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James T. Markle

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## THE CONDOMINIUM AS HOMESTEAD PROPERTY

By JAMES T. MARKLE\*

THE homestead right is a right granted to Californians by the Constitution of 1849<sup>1</sup> and reaffirmed by the Constitution of 1879.<sup>2</sup> In essence, the statutes implementing the constitutional provision provide that the owner of real property<sup>3</sup> who resides in a dwelling house thereon may select a homestead<sup>4</sup> therefrom which will be exempt from execution or forced sale<sup>5</sup> upon compliance with statutory requirements as to the execution, acknowledgment and filing of a declaration.<sup>6</sup> The amount of the homestead exemption, for a head of a family, is currently \$12,500.<sup>7</sup>

The condominium has not yet given rise to litigation as to its fitness as the subject of a homestead declaration. It is to be expected, however, that this issue eventually will be presented to the courts. The purpose of this note is to review the judicial construction of homestead statutes<sup>8</sup> dealing with the characteristics of homestead property in the light of special problems created by the peculiar nature of the condominium, so that a prediction may be made as to their applicability to the condominium.

The condominium will combine three problems that are found only singly or doubly—if at all—in traditionally homesteaded property. These problems are concerned with (1) adequacy of the property interest, (2) effect of an undivided interest, and (3) effect of multi-family occupancy. It should prove useful to examine existing law in these problem areas in order to determine, if possible, what the attitude of the courts will be toward the condominium as a subject of a home-

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\* Member, second year class.

<sup>1</sup> Art. XI, § 15.

<sup>2</sup> Art. XVII, § 1.

<sup>3</sup> CAL. CIV. CODE § 1238.

<sup>4</sup> CAL. CIV. CODE § 1237.

<sup>5</sup> CAL. CIV. CODE § 1240.

<sup>6</sup> CAL. CIV. CODE §§ 1262-1264.

<sup>7</sup> CAL. CIV. CODE § 1260.

<sup>8</sup> CAL. CIV. CODE § 1237: "The homestead consists of the dwelling house in which the claimant resides, together with outbuildings, and the land on which the same are situated, selected as in this title provided." CAL. CIV. CODE § 1238: "Property, within the meaning of this title, includes any freehold title, interest or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive."

stead declaration.<sup>9</sup> Finally, a consideration of the courts' pronouncements as to the policy underlying homestead legislation should also prove useful. Indeed, given the absence of closely analogous precedents, when the first case involving a homesteaded condominium is litigated policy may prove decisive.

### *Adequacy of the Property Interest*

While there is dispute as to the precise conditions of determinability, it is generally accepted that the owner of a condominium will have a fee simple determinable both in the air space enclosed by the walls of his particular apartment — with the right to exclusive possession thereof — and in the “common elements” of the project — halls, lobby, roof, utility system, swimming pool, and underlying land — as tenant in common.<sup>10</sup> Thus, the first problem presented is to determine whether such an interest is within the statutory definition of property that may be homesteaded.<sup>11</sup> There is, of course, no case directly in point. However, the statute has in this respect been construed liberally, the cases taking the position that any interest in the land of a nature to support present possession, coupled with the requisite occupancy, is sufficient for the establishment of a homestead.<sup>12</sup> Thus, it has been held that a life estate is an interest adequate to support a homestead declaration,<sup>13</sup> as is an equitable interest,<sup>14</sup> and a right in public land pre-empted by claimant prior to acquisition of any title;<sup>15</sup> and even an adverse possession.<sup>16</sup> And a so-called probate home-

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<sup>9</sup> Another type of multi-dwelling property ownership to which the considerations discussed in this note would appear equally applicable is the “deed plan” of community apartment, wherein ownership in the project is accomplished through deeds of undivided interests in the apartment property, with the exclusive right to use a specific apartment. For a brief discussion of this type of ownership, see Barber, *The Deed Plan Community Apartment Project*, 36 CAL. S. BAR J. 310 (1961).

<sup>10</sup> See Borgwardt, *The Condominium*, 36 CAL. S. BAR J. 603, 604-606 (1961); Comment, 50 CALIF. L. REV. 299, 301-304 (1962).

<sup>11</sup> “[A]ny freehold title, interest, or estate which vests in the claimant the immediate right of possession . . .” CAL. CIV. CODE § 1238.

