

A Note on the Case of
LOS ANGELES PACIFIC COMPANY v. HUBBARD
121 Pac. 306
involving
THE INTERPRETATION OF THE STREET OPENING ACT
of 1903
and
ZANONI v. SPRAGUE
116 Pac. 989
with
A Discussion of
THE NATURE OF THE HOMESTEAD ESTATE
by
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LOS ANGELES PACIFIC COMPANY v. HUBBARD

121 Pac. 306

Statement of the Case.

Proceedings were taken by the city of Los Angeles for the purpose of opening and widening Sixteenth street, pursuant to the street opening act of 1903, as amended in 1909; an assessment for the cost of the proposed improvement was levied against the lands located within the boundaries of the district as specified in the ordinance of intention. Among other assessments was one levied upon certain property of plaintiff within the district so established, which assessment so made was as follows: "All ties, tracks, poles, wires, switches, franchises, etc., used in operating an electric street railway on Sixteenth street, between the west line of Figueroa street prolonged southerly across Sixteenth street, and the intersection of said electric street railway tracks with the electric street railway tracks of the Los Angeles Interurban Railway Company at Georgia street, and between the intersection of the said electric street railway tracks with the electric street railway tracks of the Los Angeles Interurban Railway Company at Burlington Avenue and the east line of Pacific Avenue prolonged southerly across Sixteenth street." Plaintiff refused to pay the assessment, and the property so

assessed was advertised for sale on account of delinquency

in the payment thereof, whereupon this action was instituted praying that defendants, as said board of public works, be perpetually enjoined from making such sale.

The property assessed constitutes a part of an electric railroad owned and operated by plaintiff within and extending from the city to points outside thereof.

Appellants base their right to make the assessment upon section 16 of the Street Opening Act of 1903, which requires the street superintendent, upon receipt of a diagram made by the city engineer showing (sec. 15) "the land to be taken for the proposed improvement, and also each separate lot, piece, or parcel of land within the assessment district, and the dimensions of each such lot, piece or parcel of land, and the relative location of the same to the proposed improvement," to (sec. 16) "assess the total expense of the proposed improvement upon and against the lands, including the property of any railroad or street railroad within said assessment district, except the land to be taken for such improvement, in proportion to the benefits to be received from said improvement." Section 17 of the Act provides that the "assessment shall describe each lot, piece or parcel of land assessed for said improvement, and shall designate each such lot, piece or parcel of land with an appropriate number." Section

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provides that the assessments contained in the assessment roll shall be a lien upon the property against which it is made, and section 23 provides for the sale of the property upon which the assessments become a lien, at public auction.

The court held in this case that the legislature had used the word "property" in the Act of 1903 as applying to "land" only, (as throughout the act the words "property," "lands," and "each lot, piece or parcel of land," are used interchangeably), and as having reference to that species of property only, designated as land which the Civil Code, section 659, defines as, "the solid material of the earth."

It was concluded, therefore, that there was no authority for the superintendent of streets to levy an assessment against the "ties, tracks, poles, rails and switches", as such, entering into plaintiff's street railroad, and used in the operation thereof. The court said, "He might with with equal propriety have assessed the buildings and improvements erected upon a lot or tract of land located in the district. The land, not the improvements thereon, is subject to assessment for the cost of widening a street, under the street opening Act of 1903." But as to the franchise of the plaintiff company, it was held, on the authority of the Appeal of North Beach and Mission Railroad Company, 32 Cal. 500, from which the court quoted, that the franchise was an estate in the land of the street, that it was real estate, and that it

was land. Stockton G. & E. Co. v. San Joaquin Co., 148 Cal. 33, was also cited as an authority for this doctrine.

As to plaintiff's contention that the lien on the property of the railroad company could not be enforced by sale and conveyance of a part of the right of way, since such conveyance would interfere with the interests of the public, the court held that the lien could be so enforced. The cases holding to the contrary, cited by the counsel for the railroad company, were said to be not in point for the reason that they dealt with statutes providing only in general terms for assessing such property for local improvements. And Southern California Railway Company v. Workman, 146 Cal. 80, was cited as an authority that even in California, under the general terms of the Vrooman Act of 1885, the right of way of a railroad fronting and abutting upon a street, is not subject to assessment for the cost of improving a street. But it was maintained that as the general language of the Act of 1903 would apply to all lands of the railroad company other than its rights of way, no effect would be given the words, "including the property of any railroad or street railroad," unless the right of way be assessed. That some effect must be given this language, because of section 3541 of the Civil Code, which provides, "An interpretation which gives effect is preferred to one which makes void," was the opinion of the court; and as

no constitutional objection to an act of the legislature providing for the assessment of a right of way, whether held in fee or consisting merely as an easement, presented itself, it must have been the intention of the legislature to provide for the assessment of such rights of way where the property would be benefited by the widening of the street.

Therefore it was concluded that the right of plaintiff to the use of the street for the purpose specified in the grant of its franchise, constituted a piece or parcel of land within the meaning of the term as used in the Street Opening Act of 1903.

And the court added, "We perceive no insuperable difficulty in making a diagram delineating thereon that part occupied by the railroad for the purpose granted, nor in making a sale to the one who would take the least part of the property assessed, as directed in section 25."

And further, that "since the easement created constituted a parcel of land, it must follow that the improvements, consisting of poles, wires, ties, rails, etc. constructed thereon, and affixed to the land pursuant to the terms of the grant and necessary for the use of the easement for the purpose granted, must be deemed a part of such piece or parcel of land." And this though the court expressly said, ante, "the land, not the improvements thereon, is subject to assessment for the

cost of widening a street under the Act of 1903."

In conclusion, "we think it clearly appears that it was the intent of the Legislature that the rights of way of railroads, whether owned in fee or otherwise, should be assessed for the cost of widening the street, in proportion to the benefits inuring to such property as a result of the improvement made."

An Examination of the Appeal of North Beach
and Mission P. R., 32 Gal. 499.

Since the decision in this case is based largely upon the language used in the case of North Beach and Mission Ry. Co., 32 Cal. 499, let us first examine that case.

Proceedings for widening Kearny street, in the city of San Francisco, were taken by the Board of Supervisors of the city and county of San Francisco, under the Act of 1864. (Statutes 1864 p. 347.) By the provisions of this act the supervisors were authorized to make the improvement and assess the expenses of the work "upon the owners and occupants of houses, lots and other real estate, corporations and companies to be benefited thereby." It was determined that appellant, the proprietor of a street railroad extending through the whole length of that portion of Kearny street to be widened, would be benefited, and should be required to pay a portion of the expenses. The sum of \$20,000 was assessed upon the railroad company as its just portion and they appealed.

The court, in delivering its opinion, enumerated the principal questions to be determined, which were:

1. Has the appellant any property, estate, or interest within the district benefited?
2. If so, is such estate capable of being enhanced in value by the proposed widening of Kearny street, and will

any substantial benefits accrue to the company because of such improvements?

3. Does the statute prescribe or authorize a different rule of apportionment of the expenses of the work with respect to appellant and other companies and corporations, from that applied to owners of land within the district deemed benefited?

4. Did the Commissioners apportion the amount among the owners of lands and the appellant according to the benefits received by each?

Appellants had, in 1861, acquired a right of way whereon to construct and lay down a railroad track within the corporate limits of the city, and to run horse cars thereon.

We quote from the opinion of the court as follows:

"This right of way is at least, an easement in said street. ... But an easement is property, recognized as such by law. .. It is an incorporeal hereditament, but it is still a tenement and an interest in the land. ... Thus it appears that the appellant has acquired an interest in the soil in Kearny street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as it is necessary for the purpose, in the mode prescribed; and this interest is property - an interest in the land - and that it

is real estate, and the rails thus laid down, attached to the and annexed to the easement became themselves a part of the land - and that, in those states where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate, in the same manner, and upon the same principles as land, - as if the company owned the land itself upon which the track is laid, to the extent of its interest in it. The interest is local - fixed to the particular land, the particular street - and cannot be enjoyed beyond or independent of that fixed locality. It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other; and the right of the street railroad company to the exclusive control and enjoyment of its estate in the soil of the street to the full extent of that estate, is as perfect as the right of the lessee or owner of the lot fronting on the same street to control and enjoy this estate. The several estates are substantially the same kind, and are of equal dignity before the law, but one is larger, more extensive than the other. Practically they differ only in the quantity of interest, not in quality."

