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Homestead: A (New) Hope

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HOMESTEAD: A (NEW) HOPE

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ABSTRACT

A finely-tuned balancing of the free functioning of private and commercial enterprise against a family's interests in shelter and a home is at the heart of homestead exemption laws. In South Dakota's history, this balancing act has been displayed over a 145-year history in the form of legislative enactments, judicial decisions, and referendums. This history illuminates the expression of values against the dynamics of rule-making. A previously published article in this review, Prequel to Homestead, outlined South Dakota's homestead laws under the contemporary statutory framework and also considered the constitutional history of homestead laws leading up to South Dakota's becoming a state in 1889. This article picks up where the prior article left off and presents judicial decisions dealing with the constitutional ambits of the homestead exemption beginning in 1889 and continuing through today. It concludes with an assessment of an unresolved homestead issue in the context of asset protection: whether a trust-owned or entity-owned home qualifies for homestead protection rights.

The policy of the law is to preserve a home for the family even at the sacrifice of just demands.¹

I. INTRODUCTION

In 1946, the Dean of the University of South Dakota School of Law, Marshall McKusick, typed (or had typed for him) a monograph titled *The Historical Evolution of the Homestead Exemption in South Dakota*.² I discovered a copy—perhaps the only copy—in the basement stacks of the McKusick Library at that same law school. The thirteen-page, typed monograph, as is stated on its cover page, was written “for teaching purposes.”³ If one counts back to the birth of Dakota Territory in 1861, Dean McKusick’s 1946 monograph covers eighty-five years of homestead law in South Dakota.⁴ The aim of this article is to update his monograph and include the last seventy-two years of South Dakota homestead law. In my previous article with this review, *Prequel to Homestead*, I unpacked the pre-statehood statutory history and constitutional debates leading up to 1889—

1. MARSHALL MCKUSICK, *THE HISTORICAL DEVELOPMENT OF THE HOMESTEAD EXEMPTION IN SOUTH DAKOTA* 1 (1946). Due to its limited public availability, Dean McKusick’s monograph will be published with this review after 2021.

2. MCKUSICK, *supra* note 1, cover page. Marshall McKusick joined the academy at the University of South Dakota School of Law in 1902. *Id.* He later became Dean of the institution (serving for forty years), and he continued to teach. *Id.* For other published scholarship on South Dakota’s homestead laws, see generally Thomas E. Simmons, *Prequel to Homestead*, 62 S.D. L. REV. 327 (2017) (exploring the history leading up to South Dakota’s homestead laws); James A. Craig, *A “Rogue’s Paradise?”: A Review of South Dakota’s Property Exemptions and a Call for Change*, 59 S.D. L. REV. 257 (2014) (explaining South Dakota’s property-exemption statutes, their history, and recent cases); Fred Winkler, *Comment, Creditors And the South Dakota Homestead Exemption*, 17 S.D. L. REV. 483 (1972) (studying the effect of South Dakota homestead exemption on the creditor).

3. MCKUSICK, *supra* note 1, at 1.

4. *Id.*

the year in which South Dakota became a state and enacted its constitutional homestead provision.⁵ Here, I aim to complete a historical assessment of South Dakota's homestead exemption, focusing upon the state constitutional developments of the homestead right after 1889 in published decisions of the South Dakota Supreme Court.

Following a reconstruction of that narrative, this article assesses current homestead law.⁶ The homestead exemption protects shelter as a fundamental human need. It defines that protection in terms of a "family," broadly conceived.⁷ While the basic requisites for shelter are unchanged since 1889 (advancements in engineering, technology, and design aside), the idea of a family has been more dynamic.⁸ The state constitutional framework for homestead laws, meanwhile, has remained static. The primary thrust of this article discusses the history, evolution, and scope of South Dakota's homestead laws in a state constitutional context as interpreted by the South Dakota Supreme Court.⁹ It concludes with an assessment of layering asset protection strategies—a trust or a limited liability entity—with homestead protections.¹⁰

II. DISCUSSION

A. SOME CONTEXT AND SOME DEFINITIONS

Homestead rights secure a family's shelter against financial misfortune.¹¹ The law achieves this aim, perfectly or imperfectly, in three primary ways; first, by suspending creditor remedies against the homestead *res*. The rights of a homeowner's creditors are impaired so as to better secure the use of the home by its owner.¹² There is an element of protectionism at work here, to be sure.