<sup>12</sup> “The homestead right can attach to any estate in the land which the claimant possesses.” Annot., 74 A.L.R.2d 1355 (1960).

<sup>13</sup> *Arighi v. Rule and Sons*, 41 Cal. App. 2d 852, 107 P.2d 970 (1940), wherein the court states the general rule that “a fee simple in the land is not necessary for the establishment of a homestead, as the homestead right is not an estate in the land, but a mere privilege of exemption from execution of such estate as the holder occupies”; accord, Application of Rauer's Collection Co., 87 Cal. App. 2d 248, 196 P.2d 803 (1948).

<sup>14</sup> *Perry v. Ross*, 104 Cal. 15, 37 Pac. 757 (1894); *Alexander v. Jackson*, 92 Cal. 515, 28 Pac. 593, 27 Am. St. Rep. 158 (1891); *Belieu v. Power*, 54 Cal. App. 244, 201 Pac. 620 (1921).

<sup>15</sup> *Bell v. Wilson*, 172 Cal. 123, 155 Pac. 625 (1916).

<sup>16</sup> *Spencer v. Geissman*, 37 Cal. 96, 99 Am. St. Rep. 248 (1869); accord, Application of Rauer's Collection Co., 87 Cal. App. 2d 248, 196 P.2d 803 (1948).

stead<sup>17</sup> has been set apart in property to which there was an adverse claim.<sup>18</sup>

Based upon these decisions, the reasonable conclusion is that the nature of a condominium owner's property interest — a determinable fee — is not repugnant to the homestead statute's definition of property as that statute has been construed by the courts.

### *Effect of an Undivided Interest*

A part of the condominium owner's total property interest will be held in cotenancy with the other unit owners in the project.<sup>19</sup> This fact is the basis of the second problem considered herein: the effect of this undivided interest upon the validity of a homestead declaration.

Prior to 1929, it was well-settled that land owned by persons as tenants in common or as joint tenants could not be the subject of a homestead declaration.<sup>20</sup> In 1929, however, the words, "even though such a right of possession is not exclusive," were added to section 1238 of the Civil Code.<sup>21</sup> In *Estate of Kachigian*, the court states the effect of this amendment in words that are particularly significant:<sup>22</sup>

In our opinion the former rule prohibiting the selection of a homestead from an undivided interest in property during the lifetime of the owner has been abandoned. In view of the law prevailing at the time of this amendment [1929] it seems obvious that the amendment could have referred only to estates *such as tenancies in common* and joint tenancies, for the cases establishing that law were based upon the theory that because of the nature of such tenancies, in particular,

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<sup>17</sup> CAL. PROB. CODE § 661 defines the probate homestead. Property cannot be set aside as a probate homestead that could not be declared a homestead in decedent's lifetime. See *Estate of Gallagher*, 134 Cal. 96, 66 Pac. 70 (1901) (farmland with no dwelling house thereon); *In re Armstrong*, 80 Cal. 71, 22 Pac. 79 (1889) (widely scattered tracts); *Estate of Noah*, 73 Cal. 590, 15 Pac. 290, 2 Am. St. Rep. 834 (1887) (property used exclusively for business purposes); *Kingsley v. Kingsley*, 39 Cal. 665 (1870) (partnership property); *accord*, *Estate of Kachigian*, 20 Cal. 2d 787, 128 P.2d 865 (1942).

<sup>18</sup> *Estate of Dalton*, 87 Cal. App. 2d 333, 197 P.2d 62 (1948).

<sup>19</sup> See note 3, *supra*.

<sup>20</sup> See *Estate of Kachigian*, 20 Cal. 2d 787, 128 P.2d 865 (1942) and cases cited. The early leading case was *Wolf v. Fleischacher*, 5 Cal. 244, 63 Am. Dec. 121 (1855). Consonant with the rule that a probate homestead could not be set apart in land that could not be the subject of a homestead declared in decedent's lifetime, the courts refused to set apart probate homesteads in lands held by decedent in cotenancy. See *Estate of Carraghar*, 181 Cal. 15, 183 Pac. 161 (1919); *Kingsley v. Kingsley*, 39 Cal. 665 (1870). Early judicial dissatisfaction with the rule in *Wolf v. Fleischacher*, is evidenced by the concurring opinion of Olney, J., in *Estate of Carraghar*. It would appear that California's view as to the unsuitability of a cotenancy as homestead property did not represent the weight of authority. Cases are collected in *Annot.*, 89 A.L.R. 511 (1934).