Having so disposed of the first question, the court

proceeded to a consideration of the second. "What ever change in any particular street, therefore," we find the court saying, "will increase or diminish the travel in the cars, must, directly in the same ratio, increase or diminish the value of its easement -its estate in the particular street in which the change is made, and upon which such increase or diminution depends."

In discussing the third question the court quoted from Sec. 5 of the Act of 1864, p. 351, where it is provided that, "When any street or part of any street in the said city and county occupied or used by the track of any railroad company shall require to be altered or widened for the convenience of public travel, and proceedings for the altering or widening of the same shall have been taken under the provisions of this act, it shall be lawful for the commissioners appointed as in this act provided, and whose duty it may be to make a just and equitable assessment of the whole amount of costs, damages, and expenses of such altering or widening among the owners of all the lands and real estate intended to be benefited thereby, to assess such portions of such costs, damages, and expenses upon the corporation or company owning or using said railroad track, as shall to them seem equitable and just, and such assessment shall be a lien upon any property of said corporation or company in the said city and county,

and may also be enforced in the same manner as the assessments upon such owners of lands and real estate intended to be benefited thereby." Also reference is made to Section 7 which provides that such "assessment shall be a lien upon any property of said corporation or company in said city and county, and may also be enforced in the same manner as the assessment upon owners of lands and real estate intended to be benefited thereby." But the court adds, "The clause has no bearing upon any question involved in this appeal ... so here the Commissioners only determined the amounts which ought to be paid respectively by the appellant and the several owners of land benefited."

Under discussion of the fourth question we find on page 524, "Owners of houses and lots, and owners of railroads are mentioned together throughout the act." and on page 526, "In the present case the statute requires the expenses to be assessed upon the owners of houses and lands, and railroad companies to be benefited."

We have quoted at considerable length from the Act of 1864 for the purpose of showing the difference between that act and the one under which the principal case was decided; and also from the opinion of the court with the intention of showing that the court in this case did not at any time maintain that the interest that the railroad company had in the

street was "houses , lots, or lands." but that a distinction was maintained between the "owners of houses and lands" and "corporations and companies", among the latter of which the railroad companies are to be classed.

It is questionable whether the court did not in this case prove more than was necessary. If so its holding even that the interest of the railroad company - its easement - in the street was real estate was unnecessary since the statute expressly provided (sec. 16) for assessment against owners of houses and lands, corporations and companies that may be benefited thereby. But even granting that the case is an authority for the doctrine that the easement of the company is real estate there is no finding that such real estate is land.

The statute of 1864 does not provide that the assessment shall be merely upon land, but we find" lands and real estate" used in sections 5, "houses, lots, and other real estate" in sec. 6, "lands and tenements", sections 6 and 7, and "lands and real estate" in section 7, a distinction between the terms being seemingly recognized throughout.

This case may be authority for the argument that the right of way of a street railroad company in the street of a city is property, and even that it is real estate - an interest in land - but the case can hardly be quoted as an author-

ity for the doctrine that a right of way is land, "the solid material of the earth", and it is to be noted that the statute of 1864 authorized the assessment to be made, not upon lands, as does the act of 1903, but "upon the owners and occupants of houses and lands, corporations and companies that may be benefited thereby."

A Review of the Case of the Stockton Gas and Electric Co. v. San Joaquin County, 148 Cal. 313.

The case of Stockton Gas and Electric Co. v. San Joaquin County, 148 Cal. 313, was also relied on by the court as an authority for the doctrine that a franchise is real estate. Briefly, that was an action to collect general taxes assessed against the Gas and Electric company on their franchise to lay pipes and conduits in the streets of the city of Stockton, and to erect therein poles strung with wires, for the transmission of electricity. The question was as to the situs of the franchise for purposes of taxation - in San Joaquin County, or the principal place of business of the corporation, in San Francisco.

In holding that the situs of the franchise for such purpose was the place where the right was exercised, in Stockton, the court said, after quoting authorities, "It could appear then, that the franchise extended by the Constitution is of such a character that it is indissolubly annexed to the street of a city in and upon which it is exercised, and that, while an incorporeal hereditament, it is in contemplation of law, real property, an easement appurtenant to such streets." (But it must be borne in mind that here the court was dealing with general taxation, and not with special assessments. It may

be conceded that the right of way may be taxed as real estate under the general tax laws providing therefore, there being numerous authorities for this position.) But this case does not hold that the franchise of the Gas and Electric company was land, even under the general tax laws. It was held to be merely an interest in the land - an easement, - an incorporeal hereditament - a thing not having physical, material existence. Is the right of way of a street railroad company land?

Our own codes recognize that while land is real estate, not all real estate is land - see California Civil Code, section 658 where real property is held to consist of: (1) Land, (2) That which is affixed to land, (3) That which is incidental or appurtenant to land, and (4) That which is immovable by law.

In the case of Farmers' Loan and Trust Co. v. Borough of Ansonia, decided in Connecticut in 1891, and reported in 61 Conn. 76 (23 Atl. 705), taxation of the franchise of the Ansonia Street Railway Company was held invalid under a statute providing that the cost of street improvements should be assessed against "land and buildings" benefited. The court said, in discussing the question as to whether the railroad company had such an interest in the land as could be taxed as land, "'Real estate' is a more comprehensive term than 'land', and the fact that in the charter the legislature substituted the

narrower term 'land' in place of 'property' which was used in the former charter of Ansonia, furnishes ground for doubt and difference of opinion." However, the decision of this case was not based on this point, the court saying that since there was another ground upon which all agreed, they preferred to leave this question undecided. In Park Commissioners v. The Chicago, Burlington and Quebec Railroad Company, 107 Ill. 105, where the right of way of the defendant railway was assessed under a statute providing for assessment of contiguous property abutting on the street, the court said that the right of way was not within the meaning of the act. Nothing but some tangible object or thing can be said to abut on a street, and the subject of assessment is not pretended to be anything of this kind. "Mere intangible rights or privileges are incapable of abutting on anything."

In the City of Muscatine v. Chicago, Rock Island and P. Railway Company, (Iowa 1890), 88 Iowa, 291, (44 N. W. 909), it was held that since the charter of the city authorized it to require the owner of lots adjacent to a street to pave it, and not the owner of a mere easement in the lots, plaintiff could not recover. Also in another Iowa case, decided subsequently, in 1900, Chicago, B. T. & P. Ry. Co. v. City of Ottumwa, 112 Iowa 300, it was held that under a statute authorizing the city to levy a special tax on "lots and parcels of

land fronting on the highway" to be improved, the right of way of the railway company which fronted on the highway was a mere easement and "neither a lot or a parcel of land. It can hardly be maintained that according to the approved uses of language the owner of an easement is the owner of a lot or parcel of land. A railroad by condemnation does not acquire ownership in the land itself. The owner of the land still has the fee title."

And in *Koons v. Lucas*, (Iowa, 1879), 52 Iowa 177, it was held that the statute providing for the assessment of the cost of street improvements on the "lots and parcels of land fronting on such highway", did not authorize the assessment and levy of part of the expense on a street railway company which had built and operated its line upon the street in question. "It (the railroad company) does not own any part of the street, nor any lot abutting on it, but has a mere easement, or right of way over the street."

The case of *North Jersey Street Railway Company v. Mayor of Jersey City*, 68 N. J. Law 140, (N. J. 1902), contains the following, "It seems quite clear that the property of the of the railway (its right of way in the street) is not land subject to assessments under the statute. But aside from the question whether the plaintiff's right in the street partakes of the nature of real estate, we think it clear that it is

not a lot, parcel, or piece of land, in the sense of the statute."

Is the Right of Way of a Street Railroad Co. Real Estate?

Other authorities may be given to the effect that the right of way of a railroad company is not even "real estate." The court said in *City of Erie v. Piece of Land Fronting on State street*, (Pa. 1896), 175 Pa. 523, "The reason why such property so used is exempt from taxation as real estate is that it is not real estate, but is a part of the corporate franchise. If any part of the ground in question was used for other purposes than as the bed of a railroad, that portion would be liable to taxation." And in this case the right of way was not in the street, but abutted on the street. Also see *Mayor, etc. of the City of Newark v. State Board of Taxation* (N. J. 1902), 67 N. J. L. 246, "That there is an inherent value in the property of the North Jersey Street Railway Company over and above the cost of reproducing its rails, stringers, poles, wires, power-house, etc., needs no demonstration. That value, however, springs not out of any ownership by the company of an interest in the soil of the highways over which its road passes, but out of its ownership of the franchise to maintain and operate its road over these highways, and to collect tolls from all persons traveling upon it."