5. See generally Simmons, *supra* note 2 (discussing the history of South Dakota homestead laws).

6. See *infra* Part III (summarizing and analyzing homestead provision caselaw since 1889).

7. See S.D. CONST. art. XXI, § 4 (1889) (requiring homestead recognition "by law, to all heads of families").

8. See generally Jane Drummey, Note, *Family Ties: A Comparison of the Changing Legal Definition of Family in Succession Rights to Rent-Regulated Housing in the United States and Great Britain*, 17 BROOK. J. INT'L L. 123 (1991) (discussing the term "family" in the scope of tenancy); William Graham, Note, *There Goes the Neighborhood: The Evolution of "Family" in Local Zoning Ordinances*, 9 Touro L. Rev. 699 (1993) (discussing the term "family" in the scope of zoning ordinances).

9. See *infra* Parts III.A-S (summarizing the history of homestead caselaw in South Dakota).

10. See *infra* Part IV (defining homestead "owner" in new contexts such as trusts and LLCs).

11. E.g., *GMAC Mortgage, LLC v. Arrigo*, 8 N.E.3d 621, 625 (Ill. Ct. App. 2014) (noting that the homestead exemption "secures to the homesteader 'a shelter beyond the reach of his improvidence or financial misfortune'") (citation omitted).

12. S.D.C.L. § 43-31-1 (Supp. 2017); see also *In re Dependency of Schermer*, 169 P.3d 452, 465 (Wash. 2007) (quoting *Pinebrook Homeowners Assoc. v. Owen*, 739 P.2d 110, 113 (Wash. Ct. App. 1987)) ("The homestead act 'implements the policy that each citizen have a home where [the] family may be sheltered and live beyond the reach of financial misfortune.'").

Otherwise rightful creditor rights give way in favor of securing an individual's or family's home against financial catastrophe.¹³

Secondly, homestead rights aim to shelter the marital relationship by suspending unilateral alienation rights.¹⁴ One spouse, acting without the other, can neither mortgage nor convey the homestead.¹⁵ Both spouses must join the conveyance or mortgage in order for the act to be effective. The prohibition of unilateral spousal alienation rights ensures that spouses either act in concert with regards to their homestead or not at all.¹⁶ The prohibition advances the aim of providing stability to the marital relationship.¹⁷ This second aim overlaps with the first and is typically given less importance by courts and commentaries.¹⁸ Its application is more limited than the first because, while homestead creditor rules apply to any homeowner (including single persons), the marital-related protections only apply to a married owner.¹⁹

Third, and decidedly least important (or at least less commonly litigated), homestead descent rights allow a surviving spouse and minor children to continue to reside in the family home following the owner's death, free from claims by other heirs or creditors.²⁰ These survivorship rights help protect the family

13. See *Russell v. Black*, No. 992397, 2000 WL 1473468, at *3 (Mass. Sup. Aug. 1, 2000) (observing "that the very purpose of the homestead laws is to allow homeowners (and, in particular, elderly and disabled homeowners) to protect their homes from the reach of creditors").

14. *Kaiser v. Klein*, 137 N.W. 52, 53 (S.D. 1912).

15. S.D.C.L. § 43-31-17 (2004); *Crawford v. Carter*, 37 N.W.2d 241, 245 (S.D. 1949); see also *McGhee v. Wilson*, 20 So. 619, 621 (Ala. 1896) (holding a husband's unilateral grant of an easement over the homestead was invalid without his wife's consent).

16. See *Brattleboro Savings & Loan Assn. v. Hardie*, 94 A.3d 1132, 1140 (Vt. 2014) (Bent, J., concurring) (explaining that "the prohibition against unilateral spousal alienation of the marital homestead [and] [t]he purpose of 'joinder' statutes such as this, which are part of virtually every state's homestead laws, is not only to protect the financial interests of the family, but in particular to protect the nonsigning spouse from unilateral alienation of the homestead by the conveying spouse") (citations omitted).

17. Cf. *Sawada v. Endo*, 561 P.2d 1291, 1297 (Haw. 1977) (emphasizing, in holding that tenancy by the entirety property enjoys asset protection features as to the creditors of only one of the spouses, that "were [we] to select between a public policy favoring the creditors of one of the spouses and favoring the interests of the family unit, we would not hesitate to choose the latter").

