leggett v. Van Horn, 76 Ga. 795.

[2] Smith v. Sills, 126 Ind. 205; 25 N. E. 881. *See* Junker v. Hustes, 113 Ind. 524.

[3] Rev. Stat. of Indiana (1881), § 703.

which he holds, and on which he seeks to recover, set off to him as exempt from sale or seizure?"

It will be observed that this question puts the statute to a greater strain than did that of the preceding case; for here the action was on an open account — partly for goods sold to the defendant — not on a promissory note; and the set-off was that of a judgment, not an unadjudicated claim of indebtedness. Had this question been wholly pristine, a clear distinction might have been drawn between it and the other. It was treated by the court, however, as settled by prior deliverances, the set-off was disallowed, and the judgment creditor was condemned to pay, with his adjudicated claim left unpaid.[1] The court thus disposed of the argument that the competitive debts had canceled each other and had become extinct by confusion: "The proposition of appellant that,

[1] Coppage v. Gregg (Ind.), 27 N. E. 570. Reinhard, J., for the court: "It has been decided repeatedly that where an insolvent debtor holds a judgment for less than the amount exempt by statute, and that judgment is all the property he owns, the judgment defendant will not be allowed to satisfy it by a set-off of another judgment which the latter holds against him. Puett v. Beard, 86 Ind. 172; Butler v. Bowser, *supra;* Junker v. Hustes, *supra.* We can see no distinction in principle between the question determined by these cases and the one now under consideration. We know of no rule which prescribes to the debtor what kind of property he shall or shall not claim as exempt. If he can claim as exempt a judgment of which he is the owner, no good reason can be shown why he cannot with equal propriety claim an account or a note or any other chose in action. One is as much 'property' as the other, and the same rule of law is applicable to both. See Pickrell v. Jerauld, *ante,* 433 (decided at the present term of this court). The appellant argues that 'if exemption as against a set-off may be claimed, then a plaintiff, although worth a million dollars, may claim exemption of his claim as against a set-off, and thus defeat the defendant, and amerce him in costs, although equity and good conscience requires the plaintiff to pay them.' There would be much force in this argument if the law permitted a millionaire to claim the exemption in such cases; but it only permits this to be done by a party whose entire property, including the judgment or other thing claimed as exempt, does not exceed in value $600. Carpenter v. Cool, 115 Ind. 134; 17 N. E. Rep. 266. We hold, therefore, that the appellee had the right under the statute to demand as exempt the claim which he held against the estate of the appellant's decedent. We think the proceeding against him by set-off was such 'final process' as was contemplated by the framers of the act. We believe the decisions of our own state, as well as the weight of other American authorities, fully sustain this conclusion."

where there are mutual outstanding claims of two parties, they extinguish each other *pro tanto*, though correct as to an abstract statement of law, can have no application here, where property is claimed as exempt from sale or seizure. The equitable or civil-law doctrine of compensation cannot be invoked to strike down a plain constitutional and statutory right guarantied to the impoverished householder. The cases already cited fully recognize, if they do not in terms establish, this principle."[1]

It will be observed that the cases thus far cited, on the subject of set-off, are all from one state; but there have been somewhat similar deliverances in others. That a debtor may have a judgment due him exempted in his favor[2] is a proposition less radical that the one above propounded and judicially sustained. That a laborer may pursue his claim for a sum due for wages to the point of execution, notwithstanding the plea of a judgment as offset by a defendant who had bought it for the purpose, is more nearly parallel.[3] A laborer sued for wages in a sum within the exemption limit. The defendant pleaded, as set-off, a judgment which had been duly rendered against the laborer, and which had been transferred by the judgment creditor to him. He took the assignment of this judgment after he had become indebted to the laborer but before the latter had brought suit. The statute expressly provided[4] that "the defendant may plead, by way of set-off or cross-action, mutual demands held by the defendant against the plaintiff at the time of action brought, and mutual when offered in set-off." The court said: "This provision must be construed with reference to the act of 1871, whereby $30 of the wages of every mechanic and laborer is exempt from 'execution, attachment or garnishment.' Exemption statutes are entitled to a liberal construction. The manifest purpose of the legislature was to exempt this amount of wages from

[1] To the cases alluded to may be added, as bearing on this subject rather pointedly: Dumbould v. Rowley, 113 Ind. 353; Barnard v. Brown, 112 Ind. 53; Taylor v. Duesterberg, 109 Ind. 165; Burdge v. Bolin, 106 Ind. 175. *Compare* Convery v. Langdon, 66 Ind. 311.

[2] Mace v. Heath (Neb.), 51 N. W. 317.

[3] Collier v. Murphy, 90 Tenn. 300.

[4] Tennessee Code, § 3628 (M. & V.). *Vide Id.*, § 2931, Act of 1871.

any kind of coercive process of the law. If such a demand cannot be reached by attachment or execution or garnishment, is it a claim subject to be set off by a claim or demand in no way springing out of the contract under which the wages were earned? We think the exemption laws cannot be defeated by such a construction of the statute concerning set-offs. . . . While the language used in the act of 1871, strictly construed, would protect such wages only from 'execution, attachment, or garnishment,' yet the whole spirit of the act is such that we think this claim would not subject to any manner of legal seizure. 'Seizure' is a word often used in our exemption laws, and this word has been used by the editors of the last revision of our Code as fairly construing the force and meaning of this exemption of wages. While we must look to the original act when any doubt arises as to the correctness of the revisal, yet the word, as used by the revisors, expresses very fully what we take to be included within the meaning of the act of 1871. To subject this claim for wages to a set-off of the kind here offered was to subject exempted wages to a species of legal seizure not admissible. Let judgment be rendered for the amount of the judgment below, and the amount of the judgment improperly allowed to be set off, and costs of appeal." [1]

In the volume containing the report of this case there is another in which the charges for medical treatment in an infirmary were unsuccessfully set off against a claim for laborer's wages. It was a case of garnishment; the garnishee was a railroad company which had established the infirmary for the treatment of its employés; the laborer had consented to become an inmate of the establishment; the garnishee was the pleader of the set-off. It is seen that there are some features different from those of the foregoing case.[2]

Among the older cases there is one in which the offset of one judgment against another was denied on the ground that the first was exempt; that the constitution forbade final process against exempt property; that the judgment was such property (since the first judgment creditor had not the allowed

[1] Lurton, J., for the court. *See* Waite v. Franciola, 90 Tenn. 191; Duff v. Wells, 7 Heisk. 17.

[2] Railway Co. v. Kennedy, 90 Tenn. 185.

amount of chattels without it); and that the crediting of the second judgment against the first would virtually be "final process."[1]

'It will be observed that all of the decisions denying that counter-claims and even judgments upon them may be credited against the exemptionist's judgment look to the rule of liberal construction for support. In the promissory note case, the provision that exempt property "shall not be liable to sale on execution or any other final process" was made to protect the exemptionist in his character of plaintiff, when the defendant was not assailing, but virtually defending on the ground that his indebtedness to the plaintiff had been canceled. In the open-account case the same provision was held to serve the exemptionist-plaintiff as though the pleading of a judgment by the defendant had been a demand for final process.

The case of the denial of a judgment as offset against a laborer's claim for wages was under different statutory provisions. Mutual demands were expressly authorized to be pleaded against each other, but execution or attachment of exempt wages, to a limited amount, was inhibited. These enactments, construed together, were held to give the plaintiff the same protection against his adjudicated indebtedness to the defendant as he would have had if he had been the defendant and his wages had been attached by garnishment. In another laborer's case, under the same statute, garnishment of his employer for the wages was disallowed — the laborer having voluntarily accepted services equivalent to payment. Suppose he had sued his employer: could the latter have set up those services as set-off, under the construction given to the statutes in the other case?

To the exemptionist's suit the defendant always has the right to plead payment. He not only has the right to plead payment in money, but also the giving of goods or services in payment if the plaintiff has taken them as satisfaction for the demand. If there is nothing due to the exemptionist; if the defendant owes him nothing, there can be no judgment in favor of the former. If, instead of a plea of payment, an offset is pleaded, it ought to have equal consideration if the

[1] Curlee v. Thomas, 74 N. C. 54; *Compare* Mallory v. Norton, 21 Barb. 424; Temple v. Scott, 3 Minn. 419. Wilson v. McElroy, 32 Pa. St. 82.

plaintiff has voluntarily received compensation. If a laborer's wages are payable in money, and he owes a debt to his employer payable in service, the debt ought not to be allowed as offset against the demand for wages.

§ 6. Money Deposited.

It is not meant to classify money with incorporeal things, but it is treated in this chapter instead of the last because of some of its peculiar characteristics. It is an index of value rather than the thing which it represents. This is clear where promises on paper are accounted money. Coin is certainly a palpable object. The Roman law writers give money of this kind as a sample of *res corporales*. It differs, however, from most tangible things as to execution. It is judicially appropriated to the satisfaction of a judgment — not executed.

It has already been shown that a debtor cannot claim money instead of goods; that is, he cannot let his goods be sold and then claim their value from the proceeds to the limit of the exemption.[1] The statutes make no specific exemption of money to the debtor; but, since it is personalty, may it not be selected by him under general provisions when it is in bank or in the keeping of a friend, and is therefore liable to be reached by the creditor?

Though a specified sum of cash in hand be not exempted by statute, there is no reason why money should not be saved to the debtor under provisions which allow him personalty to a given amount of value when execution is pending against his property, when it is all that he has or when that is necessary to make up the amount, owing to the inadequacy of the other chattels which he possesses, or when he selects it in preference to other things.

What cash he has in his pocket is not exposed to execution; but what he has on deposit in bank, or in the keeping of friends, is liable to be reached by the creditor when it cannot be claimed as exempt; so, money thus situated comes under the provisions above mentioned. The debtor, when privileged to select the personalty he prefers, to the statutory limit of exemption, may choose his money.

It has been decided repeatedly that money deposited in

[1] *Ante*, p. 784.

bank and money due but not collected are subject to selection as exempt.[1]

§ 7. Fire Insurance Money.

Is the exemption of personal property to be understood as applicable to money paid for insurance after the property has been lost by fire? Take this statute: "If the debtor is a resident of this state, and is the head of a family, he may hold exempt from execution . . . books, instruments. . . ."[2] A physician's library and instruments were exempt under this act, and they were consumed by fire; he was a resident, and married: was the insurance money exempt? The court before which this question came, answered affirmatively. It admitted that "there is no provision as to the exemption or liability of the proceeds or avails of such property when disposed of by sale or otherwise." There is none, when such property is burnt. The court mentioned no ambiguity in the statute, to be interpreted either liberally or strictly, but said that the statute must be interpreted liberally, because its purpose is to secure to the debtor the books, instruments, etc., necessary to the making of his livelihood; to secure food, raiment and shelter to dependent families: hence the court concludes that if exempt articles be insured, and then lost, "the indemnity secured by insurance stands in the place of the books." The court argued: "It is plain that a trespasser, by appropriating the property and converting it to his own use, cannot make it subject to the payment of the owner's debts by holding the value of the property the measure of the debtor's damages for the trespass, subject to garnishment by creditors. If he could do this, it would be a convenient method to defeat the exemption of the statute. . . . The debtor . . . has the authority to change the articles of exempt property by sale and purchase, exchange, or otherwise. He cannot be presumed to have abandoned his right to this authority until he has had an opportunity to exercise it. The creditor cannot complaim of its exercise. He is defeated

[1] Fanning v. First N. Bank, 76 Ill. 53; Jones v. Tracy, 75 Pa. St. 417; Strouse v. Becker, 44 Pa. St. 206; Carter v. Carter, 20 Fla. 558; Houghton v. Lee, 50 Cal. 101; Frost v. Naylor, 68 N. C. 325; Probst v. Scott, 31 Ark. 652.

[2] Ia. Code, § 3072.

of no right thereby. The property is held free of his debt, and he is not prejudiced by the change to the other like property."[1]

The reasoning of the court will probably find favor beyond the state where the decision is law. It is certainly good for the legislature; and if the indemnity money for exempt chattels lost by fire were declared legislatively to be exempt everywhere, creditors would not be injured, since exempt things would thus become exempt cash of equal or less value. It is likely that the legislators who made the act above interpreted would have exempted such money had this additional legislation been proposed. Courts have read between lines frequently when construing homestead statutes — perhaps almost necessarily. But this view is not taken always. Money for exempt property destroyed has been held not exempt.[2]

§ 8. Life Insurance Money.

By a statute exempting five hundred dollars annually paid by a husband as premium on his policy of insurance on his own life for the benefit of his wife, it was decided that when the annual premium exceeds that sum, his creditors may sue to recover the surplus while both husband and wife are living.[3] But it had been previously held (and the case was now not disapproved, but distinguished) that the creditor's claim must antedate the payment of the premium when he seeks to reach the excess.[4] But the creditor must be such within the meaning of the statute; so, a receiver, appointed to represent the husband, cannot sue and recover the excess of premium.[5]

[1] Reynolds v. Haines (Ia.), 49 N. W. 851. The court, through Chief Justice Beck, said: "These doctrines and conclusions find support in the following decisions of this court: Kaiser v. Seaton, 62 Ia. 463; . . . Mudge v. Lanning, 68 Ia. 641. . . . See, also, cases cited in Kaiser v. Seaton, *supra*, and the following: Evans v. Harvester Works, 63 Ia. 204; . . . Brainard v. Simmons, 67 Ia. 646; . . . Leavitt v. Metcalf, 2 Vt. 342; Mulliken v. Winter, 2 Duv. 256; Tillotson v. Walcott, 48 N. Y. 188. Counsel for plaintiffs cite Wooster v. Page, 54 N. H. 125. It is not in harmony with our conclusions."

[2] Monniea v. German Ins. Co., 12 Ill. App. 240.

[3] Stokes v. Amerman, 55 Hun, 178.

[4] Baron v. Brummer, 100 N. Y. 372.

[5] Masten v. Amerman, 51 Hun, 244; McEwen v. Brewster, 17 Hun, 223; Farnsworth v. Wood, 91 N. Y. 308; Underwood v. Sutcliffe, 77 N. Y. 58; Dubois v. Cassidy, 75 N. Y. 298; Williams v. Thorn, 70 N. Y. 270; Browning v. Bettis, 8 Paige, 568.

When the law limits the amount of annual premium which one may pay in insuring his life for the benefit of his widow or children, creditors may levy upon the insurance money when due, in the proportion which the excess of the rate allowed bears to the whole rate paid. The balance goes exempt into the hands of the widow or children. It matters not whether the policy be home or foreign.[1]

When the limitation is as to the policy (restricting it to ten thousand dollars, for instance), which one may take out in behalf of another free from liability for his own obligations,[2] the object is exemption in favor of the beneficiary from the debts of the insured. But, suppose the beneficiary pays the premiums — he is not protected from his own creditors in the enjoyment of the insurance money when due.[3]

§ 9. Pension Money and Its Investment.

Pension money and its proceeds have been exempted by "An act to exempt from judicial sale the pension money paid to any person by the United States government, and certain proceeds and accumulation thereof."[4] By section 1, "All money received by any person, resident of the state, as a pen-

[1] Cross v. Armstrong, 44 Ohio St. 613. *See* Cent. L. J., Nov. 11, 1892.

[2] Miss. Code, 1880, § 1261.

[3] Yale v. McLaurin, 66 Miss. 461. "Appellee took out a policy of insurance upon the life of her husband for the sum of two thousand dollars, upon which she paid the premiums. . . . The manifest purpose and end of the statute is to secure to the beneficiary of a life policy the proceeds thereof, freed from liability for the debts of another by whom the premiums have been paid." They were not exempt as against her own debts. *Ib.* Life insurance money is exempt in Minnesota, as stated in the case of Brown v. Balfour, 46 Minn. 68. In Tennessee, $58,000 of life insurance on the husband, payable to the wife, was held exempt though he was insolvent when he insured his life and he had paid in premiums more than the debt sued on. Harvey v. Harrison, 89 Tenn. 470. In Alabama, though a husband had waived his exemption as to personal property in a promissory note, the proceeds of his insurance policy in favor of his wife were held to be hers absolutely at his death. Craft v. Stoutz (Ala.), 10 So. 647; Ala. Code, § 2356, limiting annual premiums to $500. In New York a widow, who has the proceeds of her deceased husband's life insurance in her possession as her own, cannot hold them as exempt against her own creditors. Millington v. Fox, 13 N. Y. S. 334; Crosby v. Stephan, 32 Hun, 478. *Contra*, Leonard v. Clinton, 26 Hun, 288; Austin v. McLaurin, 1 N. Y. S. 209. *See* Hise v. Ins. Co. (Ky.), 13 S. W. 369.

[4] Acts of 20th Gen. Ass. of Iowa, ch. 23.

sion from the United States government, whether in the actual possession of such pensioner or deposited, loaned or invested by him, shall be exempt from execution or attachment or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not." The second section exempts the homestead of such pensioner if purchased with such money or its accumulations. This statute has been construed with a liberality seemingly carried to extremity.[1]

To render exempt *the property purchased* by pension money, it must "inure wholly to the benefit of the pensioner."[2] And it is held that property so purchased may be exchanged for other property, and that the latter will be exempt because indirectly bought with the pension money. The properties thus successively protected by reason of the kind of money invested in the first of a series need not be homesteads or specific chattels favored by exemption laws but any species of property, real, personal or mixed. The original purchase may be exchanged for more valuable property, and successive exchanges by good bargains may greatly enhance the means of the pensioner, but the statute cited, as construed, renders the latest acquisition exempt.

A pensioner bought a horse with pension money, and then swapped him for a better one, giving nothing to boot: the new steed, with its excess of value, was held exempt.[3]

[1] Diamond v. Palmer, 79 Ia. 578. *Compare* the dissenting opinion of Chief Justice Rothrock, at p. 581. *See* Smythe v. Fiske, 23 Wall. 374.

[2] Crow v. Brown, 81 Ia. 344; 46 N. W. 993; Dean v. Clark, 81 Ia. 753; 46 N. W. 995, *overruling* Foster v. Byrne, 76 Ia. 295; 35 N. W. 513, and 41 N. W. 22, and Triplett v. Graham, 58 Ia. 135; 12 N. W. 143.

[3] Smith v. Hill, (Ia.), 49 N. W. 1043. Rothrock, C. J.: "The amount in controversy does not exceed $100, and the appeal comes to us by a certificate of the trial judge, which is in these words: 'It is hereby certified that the following question of law is involved in the decision of the above entitled cause, upon which it is desirable to have the opinion of the supreme court, viz.: The defendant James A. Hill is a pensioner of the United States, and a resident of the state of Iowa, and has been for more than ten years last past. That in the month of January, 1888, he purchased a horse for $65, the entire purchase price of which he paid out of moneys received as such pensioner. Thereafter he made an even exchange of said horse for another, which it is agreed is now, and was at the time of the levy of the attachment in this action, worth $125. Is the defendant entitled to the horse last mentioned, as exempt property, under section 4305, McClain's Code, being sec. 1, ch. 23, Laws 20th Gen.

The state statute, as construed, not only saves original purchases and property or money received in exchange for them, but also all accretions — the increase of stock from domestic animals bought with pension money — accumulations of any character from the original investment. As the law of a state, settled by the courts there, it may be unprofitable to discuss it; but as an interpretation or application of the statute of the United States on the subject, it will not be improper to consider its bearing in connection with that law, with a view to its influence on other states.

Assem., or has the creditor a right, in an action at law, to have the property sold, and the excess over the amount originally invested by the pensioner subjected to the payment of his debt?' The section of the Code referred to in the certificate is as follows: 'All money received by any person resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution or attachment or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not.' If the defendant had not traded horses, but had kept the one first purchased for $65, and paid for with pension money, the horse would have been exempt. No additional money from any source is invested in the horse in controversy. The whole investment in this horse was pension money. It is true it was not a direct investment. But construing exemption laws liberally, as we always do, we think there should be no partition of this horse between the pensioner and his creditors. The result of such a construction of the statute would be to compel the pensioner to retain the identical horses, cows and other property purchased with his pension money, or to prevent him from investing it in any property. The horse in question is exempt to the extent of the pension money invested in him; and because the pensioner may have made a good trade, and procured a horse worth more than that amount, appears to us to be no reason for ordering the horse to be sold, and the pensioner paid his pension money back, and the balance paid to his credit. It is conceded by the certificate that the money invested in the horse is exempt, but that because he is of more value than the pension money the excess of such value is not exempt. It seems to us this rule would require pensioners to be careful that they did not invest the exempt money in property worth more than the money paid for it. There is nothing in this opinion inconsistent with the case of Diamond v. Palmer, 79 Iowa, 578, 44 N. W. Rep. 819. In that case it was held by a majority of the court that, where a pensioner paid for the services of a stallion with pension money, it gave him an exempt interest in the colts, the dams of the colts being exempt because purchased with pension money. In the case at bar the horse in question represents pension money, and nothing else. There was not one cent of any other money invested in him. Reversed."

§ 10. Pension Money in Transit.

The federal statute itself merely provides that the pension money "due or to become due to any pensioner" shall be exempt in the hands of any officer or agent and "shall inure wholly to the benefit" of the pensioner.[1] This has generally been construed and understood to mean that the pension money shall be exempt till it reaches the pensioner's hands — not afterwards — nor when it has been converted into land or other property. The property purchased with pension money has not been generally held exempt by virtue of the federal statute.[2]

The reasons may be drawn from the face of the statute. The money due or becoming due is the subject. *It* shall not be liable to attachment levy or seizure in the hands of any officer or agent, i. e., the unpaid sum coming to the pensioner shall not be liable — not the paid money afterwards or property bought with it afterwards. *It* shall inure to the benefit of the pensioner only — not to assignees, pension agents, creditors or anybody else — to him only, and shall be paid to him only. *It* shall not be seized, attached or made to inure to another person's benefit while in course of transmission to the pensioner; but, when transmitted to him it is no longer inviolable so far as the statute provides, for on that subject it is silent.

This facial meaning accords with the same statute which inhibits the pensioner from selling or pledging any part or interest of his pension before he gets it. And it accords with other federal statutes, containing like provisions to protect

[1] U. S. Rev. Stat., § 4747: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, but shall inure wholly to the benefit of such pensioner."

[2] Rozelle v. Rhodes, 116 Pa. St. 134; Jardain v. Association, 44 N. J. L. 376; Kellogg v. Waite, 12 Allen, 529; Friend v. Garcelon, 77 Me. 26; Crane v. Linneus, 77 Me. 61; Payne v. Gibson, 5 Lea, 173; Cranz v. White, 27 Kan. 319; Stockwell v. Bank, 36 Hun, 583; Spelman v. Aldrich, 126 Mass. 117; Robion v. Walker, 82 Ky. 61; Faurot v. Carr, 108 Ind. 126; McFarland v. Fish, 34 W. Va. 548; 12 S. E. 548; *distinguishing* Hissem v. Johnson, 27 W. Va. 652, and the able dissenting opinion of Judge Robinson, in the case of Crow v. Brown, *supra*, which has helped the writer to most of the foregoing cases.

the beneficiary from losing or jeopardizing the benefit intended for him by the granting of the pension, as suggested virtually in the dissenting opinion above cited.

The investment of the money by the recipient of the pension is not *the* subject, or *a* subject, of the statute. The inviolability of the cash itself, after the pension office has paid it to him, is not a subject of the statute. He certainly may buy what he please with the money. He may buy a stock of goods — a house and lot — a farm. Suppose the money invested in a home, is the statutory provision: it "shall inure wholly to the benefit of such pensioner," applicable to the home? May the home, purchased by pension money, not become a basis of credit like other realty of his? How can we find in the statute that the home purchased shall not inure to the benefit of a creditor?

Congress does not seem to have designed to pass an exemption law, but merely to have meant to protect the pension money till it should reach the hands of the beneficiary — or, rather, to pass an exemption law relative to the pension in transit.[1]

[1] Robinson, J., in his dissent in the *Crow* case, *supra*, points out some cases wholly or partially favoring the majority opinion: "The doctrine of the majority opinion was approved in Falschow v. Werner, 51 Wis. 87; 7 N. W. 911, and so far as I am aware it has been approved by no other court of last resort, although something in the nature of a *dictum* was said in approval in Hayward v. Clark, 50 Vt. 617. It is interesting to note, in this connection, that the only case cited by the supreme court of Wisconsin to support its views is Eckert v. McKee, 9 Bush, 355. That case, so far as it supports the doctrine of the Wisconsin court, was overruled by the court which decided it in Robion v. Walker, *supra*. It has been held that, before the pension check is cashed, it so far represents money in the course of transmission that it may be disposed of by the pensioner and the pension money thus placed beyond the reach of creditors of the pensioner. Farmer v. Turner, 64 Ia. 690; 21 N. W. 140; Hissem v. Johnson, *supra;* Hayward v. Clark, *supra*." The question whether congress has power to exempt pension money after its passage to the pensioner's hands is then noticed by the dissenting judge, as follows: "The appellee contends that congress has no power to exempt from execution pension money after its payment to the pensioner. That power was questioned in Webb v. Holt, 57 Ia. 716; . . . in Hissem v. Johnson, *supra*, and in Cranz v. White, *supra*. It was referred to but not determined in United States v. Hall, 98 U. S. 343; — that case going no further than to hold that congress may enact laws to protect pension money until it shall have passed into the hands of the pensioner. The power to enact laws,

§ 11. The United States Pension Act: Whether it Exempts Accumulations from the Mouey.

The argument for the construction of the statute so as to render the pension money, with its purchases, invulnerable after the date of its lodgment in the pocket of the pensioner, is that the clauses forbidding seizure before such lodgment, and declaring that the pension money shall inure wholly for his benefit, are incompatible with "the idea that it can be seized after it comes into his possession." The inhibition, of seizure before, was already the law, and its reiteration in this statute would have been supererogatory, it is argued. And it is further contended that the act of congress is an exemption statute, with sole purpose to keep off creditors from pension money. And finally, that, being an exemption act, it should protect property purchased with it so as to secure to the "pensioner" the whole "benefit," which would not be the case if the property becomes liable for his debts. Then

which shall have the effect necessarily given to the section under consideration by the opinion of the majority, is not expressed in the constitution; and, if possessed by congress, it is an implied or incidental power. In the view I take of the statute it is not necessary to determine whether that power exists; but the fact that, if exercised, it would create in many, if not all, the states a new class of exemptions, and would be contrary to the general policy of congress not to interfere unnecessarily with the domestic affairs of the several states, is an additional reason in favor of the conclusion that congress did not intend to exempt property in the hands of the pensioner, purchased with the pension money, from liability for his debts, but did intend to leave the matter of creating such exemption to the discretion of the state legislature. Happily the general assembly of Iowa . . . has extended the protection provided by congress to investments made by the pensioner, and the question involved in this case will be of interest in comparatively few cases. [True in Iowa but not out of it.] Believing as I do, however, that the construction of the federal statute adopted by the majority is not sanctioned by the rules of construction, and that it does not effectuate the intent of congress, I can but dissent from their opinion. Certainly the prior decisions of this court should not be overruled, and the great weight of authority disregarded, unless for reasons so convincing as to leave little room to doubt the correctness of such a course. . . ." *See* Judge Robinson's dissent in full — especially his review of the decisions of several states. The question, in other states, will be aided by this case, considered not as authority, but as containing reasons. So a dissenting opinion may be as important to them as that of the majority.

it is said that such exemption act should be liberally construed in favor of the debtor.[1]

The writer will present some thought upon those arguments, though with diffidence and with high respect for the jurists who have advanced them. It is true that pension money is not attachable or otherwise seizable by creditors while it is held by the government through any of its officers, and there was no necessity for a repetition of what was law before this statute was passed; but to infer that therefore a repetition means that the money shall not be attachable or seizable when it no longer "remains with the pension officer, or any officer or agent thereof," seems unwarrantable.

Where is the incongruity in the money being attachable, and its inuring wholly to the pensioner's benefit? The pensioner wholly has the benefit of the pension if he gets a debt paid with it. He has it as clearly as though he had bought a farm with it. An honest pensioner will prefer to pay a debt and have no farm, rather than have a farm and not pay the debt. He is benefited by becoming rid of debt, whether he pays out the pension money voluntarily or has it paid out for him under a judgment.

The act of congress is not primarily an exemption act, and hardly has an exemption feature, since its protection of the pension from seizure while yet in government hands is said to be supererogatory, and it has nothing to say about it after its reaching the pensioner's hands — the money not presumably being kept apart from other funds but such disposition made of it as he thinks fit. Supererogatory legislation does not justify the judicial substitution of something not mentioned in the statute. It may awaken inquiry, and courts may look to see what shadow it casts — whether there is anything implied; but statutes are not to be *extended* because meaningless so far as they go.

Evidently this is no more an exemption statute than a law forbidding the attachment of a debt before it is due, or prohibiting the seizure of goods in transit, or the levy upon

[1] Crow v. Brown, *supra*, in which the dissenting opinion of Beck, J., in Foster v. Hannum, *supra*, and that of Rothrock, J., in Webb v. Holt, *supra*, are referred to for the reasons of the decision overruling those cases.

assets while in course of probate administration, would be. And, not being such, the ever-repeated plea for the liberal construction of exemption statutes is not applicable to this statute. It ought to be liberally construed, because it is a pension act designed to benefit soldiers; not because of its being an exemption act (except that it is true that non-liability to "attachment, levy, or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof," is such), for that feature had been anticipated by prior act and decision, and is supererogatory, as it is said.[1]

If this federal statute means that pension money paid to the pensioner, and its proceeds and accumulations and property purchased with it, are exempt, is not the above mentioned state statute so providing a work of supererogation? Such money, held or invested by him, is protected by the act of congress from execution or attachment or seizure by or under any legal process whatever (as the state law has it), if the federal law is such an exemption act as claimed. This is no argument against the court's view, since it is quite competent for a state legislature to repeat congress on such a subject, but it seems improbable that it would mean to do a useless thing.

The state statute above discussed has been further construed as forbidding the application of the pension money of an insane pensioner to reimburse the county for her support in the county-house after that statute took effect. Whether it could be applied for her support there before that time was a question upon which the judges were not all in accord, but it was answered in the negative to comport with a former ruling.[2]

[1] U. S. Rev. Stat., § 4765; Buchanan v. Alexander, 4 How. 20.

[2] Fayette County v. Hancock (Ia.), 49 N. W. 1040. Robinson, J.: "In May, 1861, Jane Nicoll was duly adjudged to be insaue by the proper authorities of Fayette county, and was committed to the Iowa hospital for the insane, where she was confined until the 21st day of April, 1873. At that time she was removed to the poor-farm of plaintiff, where she has since remained. She is now, and has been at all times since May, 1861, insane. For many years she had pending an application for a pension on account of her husband, who had been a soldier of the United States during the war of the Rebellion. The application not having been allowed after the lapse of several years, the plaintiff, with the intent to be reimbursed for its expenses in supporting Mrs. Nicoll, employed an attorney to prosecute the claim, and paid $10 for that purpose. In

In the case so construing, the pension money had already reached the hands of the pensioner, being in those of the guardian of the insane woman, which was the only payment to her which was legally possible. The federal statute, therefore, did not touch the case. The state statute, which extends the federal provision (that the money "shall inure wholly to the benefit of the pensioner" while in the treasury or in transit) so as to render it exempt *after* it reaches the pensioner's hands, was now farther extended by construction to protect the pensioner from payment for her own board and nurse-

November, 1882, on the application of plaintiff, H. P. Hancock was appointed guardian of the estate of Mrs. Nicoll, and, having qualified as such, entered upon the discharge of his duties. In December, 1888, the claim of Mrs. Nicoll was allowed, and a sum of money, stated in argument to be about $2,400, was paid to defendant for her. The money so paid comprises all the property of Mrs. Nicoll which defendant has received. In March, 1889, plaintiff filed against defendant for allowance a claim for $3,003.14, for expenses incurred in adjudging Mrs. Nicoll insane, in paying her expenses at the hospital for the insane, in supporting her at its poor-farm, and for money paid in prosecuting her claim for a pension. Defendant filed objections to the claim on several grounds, one of which was that the money in his hands was not liable for the payment of the claim, because it was money received from the United States as a pension. In April, 1890, the board of supervisors of plaintiff remitted all of its claim in excess of $1,800. In June, 1889, the court, by consent of parties, ordered the defendant to pay to plaintiff for the support of Mrs. Nicoll the sum of $2 per week, and of that order no complaint is made. On the final hearing the court allowed plaintiff the sum of $1,730.83, and from that order the defendant appeals. The order did not, in terms, require the payment of the amount specified from pension money, but the pleadings and stipulations in the case show clearly that defendant had no other funds, and that the controversy was over the appropriation of the pension money for the payment of the claim of plaintiff. It is evident that the order was designed to be an appropriation of the pension money to the amount specified, and must be treated by us as having that effect. The money in question is in the possession of the guardian of the estate of the pensioner, and therefore is constructively in her possession, and not in the course of transmission to her. The estate of an insane person, subject to execution, is liable for the expenses incurred by the county in his support. Code, § 1433. The right to be reimbursed for such expenses, if not waived by the board of supervisors, is similar to the right to recover from the estate money for any other legal purpose, and is governed by the same rules. We are required to determine in this case whether the pension money of an insane person, received from the United States after chapter 23, Acts 20th Gen. Assem. Iowa, exempting pension money, took effect, is liable for expenses incurred and paid by the

care in an almshouse. Would the pension money not inure to the insane woman's benefit by paying for such necessary support? True, her obligation was a debt; and if the statute means what it is now construed to mean, the county had notice, upon the promulgation of the act, that the pension was exempt from such a debt. May the pension money, in possession of the guardian of the insane woman, be applied now to defray her passing expenses from month to month? If not, in what way can it be used so as to "inure" to her "benefit?" *

county in which such person has his legal residence for his support. We are agreed that the pension money is not liable for such expenses incurred after the act named took effect, and before an order appropriating money for future support is made. Whether it can be appropriated by an order providing for expenses to be thereafter incurred is a question not invoived in this case, and not determined. In regard to the right of the county to have appropriated pension money received after the act named took effect, for expenses incurred and paid by it in support of the insane pensioner before that time, we are not agreed. As to that, the rule announced by the majority of this court in Crow v. Brown (Iowa), 46 N. W. Rep. 993, governs. The writer adheres to the views expressed in the minority opinion in that case, but the other members of the court are satisfied with the views expressed in the majority opinion, and the order of the district court is therefore reversed."

* Additional sections to this chapter, on the money and necessaries usually allowed for the temporary support of widows and orphans of decedents while estates are being settled, would not be strictly congruous with the general subject in hand. Although such allowances are free from the claims of creditors, they are not embraced in the exemption statutes, and they properly belong to another branch of the law. The topic is comprehensively treated in Schouler's work on Executors and Administrators, §§ 447-457, and the authorities cited are brought up to a comparatively recent date.

CHAPTER XXVII.

EXEMPTION ENFORCED.

§ 1. Debtor's Schedule.
2. Schedule and Appraisement.
3. Appraisement of the Widow's Allowance.
4. Remedies for Wrongful Levy.
5. Damages Dependent on Legality of Claim for Exemption.
§ 6. Replevin.
7. Burden of Proof.
8. Laches and Passive Waiver.
9. Waiver in Promissory Notes.
10. Notice — Rank of Creditors.
11. Mortgage, Relative to Waiver.

§ 1. Debtor's Schedule.

No prescribed form: The selection of exempt articles and the notification of the officer are usually attended with no formal procedure. When the exemption is absolute, the officer is bound to recognize the debtor's right; when it is such that the officer should have notice of the claim, an oral demand is usually sufficient, since the statutes have no form for it, as a general thing. Form ought to be followed when any is prescribed. A schedule must be filed when that is required. The claim may be made by letter addressed to the sheriff. All that is necessary is that the officer in charge of the execution be brought to a knowledge of the debtor's claim for exemption to the amount accorded by statute.[1] Thus, a debtor was held to have made a sufficient selection and notification when, of three horses attached, he claimed to own but one and refused to select from the three, though it afterwards appeared that he owned all. His action was honest and disingenuous, and his notice to the sheriff on the day of sale was held to be in time and sufficiently formal.[2]

To claim what the law allows, when the claimant does not possess it, is futile. One who claimed a horse in his schedule,

[1] Keller v. Bricker, 64 Pa. St. 379; Diehl v. Holben, 39 Pa. St. 213; Bowman v. Smiley, 31 Pa. St. 225; Finnin v. Malloy, 33 N. Y. Sup'r, 382, 390; People v. Palmer, 46 Ill. 402; McCluskey v. McNeely, 8 Ill. 578; Clark v. Bond, 7 Bax. 288; Simpson v. Simpson, 30 Ala. 225; Mark v. The State, 15 Ind. 98; Bryan v. Kelly, 85 Ala. 569.

[2] Plimpton v. Sprague, 47 Vt. 467; Haskins v. Bennett, 41 Vt. 698.

and bought one afterwards to be covered by the claim, did not come within the law.[1] And a claim or exemption beyond articles enumerated in a statute, or the constitution of the state (as the case may be), is void.[2] For, though construction is not strict,[3] yet the rule, that what is not enumerated is excluded, is always observed.

When necessary: Whether a debtor must file an inventory of his property, when claiming chattel exemption, has been held, under statute, to depend upon the time of claiming — whether before or after the levy. If before, no inventory is required, unless there is demand in writing for it, by the creditor,[4] made before the term in which the process is returnable. If the debtor claim after levy, there must be an inventory accompanying the claim. When attached movables, credits or choses in action are claimed as exempt, and they are held by a garnishee, the claim must have an inventory of the claimant's property filed with it. The lack of inventory, when one is legally required, will warrant the creditor in asking judgment. If the list is filed but is not complete, the plaintiff may require completion or may accept the list as it is, at his option.[5]

No inventory was thought necessary when money had been attached by garnishment and was claimed by the defendant as exempt;[6] but when property seized under a distress warrant was claimed as exempt, an inventory or schedule was required.[7] The difference was not between money and goods, but between the statutes under which the seizures were made, as construed.[8]

A schedule is held necessary when required by statute, though all a debtor's property be exempt, and he offer to surrender it, on a petition for his personal release from custody.[9]

A debtor, having furnished his schedule to an officer in charge of an execution against his property, and claimed all

[1] Smith v. Eckels, 65 Ga. 326.

[2] Duncan v. Barnett, 11 S. C. 333.

[3] Washburn v. Goodheart, 88 Ill. 229.

[4] Menzie v. Kelly, 8 Ill. App. 259.

[5] Tonsmere v. Buckland, 88 Ala. 312; Ala. Code (1886), §§ 2521, 2525.

[6] Decatur Co. v. Deford, 93 Ala. 347; 9 So. 454. *Compare* Tonsmere v. Buckland, 88 Ala. 312, and *Ex parte* Redd, 73 Ala. 548.

[7] Ehle v. Deitz, 32 Ill. App. 547.

[8] Ala. Code, § 2533.

[9] Stricker v. Kubusky, 35 Ill. App. 159; Act concerning Insolvent Debtors (1872), §§ 8, 9.

the chattels mentioned in it as exempt, further claimed that his realty (which the officer had levied upon) should contribute to his exemption so much as to make up what the personalty lacked of six hundred dollars — the statutory maximum. The sheriff sold the land and refused to give any of its proceeds to make up the exempted sum: whereupon, the debtor sued him, and made allegations equivalent to the above statement, which the court deemed sufficient as to the debtor's duty relative to claim and schedule.[1]

In litigation, when the debtor alleges that he filed his schedule with the sheriff, he ought further to make such averment as will show that it was made and filed as required by statute.[2]

Omissions: If the officer in charge of an execution mislead the debtor as to matters of fact, and cause him to fail to file his schedule, he does not cut the debtor off from all subsequent right to claim. Though the law may have fixed a time within which the schedule should be filed, it seems that he is not held to the time when misled by the officer.[3] Of course, the debtor cannot plead ignorance of the law and thus excuse his laches; but he is not presumed to know facts; and he naturally would look to the officer in charge as to a disinterested person whose words are reliable. Indeed, does prescribed time begin to run before official information is received, where the statute makes it the duty of the officer to give it? The statutes do not, everywhere; not in the state of the above cited case, it seems; yet the debtor's excuse was respected, when sued upon his bond given to replevin goods, in the hands of an officer, which he claimed as exempt. The court held that it was the duty of the officer to give the debtor informa-

[1] Chatten v. Snider, 126 Ind. 387. *See* Robinson v. Hughes, 117 Ind. 293; Ind. Const., art. 1, § 22; R. S. (1881), §§ 67, 703. *Compare* Vogelsong v. Beltzhoover, 59 Pa. St. 57. Realty and personalty both go to make up the exempt sum, in Indiana, where there are no *Homestead Laws*, technically speaking. Realty, worth less than the exemption authorized by law, may be set off to the widow, much as under a homestead law. But, in such case, it was held liable for a privileged debt. Fleming v. Henderson, 123 Ind. 234. If the realty and personalty of the judgment debtor is worth no more than the amount exempted, the sheriff is not bound to make levy. State v. Harper, 120 Ind. 23.