This case was first heard in 1901 and the assessment against the right of way upheld, Justice Garrison dissenting. In overruling this decision in 1902, the court stated that it did so for the reasons advanced by Justice Garrison, which therefore become important. He said, "The questions upon which unanimity is lacking are, 'What does a trolley company own in the streets of this state?' and 'How should it be taxed therefor?' My colleagues think that it owns 'an interest in the highways over which it passes', and that this is real estate for which it should be taxed at its true value. I think that it owns whatever personal property it has lawfully annexed to the soil of the highway, for which it should be taxed at its true value in its permanent environment." Also see *King v. Duryea*, 45 N. J. Law 258.

In *State of Minnesota ex rel. St. Paul City Ry. Co. v. District Court of Ramsey County*, (Minn. 1884), 31 Minn. 354, (17 N.W. 954), the right of way of the street railway was assessed under a statute providing that such assessments should be made upon "real estate" benefited thereby.

The court said that to call petitioner's easement in the street on which its track is laid real estate is inconsistent with legislative intent, and repugnant to the context of the statutes under which the assessment was made, these statutes seeming by constant reference to "lots and parcels of

land" to limit the assessment to land. "That a mere easement such as is the right of petitioner in the streets in which its tracks are laid, or the rails, spikes and timbers which comprise its track, are not lots or parcels of land, admits of no argument. Neither is its franchise to lay, maintain or operate its road over the streets, nor such franchise and its track taken together, a lot or parcel of land. Hence a portion of its track in a public street cannot be assessable as real estate to defray the expense of paving."

This doctrine has also been asserted in Washington under a statute of 1893 providing that assessments for street improvements should be apportioned between each several lot, block, tract and parcel of land. In *City of Seattle v. Seattle Electric Company*, decided in 1908, 48 Wash. 599 (94 Pac. 194) the court said that respondents' right in the street did not constitute either a lot, block, tract or parcel of land, nor did it constitute an interest in land as that term is generally understood. It is an easement only and as such is not assessable under the statute in question.

The holding in this case was repeated in *In Re City of Seattle*, 1908, 49 Wash. 109, (95 Pac. 1075).

The above mentioned statute of 1893 was amended in 1907 and the words and "other property" inserted after "lots, blocks, tracts, and parcels of land."

But in *City of Seattle v. Seattle Electric Company*, 1909, 54 Wash. 460, (103 Pac. 8077), the opinion of the court was that the doctrine of the former cases still controlled. "If the legislature intended to grant the power to assess the franchise of a street railway company it should, and no doubt would, have provided for such assessment in plain and express terms. We cannot assume that in using such general words following associated analogous words of well understood meaning, it intended to embrace property foreign to the class provided for by the specific words. Such an interpretation would create a right in the city by a construction which the words do not justify."

The Construction of the Statute of 1903.

While it was admitted by the court that on the authority of the case of *Southern Cal. Ry. Co. v. Workman*, 146 Cal. 80, the payment of assessments cannot be enforced by the sale and conveyance of a part of the right of way essential to the operation of a street railroad in the interest of the public, it is argued in the principal case that that doctrine applies only under a statute couched in general terms, such as the Vrooman Act under which the *Workman* case was decided, and that even under the Act of 1903, under the general language of section 16, that case would be authority, were it not for the phrase "including the property of any railroad or street rail-

road within the district." It is argued that since the land of such railroad company would be included under the general terms, some force must be given to the phrase mentioned, and therefore the right of way of the street railway company must have been within the legislative intent.

It is somewhat difficult to see why such a narrow construction then, should have been put upon the terms. The statute in its use of the word property means land only, so the court holds - but the property of the railway companies must be included so it must have been intended that they were to be considered for the purposes of street assessments, as land. The question arises at this point why it might not have been argued from the use of the phrase "including the property of any railroad company or street railway company", that the statute was not restricted in its application, to land but applied equally to other property. Such inference would be quite as consistent, especially coupled with the fact that the general term "property" is used in numerous places throughout the act - in the title thereto, and in sections 4, 5, 6, 7, 8, 12, 13, 14, 15, 17.

But even if we do not go that far must we necessarily infer from the language of the statute that it was intended to apply to rights of way where the fee was not in the company? Could not sufficient effect have been given to those words

by limiting their application to cases where the railway company held the fee of the right of way? Numerous cases may be cited to show that an exemption from such assessments against real estate and land of railroads and other quasi-public corporations has been sustained, even where the fee was in the railroad or corporation. These exemptions were based on two grounds : first, that such right of way could not be benefited and, second, because of the public nature of the business in which the corporation was engaged, which prevented the enforcement of the lien by sale of a part of the property, and the consequent dismemberment of the road.

In Dillon on Municipal Corporations, Vol. IV, Section 1451, we find: "In some jurisdictions it is held that a railroad is, in contemplation of the law, a public highway ; that it is therefore property devoted to a public use, and comes within the general rule that a special assessment cannot be imposed on public property unless the legislature has expressly authorized such an assessment to be made. Other jurisdictions hold that special benefits are essential to authorize special assessments, and that land used as a roadbed or right of way, cannot possibly be benefited by improvements of a street adjoining or contiguous thereto."

In Philadelphia v. Philadelphia, Wilmington and

Baltimore Ry. Co. (Pa. 1859), 33 Pa. 41, the municipal authorities of Philadelphia paved the Gray's Ferry road where it lay side by side with defendants' roadbed, and sought to charge one half the expense to the railroad company. In holding that the assessment could not be sustained the court said, "It would be strange legislation that would authorize the soil of one public road to be taxed, in order to raise funds to make or improve a neighboring one."

In the Lehigh Coal and Navigation Co. v. Northampton, 8 Watts & Searg. 334, it was held that the bed, berm bank, tow path, etc. of a canal company were not liable to taxation under an act making real estate, viz. all "houses, lands, lots of ground", etc. subject to taxation, nor under a subsequent act which declared that "all real estate, to wit, houses, lands and lots of ground, ... and all other real estate not exempt by law from taxation", should not be taxed for state and county purposes.

Two years later, after the passing of the Act of 1864 which made "all property, real and personal, not taxed under existing laws", liable, it was held in Railroad Company v. Berks County, 6 Pa. 70, that water stations and depots of railroad companies were not taxable; and a distinction was drawn between property that was indispensable to the use of the road, and that which was only convenient and advantageous

in its operation. In *City of Philadelphia v. Electric Traction Co.*, (1904), 208 Pa. 157, (57 Atl. 354), under an act providing that real property of railroad corporations - the superstructure of the road and water stations alone excepted -should be subject to taxation for city purposes, a power house for the manufacture of electricity, owned and used by a traction motor company operating street railroads, was held exempt from taxation. And in *Conoy Township Supervisors v. York Haven Electric Power Plant Co.*, (1908), 222 Pa. 319 (71 Atl. 207) the court said, after reviewing these and other cases, "The real estate of turnpike, navigation, canal, railroad, street railroad, gas, water and electric companies, essential and necessary to the exercise of their corporate franchises, is not subject to taxation for local purposes." Also see *Junction Ry. Co. v. Philadelphia*, (1879), 86 Pa. 424, where it was held that no part of the expense of paving a bridge over Girard ave. in Philadelphia should be charged against the roadbed of the railroad company which crossed the avenue under the bridge and which the company held in fee, because no benefit could accrue to the railroad company,

Pennsylvania is not the only state in which this doctrine has been maintained. In *Chicago, M. & St. Paul Ry. Co. v. Milwaukee*, (Wisconsin 1895), 39 Wis. 506, (62 N. W. 417), an assessment for street work was levied against the

right of way of a railway company, who held the land in fee. It was held that the assessment could not be sustained, on the ground that the property of the corporation was charged with a public trust in favor of the company, and that public policy forbade a severance and segregation of its parts essential to the exercise of the franchises, by forced sale or legal process for an assessment.