18. See also Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 429 n.439 (2002) (explaining: "A rule requiring spouses to bargain over—or even communicate about—intrafamily resource allocation would stand in interesting contrast to constitutional pronouncements about legal rules affecting the private ordering of interspousal communication"). For example, in *Planned Parenthood v. Casey*, "[a]lthough the Court acknowledged the need of minors for adult advice and the interests of parents in the welfare of their children, the Court rejected the argument that the state 'has an interest in protecting the independent right of the parents' to determine and strive for what they believe to be best for their children." *Id.* quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 895-98 (1992). Chapman continues: "One might try to distinguish cases of family and reproductive rights from cases involving economic or property rights." *Id.* "But the two are related, as the Court observed in *Casey*, 505 U.S. at 893, and as indicated by bankruptcy decisions balancing economic rules against reproductive rights, the right to marry, and the discharge of parental responsibilities. *Id.* (citations and internal citations omitted).

19. See *In re Clark*, 384 B.R. 563, 566 (Bankr. W.D.Mo. 2008) (explaining that Missouri's prohibition of unilateral conveyance of a homestead "protect[s] the non-conveying spouse").

20. S.D.C.L. § 43-31-15 (2004); *Wells v. Sweeney*, 94 N.W. 394, 395 (S.D. 1903).

homestead even after the chief breadwinner's death.²¹ The aim with this third protection is clear: securing a surviving family's continuing right to shelter.²² It overlaps to some degree with the first two aims.

Several related objectives are bundled in the justifications for the overall aims of homestead laws—securing a family's shelter against financial misfortune.²³ Homestead protections seek to ensure a basic human necessity: shelter from the elements; protection of life and safety.²⁴ This aim is achieved largely by sheltering the home *res* from creditors. Because shelter is a fundamental human need, it might even be argued that homestead laws represent as a peculiar variety of human rights legislation.²⁵ To the extent that families are saved from having their home sold by their creditors, the homestead exemption also serves to lessen the burdens on governments and communities caused by homelessness or excessive vacancies.²⁶ The withholding of basic needs such as safety might lead to increased criminality and lawlessness, creating even more demands on government resources.²⁷ Depending on the scope of exception creditors to the homestead, the exemption might also be characterized as a kind of consumer protection law, preventing the owner from overextending her credit since it deters

21. See MacKenzie Breitenstein, Note, *The Ideal Homestead Exemption: Avoiding Asset Conversion and Fraud but Still Protecting Dependents*, 58 DRAKE L. REV. 1121, 1126 (2010) (claiming: "The central purpose of homestead exemptions is to protect dependents").

22. *E.g.*, *Chames v. DeMayo*, 972 So.2d 850, 853-54 (Fla. 2007) (emphasizing: "The public policy furthered by a homestead exemption is to 'promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.'") (citation omitted).

23. *E.g.*, *Engstrom's of Alexandria, Inc. v. Vaughn*, 138 So.2d 672, 600 (La. Ct. App. 1962) (noting that the object of a homestead exemption "is to secure a home beyond the reach of financial misfortune, around which gathers the affection of the family, the greatest incentive to virtue, to honor, and to industry" on the theory that the protection of the family is of at least as paramount importance to the state as the payment of debts") (citation and internal citation omitted).

24. *E.g.*, *Kleinert v. Lefkowitz*, 259 N.W. 871, 873 (Mich. 1935) (noting that Michigan's constitutional homestead exemption "was to preserve the home for the family, even at the sacrifice of the just demands of creditors, for the reason the preservation of the home was regarded as of paramount importance").

25. See *Johnson v. Newberry*, 267 S.W. 476, 481-82 (Tex. Ct. App. 1924) (reasoning that "if a home is not to be classed as a necessary, then we would be compelled to say that the Constitution has thrown greater safeguards around a thing unnecessary and inappropriate for a married man than it has about almost any other subject of human rights").

26. See *Scholtec v. Estate of Reeves*, 490 S.E.2d 603, 607 (S.C. Ct. App. 1997) (citations omitted) (explaining that a homestead exemption can help to prevent citizens from becoming dependent on government support or welfare).

27. Arguably, expansive homestead exemption protections would reduce homelessness caused by foreclosures so long as—as is generally the case—mortgagees qualify as exception creditors, so as to not deter the lending of money to purchase a home in the first place. See *Hickman v. Long*, 150 N.W. 298, 299 (S.D. 1914) (explaining a homestead exception for the purchase money mortgage). If homestead exemptions defeat the ability of a mortgagee to foreclose, home lending will be made less available to low-income households and the frequency of home ownership will be reduced. If homestead exemptions only defeat the ability of judgment lienholders to force a sale of the homestead, the availability of home loans will be unaffected but the likelihood of a forced sale of a home will be reduced. Thus, both home purchasing and home retention will be maximized. In fairness, the availability of unsecured consumer credit will be negatively impacted by exempting the homestead from judgment lienholders, but homestead law is focused on protecting a family's shelter, not their big screen televisions.

