HANNON, EXECUTOR, *v.* SOMMER.

Circuit Court, D. Kansas. June, 1881.

1. HOMESTEAD—STATUTORY CONSTRUCTION.

The constitution and statutes of Kansas provide that a homestead to the extent of 160 acres of farming land, occupied as a residence by the family of the owner, together with all 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. *Held,* that the latter clause necessarily implies that the homestead may be alienated by its owner if the relation of husband and wife does not exist.

2. POWER OF HUSBAND TO MORTGAGE HOMESTEAD AFTER DEATH OF WIFE.

The husband, after death of the wife, under the laws of Kansas, may alienate his interest in the homestead by deed absolute, or may mortgage the same subject to the right of occupancy of the premises as a homestead by the minor children, whose rights under the homestead law are not affected by the mortgage.

3. MORTGAGE—VALID LIEN.

Such a mortgage is not void from want of power in the husband to execute it, but is a valid lien on his undivided half, subject to the right of occupancy and use of the whole by the heirs.

4. FORECLOSURE—DECREE.

In a suit for foreclosure of a mortgage of the homestead property made by a husband after the death of his wife, *held,* that plaintiff is entitled to a decree of foreclosure upon the interest of the respondent, subject to the homestead rights of the heirs, though the husband remains unmarried.

In Equity. Bill to foreclose mortgage.

The property mortgaged, 160 acres of farming land, was occupied as a homestead by the surviving husband and his minor children, his wife having died about a year before the date of the mortgage. The minor children were not made parties to the suit. The case was heard at the June term of 1879, and a reargument

was directed on the questions: Is the mortgage void because the husband had no power to execute it? and, if so, is the plaintiff entitled to a decree of foreclosure while the husband remains unmarried and the children are minors?

On Reargument.

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Mahan & Burton, for complainant.

Hoffman & Pierce, for respondent.

MCCRARY, C. J. The constitution of the state of Kansas provides as follows, (article 15, § 9:)

"A homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city occupied as 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 consent of both husband and wife."

Substantially the same provision is embodied in the Statutes of Kansas, *c.* 38, § 1.

It is, of course, very clear that, under these provisions, the homestead cannot be alienated without the joint consent of husband and wife when that relation exists, and a mortgage executed by the one without the consent of the other would be void; but the question here is whether a mortgage upon such homestead is equally void if executed by the husband alone after the death of the wife. That the minor children have a right to the use and occupancy of the homestead, and that this right cannot be interfered with by the mortgagee, or any one claiming under

him, whether through a foreclosure sale or otherwise, seems to be conceded. The only question is as to the right of complainant to a decree for the sale of the undivided half of the premises, subject to the right of the minor heirs to the use and occupancy of the premises, whatever the extent of that right may be.

It is the settled law of Kansas that the homestead may be alienated by the joint deed of husband and wife; and also that, in the case of the death of either, the survivor may subsequently alienate his or her interest, subject to the right of occupancy of the premises as a homestead by any members of the family entitled to such occupancy, and not joining in the conveyance. *Dayton* v. *Donart,* 22 Kan. 256; *Gatton* v. *Tolley,* Id. 678.

The respondent, therefore, might have sold, by deed absolute and unconditional, all his interest in the premises at the time he executed the mortgage, and the sale would have been valid as against all the world except the children, whose right under the homestead law would have remained the same precisely as if no sale had been made. It 603 is well settled as a general rule that any interest in lands which is the subject of contract or sale may be mortgaged. 2 Story, Eq. Jur. § 1021; *Miller* v. *Lepton,* 6 Blackf. (Ind.) 238.

But it is insisted by counsel for respondent that the constitutional provision above quoted constitutes an exception to the general doctrine on this subject, because it declares that the homestead "occupied as a residence by the family of the owner, together with all of the improvements on the same, shall be exempted from forced sale under any process of law," except for taxes, for purchase money, or by virtue of a lien given by the consent of both husband and wife. This clause must be construed in connection with the remainder of the sentence, which declares that the homestead "shall not be alienated without the joint consent of both husband and wife when that relation exists." This

provision necessarily implies that the homestead may be alienated by its owner if the relation of husband and wife does not exist; and if it can be alienated absolutely, it can be mortgaged.

If it can be mortgaged, the mortgage can be foreclosed, and the equity of the mortgagor, whatever it is, may be sold. The constitutional provision was intended to protect the right of the wife and children in the homestead by exempting it from sale for debt, and requiring a sale or mortgage to be made by both husband and wife when that relation exists. It did not provide for the case of a homestead held by a husband after the wife's death. The words "forced sale," employed in the above provision of the constitution, should, we think, be held to mean sales upon execution or other process for the collection of the ordinary debts of the owner, and not to a sale made for the enforcement of a mortgage which the owner had the right to execute, and which the holder has the right to foreclose. This construction preserves all the homestead rights of the heirs. It would be no advantage to them to require complainant to wait for his decree until their right of occupancy and use has ceased; nor can it do any harm to sell at once the interest of the mortgagor, subject to their rights. The purpose of the constitutional provision—to protect the homestead rights of the family—is accomplished by such a decree.

Our conclusions are:

(1) That the mortgage is not void because the husband had no power to execute it. (2) That it is a valid lien on his undivided half, subject to the right of occupancy and use of the whole by the heirs. (3) That complainant is entitled to a decree of foreclosure upon the interest of the respondent, subject 604 to the homestead rights of the heirs, whatever those rights may be; and we do not undertake to define or limit

them. That can be properly done only in a proceeding to which they are parties.

Decree accordingly.

FOSTER, D. J., concurs.