[2] Over v. Shannon, 75 Ind. 352.

[3] Morrissey v. Feeley, 36 Ill. App. 556.

tion of the writ of execution when serving it. If done, the debtor could have claimed in due time.

In making his schedule, the debtor ought to sign it regularly; but his signature in the body of the affidavit has been allowed[1] — even its entire omission was not fatal after the officer had received it without objection, taken the debtor's affidavit upon it, and carried it off without calling the debtor's attention to the lack of signature.[2]

The delay or neglect of the officer to cause appraisement to be made at the proper time is no fault of the debtor; so, if sale take place without it, the debtor may claim his exemption from the proceeds of the sale instead of suing the officer for damages, in some jurisdictions.[3] In others, he may take the latter course, or he may recover the exempt property even from an innocent purchaser.[4]

Where the probate judge orders the payment and investment of money due to debtor, the latter may make his schedule after such order, and then the judge may grant the exemption.[5]

Objection waived: The schedule must contain all that the statute requires; for instance, a list of all the debtor's property, the claim of exemption in whole or in part, the residuary of the claimant within the state, and his family headship (though many statutes do not require all this); and a failure to make the schedule conform to the statute has been found fatal.[6] But if the creditor, without objecting to the omission of property from the schedule, contests the right of exemption, it has been held that he thus waives objection.[7] It has been questioned whether a debtor may amend.[8]

The omission of some articles will not vitiate the schedule;[9]

[1] Schumann v. Pilcher, 36 Ill. App. 43.

[2] Cooper v. Payne, 36 Ill. App. 155; Langston v. Murphy, 31 Ill. App. 188.

[3] Coleman's Appeal, 103 Pa. St. 366.

[4] Huseman v. Sims, 104 Ind. 317; Conwell v. Conwell, 100 Ind. 437; Graham v. Crocket, 18 Ind. 119; Haswell v. Parsons, 15 Cal. 266; Below v. Robbins, 76 Wis. 600; State v. Harrington, 33 Mo. App. 476; Alsup v. Jordan, 69 Tex. 300. *See* State v. Kurtzeborn, 2 Mo. App. 335.

[5] This in Georgia, where the ordinary makes such orders. Douglass v. Boylston, 69 Ga. 186.

[6] Guise v. State, 41 Ark. 249.

[7] Trager v. Feebleman (Ala.), 10 So. 213.

[8] Blair v. Parker, 4 Ill. App. 409.

[9] Paddock v. Balgord (S. D.), 48 N. W. 840.

especially if done innocently, and if the omitted articles bear small proportion to the whole. When the debtor leaves out money or anything, it is held that the plaintiff waives objection to the omission by proceeding to contest the right of exemption without pointing out this defect of the debtor's claim. Upon the plaintiff's showing that the defendant had money to a large amount just before he was sued and before attachment had issued, the defendant may account for it by showing that he has applied it to his debts. If he has paid it out before receiving a demand for an inventory, it cannot be included in the estimate of his effects made to ascertain the amount of his exemption.[1]

[1] Trager v. Feebleman (Ala.), 10 So. 213. Clopton, J.: "An attachment sued out by the appellants against the appellee January 1, 1890, was levied the next day on certain personal property. On the same day appellee filed with the officer levying the process a verified claim to the property as exempt under section 2521 of the Code. Notice thereof having been given to the plaintiffs, they instituted a contest of the claim in the mode prescribed by the statute. It may be conceded that the claim of exemption filed with the officer, not having been accompanied by a statement of personal property, choses in action, and money, as required by section 2521, was insufficient. Instead of objecting thereto on this ground, plaintiffs made a written demand upon defendant, August 16, 1890, to file in the circuit court a full and complete inventory of all his personal property, except such as is specially exempt from levy and sale, all moneys, debts and choses in action belonging to him, or in which he is beneficially interested. By the written demand under section 2525 the plaintiffs waived the objection to the sufficiency of the claim of exemption. Tonsmere v. Buckland, 88 Ala. 312, 6 South. Rep. 904. Defendant having filed an inventory in answer to the demand, an issue was formed under the direction of the court. The real issue in such contest is whether the claimant had other personal property or choses in action or money not embraced in the inventory. But it is unnecessary to consider the propriety of the ruling of the court refusing to require defendant to join in the special issues tendered by plaintiffs. Under the general issue as formed they were allowed and had the full benefit which they could have derived from the special issues. The refusal, if erroneous, is error without injury. Plaintiffs having introduced evidence showing that defendant, shortly before the issue of the attachment, received money for goods sold, and had a considerable sum in his possession, it was competent for him to show that he had appropriated the money to the payment of debts justly due by him. The evidence was relevant to the issue, whether the money belonged to him or was in his possession when the written demand for an inventory was made. It is shown that on January 1, 1890, the same day on which the attachment was issued, defendant handed to his clerk, who is his brother, a sum of money,—

When no schedule has been filed by the debtor, it is safer for the officer to have an inventory made (of the property susceptible of being claimed) before exposing to sale.[1] The earlier exemption statutes were not so nearly uniform as the

$500,— which he directed him to pay to his mother and brother on account of debts which he owed them respectively, and get their receipts. . . The well-settled rule is that when one person delivers money to another, accompanied by a mere request, without any present valuable consideration, to pay it to a third person, such request does not, of itself, change the ownership of the money. Coleman v. Hatcher, 77 Ala. 217. But if the money is subsequently paid to such third person, and he receives it in payment of his debt, this is a ratification of the unauthorized act, which operates, by relation, to change the ownership of the money as of the time of its delivery to the receiver. Brooks v. Hildreth, 22 Ala. 469. Until such payment or ratification, or until the depositary has entered into some arrangement with the creditor, by which he is brought under obligation to hold the money for him, and by which he would be prejudiced by a revocation of the original direction, the money is subject to garnishment in his hands. The mere selection and claim of certain property as exempt, though levied on by attachment or execution, does not deprive the defendant of the right to prefer creditors, and apply any property he may own, not levied on, to the payment of their just debts. Weis v. Levy, 69 Ala. 209. If he has other property or money which may be subjected to his debts, it is incumbent on the attaching or executing creditor to reach and subject it by legal process. Plaintiffs had the right to garnishee the clerk, and thereby intercept the payment of the money to the mother and brother; but, failing to do so, they acquired no lien on the money, and its application to the uses originally intended — the payment of their debts — offended no rights of plaintiffs. No rights of theirs intervened so as to prevent a ratification from having the same force and effect as previous authority to collect the money. Of course, this rule has no application if the defendant thereby attempted a fraudulent disposition of the money as against his existing creditors. It may be that, had the defendant filed an inventory when he filed his claim of exemption with the officer, such inventory should have embraced the money in the hands of the clerk, which had not then been paid to the creditors, stating the facts. It had, however, been paid over when the written demand was made for an inventory. In such case the issue is not whether the money belonged to defendant at the time he filed his claim of exemption, but whether it belonged to him when the written demand to file an inventory in the circuit court was made under section 2525. The money having been paid to the mother and brother, and received by them in payment of their debts, before the written demand, cannot be estimated, if their debts be just, in ascertaining the amount of the exemption to which defendant is entitled, nor deducted from his claim of exemption. . . ."

[1] Elliott v. Whitmore, 5 Mich. 533, *536*.

present ones are, in requiring the debtor to file a schedule of his property when exemption of chattels to a limited amount was allowed. Sometimes the appraisers made out the list or inventory.[1] Now the claiming debtor is usually required to make the inventory (when the chattels are not absolutely exempt); but a substantial compliance is held satisfactory.[2] If it is not complete, but is verified, the debtor is entitled to have an appraisement.[3] It has been held that the purchaser gets no title when the sale has taken place before the debtor has made his schedule;[4] but he must have been guilty of no laches. If the officer has extended the time, there can be no levy or sale meanwhile.[5] The debtor's wife may make and submit the schedule of her husband's property, if she show satisfactorily why her husband does not do so; without so showing, her act is void.[6] If a non-resident may lawfully claim, he must present his schedule.[7]

What is not scheduled, and what is scheduled but not claimed, may be sold.[8] When a deserted wife sold property of her husband in which there was four hundred dollars' worth that might have been claimed, and took it back after levy upon it by a creditor, the transaction was held not fraudulent. She then claimed and filed a defective schedule, but the court held that the omission of some of the property was not fatal to her claim.[9] The sale and revocation were not a fraud upon creditors, because the property was susceptible of being claimed as exempt.[10]

§ 2. Schedule and Appraisement.

After the debtor who claims exemption has submitted his schedule, it becomes the duty of the officer in charge of the execution to summon appraisers and have all the articles of

[1] Mark v. The State, 15 Ind. 98.

[2] Gregory v. Latchem, 53 Ind. 449.

[3] Douch v. Rahner, 61 Ind. 64.

[4] Chapen v. Hoel, 11 Ill. App. 309.

[5] Pelkey v. People, 11 Ill. App. 82.

[6] Mapp v. Long, 62 Ga. 568; Ga. Code, § 2041.

[7] Menzie v. Kelly, 8 Ill. App. 259; Biggs v. McKenzie, 16 Ill. App. 286; Cook v. Bohl, 8 Ill. App. 293.

[8] Berry v. Hanks, 28 Ill. App. 51; Blair v. Parker, 4 Ill. App. 409; Austin v. Swank, 9 Ind. 109; Douch v. Rahner, 61 Ind. 64; State v. Read, 94 Ind. 103; Heath v. Keyes, 35 Wis. 668; Megehe v. Draper, 21 Mo. 510; Elder v. Williams, 16 Nev. 416.

[9] Berry v. Hanks, 28 Ill. App. 51.

[10] *Ib.;* Green v. Marks, 25 Ill. 204; Ives v. Mills, 37 Ill. 75; Bliss v. Clark, 39 Ill. 590.

property appraised. The sheriff's employees are not competent to act as appraisers.[1] In performing their duty, the appraisers must take actual and ocular notice of all the chattels. If even one article be appraised as a matter of guess, without actual inspection, the whole appraisement will be vitiated. Property sold by the officer after such an appraisement may be treated as not appraised and therefore illegally sold; so the debtor may regain it by replevin.[2] If the debtor himself has not misled the officer; has not caused the vitiation of the appraisement by secreting chattels or the like, he has a right to complain of the injury done him by an invalid appraisement and sale.[3]

When duly notified, the debtor cannot neglect the making of his schedule without forfeiting his right to the exemption dependent upon selection. Selling the property, susceptible of becoming exempt upon scheduling and selecting, will not obviate such result of neglect. The purchaser cannot hold the property as exempt, if he bought after the lien of judgment had fastened upon it, unless the debtor (his vendor) filed his schedule and claimed his privilege. The duty of the judgment debtor is to make, and swear to, his list of property, including debts due him; this list he must deliver to the officer in charge of the writ (unless the statute requires its delivery to the clerk and its being filed in the case). After the inspection of the tangible articles and their estimation by the appraisers, the debtor chooses so many and so much as will be equivalent to the monetary maximum of exemption, or less. He cannot avoid this by prior selling after judgment.[4]

The schedule is of the debtor's property possessed by him on the day of taking his oath.[5] The officer takes the schedule as correct. It has been said that he cannot question it when it is duly verified.[6] It is not his business to question it. The

[1] Posey v. Loutey, 12 Phila. 410.

[2] Smith v. Dauel, 29 Ill. App. 290.

[3] Menzie v. Kelly, 8 Ill. App. 261.

[4] Chapin v. Hoel, 11 Ill. App. 310; Blair v. Parker, 4 Ill. App. 409; Casper v. People, 6 Ill. App. 28; Cook v. Bohl, 8 Ill. App. 293; Camp v. Ganley, 6 Ill. App. 499; Stanton v. McMullen, 7 Ill. App. 331.

[5] Taylor v. Beach, 14 Ill. App. 259.

[6] Douch v. Rahner, 61 Ind. 64, *68*. The court said: "It was the sheriff's duty in this case, after the appellee had made and delivered to him said inventory, schedule and affidavit, and had designated and claimed the property levied on as exempt from sale on said execution, to ascertain, in

plaintiff's counsel are presumed to look after their client's interests; they have means at command to counteract a wrongful appraisement and correct a false schedule; but the sheriff has none and needs none. Though in charge of the writ, and bound to make the money for the plaintiff out of the defendant's liable property, he has nothing to do with property which has been selected as exempt according to legal direction, and within the statutory limit of value.

The creditor's objections to the debtor's allotment of exempt property, real or personal or both, must be made so that the debtor can meet them. They may be filed in the clerk's office of the court controlling the allotment, and must, when the statute directs it.[1] The returns of the execution should show the statutory allotment of personal property to the debtor, which becomes final upon the return, so far as others are concerned; but the debtor may have omissions of the appraisers corrected, when some of his property has been overlooked.[2]

Creditors may treat the report of the appraisers as a nullity when it appears that those officers were not sworn and that they have not made such a list, describing the property, as the statute requires in order to enable creditors to know what personal property is legally exempt. The same appraisers may lay off homestead and allot chattel exemption, but they must proceed according to law.[3]

the mode prescribed by the statute, the value of the property claimed as exempt; and having ascertained that such property was of no greater value than three hundred dollars, it was the further duty of the sheriff to set apart such property to the appellee, as exempt from sale on execution. The sheriff was not authorized by law to question the correctness of the inventory, schedule and affidavit of the appellee, or to determine whether or not the appellee's schedule was a true schedule of all his property. When the appellee had complied with the requirements of the statute, and it appeared that he was a resident householder, and that the value of the property claimed by him as exempt did not exceed three hundred dollars, he was entitled, under the law, to 'designate the property so claimed,' and it was the duty of the sheriff to set it apart to him, without regard to the truth or falsity of the schedule."

[1] McAuley v. Morris, 101 N. C. 369; N. C. Code, § 519.

[2] Pate v. Harper, 94 N. C. 23. *See* Burton v. Spiers, 87 N. C. 87; Duvall v. Rollins, 68 N. C. 220; Crummen v. Bennet, 68 N. C. 494. As to revision of allotments, *see* Jones v. Com'rs, 85 N. C. 278.

[3] Smith v. Hunt, 68 N. C. 482.

The defendant should exhibit his scheduled effects to the appraisers.[1] If the chattels are out of the county, that fact does not exonerate the officer from the duty of appointing appraisers.[2] If property is levied upon in two counties, under one judgment, and the debtor files his schedule in the first county and makes his selection; and, upon the sheriff's retaining the selected property, files his schedule in the second and makes his selection, he is not responsible for not surrendering the property selected in the first county on demand of the sheriff of the second, being unable to comply by reason of the first sheriff's detention of it. And the sheriff of the second county is bound to respect the selection there, under the circumstances.[3]

When property has been scheduled, appraised and set off to the debtor in one suit, must the same process be undergone in a subsequent suit, soon following the first, instituted by another creditor? As a general rule, the repetition would be unavoidable,[4] though only one exemption can be allowed, however many the suits.[5]

§ 3. Appraisement of the Widow's Allowance.

Appraisement is not necessary when a fixed sum is exempt for the widow and she agrees to take the cash from proceeds of sale.[6] It is useless to appraise money.[7] When she selects goods, the appraisement should be made promptly; and when the law has provided that the estimate shall be made by appraisers, their decision cannot be reviewed or set aside by other officers not empowered to do so by statute.[8] The power to confirm or set aside is only in the court, to be exercised upon issue duly made. When an orphan's court had confirmed the appraisement of goods to the extent of three hundred dollars for the widow of a decedent pursuant to statute, Judge Black said for the court on appeal of the case: "We think that the confirmation of the appraisement was an adju-

[1] Lansden v. Hampton, 38 Ill. App. 115.

[2] *Ib.*

[3] Keefer v. Guffin, 38 Ill. App. 622.

[4] Weller v. Moore, 50 Ark. 253. But *see* Austin v. Swank, 9 Ind. 109.

[5] Weis v. Levy, 69 Ala. 209.

[6] Sellers' Estate, 82 Pa. St. 153.

[7] Peterman's Appeal, 76 Pa. St. 116; Baldy's Appeal, 40 Pa. St. 328; Larrison's Appeal, 36 Pa. St. 130.

[8] Vandevort's Appeal, 43 Pa. St. 462.

dication of the property mentioned in the inventory to the widow. It was conclusive against the creditor, for it was a judgment *in rem* which determined forever the *status* of a thing and was binding upon the world. Afterwards it was the widow's property absolutely."[1] The reader perceives that the confirmation is held to be *res adjudicata quoad omnes*, not merely as to creditors cited; a general proceeding *in rem*, not a limited one. Whether the world was concluded depends upon the notice; upon everybody's having had opportunity to oppose the creating of such *status*. The confirmation was binding on the creditor, doubtless.

When the widow's title to her exemption vests in her at the death of her husband, she cannot acquire any additional right by the appraisement of the property. Appraisement may be necessary to sever her portion from a mass, or to relieve the administrator of responsibility, and to enable him to know what property is under his administration.[2]

§ 4. Remedies for Wrongful Levy.

Concurrent remedies: The officer who disregards an exemption claim may be sued by the beneficiary for failure of duty, or he may be compelled by *mandamus* to have the property appraised and the exemption ascertained, or he may be enjoined from selling the non-liable chattels.[3] On the other hand, he may defend himself when sued by averring and proving that the property is exempt or not exempt, as the case may be; for he may have been sued by the creditor for not levying upon certain property, or by the debtor for levying upon it, or by some other officer for the disturbance of his possession. An officer can maintain an action as plaintiff to relieve himself of the obligations which he is under to

[1] Runyan's Appeal, 27 Pa. St. 121.

[2] York v. York, 38 Ill. 522 (*see* note of Hon. Levi North); Hastings v. Meyers, 21 Mo. 519; Kellogg v. Graves, 5 Ind. 509; Sheldon v. Bliss, 4 Seld. (N. Y.) 34. In New York, if the appraisers fail to set off the exemption to which the widow is entitled from her husband's estate, and the executor sells, the surrogate may have the proceeds of the sale paid to her in an amount equivalent to her interest in the property. Sheldon v. Bliss, 8 N. Y. 31.

[3] Cunningham v. Conway, 25 Neb. 615; Johnson v. Hahn, 4 Neb. 149; Mohawk R. Co. v. Artcher, 6 Paige, 83; Belknap v. Belknap, 2 Johns. Chan. 463.

the parties interested in any attachment or levy made by him.[1] It is safer for the officer to make the levy when there is no specific exemption and no claim made.[2]

The writ of *fieri facias* protects the officer in seizing property liable to execution belonging to the judgment debtor, provided the writ itself is valid and issued by a court clothed with jurisdiction; but the writ will not protect him if he seize property which is exempt after notice, and if he proceed to sell with knowledge of the defendant's rightful claim.[3] He must not fail, however, to give the notice if the debtor is in the county.[4]

Receiver: When a suit has been brought to recover for the conversion of chattels exempt and a receiver of the plaintiff's property has been appointed in proceedings to supplement the execution, does the plaintiff's right in the pending action pass over to the receiver? Under such a state of things, the judge answered the question as follows: "I think it clear that this right of action did not pass to the receiver. It was founded upon injury to property which the creditor had no claim to have applied to the payment of his debt. The property was taken from the respondent without his consent, and he had the right of election, either to prosecute the action to judgment and collect damages or discontinue the same and sue to recover the possession of the specific property. With the exercise of this right neither the creditors of the respondent nor the receiver could at all interfere. The right of action not resting in the receiver, there is no ground for claiming that the judgment thereafter recovered vested in him; consequently, the judgment debtor had no right to pay the same to the receiver, and such payment did not satisfy the judgment."[5]

Does the appointment of a receiver of the defendant's property in a pending action authorize that officer to take

[1] Connaughton v. Sands, 32 Wis. 387; Main v. Bell, 27 Wis. 519. *See* Earl v. Camp, 16 Wend. 562, *571;* Smith v. Hill, 22 Barb. 656, *659.* *Compare* Cornell v. Dakin, 38 N. Y. 253.

[2] Abbott v. Gillespy, 75 Ala. 180.

[3] Hoyt v. Van Alstyne, 15 Barb. 568. *See* Duncan v. Spear, 11 Wend. 54.

[4] Foote v. People, 12 Ill. App. 94.

[5] Andrews v. Rowan, 28 How. Pr. 126; Hudson v. Plets, 11 Paige, 180.

charge of the defendant's exempt property? The court, while answering "No," said the question was important for review and decision, affecting a multitude of cases arising daily. Statutory provisions relative to proceedings supplementary to execution were examined, prior decisions reviewed and a negative answer reached.[1]

Damages: Though the statute may give double or treble damages against a trespasser who wrongfully takes and sells a judgment-debtor's exempt goods, yet the injured party may proceed by the ordinary action of trespass, and recover single damages. Certainly, the wrong-doing officer cannot complain, as defendant in such action, that he was not sued for more.[2] While double damages may be recovered against the officer, only single can be awarded against his surety; and only single when both are sued together.[3]

If an article is specifically exempt by statute, and the debtor does not point out other property as liable, the sheriff will seize and sell such article at his peril; for the debtor is not obliged to turn out something else.[4] The officer's process will not justify his action; his adjudication at the sale will not convey the property.[5]

It is trespass for an officer to seize and sell exempt property, and the action of trespass will lie unless the statute has provided some other form of remedy.[6] The statutory action may be that of trespass, even when double or treble the value of the goods taken are recoverable.[7] The jury's estimation of damages should be regarded as the single value of the exempt goods wrongfully attached, or otherwise seized, it has been repeatedly declared,[8] unless they have been instructed to find

[1] Finnin v. Malloy, 33 N. Y. Superior, 382; N. Y. Code, §§ 297–8. In Georgia a receiver is appointed by the court on its own motion when the personal property of the debtor exceeds the amount which is exempt by law, as shown by the schedule. McWilliams v. Bones, 84 Ga. 199.

[2] Amend v. Murphy, 69 Ill. 337; Cornelia v. Ellis, 11 Ill. 584; Pace v. Vaughan, 1 Gil. 30.

[3] Camp v. Ganley, 6 Ill. App. 499.

[4] *Ib.*

[5] Williams v. Miller, 16 Ct. 143; Johns v. Chitty, 1 Burr. 32.

[6] Dow v. Smith, 7 Vt. 465; Leavitt v. Holbrook, 5 Vt. 405; Hart v. Hyde, 5 Vt. 328; Haskill v. Andros, 4 Vt. 609; Fry v. Canfield, 4 Vt. 9; Spooner v. Fletcher, 3 Vt. 133; Kilburn v. Demming, 2 Vt. 404; Leavitt v. Metcalf, 2 Vt. 342.

[7] Wymond v. Amsbury, 2 Colo. 213; Colo. Rev. Stat. 380.

[8] Newcomb v. Butterfield, 8 Johns. 342; Warren v. Doolittle, 5 Cow.

double or treble damages.[1] If single damages are returned, and the jury meant no more, the court may treble the verdict under such statutory provision as that above mentioned. If there are no means of knowing whether the jury have assessed single or double or treble damages, the court ought not to increase them; for it would be monstrous to inflict upon the trespasser nine times the loss he has caused — which would be done were the jury to assess treble damages and the court to presume single damage and then treble it in the judgment.

The officer is guilty of no trespass in attaching or levying upon property which is not absolutely exempt, and which has not been selected after appraisement. He must have time to make his inventory and take the steps necessary to ascertain the *status* of the property — whether liable or not.[2] Where a statute inhibits the seizure of chattels to the amount of a stated sum, the obvious meaning is that they shall not be seized *when ascertained* to be of that value or less.[3]

So when household furniture is exempt, and there is a question whether the furniture seized is used or meant to be used by the debtor in his household, the officer, while holding them preliminary to the settling of such question, ought not to be condemned as a trespasser. Especially, when the debtor is not, and was not at the time of the levy, the custodian or lawful possessor of the goods. He may be the general owner, yet if another is in lawful possession, and has special property in the goods, the general owner can sustain neither trespass nor trover, it has been held.[4]

When personal exemption is for the benefit of the wife and children of the debtor, an action for the conversion of it may

684; Beekman v. Chalmers, 1 Cow. 584; Cooper v. Maupin, 6 Mo. 634.

[1] Brewster v. Link, 28 Mo. 148.

[2] Bounel v. Dunn, 29 N. J. L. 435. Same title, 28 Ib. 153 (Nix. Dig. 249, 251). *Citing* The Six Carpenters' Case, 8 Coke, 290; Waddel v. Cook, 2 Hill, 47.

[3] *Ib.*

[4] Bourne v. Merritt, 22 Vt. 429. In Funk v. Israel, 5 Ia. 450, it is said: "At common law, the owner of a chattel might, by the action of replevin, take it from the possession of any person who unlawfully held it, unless it was in the custody of the law. If wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer; for the common law would not grant process to take, from an officer, goods which he had taken by legal process already issued. Cromwell v. Owings, 7 Harr. & Johnson, 55; Ilsley v. Stubb, 5 Mass. 280."

be brought by them, or by the debtor himself, under statutory authorization as interpreted.[1]

It has been held that a tenant in common may recover damages for the execution sale of chattels claimed as exempt. The thing sold may be indivisible, yet the tenant in common may have damages — double damages under a statute awarding them to owners without designating this particular class of proprietors. The court, so holding, pointed out distinction between partnership and co-tenancy, as to the nature of the title.[2]

A mortgagee in possession of exempt property, or having the right of possession, has his action for its conversion.[3]

§ 5. Damages Dependent on Legality of Claim for Exemption.

Though an officer in charge of an attachment disregard a claim of exemption, he will not be liable, if the claim was unfounded and the property attachable, and the proceeds of sale were duly applied to the debt. The plaintiff, in his action against the officer for damages, cannot show that he has been injured, under such circumstances.[4] But an officer has no right to disregard a claim for exemption because the creditor has told him that the claim is not well founded in law, that the debtor has denied ownership in himself and alleged it to be in his wife, or anything of the kind. If the debtor was found in possession, and no waiver of his legal right has been duly made and properly brought to the knowledge of the sheriff, that officer is culpable for heeding the mere statements of the creditor so far as to go on and sell the exempt goods. On the contrary, it is his duty to have these goods set apart to the debtor, after appraisement; and he cannot demand an indemnifying bond of the debtor before taking such action.[5]

[1] Braswell v. McDaniel, 74 Ga. 319; Ga. Code, § 2040.

[2] Trowbridge v. Cross, 117 Ill. 109; Servanti v. Lusk, 43 Cal. 238; Radcliffe v. Wood, 25 Barb. 52.

[3] Ganong v. Green, 71 Mich. 1; Harvey v. McAdams, 32 Mich. 472; Worthington v. Hanna, 23 Mich. 530; Tannahill v. Tuttle, 3 Mich. 104. *See* Burk v. Webb, 32 Mich. 173.

[4] Bryan v. Kelly, 85 Ala. 569; Abbott v. Gillespy, 75 Ala. 180; Wilson v. Strobach, 59 Ala. 488.

[5] Williamson v. Krumbhaar, 132 Pa. St. 455.

The debtor, suing an officer for taking his exempt property, must show that he has complied with the statute, exhibited his affidavit that he is the head of a family (and whatever else is required), to the officer, in due time.[1] The statutory affidavit must precede such suit,[2] unless the action be instituted by a purchaser from the debtor.[3]

In a suit involving the possession of property, he who alleges that he had claimed it as exempt, in form and substance according to statute, before its wrongful sale by the sheriff, must also set up title to make his pleading sufficient on demurrer.[4] He is held to a substantial compliance with the statute, and must plead that fact but need not set out all the particulars. So far as the officer is concerned, he is bound to take the sworn statement of the debtor when there is no ground for refusing beyond his own doubt of its truth.[5]

In a suit against a sheriff for refusing to allow the debtor to select the personal property exempt by statute, the plaintiff's allegation that the sheriff, by his deputy, did convert the

[1] Gamble v. Reynolds, 42 Ala. 236.

[2] Simpson v. Simpson, 30 Ala. 225.

[3] Cook v. Baiue, 37 Ala. 350.

[4] Over v. Shannon, 75 Ind. 352.

[5] In Indiana, the claimant of exemption is held to a substantial compliance with the statute; in pleading that he has thus complied he need not set forth his schedule or make it an exhibit. Stallings v. Reed, 94 Ind. 103; Hall v. Hough, 24 Ind. 273. The claim may be set up before or after the levy. *Ib.;* Pate v. Swann, 7 Blackf. 500. This quotation is from the case first cited above: "A constable is bound, at his peril, to accept a proper schedule when duly tendered by the debtor, and if he levies after the tender of a proper schedule he is a trespasser. Stephens v. Lawson, 7 Blackf. 275. The officer cannot dispute the truth of the schedule, but must act upon it and set apart the property claimed by the debtor, even though the latter owns property not exhibited in the schedule. Douch v. Rahner, 61 Ind. 64. A mandate will lie to compel the sheriff to set apart the property designated by the debtor. Young v. Baxter, 55 Ind. 188; Pudney v. Burkhart, 62 Ind. 179; Mark v. State, 15 Ind. 98. *See* Michael v. Eckman (Fla.), 7 So. 365. The right of the debtor to claim the property need not be exercised until after appraisement, and he may then designate the property he selects to claim. Kelley v. McFadden, 80 Ind. 536. It appears from the decisions to which we have referred that the debtor is favored in the matter of exemption, and that the officer is placed in a situation of difficulty and embarrassment; for, if he rejects a schedule which is in substantial compliance with the statute, he is liable to the debtor." . . . *Judge Elliott.* The debtor should make affidavit that the schedule contains a list of all his personal property. Taylor v. Beach, 14 Ill. App. 259.

property to his own use, was a sufficient averment that the deputy was acting under the defendant as sheriff.[1]

When only costs recoverable: In a suit for conversion, only damages for costs and other actual losses can be recovered when the debtor has bought the property itself at the public sale.[2] If the owner has the property, even though he bought it from a purchaser at the sale, he cannot have it and yet recover the price of it from the officer, if he has lost nothing except costs and expenses incident to the sheriff's wrong-doing.[3] This is not to be understood as meaning that he may be made the loser of his exempt property, so that he has to buy it back, and yet have no redress.

Judgment against the creditor and the seizing officer, for trespass in taking and selling exempt property, is not conclusive that the trespass was intentional and wilful.[4] Judgment declaring certain property subject to levy has been held *res judicata*.[5]

§ 6. Replevin.

Officers cannot be made to give up property which they have levied upon, by the claimant's replevin, when he claims personal property exemption in lieu of realty exemption or homestead, unless he has made and filed his schedule or inventory of property, and has selected his portion after appraisement, where the statute requires his compliance with these conditions. The requirement is not merely directory.[6] If, after his compliance respecting the inventory, the officer refuses to have the appraisement made, he may be compelled by *mandamus*.[7] He cannot release attached property after having

[1] Hutchinson v. Whitmore (Mich.), 51 N. W. 451, *citing* Howell's Stat., ch. 266, § 27 (8), and *distinguishing*, as to the right of selection, McCoy v. Brennan, 61 Mich. 362.

[2] Northrup v. Cross (N. D.), 51 N. W. 719; Ford v. Williams, 24 N. Y. 359; Baker v. Freeman, 9 Wend. 36; McInroy v. Dyer, 47 Pa. St. 118.

[3] Leonard v. Maginnis, 34 Minn. 506; Sprague v. Brown, 40 Wis. 612.

[4] Stanton v. McMullen, 7 Ill. App. 326.

[5] Dipert v. Jones (Ind.), 30 N. E. 419.

[6] Mann v. Welton, 21 Neb. 541; Neb. Civ. Code, §§ 521–2; Settles v. Bond, 49 Ark. 114; Chambers v. Perry, 47 Ark. 400.

[7] *Ib.;* Metz v. Cunningham, 6 Neb. 92; People v. McClay, 2 Neb. 8. *See* Axtell v. Warden, 7 Neb. 182; Williams v. Golden, 10 Neb. 432; Neb. Gen. Stat. 618.

made his return showing what he has seized, till ordered by the court which issued the writ, though a higher court has directed the lower one, by *mandamus*, to issue a *supersedeas*.[1]

As the debtor is not confined to a single remedy against the officer, he may proceed by replevin, or he may choose a statute remedy when one is accorded to him.[2] He may sue for the value of exempt property wrongfully sold.[3]

Are damages exempt? It is held that, though an exemptionist may reclaim property by replevin and recover whatever profits the wrong-doer may have gained by the detention of it, the damages for such profits are not exempt — they do not take the character of the property in this respect.[4]

A sheriff, against whom judgment had been rendered for the conversion of exempt property, paid the amount of it, not to the owner who had been bereft of the property and who had recovered the judgment for the conversion, but to another sheriff who held an *alias fi. fa.* against the owner. In other words, after the property had been wrongfully converted to pay the original creditor, the wrong-doing sheriff sought to put the money recovered of him therefor into the hands of another sheriff to be wrongfully converted. What was adjudged to be due by the first sheriff for selling exempt property was no more liable than the property itself had been.[5] The judgment for wrongful conversion stood for the exempt property converted.[6]

§ 7. Burden of Proof.

The law shows what is exempt, but the facts which bring claimed property within the law must be proved by the claimant. If the value of the claimed property is proved,

[1] Farris v. State. 33 Ark. 70.

[2] In Mississippi it has been held that exempt property of the judgment-debtor may be replevied by him, after having been levied upon by the sheriff in execution, though that is not his only remedy. Code of 1871, § 2134; Ross v. Hawthorne, 55 Miss. 551; Mosely v. Anderson, 40 Miss. 50. The debtor had also a remedy under the code. *Ib.* The remedy by replevin had been frequently resorted to in actions against the sheriff. Hopkins v. Drake, 44 Miss. 619; Ford v. Dyer, 26 Miss. 243; Yarborough v. Harper, 25 Miss. 112.

[3] Stilson v. Gibbs, 53 Mich. 280.

[4] Johnson v. Edde, 58 Miss. 664.

[5] Below v. Robbins, 76 Wis. 600.

[6] Tillotson v. Wolcott, 48 N. Y. 188, *190;* Commissioners v. Riley, 75 N. C. 144. *Compare* Mallory v. Norton, 21 Barb. 424, and Temple v. Scott, 3 Minn. 306.

and the character of it shown, still he must prove that he is a householder and has a family, when that fact is requisite. If all this be established, it must yet be made to appear that he has not "retained a sufficient amount to satisfy any claim he could make for exempt property."[1] The law does not presume that the chattels levied upon are all the property he possesses. The rule, when the exemption is not specific, is that the *onus* is on him to show that he is within the statute in respect to his means.[2]

All personal property is liable to execution on a judgment against its owner, as a general rule: so, if he plead anything to take it out of the rule, the burden is on him to sustain his plea. He who sets up exemption must prove it. But there is the principle, that when exemption exists, and he sells the exempt property, and creditors charge that the sale is in fraud of their rights, it is incumbent upon them to establish the fraud. As to property really exempt, there are no creditors; there are none to claim injury by any disposition which the debtor may have made of property which they never could have reached.[3] But are creditors bound to show that property, which they claim to have been fraudulently sold by the debtor to defeat their judgment, was *not* exempt? Must they prove a negative? It was held under a statute requiring the debtor to schedule his property and specify that claimed as exempt, that the burden of such a matter is on him and not on his creditors, and that even when they had charged fraud as above suggested, they were not bound to show that the property would not have been exempt, had the debtor made no disposition of it.[4]

[1] Tuttle v. Buck, 41 Barb. 417; Griffin v. Sutherland, 14 Barb. 456; Carnrick v. Myers, 14 Barb. 9; Willson v. Ellis, 1 Denio, 462; Brown v. Davis, 9 Hun, 43; Seaman v. Luce, 23 Barb. 240; Brooks v. Hathaway, 8 Hun, 290; Van Sickler v. Jacobs, 14 Johns. 434; McCoy v. Dail, 6 Bax. 137; Blythe v. Jett, 52 Ark. 547.

[2] McMasters v. Alsop, 85 Ill. 157; Bonnell v. Bowman, 53 Ill. 460; Smothers v. Holly, 47 Ill. 331; Finley v. Sly, 44 Ind. 237. (Euper v. Alkire, 37 Ark. 283, distinguished as not applying to personalty.)

[3] Clark v. Anthony, 31 Ark. 546; Erb v. Cole, 31 Ark. 557; Stanley v. Snyder, 43 Ark. 434; Bogan v. Cleveland, 52 Ark. 101.

[4] Blythe v. Jett, 52 Ark. 547 (Mansf. Dig., § 3006), overruling on this point, Erb v. Cole, *supra*, and *citing* Davis v. Prosser, 32 Barb. 290, and several other cases. In California creditors

The transcript of a declaration makes proof of it;[1] but if it shows itself invalid as to the pending execution in the case in which it is offered, and is not supported by an affidavit, it may be disregarded.[2]

§ 8. Laches and Passive Waiver.

Exemption may be forfeited by not claiming it.[3]

If the officer neglects the duty of giving the debtor his opportunity of designating the chattels to be held exempt, the debtor does not forfeit his right by not claiming immediately upon learning of the levy. He may be silent yet not estopped when no expense is caused thereby, it is said in exposition of statute.[4] A failure to demand exemption at the time of the levy does not everywhere work forfeiture;[5] and it has been held that disclaimer of ownership by the debtor does not estop him, if the officer is not shown to have been influenced by it.[6]

A request by an absent debtor, made to a judgment creditor by letter, that the latter would postpone execution, is not to be considered as implying a waiver of exemption.[7] Standing by, and not objecting, is waiver, when the statute points out the time and manner of claiming.[8] A wife was presumed to have waived her exemption in community property when her

opposing the granting of exemption to their debtor need file no paper if he has already petitioned for exemption. *In re* Baldwin, 71 Cal. 74.

[1] Stevenson v. Moody, 85 Ala. 33.

[2] *Ex parte* Barnes, 84 Ala. 540.

[3] Bell v. Davis, 42 Ala. 460; Ross v. Hannah, 18 Ala. 125; Gresham v. Walker, 10 Ala. 370; Zielke v. Morgan, 50 Wis. 560; Russell v. Lennon, 39 Wis. 570; Iliff v. Arnott, 31 Kan. 672; Pond v. Kimball, 101 Mass. 105; Buzzell v. Hardy, 58 N. H. 331; Harlan v. Haines, 125 Pa. St. 48; Bair v. Steinman, 52 Pa. St. 423; Tasker v. Sheldon, 115 Pa. St. 107; Bittenger's Appeal, 76 Pa. St. 105. *Compare* Howard, etc. v. Railroad Co., 102 Pa. St. 220; Barton v. Brown, 68 Cal. 11; Green v. Blunt, 59 Ia. 79; Richards v. Haines, 30 Ia. 574; Hammersmith v. Avery, 18 Nev. 225; Boesker v. Pickett, 81 Ind. 554; State v. Melogne, 9 Ind. 196; Butt v. Green, 29 O. St. 667; Russell v. Dean, 30 Hun, 242.