creditors from relying on the ability to recover an unpaid debt from a homestead property.²⁸

The secondary aims of homestead laws sketched above—protecting spouses by rejecting unilateral alienation attempts and ensuring shelter in the form of occupation rights for a surviving spouse and minor children—coincide with the first aim, with the additional hoped-for benefit of helping ensure the integrity and cohesion of an owner's family.²⁹ Interestingly, then, homestead laws are located at an intersection of typically conservative political values (protecting the traditional nuclear family and the sanctity of marriage) and traditionally liberal political values (governmental paternalism and consumer protection).³⁰ The debtor is in part protected from his own natural tendency to overspend, while at the same time, the solidity of his marital relationship and the sheltering of his offspring are reinforced by the state.³¹ Homestead laws thus represent a unique combination of consumer protection and traditional family values legislation.

To match up with these aims, three varieties or subtypes of homestead laws must be recognized and labeled. First, the "homestead exemption" describes the inability of creditors to force a sale of one's home.³² Second, the requirement that both spouses join a conveyance of the homestead property I will label the "homestead veto."³³ Third, the inheritance characteristics of a homestead

28. See Charles C. Boettcher, Comment, *Taking Texas Home Equity for a Walk, But Keeping it on a Short Leash!*, 30 TEX. TECH. L. REV. 197, 233 (1999) (noting the "consumer protections" and "healthy skepticism towards financial institutions" in Texas Constitutional homestead protections); Allen Wilson, Comment, *More than Just a Boon to Wealthy Debtors: How the Texas Homestead Law Helped Insulate Texas from the Foreclosure Typhoon*, 64 BAYLOR L. REV. 999, 1030 (2012) (noting certain consumer protection aspects of Texas' homestead exemption laws).

29. See *In re Davis*, 329 F.Supp. 1067, 1071 (E.D. Mich. 1971) (reasoning "that the overriding purpose of the homestead exemption is to protect the family as a whole rather than the separate members as individuals").

30. See also *Johnson v. Newberry*, 267 S.W. 476, 481 (Tex. Ct. App. 1924) (reasoning that in acting homestead exemption laws "it must be assumed that the framers of the Constitution believed that the ownership of a home was not only reasonably appropriate for a married man but of value to the state as well").

31. The pleas of John D. Pierce, a member of the 1850 Michigan Constitutional Convention combine the emphasis on traditional family values with consumer protection aims:

The homestead should be free, inviolate. No man-no woman-no child-no family should be driven from home, because the hand of adversity presses hard upon them. The measure is so accordant with the real spirit of progress, so just in itself, so wisely expedient in all exigencies to which families are liable, so alleviating when ill fortune bears them down, and so consonant with the popular sentiment and the principles of true Christian morality, that no power on earth can prevent its universal adoption, and they shall sit every man under his vine and fig tree. It is the high duty of the State to throw around every homestead, every fireside, every hearth-stone, the shield of its protection.

Kleinert v. Lefkowitz, 259 N.W. 871, 873 (Mich. 1935). "Substantially similar sentiments were expressed by other members of the Convention." *Id.*

32. S.D.C.L. §§ 43-31-1, 43-45-3 (Supp. 2017).

33. S.D.C.L. § 43-31-17 (2004); 40 AM. JUR. 2D *Homestead* § 1 (2008) (citing *Stokes v. Smith*, 100 S.E.2d 85 (N.C. 1957)).

property when an owner is survived by a spouse or minor children—these inheritance or survivorship rights I will call the “homestead descent.”³⁴

As the reader is now beginning to suspect, the term “homestead” in these various legal contexts can prove slippery.³⁵ Even more generally, when referring to this bundle of different characteristics of homestead rights, the use of the term can be troublesome. “Homestead” in a general sense typically refers to the extent and contours of the exemption from creditor claims or, alternatively, the characteristics of property itself which qualifies as a homestead. In these senses, the homestead means a privilege or bundle of defined rights and limitations in regards to certain realty.³⁶ Alternatively, the term can simply refer to that parcel of realty which may enjoy these characteristics.³⁷ Here, I will call the exemption and its characteristics the “homestead right” or “homestead privilege” and the *res* itself the “homestead property.”³⁸

B. OUR STORY SO FAR

The starting point for the legal history of South Dakota is April 19, 1858.³⁹ On that date, the federal government entered into a treaty with the Yankton Sioux tribe.⁴⁰ The Yankton Sioux agreed to withdraw to a 400,000 acre reservation tract in present-day Charles Mix County.⁴¹ The tribe ceded an enormous, triangle-shaped swath of land in exchange for a fifty-year annuity of \$1.6 million.⁴² Later that same year, a convention resolved to elect a provisional body to petition

34. See S.D.C.L. § 43-31-15 (2004) (outlining the homestead rights of surviving spouses and minor children). Dean McKusick called this third variety of homestead rules the “probate homestead.” MCKUSICK, *supra* note 1, at 11.