In *Naugatuck R. Co. v. City of Waterbury*, 78 Conn. 193, it was held that "railroad land abutting upon a street or highway, when the land is necessary for railroad purposes, is used solely and exclusively for such purposes, and is permanently devoted to such uses and purposes, is not so benefited by paving the street in front of said land, as to justify an assessment for benefits. Also see *Bridgeport v. Railroad Co.*, 36 Conn. 255; *Railroad Co. v. New Haven*, 42 Conn. 279; *Railroad Co. v. New Britain*, 49 Conn. 40.

In *New Jersey R. R. & T. Co. v. City of Elizabeth*, (Conn. 1875), 37 N. J.

L. 330, it was held that the lands of the railway company were not liable for assessment for the construction of a sewer, or for paving a street crossing their railroad, since they were not benefited thereby. Also see *Davis v. Newark*, 54 N. J. Law 144, for a similar holding.

Should ties, poles wires, etc. be included in the

assessment.

In the principal case the court has found specifically that the term "lands", as used in the Street Opening Act, has reference to "the solid material of the earth"; that the franchise of the company is land, and the necessary conclusion is, that the franchise of the company is "the solid material of the earth". Such a conclusion does violence to the general conception of a franchise, which Bouvier defines as "a special privilege conferred by government on individuals, which does not belong to the citizens of the country generally."

Also it was held that since the term property was intended to apply only to the "solid material of the earth", the superintendent of streets had no authority to levy an assessment against "the ties tracks, poles, rails, and switches", as such, they not being land, but improvements, and improvements not being subject to assessment under the act. But nevertheless it was held that since the easement of the company is land, and they are affixed to the land, they must be deemed a part of such piece or parcel of land, and become a piece or parcel of the "solid material of the earth."

While we do not contend that for purposes of taxation such improvements might not be classified as real estate, or even land, there is at least a seeming inconsistency in

excluding them from assessment as such when separately enumerated and including them under the general term "franchise." It would be quite as permissible to include the buildings upon the lots abutting or the street and the depots, car barns, etc. of the street railway company, that might be standing on lots of land owned by the company, within the district. The court does not deny that the poles, wires, ties, rails, etc. are improvements, but on the contrary they are expressly designated as such.

The court says that no constitutional objection to the assessment of the right of way to cover benefits is apparent, and this is true if it be not open to the objection that a statute which provides for an assessment of the improvements on the lands of railroad companies, and for improvements on no other lands is unjustly discriminating. If the poles and wires of a street car company, having a franchise to operate its lines in the street are land, then are not the wires and poles of an electric light and power company in such streets also assessable as land for such purposes, and by analogy the wires and poles of telegraph and telephone companies and the mains and pipes of gas and water companies. They are "constructed upon and affixed to the land pursuant to the terms of their grants, and necessary to the use of the easement for the purpose granted." Yet it was held in *Elwood v.*

Rochester, 50 Hun. 102, 119, that under a statute providing that "lots and parcels" of land should be assessed for local improvements, the mains and pipes of gas companies and the poles and wires of electric light companies were not assessable.

And in Citizens' Gas-light Co. v. Board of Assessors of Brooklyn, 39 N.Y. 81, under a statute providing for the assessment of "the real estate of all incorporated companies to be assessed ... in the same manner as the real estate of individuals, "that the mains running under the streets could not be regarded as real estate.

Also, in Appeal of the City of Pittsburgh, 123 Pa. 374, the gas mains of a company engaged in supplying natural gas to the city of Pittsburgh, were held not real estate within the city, and not taxable as such.

It may be answered, perhaps, that no express authority and direction is given to assess the property of such companies. Then is there not discrimination against railroad companies? To hold that property is land only, except as it applies to the property of the railroad company, that the term land includes improvements when applied to the property of the railroad company and not otherwise, is at least strongly suggestive of discrimination. The case of Stockton Gas and Electric Co. v. San Joaquin Co., 148 Cal. 313, relied on to support the doctrine that the franchise of the street

railroad company is land, would go to show also that railroad companies are discriminated against in that the their franchises were liable to be assessed, while those of electric light and gas companies were exempt under the Statute of 1909.

Sale of Right of Way.

The question of enforcement of the sale of a part of the franchise of the railroad company remains to be considered. As has been previously stated, the court in the principal case conceded that under statutes providing only in general terms for the sale of the right of way, such right of way was not subject to sale, that the case of Southern Cal. Ry. v. Workman is not in point here, since the Vrooman act provided only in general terms for assessment, and that certain other cases cited by the counsel for the street railroad company, which go to support this contention, are not in point for the reason that the statutes under which they were decided provide only in general terms for assessment of property for local improvements.

We have to acknowledge that the force of this argument, does not appear to us. The arguments generally advanced to uphold the doctrine that the sale of a part of the right of way of a railroad cannot be made to satisfy special assessments, are equally applicable whether the statutes provide in general or express terms for the assessment of such right of

way.

Of the cases cited by the court as being not in point, the first is State v. District Court of Ramsey Co., 31 Minn. 354. There the court said: "Again we consider consequences. The great public disadvantage and inconvenience which would result from holding the petitioner's track to be real estate, so that a detached and intermediate portion of it could be sold to satisfy an assessment for a local improvement, demonstrate the extreme improbability that any such rule of law could have been contemplated by the legislature. If such portion can be sold it can be bought. What does the purchaser get? Not the franchise of the company to operate its road over the portion of the track purchased, for no transfer of this franchise is provided for; and without express authority from the sovereign a franchise of this public nature is not transferred. But if the purchaser gets anything he must get the company's easement in the street, together with the rails, ties, etc. of the superstructure. The result would be that, on the one hand the company's use of the street and of its superstructure would be interrupted, and on the other the purchaser would not acquire the franchise to operate what he purchased. The public, meanwhile, would suffer great inconvenience. If there could be one interruption of this kind

there could be fifty, and the franchise of the company might be practically destroyed, with no corresponding advantage to the purchaser or to the fund required to defray the expense of the assessment. The company would be disabled to perform its duties to the public, and the very purpose of its creation would be thwarted. It would require very clear and explicit legislative expression to justify a construction of the assessment law which would lead to such disastrous and unreasonable consequences." The second case is *City of Seattle v. Seattle Electric Co.*, 48 Wash. 599; we quote as follows: "If the city's contention be correct, the Legislature provided for the enforcement of the assessment, not by making the charge a lien against the entire road, but by making it a charge on that portion of the road only, which passes over the improved street, be the same 10 blocks in length as in this instance, or only the length of an ordinary car, as it might be in another case, and confined the power to collect to a sale of that specific part. This it will be seen, could result in dividing the street car system into many small independent parts, the one part operated without regard to the other, practically nullifying its primary purpose, namely, the speedy transportation of passengers from one part of the city to another."

In *re City of Seattle*, 49 Wash. 109, substantiates the holding of the preceding case though no reference is made

to the matter of sale of the right of way; and this is also the case in *City of Seattle v. Seattle Electric Co.*, 54 Wash. 460, the next case cited by the court. We admit that in *North Jersey St. Ry. Co. v. Mayor of Jersey City*, 68 N. J. Law 140, is not in point as to this question, as no mention is made therein regarding the sale of the right of way.

Coming to *So. Cal. Ry. Co. v. Workman*, 146 Cal. 80, to which we have already referred, we find the following expression of opinion by the court: "There is no authority (under the Vrooman Act) for making an assessment upon a right of way, or for selling the same. A railroad company is a quasi-public corporation in which the public is interested. It holds a franchise from the state and must operate its road or forfeit its franchise. A part of its right of way cannot be sold on execution or for a street assessment." The court based its decision on *Chicago, etc. Ry. Co. v. City of Milwaukee*, 89 Wis. 509; *Louisville, etc. R. R. Co. v. Bonney*, 117 Ind. 501; and *Sweeney v. Kansas City, etc. Ry. Co.*, 54 Mo. App. 266.

In *Chicago, M & St. P. Ry. Co. v. Milwaukee*, 89 Wis. 506, which has previously been cited, it was said: "Public policy would seem to forbid a severance and segregation of its several special or particular parts, essential to the exercise of the franchises and the use and operation of the road by forced sale upon legal process, or for an assessment." It is

true that the language of the statute under which this case was decided was general and the court said, "In the absence of an express statute authorizing an assessment of the tracks and necessary right of way of a railroad company, the assessment and sale thereof for benefits by local improvements cannot be sustained." But in our opinion the arguments as to the effects apply equally well, whether the statute be general or special.