[4] Ellsworth v. Savre, 67 Ia. 449 (Ia. Code, § 3072, as amended in 1882), *distinguishing* Angell v. Johnson, 51 Ia. 625, and Moffitt v. Adams, 60 Ia. 44 (*compare* Rice v. Nolan, 33 Kan. 28); Wicker v. Comstock, 52 Wis. 319; Coleman's Appeal, 103 Pa. St. 366.

[5] Shepherd v. Murrill, 90 N. C. 208.

[6] McAbe v. Thompson, 27 Minn. 134.

[7] Harrington v. Smith, 14 Colo. 376.

[8] Graves v. Hinkle, 120 Ind. 157; Ind. R. S. (1881), § 2670, relative to claim when property is assigned, etc.

husband had consented to its attachment, and she had made no objection.[1]

When property was assigned, and the assignor had the promise of the assignee to set off certain personal property as exempt, which the latter neglected to do; and when the assignor was absent at the appraisement on account of sickness, he was not held to have waived.[2]

[1] Dodge v. Knight (Tex.), 16 S. W. 626.

[2] Doherty v. Ramsey, 1 Ind. App. 530; 27 N. E. 879. The court said: "The law requires an assignee to make a full and complete inventory of all the property owned by the assignor within thirty days after he enters upon the execution of the trust, and within twenty days after the preparation and filing of such inventory he shall cause all of the property mentioned therein to be appraised by two competent appraisers. Section 2670, Revised Statutes 1881, provides that, if the assignor be a resident householder of this state, the appraisers shall set off to him such articles of property mentioned in the inventory as he may select, not exceeding in value $300. The amount of exemption provided by this statute was enlarged by implication to $600 by the act of March 29, 1879. O'Neil v. Beck, 69 Ind. 239. In the case of Graves v. Hinkle, 120 Ind. 157, 21 N. E. Rep. 328, it was held that an assignor could avail himself of the right of exemption only by a substantial compliance with the requirements of section 2670, *supra*, and that he must select the articles of property claimed by him as exempt from sale at the time and in the manner provided in that section; and, if he failed to do so, the right of exemption would be deemed to have been waived, and the property would all constitute a trust fund for the exclusive benefit of the creditors until they were all satisfied. The court said: 'As against his deed, which transfers the title to the property, the assignor can only claim the right of exemption by pursuing the method prescribed by the statute. He has a right to claim the amount out of real estate or personal property, or both; but, unless prevented from doing so without his own fault or neglect, he must assert his right in the manner and at the time prescribed by the statute.' In the case before us the petition states that the assignor was a householder of this state, and that a few days before the appraisement he demanded of the assignee that property of the value of $600 be set off to him as exempt from sale, and that he then and there designated and selected the particular property so claimed by him, and the assignee promised to have the property so set apart at the time of the appraisement. The assignor was confined to his house by sickness when the property was appraised, and could not be present to again assert his right to exemption, and again select the articles of property claimed by him, but relied upon the agreement of the assignee to protect his rights in the matter. The law contemplates that the appraisement shall be made under the supervision of the assignee. Following the decisions of the supreme court requiring a liberal construction of the exemption laws in favor of the debtor, we are of the opinion that the petition shows a sub-

If the debtor has made claim and it has been disregarded by the officer in charge of the execution, he has his remedy to enforce his right. And it has been held that if, after having claimed, he stand by and neglect to resort to *mandamus*, he will be deemed to have waived his right. Or, if his claim has been denied by a court, and he has not appealed, he is considered as having acquiesced in the judgment and lost his exemption right, whether in homestead or chattels.[1]

If a judgment entry is that of a money judgment without mention of any stipulation waiving exemption, it will amount to "an abandonment of the waiver and a consent to accept a common judgment for money," it has been held.[2]

stantial compliance with the statute. At least, enough is stated to rebut the presumption of a waiver resulting from the assignor's failure to be present and assert his right at the time of the appraisement. Where the assignor substantially pursues the method prescribed by the statute in asserting his right to exemption, and the assignee refuses to set off property to him, but converts it into the trust fund, the assignor is equitably entitled to the proceeds of the property which should have been set apart to him; and it is the duty of the court, on proper application, to order the assignee to turn such proceeds over to the assignor. The petition in this case was sufficient, and the relief prayed for ought to have been granted, unless the answer contained facts sufficient to defeat the right of exemption. It is insisted that, because the assignor transferred a large amount of property to one Street, for his own use, and to withdraw it from the operation of the assignment, he should not be allowed the right to the exemption expressly conferred upon him by the statute. It appears by the answer that the assignor had given the assignee an order on Street for the money so transferred to him, but Street refused to pay it over, and the assignee had a suit then pending for its recovery. By the recording of the deed of assignment, the legal title to all of the property owned by the assignor at that time became vested in the assignee for the benefit of the creditors, including any and all property that may have been sold, conveyed or assigned by the assignor with the intent to defraud his creditors. Seibert v. Milligan, 110 Ind. 111, 10 N. E. Rep. 929. Not only did the law bring the money fraudulently transferred by the assignor into the trust estate, but he executed a written order voluntarily surrendering to the assignee all of such property, so that it cannot be claimed that the assignor should receive his exemption from that fund. This beneficent provision of the statute can only be invoked by one in the character of a householder, and was designed largely for the benefit of those dependent in a measure upon the debtor for support. . . ."

[1] Chambers v. Perry, 47 Ark. 400; Cason v. Bone, 43 Ark. 17; Healy v. Connor, 40 Ark. 352; Butt v. Green, 29 O. St. 667.

[2] Agnew v. Walden (Ala.), 10 So. 224; Courie v. Goodwin, 89 Ala. 569; Brown v. Leitch, 60 Ala. 313; Hosea v. Talbert, 65 Ala. 173.

Where waiver of exemption, in a lease, is valid, the personalty of the debtor may be executed, though the judgment do not recite or note the waiver.[1]

The debtor does not waive by returning the property under a bond given to the sheriff for its redelivery.[2]

The acceptance of the officer's selection waives all irregularities.[3]

§ 9. Waiver in Promissory Notes.

The states are not agreed as to whether exemption may be waived in a promissory note. Those holding the affirmative say that exemption is a personal privilege which may not only be waived when execution is pending (as all agree), but that it may be relinquished beforehand in favor of a particular creditor, the payee of the note. They say that this is part of the consideration; that the creditor trusts on the faith of the waiver, and therefore the court should respect it; and that the debtor is benefited by having his credit bettered by debarring himself and family of the exemption privilege.[4]

The states holding the negative appeal to public policy. Exemption is something which concerns not only the debtor, but his family and the community; so the debtor cannot defeat the purpose of the legislator by stipulating that he will not avail himself of the benefit for himself, his family and the public. He cannot cut himself off from his defenses by prestipulations; and cannot, from his exemptions, it is said. These, or like reasons, have been given.[5]

[1] Hoisington v. Huff, 24 Kan. 379; Comp. L. (1879), ch. 55, § 30; Greeno v. Barnard, 18 Kan. 518; Frost v. Shaw, 3 O. St. 270.

[2] Desmond v. State, 15 Neb. 438; Neb. Code, § 1072.

[3] State v. Conner, 73 Mo. 572.

[4] Case v. Dunmore, 23 Pa. St. 94. *Compare* Shelley's Appeal, 36 Pa. St. 373. *380;* Neely v. Henry, 63 Ala. 261; Hoisington v. Huff, 24 Kan. 379 (waiver in a lease); Gamble v. Central R. Co., 80 Ga. 595 (note payable in Alabama).

[5] Kneetle v. Newcomb, 22 N. Y. 250; Recht v. Kelly, 82 Ill. 147; Phelps v. Phelps, 72 Ill. 545; Green v. Watson, 75 Ga. 471; S. C., 58 Am. Rep. 479; Stafford v. Elliott, 59 Ga. 837; Curtis v. O'Brien, 20 Ia. 376; Moxley v. Ragan, 10 Bush, 158; Levicks v. Walker, 15 La. An. 245; Branch v. Tomlinson, 77 N. C. 8; Carter v. Carter, 20 Fla. 558; S. C., 51 Am. R. 618. A note, waiving exemption, made in Georgia, payable in Alabama, not usurious in Georgia, is not open to inquiry respecting its usuriousness in Alabama, by the debtor, after judgment upon the note. Gam-

§ 10. Notice — Rank of Creditors, etc.

A debtor, not notified and whose whole personal chattels do not exceed the exemption limit, is not necessarily to be understood as having waived his exemption right by failing

ble v. Central R. Co., 80 Ga. 595. In the case of Cleghorn v. Greeson, 77 Ga. 343, the judgment showed usury on its face by Georgia law. The court explained, in Gamble's case, that it did not mean to rule by implication "that the law of Alabama would vitiate a waiver of exemption made here [in Georgia] in favor of a debt pure by our law though payable in that state, but only that *the question cannot be made after judgment* — no usury appearing on the face of the record, and none being alleged save that which is obnoxious to the foreign law only." In Alabama, the waiver of all exemptions, in a promissory note, will hold good as to chattels but not as to realty. Agnew v. Walden (Ala.), 10 So. 224. The court said: "The claim sued on, as described in the complaint, and as the testimony tends to show, contains a waiver of all exemptions or relief laws under the statutes and constitution of Alabama. This is a good waiver of exemptions of personal property, but not of real estate. Neely v. Henry, 63 Ala. 261. The substance of the claim, as filed and recorded in the probate court, states the date of the note, amount when due, names of the payees, and date of filing. It contains no mention of the waiver of exemptions. In Smith v. Fellows, 58 Ala. 467, we stated some of the reasons which go to make up the policy of our legislation requiring claims against decedents' estates to be presented or filed within eighteen months. There may be other reasons. Personal representatives, among their first duties, are required to set apart exemptions of personal property if there be a surviving widow, or minor child or children; and it may be that to constitute a statement of the claim that will cut off exemptions the waiver should be set forth, if there be one. But we need not decide this question. The judgment entry is a simple judgment for money, and is silent as to the stipulation waiving exemptions. This amounts to an abandonment of the waiver, and a consent to accept a common judgment for money. Courie v. Goodwin, 89 Ala. 569, 8 South. Rep. 9; Brown v. Leitch, 60 Ala. 313: Hosea v. Talbert, 65 Ala. 173. Some of the questions sought to be raised are scarcely presented in such form as that we can consider them. Eliminating them, we find no error in the record." And a waiver of homestead exemption in a promissory note does not include that of chattel exemption. Reed Lumber Co. v. Lewis (Ala.), 10 So. 333. In this case, the court said: "It is not claimed in the complaint that either of the defendants waived their exemptions of personal property as against the notes sued on. The averment is 'that in each of said notes defendants waived all homestead exemptions as against this debt.' Manifestly, upon such a waiver, there could be no judgment declaration of a waiver of exemption of personalty; and, even were this otherwise, the declaration in this judgment should have been confined to W. T. Farrar, who, it is alleged, signed the partnership name to the notes. Terrell v. Hurst, 76 Ala. 588. The judgment is reversed, and the cause remanded."

to put in his claim till long after his property has been attached.[1] He may reasonably be supposed to await notice from the seizing officer, where the giving of it is made a duty.

In the case cited the debtor's property was specifically exempt in part, and wholly exempt upon claim. The officer should have given him notice (so that selection could be made between three horses of which two only were specifically exempt), if only specific exemption had been involved. The debtor was entitled to three hundred dollars' worth of personal property, and, as all that he owned did not exceed this allowance, he was not held to have lost his right by his *laches*.[2]

The assignment of all his property by a debtor for the benefit of his creditors does not affect his right to exempt property retained, though literally included in the assignment.[3]

The creditor, entitled to notice of the filing of the schedule and claim of exemption, waives it by his appearance to contest the claim.[4] When the lower court has refused to restrain the sale of property claimed as exempt on the ground that no notice has been given to the creditor, and the debtor applies to the higher court, if the creditor meet him there to contest the application he will thus waive his right to notice of the schedule.[5]

Notice of opposition to the exemption allotment to the debtor must be given by him and served in such way as to appear of record — not orally, nor by mail.[6] This may not be required everywhere, but would be a good rule for general practice.

Notice by the debtor to the judgment creditor that he claims exemption in certain chattels will enable him to prosecute his claim though the property may have been subsequently bought by the creditor at execution sale.[7] And he may go on with his suit, though he has changed his residence after its institution.[8]

Will the debtor's waiver, in favor of a creditor whose claim

[1] Holliday v. Mansker, 44 Mo. App. 465.

[2] *Ib.;* State v. Emmerson, 74 Mo. 607.

[3] Close v. Sinclair, 38 O. St. 530.

[4] Garrett v. Wade, 46 Ark. 493.

[5] Brown v. Doneghey, 46 Ark. 497.

[6] Allen v. Strickland, 100 N. C. 225.

[7] Gardner v. King, 37 Kan. 671.

[8] McCrary v. Chase, 71 Ala. 540. *See* further, as to contests of exemptions, Clark v. Spencer, 75 Ala. 49; Levy v. Moog, 69 Ala. 63.

(secured by lien) is less than the maximum of exemption, inure to the advantage of those holding liens of less rank and debar the debtor from having the balance of his exemption? That is to say: the exemption maximum being three hundred dollars, and the senior's claim two hundred, would the debtor be estopped from claiming one hundred, as against the junior creditors, by reason of his special waiver?

Answer has been made as follows:—

"First — A waiver as to any lien will inure to the benefit of all prior liens, on the principle that the debtor cannot alter the precedence settled by law.

"Secondly — A waiver as to any lien will inure to the benefit of subsequent liens so far as to compel the waiver-creditor to resort first to the exempted fund, on the principle of the equity of creditors having one and two funds, respectively, under their control.

"Thirdly — A waiver will not inure to the benefit of subsequent liens beyond its own amount: so that if the waiver judgment is less than three hundred dollars, the balance will go to the debtor claiming his exemption; and this on the broad ground that men may do what they will with their own, provided they do not contravene the settled rules of law, or impair the rights of others."[1] This answer is the result of a learned discussion of the question.

An express general waiver of exemption from forced sale for rent, made by a lessee in his lease, was held applicable to any of his property, whether seized for rent or not.[2]

A waiver as to any lien is a waiver as to all anterior ones, since otherwise the junior would be given a better place than the senior liens. The principle is that, the law having fixed the rank of the respective liens, the debtor cannot reverse or alter it.[3]

§ 11. Mortgage, Relative to Waiver.

We usually think of exemption with reference to execution; and it has been contended that when the debtor's property is

[1] Hallman v. Hallman, 124 Pa. St. 347, and cases cited; Thomas' Appeal, 69 Pa. St. 121.

[2] Beatty v. Rankin, 139 Pa. St. 358. Mitchell v. Coates, 47 Pa. St. 202, *distinguished.*

[3] Miller v. Getz, 135 Pa. St. 558; Hallman v. Hallman, 124 Pa. St. 347.

sold otherwise than by such forced sale, as by mortgage foreclosure, there is no exemption. But the opposite rule prevails. If there be excess after the satisfaction of a mortgage, it is not open to creditors to the exclusion of the exemption right.[1] The reason for protecting the debtor and his family is as great when the sale is by mortgage foreclosure as when by writ of *fieri facias*. The principle should be universally recognized; at least, it should be wherever the statute is virtually the same as that upon which the above cited decisions were founded.[2] The literal language of the statute may be that the property shall be exempt from execution, but the spirit would seem to be that it shall be saved to the debtor free from his creditor's claims. The relief to the debtor and his family is as much needed under one form of sale as under another. If creditors could redeem the mortgage, and make as much money out of the mortgaged property as the mortgagee could have made, and go on and apply any excess of proceeds to their debts, they could do more than the mortgagee could have done. Would any fair construction of an exemption statute simply forbidding execution sale of exempt property allow this indirect way of taking it from the debtor?

When a debtor has mortgaged all his personal property to his creditor, he cannot claim any portion of it as exempt from foreclosure sale, as he could in case of execution had no mortgage been given.[3]

A creditor cannot complain that his debtor has mortgaged exempt chattels, since he could not have made his money out of them had they remained unincumbered.[4] The principle is

[1] Darby v. Rouse (Md.), 22 A. 1110; Muhr v. Pinover, 67 Md. 488. *Compare* Boulden's Case, 57 Md. 314.

[2] Maryland, Act 1861, ch. 7. Property to the value of $100 shall be "exempt from execution."

[3] Conway v. Wilson, 44 N. J. Eq. 457; Flanders v. Wells, 61 Ga. 195; Cronan v. Honor, 10 Heisk. 533; Moxley v. Ragan, 10 Bush, 156; Patterson v. Taylor, 15 Fla. 336; Lavillebauve v. Frederic, 20 La. Ann. 374; Roundy v. Converse, 71 Wis. 524; Fejavary v. Broesch, 52 Ia. 88; Frost v. Shaw, 3 O. St. 270; Jones v. Scott, 10 Kan. 33; McAuley's Appeal, 35 Pa. St. 209; Gangwere's Appeal, 36 Pa. St. 466; Bowman v. Smiley, 7 Casey, 225; Love v. Blair, 72 Ind. 281; Barnard v. Brown, 112 Ind. 53; 13 N. E. 401.

[4] Washburn v. Goodheart, 88 Ill. 229; Vaughan v. Thompson, 17 Ill. 78; Hunter v. Bosworth, 43 Wis. 583 (*see* Anderson v. Patterson, 64 Wis. 557); Patten v. Smith, 4 Ct. 450; Collett v. Jones, 2 B. Mon. 19; Prout v. Vaughan, 52 Vt. 451.

the same whatever the species of property.[1] But if the value of the mortgaged property greatly exceeds the debt secured, the good faith of the mortgagor may be questioned, and the question submitted to a jury.[2]

The right to mortgage that in which the creditor has no concern is as clear as the right to sell it; and the exemptionist has the right to sell.[3] But the proceeds would not therefore be exempt;[4] nor would property taken by way of exchange.[5]

If a debtor has voluntarily mortgaged his exempt personal property, does he thereby relinquish his exemption claim so that the goods are exposed to the general creditor? Undoubtedly there is relinquishment as to the mortgagee; but is there as to other creditors? The authorities say there is not. Even the right of redemption is held inviolable.[6] Though such mortgage be declared a general assignment, yet it is held that only creditors having waiver can take in distribution.[7]

It was held that a wife could claim exemption in the chattels mortgaged to the amount of the statutory limit — three hundred dollars — when the mortgagor had no homestead. This was held under statutory construction.[8] The husband was estopped[9] but the wife could claim, as she had been no party to the mortgage.

The debtor may claim exemption in his unmortgaged chattels when they are levied upon with others that he has mort-

[1] Weis v. Levy, 69 Ala. 209; Courier v. Sutherland, 54 N. H. 475; Bayne v. Patterson, 40 Mich. 658; Muhr v. Pinover, 66 Md. 480. *Compare* Chynoweth v. Tenney, 10 Wis. 397; Single v. Phelps, 20 Wis. 398; Case v. Fish, 58 Wis. 56.

[2] Ganong v. Green, 71 Mich. 1; Olmstead v. Mattison, 45 Mich. 617; Allen v. Kinyon, 41 Mich. 281; Loomis v. Smith, 37 Mich. 595. *See* Stewart v. Brown, 48 Mich. 383.

[3] Buckley v. Wheeler, 52 Mich. 1; Washburn v. Goodheart, 88 Ill. 229; Crouan v. Honor, 10 Heisk. 353; Kulage v. Schueler, 7 Mo. App. 250; Taylor v. Rice (N. D.), 44 N. W. 1017; Gardner v. King, 37 Kan. 671; 15 P. 920; Robson v. Rawlins, 79 Ga. 354; 7 S. E. 212; Paddock v. Lance, 94 Mo. 283; 6 S. W. 241.

[4] Harrier v. Fassett, 56 Ia. 264.

[5] Bennett v. Hutson, 33 Ark. 762.

[6] Jones v. Scott, 10 Kan. 33; Buckley v. Wheeler, 52 Mich. 1; Mandlove v. Burton, 1 Ind. 39; McGivney v. Childs, 41 Hun, 607. *See* Wilson v. Joseph, 107 Ind. 490; Zelnicker v. Brigham, 74 Ala. 598; Collet v. Jones, 2 B. Mon. 19, and 7 B. Mon. 586; Slaughter v. Detiney, 15 Ind. 49; State v. Carroll, 24 Mo. App. 358.

[7] Collier v. Wood Brothers, 85 Ala. 91.

[8] Colwell v. Carper, 15 O. St. 279.

[9] *Ib.;* Frost v. Shaw, 3 O. St. 270. *See* Slanker v. Beardsley, 9 O. St. 589.

gaged, and he may select an exempt article before seizure and leave the officer only a mortgaged one to proceed against, where the officer has been notified by record or otherwise.[1]

When the debtor has mortgaged chattels, part of which are specifically exempt, he may have the non-exempt portion first exhausted at the foreclosure sale, *if he claim this privilege.* The mortgagee is not bound to sell in this order, in the absence of the claim. And the interposition of the debtor must be timely. He cannot stand by until his wheat has been threshed by the sheriff, and then demand that, as it is exempt, other property must be first exhausted.[2] The general rule as to the exhaustion of the one of two funds which will leave the other to junior mortgagees is well established;[3] and it has been applied when exempt and non-exempt property were both liable.[4]

Mortgaged chattels, remaining in the possession of the mortgagor, may be claimed by him under the exemption provided by statute, if they are exempt; but the mortgagee cannot claim them and save them from execution, where he is held to have no interest.[5]

In some states a chattel mortgage does not imply a waiver of exemption — only express waiver will hold good.[6] Whether the waiver is with reference to a part or the whole of the property exempted by law should be specified in the instrument, though the chattels need not be designated when the waiver covers the whole.[7] Such waiver, unlike that respecting homestead, does not need the wife's signature to make it valid.[8]

[1] Greenleaf v. Sanborn, 44 N. H. 16; McCoy v. Dail, 6 Bax. 137; Tryon v. Mansir, 2 Allen, 219; Baldwin v. Talbot, 43 Mich. 11.

[2] Miller v. McCarty, 47 Minn. 321; 50 N. W. 235.

[3] Searle v. Chapman, 121 Mass. 19; Hallman v. Hallman, 124 Pa. St. 347.

[4] McLaughlin v. Hart, 46 Cal. 638; Armitage v. Toll, 64 Mich. 412; Wilson v. Patton, 87 N. C. 318. *See* Horton v. Kelly, 40 Minn. 193.

[5] Sherrible v. Chaffee (R. I.), 21 A. 103. In Maryland, $100 may be claimed by a debtor "as against existing judgment creditors," from the proceeds of his property sold for debt. Darby v. Rouse (Md.), 22 A. 1110; Md. Act. of 1861, ch. 7. *Compare* Muhr v. Pinover, 67 Md. 488, and Boulden's Case, 57 Md. 314.

[6] Knox v. Wilson, 77 Ala. 309; Ala. Code, 1876, § 2848.

[7] Neely v. Henry, 63 Ala. 261.

[8] *Ib.* In this case, waiver of exemption, made in a promissory note, was recognized; so also in Brown v. Leitch, 60 Ala. 313; Bibb v. Janney, 45 Ala. 329.

CHAPTER XXVIII.

EXEMPTING ATTACHED CHATTELS.

§ 1. Claiming before Judgment.
2. Attachment and Execution Different as to Claiming.
3. Effect of Judgment upon Attachment.
4. Conventional Waiver.
5. Sale *Pendente Lite.*
6. Garnishment in Foreign Jurisdiction.
§ 7. Garnishment and State Comity.
8. Garnishee's Disclosure in Foreign Jurisdiction.
9. Railroad Company Garnishee — Disclosure.
10. Non-residents, as to Chattel Exemption.

§ 1. Claiming before Judgment.

The service of the attachment process is usually prompt and often hurried, especially when there are competing creditors each trying to get the first lien, and when the chattels of the debtor are likely to be concealed or spirited away by him if he be not prevented by the timely action of the officer in charge of the writ. Under such circumstances, it is sometimes impracticable to give the debtor the opportunity of selecting his exempt portion before the seizure of his goods. He should have notice, however, as soon as possible, so that he may select and claim the articles which he is entitled to keep, and so that the officer may take additional property to supply the deficiency created by the release of things specifically exempt; for, by virtue of the writ, he could seize no more than what was needed to satisfy the debt and costs, in the first instance. If he has secured ten horses, and the debtor is entitled to select one and exercises his right, the officer may then release that one and attach another, or some other property in its place. The exemption being specific, the release may be made without order of court, at this first stage of the proceeding, *before the return is made.*

Claiming, whether of the officer or of the court, is usually by the debtor himself, but under some circumstances other beneficiaries may claim. For, though only he can defend

against the main suit, others may have such interest in the exemptions that they may apply for the release of such articles as the law secures to families. When the debtor has absconded, he may have forfeited his privilege as to exemption,[1] yet if it is for family benefit, his wife may claim it,[2] though she cannot defend the suit to recover the debt. If non-residency is the ground of the attachment, or rather if the debtor be a non-resident and therefore not entitled to exemption, it is held that the attaching officer cannot release any property to the wife without rendering himself liable on his bond.[3]

Where the absentee has not forfeited his right to claim, not only his wife but a son or daughter of proper age may interpose to save the exemption, without any power of attorney or other authorization, oral or written. It has been said judicially: "The domestic attachment act provides for the exemption, although the debtor has absconded with purpose to defraud his creditors, evidently requiring no authority from the husband. The act, allowing the widow of a decedent to retain, directs that the property remain for the use of the widow and children. Considering the act in question by these, *in pari materia*, we are of opinion that the authority of the daughter to make the demand was clearly implied by law." This (a part of a charge to a jury by the trial court) was approved on appeal.[4]

Although the debtor may always exercise the right of defense to a suit brought against himself or his property, he has been denied his claim of exemption in attachment cases when he had permanently removed from the state,[5] or was about to do so.[6] But the laws of a state may allow a foreign defendant to claim his attached wages, or other personalty, to the amount of the exemption.[7] And, though exercising his undoubted right to defend the main suit, and also his equal right to oppose the attachment on any legal grounds, the

[1] *Ante*, p. 765.

[2] Malvin v. Christoph, 54 Ia. 562; Griffith v. Bailey, 79 Mo. 472.

[3] State v. Chaney, 36 Mo. App. 513. *Compare* Fish v. Street, 27 Kan. 270. *See* Barker v. Ellis, 68 Miss. 172.

[4] Wilson v. McElroy, 32 Pa. St. 82. It appears that the daughter who claimed was a minor. Even when the father was not absent, an adult daughter, who lived with him, was allowed to claim. Halbe's Estate, 9 Pa. Co. Ct. 512. *See ante*, pp. 655, 773.

[5] McHugh v. Curtis, 48 Mich. 262.

[6] Stein v. Burnett, 43 Mo. App. 477.

[7] Menzie v. Kelly, 8 Ill. App. 259.

debtor cannot claim exemption awarded to heads of families when he has no family.[1]

The debtor himself has no right to claim the exemption of things which he did not own or lawfully possess at the date of the attachment when the lien was created hypothetically: just as in an ordinary case he must have his right of exemption, when the judgment lien attaches generally, to enable him to hold his exempt chattels as not affected by it.[2] If his possessory right existed at the date of the attachment, he may claim it; as to the extent of the exemption, the law existing when the debt was created must govern.[3] If he has mortgaged his chattels he is yet the proper claimant of exemption, rather than the mortgagee, in a suit against himself.[4]

The notified debtor may claim of the officer,[5] before the return, or of the court when the officer does not release the claimed property on demand. There is no sacramental form.[6] He is required to file an inventory or schedule, in some states, that it may be seen what exemption should be awarded him.[7] In others he files a declaration of exemption; and it is held that when he has done that, and the plaintiff has made affidavit and given bond for a contest, but has not notified the defendant in writing, the latter is not bound to join in the contest.[8] When contest is joined, the jury should find the facts

[1] Murdock v. Dalby, 13 Mo. App. 41. But he may be a proper claimant of exemption dependent upon his family headship, when his wife and children are absent from the state. State v. Finn, 8 Mo. App. 261. And when he is a housekeeper, with a sister living with him, though he be an unmarried man. Kelly v. McFadden, 80 Ind. 536; Bell v. Keach, 80 Ky. 42; Duncan v. Frank, 8 Mo. App. 286. A woman may claim under similar circumstances. Arnold v. Waltz, 53 Ia. 706. And when a widower and his daughter had another family to keep house for them, he was considered entitled to claim. Bunnell v. Hay, 73 Ind. 452; Lowry v. McAllister, 86 Ind. 543. It was held that a claimant need not be a housekeeper but must be the head of a family. Astley v. Capron, 89 Ind. 167.

[2] Berry v. Nichols, 96 Ind. 287.

[3] Todd v. McCravey, 77 Ala. 468; Bell v. Hall, 76 Ala. 546; Keel v. Larkin, 72 Ala. 493; Moore v. Boozier, 42 Ark. 385. *See* Ellis v. Barnett, 65 Ga. 350; Nowland v. Lanagan, 45 Ark. 108; *ante*, p. 766.

[4] Sherrible v. Chaffee (R. I.), 21 A. 103.

[5] Wilcox v. Howe, 59 Hun, 268.

[6] Bassett v. Inman, 7 Colo. 270.

[7] In Nebraska the inventory may be filed either in court or with the officer. State v. Carson, 27 Neb. 501.

[8] Bledsoe v. Gary (Ala.), 10 So. 502; Hutcheson v. Powell, 92 Ala. 619;

bringing the claimed property under the exemption law, or otherwise; they should not merely decide that it is exempt under the law when they are impaneled to pass upon the facts.[1]

Though chattels are not attachable if exempt, yet evidence may be received on the question, duly raised, whether they are exempt.[2] Though wages, within the monetary or time limits fixed by statute, are not attachable, the excess is; and, on proof of excess and its amount, in an attachment case, the writ will hold good as to that.[3]

A schedule of personal property must have the articles specified — not generally stated as "household furniture," for instance[4] — since otherwise it would not appear upon its face how the household is composed; and appraisers could not so easily estimate the several values. If excess be claimed by the debtor when pleading exemption against attachment, the other party could more easily expose the wrong by having a detailed schedule before him.

The *onus* is on the claimant of exemption to prove that the property is exempt — not merely that it is of the kind which the law exempts.[5] If the exemption claim, made to the offi-

Fears v. Thompson, 82 Ala. 294; Ala. Code, § 2520. When personal property of the debtor is attached in third hands by garnishment, and he claims it as exempt, he must file his claim and schedule; but if the property thus attached is money it need not be included in the schedule. If not money, there would yet seem to be no need of including it. Decatur Mercantile Co. v. Deford, 93 Ala. 347; Ala. Code. § 2533. It was held in Illinois that there was no exemption of money in bank, when reached by attachment or garnishment, by the statute governing the case at bar. Nichols v. Goodheart, 5 Ill. App. 574. But when governed by another statute, money in the hands of a garnishee in Illinois was held to be rightly attached, though exempt by the law of the state of the contract. Roch v. R. I. Ins. Co., 2 Ill. App. 360. Money received by the beneficiary of a benevolent society was held not exempt by New York statute. Acts of 1879, ch. 189; Bolt v. Keyhoe, 30 Hun, 619. Further as to distinction between tangible property and money or choses in action, in cases of garnishment, *see* Todd v. McCravey, 77 Ala. 468.

[1] Paulson v. Nunan (Cal.), 30 P. 845 (following same case, 54 Cal. 123); Code Civ. Proc., § 690 (6).

[2] George v. Fellows, 60 N. H. 398. *See* Adams v. Bushey, 60 N. H. 290.

[3] First N. Bank v. Weckler, 52 Md. 30, *42*.

[4] Friedman v. Sullivan, 48 Ark. 213.

[5] Rollins v. Allison, 59 Vt. 188; Bourne v. Merritt, 22 Vt. 429.

cer, is unfounded, he may disregard it and go on to attach, with impunity.[1]

§ 2. Attachment and Execution Different as to Claiming.

Whatever is exempt from levy in an ordinary suit is also exempt from attachment. The right of claiming the statutory benefit does not depend at all upon the character of the writ — whether that of attachment or *fieri facias*. The time of claiming is not the same under both processes, as will presently be shown; but the right, properly claimed, belongs to the debtor under either.[2]

Many states allow claiming at any time before sale in ordinary cases. The judgment lien may be considered as subject to the exemption. Chattels are not dedicated like homesteads: so the court cannot know what particular chattels the debtor will select, and therefore cannot expressly except them from the operation of the judgment lien. And the sheriff, making the levy before selection, cannot then know what to let alone.

In an ordinary personal suit the claim may be filed in the record before levy, or lodged with the officer afterwards, but prior to sale.[3] The lien created by the levy is not impaired by the claim;[4] it holds good as to the liable property. If all the property which the debtor possesses is within the exemption limit, there is no need for selection; and the officer must know that it is all exempt in the absence of any claim.[5] The question of exemption is sometimes raised on the trial of a cause, as when the privilege is claimed by answer in chancery.[6] A claim and affidavit made after judgment, in an ordinary suit, ought to show when the debt (adjudicated upon)

[1] Bryan v. Kelly, 85 Ala. 569.

[2] Anderson v. Odell, 51 Mich. 492; Church v. Holcomb, 45 Mich. 41; Williamson v. Harris, 57 Ala. 40; Staniels v. Raymond, 4 Cush. 314; Davenport v. Swan, 9 Humph. 186; Wilson v. Paulson, 57 Ga. 596; Sappington v. Oeschli, 49 Mo. 244; Hastie v. Kelly, 57 Vt. 293; Clark v. Averill, 31 Vt. 512; Winterfield v. Railroad, 29 Wis. 589; Plant v. Smythe, 45 Cal. 161; Savery v. Browning, 18 Ia. 246; Fanning v. First N. Bank, 76 Ill. 53. *Compare* Illinois Glass Co. v. Holman, 19 Ill. App. 30.

[3] Wright v. Grabfelder, 74 Ala. 460; Totten v. Sale, 72 Ala. 488; Shepherd v. Murrill, 90 N. C. 208; *ante*, p. 177.

[4] Sims v. Eslava, 74 Ala. 594.

[5] Alley v. Daniel, 75 Ala. 403.

[6] Zelnicker v. Brigham, 74 Ala. 598.

was contracted, so that it may appear whether the existing statute or a former one is to control the question of exemption.[1] However, the burden of showing this will rest on the plaintiff under some circumstances.

If no claim be interposed at any stage, the plaintiff, the officer and the court cannot know, in the absence of specific exemption, whether the debtor wants to exercise his privilege or not; whether he prefers to withhold a part of his property or to let it all go to pay his debts. He certainly may forego his privilege; and he may withdraw his claim after having made it.[2] So it cannot be said that a writ of execution is inoperative because there is a law authorizing the allowance of exemption to the debtor if he claim it.[3] In the absence of a claim and selection after the debtor has been duly notified, the officer may go on and sell.[4]

The lien of a judgment rendered with privilege upon the thing attached is quite different from that just considered. A definite piece of property is attached before judgment under a writ duly issued upon sworn preliminary showing, and it is taken from the possession of the alleged debtor, and he knows then that he has the right of claiming it as exempt. He ought to do so then; certainly he ought to do so before the inchoate lien (brought to precarious life by the attachment) has matured into a complete, specific lien, equal to a mortgage, by virtue of the judgment. At least, before the rendition of the judgment he should manifest his mind and legally prefer his claim, if he does not do so at once, upon first knowledge of the attachment. If he relies upon exemption, he may plead it in his answer; he should make his application in some form before the attachment lien has become specific and become irretrievably fastened upon the thing attached. The officer cannot release after his return.

[1] Randolph v. Little, 62 Ala. 397.

[2] White Deer Overseer's Appeal, 95 Pa. St. 191 (claim withdrawn by a pauper).

[3] In Arkansas, exemption does not apply when there is judgment in replevin. Smith v. Ragsdale, 36 Ark. 297. But it is applicable against execution on a bail-bond (State v. Williford, 36 Ark. 155), though the bond be to the state. *Ib.* If the debtor has obtained possession from the officer by giving a delivery bond, he is not thereby precluded from claiming exemption. Jacks v. Bigham, 36 Ark. 481; Desmond v. State, 15 Neb. 438.

[4] Wright v. Deyoe, 86 Ill. 490; Zielke v. Morgan, 50 Wis. 560.

§ 3. Effect of Judgment upon Attachment.

It is held that it is too late to claim exemption in attached property after judgment has perfected the contingent lien created by the act of attaching; for then the debt sued on has become a debt of the property itself. While the case is pending, the writ may be quashed so far as it bears on exempt property, but after judgment the right to claim is waived.[1]

If the attachment defendant can remain passive, make no attempt to dissolve the attachment *in limine litis*, make no defense to the suit, allow the inchoate lien (created by the act of attaching) to mature, and then defeat the whole proceeding by claiming exemption, he can put the attaching creditor in a worse position than an ordinary one would occupy. For, having attached sufficient property to satisfy his demand, the creditor can take no more while that is held, and the debtor is free to dispose of whatever else he has. All the unattached may be spirited away out of the reach of process while the case is pending. When it becomes impossible to find other property to attach, the creditor learns that he has gathered apples of Sodom. On the other hand, the ordinary creditor obtains a general judgment, and he is not hurt by the debtor's selection of one article, for he may immediately pounce upon another. Such result of the extraordinary remedy, granted when the ordinary is inadequate by the preliminary showing of the attaching creditor, would be itself extraordinary — not to say absurd.

[1] Richardson v. Adler, 46 Ark. 43; Turner v. Vaughan, 33 Ark. 454; Grubbs v. Ellison, 23 Ark. 287; Perkins v. Bragg, 29 Ind. 507; Kelly v. Dill, 23 Minn. 435; Barton v. Brown, 68 Cal. 11; Keybers v. McComber, 67 Cal. 395; Wilcox v. Howe, 59 Hun, 268; Russell v. Dean, 30 Hun, 242; Twaddle v. Rogers, 14 Phila. 163; Colson v. Wilson, 58 Me. 416; Smith v. Chadwick, 51 Me. 515; Barney v. Keniston, 58 N. H. 168; Buzzell v. Hardy, 58 N. H. 331; Howard v. Farr, 18 N. H. 457; Bourne v. Merritt, 22 Vt. 429; Clapp v. Thomas, 5 Allen, 158; Morris v. Shafer, 93 Pa. St. 489; Blair v. Steinman, 52 Pa. St. 423; Strouse v. Becker, 44 Pa. St. 206; Gay v. Southworth, 113 Mass. 38 (*compare* Copp v. Williams, 135 Mass. 401, and Savage v. Davis, 134 Mass. 401); Drake on Att., § 244*a*; Waples on Att. and Gar., pp. 164–7; *ante*, ch. X, § 7. "Whether the property attached is subject to execution is *res adjudicata* after judgment in attachment. The judgment against the property is a judgment *in rem*, and is as conclusive as a judgment against the person." Haas v. Shaw, 91 Ind. 384; State v. Manly, 15 Ind. 8.

It has been held that exempt community property, seized under a writ of attachment, was subjected to a valid lien upon being prosecuted to judgment; that the consent of the husband and the silence of the wife waived the exemption right. There was discussion, in the case so holding, whether the chattels attached were really exempt under the statute; but the court said that if it had appeared that they were exempt, the facts show that the defendant consented to the seizure and "waived the benefit of the exemption, and he cannot, under such facts, be heard to complain."[1]

The debtor must claim *when* and *as* the law requires, if he would avail himself of his exemption privilege.[2] The privilege is personal and depends upon its being claimed.[3] If the debtor fails to select specific chattels, he cannot have any of the proceeds of the attachment sale.[4]

The garnishee's statement that the defendant claims is not sufficient.[5] Nor will it avail the defendant to say, or have the garnishee say for him, that the property or credit could have been claimed as exempt.[6] He must actually claim before the property or credit is condemned in the hands of the garnishee.[7] The defendant does not lose his right of exemption by garnishment proceedings when he has had no notice.[8] And it has been said that, if not notified before, he may claim when he has notice of the sale;[9] but if there has been judgment rendered without service upon him, or notice to him, the whole proceeding is a nullity.