35. The terminology hazards connected with homestead discussions are articulated in Justice Clark’s dissent to the nineteenth century decision of *Vanstory v. Thorton*:

There is a distinction between the homestead and the homestead right. The former is the lot of land exempted from sale. The latter is the right to have it exempted; to use and occupy it free from molestation. The former the constitution permits to be conveyed, but only with the wife’s assent and privy examination. The latter cannot be conveyed to another. It does not pass by a conveyance of the land. It is not property, but a personal privilege, extending in certain cases to the minority of the children and the widow. An inadvertence of expression in some of the opinions as to this distinction has led to some confusion and misapprehension.

Vanstory v. Thorton, 17 S.E. 566, 569 (N.C. 1893) (Clark, J., dissenting). While the homestead descent is inalienable and nontransferable, this does not necessarily mean that a homestead is not “property.” The rightful occupants enjoying a *res* pursuant to homestead descent rights have the right to eject trespassers and, in that sense, they have property rights in their homestead.

36. *Wisner v. Pavlin*, 2006 SD 64, ¶ 21, 719 N.W.2d 770, 779. *But see Bullene v. Hiatt*, 12 Kan. 98, 99 (Kan. 1873) (“The homestead exemption is not a personal privilege, to be claimed by the debtor, but an absolute right . . .”).

37. 40 AM. JUR. 2D *Homestead* § 1 (2008) (citations omitted).

38. I will use the terms “right” and “privilege” interchangeably.

39. *Simmons*, *supra* note 2, at 363.

40. *Id.*

41. HERBERT S. SCHELL, *HISTORY OF SOUTH DAKOTA* 70-71 (2d ed. 1968).

42. *Id.* at 71. The enormous triangle of ceded land ran from Fort Pierre and Lake Kampeska to the Big Sioux and Missouri Rivers. *Id.*; see *infra* Part V.A (reprinting an 1862 map reflecting the same).

Congress to designate Dakota Territory; the process was repeated the next year.⁴³ Following ratification of the Yankton treaty on February 17, 1859, and a brief dispute regarding the timeline for the Yankton tribe's withdrawal, the territory opened to white settlers in July.⁴⁴ About 1,000 white settlers, who had camped along the territorial borders, quickly swarmed in.⁴⁵ Those pioneers joined others already squatting on town sites like Sioux Falls.⁴⁶

Dakota Territory officially became a territory in March of 1861.⁴⁷ William Jayne, the first territorial governor, was a doctor from Abraham Lincoln's hometown of Springfield, Illinois.⁴⁸ Jayne had been Lincoln's personal physician.⁴⁹ The territorial government also consisted of three judges, a secretary, a few other minor officials, and a bicameral legislature.⁵⁰ Governor Jayne promptly took a census, divided the area into districts, and scheduled a legislative election for that fall.⁵¹

Following the fall elections, the first territorial legislature met in Yankton, which served as the territorial capitol until it was moved to Bismarck.⁵² The first territorial legislature consisted of thirteen men in the lower house and nine in the council (the upper house).⁵³ The twenty-two men met in private homes over a legislative session of sixty days.⁵⁴ Their unruly antics included wine lunches, wine dinners, and wine quarrels.⁵⁵ Governor Jayne's address to this first, rather rowdy Dakota Legislature, included an emphasis on the need for homestead laws. He recommended that

a law be passed securing to every family freedom from execution and sale of their homestead; if resident in the country, a house and so many acres as your wisdom may determine. I believe that such a law is eminently just and proper. I would have every man know, and especially every wife and child feel, that there was one spot on earth that they could call home; one place that the cruel and remorseless

43. William Maxwell Blackburn, *A History of North and South Dakota*, in 1 SOUTH DAKOTA HISTORICAL COLLECTIONS 48 (1902).

44. SCHELL, *supra* note 41, at 71-72.

45. *Id.* at 71.

46. WAYNE FANEUST, *OUTLAW DAKOTA: THE MURDEROUS TIMES AND CRIMINAL TRIALS OF FRONTIER JUDGE PETER C. SHANNON* 2-3 (2016). As early as 1858, speculators at Sioux Falls "set up a squatter government complete with a governor and legislature." *Id.* at 3.