In *Kansas City, P. & G. Ry. Co. v. Board of Waterworks Imp. Dist. No. 1*, 68 Ark. 376, the court held that an assessment against the right of way of the railroad company in an improvement district could only be collected against the railroad company as a unit, - that is, against the whole road in the state, - whether the assessment against it be in personam or only in rem.

It might be well to note here that the statute of 1864 under which the *Appeal of the North Beach & Mission Ry. Co.* was decided, provided not for an assessment against the particular real estate assessed, but against the owners thereof, (statutes of 1864, p. 351) and that the lien against the property of a corporation or company should be upon any property of such corporation or company, in the city.

In *Minneapolis & St. P. L. R. Co. v. Lindquist*, 119 Iowa 144, where a right of way was assessed for the construc-

tion of a sewer, and under a statute providing, "all special assessments made under this chapter against any railway or street railway shall be a debt due personally from such railway, and ... may be collected in the district or superior court by action at law, in the name of the city or town against such railway or street railway, or the lien thereof enforced against the property of such railway or street railway, on or against which the same has been levied", the court said, "Though we do not decide, since the question is not before us, it could hardly have been intended by the legislature, that the roadbed or right of way or other property so connected with the operation of the railroad as that its loss by conveyance or sale would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, thereby interfering with the paramount interest of the public in these purposes, should be siezed in small parts abutting local improvements in the numerous cities and towns traversed by the lines."

The case of Lake Shore & M. S. Ry. Co. v. Grand Rapids, 102 Mich. 374, held that the terminal property of a railroad company, including the right of way, could not be sold for nonpayment of assessments thereon for local improvements; and numerous authorities were cited by the court to uphold its position - that the rights of the public must not

be affected by sale of such property. And the question whether a part of the railroad bed could be sold for assessments for opening a street in Grand Rapids, was held, in the case of Detroit, S. H. & M. Ry. Co. v. Grand Rapids, 106 Mich. 13, (63 N. W. 1007), to be governed by this case.

The doctrine of the Pennsylvania Courts which has been shown in cases already cited was expressed in *Susquehanna Canal Co. v. Bonham*, 9 Watts & Searg. 27, that the privileges granted to corporations to construct turnpike roads, canals, etc. are conferred with a view to the public use and accommodation and same cannot be taken from them by execution and sold by a creditor, because to permit it would tend to defeat the whole object of the charter by taking the improvements out of the hands of the corporation, and destroying their use and benefit.

The arguments advanced by the authorities cited should go far to show that the legislature could not have intended that assessments should be made against the right of way of railroad companies, or that the same might become a lien on such property enforceable by sale of a part of such right of way, with consequent dismemberment of the whole. If a part may be sold, the whole is thereby virtually destroyed, and the damage resulting to the company and to the public would be out of all proportion to that suffered by the owners of mere lots of land within the district.

If the right of way of a street railroad company is land it must be land in the street - and we have the curious proposition that a portion of a public street can be taxed for the improvement of that street. And if the right of way may be sold it must be bought. What would the buyer get? No one would admit that he would get the land in the street and it can hardly be contended that he would get a right to operate a line of his own over the portion of the right of way sold for assessments.

Could a Map showing the Property of the Railroad Company assessed, be made?

And farther is there not a practical difficulty in making a map showing the property assessed, including the poles, wires and switches of the company. Would the strip of land delineated be measured by the width of the track and the length of that part of the street improved? If so the poles set along the sidewalk, and the wires strung thereon would not be delineated on the map.

A farther indication that the legislature could not have intended to include the right of way of a railroad in the property liable to assessment under this act is found in Sec. 4 where it is provided that the owners of a majority of the frontage of the property fronting on streets, or parts of streets

within the assessment district may, by petition, bar the proceedings under the ordinance of intention to make the intended improvements. Since rights of way of street railways having their tracks in the streets can not be said to front on the s street, the owners of same, should they petition for a stay of proceedings, would not be entitled to consideration, and their protests might be overruled by a minority of the property holders.

This consideration, coupled with those heretofore advanced, seems to us to show with no slight degree of clearness that the legislature did not intend to include the rights of way of street railway companies as land, subject to assessment under the Street Opening Act of 1903, as amended in 1909, and the weight of the argument seems more than sufficient to show that the mere addition of the phrase "including the property of any railroad or street railroad" was not intended to do more than insure the inclusion of the land of any such, railroad company in the assessment, and was no more than the result of an excess of zeal to prevent the escape of such company from just assessment of its land.

A Brief Note on the Case of
ZANONI v. SPRAGUE,
116 Pac. 989,
and
A Discussion of
THE NATURE OF THE HOMESTEAD ESTATE

Annette Abbott Adams.

Approved:
Orrie K. McMurray

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Zanoni v. Sprague

116 Pac. 989.

Supreme Court of California, 1911.

An action was prosecuted by Sadie Zanoni, administratrix of the estate of Catherine Powers, deceased, against John Sprague, as administrator of the estate of Jane Sprague, deceased, to quiet title to certain property in San Francisco.

Catherine Powers married Alfred Coad in 1869; in 1870 Coad filed a declaration of homestead on certain property which was his separate property prior to his marriage. In 1881 Coad was granted a divorce from Catherine Powers. The homestead had never been abandoned and the decree of divorce was silent regarding it. Subsequently Coad married again, and after his death his widow, Jane Coad, married defendant Sprague. Catherine Powers and Jane Sprague both died intestate.

Plaintiff claimed that Catherine Powers was, at the time of her death, owner in fee of the premises in question, they having become hers on the death of Coad, by right of survivorship, the homestead never having been terminated in any mode prescribed by the codes. See

California Civil Code, sec. 1243.

The defendant contended that the interest of Catherine Powers in the land terminated with the decree of divorce, and it was so held. It was presumed, in the absence of statement to the contrary, that the court made no order awarding the homestead "for a limited period" to Catherine Powers, therefore her interest in the property terminated with the decree of divorce; for, since the homestead was selected from the separate property, of Coad, it was not necessary that the court should have assigned it to him, when the decree of divorce was entered.

Plaintiff's contention that Section 1474 of the Code of Civil Procedure providing that homestead property, on the death of one spouse vests absolutely in the other, was held to apply only to cases where, at the time of the death, the parties are still spouses.

This case raises several interesting questions. First: Was it properly assumed that since the homestead was selected from the separate property of Coad, it was not necessary that the court should have assigned it to him when the decree of divorce was entered? Paragraph 4 of sec. 146 of the Civil Code reads, "If a homestead has been selected from the separate property of either, it shall

be assigned to the former owner of such property subject to the power of the court to assign it for a limited period to the innocent party."

And sec. 147 provides, "The court, in rendering a decree of divorce, must make such order for the disposition of community property and of the homestead, as in this chapter provided."

Under a strict construction of sec. 147, it might well be said, that since there was an obligation upon the court to make such disposition of the homestead as is provided for by the law, and the court failed so to do, the result which the action of the court would have produced, was not effected, and Catherine Powers therefore continued to hold such interest in the homestead as she had before the divorce was granted.

In *Burkett v. Burkett*, 78 Cal. 310, it was held that where there was no adjudication of the property rights at the time of granting the divorce, the homestead passed to the former owner, the wife.

Also in *Tabler v. Peverill*, 4 Cal. App. 671, where a decree of divorce left property indisposed of, it was held that the divorced parties became tenants in common of community property; but no homestead was there involved.

A similar opinion was given in *Goday v. Goday*, 39 Cal., 157.

A determination of the first question is dependent to some extent, upon the second which is, what is the effect of divorce upon the homestead interest or estate? Does the homestead continue to exist as such, after the decree of divorce is entered, or does property on which the homestead has been declared, lose its homestead character and resume that which it had before the declaration. The decision in the principal case would seem to support the latter conclusion, though the question is not directly decided in the case. The court said, "Whether under such circumstances, such property would still retain the essential characteristics of the homestead so far as the "former owner", is concerned, need not be decided here, although such has been declared to be the rule in this state"; citing *City Store v. Cofer*, 111 Cal. 482.