The complainant, in a suit upon a promissory note, alleged that the note waived exemption. There was judgment without recognition of the waiver. Garnishment proceeding, in aid of execution, followed the judgment. The garnishee set up the exemption of defendant's wages while admitting his own

[1] Dodge v. Knight (Tex.), 16 S. W. 626.

[2] Baesker v. Picket, 81 Ind. 554. *Compare* Campbell v. Gould, 17 Ind. 133.

[3] Longley v. Daly (S. D.), 46 N. W. 247; Comp. Laws, § 5126.

[4] Surratt v. Young, 55 Ark. 447; 18 S. W. 539.

[5] Courie v. Goodwin, 89 Ala. 569.

[6] Conley v. Chilcote, 25 Ohio St. 320. *Compare* Jewett v. Guyer, 38 Vt. 209, 218.

[7] Todd v. McCravey, 77 Ala. 468; *See* Winter v. Simpson, 42 Ark. 410.

[8] Mace v. Heath (Neb.), 51 N. W. 317.

[9] Howard Ass'n v. Reading R. Co., 102 Pa. St. 220.

indebtedness to the defendant. The court said the claim could be made only by the defendant himself.[1]

When made by the defendant himself, to save what he has in the hands of garnishees who have answered and admitted, the plaintiff may contest the claim and inventory. In one case the plaintiff showed that the defendant had had a large bank account *two years and a half before* the attachment. The court thus reasoned when allowing the evidence: "There was no presumption of law that a large sum of money, on deposit in a bank, had been spent without acquiring a *quid pro quo* for it in return, by reason of this lapse of time, nor that whatever may have been thus acquired had been consumed in its using. These facts, if true, should have been proved by affirmative testimony."[2] How far back may one go, when showing what a dependant once had, to throw upon him the burden of explaining what he has done with his money?

The personal property of a debtor having been attached, and having been held till judgment and then advertised for sale, the debtor sued out a writ of *mandamus* against the sheriff commanding him to have the property appraised and to set off five hundred dollars' worth of it (the maximum exemption) to the relator, in lieu of homestead, since he had no realty.

The relator was the head of a family, and the exemption was accorded to him, now after the contingent lien created by attaching had been made certain and perfect by judgment. It appears that the debtor filed an inventory which the officer would not notice, doubtless thinking it had come too late after judgment in an attachment suit. The sheriff pleaded, as respondent to the *mandamus* proceeding, that the debtor was estopped by *laches* and by his consent to the judgment.

The court held that the debtor was in time; that he could claim at any date before the sale,[3] contrary to cases above.

[1] Courie v. Goodwin, 89 Ala. 569; Ala. Code, § 2512, exempting $25 per month wages. How waiver is to be pleaded by plaintiff. Golden v. Conner, 89 Ala. 598.

[2] Davis v. Hays, 89 Ala. 563.

[3] Stevens v. Carson, 27 Neb. 501 (Neb. Civ. Code, § 522); Mann v. Welton, 21 Neb. 541; Hamilton v. Fleming, 26 Neb. 240, substantially overruling State v. Sanford, 12 Neb. 425, and State v. Krumpus, 13 Neb. 321 (*see* Kahoon v. Krumpus, 13 Neb. 266); State v. Wilson (Neb.), 48 N. W. 147. A debtor was allowed to claim his stock in trade on the morn-

§ 4. Conventional Waiver.

A general renunciation of the benefit of all exemption laws is against public policy. If made in a promissory note, it will not be regarded.[1] If there is an executory agreement not to claim the statutory exemption of personal property, it is held invalid and not enforceable;[2] but, for a consideration, specified chattels may be removed from the operation of exemption laws; particular creditors may be favored, and it has been held that all exemption of personalty may be waived in a promissory note.[3] A waiver, good for the creditor favored, is not therefore available by others.[4] If made by a member of a firm, it is good against himself, but not his partners, though he signed the firm name.[5]

The waiver of all exemption, in a promissory note, is good as to personal property,[6] but it should be stated in the judgment,[7] since otherwise it is nugatory.[8] If the waiver is of homestead exemption, chattels may be claimed, as it is not extended by construction beyond the literal expression.[9] If a note is given with a lien upon a particular chattel, exemption is waived as to that while it remains unaffected as to other chattels.[10] This was held in one jurisdiction, while in another it was decided that a mortgage of personal property, whether written or verbal, is not a waiver of exemption unless the intention to forego it be clearly expressed.[11] With respect to the lien of a landlord for rent there may be waiver of exemption in the lease;[12] but where there is no protection of chattels from rent judgments such stipulation in a lease would be unnecessary.

The attaching creditor, by demanding an inventory of the

ing before attachment sale. Rice v. Nolan, 33 Kan. 28.

[1] Recht v. Kelly, 82 Ill. 147; *ante*, p. 869.

[2] Branch v. Tomlinson, 77 N. C. 388. *Compare* Fogg v. Littlefield, 68 Me. 52, and Brown v. Leitch, 60 Ala. 313.

[3] Cases cited in the next paragraph.

[4] Bowman v. Tagg, 12 Phila. 345.

[5] Terrell v. Hurst, 76 Ala. 588.

[6] Agnew v. Walden (Ala.), 10 So. 224; Alabama Code of 1886, § 2083; Neely v. Henry, 63 Ala. 261.

[7] *Ib.*

[8] Courie v. Goodwin, 89 Ala. 569; Hosea v. Talbert, 65 Ala. 173; Brown v. Leitch, 60 Ala. 313.

[9] Reed Lumber Co. v. Lewis (Ala.), 10 So. 333. *See* Smith v. Fellows, 58 Ala. 467, as to the time of presenting the claim.

[10] Mynatt v. McGill, 3 Lea, 72.

[11] Knox v. Wilson, 77 Ala. 309.

[12] Hoisington v. Huff, 24 Kan. 379.

defendant's property, waives objection to the sufficiency of the exemption claim.[1] On the other hand, if the defendant points out specific property to the sheriff, for execution, he waives his right to claim it afterwards.[2] His hesitancy when notified by the officer to claim — saying that he "would go and see about it"— was held to be no waiver.[3]

After the defendant's property has been seized, he may become bailee under the sheriff and have charge of it in that capacity, and yet not yield his right to claim his exemption.[4]

§ 5. Sale Pendente Lite.

When there is an order of court to sell attached articles before final judgment, the debtor before sale should claim them as exempt, if he is to claim at all.[5] The property may be perishable, or there may be some other good reason rendering it proper for the judge as custodian of the seized goods to convert them into money; or there may be the consent of both parties for the preliminary sale. If the order of sale has been duly issued, the authorization of the constitution of the state for the selection of specific property, and the direction of the statute as to the method of selection by the debtor who is the head of a family, and the provision that sale of selected articles may be prevented by *supersedeas*, do not give the defendant any right to claim after he has let the proper time slip. He then comes up too late to take the proceeds of the sold goods as exempt. In the case above cited the debtor had agreed that the sale might be made, yet he sought to claim the proceeds after sale. His assent to the sale does not seem to have had weight in determining the legality of it, as will appear from the second form of the question formulated by the counsel on both sides of the case and submitted to the court: "Can the debtor set up and maintain his claim for exemptions after property has been seized by attachment and sold by the sheriff upon an order made by the judge in vacation with the consent of the debtor?

[1] Trager v. Feebleman (Ala.), 10 So. 213; Alabama Code, §§ 2524, 2525.

[2] People v. Johnson, 4 Ill. App. 346; Flander v. Wells, 61 Ga. 195; Georgia Code, § 2040.

[3] Green v. Blunt, 59 Ia. 79.

[4] Parham v. McMurray, 32 Ark. 261.

[5] Surratt v. Young, 55 Ark. 447; 18 S. W. 539.

In other words, can the debtor maintain his claim to exemptions out of the proceeds of the sale of his property by the sheriff upon request of the creditors under an order of attachment pending the litigation?" The constitution of the state provides: "The personal property of any resident in this state who is married or the head of a family, in specific articles, to be selected by such resident, not exceeding in value the sum of $500, in addition to his or her wearing apparel, shall be exempt."[1] The governing statute provides: "Whenever any resident of this state shall, upon the issue against him for the collection of any debt by contract of any execution or other process, or of any attachment except specific attachment against his property, desire to claim any of the exemptions provided for in article 9 of the constitution of this state, he shall prepare a schedule, verified by affidavit, of all his property, including moneys, rights, choses in action, held by himself or others for him, and specifying the particular property which he claims as exempt, under the provisions of said article."[2]

The submitted question was answered in the negative, in view of the provisions of the constitution and statute.[3] If,

[1] Const. Ark., art. 9, § 2.

[2] Mansf. (Ark.) Dig., § 3006.

[3] The court said of them: "These provisions seem to require that the debtor shall claim his exemptions in specific articles, to be selected by him. Most of the authorities bearing upon the question, when must the selection be made? hold that it must be made in a reasonable time; and they all seem to agree — as far as we have examined — that, as a rule, the selection must be made before the sale of the property, which is said in most of the cases in reference to a sale of the property attached on final process. It would seem that the claim of exemption should be made in accordance strictly with the requirements of the statute, and in apt time, that the debtor may have the benefit of the humane provisions of the law in reference to exemptions, and that the creditor may not be prejudiced in his rights. *Prima facie* all the property of the debtor is subject to sale on execution for the payment of his debts. But the constitution confers upon him the privilege of claiming specific articles of his property as exempt from execution, and the statute points out particularly the manner in which this must be done, and provides that when it is thus done a *supersedeas* shall be issued to prevent the sale of the property thus selected as exempt. If the debtor were permitted to stand by and see his property sold, without claiming his exemptions in specific articles, and then be allowed to claim the amount in value of his exemptions out of the proceeds of the sale of his property, it is not difficult to see how he might work this to the prejudice of his creditors, and how an improvi-

after sale before trial, the creditor fail to get judgment, the proceeds of the sale would go to the defendant as a matter of course; — not because they are exempt but because they belong to him. The time of claiming generally is any day before the trial of the attachment case.[1] But when there is an order for sale while the attachment is pending, the time for claiming cannot be any day before trial but must be before the preliminary sale, according to the authority above cited on this particular point.

§ 6. Garnishment in Foreign Jurisdiction.

"A creditor, who attempts to evade the exemption laws of his state by resort to attachment proceedings in the court of another state against the property of a debtor who is a resident of the state of the creditor's domicile, may be enjoined by the courts of the latter state from prosecuting his suit in the foreign jurisdiction."[2] The creditor may be enjoined — not the court in which he would proceed.[3] But it is also held, in the case first above cited, that when the parties live in different states, the creditor may attach, in his own, the property of the debtor found there, though such property may be ex-

dent and thriftless man, by permitting the sale of his property exempt by law from execution, and necessary for the use of his family, might thwart the purpose of the law in securing the right to a debtor to claim his exemption. We do not think that the statute confers upon a debtor the right to claim his exemptions out of the proceeds of property after it is sold under the process of the court, or under an order of the court, as in this case, when he has an opportunity to and might claim his exemptions in specific articles, as provided by the statute." The consent of the debtor to the sale by indorsing it upon the petition did not affect the question; and the fact that he had made an assignment before the attachment "cuts no figure" in the opinion: so the decision has a general application in its state to all sales of exempt chattels attached when made *pendente lite*. Surratt v. Young, *supra, citing*, among other authorities, King v. Ruble, 54 Ark. 418; Brown v. Peters, 53 Ark. 182; Chambers v. Perry, 47 Ark. 400; Healey v. Connor, 40 Ark. 352; Norris v. Kidd, 28 Ark. 499.

[1] Bancord v. Parker, 65 Pa. 336; Borland v. O'Neile, 22 Cal. 505; Collins v. Nichols, 5 Ind. 447; Cooper v. Reeves, 13 Ind. 53. Statutes, providing how chattels shall be claimed as exempt, strictly construed. Collins v. Boyd, 56 Pa. St. 402.

[2] C. J. Cockrill, for the court, in Griffith v. Langsdale, 53 Ark. 73, *citing* Cole v. Cunningham, 133 U. S. 107; Keyser v. Rice, 47 Md. 203; Snook v. Snetzer, 25 O. St. 516; Wilson v. Joseph, 107 Ind. 490; Hagar v. Adams, 70 Ia. 746.

[3] Pickett v. Ferguson, 45 Ark. 177.

empt in the debtor's state. Should the creditor be found in the state of the debtor's domicile, courts there cannot enjoin him from prosecuting the proceedings instituted at his home.

The purchase of claims against railroad employees, to be taken to another state for the purpose of garnishing the railroad company for the wages of such employees which are exempt at their domicile, has been vigorously condemned as "an attempt to defraud the laws of the state." . . . The petition, in a case to enjoin a person so purchasing and garnishing, charged that the claims "were bought with the sole purpose of having them collected in foreign jurisdictions out of the employees' wages for the last thirty days of service, and thus evade our own statute. . . ." The court, assuming this allegation to have been proved in the lower court, said: "The jurisdiction of a court of equity in this state to prevent a fraud of that character is unquestioned. It is not an attempt on the part of the court to interfere with courts in other jurisdictions, but to restrain a defendant, who is within its own jurisdiction, from committing a wrong."[1]

Can the garnishee invoke a court of equity and enjoin the plaintiff from garnishing in another jurisdiction? If the garnishee is a railroad company, may it protect its own employees in this way? The court, in the case first above cited, answered in the affirmative, provided the garnishee join with the injured party.

The creditor who, in contravention of the law of his own state, sends his claim out of it, assigns it to a person in another state for the purpose of having it collected there by garnishment while his debtor lives in his own state, may be sued civilly for damages, though he be also liable criminally.[2]

[1] Wabash R. Co. v. Seifert, 41 Mo. App. 35; Todd v. Railroad, 33 Mo. App. 110; Fielder v. Jessup, 24 Mo. App. 91; Missouri R. Co. v. Maltby, 34 Kan. 125; Cunningham v. Butler, 142 Mass. 47; Engel v. Scheuerman, 40 Ga. 206; Teager v. Landsley, 27 N. W. 739. In the Wabash cases, claims against railroad men were bought in Missouri (where they could not be made out of the wages of the men by garnishing the Wabash Western Ry. Co.), and were taken to Illinois for the purpose of the garnishment.

[2] Kestler v. Kern (Ind.), 28 N. E. 726 (*distinguishing* Uppinghouse v. Mundel, 103 Ind. 238); Stack v. Bare, 39 Kan. 100. "It is made a crime punishable by fine," says Judge Crumpacker, in the case above cited, "for any person to send, or cause to

Statutory inhibition of the assignment of claims to be sued upon in a state foreign to that of the assignment, for the purpose of depriving a debtor of his exemption right, has been held to be not contrary to the provision of the federal constitution that "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."[1] And, without such statutory inhibition, it is held that an exemptionist may restrain his creditor from prosecuting suit in another state, to the defeat of his exemption privilege, by writ of injunction.[2]

A statute forbade the creditor to send his claim out of the state to be sued upon with the view of depriving the debtor of the benefit of the exemption laws.[3] If he does not *send* the claim, but *takes* it to a foreign jurisdiction, does he violate the law? He would violate its spirit, if his purpose be to cut off his debtor from the privilege of pleading exemption. In a case under this law, a creditor went to a neighboring state for the purpose of garnishing a railroad company there which op-

be sent, any claim against a citizen of this state, into another state, or to assign or transfer such claim, for the purpose of being collected in the courts of another state, with the purpose aud intention of depriving such debtor citizen of his rights under the exemption laws of this state, where the parties and subject-matter are within the jurisdiction and could be reached by the process of the courts in this state. Sections 2162, 2163, Rev. Stat. 1881; State v. Dittmar, 120 Ind. 54." . . . "If an officer refuses to surrender property exempt from sale, but proceeds to dispose of it, the debtor may recover the property in the hands of an innocent purchaser, or he may sue the officer and the judgment plaintiff, or either of them, for trespass, and recover the value of the property, *notwithstanding he may have had credit for it upon his debt.* Huseman v. Sims, 104 Ind. 317; . . . Conwell v. Conwell, 100 Ind. 437; . . . Douch v. Rahner, 61 Ind. 64; Graham v. Crocket, 18 Ind. 119; Haswell v. Parsons, 15 Cal. 266; Belou v. Robbins, 76 Wis. 600; . . . State v. Harrington, 33 Mo. App. 476; Alsup v. Jordan, 69 Tex. 300. . . ." The profession will hardly assent to the last clause above quoted from Judge Crumpacker, if meant to apply to cases in which the debt has been paid.

[1] Sweeny v. Hunter, 145 Pa. St. 363; 22 A. 653; U. S. Const., art. 4, § 2; Pa. P. L. 164.

[2] *Ib.;* Cole v. Cunningham, 133 U. S. 107; Story's Eq. Jur., §§ 899, 890; Zimmerman v. Franke, 34 Kan. 650; Wilson v. Joseph, 107 Ind. 490; Mumper v. Wilson, 72 Iowa, 163; Teager v. Landsley, 69 Iowa, 725; Engel v. Scheuerman, 40 Ga. 206; Dehon v. Foster, 7 Allen, 57; Keyser v. Rice, 47 Md. 203; Snook v. Snetzer, 25 Ohio St. 516.

[3] Ind. R. S. (1881), § 2162.

erated in both states and was amenable to suits in either. The purpose being proved, the court held that his taking the claim there was equivalent to his sending it there, and so the statute had been violated.[1] Had he moved from his state where the claim originated to the neighboring state, for the general purpose of changing his home, and not the particular object of collecting his debt by garnishment where the exemption could not be successfully pleaded, the decision ought to have been, and doubtless would have been, the other way.

The creditor has a perfect legal right to remove from his state to another, and to collect his debt in the latter, by garnishment, from a debtor living in the former. In such case, when this has been done, the debtor may have been inconvenienced; but since there has been no breach of duty on the part of the creditor, he has inflicted no injury upon the debtor. Had he done an unlawful act resulting in injury to the public, a person sharing the injury with the rest of the community is not legally damaged so as to be entitled to complain personally: this illustrates *injuria sine damno.*

A railroad employee named Bare, the head of a family, was indebted to one Stark, who assigned his claim. The assignee sued Bare in a state where the railroad was operated but not where the employee resided, and garnished the railroad company for wages due the defendant. Bare could not have his wages exempted there, though they were exempt in his own state; so they were applied to his debt. Then he sued Stark for damages because of the transfer (which was without consideration) which had resulted in his deprivation of his right of exemption and the injury of his credit with the company. Bare alleged that Stark owed him a greater sum, at the time of the assignment, than that which was assigned, sued upon and put in judgment against him. No recovery on the indebtedness of Stark to Bare was claimed in the action. The court said: "We have . . . held that where a citizen of this state attempts by a proceeding of attachment or garnishment in another state to subject to the payment of his debt personal earnings of the debtor which under our laws are exempt, and thus prevent such debtor from availing himself of the benefit of the exemption laws of the state, an action by injunction

[1] State v. Dittmar, 120 Ind. 54, 388.

restraining the wrongful action may be maintained by the debtor against such wrong-doer. . . . We think it is a wrong which may not only be restrained by injunction, but that the citizen who proceeds and inflicts the wrong is liable to the debtor to the extent of the injury sustained."[1]

In another state, under a similar exemption law, a creditor reached his debtor's exempt earnings by garnishment, and the latter sued and recovered therefor in his own state — the court saying: "It is well settled that if exempt property is seized and applied to the payment of a judgment, the owner may have his action against the wrong-doer, unless such exemption is waived by some act or omission of the debtor."[2] Under different states of facts, the principle enounced in these cases has been repeatedly recognized.[3]

§ 7. Garnishment and State Comity.

Where the parties and the subject-matter are within one state, a court of that state is the proper tribunal to settle the contest. If one party seeks the tribunal of a different state, and has his suit settled under laws different from those which would have governed at the home of the parties (especially if that tribunal be an inferior one and there is good reason to believe that its decree would have been reversed on appeal), it has been thought that comity does not require courts in the state of the parties to regard the foreign judgment.[4] "It would be carrying the rule of comity to an absurd length for our courts to give to foreign creditors a better position in this respect than they do domestic creditors."[5]

The doctrine has been advanced, and stoutly advocated and judicially acted upon, that when the creditor and his debtor

[1] Stark v. Bare, 39 Kan. 100.

[2] Albrecht v. Treitschke, 17 Neb. 205.

[3] Vail v. Knapp, 49 Barb. 299; Haswell v. Parsons. 15 Cal. 266; Snook v. Snetzer, 25 Ohio St. 516; Phelps v. Goddard, 1 Tyler (Vt.), 60; Phillips v. Hunter, 2 H. Black. 403; Williams v. Ingersoll, 89 N. Y. 508; Osgood v. Maguire, 61 N. Y. 529.

[4] Leonard, J., in Martin v. Central Vt. Ry. Co., 50 Hun, 354. One party had gone from New York, where both parties lived, to Vermont, and obtained judgment there when he could have obtained none under the laws of New York — and it was this which was thought not binding, when tested in New York, and when to the prejudice of a New York citizen.

[5] Martin v. Cent. Vt. Ry. Co., *supra*, by the court; *citing* Osgood v. Maguire, *supra*.

reside in the same state, and the debt was created there and intended to be payable there, and the debt is for wages which are exempt there, "*the exemption of wages is such an incident of the debt from the employer that it will follow the debt, if the debt follows the garnishee* [*into another state*], . . . *and attach itself to every process of collection* . . . [*there*], *unless jurisdiction is obtained over the person of the principal debtor.*" [1]

If the doctrine is sound, the exception seems unnecessary, for the foreign court's acquisition of jurisdiction "over the *person* of the principal debtor" would render his position neither better nor worse. Jurisdiction over the thing attached, and notice to the principal debtor so that he may appear and defend if he choose, is all that the court needs to authorize it to condemn the thing: so the question of comity is not dependent upon jurisdiction over the principal defendant's person.

With this qualification of the doctrine eliminated, the principle stated is that a credit exempt in one state is so in all. No doubt it is competent for the court of one state to respect the exemption laws of another, and the comity is commendable. When, by the pleadings, by the disclosure of the garnishee, or in any proper way, the benefit of the law is claimed and the law brought to the knowledge of the court, it would be well if every court in every state of the Union would observe such comity. But the doctrine is not universally established. In the present state of things, a court, having jurisdiction of the plaintiff, and of the defendant or his property or credit as the case may be, and of the garnishee, and of the subject-matter, may observe such comity or not. In the case

[1] Drake v. Lake Shore, etc. R. Co., 69 Mich. 168, *179*. All the parties, including the garnishee, lived in Indiana. The creditor assigned his claim — the assignee sued in Michigan, and garnished the Lake Shore Railroad Co., which did business in both states. The court cited the following cases as supporting the doctrine above stated: Wright v. Railroad Co., 19 Neb. 175; Turner v. Railroad Co., 19 Neb. 241; De Witt v. Machine Co., 17 Neb. 533; Railroad Co. v. Dooley, 78 Ala. 524; Pierce v. Railway Co., 36 Wis. 283; Baylies v. Houghton, 15 Vt. 626; Tingley v. Bateman, 10 Mass. 343; Sawyer v. Thompson, 4 Frost (N. H.), 510; Railway Co. v. Maltby, 34 Kan. 123; Lovejoy v. Albee, 33 Me. 414; Hamilton v. Rogers, 67 Mich. 135.

last cited, the court took ground for the comity and settled the law of the state in favor of it, so that the profession may regard it as settled there that exemption, attached to a credit, follows it across state lines into that state, and will be regarded there because of its creation in another state.

But what shall be said of a court, with complete jurisdiction over the parties, the subject-matter and the *res* (or rather, over the plaintiff, the garnishee, the subject-matter, and also over either the *res* or the defendant, or both), which holds itself bound by the laws of its own state only, and not bound to give effect to the exemption laws of other states? If such court charges the garnishee, and gives judgment against the principal debtor, and subjects the attached credit to the payment of the debt — all according to the laws of its jurisdiction — who shall gainsay the judgment? The final decree of a court clothed with jurisdiction must be everywhere respected, so far as the contest before it is adjudicated, when there is no matter of juridical morals at stake. There is none when the contest merely involves exemption. When, by the laws of one state, preference is given to one creditor over another of equal rank in an insolvent's assignment, a court of another state, where such preference is held juridically immoral and fraudulent, may disregard the foreign statute in an action to enforce it in the latter state. So, in slavery times, courts of a free state were not bound to enforce the law of a slave state determining the *status* of a man to be that of a slave, but might repudiate it on juridically moral grounds. But when no such grounds exist, comity requires that the statutes duly enacted in one state must be respected in another. And exemption questions constitute no exception.

The position taken in a case above noticed,[1] that the foreign judgment of an inferior court may be disregarded when there is good reason to believe that it would have been reversed had the case been appealed, seems wholly untenable. Judgments of inferior courts, when they are final — when the jurisdiction has been exhausted — are as much to be respected as any other. The final decree of a justice of the peace is as sacred

[1] Martin v. Central Vt. R. Co., *supra*, in the separate opinion of Leonard, J.

in the state where it was rendered, and as much to be respected in other states, as though rendered by a supreme court. What would become of our whole judicial system if a judgment in one state could be disregarded in another on the ground that it might have been reversed had it been appealed?

No one would seriously contend for such loose observance of the constitutional requirement that "full faith and credit shall be given in each state to the . . . judicial proceedings of every other state,"[1] in its application to judgments generally; and there is no reason why judgments affecting exemption should form an exception.

The principles enounced by the courts of one state are often far from deserving full faith and credit in every other state, and there is no constitutional mandate that such credit should be given them; but any judicial proceeding of a court, however inferior (whether it might have been reversed on appeal had appeal been taken, or not), is entitled to full faith and credit in all the states.

If, therefore, the wages of a railroad employee are exempt in the state where the wage-earner and the employing corporation are domiciled, and the latter is garnished in another state and legally made to pay those wages to the laborer's creditor, in accordance with the laws of the latter state, full faith and credit must be given in the former state to that judicial proceeding.

Is the wage-earner then without any remedy at home? No. He has his remedy and may have two. He may sue his creditor who injured him by depriving him of his exemption right, whether by garnishing the company in a state where that right could not be successfully set up, or by assigning his claim that the assignee might do so — for the wrong to the exemptionist is the same, whichever course his creditor may have pursued. The cases above cited, in which the exemptionist resorted to such remedy and succeeded, were decided on broad grounds, good everywhere — not on any peculiar provisions of any state statute. If the exemptionist can show that he has been wrongfully deprived of a right, and thereby injured, he ought to have his right of action for reparation

[1] Const. U. S., art. IV, sec. 1.

against the wrong-doer, in whatever state the wrong may have been perpetrated.

And he may elect to sue the garnishee who has been made to pay once, if there was no disclosure that the claim was for wages and that the wages were exempt, provided the charging of the garnishee was owing to the want of such disclosure by him. If, on the other hand, no fault attaches to the garnishee, the wronged exemptionist is shut up to his remedy against his creditor who wronged him.

§ 8. Garnishee's Disclosure in Foreign Jurisdiction.

The garnishee would not make himself liable for not disclosing that the defendant's credit attached in his hands is exempt in the state of his and the defendant's domicile, if the law of the state (where the garnishment proceeding is had) forbids the pleading of the exemption laws of a different state, or holds them no defense for the garnishee or the principal defendant.

The law of some states, as expounded by their courts, does disfavor such pleading and defense. In a case where both plaintiff and defendant resided in a state where wages were exempt, and a railroad company was garnished in another state for the wages of the debtor, the garnishee was charged, and the court held that the law exempting wages in the debtor's state could not be invoked to save his wages.[1] Soon after, in the same state, it was judicially declared to be a *settled rule* there that the exemption laws of another state cannot be pleaded or relied upon as a defense by either the garnishee or judgment debtor.[2]

While the decisions touching this subject, and which have been relied upon sometimes to sustain the doctrine that one state is not bound to enforce the exemption laws of another,

[1] Mooney v. Railroad Co., 60 Ia. 346.

[2] Broadstreet v. Clark, 65 Ia. 670. *See*, as bearing more or less on this "rule." Leibner v. Railroad Co., 49 Ia. 688; Newell v. Hayden, 8 Ia. 140; Morgan v. Neville, 74 Pa. St. 52. *See*, also, as cases less pertinent, Conley v. Chilcote, 25 O. St. 320; Railroad Co. v. May, 25 O. St. 347; Pierce v. Railway Co., 36 Wis. 283; Banks v. Railway Co., 45 Wis. 172; Lock v. Johnson, 36 Me. 464; Railroad Co. v. Ragland, 85 Ill. 375; and see the review of those cases by Morse, J., for the Michigan court, in Drake v. Lake Shore, etc., *supra*.

may not fully support that doctrine, there can be little doubt that the position is sound. Upon principle, it seems well grounded; and the *settled rule* enounced in a case above noticed [1] is one which any court may consistently follow. As we have seen that there is no rule of comity generally recognized so as to establish a different rule, we cannot condemn any state for following this, while we may prefer to have a state voluntarily respect the exemption laws of all the rest as a matter of comity.

There can be no universal rule now laid down which will give the wronged wage-earning exemptionist any other remedy than the two above suggested — which two ought to avail him everywhere.

It has been frequently held (or rather, the doctrine has been favored) that, though exemption laws do not create vested rights and put them into contracts, and though they have no extraterritorial authority, yet if the laws of two states both exempt property with like provisions, mutual comity will be observed. The court of one state, in a suit between citizens of the other, will give effect to the exemption laws of the other state, since they are virtually the same as those of its own.[2]

It has been held that a garnishee cannot be charged to pay at a time and place in which his obligation is not payable to the defendant; that is, the plaintiff cannot step into the defendant's shoes and exact of the garnishee what the defendant himself could not have exacted; but if the garnishee is a resident of the state in which jurisdiction has been acquired over the defendant, he cannot resist being charged on the ground that his debt to the defendant is payable elsewhere. This seemingly contradictory holding, as briefly stated from the syllabus of a case, will be clearer after the statement of the facts. An attachment suit was brought against a non-resident firm. One of the partners appeared, and judgment was rendered against the firm. A railroad company, being garnished, answered that it was indebted to one of the defendants resid-

[1] Broadstreet v. Clark, *supra*.

[2] Kestler v. Kern (Ind.), 28 N. E. 726, *729;* Railroad Co. v. Baker, 122 Ind. 433; Wright v. Railway Co., 19 Neb. 175; Drake v. Railway Co., 69 Mich. 168; Railroad Co. v. Maltby, 34 Kan. 125; Pierce v. Railroad Co., 36 Wis. 288.

ing in another state, and that the indebtedness was payable there and not elsewhere, according to agreement with him when he was contracted with as an employee of the company; that the sum due him was for wages exempt in his state.

The garnishee, though discharged in the trial court, was charged by the supreme court. The latter said: "The authorities are that although the debtor reside in another state, if the debt was made payable within the state where it is made the subject of garnishment, such non-residence would not avail; but if the debt is payable generally, or at a particular place within another state, and the debtor reside there, then the *chose in action*, like personal property in his hands belonging to the defendant, attaches to his person and becomes *local* with him in that state, and he cannot be made to answer for such debt in another state, as trustee or garnishee; and these are the only qualifications of the principle. It is only necessary to recur to the situation and facts of this case to show that it is entirely outside of this principle.

"The trustee debtor or garnishee in this case is a corporation and resident of this state; and the defendant in the attachment, whose credit or *chose in action* is sought to be reached by the garnishment, has submitted to the jurisdiction of the court. . . ."[1]

§ 9. Railroad Company Garnishee — Disclosure.

A railroad company, being garnished for the wages of its employee, acknowledged the indebtedness to the defendant but did not state that the last month's wages were exempt. The defendant, a brakeman, after judgment against him and the garnishee, in favor of the plaintiff, brought suit against the company for his wages. It was held that the judgment in the garnishment proceedings, and payment by the garnishee accordingly, did not relieve from liability to pay again at the suit of the employee. The court reasoned that as the defendant in the first suit was not a party to the auxiliary garnishment proceedings — was not notified of the writ of garnishment — the statute was not meant to confine the garnishee literally to its requirement that he answer as to his indebtedness or property possession, but should further disclose that

[1] Coml. Nat. Bank v. Chicago, etc. R. Co., 45 Wis. 172.

the property or debt is exempt, if it be so.[1] The brakeman, defendant in the first suit, could have appeared and set up his exemption. This would have saved his case and relieved the garnishee company from paying twice. He was in default — he failed to answer, though cited — he allowed the company (after its answer as garnishee to all that the statute required on its face) to pay his debt, and then sued them and made them pay again. It is true that the wage-earner's debtor, when garnished, "cannot deprive him of it by his neglect to disclose the whole matter when summoned as his trustee;"[2] but when the statute requires the garnishee to answer as to indebtedness merely, it is yet in the defendant's power to set up the exemption of his wages; and he ought not to be benefited by his own *laches* so far as to have his wages paid twice, when he neglects to answer. If the statute requires the garnishee to explain the nature of the indebtedness and to disclose the fact that the credit due by him to the defendant is exempt, he would have nobody to blame if made to pay twice on account of his failure so to answer. It is always true that "the garnishee cannot deprive him [the defendant] of it [the exemption] by his neglect to disclose the whole matter when summoned as his trustee;" for the defendant can prevent such a deprivation by answering and setting up his rights. The finding against the garnishee is nothing against the defendant till the judgment against himself: so the garnishee cannot possibly deprive him of his exemption, unless the defendant fails to defend. The fact of the defendant's not being notified of auxiliary garnishment proceedings does not seem to bear upon the matter. He cannot be hurt by somebody's acknowledgment of indebtedness to him.[3]

If a debtor has been forced to pay into court, by garnish-

[1] Mo. Pac. R. Co. v. Whipsker, 77 Tex. 17.

[2] Lock v. Johnson, 36 Me. 464; Railway v. Ragland, 84 Ill. 375; Winterfield v. Railway, 29 Wis. 589; Daniels v. Man, 75 Me. 397; Jones v. Tracy, 75 Pa. St. 417, cases cited to sustain the above quotation by the court.

[3] Under the exposition given in the Missouri Pacific case, *supra*, of the Texas statute, that it *implictly* requires disclosure by the garnishee of the nature of the indebtedness to show whether it is exempt or not, it is said, in Burke v. Hance, 76 Tex. 82: "If the evidence showed that the judgment was rendered for the seizure of exempt property, and if that fact was known to the garnishee, it would be his duty to plead it."

ment proceeding against him, what he owed the defendant, he is acquitted of his indebtedness and cannot be compelled to pay again in another state in an action brought by the former defendant against him directly. The fact, that the indebtedness was wages due by the garnishee to the original defendant, was not allowed to affect the question, though they were exempt in the state where the latter action was brought. Plea of payment of those wages, in a different state, under order of a court clothed with jurisdiction, was sustained.[1] It is certainly to the interest of the garnishee to disclose the exempt character of what is sought to be attached in his hands, and courts have said it is a duty.[2]

Wages which accrue after the debtor's employer has been garnished for his wages due are not covered by the garnishment unless there be statutory provision that the date of the trial and of the garnishee's answer then, in open court, shall be the time of fixing what credits the defendant has in the garnishee's hands. Where the statute makes the date of the service upon the garnishee the time of determining the credits, none subsequently earned would be covered. Where the statute, in terms, "exempts all wages not actually due at the time" of the attachment or garnishment, there is no room for construction.[3]

§ 10. Non-residents, as to Chattel Exemption.

It has been asserted as a *rule*, that "if the statutes do not restrict the exemption of property, for the payment of debt, to residents, or to some other particular class of persons, the courts have no authority to make such restriction, and the statute will apply to all classes, non-residents as well as residents."[4]

[1] Chicago R. Co. v. Moore (Neb.), 48 N. W. 475.

[2] Chicago, etc. v. Mason, 11 Ill. App. 525; Chicago, etc. v. Ragland, 84 Ill. 375. If a railroad company be garnished for the wages of an employee who has funds enough of the corporation in hand to meet the wages due him, the company, on disclosure of the fact, ought not to be charged as garnishee, under a statute that requires the defendant's credit to be due him "absolutely and without any contingency." Fellows v. Smith, 131 Mass. 363; Mass. Gen. Stat., ch. 142, §§ 24, 25, 26.

[3] House v. Balt. & O. R. Co., 48 Md. 130; Moore v. Heaney, 14 Md. 563. *Compare* First. N. Bank v. Jaggers, 31 Md. 51.

[4] Mo. Pac. R. Co. v. Maltby, 34 Kas. 130; Zimmerman v. Franke, 34 Kas.

The privilege of exemption is not confined to residents under all the statutes. Non-residents have been allowed the same rights as family-men living in the state. They must file their schedule and comply with the law in all respects, as a resident.[1] A husband, habitually living away from his family, was presumed to keep his domicile with them and did not forfeit his exemption privilege.[2]

It would seem that the reason why chattel exemption is often made the privilege of residents is the good of the state, the prevention of pauperism and the quiet of families. That reason would seem inapplicable when a resident has quit his business and is on the eve of taking his exempt chattels, machinery, etc., out of the state. The creditor permanently located ought not to lose his claim when the debtor is about to cease to be a resident — going out of the state with a few hundred dollars' worth of property. But, under the statute governing, it was decided that a debtor might take his lumber-and-shingle-making machinery from the state, despite the creditor.[3]

When exemption is accorded only to residents, the fact of residence must be proved, and the *onus* is on the claimant.[4] A debtor having sold his stock of goods and being paid partly by the cancellation of a debt due the purchaser and the balance in promissory notes — which notes, together with his other remaining property, did not exceed in value the amount allowed in his state as exempt — was justified by the court in the transaction, provided he was a resident of the state — residents only being allowed the exemption by statute. The goods thus sold were attached by other creditors of the vendor, and the purchaser sued the sheriff for wrongful at-

650. So, following the *rule*, it was held, later, that the wages of a Nebraska head of family are not subject to garnishment in Kansas — both states exempting wages. Kan. City, etc. R. Co. v. Gough, 35 Kas. 1, *distinguishing* Burlington, etc. R. Co. v. Thompson, 31 Kas. 180. *See* Rice v. Nolan, 33 Kas. 28.

[1] Menzie v. Kelly, 8 Ill. App. 259; Mineral Point R. Co. v. Barron, 83 Ill. 365.

[2] Freehling v. Bresnahan, 61 Mich. 540.

[3] Wood v. Bresnahan, 63 Mich. 614, *distinguishing* McHugh v. Curtis, 48 Mich. 262, and *citing* O'Donnell v. Segar, 25 Mich. 367, as intimating the same view.

[4] Brinson v. Edwards (Ala.), 10 So. 219; Carter v. Chambers, 79 Ala. 223.

tachment. It was under this state of facts that the court held, as above stated, that residence is a fact not presumed, and which therefore must be proved.[1]

[1] Brinson v. Edwards, *supra*. The court said of the vendor: "Avenger was not entitled to exemptions unless he was a resident of this state. Code 1886, §§ 2507, 2511. The position assumed by the plaintiff was that the transaction by which he acquired the stock of goods could not be vitiated by the fact that notes were given for the balance of the purchase-price, and that they were made payable in the future, because such notes became part of the exemptions allowed by the law to the debtor. To the maintenance of this position proof of the debtor's residence in this state was essential. In the bill of sale Avenger is described as of the county of Lowndes and state of Alabama, but the record discloses no direct evidence upon the question of his residence; and it is not shown that the fact of his residence in Alabama was conceded. In the absence of an admission as to a material fact, unless it appears that such fact was clearly shown, and that it was not contested, the evidence in regard thereto, though clear and without conflict, must be submitted to the jury; and the trial court, in charging the jury, has no right to assume the existence of such fact as established. 1 Brick. Dig., p. 336, § 8; 3 Brick. Dig., p. 114, § 118 *et seq.* While it does not appear from the bill of exceptions that there was any dispute in regard to this material fact, yet it is not shown that the existence thereof was conceded, or that the defendant in any way waived the right to take advantage of what was perhaps an inadvertence on the part of the plaintiff in failing to introduce proof on the subject. In the absence of any such showing, the court could not assume that such fact was admitted. Carter v. Chambers, 79 Ala. 223. The part of the general charge to which exception was reserved was faulty in failing to submit to the jury the question of the debtor's residence. The transaction there hypothesized could not as a matter of law be pronounced valid unless the fact existed which would entitle the debtor to claim exemptions. If that fact did not exist, and the balance of the purchase-price for the property sold was paid to the debtor in cash, such circumstances could have been looked to by the jury in determining the *bona fides* of the transaction (Levy v. Williams, 79 Ala. 171); and if, as in the present case, such balance was secured to be paid to the debtor in the future, there was involved such a hindering and obstruction of the other creditors as to render the transaction voidable by them (McDowell v. Steele, 87 Ala. 493). In the instruction under consideration, the fact of Avenger's residence in this state should have been hypothesized. The failure to do so renders the charge erroneous. For this error the judgment must be reversed."