47. Act of Mar. 2, 1861, ch. 86, § 1, 12 Stat. 239 (1861). This act was signed by President Buchanan. PATRICK M. GARRY, *THE SOUTH DAKOTA STATE CONSTITUTION* 3 (2014). Initially, Dakota Territory included areas of present-day Montana, Idaho, and North Dakota; by 1882, Dakota Territory represented the land mass today occupied by North Dakota and South Dakota. *Id.* at 4.

48. SCHELL, *supra* note 41, at 93. The first executive mansion was a log cabin. *Id.* at 94.

49. FANEUST, *supra* note 46, at 5.

50. SCHELL, *supra* note 41, at 93.

51. *Id.* at 94.

52. Blackburn, *supra* note 43, at 49.

53. SCHELL, *supra* note 41, at 94; Blackburn, *supra* note 43, at 50.

54. Blackburn, *supra* note 43, at 50.

55. MOSES K. ARMSTRONG, *THE EARLY EMPIRE BUILDERS OF THE GREAT WEST* 68-69 (1901).

creditor could not tread upon; that one fireside was sacred, and that one roof should shelter the innocent and unfortunate.⁵⁶

Responsive to this plea, the 1862 territorial legislature enacted a homestead law.⁵⁷ This first homestead exemption extended to the creditors of a decedent homestead owner's widow or minor children, but no particular homestead descent right was included.⁵⁸ A homestead spousal veto right was enacted as to the effectiveness of a mortgage, but not as to conveyances.⁵⁹ Initially, the homestead's size limit was set at eighty acres; one acre if within a municipality.⁶⁰ Three exceptions were crafted: one for taxes, a second "from execution for clerks' laborers' or mechanics' wages," and a third for mortgages.⁶¹ As the Dakota Territory's twenty-eight year history (from 1861 until 1889) unfolded, the homestead exemption was never far from the legislators' minds. In 1877, the probate code was expanded to incorporate homestead provisions.⁶² A homestead descent right was also added.⁶³

Meanwhile, South Dakota's attempts to secure statehood were protracted and frustrating.⁶⁴ The statehood story is one of "long persistency, loyal patience and repeated delay."⁶⁵ The path can be traced by more than thirty congressional bills that failed to achieve their aim.⁶⁶ By 1879, "a genuine and forceful division propaganda was inaugurated which did not abate its efforts until division [into North Dakota and South Dakota along the forty-sixth parallel] was accomplished, ten years later."⁶⁷ Congressional reticence to statehood stemmed from a Democrat-majority Congress resistant to the admission of two new states and the

56. 1 GEORGE W. KINGSBURY, HISTORY OF DAKOTA TERRITORY 202 (George Martin Smith ed., 1915).

57. 1862 Dak. Sess. Laws ch. 37, 299-301. The first statutory form of homestead, therefore, preceded the later state constitutional homestead provision in 1889. Compare *id.* (enacting a statutory homestead exemption in 1862), with S.D. CONST. art. XXI, § 4 (1889) (enacting a constitutional homestead exemption over three decades later).

58. 1862 Dak. Sess. Laws ch. 37, § 1, 299.

59. *Id.* § 2, at 299-300.

60. *Id.* § 1, at 299.

61. See *id.* §§ 2, 7, 9, at 299-301 (regarding mortgages, taxes, and mechanics', clerks', and laborers' wages, respectively).

62. See THE REVISED CODES OF THE TERRITORY OF DAKOTA §§ 128-36, at 664-66 (Geo. H. Hand, ed., 1877) (providing a chapter regarding the homestead and the allotment of personal property).

63. *Id.* § 15, at 184.

64. See generally Carrol Gardner Green, *The Struggle of South Dakota to Become a State*, in 12 SOUTH DAKOTA HISTORICAL COLLECTIONS 503 (1924) (on file with the Chilson Collection, Archives & Special Collections, University of South Dakota) (accounting the struggle for statehood from its earliest desires to the constitution's adoption in 1889); Marie Louise Lotze, *How South Dakota Became a State* (1912) (unpublished M.A. thesis, University of South Dakota) (on file with the Chilson Collection, Archives & Special Collections, University of South Dakota) (tracing South Dakota political developments).