<sup>21</sup> Stats. 1929, c. 184, p. 339, § 1. This section's present definition of property subject to homestead declaration is given in note 1, *supra*.

<sup>22</sup> *Estate of Kachigian*, 20 Cal. 2d 787, 128 P.2d 865 (1942).

the absence of an exclusive right of possession, it was impossible to segregate and delimit the individual interest sought to be impressed with a homestead. The Legislature removed this judicially imposed obstacle. [Emphasis added.]

In *Kachigian*,<sup>23</sup> the trial court refused to set apart a probate homestead in land held by a decedent as a tenant in common. Decedent's cotenant was his brother. In reversing, the court cited the earlier case of *Watson v. Peyton*,<sup>24</sup> and held that the reasoning therein was equally applicable "to situations wherein the cotenants are not husband and wife."<sup>25</sup> [Emphasis added.] A number of cases uphold *Kachigian's* construction of the 1929 amendment as validating a cotenancy as the subject of a homestead declaration.<sup>26</sup> However, it must be observed that *Kachigian* remains the only case in this jurisdiction wherein the court has passed upon the suitability as homestead property of land held in tenancy in common where the cotenants were *not husband and wife*. And of course no case has been passed upon wherein there were more than two cotenants.

Notwithstanding the dearth of litigation it is submitted that the language of the amendment, and the courts' reasoning in construing it in favor of marital cotenancies, admit of the conclusion that removal of the obstacle to undivided interests generally should result in a construction favorable to situations where the cotenants are unrelated and numerous.<sup>27</sup>

A subsidiary issue must be dealt with at this point. The condominium owner will own two more or less distinct interests in the premises: a determinable fee with the right to exclusive possession in a portion of the building, and a determinable fee as cotenant in other portions.<sup>28</sup> Should the homestead privilege attach to his total property interest? Again, there is no California case in point. However, in a recent Nebraska case, where the homestead declarant held a fee simple as tenant in common in an undivided half of homestead property, and a life interest in the other undivided half, it was held that the home-

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<sup>23</sup> *Ibid.*

<sup>24</sup> 10 Cal. 2d 156, 73 P.2d 906 (1937). Here, the property was held in joint tenancy by husband and wife.

<sup>25</sup> Estate of *Kachigian*, 20 Cal. 2d 787, 128 P.2d 865 (1942).

<sup>26</sup> *Squibb v. Squibb*, 190 Cal. App. 2d 766, 12 Cal. Rptr. 346 (1961); *California Bank v. Schlesinger*, 159 Cal. App. 2d Supp. 854, 324 P.2d 119 (App. Dep't., Super. Ct., Los Angeles 1958); *In re Miller*, 27 F. Supp. 999 (S. D. Cal. 1939).

<sup>27</sup> See *First Nat. Bank v. Anderson*, 206 Okla. 54, 240 P.2d 1066 (1952), upholding a homestead selected in an undivided one-eighth interest in land; there appeared to be no relationship between declarant and his cotenants.

<sup>28</sup> See note 3, *supra*.

stead privilege attached to declarant's entire property.<sup>29</sup> In conveying a condominium it appears that the owner's interests will be conveyed in one deed,<sup>30</sup> and appraised as a whole for tax purposes.<sup>31</sup> Moreover, the Civil Code provides for the appointment of appraisers in the event of an execution against the homestead.<sup>32</sup> Thus, as a practical matter, the ownership of two technically distinct interests would appear to be no bar to attachment of the homestead privilege to the owner's total interest.

### *Effect of Multi-Family Occupancy*

In defining the homestead, the Civil Code speaks of "the dwelling house in which the claimant resides."<sup>33</sup> This definition suggests a third question for consideration: can the condominium owner who has filed a homestead declaration be said to reside in a "dwelling house" within the meaning of section 1237?