CHAPTER XXIX.

EXEMPTION DENIED IN CERTAIN SUITS, ETC.

§ 1. Suits Against Partnerships.
2. Partner's Share Held Liable.
3. Partner's Share Held Exemptible.
4. Suits for Antecedent Debts, etc.
§ 5. Suits for Purchase-money.
6. Actions *Ex Delicto*.
7. Fraudulent Concealment.
8. Fraudulent Sale.
9. Fraudulent Assignment.

§ 1. Suits Against Partnerships.

As a general rule, exemption is of individual — not partnership-property. The statutes usually speak of the exemptionist in the singular, as the debtor, the householder, the head of a family, and the like. When members of certain favored avocations are meant, they are usually designated as individuals; as, the farmer, the mechanic, the laborer. If the property of a partnership is to be exempt, the statute says so or ought to say so. There are cases recognizing the exemption of partnership property, but ordinarily the statutes favor the individual representing a family, or the follower of an avocation; and the general rule is that partnership property is not exempt when not expressly made so.[1]

A yoke of oxen was the subject of the contest in the case above cited. Owned by insolvent partners in business, they were claimed as exempt under a statute in which it is provided respecting the debtor: "If he has more than one pair of working cattle, he may select," etc.[2] The firm had a yoke of oxen used in their business, which were held not exempt.[3] But under like circumstances, though under a different statute, it was said: "If each of the plaintiffs had owned a pair of

[1] Thurlow v. Warren, 82 Me. 164. Judge Virgin said for the court: "Although in some jurisdictions the contrary view is taken, still the great weight of deliberate and well-considered cases hold that individual and not partnership property is exempt. Pond v. Kimball, 101 Mass. 105; Bonsall v. Cornley, 44 Pa. St. 442; Guptil v. McFee, 9 Kas. 30; *In re* Handlin, 3 Dill. 290; Russell v. Lennon, 39 Wis. 573; overruling Gilman v. Williams, 7 Wis. 336."

[2] Me. R. S., ch. 81, § 62, clause 7.

[3] Thurlow v. Warren, 82 Me. 164.

horses, both teams would have been exempted." And further: "It would be an obvious perversion of the statute to hold that the plaintiff forfeited its protection by owning but a single team between them, used for the common support of both."[1]

Under a statute treating the beneficiary of the exemption in the singular as most statutes do, several partners claimed separate allowances from partnership property; and, in denying the claims, the court said: "It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless possibly the clause as to fishermen be an exemption. Its apparent object is to secure to the debtor the means of supporting himself and his family by following his trade or handicraft with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessaries out of his property. But property belonging to the firm cannot be said to belong to either partner as his separate property. . . . The exemption, in our opinion, is several, and not joint."[2] This reasoning was adopted in a later case under a similar statute.[3] And where exemption to a certain sum is granted to debtors, the statute does not thus offer exemption to partnerships.[4]

The question has been much discussed, but it seems clear that a partner cannot claim as exempt to him, property which he does not own. The firm is an artificial person of which he is a part; but its property is not his. Therefore, there must be statutory authorization before he can rightfully claim any portion of the partnership property, other than such authorization as that which exempts certain property to individual debtor-owners.[5] "No one of the members of a copartnership

[1] Stewart v. Brown, 37 N. Y. 350.

[2] Pond v. Kimball, *supra*.

[3] Cowan v. Creditors, 77 Cal. 403.

[4] Wise v. Frey, 7 Neb. 134; White v. Heffner, 30 La. Ann. II, 1280; Spiro v. Paxton, 3 Lea, 75; Baker v. Sheehan, 29 Minn. 235; State v. Bowden, 18 Fla. 17.

[5] If further pursuit on this question is desired by the reader, he is referred to the following cases: Gill v. Latterman, 9 Lea, 881; Spiro v. Paxton, 3 Lea, 75 (S. C., 31 Am. Rep. 630); Gaylord v. Imhoff, 26 O. St. 317 (S. C., 20 Am. Rep. 762); State v. Spencer, 64 Mo. 350 (S. C., 27 Am. Rep. 244); Bonsall v. Comly, 44 Pa. St. 442; Holmes v. Winchester, 133

has a separate property in the partnership effects. The ownership is a joint one, and resides in the firm. The partnership effects are primarily liable for the partnership debts." [1]

§ 2. Partner's Share Held Liable.

There is not uniformity in the several states as to the allowance of exemption to individual members of a firm, in partnership property. In many, the privilege is decidedly denied.[2] The partner's interest is his portion of the assets after the firm debts are paid. In the language of Judge Story: "Joint property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts, against all persons not having a higher equity. A long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners; that is to say, the partners have the right to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right, except to his own share of the residue. . . ." [3]

Mass. 542; Giovanni v. First N. Bank, 55 Ala. 305 (S. C., 28 Am. Rep. 723); Elias v. Verdigo, 27 Cal. 418; Short v. McGruder, 22 Fed. 46. *Compare* Stewart v. Brown, 37 N. Y. 350; 93 Am. Dec. 578; Blanchard v. Paschall, 68 Ga. 32; 45 Am. Rep. 474; Skinner v. Shannan, 44 Mich. 86; 38 Am. Rep. 232; McCoy v. Brennan, 61 Mich. 362; Evans v. Bryan, 95 N. C. 174; 59 Am. Rep. 233.

[1] Clegg v. Houston, 1 Phila. 353; Hoyt v. Hoyt, 69 Ia. 174.

[2] Schlapback v. Long, 90 Ala. 525 (in which it is held that, if husband and wife be partners in business, neither can claim exemption from the partnership property); Weller v. Weller, 131 Mass. 446; Deeter v. Sellers, 102 Ind. 458; Henry v. Anderson, 77 Ind. 361 (*see* State v. Read, 94 Ind. 103); Richardson v. Adler, 46 Ark. 43; Ward v. Hahn, 16 Minn. 167; West v. Ward, 26 Wis. 580; Wright v. Pratt, 31 Wis. 99; Letchford v. Cary, 52 Miss. 791; McManus v. Campbell, 37 Tex. 267; Terry v. Berry, 13 Nev. 515; Rhodes v. Williams, 12 Nev. 20; Kingsley v. Kingsley, 39 Cal. 666; Amphlett v. Hibbard, 29 Mich. 298.

[3] Story's Eq. Jur., § 1253. As was said by the court, through Chief Justice Randall, in State v. Bowden, *supra:* "In the nature of partnership, the property of the firm is not the individual property of either of its members. Neither of them can of right use the property for the payment of his individual debts. The property of the firm is, in the first instance, assets for the satisfaction of the debts of the concern; and, secondly, for the reimbursement of such members of it as are in advance of their proper share of the capital and debts. Until the share of each member is ascertained and severed, the assets are not the separate property of either, but the joint property of all, subject to the above conditions.

"If either partner dies, the partnership property survives to and

Whether a partner can claim exemption relative to the merchandise of the firm to which he belongs is a question which has been likened to partnership in realty, and decided in the negative by parity of reasoning.[1]

Though one partner can bind his firm by mortgaging partnership property to secure debts of the firm, the benefit of statutory exemption to a person engaged in business was held not applicable to a partner who mortgaged some of his firm's stock in trade without the knowledge of his copartner.[2]

An execution issued against partnership property before the dissolution of the firm owning it was levied on the share of one partner after the dissolution; and it was held that he could not claim exemption.[3] When the execution came into the sheriff's hands, the claimant's interest was in common with the other partner's, and could not be appropriated, even in part, for his family's benefit.[4]

The interest of a possessor in common of personal prop-

vests in the survivor, not as his individual property absolutely, but to be applied to the liquidation of the liabilities of the copartnership to its creditors, and to reimburse advances by its members before distribution among them all, in proportion to their several equities. . . .

" . . . The constitutional and the statutory provisions on the subject of exemptions contemplate that the debtor may claim an exemption out of his own property. Partnership assets are not the property of either of the partners. Their possession and ownership for partnership purposes, not for private purposes, go to the survivor if one of them dies, and must be applied to the payment of copartnership debts and for distribution, as before stated.

"Property exempted from levy and sale must be selected so as to be identified and set apart. Partnership effects of a mercantile firm are constantly changing in respect to identity, and as one partner cannot take possession of the goods and convert them to his own use against the consent of his copartners, but the goods remain partnership property until sold, a 'selection' of such goods by one partner as his exempt property would be a fruitless and idle ceremony — the same goods still remaining the property of the firm for partnership purposes."

[1] Fingurhuth v. Lachman, 37 Mo. App. 489, decided upon the authority of a homestead case; Trowbridge v. Cross, 117 Ill. 109; R. S., ch. 52, § 13.

[2] Harvey v. Ford, 83 Mich. 506; 47 N. W. 242; Howell's Stat., § 7686.

[3] State v. Day (Ind. App.), 29 N. E. 436; Love v. Blair, 72 Ind. 281.

[4] Pond v. Kimball, 101 Mass. 105; Henry v. Anderson, 77 Ind. 361; Deeter v. Sellers, 102 Ind. 458; Smith v. Harris, 76 Ind. 104. *Compare* Robinson v. Hughes, 117 Ind. 293, and Goudy v. Werbe, 117 Ind. 154. In State v. Day, *supra*, it was held that a firm way waive their equitable liens in favor of a mortgage lien on a debt of one partner. *See* Purple v. Farrington, 119 Ind. 164.

erty has been held exempt, "*where the possession as well as title is several.*" Distinction was drawn between such interest and partnership interest, in relation to exemption — the court remarking that if the articles levied upon were partnership property for a partnership debt, there would be a striking analogy between the case under consideration and one previously decided in which exemption was denied.[1]

§ 3. Partner's Share Held Exemptible.

The question: Whether, if a portion of the personal property (included in the schedule of the applicant for exemption) belonged to the firm of which he was a member at the time it was levied upon, and no severance had been made by the partners at the time — whether he is entitled to an exemption in such portion? was judicially answered in the affirmative, in a state where it came up as new. The court remarked that, "in fact and in law, the individual members of the firm are the real owners of the partnership property. And although the law directs how debts shall be paid, it never loses sight of the fact that a partnership is made up of individuals who own the assets. It is nevertheless true that in the absence of any legal provision giving a different direction to the disposition of the assets of a firm, they would have to be paid out as

[1] Heckle v. Grewe, 125 Ill. 58; 26 Ill. App. 339 (*distinguishing* Trowbridge v. Cross, 117 Ill. 109); Conway v. Wilson, 44 N. J. Eq. 457. In Illinois a partner cannot have his exemption from the property of his firm, before or after the dissolution of the partnership, as against the creditors of the firm. In a case involving this rule, the court said: "Firm assets are a trust fund for the payment of creditors. The partners individually can have no absolute property in it or in any specific part of it until the creditors are fully satisfied. This elementary doctrine of the law of partnership has been held to bar analogous claims of dower and homestead exemption in real estate of the firm Trowbridge v. Cross, 117 Ill. 109; Simpson v. Leech, 86 Ill. 286; Bopp v. Fox, 63 Ill. 540. Its like operation upon personal property, to bar such claim as is here made, is clearly recognized in Heckle v. Grewe, 26 Ill. App. 339, and same case in 125 Ill. 58: and the precise question here presented is decided in the case of Croft Brothers, 8 Biss. 188, and in *Ex parte* Hopkins, 104 Ind. 157. We are unable to see how a dissolution of the partnership, or the consent of a partner, before the firm creditors are satisfied, can operate to give a partner any greater right to the firm assets or any part thereof, as against the creditors, than he would otherwise have." Wills v. Downs, 38 Ill. App. 269, Pleasants, J.

claimed. But here is interposed between this disposition of the property which an individual may have in a partnership, another overriding and superior right thereto which no court or ministerial officer can disregard, and no officer has the jurisdiction or authority to seize and sell, except for certain specified debts in which partnership debts are not included."[1]

Another view has been taken of the question. It has been said, even judicially decided, that if the partners consent that one of their members may claim exemption in the partnership assets, he may legally have it accorded to him, though there be outstanding debts. The creditors are declared to be without right to complain, since their attitude is like that which creditors hold towards an individual debtor. To quote from an opinion so declaring: "The separate partners have a right, in order to their own exoneration, to have the joint property applied to the joint debts, and in its exercise the joint creditors reap the benefits; but no such equity resides in the creditors, as such, to have their demands first satisfied. When the partner refuses to avail himself of this equitable right, and consents to an appropriation of the common property to the personal and separate use of one of them, the result is the same as if there were no joint liabilities, and each had a perfect right to his own share.

"Putting the partnership creditors out of the way, there can be no legal obstacle to what is in effect an actual partition between them of so much as each receives as his exemption. Why should it not be so? The joint creditors have no more rights to shift the burden from the joint, and put it upon the separate, property, to the injury of the individual creditor, than he has to do the reverse and put the burden upon the joint property, to the injury of the former. Upon principle, then, we uphold and abide by the ruling heretofore made, as resting upon sound reason."[2]

Distinction is drawn between judgment against an individual partner and judgment against the firm. While in the latter case exemption is not allowable in a given state, it may

[1] Blanchard v. Paschal, 68 Ga. 32, *34.*

[2] Scott v. Kenan, 94 N. C. 296, Smith, C. J., approving Allen v. Grissom, 90 N. C. 90; O'Gorman v. Fink, 57 Wis. 649; 46 Am. Rep. 58; First N. Bank v. Hackett, 61 Wis. 335, *348;* Severson v. Porter, 73 Wis. 70, *77.*

be in the former. That is to say, an individual member of a partnership who is a judgment debtor may claim exemption out of his share of the partnership effects in states where he could not if the judgment were against the partnership.[1] In some states, after the dissolution of a partnership with the lien of a levy resting upon the firm property, one of the late members may claim exemption in his own behalf.[2] And it is said that a debtor may put himself in position to claim exemption after the lien has attached, though he had no right to exemption when it attached.[3] The lien upon the partnership property must be a general one, subject to exemption; that is, a lien on the non-exempt portion, if any has immunity; for a member of a late firm could not dislodge a lien upon its partnership property without satisfying it.

A woman, as one of a firm, sued a sheriff for selling partnership goods under execution after she had notified him of her claim. The fact that she had drawn a thousand dollars from the assets of the firm just before the levy was not deemed by the court an impediment to her claim, since it was a matter between the partners. The amount drawn was four times the statutory exemption claimable by each partner from the stock in trade. By the statute each member could claim $250.[4] This claim may be asserted by each partner individually; it is not necessary that all should join. And he can enforce it, though no other member of the firm is in court or has claimed in any way.[5]

§ 4. Suits for Antecedent Debts, etc.

This kind of suit has been treated heretofore;[6] and as chattels do not differ from homesteads, as to the principles involved, there need be no repetition here. Those principles

[1] Wise v. Frey, 7 Neb. 134; Servanti v. Lusk, 43 Cal. 238; Newton v. Howe, 9 Am. Rep. 616.

[2] Russell v. Lennon, 39 Wis. 570; Skinner v. Shannon, 44 Mich. 86; Blanchard v. Paschal, 68 Ga. 32; Stewart v. Brown, 37 N. Y. 350.

[3] Watson v. Simpson, 5 Ala. 233; Letchford v. Cary, 52 Miss. 791; McManus v. Campbell, 37 Tex. 267. These two last stated points were made by Judge Crumpacker in his dissenting opinion in State v. Day (Ind. App.), 29 N. E. 436.

[4] McCoy v. Brennan, 61 Mich. 362; Waite v. Mathews, 50 Mich. 393; Skinner v. Shannon, 44 Mich. 86.

[5] *Ib.;* Russell v. Lennon, 39 Wis. 570; Newton v. Howe, 29 Wis. 531.

[6] *Ante,* p. 276 *et seq.*

have been pointedly applied to chattel exemption. It has been held unconstitutional to exempt personal property from the liability already upon it. However great or little the amount exempted, it is held that it would impair the contract by which the antecedent debt was created.[1]

Personalty is generally liable, without exemption, for taxes;[2] and less generally so for rents. Though property selected by the debtor and set apart by the court be free from liability for rent, yet a distress warrant against it will be effectual in the absence of any proof of the exempt character.[3] Rents of property dedicated to public use take the character of the property itself, as to exemption.[4]

§ 5. Suits for Purchase-money.

Personal property being by statute made liable for purchase-money except when in the hands of an innocent third person who acquired without notice,[5] is not subjected to a lien by such statute. Priorities among contending creditors are not regulated by it. The court, in construing the statute, said that the evident intent of the legislature "was to take out of the exemptions of the original act such of his personal property as otherwise might have been exempt from attachment or execution, when the execution is on a judgment for the purchase-money of such personal property. It was not the intention of the legislature to impress upon the personal property a lien in favor of the vendor of such property, but to provide that if, upon execution issued upon a judgment for the purchase-money, such property was found still the property of the execution debtor, he should not be permitted to claim and hold it as exempt from sale as against the vendor's execution for the purchase-money."[6]

[1] Johnson v. Fletcher, 54 Miss. 628; Carlton v. Watts, 82 N. C. 212; Johnson v. Dobbs, 69 Ga. 605; *ante*, pp. 677–680.

[2] Oliver v. White, 18 S. C. 235; Ransom v. Duff, 60 Miss. 901.

[3] Shiver v. Williams, 85 Ga. 583; Ga. Code, § 2040. In Georgia, exemption is by the ordinary. Sasser v. Roberts, 68 Ga. 252.

[4] Kline v. Ascension Parish, 33 La. Ann. 562.

[5] Mo. R. S. (1879), § 2353.

[6] Straus v. Rothan, 102 Mo. 261, *citing* Norris v. Brunswick, 73 Mo. 257; Haworth v. Franklin, 74 Mo. 106; Parker v. Rhodes, 79 Mo. 88; and *overruling* Comfort v. Mason, 96 Mo. 127; Bolckow Co. v. Turner, 23 Mo. App. 103, and Boyd v. Furniture Co., 38 Mo. App. 210.

A chattel is liable for its purchase price, whether security for the debt has been taken or not;[1] and whether or not judgment on a note given for the price has been rendered in favor of an assignee of the note.[2]

Must the fact that the note was given for purchase-money appear on its face? or of record? May it be established by parol? It has been held, where such a note did not show its consideration, that parol evidence was sufficient to show that it represented the purchase-money.[3] And where there was nothing of record to show the consideration of the note, the court indorsed upon the judgment that the purchase-money for specified property was represented by the note. This was done under statutory authorization,[4] and would not be otherwise done, it is apprehended.

Things bought with borrowed money, borrowed for the avowed purpose of buying them, are not exempt as against the lender. A horse and harness were bought with such money, and were claimed as exempt when the lenders sought to execute their judgment against the borrower by levying upon them. The suit was for purchase-money and therefore the things purchased with it were not exempt.[5] There may be found exceptional states in which this rule, as to borrowed money, is not applied, but the rule is general that chattels are not exempt against a judgment for their price while they remain in the hands of the first purchaser.[6] When the price and indebtedness are evidenced by a note, the holder may recover, unbarred by exemption, though he be not the original lender and obligee.[7]

[1] Roberts v. McGur, 82 Mich. 221; 46 N. W. 370.

[2] State v. Orahood, 27 Mo. App. 496, in which the point is made to rest on homestead decisions relative to assignment of purchase-money notes.

[3] *Ib.*

[4] Green v. Spann, 25 S. C. 273; So. Car. Gen. Stat., § 2001. Difference is made, as to exemption, between a debt for necessary supplies to a family, and one for groceries sold to the keeper of a boarding-house. Lenhoff v. Fisher (Neb.), 48 N. W. 821.

[5] Houlehan v. Rassler, 73 Wis. 557; Wis. R. S., § 2982, cl. 20.

[6] State v. Orahood, 27 Mo. App. 496.

[7] *Ib.* The court said, through Judge Thompson: "It cannot, we apprehend, be contended that the right to subject the chattel to the payment of the indebtedness for its purchase price is waived by the vendor by the mere fact of taking a promissory note from the purchaser. So far as we know, none of the decisions relating to the subject go so far. If we are right in this conclusion, the ex-

Though the note be received as payment and satisfaction of the price of the chattel sold, a suit upon it is for purchase-money, and it therefore is not obstructed by exemption.[1]

An act expressly providing that no property shall be exempt from sale for a debt incurred for its purchase or improvement was held to have no reference to personal property. The court said that the non-exemption "does not apply naturally to personal property, but is more properly applicable to real property. . . . Notwithstanding the general words of the section are comprehensive enough to embrace personal property, we are of opinion that such property is not within the intendment of the section, and that it is to be considered as applying to the homestead exemption alone."[2]

In a jurisdiction which holds chattels bound for the purchase price just as land is,[3] it was yet held that a sewing machine, bought but not wholly paid for, was exempt as against the seller in a suit on the note given for the purchase-money.[4]

The purchaser of a horse gave his note to a creditor of the seller, who credited it to a land debt due him by the seller of the horse. The maker being sued on the note, it was held that the consideration of the note was, not the horse, but the extinguishment of the land debt. The horse, having been set

ception contained in section 2353, Revised Statutes, creates a privilege or incident which adheres to the note, which is the evidence of the debt. . . . In California and Georgia it is held that the assignment of a note given for purchase-money of a homestead carries with it the preference of the vendor over the right of homestead of the vendee. Dillon v. Byrne, 5 Cal. 455; Berrell v. Schie, 9 Cal. 104; Sponger v. Compton, 54 Ga. 355; Wofford v. Gayues, 53 Ga. 485." The court further cited Edwards v. Edwards, 24 O. St. 202; Sloan v. Camphell, 71 Mo. 387; Adams v. Cowherd, 30 Mo. 458. A lady gave her note for a piano, gave the piano to her daughter, and the daughter sold it to a third person. The holder of the note transferred it, and the transferee sued the maker, obtained judgment, and levied upon the piano. Replevin was sued out against the officer by the person who bought the instrument of the daughter, and from whom the officer had taken it. Chief Justice Sherwood said, in deciding: "The piano of plaintiff was not subject to the levy. . . . The act of March 31. 1874, does not apply to a case of this kind. It does not go beyond, nor was it intended to go beyond, the purchaser. Norris v. Brunswick, 73 Mo. 256." Haworth v. Franklin, 74 Mo. 106.

[1] Rogers v. Brackett, 34 Minn. 279; Gen. St. 1878 (of Minn.), ch. 66, § 311.

[2] Wells v. Lily, 86 Ill. 317; Howard v. Lakin, 88 Ill. 36; Ill. Rev. Stat. of 1874, p. 497.

[3] Roberts v. McGur, 82 Mich. 221.

[4] Singer Manufacturing Co. v. Culloton (Mich.), 51 N. W. 687.

apart as exempt to its purchaser, was not liable for the land debt;[1] but the note for the horse was the one sued upon, and, as the maker had not paid for the animal, should he have been protected? The payee took the note as a payment on the land; but if he could get nothing for it, he is a loser and the maker has gained a horse.

Claiming purchase-money against mortgage recorded before levy: A mortgage recorded before attachment is laid ranks higher than the attachment lien, even though the latter is to secure the purchase price: *provided* the mortgage was taken without notice that the mortgagor had not paid for the chattels mortgaged. This is the rule where the statute excepts personal property from exemption against a claim for its purchase price but does not create a lien in favor of such claim. The exemption has no effect on such claim; so, when the property has been sold before payment, and has passed into third hands without notice, the original vendor, without recorded lien, cannot follow it to obtain the purchase-money. It is *queried* by the court whether a mortgagee, apprised of the fact that the mortgagor has not paid the purchase-money at the time of the creation of the debt to be secured, may be regarded as a lienor taking rank in the order of time, or whether he is to be treated as a purchaser with notice.[2]

§ 6. Actions Ex Delicto.

The general rule is that there is no exemption when the judgment and execution are for tort. And it is maintained, in the later decisions cited in the next note, that a writ of execution on a judgment to recover land is not subject to a claim for personal property exemption, because it is not "an execution for the collection of debt." This suggests a broader distinction than that between tort and contract.[3]

[1] Washington v. Cartwright, 65 Ga. 177; Ga. Code, §§ 2040 *et seq.*

[2] Corning v. Rinehart Medicine Co., 46 Mo. App. 16, *following* Straus v. Sole Leather Co. (Mo.), 14 S. W. 940, and *distinguishing* Boyd v. Furniture Co., 38 Mo. App. 210; Bolckow Milling Co. v. Turner, 23 Mo. App. 103; State v. Mason, 96 Mo. 127; Parker v. Rhodes, 79 Mo. 88; Norris v. Brunswick, 73 Mo. 258. *See* Haworth v. Franklin, 74 Mo. 106; Greely v. Reading, 74 Mo. 309; Woolfolk v. Kemper, 31 Mo. App. 421; Range Co. v. Alexe, 28 Mo. App. 184; Petring v. Drygoods Co., 90 Mo. 649. *See* the construed statute, Mo. Rev. Stat. (1889), § 4914.

[3] Vincent v. The State, 74 Ala. 274; Williams v. Bowden, 69 Ala. 433;

A claim for tort is not a claim for debt. There is no ascertained indebtedness; nothing that the law will recognize as an existing debt. Statutory authorizations of attachment for debt do not include attachment for tort unless so expressed.[1]

There is no debt till judgment.[2] And if the judgment show on its face that it is for tort, it is held that no exemption can be pleaded against it successfully. The sheriff may go on and sell regardless of the defendant's notice and claim of exemption, when the judgment shows this.[3] But if it does not show that it is for tort, but is merely a money judgment so far as its face discloses (though the record may show it for tort), the officer cannot disregard the claim of exemption with impunity. He cannot go behind the decree itself and see that it was rendered for tort, and then decide himself upon the exemption claim.[4] But it is held that if the judgment is for a tax, yet does not show that fact, the sheriff may sell and the debtor cannot claim exemption.[5]

Judgments on penalties cannot be met by the plea of exemption given by law against judgments for debt.[6] In an action on both tort and contract, the defendant may treat the suit as on the latter and may claim exemption.[7] If the two causes of action can be separated as to the proceeds, the defendant's claim should apply to those from contract but not to those from tort;[8] for the rule is recognized generally, all over the country, that from judgments for torts there is no escape for defendants by claims of exemption.[9]

Stuckey v. McGibbon (Ala.), 8 So. 379 (*limiting* Clingman v. Kemp, 57 Ala. 195); *Ex parte* Barnes, 84 Ala. 540; Meredith v. Holmes, 68 Ala. 190; Penton v. Diamond (Ala.), 9 So. 175.

[1] Holcomb v. Winchester, 52 Ct. 447; S. C., 52 Am. Rep. 608; Getchell v. Chase, 37 N. H. 106; Foster v. Dudley, 30 N. H. 463; Cook v. Wathall, 20 Ala. 334; Victor v. Hartford Ins. Co., 33 Ia. 210.

[2] *Ib.*; Thayer v. Southwick, 8 Gray, 229; Kellogg v. Schuyler, 2 Denio, 73; Cranch v. Gridley, 6 Hill, 250.

[3] McLaren v. Anderson, 81 Ala. 106.

[4] *Ib.;* Block v. Bragg, 68 Ala. 291; Block v. George, 70 Ala. 409.

[5] Oliver v. White, 18 S. C. 235.

[6] Williams v. Bowden, 69 Ala. 433; Meredith v. Holmes, 68 Ala. 190; Cason v. Bone, 43 Ark. 17. *See* St. Louis v. Hart, 38 Ark. 112, on waiving action of tort and taking another. In this case it was held that a judgment for "use and occupation" is on a contract — not *ex delicto;* so exemption was allowed.

[7] Ries v. McClatchey, 128 Ind. 125; 27 N. E. 349; Hickox v. Fay, 36 Barb. 9; Holmes v. Farris, 63 Me. 318.

[8] Keller v. McMahan, 77 Ind. 62.

[9] De Hart v. Haun, 126 Ind. 378; 26 N. E. 61.

There is no exemption when the debt is for property obtained by false pretenses.[1]

Tort by wife: Exemption not holding against a judgment for the debtor's tort, would it hold against such judgment when the tort was committed by his wife? At common law it seems that a husband is answerable for the torts of his wife, and therefore it has been thought that statutory relief is necessary to save him from the loss of his exemption right by reason of her tortious acts, when execution is pending against him on a judgment therefor.[2]

Costs: Costs follow the condition of the suit, so that exemption may be interposed against their forced collection when contract was the ground of the action, in some states. When the judgment is for tort, the costs may be collected with the main demand, unhindered. There is no reason why court officers should not be paid, whatever the character of the cause, but the distinction above mentioned prevails extensively, and may well be illustrated by the subjoined note relative to the statutes and decisions of one state.[3]

[1] Hall v. Harris (S. D.), 46 N. W. 931; Comp. Laws Dak., § 5139.

[2] McCabe v. Berge, 89 Ind. 225; Howk, J., for the court: "The common-law liability of the husband for the torts of his wife was merely an incident of the marriage relation or *status*. Ball v. Bennett, 21 Ind. 427; Choen v. Porter, 66 Ind. 194; Stockwell v. Thomas, 76 Ind. 506; Cooley on Torts, 115. It cannot be said, therefore, that the appellant could lawfully claim any of his property as exempt from sale on execution issued on the judgment recovered against *him* for the tort of his wife. . . . We direct attention to section 5120, R. S. 1881, in force September 19, 1881, wherein it is provided as follows: 'Married women, without reference to their ages, shall be liable for torts committed by them; and an action may be prosecuted against them for torts committed, as if unmarried. Husbands shall not be liable for the contracts or the torts of their wives.'" Above this, the court had said: "For aught that appears to the contrary, the judgment in the slander suit against the appellant, as well as against his wife, was for damages resulting directly . . . from the tortious conduct or language of his wife. The judgment . . . is a complete bar to his subsequent claim for exemption. Slaughter v. Detiney, 15 Ind. 49; Sullivan v. Winslow, 22 Ind. 153; Love v. Blair, 72 Ind. 281."

[3] Indiana has no homestead law but has exemption of both realty and personalty: six hundred dollars' worth of property are exempt to a resident householder, and it may be taken in land or chattels or both. The act of May 31, 1879 provides: "An amount of property not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court,

The costs take the character of the judgment, as to chattel exemption.[1] Even the surety of a tort-doer cannot successfully claim exemption against the judgment and costs for the acts of his principal.[2] A guardian's liability, to pay costs adjudged, was held to be on contract when no fraud or negligence had been charged against him as causes for his removal from office.[3]

§ 7. Fraudulent Concealment.

An applicant for real and personal exemption, in a state where mixed benefits of the kind were and are allowable, was denied homestead because of the fraudulent withholding of some of his personalty in the exhibit of it. He had withheld a few hundred dollars, to bear the expense of the litigation. The lower court condemned the reservation and charged the jury that an applicant cannot ask a homestead unless he come into court with clean hands; and the higher court approved the

for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act." R. S. (1881), § 703. The same law existed before, except as to the amount exempted. 2 R. S. (1876), p. 353. "In the early case of State v. Melogue, 9 Ind. 196, after quoting the statute, the court said: 'Under the above provisions, we think property is exempt from execution only in actions upon contract.' And so the statute has always been construed by this court. Keller v. McMahan, 77 Ind. 62; Thompson v. Ross, 87 Ind. 156; Nowling v. McIntosh, 89 Ind. 593; Berry v. Nichols, 96 Ind. 287. In the last case cited, in speaking of the complaint, the court said: 'It should have been averred that the judgment had been rendered on a debt growing out of a contract, express or implied; for, if it grew out of a tort, the exemption was not allowable.' In Church v. Hag, 93 Ind. 323, it was substantially held that the costs recovered by the plaintiff, in a suit for tort, being an incident of the judgment for damages, are collectible on execution in the same way; the judgment is an entirety, and no property is exempt from an execution thereon, either for the damages or the costs. . . . Costs are not matter of contract, but they are given or withheld by statute. Dearinger v. Ridgeway, 34 Ind. 54; Schlicht v. State, 56 Ind. 173; Henderson v. State, 96 Ind. 437, on p. 444." Extract from opinion of Judge Howk, for the court, in the case of Wingler v. McIntosh, 100 Ind. 439, in which it was held that no exemption can be allowed, though the suit is for costs growing out of a suit upon contract, when it is not disclosed by record that the costs are incidental to indebtedness from express or implied contract.

[1] Massie v. Enyart, 33 Ark. 688; Clingman v. Kemp, 57 Ala. 195.

[2] Irwin v. State, 6 Lea, 588. *See* State v. Cobb, 4 Lea, 481.

[3] Estate of Taylor, 9 Pa. Co. Ct. 293.

charge.[1] This seems entirely just; but it has been held, on the contrary, that concealing property equal in value to that which is claimed as exempt does not affect the claim.[2] But when a debtor had two wagons, and hid one and claimed the other, the fraud was a bar to his subsequent claim for treble damages of the officer for wrongful levy.[3]

"Before a dishonest debtor can be legally entitled to exemptions, all of his property must be available to creditors, and the debtor must not retain any of the fruits of his fraud, or remain in the enjoyment of any of his property except his exemptions. If any of his property remains in his hands unappropriated to creditors, or be by him put out of their reach by any fraudulent device or arrangement, then such property, to the extent of its value, will be regarded by the law as a satisfaction of his claims for exemption."[4]

In a state where an insolvent's preference of creditors is not held fraudulent, it seems that an exemptionist may make such preference after attachment or the levy of exemption, by applying to the payment of other than the seizing creditors, such property as is free from the writ.[5] But he cannot give away money or effects, when insolvent, and after attachment, without committing fraud upon his creditors.[6]

A debtor's duplicity, concealment of property, attempts to avoid creditors by putting his chattels in his wife's name, fraud in any form — does not work a forfeiture of the exemption right everywhere. True, it has been held that fraudulent practices, of the kind mentioned, do work such forfeiture;[7] and, if the family of the debtor be left out of the question, or if he be the claimant of an exemption exclusively personal to himself, there is good reason for holding him to that estoppel which his denial of ownership by word or act entails upon him. Having averred the property to be his wife's, what right has he afterwards to say that it is his? It is said the

[1] McNally v. Mulherin, 79 Ga. 617. *See*, as to false pretenses, Hall v. Harris (S. D.), 46 N. W. 93.

[2] Elder v. Williams, 16 Nev. 416.

[3] Yates v. Gransbury, 9 Colo. 323.

[4] Naumburg v. Hyatt, 24 Fed. 898, *905;* Bruff v. Stern, 81 N. C. 183.

[5] Trager v. Feebleman (Ala.), 10 So. 213; Weis v. Levy, 69 Ala. 209.

[6] *Ib.*

[7] Strouse v. Becker, 38 Pa. St. 190; Kreider's Estate, 135 Pa. St. 578.

exemption laws are not confined by the legislator to honest men, and therefore one does not forfeit their benefits by being a rogue.[1] True — those laws are for rascals as well as for good men; and judges are not to discriminate between them, and attempt to look into their hearts. The applicant, who is within the statute, is entitled to the benefit, be he good or bad. But this is not to the point; this is no reason why one who has denied ownership should not be held estopped when afterwards claiming it, if he is the only beneficiary.

The family argument is better. The law makes the wife and children of the debtor beneficiaries; and their representative, the head of the family, ought not to be allowed to injure them by his frauds.[2] He cannot defeat them by absconding, for then the wife may assume to be the head of the family and claim the exemption in his stead.[3]

§ 8. Fraudulent Sale.

It has been frequently decided that the debtor's sale of exempt property is no fraud upon the creditor, and does not debar him from claiming it as exempt if it has been taken back and the sale rescinded.[4]

It seems that the debtor forfeits no exemption right by committing perjury in the affidavit. To state the matter as the court put it: "What we now decide is, that when a claim for exemption is substantially in accordance with the statute, and the schedule is sworn to as the statute requires, the sheriff

[1] Moseley v. Anderson, 4 Miss. 49.

[2] Stevens v. Carson, 27 Neb. 501; Freeman on Ex., § 214*a*.

[3] Hamilton v. Fleming, 26 Neb. 240, *245;* Schaller v. Kurtz, 25 Neb. 655: Frazier v. Syas, 10 Neb. 115.

[4] Redden v. Potter, 16 Ill. App. 265; Berry v. Hanks, 28 Ill. App. 51; Vaughn v. Thompson, 17 Ill. 78; Bell v. Devore, 96 Ill. 217; Bliss v. Clark, 39 Ill. 590; Ives v. Mills, 37 Ill. 75; Green v. Marks, 25 Ill. 223; Mosby v. Anderson, 40 Miss. 49; Duvall v. Rollins, 71 N. C. 221; Crummen v. Bennett, 68 N. C. 494; McCord v. Moore, 5 Heisk. 734; Anthony v. Wade, 1 Bush. 110; Commissioners v. Riley, 75 N. C. 144; Gaster v. Hardie, 75 N. C. 460; Ketchum v. Allen, 46 Ct. 416; Patten v. Smith, 4 Ct. 450; Wilcox v. Hawley, 31 N. Y. 648; Seers v. Hawks, 14 O. St. 298; Hanes v. Tiffany, 25 O. St. 549; Tracy v. Cover, 28 O. St. 61; Morris v. Tennent, 56 Ga. 577; Bates v. Callender, 3 Dak. 256; Elder v. Williams, 16 Nev. 416; Kulage v. Schueler, 7 Mo. App. 250; Callaway v. Carpenter, 10 Ala. 500; Naumburg v. Hyatt, 24 Fed. 898; Prout v. Vaughn, 52 Vt. 451; Hetrick v. Campbell, 14 Pa. St. 263.

cannot refuse to appraise and set apart the property on the ground of perjury in the affidavit." [1]

It has been held that the vendee of chattels fraudulently sold to him cannot set up the vendor's privilege of exemption against the latter's creditors who proceed against the goods to execute their judgment, or to attach by trustee process. Fraud against creditors is held possible by an exemptionist in the disposition of his exempt property, in this connection.[2]

A debtor sold his stock of goods, paid a part of the proceeds to preferred creditors, and retained the balance as exempt — it not exceeding the sum of $1,000 allowed to debtors. Of this transaction, it was judicially said "that it could make no possible difference to his creditors whether the property retained by him as exempt consisted of a part of a stock of goods or of the equivalent in value thereof in notes or in cash. There is nothing for creditors to complain of in a transaction which cannot have effect to work any detriment to their rights in reference to the property of the debtor. The charges requested by the defendants are framed upon the theory that, though the excess in value of the stock of goods above the sum of the debts paid therewith, together with [the debtor's] other property, did not amount to more than he could claim as exempt, yet, if notes payable in the future were taken by the debtor for such excess, the law would pronounce the transaction fraudulent as against other creditors. Our conclusion is that such a mere change in form of a part of the debtor's exempt property could not vitiate the transaction, as the change involves no prejudice to the right of creditors, and that the charges were properly refused." [3] . . .

[1] Over v. Shannon, 91 Ind. 99, *citing* Douch v. Rahner, 61 Ind. 64. *See* Boeskel v. Pickett, 81 Ind. 554; Kelley v. McFadden, 80 Ind. 536.