65. Blackburn, *supra* note 43, at 77.

66. *Id.* In 1887, Dakota Territorial Governor Pierce noted the ironic contrast between the protracted, failed statehood efforts and the fresh memories of the Civil War: "We have seen people fighting to get out of the union amid the protests of the national government; it is a novel sight to see 500,000 people struggling to get into the union without being heeded or recognized." *Id.*

67. 1 SOUTH DAKOTA CONSTITUTIONAL CONVENTION: HELD AT SIOUX FALLS, SEPTEMBER, 1885 5 (Doane Robinson ed., 1907) [hereinafter DEBATES I].

resulting election of Republican congressmen.⁶⁸ Prior to statehood, three constitutional conventions were held, beginning in 1883. Although each convention produced a draft state constitution, only the third produced a text that was officially adopted. Thus, the evolution of the State Constitution through these three successive conventions—those of 1883, 1885, and, finally, 1889—illuminates the final constitutional text.⁶⁹

The 1883 Constitution would have simply provided: "The Legislature shall pass liberal homestead and exemption laws."⁷⁰ The 1883 convention, however, was unsuccessful. Congress rebuked the first organized attempt to secure statehood.⁷¹ Two years later, in 1885, the territorial legislature tried again and called for a second constitutional convention.⁷² The second constitutional convention is considered the most important of the three since the constitution it produced was, as a whole, largely identical to the official one endorsed by Congress in 1889.⁷³ The delegates considered different equity limitations. They acknowledged that, while specifying an upper limit on the homestead exemption might be inappropriate in a constitutional sense, the final object of constitutional drafting "is to limit the legislature."⁷⁴ In its final form as adopted by the second constitutional convention, no equity cap was included. Instead, the homestead provision set the upper limit (and perhaps the lower limit) of the exemption with the modifiers "wholesome," and "defined," and "limited." It read:

The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws.⁷⁵

68. JON K. LAUCK, *PRAIRIE REPUBLIC: THE POLITICAL CULTURE OF DAKOTA TERRITORY, 1879-1889* 95-96 (2010). Lauck clarifies:

Between 1881 and 1883, the Republicans held the presidency and both houses of Congress and thus had the opportunity to approve statehood for the Dakotas, but Senator Eugene Hale of Maine objected because of the failure of the city of Yankton to pay off certain railroad bonds (some of the bondholders were in Maine). During the six years following the 1882 elections, the federal government was divided along partisan lines, and thus the Democrats could block statehood for the Dakotas.

Id. (citations omitted).

69. See Catherine Lucie Zumpano Chicoine & Patrick M. Garry, *The 1885 and 1889 Constitutional Convention Debates*, 59 S.D. L. REV. 179, 179 (2014) ("Each of the proposed constitutions produced by subsequent conventions built upon the work of previous conventions. Therefore, determining the intended meaning of provisions in the 1889 Constitution may require a consultation of debates related to similar provisions in previously proposed constitutions.").

70. DEBATES I, *supra* note 67, at 35.

71. LAUCK, *supra* note 68, at 122.

72. DEBATES I, *supra* note 67, at 45; LAUCK, *supra* note 68, at 122; see also 1885 Dak. Sess. Laws ch. 33, 51-55 (providing for a constitutional convention and formation of a state constitution).

73. GARRY, *supra* note 47, at 20.

74. DEBATES I, *supra* note 67, at 557.

75. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 73 (Sioux Falls, S.T. Clover 1885) (quoting S.D. CONST. art XXI, § 4 (1885)) (on file with the Chilson Collection, Archives & Special Collections, University of South Dakota). The 1885 provision was situated at article XXI, section 4. It would stay in that precise location within the 1889 South Dakota Constitution. S.D. CONST. art. XXI, § 4 (1889).

The convention unanimously adopted the 1885 constitution.⁷⁶ Congress, however, blocked the attempt. Statehood was denied again.⁷⁷

As Dakota Territory's population grew, calls for statehood intensified.⁷⁸ In the November of 1888 national elections, Republicans swept the presidency, attained majorities in both houses of Congress, and thus politically cleared the way for statehood.⁷⁹ Grover Cleveland had been defeated by Benjamin Harrison for the presidency; President Cleveland signed the Omnibus Bill providing for statehood just before he left office.⁸⁰

The third state constitutional convention was the first one authorized by Congress.⁸¹ South Dakota could have either adopted the 1885 constitution with certain revisions or approved a new one; the former option was selected.⁸² The 1889 convention essentially re-adopted the 1885 constitution, with just a few amendments and changes.⁸³ At the convention, the exemption committee's report was adopted without debate.⁸⁴ Article XXI, Section 4 of the South Dakota Constitution in its final form reads:

The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws.⁸⁵

76. LAUCK, *supra* note 68, at 125 (citations omitted).

77. *Id.*

78. GARRY, *supra* note 47, at 6.

79. *Id.* at 26-27.