In the latter case it was held that a homestead declared by a married woman upon her separate property was not affected by a decree of divorce obtained by her from her husband, where the pleadings and decree were silent as to homestead property; and one who obtained a money judgment against her pending the action for divorce, upon a debt for which the property was not liable, could not acquire title

by sale of the homestead under execution subsequent to the decree.

In Shoemake v. Chalfant, 47 Cal. 432, it was held in 1874 that a decree of divorce, by which the homestead of the parties was partitioned between them, destroyed the homestead and rendered the part partitioned to each, liable to be sold under execution against the party to whom it was partitioned.

As to the effect on the homestead of the destruction of the family relation by death of one of the parties, there seems to be a division of authority. A line of cases of which Revalk v. Kramer, 8 Cal. 66, is the first, holds that unless a person is the head of a family the right of homestead can not exist. Gee v. Moore, 14 Cal. 472, follows this doctrine, as does Watson v. His Creditors, 58 Cal. 557. The latter case, decided under the codes which at that time provided that on the death of the wife the homestead vested absolutely in the husband, holds that the homestead character was not retained even though there were surviving children. Also see Santa Cruz Bank v. Cooper, 56 Cal. 339.

On the other hand it is held in Tyrrell v. Baldwin, 78 Cal. 470, that the homestead vests in the survivor, and is not subject to forced sale for the subsequent debts of

such survivor. The estate of Ackerman, 80 Cal. 208, Sanders v. Russell, 86 Cal. 119, and Hibernia Savings and Loan Society v. Laidlaw, 4 Cal. App. 626, hold that the homestead passes to the surviving spouse still retaining its homestead character.

By analogy to the latter cases, and following City Store v. Cofer, 111 Cal. 482, we may conclude that the homestead, after the decree of divorce was entered, became the separate property of Coad, still retaining its characteristics as a homestead.

To what results may this conclusion carry us? Let us suppose that A. who owns a tract of land, marries; a homestead is declared on this land, and subsequently A. divorces his wife, the decree of divorce being silent as to the homestead. According to the reasoning of the principal case, A. would be the owner of the land, which would still retain its homestead characteristics. B. a woman who owns separate property, marries and a homestead is, with her consent, declared on her separate property. Subsequently she divorces her husband, the decree making no disposition of the property, which reverts to B., still retaining the characteristics of a homestead. A. and B., both having homesteads, intermarry, acquire community property, upon

which they reside, and they jointly declare a homestead thereon. Query: Can one family have three homesteads ? On the death of one of the spouses, the homestead declared on the community property would vest in the survivor (Code of Civil Procedure, sec. 1474), who would then have two homesteads, if our previous reasoning is correct. And should the survivor marry again, could another homestead be declared for the benefit of the new family, which homestead might on the death of this third spouse revert to the survivors who already had two homesteads? Second query: How many valid homesteads can one person have?

In Higgins v. Higgins, 46 Cal. 259, it was held that a widow to whom the Probate Court had set aside a homestead out of the estate of her deceased husband, might claim a second homestead under the general Homestead Act, on the estate of her second husband. The court said, however, "Whether the wife can claim a homestead in the estate of her second husband is a novel question, for the first time presented to this Court."

Gambetti v. Brock, 41 Cal. 78, the court said: "It is clear that under the act (1860) there cannot be two separate valid homestead claims, the one by the wife, and

the other by the husband, upon separate parcels of land"; "but the court in this case was considering the creation of homesteads during the coverture, and this statement was based on the provision that a homestead could only be declared by the head of the family, residing on the premises, or by a wife, if the husband had failed to make the declaration.

In Waggle v. Worthy, 74 Cal. 266, it was held that a person cannot have two homesteads; and if he attempts to acquire a second while the first is in force, the second is void. But again the situation in this case is different, for this decision refers to an attempt by a husband to acquire a second homestead for the protection of the same family.

It would appear that we have authority for concluding that a person may have as many homesteads as he contracts marriages. And that one family may have existing for its benefit, or for the benefit of its members, three, five, or more according to the number of marriages that the spouses have contracted, assuming that in each case the contracting parties have been vested with homesteads on the dissolution of their former marriages.

Leaving this field of speculation which has been opened by the case under discussion, we come to the

consideration of the nature of the right or interest which a declaration of homestead gives the parties thereto, with which subject the remainder of this article will deal.

The Nature of the Homestead Estate.

Sec. 15 of Art. XI of the Constitution of California as adopted in 1850, provided: "The legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families."

Pursuant to the authority given them by this section, the Legislature enacted, in 1851, certain homestead laws.

It was provided that the homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, should be exempt from execution except as to vendors', mechanics' or laborers' liens, or to any mortgages lawfully obtained. That no alienation of the land by the husband should be valid without the signature of the wife, and providing farther, sec. 10, that the homestead and other property exempt from forced sale, upon the death of the head of the family, should be set apart by the Probate Court for the benefit of the surviving wife and his own legitimate children, and in case of no surviving wife or his own legitimate children, for his next heirs at law.

This statute continued in force until 1860, and during this period it seems generally to have been held that the homestead was a sort of joint tenancy, between husband and wife. One of the earliest cases to assert this doctrine is that of Taylor v. Harguns, 4 Cal. 268, decided in 1854. The court said: "As soon as a place, by the occupancy in good faith by the family, acquires the nature of a homestead, the nature of the estate becomes changed, without reference to the manner in which the title to the property originated, whether it was the separate estate of either husband or wife, or the common property of both. It is turned into a sort of joint tenancy with the right of survivorship, at least as between husband and wife, and this estate cannot be altered or destroyed except by the concurrence of both, in the manner provided by law."

In Poole v. Gerrard, 6 Cal. 72, it was said: "The homestead is a joint estate in husband and wife, with the right of survivorship. It is neither common property that would enable the husband to sue alone, nor is it the separate estate of the wife, in which case she would be enabled to sue alone."

Revalk v. Kramer, 8 Cal. 66, modifies to some extent the doctrine of the preceding cases. We find the court

saying, "This (that the right of husband and wife is a sort of joint tenancy) is no doubt true as a general proposition, but still the parties do not stand precisely equal in every respect. While the husband lives he is considered the head of the family, and upon his death the widow takes that capacity, and all the incidents, privileges, and responsibilities attached to it. But when the wife dies the surviving husband takes upon himself no new capacity but continues as he was before, the head of the family. He can now alienate the homestead by his single deed which it is doubtful that the wife can do when she survives the husband, and there are surviving children. If there be no surviving wife or children, then the homestead goes to the next heirs of the husband. There is no such provision where the wife dies and the husband survives,"

In Buchanan's Estate, 8 Cal. 507, we find, "The homestead is not common property but a sort of joint tenancy with the right of survivorship:" and in Thompkins' Estate, 12 Cal. 114, "Under the decisions of this court, the homestead estate is a sort of joint tenancy, with the right of survivorship as between husband and wife, and cannot be destroyed except by the concurrence of both in the manner prescribed by law." Also see Dunn v. Tozer,

10 Cal. 167, from which we quote: "They (the husband and wife) had become joint owners of the property, with the right of survivorship."

This view was, however, repudiated by Chief Justice Field, in Gee v. Moore, 14 Cal. 472. He said, "There is nothing in the nature of the homestead right or privilege which justifies its designation as a joint tenancy. The right or privilege has no single feature resembling a joint tenancy. The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to the alienation, or another homestead is provided or they are otherwise abandoned. The wife if surviving the husband, takes the homestead not by virtue of any right of survivorship arising from the alleged joint tenancy, but as property set apart by law from the husband's estate for her benefit and that of her children, if there be any."

That any estate existed in the wife was denied; the power of alienation and not the nature of the husband's estate is affected. And in regard to the doctrine of Taylor v. Harguns and Poole v. Gerrard, the court added: "This doctrine has never met the approbation of the profession and

is not warranted by any language of the Constitution or the Statute."

Guiod v. Guiod, 14 Cal. 506, accords with Gee v. Moore. Chief Justice Field delivered the opinion, which was reiterated by him in Bowman v. Norton, 16 Cal. 213. Johnston v. Bush, 49 Cal. 198, expresses the same doctrine, as does Brennan v. Wallace, 25 Cal. 108.