[2] Tilton v. Sanborn, 59 N. H. 290; Somers v. Emerson, 58 N. H. 48; Gutterson v. Morse, 58 N. H. 529; Currier v. Sutherland, 54 N. H. 475; Wooster v. Page, 54 N. H. 125; Kent v. Hutchins, 50 N. H. 92; Manchester v. Burns, 45 N. H. 482; Emerson v. Smith, 51 Pa. St. 90; Smith v. Emerson, 43 Pa. St. 456; Gilleland v. Rhoads, 34 Pa. St. 187; Freeman v. Smith, 30 Pa. St. 264; Carl v. Smith, 8 Phila. 569; Larkin v. McAnnally, 5 Phila. 17. So held formerly in Indiana and Illinois. Mandlove v. Burton, 1 Ind. 39; Cook v. Scott, 6 Ill. 344; Cassell v. Williams, 12 Ill. 387. *See* Brackett v. Watkins, 21 Wend. 68; Brinson v. Edwards (Ala.), 10 So. 219; Byrd v. Curlin, 1 Humph. 466.

[3] Brinson v. Edwards (Ala.), 10 So. 219.

"As only part of the consideration was the payment of antecedent debts, the validity of the sale against other creditors is to be determined by the rules governing sales by debtors for a new consideration."[1] The sale was invalid as to other creditors, if there was design to defraud or delay them, and if the purchaser had notice of such design.[2] But giving preference, when the law permits it, does not invalidate the transaction.[3]

The seller of chattels, whose purpose is to cheat his creditors, cannot afterwards claim exemption as to such articles when they are levied upon at the suit of the creditors. There is an exception to this, however. Articles specifically exempt may be claimed under such circumstances, and even other articles may be when they compose all the debtor's effects and are worth no more than the exemption limit.[4] This is the law where the courts so hold; but, on principle, the exception may not hold everywhere. The analogy between chattels and

[1] *Ib.;* Owens v. Hobbie, 82 Ala. 466.

[2] Lehman v. Kelly, 68 Ala. 192.

[3] Carter v. Coleman, 84 Ala. 256. In Brinson v. Edwards, *supra*, it is said of the debtor: "It is plain that he had the right to pay the preferred debts with their equivalent in value from the stock of goods, and, if what was left, together with his other personal property, did not amount to more than $1,000 in value, and he was a resident of the state, he could have disposed of such remainder of the stock just as he pleased; for, if the debtor's property does not exceed in value the amount exempted, the exemption privilege is attached to it by operation of the statute, without any act of selection by him, and creditors cannot be prejudiced by any disposition of property which is not liable to their demands. Nance v. Nance, 84 Ala. 375; 4 South. Rep. 699; Alley v. Daniel, 75 Ala. 403; Myers v. Conway, 90 Ala. 109; 7 South. Rep. 639. By selling the whole stock in bulk, and taking notes or cash for the difference between its estimated value and the debts paid, no greater benefit was reserved to the debtor, nor was the position of his creditors changed for the worse. Whether the property that could be claimed as exempt was disposed of in the one way or the other, the result would not be to secure to the debtor anything more than he was entitled to retain, or to put out of the way of other creditors any property which they had the right to have applied to the satisfaction of their claims. No more in the one case than in the other does the debtor acquire any benefit beyond what the law would have secured to him. McDowell v. Steele, 87 Ala. 493; 6 South. Rep. 288."

[4] State v. Koch, 40 Mo. App. 635; Alt v. Bank, 9 Mo. App. 91; Kulage v. Schueler, 7 Mo. App. 250; Weinrich v. Koelling, 21 Mo. App. 133; Stotesbury v. Kirtland, 35 Mo. App. 157; Hombs v. Corbin, 34 Mo. App. —.

homesteads, in this respect, has been frequently pointed out by the courts, but it is not quite perfect. A chattel specifically exempt, such as a horse and wagon, may be readily transported from one place to another; title passes by delivery; there is no record of the sale ordinarily: so there are difficulties in treating chattel sales as nullities which do not attend abortive transfers of realty. When the identity of chattels sold by the debtor has been lost, creditors are necessarily without means of exercising any direct remedy against them.[1]

§ 9. Fraudulent Assignment.

A debtor may mortgage all his personal property, if it is all exempt, without defrauding his creditors, since they are treated as disinterested.[2] But he cannot reserve from an assignment of his property for the benefit of his creditors, money equal to his chattel exemption, to be given him from the proceeds of the property.[3]

A debtor surrendered his property by deed of assignment, with express reservation of "the exemptions allowed by law." He specified no property, selected none, but meant to have the value of the exemptions returned to him from the proceeds of the property surrendered. An attachment suit was brought, in which the assignment, offered in evidence, was excluded for "fraud upon its face," by the trial court. The question of the exclusion, whether rightful, was the only one presented to the supreme court. Was the assignment *prima facie* fraudulent because of the reservation of the value of exemptions that might have been claimed in the property assigned? The reasoning of the court will furnish the matter of the following remarks in reply.

The deed expressly transfers all the assignor's personal property. There is a *habendum* directing the assignee to dispose of it as the law requires respecting trust property, and pay the assignor (in addition to the wearing apparel of himself and his family and such other property as he might select at

[1] Post v. Bird (Fla.), 9 So. 888.

[2] Sims v. Phillips, 54 Ark. 193; Blythe v. Jett, 52 Ark. 547; Erb v. Cole, 31 Ark. 554. Mortgaged property of the debtor, selected by the officer at more than the appraised value, defrauds the debtor. No selection can be made of a specific portion so as to bind the mortgagee. Bayne v. Patterson, 40 Mich. 658.

[3] King v. Ruble, 54 Ark. 418.

its appraised value), such sum as will amount to five hundred dollars — adding "which I hereby claim and reserve as the amount allowed me by law as exempt from sale."

Under this assignment, the property passed to the assignor. Not the property less the exemptions, but all. The case is therefore different from those in the books in which the title to exempt chattels never so passed. The court said the question, in this case, had seldom, if ever, been before the courts.

The general rule is that an insolvent cannot assign his property to another in trust for himself. While he may hold property to the value of the exemption, and assign the rest, creditors may claim all he has above the exempt things retained. They are injured by the burdening of the residue — the assigned portion of the debtor's property — with any further claim by him. They are not injured by his selection and reservation of property before assigning the balance of it — for they never had any right to look to the exempt portion. Is the difference that between six and half a dozen? Something more: the law of assignment made it the duty of the assignee to sell all the assigned property at public auction, and to reduce assigned *choses in action* to possession. Whatever expense the sale, and suits upon promissory notes, and the like, would cause, the assignor would escape by this arrangement, so that he would get his five hundred dollars clear, in cash, instead of taking property at that valuation by selection before assignment. Perhaps the court may have made too much of this argument, since the presumption is that appraisers would have given the debtor property worth five hundred dollars in cash; and, had he selected regularly and assigned the non-exempt property, he would have been at no expense of sales, suits, fees of attorneys, charges of assignee, etc. True, the assignment of more than the creditors could have did increase the commissions of the assignee, and did put a burden on the creditors which was illegal if the debtor's claim on the proceeds was just. Had the assigned property consisted wholly of perishable goods, so that its value was reduced by half before the assignee's sale, must the debtor still have his five hundred dollars? If the assignment was valid — yes. But this is absurd. The assignment of all the property to creditors, with reservation that the whole

amount of the claimable exemption be paid back to the assignor after administration, cannot be maintained; it is *prima facie* unfair to creditors.

Wherever the debtor's right of exemption depends upon his claiming *property*, as in this case, he must claim in the method which the exemption statute prescribes or lose his opportunity; and it is submitted that the reasoning of the court, in the case above considered, is good law in all states which have statutes like the one under which the assignment in question was made.[1]

Claiming fraudulently: Judgment having been obtained by a wife against her husband, for maintenance, his employers were garnished in aid of execution. They answered that they had paid him in advance. The jury found that the payment was in fraud of her rights, and the court sustained the verdict. Though his wages were exempt as to earnings during thirty days immediately prior to the garnishment, under ordinary circumstances[2] (as he was the head of a family consisting of himself, his mother and his sisters),[3] yet under the circumstances of the case at bar, the court considered the payments in advance to have been made by fraud and collusion between the defendant and garnishees, and ordered the latter to pay again; and it was held that his claim of exemption for his wages could not be allowed without a perversion of the object of the statute.[4] "In a case like the one which we have here," the court said, "very slight circumstances would be sufficient to authorize the jury to find that the contract was entered into to embarrass creditors."[5]

The debtor cannot claim what he has legally assigned.[6] But the assignee, when the wife of the assignor, may hold exempt a note assigned to her by him, it was held, though there had been judgment against him, followed by the issue of an execution. No claim of exemption was made till the wife had sued upon the note, and the judgment had been pleaded as set-off.[7]

[1] *See* Burrill on Assignments, § 202.

[2] Mo. Rev. Stat. (1889), sec. 5220.

[3] Wade v. Jones, 20 Mo. 75; Duncan v. Frank, 8 Mo. App. 286; Nash v. Norment, 5 Mo. App. 545.

[4] Spengler v. Kaufman, 46 Mo. App. 644.

[5] *Ib.; citing* Reinhart v. Soap Co., 33 Mo. App. 24; Fay v. Smith, 25 Vt. 610.

[6] Stotesbury v. Kirtland, 35 Mo. App. 148.

[7] Pickrell v. Jerauld (Ind.), 27 N. E. 433. The decision cites, to sustain its liberality, Junker v. Husted, 113 Ind. 524; Barnard v. Brown, 112 Ind. 53.

CHAPTER XXX.

FEDERAL HOMESTEADS.

§ 1. Distinctive Features.
2. Beneficiaries.
3. Entry — What Land Open.
4. Application and Settlement.
5. Soldiers' and Sailors' Homesteads.
6. Executive Acts.
7. Judicial Action.
8. Settler's Rights Relative to Railroads.
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§ 1. Distinctive Features.

Differentiation: The federal homestead differs in important particulars from that of a state. It is not necessarily a family residence, it is not conditioned upon perpetual occupancy, it is not subjected to restraint as to alienation and testamentary disposition after acquisition, as state homesteads usually are. The two most important differences relate to ownership and exemption. While the state homestead is carved upon property already possessed by the beneficiary, the federal is donated to him by the government on certain conditions. While the state homestead is exempt from the ordinary debts of the owner contracted after notice and not from antecedent debts, the federal is exempt from debts antecedent to the acquisition of title and not from those subsequent.

The definition of the federal homestead, therefore, is not the same as that of the state. It is: Land donated by the United States to a settler upon the conditions, and the limitations, prescribed by statute. The principal conditions are occupancy and cultivation for five years. The principal limitation is as to the quantity of land bestowed on the settler.

Policy: The policy of federal homestead legislation is rather to induce the making of family homes than to conserve them; and it is also to parcel out the public domain to industrious citizens who will improve and cultivate the portion given them: the ultimate end being the promotion of the public welfare by encouraging a worthy yeomanry.

Principles: The principles governing the benefits conferred under the homestead laws of the United States are other than those controlling state exemptions. From the date of entry to that of the patent, the homestead is not liable for any debts of the occupant, for the reason that *he does not own it.* The title is in the United States. When he becomes the owner, on what principle is the creditor denied execution against the property on judgment rendered for debt previously contracted by the settler? A private citizen cannot confer land in fee-simple upon a donee which shall not be liable for the latter's debts; cannot make non-liability a condition, for he has no control over the subject. But the United States can and does donate its public land to settlers for homesteads and makes the property free from liability for existing debts. The creditor is not injured. Nothing is withdrawn from his grasp which he could reach before the donation. He is not put to the worse by his debtor being made the better.

Exemption: It is upon the principle of the sovereign right to protect the donation after it has been bestowed that the government exempts the homestead from antecedent debts after ceasing to own it. No one can complain of this supervision unless it be a state after the homestead has come within its authority. The state cannot, for the federal exercise of right of protection is no violation of state sovereignty.[1] Considered as a provision without which the donations might not have been made; and considered as an advantage to the states, since they are benefited by gifts to their citizens, the exemption from debts prior to the patent seems unobjectionable. The provision of the statute is that no lands acquired under it "shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."[2]

"The right to make rules, by which the lands of the government may be sold or given away, is acknowledged."[3] The power of congress to make contracts with settlers under the homestead law, to grant benefits on conditions, to regulate transfers by settlers, and the like, has been judicially recognized.[4]

[1] Lewton v. Hower, 18 Fla. 872.

[2] R. S., § 2296; Seymour v. Sanders, 3 Dill. 437.

[3] Lamb v. Davenport, 18 Wall. 307.

[4] Gibson v. Choteau, 13 Wall. 92; United States v. Gratiot, 14 Pet. 526.

A judgment obtained on a debt contracted before the issue of the patent bears no lien upon the land; the land cannot be sold under execution of such judgment, whether it remains owned and possessed by the original settler, or belongs to a purchaser to whom he has transferred his title after having perfected it.[1] Exemption dates from the original entry, which is the purchase; the issuance of the patent retroacts to that time, in effect.[2] "No attempt is made by congress to control these lands [the public lands donated for homestead], or put any condition on the state in reference to them, for any act done or debt contracted after title has passed from the United States." The settler is assured that the land he enters shall be exempt from liability for debts contracted while the title remains in the government. He is guarantied this, whether the patent shall be issued to him, or to his widow, or to his heirs or devisees.[3]

Exemption inures to the benefit of the deceased settler's successors — that is, his widow and minor children — just as to him, had he lived to receive the patent on completing his title. The pointed statutory provision to this effect[4] has always been carried out by the courts.[5]

§ 2. Beneficiaries.

Qualifications: A person making a homestead entry must be of age or the head of a family, and must be a citizen of the United States or an applicant for naturalization; or he must be qualified under the law allowing soldiers and sailors to claim. He must also be capable of contracting so that he can understandingly assume the obligations which he takes to perform the conditions upon which the homestead is bestowed.

An incompetent person cannot make a homestead entry, nor can it be made for him. The guardian of an adult who was afflicted with the softening of the brain was not permitted to make entry for his ward. He could not swear to the *intention* of his ward, nor could the latter swear to it for himself since

[1] Sorrels v. Self, 43 Ark. 451; Miller v. Little, 47 Cal. 348; Russel v. Lowth, 21 Minn. 167.

[2] Green v. Farrar, 53 Ia. 426.

[3] Sorrels v. Self, *supra*.

[4] R. S., § 2296.

[5] *Ib.;* Seymour v. Sanders, 3 Dill. 437; Gile v. Hallock, 33 Wis. 523; Nycum v. McAllister, 33 Ia. 374.

he was mentally incapable. The statute requires oath to the intention: so as no compliance could be had, no entry could be made.[1]

Married applicants: Though two homesteads cannot be taken by a married couple, each spouse while single may have taken the preliminary steps to one; and the marriage will not invalidate the right acquired. So, after the wedding, each may go on to complete his or her claim by the necessary period of residence and cultivation. One homestead may be thus completed and the other commuted; or, both may be commuted. The married beneficiaries may occupy a house built on the dividing line between the two homesteads and hold both tracts.[2]

A deserted wife is treated as the head of her family when she is in possession of land entered by her husband. She may go on and complete the performance of the conditions; she may make the final proof in his name, or she may prove the desertion and make entry in her own name.[3] Her rights cannot be defeated by her husband's fraudulent relinquishment of the homestead.[4] In a contest before the interior department, between her and him, on the question of his fraudulent relinquishment to the prejudice of her rights, the pleading and evidence may be such as to render the case not reviewable by the courts;[5] at least, not so while the question is pending before the department.[6] While such a contest is pending, she will be protected in her possession.[7] Her possession of the homestead, after her husband has left her, is such that she may recover damages against a trespasser for dispossessing her, or for removing or injuring improvements; — even punitive damages when such acts were malicious.[8]

Widow and heirs: A deceased settler's widow and children may complete the title which he left inchoate. After a caveat had been filed in application for a homestead, and the application had been granted pursuant to the caveat, the land was sold at judicial sale, and the purchaser was charged with notice.

[1] Ledford, Matter of, 1 Copp's Land Laws, 361.

[2] Hay, Matter of, 1 Copp, 363–4.

[3] 9 Land Dec. Dep't Int'r, 186; 2 *Ib.* 81.

[4] 14 Copp, Land Owner, 258.

[5] Corbett v. Wood, 32 Minn. 509.

[6] Empey v. Plugert, 64 Wis. 603.

[7] Atherton v. Fowler, 96 U. S. 513.

[8] Michaelis v. Michaelis, 43 Minn. 123.

The applicant dying, his widow and children filed a bill to have themselves subrogated to his rights and to compel the purchaser to account for the rents and profits of the land subsequent to the grant of homestead. It was held that the bill would lie.[1]

An heir, who perfects a homestead claim and gets a patent, is not barred by a judgment in ejectment against the administrator of the deceased settler.[2] Minor heirs succeed to the right of their deceased parents. The homestead may be sold for their benefit, though the patent has not been issued, and the purchaser may complete the title and obtain the patent.[3] All heirs under twenty-one years of age are "infants" within the meaning of the statute; so that, in a state where daughters reach their majority at the age of eighteen while sons do not till they become twenty-one years of age, it was held that the meaning of the federal homestead law should govern, and that a daughter over eighteen but under twenty-one was a beneficiary as well as her minor brothers.[4] Minor children who survive their parents take the whole estate of an incomplete homestead entry. Adult children are excluded.[5]

Foreign-born applicants: The qualification of citizenship, or of application therefor, has been frequently passed upon. When a foreigner has made homestead entry, it must be canceled for illegality if he did not declare his intention of becoming naturalized prior to the entry. A subsequent declaration will not cure the invalidity.[6] Proof of citizenship must be made by the enterer, if foreign born; but it may be done when making the final proof to obtain his certificate.[7] And, at that time, a foreigner was allowed to have his final certificate, though his intention had been declared after entry, on the ground that he had erroneously believed himself to be a citizen when he made the entry.[8] This case must be taken as exceptional. Ignorance of the law was allowed to excuse a foreign minor who had made entry, settled upon the land and made valuable improvements. On reaching his majority, he

[1] Hodges v. Hightower, 68 Ga. 281.
[2] Chant v. Reynolds, 49 Cal. 213.
[3] R. S., § 2292.
[4] Anderson v. Peterson, 36 Minn. 547, 549.
[5] Bernier v. Bernier, 72 Mich. 43.
[6] Marrion, Matter of, 1 Copp, 363.
[7] Hill, Matter of, 1 Copp, 363.
[8] Hay, Matter of, 1 Copp, 362.

prayed to have his entry canceled and a new one allowed him. In view of his good faith, the original entry was allowed to remain intact, subject to final proof after five years from the time he had reached his majority — the case then to be laid before the board of adjudication.[1] This course was irregular, and ought not to be drawn into precedent. It was probably less satisfactory to the settler than compliance with his reasonable prayer would have been, as it left him long in a state of uncertainty as to the final action of the board. By what legal authority this course was pursued, we are not informed. Had the settler been a native minor, not the head of a family, who had rendered no military or naval service to his country, his homestead entry would have been canceled on ascertainment of the want of the conditions required by law.[2]

§ 3. Entry — What Land Open.

What quantity: The qualified applicant may enter a quarter section or less after having filed a pre-emption claim to such quantity of unappropriated land. If such land is subject to pre-emption at a dollar and a quarter per acre when the application is made, it may be entered without prior pre-emption. Eighty acres or less, in a body, subject to pre-emption at two dollars and a half per acre, may be entered as homestead after it has been surveyed. Every owner, occupying his land as a home, may enter contiguous land, but not in such quantity as to make both together exceed a quarter section.[3] No one can acquire more as homestead.[4]

Mineral lands: Only land subject to pre-emption is open to homestead entry. As mineral land cannot be pre-empted,[5] it cannot be made a homestead.[6] If entry be made, and even if the patent be issued, the title will be void. The section last cited reserves from pre-emption and homestead entry, "lands on which are situated any known salines or mines." In a case involving it, the supreme court said through Mr. Justice Davis: "The salines in this case were not hidden as mines often are, but were so incrusted with salt that they re-

[1] *Ib.*, 361.
[2] *Ib.*, 360, 386.
[3] U. S. Rev. Stat., § 2289.
[4] *Ib.*, § 2289.
[5] *Ib.*, 2258.
[6] § 2302.

sembled 'snow-covered lakes,' and were consequently not subject to pre-emption. . . . What effect the statute might have on salines hidden in the earth, not known to the surveyor or the locator, but discovered after entry, may become a question in another case."[1] It is "known" mineral lands which are reserved from entry. If knowingly entered, the certificate and patent subsequently issued will not avail. "It has been repeatedly decided that patents for lands which have been previously granted, reserved from sale, or appropriated, are void."[2] The settler on such land acquires no vested right to it. The United States, by a bill in equity, can cancel a patent which has been issued to him.[3]

When lands, though containing minerals, do not have them in such quantity as to render mining thereon more profitable than agriculture, they may be pre-empted or subjected to homestead entry.[4] This is the rule of the land department. There may be gold and silver on the land, but if the cultivation of the soil is more profitable than the work of getting these metals, the land is not ranked as mineral land by that department.

Occupied lands: A grant to a state of "unappropriated non-mineral land" was held not to embrace land which had been improved and occupied for years by settlers.[5] The land had not only been largely improved but had been sold and resold during the several years of its occupancy. The court, passing upon its *status*, said: "Under this state of facts it cannot be contended, under the repeated decisions of both national and state courts, that this land was 'unappropriated public land' at the time of its selection by the state."[6]

Such lands are not open to appropriation by new claimants, however wanting in legality the title of the original settlers may have been. The latter may have acquired no right as

[1] Morton v. Nebraska, 21 Wall. 660, 674.

[2] *Ib.*, citing Polk v. Wandell, 9 Cr. 99; Minter v. Crommelin, 18 How. 88; Reichart v. Felps, 6 Wall. 160.

[3] McLaughlin v. United States, 107 U. S. 526.

[4] United States v. Reed, 28 Fed. 482.

[5] United States v. Williams (Nev.), 30 Fed. 309; Williams v. United States, 138 U. S. 514, in which the circuit court decision was affirmed.

[6] *Ib.*, citing Atherton v. Fowler, 96 U. S. 513; Hosmer v. Wallace, 97 U. S. 575; Trenouth v. San Francisco, 100 U. S. 251; Nickals v. Winn, 17 Nev. 189; McBrown v. Morris, 59 Cal. 64.

against the United States; but it has been judicially said that they have "initiated rights" which should be protected as against third parties.[1]

An additional reason against allowing the occupied lands to be selected by the state, under the grant, was the fraud that had been practiced upon the officers of the land department in obtaining the certificate. The court said: "Frauds of this and like character have always been held sufficient ground for vacating patents procured thereby," on the authority of the cases cited below.[2]

Land conditionally granted *in presenti* to a railroad company is not unappropriated land subject to homestead only.[3] A patent is void, if the land has not been offered at public sale, and the entry was private.[4] A patent on a homestead entry of land in an incorporated town is void.[5]

Adjoining-farm entry: Upon proof by the owner of an undivided half-interest in a farm, that a homestead entry on adjoining land is made for the use of the farm, and that all requisites have been observed, the entry may be passed for patenting. An adjoining-farm entry of eighty acres of surveyed land, at the double price required, may be secured by one who already owns eighty on which he resides. Altogether, a settler cannot have homestead in more than a hundred and sixty. He is not obliged to eke out his smaller farm by taking enough additional to reach the maximum, but may take less. Knowingly taking less is considered a waiver of any further right; but taking less under a misapprehension will not cut him off from further selection.[6]

[1] United States v. Williams, *supra;* United States v. Stone, 2 Wall. 525; Hughes v. United States, 4 Wall. 232; Frisbie v. Whitney, 9 Wall. 187.

[2] Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 530; United States v. Minor, 114 U. S. 234; United States v. Curtner, 26 Fed. 296; United States v. Mullen, 7 Saw. 466; Muller v. United States, 118 U. S. 271; Moffat v. United States, 112 U. S. 24. Before a settler's entry has been perfected by patent, it may be canceled for fraud. Even though final proof has been made, this may be done. Judd v. Randall, 36 Minn. 12.

[3] Blair Town Co. v. Kitteringham, 43 Ia. 462.

[4] United States v. Pratt, 18 Fed. 708.

[5] Burfenning v. Railroad Co., 46 Minn. 20.

[6] Copp's Land Laws, pp. 393–5.

§ 4. Application and Settlement.

Affidavit: The applicant must make affidavit before the register or receiver, at the land office of his district, that he is of age, or that he is the head of a family, or that he has served in the army or navy of the United States for the required time. He must also make oath that the application is for his own benefit exclusively, and that the entry is for actual settlement and the cultivation of the land. He must also pay a fee: five dollars for the entry of eighty acres or less; ten for an entry of more.[1]

Settlement actual: A claimant must actually and personally make a settlement upon the land, to avail himself of the law. If he has employed another to make improvements for him, who wrongfully avails himself of the situation and claims homestead in the land, he has no action of damages against such agent, because the principal had acquired no rights in the land, and the action of the agent did not amount to a legal fraud.[2] On the other hand, the pre-emptor cannot acquire homestead right for another. He has no right which he can convey, acquired by pre-emption only. He cannot sell his improvements to a purchaser who becomes the occupant of the land so as to convey any homestead right or to cause the homestead character to attach to the land.[3] So, if public lands have been certified to the state.[4]

A settler's possessory claim was sold by the sheriff under execution. The settler subsequently entered the land as homestead under act of congress, and was then adjudged to have acquired from the "paramount proprietor" a right and interest not existing in him at the date of the sheriff's sale, which vested in him the right of possession so that he could not be ejected by the purchaser at the sheriff's sale.[5] Meanwhile the purchaser was allowed the rents and profits. The court conceded that the sheriff's deed had transferred all the interest the settler had at the time. It could convey no more.[6]

[1] R. S., § 2290.

[2] Walker v. Stone, 48 Ia. 92.

[3] De Land v. Day, 45 Ia. 37.

[4] Bellows v. Todd, 34 Ia. 18; Railroad Co. v. Fremont County, 9 Wall. 89; Railroad Co. v. Smith, 9 Wall. 95.

[5] Emerson v. Sansome, 41 Cal. 552.

[6] Freeman v. Caldwell, 10 Watts, 9; England v. Clark, 4 Scam. 486.

Valid possession: A valid entry gives the right of possession as against a prior wrongful possessor, though the latter may not be disturbed. One who has made entry and obtained actual possession cannot be ejected by a former occupant whose possession was illegal.[1] Mere occupancy of the land by one who has purchased the improvements made upon it by a pre-emptor cannot convert it into a homestead.[2] Mere filing upon a piece of land creates no ownership.[3]

The possessory right must be exclusive; therefore no homestead entry can be made by tenants in common.[4]

The right of pre-emption can be acquired and exercised by individual persons only — not by partnerships. It is for the benefit of the applicant and not for others.[5] The right of homestead is limited to individuals to the exclusion of firms and tenants in common, for the same reasons. There is an exception in favor of the heirs of a deceased settler. The heirs of deceased parents take as tenants in common, and, as such, may perfect a homestead entry by making final proof. They may thus obtain the patent to which their parents, or either of them, would have become entitled had not death prevented.[6]

Commutation: A homestead settler may pay the minimum price for the land he has entered, during the five years required for his occupancy under the homestead provision, and obtain a patent as a pre-emptor upon compliance with the other requisites.[7] By doing so, he virtually makes an original entry: so a judgment in ejectment rendered before the commutation does not prevent him from proving his title under the commutation.[8] The claimant dying before the expiration of the five years period, his widow may commute the entry.[9]

[1] Goodwin v. McCabe, 75 Cal. 584.

[2] De Land v. Day, 45 Ia. 37.

[3] Schoolfield v. Houle, 13 Colo. 394.

[4] Reinhart v. Bradshaw, 19 Nev. 255; Nickals v. Winn, 17 Nev. 188; Atherton v. Fowler, 96 U. S. 513; Hosmer v. Wallace, 97 U. S. 575; Trenouth v. San Francisco, 100 U. S. 251; Smelting Co. v. Kemp, 104 U. S. 647; Frisbie v. Whitney, 9 Wall. 193; Johnson v. Towsley, 13 Wall. 72; Cowell v. Lammers, 10 Saw. 246; Hosmer v. Duggan, 56 Cal. 261; Davis v. Scott, 56 Cal. 165. *Compare* Emerson v. Sansome, 41 Cal. 552.

[5] U. S. Rev. Stat., §§ 2262, 2290; Copp's Land Laws, 56; Miller v. Little, 47 Cal. 350; Oaks v. Henton, 44 Ia. 116.

[6] Crumb v. Hambleton, 86 Mo. 501.

[7] R. S., § 2301.

[8] Thrift v. Delaney (Cal.), 10 Pac. 475.

[9] Perry v. Ashby, 5 Neb. 291.

Abandonment: Abandonment of the land for a period of six months or more, after filing the affidavit and making entry, causes it to "revert to the government," in the language of the statute, though it rather remains the property of the government, since the title has never passed. The settler forfeits all his present and prospective rights.[1]

Proof of the abandonment to the satisfaction of the register, made after notice to the settler giving him opportunity to contest the charge of non-occupancy for the time stated, is necessary to enable that officer to act in the premises.[2]

The time for the commencement of residence may be twelve months from the date of the application, when allowed by the proper officer for "climatic reasons."[3]

The statutes allow the rule concerning six months' absence to be relapsed when crops have been greatly injured or destroyed by grass-hoppers.[4]

The homestead is not necessarily abandoned by the husband's desertion of it and his wife and family who reside thereon. She becomes the head of the family under such a circumstance, and the entry will not be canceled to her injury.[5]

§ 5. Soldiers' and Sailors' Homesteads.

How secured: A person in the military or naval service, whose family, or some member of it, resides on land which he wishes to enter, on which settlement and improvement have been made in good faith, may make the necessary affidavit before his commanding officer. This affidavit, when filed with the register by the wife or other representative of the applicant, shall be as effective as though sworn before that officer, if the fees and commissions are paid.[6] So, an applicant may make his affidavit before the clerk of his county, and have it transmitted to the register or receiver, if because of distance, bodily infirmity or other good cause he cannot attend at the land office of the district where the land is situated. He must have made the necessary settlement and improvement, however; and must send the legal fees and commissions to the register and receiver.[7] Wilfully false swearing to the excusatory

[1] R. S., § 2297.
[2] *Ib.*
[3] Act March 3, 1881.
[4] Gould & T.'s Notes on R. S., p. 531.
[5] 1 Copp's Land Laws, p. 364.
[6] R. S., § 2293.
[7] R. S., § 2294.

facts of an affidavit, by an applicant, is perjury.[1] And this is so, though he swear before the clerk of a county other than that in which the land claimed is situated, according to the last cited section of the homestead act.[2]

What service: Fourteen days' service in the army or navy of the United States during war, legally rendered, followed by an honorable discharge, will relieve from the condition that the applicant for homestead benefit must be twenty-one years of age.[3]

Ninety days of such service to the United States, with such discharge, entitle the soldier or sailor who has remained loyal to the government, to a patent to one hundred and sixty acres of the public land. He has six months, after locating his homestead and filing his declaration, within which to make his entry and to begin to improve.[4]

The rules requiring occupancy and limiting the quantity of land, under the general law, are not applicable to the honorably discharged soldier or sailor; he is subject only to the special provisions relative to him, in these respects.[5]

The time he has spent in the service is counted as part of that required for residence; the term of enlistment is also credited upon the time, if he has been discharged in consequence of wounds or disability incurred in the line of duty; but there must be actual occupancy of a year at least.[6]

Soldier's children: The right of a deceased soldier's children, to locate and enter eighty acres on the public domain as an additional homestead, may be sold and assigned as personal property. The guardian of such children may sell this right, in their behalf, to a third person.

Justice Brewer, in a case in which he declared this, said: "This right to enter and locate eighty acres was a thing of value — something which enlarged the estate of the minors — was property. It was personal property, going with them where they went; could be exercised and enjoyed anywhere; did not descend to the heir; was not attached to any particular tract of land; was therefore neither permanent, fixed nor

[1] United States v. Hearing, 26 Fed. 744.

[2] *Ib.*

[3] R. S., § 2300.

[4] R. S., § 2304.

[5] Rose v. Lumber Co., 73 Cal. 385; R. S., § 2306.

[6] R. S., § 2305.

immovable. It was a right of selection and taking. Like all property, it was the subject of sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld. To preserve the Indians' title, an express restriction is inserted in the patent. The same, or something equivalent, is always necessary to stay the power of disposal which attends the ownership of property. When this right has been exercised, the location and entry made, who would doubt the right to sell the land? Yet, why should the right to sell exist after the entry and not before? Congress has placed no restriction — who may? It must be borne in mind that this is not a case in which there is to be future consideration or future duty. It is personal in that only they of a certain class can avail themselves of the gift. It is not personal in the sense that future services or future considerations are imposed. Services already rendered during the war are the consideration. The homestead duty of occupation or improvement has already been performed. It amounts simply to this: In view of what has been done, congress makes this gift. It places no restrictions on the donee but leaves him to use the gift as he sees fit. Why may he not sell it? I see no satisfactory reason to the contrary." [1]

§ 6. Executive Acts.

By land officers: Entry is allowed by action of the register and receiver of the land office. Their action may be supervised by the commissioner, and his decision may be affirmed or reversed by appeal to the secretary of the interior. Decisions of the land officers *on the facts* when no question of fraud is involved are not reviewable by the courts; but the rule is otherwise as to questions of law.[2] A decision by the secretary on a survey is not reviewable by the courts unless there is something out of the ordinary requiring their interposition.[3] While he may pass finally on certain matters of fact, he can exercise no judicial power; while he may make

[1] Mullen v. Wine, 26 Fed. 206.

[2] Hosmer v. Wallace, 47 Cal. 461; Johnson v. Towsley, 13 Wall. 72; United States v. Iron Silver Mining Co., 128 U. S. 673; Lee v. Johnson, 116 U. S. 48. *See* Hill v. Miller, 36 Mo. 182.

[3] New Orleans v. Paine, 49 Fed. 12,

rules of an executory character, he cannot legislate.[1] He has no right — and congress can confer on him no right — to impose oaths and render their false taking a criminal offense.[2]

It is held that only when the law has been misconstrued by the executive officers in applying it to the established facts, and have consequently denied parties their just rights, or when misrepresentations and fraud have misled those officers and caused the rendition of wrong decisions, that courts can interfere and set aside their action upon proper proceeding.[3]

It has even been said that the decision of the secretary of the interior upon "a mixed question of law and fact" is final.[4] If law be the predominant ingredient in the compound, would not the question be reviewable by the courts upon proper issue joined? The court which took this view in the last cited case referred approvingly to those of the preceding note, but gave no authorities on the finality of the secretary's decision of a mixed question of law and fact. The rule was stated as a settled one; the statement was: "The decisions of the secretary upon the facts of a case and upon mixed questions of law and fact are always final, and the decisions of the courts have generally sustained the secretary in the absence of positive fraud or a mistake wherein the unsuccessful party has been denied some right which materially affected his interests, or where misconstruction of the law has worked a hardship and injury upon an interested party." The latter part of this excerpt seems a little vague, since the courts cannot know of the denial of rights when the officer's decision is final — not reviewable.

Certificate: The patent cannot be given till five years after the entry. When that time has expired or within two years thereafter, the homestead holder may make his final proof that he has occupied and cultivated the land for five years from the filing of the affidavit; that none of it has been alienated except as permitted by section 2288 of the Revised Statutes,

[1] The department regulations must be reasonable, or they will be held void. Anchor v. Howe, 50 Fed. 366.

[2] United States v. Bedgood, 49 Fed. 54.

[3] Quinby v. Conlan, 104 U. S. 420; United States v. Minor, 114 U. S. 233; Marquez v. Frisbie, 101 U. S. 473; United States v. Throckmorton, 98 U. S. 61; Moore v. Robbins, 96 U. S. 530; Johnson v. Towsley, 13 Wall. 72.

[4] Porter v. Bishop, 25 Fla. 749, 759.

and that he will bear true allegiance to the government of the United States. Upon making this proof, he is entitled to a patent.

In the event of his dying between the time of making affidavit and entry, and the time for making proof, his widow may act in his stead. In case of her death during this time, his heirs or devisees may act. When a widow has made for herself the original affidavit and entry and has died before making final proof but within the time allowed therefor, her heirs or devisees must prove by two witnesses that she or they have resided upon the land and cultivated it for five years from the filing of her affidavit, and must make the asseverations of non-alienation and allegiance as above.[1] The settler may shorten the time two years by planting trees as prescribed.[2]

The proofs and oath may be made before the judge of any court of record of a county or territorial district where the land is situated; or before the clerk in the absence of the judge. The effect is as though they were made before the register or receiver of the land district. False swearing to material matter of proof, in the testimony of a witness, or in the oath of the applicant, is perjury.[3]

Public lands become private when a certificate, due and duly issued, has been obtained by a citizen. Not merely cash entries, but pre-emption and homestead entries, are subject to this rule. Soon as the final certificate recognizes the title of the homestead in the citizen, the government loses its title; the land ceases to be public; the grant of it to a railroad corporation or any other party, by congress, would be a nullity.[4]

Segregation: While a homestead entry is of record and is held valid by the land officers whose decision has not been overruled, the land is segregated from the public domain and is not subject to further grant by congress. It has already been appropriated and cannot be again appropriated while a subsisting entry remains in force. It has been severed from the rest of the government lands, and therefore will not be embraced in any general terms of appropriation, though there be no special exception expressed in its favor. This has been so often

[1] R. S., § 2291.
[2] § 2317.
[3] § 2291.
[4] Witherspoon v. Duncan, 4 Wall. 210; Carroll v. Safford, 3 How. 441.

averred "that it may now be regarded as one of the fundamental principles underlying the land system of this country."[1]

The transition of title from public to private; from government ownership to that of the homestead settler, is not such as to preclude reversion for fraud or any ground that would affect any title. There may be such defect as to defeat the confirmation in the land office; there may be omission of requisits resulting in forfeiture; there may have been fraud: so the title may be declared void in a judicial proceeding.

When the entry has been canceled or forfeited, the land reverts to the United States and is treated as a part of the public domain, never segregated therefrom; so it is now again subject to original entry.[2]

Cancellation of entry: "Under the homestead law, three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made — the land is entered. If one of these integral parts of an entry is defective; that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of

[1] Hastings v. Whitney, 132 U. S. 357, 360; Wilcox v. Jackson, 13 Pet. 498.

[2] Kansas Pac. Ry. v. Dunmeyer, 113 U. S. 629. "A homestead claim had been made and filed by one Miller, and recognized by a certificate of entry, before the line of the company's road was located. Subsequently to the location he abandoned his entry and took a title under the railroad company, and his homestead entry was canceled. Dunmeyer [the defendant in the above cited case] then entered the land under the homestead law, claiming that, by the cancellation for abandonment, it had passed back into the mass of public lands and was not brought within the grant; and, upon that claim, ousted the defendant in error, who afterwards brought his action against the railroad company for a breach of covenant, obtaining a judgment in the court below, which was afterwards affirmed in this court." Mr. Justice Lamar's statement in 132 U. S. 361-2. The homestead was held to have reverted to the government upon its abandonment by the first claimant — not to the railroad company by virtue of their grant.

entry is made of record, such entry may be afterwards canceled, on account of these defects, by the commissioner, or, on appeal, by the secretary of the interior, or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show, by supplemental proof, a full compliance with the requirements of the department; and, on failure to do so, the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry an absolute nullity." [1]

The holder of the certificate has been held to have only a determinable fee, subject to termination by cancellation of the certificate *for cause*, before the issue of the patent, by action of the commissioner.[2] And, before patenting, it is held that the general land office has power to confirm or cancel an entry at any time;[3] but this general holding has been somewhat modified and explained.[4]

The rule is that there can be no cancellation of the certificate except for cause — such as shows its issue to have been erroneous. When *duly* issued, to a homestead occupant who is entitled to it, it is evidence of his equitable title and his right to the patent evidencing his legal title: so the government itself is powerless to take it away merely at will.[5]

§ 7. Judicial Action.