If the quantity of litigation on the multi-family occupancy question is any indication, judgment creditors seeking execution and heirs and devisees in estates wherein probate homesteads have been set apart have had difficulty with the proposition that a building in which more than one family reside can be a "dwelling house" within the meaning of section 1237. And yet such is the overwhelming weight of authority.<sup>34</sup> In *Estate of Levy*,<sup>35</sup> the leading California case, the trial court set apart a probate homestead consisting of a lot and a three-story building divided into three flats, each of which had a separate street entrance. Decedent owner and wife had occupied one of the flats therein until decedent's death and his wife had continued to occupy the flat. The remaining two flats were rented. Devisees, appealing from the order in the probate proceedings, contended that multi-family occupancy of the building destroyed its character as a "dwelling house." In affirming the lower court's order the California Supreme Court relied upon cases wherein the use of a building partly, and even chiefly, for business purposes was held not inconsistent with the right of homestead provided the building was the bona fide residence of the family.<sup>36</sup>

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<sup>29</sup> Ehlers v. Campbell, 159 Neb. 328, 66 N.W.2d 585 (1954), 74 A.L.R.2d 1355.

<sup>30</sup> See Borgwardt, *supra* note 3, at 611.

<sup>31</sup> *Ibid.*

<sup>32</sup> CAL. CIV. CODE § 1249.

<sup>33</sup> CAL. CIV. CODE § 1237. This section is given in its entirety in note 1, *supra*.

<sup>34</sup> Cases are collected in Annot., 128 A.L.R. 1431 (1940).

<sup>35</sup> Estate of Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92 (1904).

<sup>36</sup> Estate of Ogburn, 105 Cal. 95, 38 Pac. 498 (1894) (probate homestead set apart in building used, in addition to family residence, as a tin shop and millinery shop); Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404 (1892) (building used additionally for hotel purposes

The rule in *Levy* has been followed consistently in the more recent cases.<sup>37</sup> Thus, the multi-family character of the condominium should present no serious obstacle to the owner's selection of his interest as a homestead.

### Conclusion

It is true, of course, that all of the cases cited herein can be distinguished in one or more important particulars from a case in which a condominium is selected as the subject of a homestead declaration. It has been the purpose of this comment to isolate those characteristics of a condominium interest which are likely to be attacked in litigation of this interest's suitability as a homestead. Each of these characteristics has been passed upon by the courts, and the suitability of property having one or two of these characteristics has been consistently upheld. There would appear to be no reasonable basis for refusing the homestead privilege to a form of property ownership which combines these characteristics.

In the final analysis, policy considerations underlying the very existence of homestead legislation, and the courts' liberal construction thereof, should have great weight. There is scarcely a case cited herein in which the court has not commented upon that policy. In *Estate of Kachigian* the court restates homestead legislation policy in these words:<sup>38</sup>

The policy underlying all homestead legislation, whether providing for the selection of a homestead by a person during his lifetime or by the court for his family after his death, is as stated in *Estate of Fath*, 132 Cal. 609, 613 [64 Pac. 995], "to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors," and to this end a liberal construction of the law and facts will be adopted.

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can support a homestead declaration). *Accord*, *Coca Cola Bottling Co. v. Feliciano*, 45 Cal. App. 2d 680, 114 P.2d 604 (1941) (gasoline station and bar); *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266 (1909) (hotel or boarding house); *Harlan v. Schulze*, 7 Cal. App. 287, 94 Pac. 379 (1908) (prostitution); *Cf. Vincenzini v. Fiorentini*, 2 Cal. App. 2d 739, 38 P.2d 876 (1934).

<sup>37</sup> *Somers v. Bank of America Nat. Trust & Savings Ass'n*, 84 Cal. App. 2d 726, 191 P.2d 776 (1948) (probate homestead set apart in a five-apartment building); *Phelps v. Loop*, 64 Cal. App. 2d 332, 148 P.2d 674 (1944) (nine apartments and nine light housekeeping rooms in building, one of which was occupied by declarant, does not prevent homestead privilege); *Schmidt v. Denning*, 117 Cal. App. 36, 3 P.2d 322 (1931) (a four-flat building selected as a homestead; selection upheld).

<sup>38</sup> *Estate of Kachigian*, 20 Cal. 2d 787, 128 P.2d 865 (1942).

It would seem that the family group residing in a condominium has no less need for protection than has any other family group.<sup>39</sup> It is submitted that extending to the family residing in a condominium the protection afforded by our present homestead legislation would be meritorious social engineering.

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<sup>39</sup> "The element common to these exemptions is the purpose of protecting the family group." 25 Cal. Jur. 2d *Homesteads* § 1 (1955).