Apparently this interpretation of the existing law did not meet with the approval of the Legislature, for in 1860 the act of 1851 was amended. Sec. I as amended, reads as follows: "The homestead, consisting of a quantity of land together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of \$5000, to be selected by the husband and wife, or either of them - - - shall not be subject to forced sale in execution or any final process from any court, for any debt or liability contracted or incurred after the passage of the act to which this is amendatory. Said selection shall be made by either the husband or wife, or both of them - - - declaring their intention in writing, to claim the same as a homestead, - - - and from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants, and all homesteads heretofore appropriated

and acquired by husband and wife under the act to which this act is amendatory shall be deemed to be held by such husband and wife in joint tenancy."

Sec. 4 reads: "The homestead and other property exempt from forced sale shall, upon the death of either husband or wife, be set apart by the Probate Court for the benefit of the surviving husband or wife and his or her legitimate children, and in the event of there being no survivor or legitimate children of either husband or wife, then the property shall be subjected to the payment of their debts."

It would seem that though the legislature chose to call the estate created a joint tenancy, they did not intend that such joint tenancy should be characterized by all of the incidents of joint tenancy at common law, the most distinctive of which was survivorship; for Section 4 provided that disposition of the joint property should be made by the Court on the death of either spouse. Rich v. Tubbs, 41 Cal. 36, gives expression to this view. "Though sec. 1, denominated the husband and wife joint tenants, yet that section was so modified by sec. 4 that they were not such in the full definition of the common law term, as under sec. 4 the children take some interest by inheritance from their deceased father or mother." It was also recognized in

Levins v. Rovegno, 71 Cal. 273. "Doubtless in some instances the relation (of joint tenancy) was wanting in some of the unities which at common law were requisite to such an estate. We know of no reason, however, why the legislature, in its wisdom, may not create such an estate, without having at hand all the materials requisite under the common law. But under the light of the construction that has been given sec. 4 we are constrained to hold that such section modifies the joint tenancy, so that upon the dissolution of the marital relation by death, half the homestead descends to the survivor, and the other half to the legitimate child or children of the deceased."

That a sort of joint tenancy was established by this law seems to have been conceded. Johnston v. Bush, 49 Cal. 198.

In 1862 Sec. 4 was amended, apparently with this defect in mind; provision for survivorship was made, though it would seem that the declaration of the existence of the relation of joint tenancy, which remained unchanged in sec. 1, would have made a specific provision for survivorship unnecessary, Sec. 4 as amended read: "The homestead property selected by the husband and wife, or either of them, according to the provisions of said Act, shall, upon the death of

the husband or wife, vest absolutely in the survivor, and be held by the survivor as fully and amply as the same was held by them or either of them immediately preceding the death of the deceased, and shall not be subject to the payment of any debt or liability contracted by or existing against the said husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such debt or liability as the homestead was subject to at the time of the death of such husband or wife."

The case of Barber v. Babel, 36 Cal. 11, was decided under this statute. Chief Justice Sawyer, in delivering the opinion of the court then said regarding the nature of the homestead estate: "We do not perceive why the character of the right, as defined, does not substantially approach very near a joint tenancy, although not created in precisely the same way, even if not technical joint tenancy at common law. In the homestead estate most of the unities are found, for it is created by the same instrument at the same time. The homestead right and the joint interests are created by the executing, acknowledging and recording of the declaration. The character of the new state with its new incidents commences at that moment, and the new rights vest in both parties at the same time. So far as the homestead right is

concerned they have one and the same interest, accruing by one and the same conveyance (or act) commencing at one and the same time, and held by one and the same individual possession. Since the statute of 1862 the right of survivorship, the grand incident of joint tenancy is added. The main substantial difference now seems to be the want of power of one of the parties to sever the tenancy, or convey at all without the concurrence of the other in the mode prescribed. But however this may be there is a joint interest in the homestead - a joint holding if not a technical joint tenancy. Although the mode of creating the joint estate or interest in husband and wife is not a conveyance in form from the one in whom the title stands on the record, to the two, and although the former legal title may be conceded to remain where it was before, yet the effect and operation of the act of recording the declaration is to take from the separate property of the one owning and consenting, or the common property of both, the property claimed as a homestead, and to vest in the two jointly an estate, or interest in the land, which interest, to the extent of the homestead value, cannot thereafter, while both live, be alienated, severed, encumbered, divested, destroyed or impaired without the concurrent act of both

parties, equally solemn and formal with that by which the new and different estate or interest was created."

The statutory provision that the interest of husband and wife in the homestead estate is joint, was preserved in sec. 1265 of the Civil Code, when the codes were adopted in 1872. That section as adopted reads: "From and after the time the declaration is filed for record, the land therein described is a homestead; and if the declaration was made by a married person, the land is thereafter by the spouses held in joint tenancy, and on the death of either of the spouses, and subject to no other liability than such as exists or has been created under the provisions of the Title, it descends to, and the title at once vests in, the survivor." This section was amended in 1873-74 to read in part as follows: "If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this Title. In other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the Probate Court to assign the same for a limited period to the family of the decedent, - - -"

The phrase, "descends to", found in the section as it appeared in 1872, was omitted from the amended form and the provision that the land should "be held by the spouses in joint tenancy", also disappeared. However, in a number of cases decided subsequently, the estate was said to be one in joint tenancy. We find in *Burkett v. Burkett*, 78 Cal. 312, "The effect of declaring the homestead was to convert the separate title of the husband into a joint title in himself and wife to the extent of the homestead." Also see *Gleason v. Spray*, 81 Cal. 217; *Porter v. Bucher*, 98 Cal. 454; *Vandall v. Teague*, 142 Cal. 471.

In the Code of Civil Procedure, survivorship was provided for under section 1474. That Code, in 1872, provided, "The homestead selected by the husband and wife, or either of them during their coverture, and recorded while both are living, on the death of the husband or wife vests absolutely in the survivor, and is not, nor are the proceeds of a sale thereof, subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them previous to or at the time of the death of such husband or wife, except such mortgage or lien as the homestead was subject to at the time of the death of such husband or wife."

By the amendments of 1873-4, this was changed to read, "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, it vests, on the death of the husband or wife, absolutely in the survivor. If it was selected from the separate property of either husband or wife 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 Probate Court to assign it for a limited period to the family of the decedent."

In 1880 this section was again amended, the words "or from the separate property of the person selecting or joining in the selection of the same", being inserted after, "from the community property", and in the second sentence the phrase, "without his or her consent" was inserted after the phrase, "separate property of either the husband or the wife". In 1909 sec. 1265 of the Civil Code was amended to conform to sec. 1474 of the Code of Civil Procedure.

Briefly stated then, the codes provide to-day that a homestead declared on community property, or on the separate property of the husband or wife with the consent of the owner, on the death of either spouse, becomes the absolute property of the survivor.
(Stockton Savings and Loan Society

v. Saddlemire, 86 Pac. 723; Fisher v. Bartholomew, 4 Cal. App. 581; Hibernia Savings and Loan Society v. Laidlaw, 4 Cal. App. 626.): but when the homestead has been declared on the separate property of the husband, by the wife, without the husband's consent, it vests, on the death of the husband, in his heirs or devisees, subject to the power of the Superior Court to set it aside for a limited time to the family of the decedent. (Warner v. Warner, 144 Cal. 615.)

What then, is the nature of the right, privilege, or estate which a declaration of homestead duly executed by husband or wife, or both of them, gives to-day. So far in this article we have confined the discussion to the voluntary homestead of a married person, and we shall continue to so limit it.

The homestead right or estate is purely a creation of statute or the constitution, there being no precisely similar interest or estate known to the common law. Different jurisdictions have designated it differently, some holding that it is an estate, others maintaining that it is a mere privilege, or right of exemption and not an estate at all. Of those states which have held that it is an estate, it has been variously designated as a joint tenancy (as in California), a life estate (Illinois), a determinable fee (North Carolina),

a trust estate (Georgia), or a freehold estate (Massachusetts). Georgia, Iowa, Kentucky and North Carolina have held it to be a mere privilege, and not an estate at all.

Lubbock v. McMann, 82 Cal. 226 (1887), holds that it is an estate, the court saying on p. 230, "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." Also see Ham v. Santa Rosa Bank (1862), 62 Cal. 125, 139.

Bouvier defines "estate" as, "the degree, quantity, nature and extent of interest which a person has in real property." If the homestead right is an interest in land, we may, under this broad definition, classify it as an estate. And we have seen that the weight of authority so far seems to support the view that it is an estate, and as such most nearly allied to a joint tenancy.