Judicial remedies: While the executive officers are discharging their duties, imposed by law, in disposing of the public

[1] Hastings v. Whitney, 132 U. S. 363-4; Newhall v. Sanger, 92 U. S. 761. *See* cases cited by the court in Hastings v. Whitney; Graham v. Hastings, 1 Land Dec. 380; St. Paul, etc. v. Forseth, 3 Land Dec. 457; South Minnesota, etc. v. Gallipean, 3 Land Dec. 166, and others. *See*, as to the right of the secretary of the interior to set aside a survey, Knight v. U. S. Land Ass'n, 142 U. S. 161.

[2] McLane v. Bovee, 35 Wis. 28; Trulock v. Taylor, 26 Ark. 54.

[3] Gray v. Stockton, 8 Minn. 472; Camp v. Smith, 2 Minn. 131; State v. Batchelder, 5 Minn. 178.

[4] Sharon v. Wooldrick, 18 Minn. 354; Jones v. Tainter, 15 Minn. 512; McCue v. Smith, 9 Minn. 237; Randell v. Edert, 7 Minn. 359.

[5] Cady v. Eighmey, 54 Ia. 615; Sillyman v. King, 36 Ia. 207; Arnold v. Grimes, 2 Ia. 1; Moyer v. McCullough, 1 Ind. 339; Boyce v. Danz, 29 Mich. 146; Brill v. Styles, 35 Ill. 305; Streeter v. Rolf, 13 Neb. 388; Cornelius v. Kessel, 58 Wis. 237; Aldrich v. Aldrich, 37 Ill. 32; O'Brien v. Perry, 28 Mo. 500; Perry v. O'Hanlon, 11 Mo. 585; Morton v. Blankenship, 5 Mo. 346; American Mortgage Co. v. Hopper. 48 Fed. 47; Smith v. Ewing, 11 Sawy. 56; Wilson v. Fine, 14 Sawy. 224.

lands under the homestead and pre-emption acts, courts will not attempt to control them by injunction or *mandamus*.[1] But when a patent is ready for delivery, *mandamus* will be issued to compel the proper officer to deliver it to the person entitled to it.[2]

It is held that courts cannot investigate the legality of the title to land on the complaint that the settler has been deprived of it by the fraud and perjury of a contestant, until the title has been vested in a party subject to their jurisdiction.[3] Appeal lies to higher executive officers when subordinate ones are charged by interested parties to have erred in the exercise of their discretionary and other powers.

Courts will not interfere when a question is pending before the land department involving the right to enter and purchase land.[4]

Courts on question of fraud: There can be no doubt of the power of the courts to pass upon questions of title to homestead lands, to inquire into questions of fraud alleged to have been perpetrated by or upon the land officers, and to settle questions between litigants arising upon those officers' rulings. Courts will not interfere when a decision of such executive and *quasi*-judicial officers appears to have been rendered regularly; that is, errors of judgment upon the facts of a contested case are generally not reviewable by the courts. Newly-discovered evidence may render it the duty of courts to give relief. Ordinarily, land-office decisions, on matters of fact, in contested cases, are final.[5]

[1] Marquez v. Frisbie, 101 U. S. 473; The Secretary v. McGarrahan, 9 Wall. 298; Litchfield v. The Register, 9 Wall. 575; Gaines v. Thompson, 7 Wall. 347; United States v. The Commissioner, 5 Wall. 563; Koehler v. Barin, 25 Fed. 161.

[2] United States v. Schurz, 102 U. S. 378. *See* Houghton v. Hardenberg, 53 Cal. 181; Cruz v. Martinez, 53 Cal. 239; Sands v. Davis, 40 Mich. 14.

[3] Empey v. Plugert, 25 N. W. 560 (Wis.).

[4] Casey v. Vasser, 50 Fed. 258.

[5] Warren v. Van Brunt, 19 Wall. 646; Johnson v. Towsley, 13 Wall. 72; Minnesota v. Bachelder, 1 Wall. 109; Lindsey v. Hawes, 2 Black, 554; Shepley v. Cowan, 91 U. S. 330; French v. Fyan, 93 U. S. 169; Moore v. Robbins, 96 U. S. 530; Marquez v. Frisbie, 101 U. S. 473; Vance v. Burbank, 101 U. S. 514; Quinby v. Conlan, 104 U. S. 420; Smelting Co. v. Kemp, 104 U. S. 636; Steel v. Smelting Co., 106 U. S. 447; Baldwin v. Stark, 107 U. S. 463; Rector v. Gibbon, 111 U. S. 276; Butterworth v. Hoe, 112 U. S. 50; United States v. Minor, 114 U. S. 233; Van Sant v. Butler, 19 Neb. 351; Kin-

If there has been fraud or mistake in the issue of the patent, or in procuring its issue, the title to the homestead is not complete beyond recall. The patent may be vacated by judicial action.[1] It may be impeached, by action at law, on the ground that, at the time of final proof, mineral deposits were known to exist in or upon the land.[2] The fact of the existence of mineral deposits may be shown at the time final proof is offered, and the issue of the patent may thus be defeated.[3]

§ 8. Settlers' Rights Relative to Railroads.

Claims in conflict: Homestead entries of record, *prima facie* valid, are held to be among the exceptions to a grant in aid of railroad construction, as those to which it "shall appear . . . that the right of pre-emption or homestead settlement has attached."[4]

What has been granted already to a settler, on condition that he comply with the statutory requisitions, cannot be granted to another while the settler is in occupancy and is performing the conditions required of him.

A homestead entry, under the act of congress authorizing it,[5] having been canceled by the proper authorities, the homestead was afterwards patented to the person making the entry, by virtue of a subsequent act of congress.[6] Meanwhile, a railroad company had come into possession of the land, claiming title; and the wife of the settler having made with it a contract to purchase the land, joined with her husband in assigning the contract to secure his obligations; and the assignee foreclosed and sold her interest. After the husband had secured the patent for the land on his original entry, he was held to hold title paramount to that held by the purchaser at the sale.[7] He signed the assignment with her at a time when

ney v. Degman, 12 Neb. 237; Rush v. Valentine, 12 Neb. 513; Aiken v. Ferry, 6 Saw. 79; Hess v. Bolinger, 48 Cal. 349; Rutledge v. Murphy, 51 Cal. 388; Powers v. Leith, 53 Cal. 711; Dilla v. Bohall, 53 Cal. 709; Mace v. Merrill, 56 Cal. 554.

[1] United States v. Missouri, etc. R. Co., 141 U. S. 358.

[2] Kansas City Mining, etc. Co. v. Clay (Arizona), 29 Pac. 9.

[3] *Ib.;* R. S., § 2258.

[4] Hastings, etc. R. Co. v. Whitney, 34 Minn. 538, in exposition of Act of Congress, July 4, 1866, granting lands to the state of Minnesota; 14 U. S. St. at Large, 87; U. S. Rev. Stat., §§ 2289, 2290, 2293; Bardon v. Northern Pac. R. Co., 12 Sup. Ct. Rep. 856.

[5] Act of May 20, 1862.

[6] Act of April 21, 1876.

[7] Kraft v. Baxter, 38 Kas. 351.

his rights under the entry had been denied by the proper federal authorities, without any design to deceive, so far as the facts show. His debt, for which the wife's contract to purchase was assigned, and upon which it was foreclosed, antedated the patent. The statute forbids forced sale to satisfy any debt contracted prior to the issue of the patent. His title to the land was inchoate when the assignment was made, but the patent retroacted so as to protect his homestead right from the date of entry. The validity of the entry depended upon his having made it for his own benefit, which he was bound to show by his oath. He could have obtained no title at all without coming within the statute which offered him a homestead — not an interest which he could vest in another by contract while the title was being perfected.

As both husband and wife signed the assignment by which they caused his debt to be paid with the money of the purchaser at the foreclosure, they were in duty bound to reimburse him; and doubtless he had a good cause of action to recover the money, with no interposition of the doctrine of *caveat emptor*, since he could not foresee that the canceled entry would be reinstated, however much he may have tried to heed the maxim; yet he had no lien upon the homestead.

Vested right: When a homestead claim has *attached*, subsequent grants cannot dislodge it.

The government "limited its gifts to lands to which a homestead right had not attached. Whenever it accepted a homestead entry, its acceptance removed the land from the terms of the grant [to the railroad company]. What should become of the matter thereafter, as between the person making the entry and the government, was a question that did not affect the railway company. It had no right to inquire. The government might have waived all the informalities and defects in the person, or in the occupation, and issued the patent. Whether it did or not was a matter of which the railroad company could not complain. It was enough for it that upon the face of the records there was an apparently valid home entry, one which the government had recognized, and one which it might finally permit to ripen into a perfect title. The homestead claim, whether good or bad, in the language of the act, *attached;* and that is all the railroad company could

inquire into. That being settled, the land did not pass under this grant" from the government to the railroad company.[1]

If a homestead be entered and then abandoned, it will not be excepted from a grant of land to a railroad company of which it forms a part.[2]

Grant to a state: The federal government having conditionally granted to a state — for the purpose of aiding railroad construction — alternate sections of land (on each side of the road line a strip ten miles wide), retaining the even-numbered sections, it was held that, "within the indemnity limits," the legal right to the even sections continued to be in the government-grantor, till selected. And those sections were open to homestead pre-emption. Rights vested in pre-emptors, under the homestead laws, were held not subject to defeat by subsequent selection by the railroad company, even though it should obtain a patent therefor. Such patent may be canceled by means of a bill in equity.[3]

Title to a homestead being in the United States till the issuance of a patent to the settler, or his becoming entitled to it, no adverse title could be obtained by another through the operation of prescription or limitation laws of any state.[4]

Right of way: A settler on the public domain, under the homestead or pre-emption laws, may grant right of way to a railroad company, and transfer land for such purpose by warranty against his own acts, as authorized by congress.[5] He may do this before the issue of his patent.[6]

A federal homestead, like any other realty, may be condemned for road purposes, at any stage of the settler's proba-

[1] McIntyre v. Roeschlaub, 37 Fed. 556, Brewer, J., construing "attached" in 12 U. S. Stat., at L., p. 492 — the Union Pac. Land Grant Act; Railway v. Dunmeyer, 113 U. S. 629, Miller, J.; Sioux City, etc. Land Co. v. Giffey, 143 U. S. 40.

[2] Young v. Goss, 42 Kas. 502, in which Kansas Pac. R. Co. v. Dunmeyer, 113 U. S. 629, is *distinguished*; Emslie v. Young, 24 Kas. 732, cited; Act of Congress, March 3, 1863, donating lands to the state of Kansas to aid railroads, etc.

[3] United States v. Mo. etc. R. Co., 141 U. S. 358; 12 Sup. Ct. Rep. 13.

[4] Redfield v. Parks, 132 U. S. 239, 244; Lindsey v. Miller, 6 Pet. 666; Bagnell v. Broderick, 13 Pet. 436; Gibson v. Chouteau, 13 Wall. 92, 101–4; United States v. Thompson, 98 U. S. 486; Rector v. Ashley, 6 Wall. 142.

[5] Rev. Stat., § 2288.

[6] United States v. Reed, 28 Fed. 482; Rube v. Sullivan, 23 Neb. 779; Union Pacific R. Co. v. Watts, 2 Dill. 310.

tionary period. When it is condemned, he is entitled to compensation, whatever his interest may be.[1] Though not the owner till he has made final proof, he is entitled to whatever damages he may suffer by the condemnation. He is treated as an owner, though the measure of damage is different in his case from that of an owner.[2]

It will be observed that the settler's right to grant the way is purely statutory. He cannot alien or incumber his homestead prior to the patent, for other purposes. The general homestead conditions are equivalent to a covenant. And a covenant against incumbrances precludes the granting of the right of way to a railroad company. Such grant of land would be a breach of the covenant, since it is an incumbrance.[3]

The general subject may be illustrated by reference to the homestead laws of the states. Right of way is an easement of perpetual use, and is therefore almost equivalent to fee-simple title; it prevents the owner from the exercise of dominion. Could such an easement be granted without molesting the enjoyment of the homestead, there would seem to be no good reason why a married owner could not give it without the assent of the other marital partner,[4] since, in such case, the incumbrance would not be such as to defeat the purpose of the law in protecting families in their homes. It can hardly be conceived, however, that a railroad can cross a farm, or the grounds of a town residence, without disturbing the dominion and enjoyment of the property. It is held, therefore, that the granting of right of way by a married man, through his homestead, requires the consent of his wife.[5] Where there is no constitutional or statutory requirement

[1] Burlington R. Co. v. Johnson, 38 Kas. 142.

[2] Ellsworth, etc. R. Co. v. Gates, 41 Kas. 574.

[3] Mitchell v. Warner, 5 Ct. 497; Hubbard v. Norton, 10 Ct. 423; Prichard v. Atkinson, 3 N. H. 335; Clark v. Estate of Conroe, 38 Vt. 469; Kellogg v. Ingersoll, 2 Mass. 97; Prescott v. Trueman, 4 Mass. 627; Harlow v. Thomas, 15 Pick. 68; Prescott v. Williams, 5 Met. (Mass.) 433; Herrick v. Moore, 19 Me. 313; Haynes v. Young, 36 Me. 557; Lamb v. Danforth, 59 Me. 322; Pilcher v. Atkinson, etc. R. Co., 38 Kas. 516; Kellogg v. Malin, 50 Mo. 496; Barlow v. McKinley, 24 Ia. 69; Beach v. Miller, 51 Ill. 206.

[4] Chicago & N. W. R. Co. v. Swinney, 38 Ia. 182.

[5] Pilcher v. Atchison, etc. R. Co., 38 Kas. 516.

that her consent must be established by written evidence, other testimony will suffice.[1]

Where the law allows the husband to lease the homestead without the consent of his wife, the reason for his inability to grant the right of way across it by his individual act may not apply;[2] but there is difference between leasing for a time and granting right of way without limit as to duration.

Government grant of right of way: Though congress has granted the right of way to a railroad company through public lands, it has given no authority, and could give none, for the company to run a road through a settler's homestead without first proceeding to have the land condemned in the usual way. Though no patent has been issued, the homestead holder who has performed the conditions of the government's donation, or is performing them, has rights which the railroad company must respect. A disregard of those rights, evinced by running a road through the homestead, will give right of action for trespass which the settler may exercise against the company.[3] And if a road be operated through such land while the route has not been "definitely fixed" and a map or profile of it filed in the office of the department of the interior, the trespass will be deemed continuous.[4]

§ 9. Alienation Inhibited.

Sale in futuro illegal: The supreme court has decided that a contract by a homestead holder to convey his homestead, or a part of it, in future, when he shall have acquired title from the government, is void as against public policy; that such a contract cannot be enforced notwithstanding a valuable consideration received from the purchaser by the seller. Mr. Justice Brewer, for the court, said: "Section 2290 of the Revised Statutes provides that a purchaser applying for the entry of a homestead claim shall make affidavit that, among other things, 'such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual

[1] *Ib.*

[2] Held so. Randall v. Texas Central R. Co., 63 Tex. 586.

[3] Savannah, etc. R. Co. v. Davis, 25 Fla. 917.

[4] *Ib.* *See*, as to a route being "definitely fixed," Wood v. Railroad, 104 U. S. 329; Grinnell v. Railroad Co., 103 U. S. 739; Leavenworth, etc. R. Co. v. United States, 92 U. S. 733; Schulenberg v. Harriman, 21 Wall. 44; Hutchings v. Low, 15 Wall. 77.

settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person;' and section 2291 . . . requires that the applicant make 'affidavit that no part of such land has been alienated.' . . . It is true that the sections contain no express prohibition of alienation, . . . yet the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury. . . . Such a contract is against public policy and will not be enforced in a court of equity."[1] The facts were that the homestead enterer and his wife gave a deed in 1876, by which, for valuable consideration then paid, they agreed to deed a portion of their homestead in 1881 (when they would have the patent) to the party of the second part.

An agreement by a homestead settler, to convey land when right to it shall have been acquired in the future, being void, is enforceable neither in equity nor at law. No alienation can be made, or validly agreed upon, before the completion of the right to the title. A prior contract to convey is void because it is against public policy.[2]

There can be no completion of the homestead settler's right before he has complied with all the conditions accompanying the governmental donation. He cannot have title, and cannot be the owner of his home, until he has complied.[3] He must prove occupancy for the requisite time, and also that he has not sold his claim.[4] Mere settlement upon the land confers no property upon him, as against the government. While his period of occupancy and his conformity to requirements will be respected by the government from its incipiency, and while nothing will be done to thwart his efforts to make himself a home on the public domain, he can have no legal title, and no legal right to one, till he shall have wholly done his part.

There is a parallel to this in the pre-emptor's case. Before

[1] Anderson v. Carkins, 135 U. S. 483; Mellison v. Allen, 30 Kas. 382; Brake v. Ballou, 19 Kas. 397; Dawson v. Merrille, 2 Neb. 119; Oaks v. Heaton, 44 Ia. 116; Aldrich v. Anderson, 2 Land Dec. 71; Nichols v. Council, 51 Ark. 26; Sherman v. Eakin, 47 Ark. 351; Marshall v. Cowles, 48 Ark. 362; Red River, etc. R. Co. v. Sture, 32 Minn. 95.

[2] Cox v. Donnelly, 34 Ark. 762; Seymour v. Sanders, 3 Dill. 437; Weeks v. White, 41 Kas. 569; Clark v. Bailey, 5 Or. 343; St. Peter Co. v. Bunker, 5 Minn. 153; Warren v. Van Brunt, 19 Wall. 646.

[3] Thrift v. Delaney, 69 Cal. 188; Shinn v. Young, 57 Cal. 525.

[4] Lindsey v. Veasy, 62 Ala. 421.

title by pre-emption can be acquired, the purchase-money must be paid, and the required proof must be made.[1]

But it has been held that when he has become entitled to enter and purchase, he may sell his right; that if the purchaser knows that there is another claimant who may contest the title, and buys with his knowledge, he is liable for the price though the title fail; that, under such circumstances, he acts on his own judgment and takes the risk of the title as to its relation to the other claimant's pretension.[2] His position seems to be like that of one who takes a quitclaim deed; he cannot recover the price when the title fails.[3] He, buying the pre-emptor's right to enter and purchase, buys no land and gets no warranty of title to land. But if he should buy the pre-emptor's interest when the right to purchase is supposed to exist, yet the seller had no right and took the money for nothing, cannot that money be recovered? Assuredly — or there would be no such thing as justice. If the purchaser should buy without notice of a contesting claim, he certainly could recover the price for which he would have no equivalent. And it does not appear that, even with notice, he ought to lose his money paid to a seller who gave nothing.

The non-alienation provision of the pre-emption law of congress has been construed as follows: "That clause of the pre-emption laws of the United States[4] which declares 'all assignments and transfers of the rights hereby secured prior to the issuing of the patent shall be null and void,' does not make void a contract for the sale and transfer of the rights which a settler expected thereafter to acquire, but refers only to a sale and transfer of the rights already secured."[5]

The reason why the homestead entererer cannot alienate until he is fully entitled to the land is his inability to complete the acquisition by making the required oath if he has sold before or contracted to sell, as pointed out by the supreme court in the extract above given. If his purpose in set-

[1] Frisby v. Whitney, 9 Wall. 195; Low v. Hutchings, 41 Cal. 634; Hutton v. Frisbie, 37 Cal. 475.

[2] Beemis v. Bridgman, 42 Minn. 496; Bedford v. Small, 31 Minn. 1; Perkins v. Trinka, 30 Minn. 241; Governeur v. Elmendorf, 5 John. Ch. 79.

[3] Earle v. De Witt, 6 Allen, 520; Earle v. Bickford, 6 Allen, 549.

[4] R. S., § 2263.

[5] Taylor v. Baker, 1 Fla. 245.

tling was mere speculation, he cannot avail himself of the beneficent homestead provision made by congress.[1]

Sale, in the absence of inhibition, allowed: In the absence of any statutory inhibition, express or implied, when no affidavit inconsistent with prior alienation is required, there is no reason why the owner of an incomplete title may not sell and convey whatever right he has. The sale of a title *in futuro* was drawn in question before the supreme court, rendering it necessary to pass upon the effect of a *proviso*,[2] which forbade future sale, upon a sale made before the passage of the act. Justice Miller, the organ of the court, expressed its opinion that contracts made by actual settlers on the public lands concerning their future title to be acquired of the government and their present possessory right, are valid when not forbidden by positive law. This was held true, though there was no statute of congress authorizing the acquisition of title when the contracts were made. The property involved was part of the city of Portland. After the contracts by which the possessors agreed to sell their yet unacquired titles, the act above cited was passed, with the *proviso* inhibiting sale as aforesaid. The court found in this an argument in favor of the validity of the contracts and said that, so far from invalidating them, the inhibition of the future sale of the settlers' interests before the issue of a patent created a strong implication in support of the sales. To quote: "The right of the United States to dispose of her own property is undisputed, and the right to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter legally acquire the title, except in cases where congress has imposed restrictions on such contracts."[3]

[1] Grower v. Fletcher, 116 U. S. 380; Quinby v. Conlan, 104 U. S. 420; Worth v. Branson, 98 U. S. 118; Hasmer v. Wallace, 97 U. S. 575; Atherton v. Fowler, 96 U. S. 513; Whittaker v. Pendola (Cal.), 20 P. 680; Union Pac. R. Co. v. Kennedy (Col.), 20 P. 696.

[2] Oregon Donation Act, 1850.

[3] Lamb v. Davenport, 18 Wall. 307; Myers v. Croft, 13 Wall. 291; Sparrow v. Strong, 3 Wall. 97; Thredgill v. Pintard, 12 How. 24; Southerland v. Whittington, 46 Ark. 285; Gaines v. Molen, 41 Ark. 232.

In the absence of any inhibition, the pre-emptor may sell his title *in futuro*.[1]

An executory agreement to sell in future, upon completion of the title, has been held to be strictly an alienation.[2]

§ 10. Incumbrances.

Inhibition of lien before completion of title: No lien can be created on government land while the title remains in the United States.[3] The patent is the settler's title deed; but as he may have acquired the equitable title by compliance with all requisites, including the required oath, so as to have an indisputable right to such deed, it is held that the actual issue of the patent to him is not essential to his right to mortgage the land.[4]

Statute construed: The statute: "No lands acquired under the provisions" of the act[5] "shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," has been construed to be "manifestly intended for the protection of the entryman, to prevent the appropriation of the land *in invitum* to the satisfaction of debts incurred anterior to the issuance of the patent;" and the inference is drawn that "a mortgage given upon a government homestead after a final certificate has been issued, but before the reception of the patent, is efficacious."[6] After performing conditions, one who has entered government land under the homestead laws, which exempt it from debts contracted prior to the issue of the patent, may yet render it liable by voluntarily putting a mortgage upon it.[7] This would be in the face of the settled doctrine of the supreme court of

[1] *Ib.*; Camp v. Smith, 2 Minn. 131; Olson v. Orton, 28 Minn. 36; Robbins v. Bunn, 54 Ill. 48; Hayward v. Ormsbee, 11 Wis. 3; Dillingham v. Fisher, 5 Wis. 475.

[2] Kingsley v. Gilman, 15 Minn. 59; Boyd v. Cudderback, 31 Ill. 113; Conover v. Mut. Ins. Co., 1 N. Y. 290; Masters v. Madison Ins. Co., 11 Barb. 624; Lane v. Maine Ins. Co., 12 Me. 44; Burbank v. Rockingham Ins. Co., 24 N. H. 550.

[3] Shoreman v. Eakin, 47 Ark. 351.

[4] Webster v. Bowman, 25 Fed. 889; Axtell v. Warden, 7 Neb. 182; Cheney v. White, 5 Neb. 261; Bellinger v. White, 5 Neb. 401.

[5] U. S. Rev. Stat., § 2296.

[6] Lewis v. Wetherell, 36 Minn. 386; Lang v. Morey, 40 Minn. 396. *See* Orr v. Stewart, 67 Cal. 275; Spiess v. Neuberg, 71 Wis. 279.

[7] Lang v. Morey, 40 Minn. 396; Nycum v. McAllister, 33 Ia. 374; Jones v. Yoakam, 5 Neb. 265; Cheney v. White, 5 Neb. 261.

the United States, if the mortgage be given before the taking of the required oath to get the certificate; for as, in such case, the oath could not be truthfully taken, the right to the land could not be completed, and the mortgage must fall to the ground. The retroaction of the patent to the date of entry would not legalize mortgages put upon government land by a settler when he did not own it. The land is not liable for any debt of the owner contracted before the issue of the patent;[1] or, rather, his right to have it issued to him. It has been held to be within the spirit of the legislation of congress, however, to allow an enterer to take in a partner and give him an interest for advances, after entry and before patenting;[2] and there can be no doubt of this, if the interest be given after the reception of the final certificate; but how can the settler swear that no part of his land has been alienated,[3] if previously he has given an interest in the land to a partner? If the advances received in consideration were for the making of improvements, and only interest in them was conveyed, there would seem to be no objection. The transaction was for the good of the settler, it may be said, and therefore within the spirit of the statute; but the oath is in the letter, and the requirement is not ambiguous.

Policy and law: If no public policy were concerned, justice between mortgagor and mortgagee would seem to require the performance of contracts made between them before the maturity of the former's title. It would not lie in his mouth to deny the validity of a contract on which he had received in money the equivalent of what he had promised to give in land. Could his grantee, holding a quitclaim title from the mortgagor bearing date later than that of the patent, question the legality of a mortgage bearing a prior date?[4] But, under the statute, as shown in a case above cited,[5] the settler cannot sell before making final proof and affidavit; and he is not the only person at fault when an attempt is made to sell in contravention of law. The vendee knows the statute, winks at

[1] Sorrels v. Self, 43 Ark. 451; Cox v. Donnelly, 34 Ark. 762.

[2] Hot Springs R. Co. v. Tyler, 36 Ark. 205.

[3] U. S. Rev. Stat., § 2291.

[4] *See* Forgy v. Merryman, 14 Neb. 513; Blanchard v. Jamison, 14 Neb. 244; Skinner v. Reynick, 10 Neb. 323; Jones v. Yoakum, 5 Neb. 265.

[5] Anderson v. Carkins, *supra.*

the violation of it by his vendor, and becomes *particeps criminis*. The same is true as to a mortgagor and a mortgagee.

Whatever burden may be put upon a federal homestead, rightfully or wrongfully, the land cannot be subjected to forced sale for ordinary debt contracted before the issuance of the patent[1] or the acquisition of title.

A mortgage, made by the occupant of land subsequently taken up under the town-site laws, was held to be not void.[2] But an occupant of land subject to pre-emption sold his improvements, after having mortgaged the property, to a purchaser who afterwards acquired the land from the government, and it was held that the mortgage could not be enforced against the land, for the mortgagor did not own it; and the purchaser derived his title from the United States — not from him.[3] If a purchaser assumes a mortgage debt on the land purchased, he is estopped from denying the validity of the mortgage under the exemption laws.[4]

Improvements made by the settler become a part of the real estate, so that a mechanic's lien for work and material does not create a lien upon the property or the building; for the settler has yet no title, and the government does not become the debtor of the mechanic.[5] But courts recognize "improvements upon public lands as property; and they uphold contracts between owners of them, when fair and reasonable, not only with regard to the improvements but also executory contracts with regard to the *title* of the lands themselves, to be afterwards acquired, so far as may be necessary to secure the enjoyment of improvements crossing lines."[6]

§ 11. Title.

The certificate of entry gives possessory right to the settler, so that he may eject an intruder (as already said),[7] and may maintain possession even against the government itself,[8] as

[1] Smith v. Steele, 13 Neb. 1.

[2] Reasoner v. Markley, 25 Kas. 635.

[3] Bull v. Shaw, 48 Cal. 455.

[4] Green v. Houston, 22 Kas. 35.

[5] Kansas Lumber Co. v. Jones, 32 Kas. 195.

[6] Mantooth v. Burke, 35 Ark. 540, 544; Hamilton v. Fowlkes, 16 Ark. 340.

[7] *Ante*, p. 933; Brummett v. Pearle, 36 Ark. 471; Broussard v. Broussard, 43 La. Ann. 921.

[8] Myers v. Croft, 13 Wall. 291; Close v. Stuyvesant, 132 Ill. 607; Robbins v. Bunn, 54 Ill. 48; Coleman v. Allen, 75 Mo. 332.

generally held with some exception;[1] for the United States must keep faith with him while he is performing the conditions of the donation. Under this certificate he may even devise his inchoate title so as to enable the devisee to complete the performance of the conditions.[2]

The final certificate, showing that all the conditions have been performed, is evidence of equitable title to the homestead. The government still holds the legal title, but only as trustee for the real proprietor.[3]

He is entitled to a patent, and therefore he may contract with reference to the land before it has been issued to him.[4] If he then convey it by warranty deed, the grantee's title will become a complete legal one upon the issuance of the patent.[5] If he agree to convey upon reception of the patent, it is held that the agreement will be binding when he receives it.[6] The patent is the title deed, given by the United States to the citizen who has performed all the conditions upon which the governmental donation of homestead land is bestowed. It relates back to the date of entry,[7] but not so as to validate an incumbrance or conveyance prior to the final certificate. It is his evidence of title, conclusive in all courts.

[1] Mantooth v. Burke, 35 Ark. 540, 544; Earle v. Hale, 31 Ark. 470; Hamilton v. Foulkes, 16 Ark. 340; Cain v. Leslie, 15 Ark. 312; Pelham v. Wilson, 4 Ark. 289. A patent on a town lot is void. Burfenning v. Chicago, St. Paul, etc. R. Co., 46 Minn. 20.

[2] Coleman v. McCormick, 37 Minn. 179.

[3] Wis. Central R. Co. v. Price, 133 U. S. 496; Defferback v. Hawke, 115 U. S. 392; Simmons v. Ogle, 105 U. S. 271; Simmons v. Wagner, 101 U. S. 260; Railway Co. v. McShane, 22 Wall. 444, 461; Railway Co. v. Prescott, 16 Wall. 603; Stark v. Starrs, 6 Wall. 402; Hughes v. United States, 4 Wall. 232; Carroll v. Safford, 3 How. 441; Carroll v. Perry, 4 McLean, 25; Astrom v. Hammond, 3 McLean, 107; Pac. Min. Co. v. Spargo, 16 Fed. 348; Union M. Co. v. Danberg, 2 Saw. 454; Gwynne v. Niswanger, 15 Ohio, 367; Smith v. Hollis, 46 Ark. 23; Coleman v. Hill, 44 Ark. 452; Brown v. Warren, 16 Nev. 228; Treadway v. Wilder, 12 Nev. 114; Axtell v. Warden, 7 Neb. 182; Stewart v. Sutherland (Cal.), 28 P. 947; Rose v. Lumber Co., 73 Cal. 385; Grant v. Oliver, 91 Cal. 158; People v. Shearer, 30 Cal. 648.

[4] Newkirk v. Marshall, 35 Kas. 77.

[5] Knight v. Leary, 54 Wis. 459. *See* Week v. Bosworth, 61 Wis. 78, 85.

[6] Lewis v. Wetherell, 36 Minn. 386; Townsend v. Fenton, 30 Minn. 528; Moore v. McIntosh, 6 Kas. 39.

[7] Union Mill Co. v. Dangberg, 2 Saw. 450.

APPENDIX.

NOTES FROM THE HOMESTEAD LAWS OUTLINING THE PRINCIPAL PROVISIONS.

Alabama. Every homestead not exceeding eighty acres, with improvements thereon, to be selected by the owner, or any lot with improvements in a town, not exceeding $2,000 in value, owned and occupied by a resident, shall be exempt, except against any mortgage or pledge thereon, or laborers' or mechanics' liens. It cannot be mortgaged or alienated without the joint consent of the husband and wife; and all instruments waiving the right of homestead must be attested by a witness. The homestead remains exempt from liability for the owner's debts, after his death, while any of his children is a minor; and it also inures to the benefit of the widow. Const., art. X, § 2. The Code carries out these mandates, and it is sufficiently cited in this treatise under different topics.

Arizona. Rev. Stat. 1887, § 2071: Every person who is the head of a family may hold as a homestead, exempt from execution and forced sale, real property selected by him or her not exceeding $4,000 in value.

§ 2072: Any person, wishing to avail himself or herself of the provisions of the foregoing section, shall make out, under oath, a claim in writing, showing that he or she is the head of a family, describing the land, stating the value, and filing it with the county recorder.

§ 2073: The claim may be by the husband or wife or by an unmarried person who is the head of a family, or by one having charge of the premises in behalf of the owner who is entitled to claim.

§ 2074: If married, the homestead may be selected from community property, or from the separate property of the husband; or, if the wife join in claiming, it may be from her separate property.

§ 2075: Abandonment is effected by declaratiou of abandonment, or by a grant of the property. It must be by both husband and wife, if the owner is married; and it holds good only when filed in the county office.

§ 2076: A married man cannot sell, lease or incumber his homestead without joinder by his wife.

§ 2077: When homestead is taken by married persons, husband and wife shall hold as joint tenants, and on the death of one it vests in the survivor; and on the death of the survivor, "the minor child or children, if any, shall receive the benefit of this act."

§ 2078: "If the plaintiff in execution be dissatisfied with the valuation of the land claimed by the defendant as homestead, he may serve upon

Arizona — continued.

him, his agent or attorney, and upon the officer holding the execution, a notice thereof in writing, and the appointment of an appraiser." Within three days thereafter, the defendant shall appoint an appraiser, and the appointees shall appraise within three days thereafter. If the homestead be found not worth over $4,000, the plaintiff shall pay the costs. If found worth more, the property shall be divided and the excess sold. If indivisible, all shall be sold, and $4,000 reserved to the debtor from the proceeds. No bid for the whole, under $4,000, shall be received.

§ 2079: The decision of the appraisers is final, if not impeached for fraud.

§ 2080: If they cannot agree, they must select a third appraiser.

Arkansas. The homestead of a resident, married or the head of a family, shall not be subject to the lien of any judgment, decree of court, sale under execution, or any process except for purchase-money, specific laborers' or mechanics' liens for improvements on it, taxes, or judgments rendered against persons in fiduciary capacity for money thus collected by them. It may consist of one hundred and sixty acres outside of any city, town or village, with improvements thereon, worth not more than $2,500, not reducible to less than eighty acres regardless of value; or one acre with its improvements within any city, town or village, worth not more than $2,500, not reducible to less than one-quarter of an acre regardless of value.

If the owner die leaving a widow but no children, she shall have the rents and profits of the homestead for life, if she has none of her own, and it shall be exempt as before; but if the owner left children (one or more), they shall be entitled to have the rents and profits till of age (the right of each to expire then, respectively, and go to those not of age till all have reached majority), and when all are of age, the whole to go to the widow. Residence of the widow and children on the homestead is not required. On the death of the widow all of the homestead shall be vested in the minor children.

Const. Ark., art. IX, §§ 3–6.

The statute repeats the constitutional provision relative to widows and minors, and adds that, to avail themselves of it, "she or they shall file with the clerk of the probate court of the county in which the homestead is situated, an accurate description" of the homestead claimed, and apply to have it reserved from sale. The clerk shall record that it has been so reserved, upon the filing of the description and application.

Dig. of Stat. of Ark., §§ 3590–3.

California. There shall be a homestead exempt as provided by law. Const. of Cal., art. XVII, § 1.

The house and land, constituting the residence of the claimant, may be selected as the homestead. It may consist of the husband's separate property, the wife's separate property if she consent, or community property. It may be selected from any real property occupied and owned by an unmarried head of a family which includes a minor child of his or her deceased wife or husband. And it may be selected from such property of any person who has living with him or her as a member of the family, a minor brother, sister, nephew or niece; a parent or grandparent; a de-

California — continued.

ceased wife's or husband's parent or grandparent; or an unmarried sister or any relative above named who is incapable of self-support, whether above or below the age of majority. The wife's consent to have the homestead selected from her separate property must appear from her own declaration of homestead or her joining in the declaration by the husband.

The homestead is exempt from execution, except on judgment obtained before the filing of the declaration so that it created a lien on the property; or judgment to enforce mechanics', laborers' or vendors' liens on the property; or mortgages created by the husband and wife or an unmarried claimant, or any mortgage anterior to the filing of the homestead declaration.

Husband and wife must join in an act incumbering the homestead, or in any declaration of abandonment or conveyance of it, which must be duly recorded to give it effect.

When the homestead is liable to execution, in part, the judgment creditor may apply for the appointment of appraisers by the superior court of the county showing that execution has been levied upon it, and that its value exceeds the sum legally exempted, and he must aver the name of the claimant.

If, by the report of the appraisers, it appear that the land is susceptible of division, the court may order the residence reserved as the homestead with as much land as the exempt limit will allow, and have the execution restricted to the residence. If reported indivisible yet excessive of the exemption limit in value, all must be sold, and the claimant's interest must be paid to him from the proceeds — and the sum paid remains inviolable by execution for six months.

The limit is $5,000 to the head of a family; $1,000 to any other person. A declarant for the $1,000 exemption must observe the same requirements as in case of making a conveyance of real estate, so far as concerns description, recordation, etc. And he must state its cash value and that he resides on the premises, though he does not state that he is the head of a family.

The declaration of homestead must be executed and acknowledged and recorded like the grant of real property. It must show that the declarant is the head of a family, or the wife of such who makes the declaration for the joint benefit of herself and her husband — and that the latter has not made a declaration; that the declarant resides on the premises claimed as a homestead; and there must be a description of the property claimed and a statement of its value in cash.

A homestead carved from community property vests in the survivor of the partners in community on the death of the other spouse, still free from any liability that did not exist before the death. When carved from separate property, the heirs or devisees of the former owner take subject to power of the court to assign the use of the property to the family of the deceased for a limited period. It does not become liable to execution for the debts of the homestead beneficiary except for liens, etc., above mentioned.

Deering's Annotated Code and Statutes of California, §§ 1237–1263.

Colorado. The legislature shall pass a liberal homestead law. Const., art. XVIII, § 1.

Gen. Stat. 1883, § 1631: Every householder who is the head of a family may have two thousand dollars' worth of homestead property exempt from debt incurred after February 1, 1868.

§ 1632: The word *homestead* must be inscribed in the margin of the recorded title.

§ 1633 requires family occupancy.

§ 1634: The survivor of married beneficiaries and his or her minor children "shall be entitled to the homestead;" but if there is no widow or widower or minor the property is liable for the debts of the deceased owner.

§ 1635: There is no quantitative limit.

§ 1636: The wife must join in a mortgage of the homestead to render it effectual.

§ 1637: Any excess of value, beyond the limit, may be subjected to execution. *See* Mills' Anno. Stat., § 2132 *et seq.*

Florida. A homestead to the extent of one hundred and sixty acres in the country or half an acre in a town or city, and improvements thereon, owned by the head of a family residing in the state, is exempt. Const. of Fla., art. IX, sec. 1.

Stat., § 1. One hundred and sixty acres in the country, or half an acre in town, with improvements, and one thousand dollars' worth of personal property, owned by a head of a family resident in the state, are exempt from execution, except for taxes, purchase-money, or labor performed on the homestead.

§ 2. In addition to the exemption in the first section, such property as the head of the family may select to the amount of $1,000. The exemption in this section shall prevent only the sale of property when the debt was contracted, liability incurred or judgment obtained before May 10, 1865, except for taxes, purchase-money and labor.

§ 3. The exemptions of sections 1 and 2 shall accrue to the heirs of the party having taken the benefit of such exemption. The exemption of section 1 shall "apply to all debts except as specified in said section, no matter when or where the debt was contracted or liability incurred."

McClellan's Dig. of Laws of Fla., pp. 528–9.

Georgia. The head of a family, or the guardian of minor children or aged and infirm persons, or any one having the care of a dependent female of any age, is entitled to exemption of realty and personalty. No court shall have jurisdiction to enforce any judgment or execution against such exempt property, except for taxes, purchase-money, labor done on it, material furnished for it, or incumbrances removed from it. The debtor may waive exemption, in writing, as to the realty. In case of the sale of the homestead under order of court, the proceeds to the amount of exemption ($1,000) must be invested in a new homestead. Besides this sum, there is personal exemption. Const., art. 9, §§ 1–5, 9. The courts recognize both a constitutional and a statutory homestead, though no person can avail himself of both. The legislation is extensive, and is sufficiently copied and cited in this treatise.

Idaho. Rev. Stat. 1887, § 3036: Homestead may be carved from community property or from the wife's separate property with her consent.

§ 3037: If it is from her separate property, she must make the homestead declaration.

§ 3039: The homestead is liable on a judgment prior to the declaration, or an attachment laid before; and for laborers', mechanics' or vendors' liens, and for mortgages given by both husband and wife.

§ 3041: Abandonment is by declaration or grant made by both husband and wife.

§ 3058: The monetary limit is $5,000 to the head of a family, $1,000 to "any other person."

The provisions of the statute are much the same as in California.

Illinois. The legislature shall pass a liberal homestead law. Const., art. IV, § 32.

Every householder having a family is entitled to homestead exemption to the amount of $1,000 in the house and land occupied by him as a residence and owned or leased. Such homestead, or right and estate therein, shall be exempt from attachment, judgment, levy or execution sale for the payment of his debts, or other purposes; and from the laws of conveyance, descent and devise, except liability for taxes and purchase-money, and for improvements.

The exemption shall continue to the survivor, and the death of husband or wife, continuing to occupy the homestead, for the benefit of such survivor and the children till of age. In case of desertion by either husband or wife, the one remaining on the homestead shall enjoy the exemption. In case of divorce the court may dispose of the homestead.

The extinguishment of the homestead must be by written instrument signed by both husband and wife, acknowledged as in conveyances of real estate or abandonment thereof or possession given to another. If the exemption is continued to a child or children, an order of court is requisite to its release.

Upon sale and conveyance, the proceeds stand in lieu of the homestead to the amount of the exemption limit, ($1,000), for a year. The same exemption applies to money received on insurance as applied to the building before being burned. The land sold is conveyed free from all the liabilities from which it was previously exempt.

In enforcing a lien upon premises which include the homestead, the court may have the portion, entitled to exemption, set apart, and cause the rest to be sold. If the premises are not susceptible of division, the whole may be sold and the value of the exemption right paid to the beneficiary out of the proceeds. Should the premises be exposed for sale, without first setting apart the homestead, they cannot be adjudicated on a bid not exceeding $1,000.

Commissioners may be appointed to estimate the premises, and the owner of the homestead may pay his debt less $1,000 and thus prevent sale, etc.

Starr & Curtiss, An. Stat. Ill., pp. 1097-1111.

Indiana. No homestead law. There is exemption of realty or personalty, or both, to the amount of $600, when the demand is on a contruct. The debtor selects the property. What is sold under exemption must bring

Indiana — continued.

two-thirds of the appraisement, unless the debtor has waived this benefit. He cannot contract in advance to waive his right of exemption when it shall arise.

The statutes are freely cited in the treatise.

Iowa. The homestead of every family, whether owned by husband or wife, is exempt from forced judicial sale, in the absence of any statutory provision to the contrary.

The surviving spouse, though childless, continuing to reside in the house used as a homestead prior to the death of the other marital partner, shall be deemed the head of the family and entitled to the exemption.

Husband and wife must act jointly in the conveyance of the homestead.

The homestead is liable for taxes, and liable upon mechanics' liens for work, labor or material in the improvement of the premises, and for debts contracted by the owner prior to the purchase when he has not effects sufficient without it to meet such obligations. It is also liable for debts created by written contract made by a competent owner who stipulated that it should be thus liable, provided he have not sufficient other property pledged for the payment of the debt in the same written contract.

The homestead must embrace the owner's residence; and if he has more than one, he must elect between them. It may embrace one or more lots or tracts of land, with improvements and appurtenances, not exceeding half an acre within a town plat or forty acres without such plat unless the value be less than $500. In such case, the quantity may be enlarged to reach that value. It cannot include lots or tracts which are not contiguous, unless they are habitually used together, in good faith, as one homestead. But it must not embrace more than one dwelling-house and its appurtenances, though a shop or other building used by the owner of the homestead in the prosecution of his ordinary business, worth not more than $300, may be included as part of the exempt home.

The selection of the homestead may be by the owner, husband or wife, by marking the bounds and giving description such as is usual in instruments conveying land, which description with the plat shall be recorded in the "Homestead Book." If the owner, husband or wife fail to mark, plat and record as directed, he does not thus forfeit the right of exemption; but the officer executing a writ against the property of such person as defendant may cause the homestead to be marked off, platted and recorded at the defendant's expense.

The owner may change the metes and bounds, having the plat and record altered to correspond; and, with the assent of his or her spouse, may change the entire homestead. But no such entire change, without such assent, shall affect the rights of the non-agreeing spouse, nor those of his or her children; nor can any change of the homestead, partial or total, affect liens or conveyances previously made. The newly selected homestead stands in place of the old, in all respects, when not subject to any of the above-named exceptions.

Disputes as to the legality of the establishment of the homestead, arising between the claimant and another, are submitted to referees, at the request of either party, whose report is acted upon by the court.

Iowa — continued.

Upon the death of husband or wife, the survivor may continue to occupy the homestead until it shall be otherwise disposed of according to law, such as the assignment to the survivor of his or her distributive share in the real estate of the deceased. The survivor, however, may elect to retain the homestead for life in lieu of such share.

Upon the death of both husband and wife (or of the owner of the homestead whomever), the property descends according to rules of descent, or as directed by will, remaining free from the debts of the decedent parent or those of the heirs inheriting it. But if there be no issue, and no surviving marital partner in the homestead, it becomes liable for the debts for which it might at any time have been liable if never held as a homestead.

A homestead may be devised, as any other property, subject to the rights of the surviving husband or wife.

McClain's Annotated Code of Iowa, §§ 3163–3185.

Kansas. "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 under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon. *Provided*, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife." Const., art. 15, sec. 9.

The homestead occupied by the intestate and his family till his death, and by his widow and children thereafter, shall continue exempt as before, and shall be the absolute property of the widow and children — subject, however, to the constitutional exceptions.

If a deceased husband owned more than the limit of land allowed as exempt, adjoining his residence, his widow may select the amount authorized by law, and she becomes entitled thereto, if there be no children.

So, if the intestate left children, but no widow, they become entitled to the homestead, as limited by law.

When there are both widow and children, homestead must be equally divided between her and them — half to her — upon her becoming married or they all becoming of age.

The division may be by mutual consent, or the proceeds may be divided when the property is not susceptible of division and a sale of it becomes necessary for the purpose.

Taylor's Genl. Stat. (1889), §§ 2593–7.

Kentucky. So much land, including the dwelling-house and its appurtenances, owned by the debtor, as shall not exceed $1,000 in value, is exempt from execution, attachment or judgment of court (except to foreclose a mortgage given by the owner, or for purchase-money due on the homestead), for all debts or liabilities incurred after June 1, 1866.

Before sale of the defendant real estate, appraisers set off a homestead

Kentucky — continued.

of $1,000 value, and their report is recorded with the other proceedings by the officer charged with the sale. Indivisible property being sold for more than the exemption limit, is transferred to the bidder, but the homestead beneficiary therein must be paid $1,000 from the proceeds in lieu of his homestead.

A mortgage, release or waiver, to affect the homestead or exemption right, must be in writing, signed by both husband and wife, and recorded like a conveyance.

Exemption continues to widow and children, "but shall be estimated in allotting a dower."

The homestead shall be for the use of the widow as long as she occupies it, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her till the youngest unmarried child arrives at full age. The termination of the widow's occupancy shall not affect the right of the children; but the land may be sold subject to the right of the widow and children, if the sale is necessary to pay the debts of the husband.

The homestead of a woman shall, in like manner, be for the use of her surviving husband and the minor unmarried children; and when his and their interest ceases it shall be disposed of in like manner, and the proceeds applied on the same terms to her debts; if none, divided among her children.

The exemption provided in this chapter shall apply to all persons, of any race or color, who are actual, *bona fide* housekeepers (with a family) of this commonwealth; but it shall not apply to sales under execution, attachment or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the land or the erection of the improvements thereon.

Genl. Stat. Ky. (1888), pp. 574–8.

Louisiana. Every head of a family, and every person having a father or mother or other person dependent upon him for support, is entitled to have his homestead, owned and occupied by him, consisting of land, buildings and appurtenances, rural or urban, exempt to the amount of $2,000.

If the homestead exceed this limit, and be sold for debt, the debt-owner is entitled to that amount from the proceeds. No husband is entitled to homestead exemption whose wife is in the actual enjoyment of property to the value of $2,000.

The exemption does not hold good against claims for the purchase-money of the homestead, or for improvements thereon, or for services thereon by a mechanic or laborer, or debt incurred by a public officer, fiduciary or attorney at law [in official capacity].

No waiver of homestead rights is valid; and no mortgage, trust-deed, or other lien on the homestead is valid, except for its purchase-money or improvements, whether created by the husband alone, or jointly with his wife. All sales of the homestead, with any defeasance, are void.

The legislature shall require homesteads to be recorded.

The homestead continues during the minority of any of the children,

Louisiana — continued.

after the owner's death, with exemption from his debts. It inures also to the benefit of the widow.

Const. La. 219, 220. Statutes, cited in the treatise, are here omitted.

Maine. A dwelling-house, with the lot on which it stands, together not exceeding $500 in value, is exempt. The claimant may file in the registry of deeds, in the county where the land lies, a certificate signed by him declaring his wish to have exemption and describing the land and buildings; and the register shall record it in a book kept for that purpose. Rev. Stat., ch. 81, § 61.

Maryland. No constitutional provision, except that the legislature shall exempt property not exceeding $500 in value. No homestead, but exemption of realty and personalty, or either.

One hundred dollars' worth of property of any defendant is exempt in "any civil proceeding whatever," except on judgment for breach of promise to marry or for seduction.

Each defendant may select property, real or personal, to the value of $100, to be ascertained by appraisers at the time of levy; and the appraisement must be returned with the writ.

Indivisible property, real or personal, must be sold if a bid exceed the amount exempted; and that amount must be paid to the defendant out of the proceeds.

Liens of vendors for purchase-money, all mortgages and liens of mechanics or others for debt contracted in the erection of building, and taxes, excepted from the effect of the exemption.

Rev. Code of Md., p. 623.

Massachusetts. There is exempted to the value of $800, the lot and buildings occupied as a residence and owned by the debtor; or buildings owned by the debtor, and so occupied, on land not his own but of which he shall be in rightful possession by lease or otherwise — he being a householder and having a family. Declaration and recording are required. The exemption continues after the owner's death, for the benefit of his widow till her death, and of the children, till the majority of the youngest child. The widow's homestead and dower are not incompatible.

No conveyance or mortgage of the homestead, by the husband, is valid unless his wife join in the deed. No release or waiver is valid unless by deed acknowledged and recorded as in case of conveyance of real estate.

The homestead is liable for antecedent debts, purchase-money, liens, taxes, etc.; but a judgment for ordinary debt, contracted after notice by recording and occupancy, bears no lien upon the property.

Mass. Gen. Stats.

Michigan. A homestead owned and occupied by a resident of this state, not exceeding forty acres, with improvements, not in a town plat, city or village; or a homestead so owned and occupied, consisting of a village, town or city lot, or parts of lots equal to one, with improvements, shall be exempt to the amount of $1,500, from forced sale on execution or any final process from a court, for any debt contracted after the adoption of this constitution. It is not exempt from the foreclosure of a mortgage.

Michigan — continued.

The wife must have joined to render valid a mortgage or conveyance given by a married man.

The exemption continues during the minority of the children of the deceased owner; also during the widowhood of his widow, unless she own a homestead in her own right.

Const., art. XVI, §§ 1–4.

To the exemption declared in the constitution, the statute adds that the homestead shall not be subject to execution for any "debts growing out of, or founded upon, contract either express or implied, made after the third day of July, 1848;" and provides that the exemption shall continue while the homestead shall be occupied by the widow or minor child of any one entitled to it while living. Exemption does not hold against a mortgage given to secure purchase-money for the homestead, nor against a mortgage given prior to the date of the statute, nor against taxes.

When forced sale is pending against property including the homestead, the owner may notify the officer in charge and have it set off when it is exempt, and reserved from sale. If the creditor, or party adversely interested to the claimant of the homestead, complain that too much has been set off, the officer in charge of the writ shall have the land surveyed, so that the statutory portion, including the dwelling, may be assigned to the beneficiary of the homestead exemption.

Indivisible property including the homestead, all worth more than the exemption limit, so found by *jurors* selected for the purpose, may be sold and the sum of $1,500 paid the beneficiary out of the proceeds, unless he, upon receiving the required prior notice, has paid the debt, less that sum, within sixty days from notice. The sum received by the debtor upon sale is exempt for a year. If no bid exceed $1,500 there can be no adjudication.

One "owning and occupying any house on land not his own," claiming it as a homestead, shall be entitled to the exemption.

Howell's An. Stat. of Mich., §§ 7721–9.

Minnesota. A dwelling-house and appurtenances, with eighty acres of land, selected by the owner, outside the platted portion of any incorporated town, is exempted. Or, the owner may select a lot within such town, or half an acre therein if there are less than five thousand inhabitants, together with the dwelling-house and appurtenances. Ownership and occupancy and state residency are required. Such property is free from attachment or sale upon execution. It continues exempt while occupied by the widow or minor children of the deceased owner who had enjoyed the exemption. A deserted wife or minor children may occupy the homestead and enjoy its protection from forced sale, when the husband or father, who owns the property, has absconded and left them.

Mortgages and conveyances require the wife's signature, unless the mortgage is to secure the purchase-money. The exemption does not affect liens for improvements, or taxes, or those arising by operation of law; but ordinary judgments create no liens on the homestead. The householder may claim his homestead when a levy is pending; and if there is any contest respecting it between the plaintiff and defendant, the statute prescribes certain proceedings, a survey, etc.

Mississippi. The constitution requires the legislature to pass a homestead law. Every citizen householder who is the head of a family may hold his country residence which he occupies with his family, to the amount of one hundred and sixty acres, exempt from execution or attachment. The value including improvements must not exceed $2,000, unless the homestead be recorded as such, when there may be $3,000 of value.

Such citizen, in town, has like limitations of homestead value. Declaration must be made, showing the selection of property and describing it, and causing it to be recorded in a book called "The Homestead Record," if, whether in town or country, the beneficiary wishes to avail himself of the larger exemption.

When not selected by the beneficiary, homestead is designated by law, consisting of land in the form of a square or parallelogram if practicable or contiguous parcels, with the family dwelling and its appurtenances thereon limited to one hundred and sixty acres and to $2,000 of value. If excessive, the excess is cut off by appraisers making the homestead estimate, and is liable to execution. If indivisible, all is sold and $2,000 saved to the debtor from the proceeds of an ordinary homestead, or $3,000 from a recorded one. Provision is made for contestation of the allotment. Liability for purchase-money, taxes, assessments, labor or material for homestead, and "upon a forfeited recognizance," continues unaffected by the exemption.

Permanent removal from the homestead is abandonment. The property may be disposed of by the owner without subjecting it to liability for his debts beyond those mentioned. The wife must join in conveying and incumbering any homestead property of her husband which they occupy together. She has the same rights and liabilities, when she is the owner, as a husband is above shown to have; and she cannot sell or incumber her homestead without his joining: both living together upon it. The benefits of the exemption laws are accorded to women citizens as well as to men.

Code of Miss., 1892.

Missouri. Every householder or head of a family may claim exemption in the realty he uses as his home within the following limitations: one hundred and sixty acres, in the country, worth not more than $1,500; or eighteen square rods, in a town of forty thousand inhabitants, worth no more than $3,000; or thirty square rods, in a town of ten thousand inhabitants and less than forty thousand, worth no more than $1,500; or five acres, in a town of less than ten thousand inhabitants, worth no more than $1.500. A married woman may claim homestead in a tract or lot occupied by her and her husband, or by her alone if he has abandoned the property as homestead. The claim must be duly acknowledged by her in such case. He cannot sell or incumber such dedicated property. He and she may jointly convey or mortgage their homestead. Rev. Stat., § 5435.

If the homestead is excessive in value, the head of the family may designate the portion he claims; or, on his failure to do so, the sheriff in charge of an execution against the property shall appoint appraisers to lay off the exempt portion. If excessive and mortgaged, the segregation is made in like manner. *Ib.*, §§ 5436–7.

Missouri — continued.

Products of the homestead are exempt when claimed. *Ib.*, § 5438.

On the death of the householder, his homestead vests in his widow and children (free from his debts unless legally charged thereon in his lifetime), till the majority of the youngest child and the death of the widow. The interest of the deceased householder, "except the estate of homestead thus continued," becomes liable for his debts. *Ib.*, § 5439.

Commissioners to set out homestead and dower must lay off the former first; and if it equals a third of the realty of the estate, there can be no dower to the widow. In any case, the dower is diminished by the amount she receives as homestead. *Ib.*, § 5440.

The homestead is liable for antecedent debts; and for all debts after a new homestead has been acquired. *Ib.*, §§ 5441–2.

Commissioners set out the homestead from the real estate of the debtor, under order of court. If the property is indivisible, and all is sold together, the court controls the proceeds. *Ib.*, §§ 5443–5.

Montana. Compiled Stats. 1887, § 321: There is no exemption from payment of the purchase price.

§ 322: The limit is one hundred and sixty acres for agricultural purposes, or one-fourth of an acre in a town, neither to exceed $2,500 in value.

§ 323: Laborers' and mechanics' liens, and mortgages made by husband and wife, and debts prior to the homestead law, are not affected.

§ 324: A defendant against whose property an execution is pending may notify the officer of his homestead when it has not been previously selected.

§ 325: If the plaintiff is dissatisfied with the allotment of homestead, he may cause a survey to be made.

§ 328: The owner may remove from his homestead yet not thus make it liable. General judgments create no lien on the homestead.

§ 329: The widow of the owner of the homestead takes the whole for life.

§ 330: Only "married men or the head of a family" are beneficiaries.

Nebraska. The homestead is limited to $2,000 in value and one hundred and sixty acres in extent not in a village or city, or to two contiguous lots within it of like value, either including improvements, selected by the owner from his separate property, or from that of his wife with her consent. An unmarried head of a family may select from any of his or her property.

The homestead is exempt from execution except on mechanics', laborers' and vendors' liens, or mortgages given by both husband and wife or by an unmarried claimant. Husband and wife must join in the incumbrance or conveyance of their homestead.

When execution is levied against lands including the homestead not liable thereto, the head of family owning it must notify the officer of his right and give a description of the premises claimed to be exempt: whereupon, only the remainder shall be liable to the levy; but the judgment creditor may cause the land claimed to be appraised. If, from the report of appraisers, it appear that the land seized is divisible, the court shall order the homestead to be set off: otherwise, all must be sold, and the

Nebraska — continued.

homestead claimant recompensed out of the proceeds. If sale to an amount not exceeding the homestead value cannot be effected, there can be no adjudication to any bidder. The sum in lieu of homestead stands exempt for six months, in case the land be sold. The same rule applies to any surplus remaining after sale of homestead on allowable liens.

"Head of family" is defined as in statutes of California.

The sale of one homestead does not preclude the establishment of another.

Compiled Stat. (1889), ch. 36, §§ 1–16.

Nevada. There shall be a homestead exempt, as provided by law. Const. Nev., art. IV, § 30.

Homestead is limited to $5,000 in value, selected by the head of a family as in Nebraska, and liable only to such debts as are collectible against it in that state and debts existing prior to November 13, 1861.

A declaration must be filed by the claimant, or by the claimants if they be man and wife. Separate property of either being dedicated as a homestead, returns to the owner or to his or her heirs on the death of the other spouse. Tenants in common may declare upon their rights of estate, subject to the rights of co-tenants.

Written declaration is essential to abandonment, signed by the head of the family, and by his wife when the declarant is married, and duly recorded. The wife's declaration is taken separately, and apart from her husband. Prior to dedication, the land may be conveyed or incumbered without her joinder if she be a non-resident of the state.

Creditors may swear that they believe a homestead proceeded against by levy is worth more than the limited amount, and then appraisers make estimate and report to the court, and thereupon proceedings are had as in Nebraska. Five thousand dollars are reserved out of the proceeds of sale for the homestead owner whose home has been sold as not susceptible of separation from the other land levied upon, which has the exempt character as did the homestead.

On the death of either husband or wife, the homestead reverts to the survivor. The children share in the benefit. If neither a spouse nor child survive, the estate is to be administered as in ordinary cases, and debts of the decedent paid.

Genl. Stat., §§ 539–542.

New Hampshire. The wife, widow and children of any person owning a homestead, or any interest therein, occupied by him or her or his or her family, shall be entitled thereto to the amount of $500 against creditors, grantees and heirs of such person during the life of such wife or widow and the minority of such children. Should the husband survive the wife and the time when all the children are of age, he shall enjoy the exemption.

No mortgage made by him alone, except to secure the purchase-money of the homestead, shall be valid so as to affect the interest of his wife, widow or children.

The deed of the husband and wife, or the deed of the survivor, or of either, should one be insane, if approved by the probate judge, shall bar the right of homestead above stated.

New Hampshire — continued.

After the death of one owning a homestead, or after any conveyance thereof, the judge of probate, on petition, may cause a homestead to be set off in the same manner as dower may be assigned by him. If the legal title was in the wife, and the husband survives her, he shall have his life estate therein exempt to the amount of $500, after the children shall have arrived at twenty-one years of age.

Like exemption is extended to the unmarried occupant or owner of his homestead.

An officer, charged with an execution against the property of the husband, shall cause a homestead to be set off, on written application of the husband, wife, or children by their guardian or next friend, such as the applicant select. It shall be set off by appraisers (one selected by the applicant), whose certificate showing the metes and bounds shall be recorded with the proceedings of the execution. The court may order a re-appraisement upon good cause shown, and a re-assignment of the homestead. Such proceedings had and recorded make good title to the wife, widow and children, and to the debtor himself for the term before expressed, against his creditors, heirs and grantees.

Indivisible property may be appraised and sold under execution, if the applicant for the setting off of the homestead, upon notice, do not pay the debt except the sum exempt within sixty days from appraisement, provided the creditor advance $500 to the officer to secure the exemption right.

If the surplus be not paid by the debtor and the advance not made by the creditor, there can be no sale unless a bid exceed $500, and only the excess can be applied to the debt and costs. The sum, $500, stands in lieu of the homestead, exempt for one year.

Genl. Laws, ch. 138, pp. 330–2.

New Jersey. A homestead is exempt to the value of $1,000, if occupied as a residence and dedicated and recorded. If the officer, in charge of an execution, thinks the homestead of the debtor worth more, he may cause it to be appraised, and the excess may be sold. If the property is indivisible, all may be sold, and $1,000 of the proceeds reserved for the debtor. Both husband and wife must join in a private sale or an incumbrance of the homestead, unless the owner sell it at a fair value and invest $1,000 of the price in a new homestead. Revision of N. J. Laws, p. 1055.

New Mexico. There is exempt to the head of a family a homestead not exceeding $1,000 in value. The exemption is from attachment or seizure by any other civil process. The usual conditions, restraints and liabilities need not be repeated. N. M. Comp. Laws.

New York. A lot with one or more buildings not worth more than $1,000, "owned and occupied as a residence by a householder having a family," designated as an exempt homestead, is exempt from execution for debt contracted after April 30, 1850, unless before the designation or for the purchase-money.

A conveyance of the property stating that it is designed to be held as a homestead exempt from sale on execution must be recorded; or, a notice with a description of it, so stating, written, acknowledged and sub-

New York — continued.

scribed by the owner, as a deed, must be recorded in the Homestead Exemption Book in the clerk's office of the county. Like property owned by a married woman and occupied by her as a residence may be designated in like manner, with like effect.

The exemption continues after the death of a woman homestead owner until the majority of the youngest surviving child; and, after the death of a man homestead owner, till the death of his widow and the majority of such child; but, in either case, occupancy as a residence by the beneficiary is essential, unless the dwelling be injured or destroyed, when occupancy may be suspended for one year.

The property cannot be sold on execution issued upon a judgment, as against which it is exempt, though it may be worth more than $1,000. After the return of the execution, the owner of the judgment may maintain a judgment creditor's action to procure a judgment directing a sale of the property and enforcing his lien upon the surplus.

The defendant is entitled to $1,000 of the proceeds, to be exempt for a year as the land was, and with the same exceptions, unless he should designate another homestead within that time. Should the defendant die before receiving such proceeds of sale, the court may direct the money to be invested for the benefit of those entitled to the exemption, "or to be otherwise disposed of as justice requires."

The homestead owner may cancel all exemptions by subscribing and acknowledging and recording a notice to that effect, describing the property thus released. All other methods of release or waiver are inhibited. Such cancellation must precede the making of a valid mortgage upon the land, unless for its purchase-money.

Throop's Ann. Code, §§ 1397–1404.

North Carolina. Every homestead and buildings thereon, to be selected by the owner, or, in lieu thereof, a town lot and buildings thereon, owned and occupied by a resident of the state, not exceeding in value $1,000, shall be exempt, except from obligation or debt contracted for the purchase of the premises, or for taxes, or for a claim for services thereon by a mechanic or laborer.

The homestead cannot be mortgaged or alienated without the joint consent of husband and wife.

The homestead estate continues exempt from the owner's debts after his death, during the minority of any of his children, and during the widowhood of his widow unless she be the owner of a homestead in her own right.

Const., art. X, secs. 2, 3, 4, 8.

The statute is in accord. The homestead of a resident is not subject to the lien of any judgment except for purchase-money, for mechanical or other work done for the claimant of the homestead, and for taxes. Code of N. C., 1883.

North Dakota. A homestead owned by either husband or wife, not exceeding in value $5,000, consisting of a dwelling-house in which the homestead claimant resides and all its appurtenances and the land on

North Dakota—continued.

which the same is situated, shall be exempt from judgment lien and from execution or forced sale, except as follows:

The homestead is subject to execution or forced sale in satisfaction of judgment obtained: *First.* On debt secured by mechanics' or laborers' liens for work or labor done, or material furnished, exclusively for the improvement of the same. *Second.* On debts secured by mortgage on the premises, executed and acknowledged by both husband and wife, or by an unmarried claimant. *Third.* On debts created for the purchase thereof, and for all taxes accruing and levied thereon.

If the land claimed as homestead can be divided without material injury the court shall order the appraisers to set off such portion, including the residence, as will amount in value to the homestead exemption.

Ohio. "Husband and wife living together, a widow, or a widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale on judgment or order a family homestead not exceeding $1,000 in value; and the husband, or, in case of his failure or refusal, the wife, shall have the right to make the demand therefor; but neither can make such demand if the other has a homestead." Rev. Stat., § 5435.

A dwelling situated on land leased from another, belonging to and occupied by any of the persons above mentioned, may become a homestead exempt like other homesteads. *Ib.*, § 5436.

A homestead shall be set apart for the widow and unmarried children of a decedent, or for both, on petition of an executor or administrator for the sale of the lands to pay debts. *Ib.*, § 5437.

An officer charged with the execution of a judgment may cause appraisers to set off a homestead on application of the debtor, his wife, agent or attorney, if the debtor has a family, if the lands against which the writ is directed, or those seized under the writ, include the homestead. The part set off must be worth no more than $1,000. If no application be made by the debtor it may be made by his widow before sale. *Ib.*, § 5438.

When the homestead of a debtor will not bear division without injury, the plaintiff in execution against it shall be paid rental excessive of $100 per annum, payable quarterly, in lieu of the proceeds of sale, if the owner will pay him such rental; but, if he will not, the homestead shall be sold at not less than its appraised value. *Ib.*, § 5439.

When a homestead is charged with liens which preclude the allowance of the exemption, and with other liens which do not preclude it, the former being paid out of the proceeds of the sale of the premises, the balance may be paid to the husband debtor or his wife to the amount of $500, in lieu of homestead, on his or her application. *Ib.*, § 5440.

Others, entitled to homestead, may take $500 in place of it, in personal property. *Ib.*, § 5441.

Mortgage must be executed by both husband and wife to make it hold the homestead. A sale under one which she has not executed cannot estop her right to have a homestead laid off. *Ib.*, § 5442.

How homestead is set off to widow and minors in an action to sell decedent's real estate. *Ib.*, § 6155.

Ohio — continued.

Of insolvent debtor, how exempted. *Ib.*, §§ 6348, 6351.

Liable for taxes, *Ib.*, §§ 2859, 5434; and on mechanic's lien, *Ib.*, §§ 3185, 3206*a*, 5434.

Oklahoma. The head of a resident family may hold exempt from attachment, execution or forced sale for the payment of debts (except as hereafter stated), a homestead not exceeding one hundred and sixty acres in one tract, or an acre in town, with the improvements, if used as the home of his family. He may rent the homestead temporarily The mortgage of the dwelling-house and eighty acres of the land is inhibited. Homestead is denied to corporations, non-residents, debtors in the act of removing their families from the territory, or who have absconded and taken their families with them. §§ 2860–1, ch. 34, p. 570.

The exceptions above indicated as to debts are: *First.* When a debt is due for purchase-money. *Second.* For taxes on the homestead. *Third.* For work and material in making improvements thereon, when the contract therefor is in writing, with the wife's assent if the amount is above $100. § 2863.

The surviving spouse may hold the homestead till it shall have been disposed of, according to law. The children hold till the majority of the youngest, when both parents are dead. § 1375, ch. 19, p. 317.

If no homestead has been selected, platted and recorded, the probate judge orders it to be done. § 1377.

The homestead is not liable for a debt against the husband or wife, existing before the debtor's death, unless it come under one of the above exceptions. § 1378.

Stat. of Ok. 1890.

Pennsylvania. There is no homestead, strictly speaking.

Property to the extent of $300, owned or possessed by any debtor, shall be exempt from levy and sale on execution or by distress for rent. The privilege is personal and may be waived.

Appraisers shall be appointed at the request of the defendant, and the property selected and appraised is free from execution, except for taxes, though liens for purchase-money of the real estate are not impaired.

If the property levied upon exceed $300 in value, and is indivisible, the defendant is entitled to that sum from the proceeds. The widow and children are entitled to the same amount from the estate of the deceased husband and father.

The exemption affects only debts contracted on or after the passage of the law.

Brightly's Purdon's Dig., vol. 1, pp. 636–8.

South Carolina. The constitution requires the legislature to exempt from attachment and sale under any process, the homestead of the resident head of a family, in land held in fee or less estate, not exceeding $1,000 in value. A married woman who has a separate estate, while her husband has less than the homestead limit of value, may claim the exemption; but both together cannot have exemption of realty beyond that limit. No property is exempt from taxes, purchase-money and cost of improvements. The homestead right cannot be waived. Const., art. II, § 32.

The statute embodies these provisions and provides for their enforcement.

South Dakota. The homestead within an incorporated town is one acre, which, with the dwelling and appurtenances, must not exceed $5,000 in value. The homestead, beyond corporation limits, must not exceed one hundred and sixty acres in extent, and $5,000 in value. There are the usual restrictions and exceptions. The statutes relative to homestead are in sections 24 to 57 of the Compiled Laws. *See* ch. 86, p. 200, of Session Acts of 1890; Session Acts of 1891.

As many of the homesteads in the new states of North and South Dakota were acquired under the territorial statutes which still govern as to the acquisition and debts then existing, the following notes on those statutes are presented:

The homestead of every family, owned by either husband or wife, shall be exempt from execution, except for taxes and on mechanic's lien for work or material in improving the exempt property. Should a husband or wife survive the other spouse and continue to occupy the homestead, whether with children or without, the exemption shall continue in favor of such occupant. Husband and wife must join in any instrument of conveyance or incumbrance.

When one owns more than one dwelling, he must select the one he would hold as exempt.

The homestead may embrace contiguous lots or tracts with buildings and appurtenances, and may embrace lots or tracts not contiguous, if habitually used in good faith as one homestead; but it must be limited to one acre within a town plat, and to one hundred and sixty acres otherwise. If the homestead is claimed upon any land claimed under the laws of the United States relating to mineral lands, it shall be limited to one acre whether within a town plat or not.

It must not embrace two dwellings, but may include a business shop used by the owner.

[The Dakota provisions are in these and other respects not repeated, like those of Iowa, which see.]

Compiled Laws of Dak., 1887, §§ 2449-2468, 5778-5781.

Tennessee. A homestead and improvements to the value of $1,000, in possession of a head of a family, is exempt, except against a claim for purchase-money therefor or improvements thereon, or for taxes.

Alienation of the homestead of a married person can be only with the joint consent of the husband and the wife.

The exemption inures to the benefit of the widow, and continues, as to the owner's debts, after his death, during the minority of any of his children.

Const., art. XI, sec. 11.

The homestead of a decedent head of a family to the value of $1,000, "or real estate" of that value, is laid off to the widow and children. The husband and wife jointly may sell the homestead. A debtor may claim land as exempt which is not occupied as a home. A leasehold homestead is not exempt from rents. Code, §§ 2935-2939.

Texas. The homestead of a family to the amount of two hundred acres of land with improvements, or a lot or lots in a town to the value of $5,000, exclusive of improvements, with the improvements thereon, used as a home or as a place of business by the head of the family, is exempt, ex-

Texas — continued.

cept upon a claim for the purchase-money thereof, or for improvements thereon, or for taxes.

It cannot be alienated without the joint consent of the husband and wife, when the owner is married.

No mortgage, lien or trust deed on the homestead is valid (except as above stated), whether created by husband and wife or by one alone, and all pretended sales of the homestead involving any condition of defeasance are void. No temporary renting shall change the character of the homestead when another homestead has not been acquired.

"On the death of the husband, wife, or both, the homestead descends and vests like other real property of the deceased and shall be governed by the same laws of descent and distribution, but shall not be partitioned among the heirs of the deceased during the life-time of the husband or widow, or so long as he or she shall occupy or use the same as a homestead, or the guardian of minor children shall be permitted so to do by order of court."

Const., art. XVI, §§ 50, 51, 52; Sayles' Texas Stat., 1888.

Utah. Comp. Laws 1888, § 3429 (11): Homestead of the value of $1,000 is exempt to the resident married householder; $500 to his wife in addition; and $250 to each of his children, in further addition. If excessive it may be partitioned or sold at the option of the debtor. If sold, he takes the proceeds to the exempt amount, which remains exempt. Appraisers are selected before sale, one by the debtor and one by the creditor; and a third is chosen in case of disagreement. The homestead is liable for purchase-money, liens and taxes. Compiled Laws, vol. II, p. 308.

The homestead must be included by the executor or administrator in the inventory of the estate of the deceased exemptionist. *Ib.*, p. 484.

When a homestead is set apart by a judgment of court, the decree must be recorded in the recorder's office of the county where the land lies. *Ib.*, p. 539.

The widow and children of a deceased exemptionist are entitled to occupy the homestead, until letters of administration have been granted and the inventory returned. The court must make reasonable allowance for their support, and may set apart all the exempt property for that purpose. *Ib.*, p. 489.

Vermont. A homestead is exempt to the value of $500. It consists of a dwelling-house and appurtenances and the land on which they are situated, while "used or kept" as a home by a housekeeper or head of a family. Permanent removal forfeits exemption. The homestead deed must be recorded prior to the contracting of the debt, to secure immunity from it. Leaving it for record, at the proper office, is compliance with this requirement on the part of the beneficiary. Homesteads are liable for purchase-money, antecedent debts, lien, taxes, etc. The widow may claim both dower and homestead in her deceased husband's real estate — the former for life and the latter in fee. The husband alone may mortgage the homestead after divorce from his wife; but while both are occupants and in marriage, both must join to sell or incumber it. Rev. Laws.

Virginia. Every householder or head of a family is entitled to exemption of realty and personalty, or either, to the amount of $2,000. Const., art. 11, § 1. *See ante*, p. 52.

There is exemption of realty and personalty to the amount of $2,000. This may be wholly in realty, or wholly in personalty, or in both together; it may include money or debts due the beneficiary. He selects from all his property to the maximum allowance, or less. The exemptionist must be a householder or the head of a family, and a resident of the state. His selection of realty must be recorded. There are special chattel exemptions in addition to the foregoing.

Homestead protection from forced sale can be secured only by recording the deed of the property in the proper office of the county in which it is situated, with a declaration of intention to claim it as a homestead and a description of it. After the death of the head of the family, his widow may continue to enjoy the property till her death or remarriage. The minor children may enjoy it till the youngest reaches majority. When the homestead right has ceased, the property passes to the heirs according to the laws of descent.

The homestead is not exempt from liabilities for purchase-money, improvements, services of laborers and mechanics, taxes, rents, court fees, debts incurred by persons in a fiduciary capacity, and debts incurred with exemption waived.

Code (1887), §§ 3630–3657; Const., art. XI, §§ 1–3.

Washington. A homestead to the value of $1,000 is secured to the head of a family when occupied by him and his family. There is no quantitative limit. Code, § 342.

The survivor of married beneficiaries becomes "entitled" to the homestead if there are no minor children. If there is no marital survivor and no minor child, the homestead becomes liable to creditors. *Ib.*, § 343.

The owner and his wife jointly may mortgage the homestead. *Ib.*, § 344. It is liable for purchase-money, etc.

West Virginia. A homestead, with improvements, to the value of $1,000, possessed by the head of a family, is exempt, except as against a claim for purchase-money, or for improvements on the premises, or for taxes. The exemption continues after the owner's death, with respect to his debts, during the minority of any of his children. Const., art. VI, § 48.

The homestead must be recorded in the land records of the county where it is situated before the debt, against which exemption is claimed, shall have been contracted. Acts of 1881, ch. 19.

Wisconsin. The homestead is limited to forty acres in the country, used for agricultural purposes, or to one-fourth of an acre in town. It must be owned and occupied by a resident of the state. The exemption is from seizure and execution upon any judgment lien except laborers' and mechanics' liens, and from all debts except those for purchase-money, mortgages, taxes, etc. It applies to the proceeds of the sale of one homestead, held, for two years or less, for the purchase of another. It is not lost by temporary removal.

The husband and wife may hold the homestead jointly or in common. It is provided that a tenant in common may have the benefit of the home-

Wisconsin — continued.

stead exemption if his co-tenants consent. The title of the homestead may be freehold or leasehold. A married man cannot alienate it without the signature of his wife. If she is insane, her interest cannot be alienated except by her guardian duly appointed.

If the husband, who owns the homestead, dies intestate, it descends to his widow free from claims and judgments against him, except as aforesaid, if he leaves no issue. If there be lawful issue the homestead descends to her during widowhood. If he leaves no widow, child or grandchild, it becomes liable to creditors for all his debts. He cannot direct the payment of his debts (except as aforesaid), by his last will, to the deprivation of the widow, minor children and grandchildren, out of his homestead property. He may devise his homestead, and the devisee takes it free from claims against the testator, except the privileged ones above mentioned.

When the homestead and other realty have been mortgaged together the latter shall be first exhausted on demand of the debtor, if susceptible of being separately sold. If both together are indivisible, the value of the homestead to the exemption limit shall be reserved from the proceeds for the debtor. When levy is made the officer must lay off a homestead to the debtor who now claims it after having previously neglected to designate one.

Sanborn & B.'s Ann. Stat. of Wis., §§ 2203-6, 2271, 2280, 2983-4, 3163, 3823, 3862, 3873.

Wyoming. Rev. Stats., § 2780. Every householder in the state of Wyoming, being the head of a family, shall be entitled to a homestead, not exceeding in value the sum of $1,500, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred.

§ 2781: Such homestead shall only be exempt as provided in the last section, while occupied as such by the owner thereof, or the person entitled thereto, or his or her family.

§ 2782: When any person dies seized of a homestead, leaving a widow or husband, or minor children, such widow or husband or minor children shall be entitled to the homestead, but in case there is no widow, husband or minor children, the homestead shall be liable for the debts of the deceased.

§ 2783: The rural quantitative limit is one hundred and sixty acres; there is no urban restriction as to quantity.

§ 2784: To sell or mortgage the homestead, the wife must join the husband in the deed.

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