However, there are some features of this so-called estate which do not bear out the analogy to a joint tenancy, even if we concede with the Court, in Barber v. Babel, already quoted, that the four so-called unities of the common law joint tenancy are found.

At common law, for instance, one joint tenant could sever the tenancy, by alienating his share. This we find

the husband or wife cannot do in regard to the homestead estate. Sections 1242, and 1243, of the Civil Code provide that a homestead can be conveyed, encumbered, or abandoned only by the joint action of husband and wife; and it is so held in numerous cases: Poole v. Gerrard, 6 Cal. 72; Revalk v. Kramer, 8 Cal. 66; Dunn v. Tozer, 10 Cal. 168; Flege v. Garvey, 47 Cal. 371; Gleason v. Spray, 81 Cal. 217; Bunting v. Salz, 84 Cal. 71; Security Loan and Trust Company v. Kauffman, 108 Cal. 214, and many others. A few cases following Goe v. Moore held that under the state of 1851 the husband could alienate the homestead subject to the right in the wife, but these cases have been overruled.

The principal incident of a joint tenancy at common law, and its distinguishing characteristic, was the right of survivorship whereby the survivor or survivors took the entire estate to the exclusion of the heirs or representatives of the deceased cotenant. Survivorship as between husband and wife has been dealt with by the various statutes of California, and this feature has been relied on particularly by those who maintain the analogy that the homestead estate bears to a joint tenancy. But in certain cases the courts have maintained that the statutes providing for survivorship are rather statutes of succession, and that the interest of

the wife in the homestead, unless same was declared on her separate property, vests only on the death of the husband, and that she takes by descent rather than as a surviving joint tenant.

In the Baker v. Brickell, 87 Cal. 294, the court said that under the statute of 1862, the homestead vested in the surviving spouse by descent,- and this though the statute provides that the holding is a joint tenancy.

But this view was not taken in the Estate of Headon, 52 Cal. 294, the court there holding that though the code in 1872 provided that the land should "descend to", and "vest in" the survivor, the surviving spouse took as surviving joint tenant.

In Fath's Estate, 132 Cal. 609 (1901) we find the following: "The aforesaid provision of sec. 1474, of the Code of Civil Procedure, is a special rule of succession provided for homesteads, and under its terms Mrs. Fath took the title to the homestead as successor to her husband."

In Rich v. Tubbs, 41 Cal. 34, the question as to who was entitled to the homestead which had been declared on the separate property of the wife with her consent, on the death of the husband, was said to depend upon the law in force at the time of the death of the husband, which law

governed the right of inheritance.

The doctrine of this case is upheld in Herrold v. Reen, 58 Cal. 443, and Tyrrel v. Baldwin, 78 Cal. 470, supports it also. The court in the latter case said, "There can be no survivorship until a death has occurred. It follows, logically we think, that the law in force at the time the title vested should prevail as to the descent."

Gruwald v. Seybolt, 82 Cal. 7, is to the same effect, as is also, Stockton Savings and Loan Society, 144 Cal. 650, and all of these cases are cited and relied upon in the case of Hannon v. Hannon, 12 Cal. App. 350, decided in 1909.

In this case the opinion adopted by the Supreme Court was that written by Justice Shaw who was on the Superior bench, and presided when the case was decided there. Justice Shaw reviewed the previous decisions, disagreeing with the conclusion in Estate of Headon, and concluding that the statutes which provide for survivorship of the homestead are statutes of descent. He also combatted the doctrine that the homestead is a joint tenancy, and pointed out that those portions of the codes that provided that the spouses should hold as joint tenants during their lives, and that upon the death of one the homestead should descent to and vest in the

other, were inconsistent if the words "descend" and "vest in" be given their technical meaning. He says in conclusion, on page 359, "I think, therefore, that it is clear from all these considerations that the purpose of inserting the declaration that the land should descend to the survivor was to make it sure that the power to change still remained in the legislature and that the so-called joint estate was not to be considered a vested estate, nor a technical joint tenancy."

If we concede that sec. 1474 of the Code of Civil Procedure, and the similar provision of sec. 1265 of the Civil Code, are statutes of succession merely, and that their provisions do not affect the nature of the holding while both husband and wife are living, one of the main arguments used to support the contention that the interest in the homestead is a joint tenancy has been overthrown. And unless we concede this we must acknowledge that the interest which a declaration of homestead made on the separate property of the husband without his consent, gives the wife, is not the same interest that she would have were he to join in the declaration; for in the former case the wife does not succeed to the homestead, but it vests, on the death of the husband, in his heirs or devisees, subject to the power of

the Superior Court to assign it for a limited period to the family of the decedent. See Warner v. Warner, 144 Cal. 615, in which the court said: "The only effect of declaring a homestead thereon (on the separate property of the husband without his consent) was to exempt it from execution or forced sale - - -. As the property was his separate property by her declaration of homestead she acquired no estate or proprietary interest therein which she could assert adversely to him, but merely secured the right to a home thereon during the common lifetime of herself and her husband. She had no right of survivorship in the property, but on his death it will vest in his heirs, discharged of all claim or interest on her part. The right given to the Superior Court by sec. 1474 of the Code of Civil Procedure to set apart the homestead to the family of the decedent, is not controlled or in any way affected by the wife's previous selection of a homestead, (Weinrich v. Hensley, 121 Cal. 653)." The interest then which the wife acquires in the homestead which she declares on the separate property of her husband without his consent, if a joint estate, is a joint estate without the incident of survivorship - she and her husband are but joint tenants for life.

On the other hand the interest which the husband

acquires in the homestead declared on the separate property of the wife has this element of survivorship since no homestead can be declared on the wife's separate property without her consent (Civil Code, sec. 1239, Oaks v. Oaks, 94 Cal. 66: Arkle v. Beedie, 141 Cal. 459), and when she gives her consent, such homestead on her death vests absolutely in her husband, (Code of Civil Procedure, sec. 1474).

At common law one joint tenant could not devise his share, but we find that under secs. 1265 Civil Code, and 1474 of the Code of Civil Procedure, the husband may devise his separate property on which a homestead has been declared without his consent.

Also at common law a husband and wife could not hold as joint tenants as, because of their legal entity, they were seized of an estate by entireties and not by moities. But sec. 161 of the California Civil Code provides that a husband and wife may hold property as joint tenants.

Section 683 of the Civil Code in defining a joint interest, limits it to an interest "expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." And the presumption of the law, when an interest is created in favor of several persons in their own right, is that the

interest is an interest in common unless acquired for partnership purposes, or unless declared in its creation to be a joint interest, or acquired as community property. In rendering a decision in *Vandall v. Teague*, 142 Cal. 471, in 1904 the court expressed the following view as to the nature of the homestead estate: "The wife acquires an estate of some sort by virtue of a homestead declared on community property. This estate she holds with her husband jointly, who has a like estate. It has some of the incidents of a joint tenancy, notably the right of survivorship. While the husband and wife are living the homestead can be destroyed only by the joint act of both husband and wife. Whatever may be the estate of the wife, it is distinct from the estate of the husband, though held jointly."

Thus we see that there still exists an uncertainty as to the exact nature of the interest which a declaration of homestead gives the husband and wife.

Personally we are inclined to the view that it is not an estate at all, at least not in the strict definition of that term.

Tiffany, in his "Modern Law of Real Property", Vol. II, p. 1121, says: "The courts have sometimes spoken of the homestead right as an 'estate' in land. While the

widow's homestead frequently has the characteristics of an estate, it is difficult to understand how the right of an owner of particular land to hold such land exempt from liability for debts can be in any sense an estate: and even in states where the statute expressly declares that it is an estate, a new meaning must, it would seem, be given to the latter term, in order that the provision may have any real significance." And Washburn, in his "Real Property", Vol. I, p. 307 says, "While the homestead right possesses some of the incidents of an estate, it is rather a protection to an estate than an estate itself."

Nevertheless, as the court said in *Levins v. Rovegno*, 71 Cal. 273, "while the relation is wanting in some of the unities which at common law were requisite to such an estate, we know of no reason why the legislature, in its wisdom, may not create such an estate, without having at hand all the requisites under the common law," And so, whether we have at hand all of the requisites for an estate, and whether that estate bear an analogy to a joint estate as same was known at common law, the name by which we call such an interest amounts to little, as long as we know what it is.