80. *Id.* Along with North Dakota and South Dakota, Washington and Montana were granted statehood. LAUCK, *supra* note 68, at 126.

81. GARRY, *supra* note 47, at 27.

82. *Id.* (citations omitted).

83. Blackburn, *supra* note 43, at 78; Lotze, *supra* note 64, at 8-9.

84. 2 SOUTH DAKOTA CONSTITUTIONAL CONVENTION: HELD AT SIOUX FALLS, JULY, 1889 178-79 (Doane Robinson ed., 1907).

85. S.D. CONST. art. XXI, § 4. This is the text as it is currently printed in the first volume of South Dakota Codified Laws, and it mirrors the 1885 constitution text. Compare *id.* (quoting the constitutional homestead provision), with *supra* text accompanying note 75 (stating an identical provision). The 1899 publication of the constitutional homestead provision by E.B. Myers & Company, however, contained a semicolon between the words "laws" and "exempting," thus:

The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws; exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general law.

1 STATUTES OF THE STATE OF SOUTH DAKOTA 50 (Edwin L. Grantham, ed., 1899) (quoting S.D. CONST. art. XXI, § 4 (1889)). The semicolon also appears in the state constitution's reprinting by the State Bindery Co. within the collection of session laws from the first state legislative session. LAWS PASSED AT THE FIRST SESSION OF THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA xlv (1890). Similarly, Dean McKusick includes the semicolon in the same location in his monograph. MCKUSICK *supra* note 1, at 1. By the time of the 1903 State Code being collected and the Constitution being reprinted, however, the semicolon had disappeared. The semicolon has remained absent ever since in subsequent reprintings. See Simmons, *supra* note 2, at 377 n.330 (noting the missing semicolon). Arguably, the omission of the semicolon could be more than simply stylistic:

Section XXI, section 4, of the South Dakota Constitution recognizes homestead and personal property exemptions. It was approved by the voters in 1889. Since then, it has

not been amended (although two proposed constitutional amendments failed). The provision originally read: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws; exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws."

The semicolon between the words "laws" and "exempting" is present in the 1889 "session laws" book where the constitution was proposed. The semicolon placement is repeated in the reprinted South Dakota Constitution in the 1890 "session laws" book. But in 1903, a new code was published—including the South Dakota Constitution—and in that printing the semicolon was omitted. Its omission carries forward to today That omission appears to be accidental.

The difference between a semicolon and no punctuation at all is significant. Without the semicolon (i.e., as the provision is currently printed) the sentence reads: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws."

The constitutional text requires two exemptions: the homestead, and personal property exemptions. The initial phrase mandating that laws be "wholesome" was clearly intended to modify both the homestead and the personal property exemptions. In other words, both the homestead and the personal property exemption laws must be "wholesome." Indeed, the South Dakota Supreme Court has construed the word "wholesome" in this constitutional context. The modifier limits the power of the legislature.

If the semicolon is dropped, however, it is much less clear whether "wholesome" modifies both the homestead and the personal property exemption. Grammatically, the omission of the semicolon means that "wholesome" might only modify the phrase immediately following it—the homestead phrase—and not the personal property phrase. Without the semicolon, one could argue that the legislature required homestead laws to be wholesome, but not personal property exemption legislation

E-Mail from author to Michael Demersseman, Chair, S.D. Code Comm'n (Mar. 9, 2017 9:55 MST) (on file with author).

The State's Code Commission took up the issue at its meeting on June 21, 2017, based upon my suggestion that the omission of the semicolon could be considered substantive and that it appeared that its omission may have been inadvertent. *Id.* The Commission considered input from Thompson Reuters' Lila Hambleton, who reasoned:

Perhaps the removal of the semicolon was not inadvertent but was done on purpose by the Commission appointed under SL 1901, ch 183. The Commission had broad revisor powers which it may have thought included getting rid of a semicolon in the Constitution that is not needed. Without doing a word for word, punctuation mark for punctuation mark comparison, we can't see whether this was the only case of a punctuation change or whether there were other revisions made by the Commission. It could be that the Commission analyzed the sentence and concluded that the semicolon didn't add anything and its use was not grammatically correct because the phrase starting with "exempting" is not a clause that can stand on its own.

With or without the semicolon, it is clear that the thing that is doing the exempting is the word "laws" that precedes it. And the noun "laws" is modified by the adjective "wholesome." Grammatically, the word wholesome does not modify anything other than the word laws. To read it the way Prof. Simmons is reading it, something other than laws would have to be doing the exempting in the case of personal property.

To change it now comes down to the present Commission concluding that the 1901 Commission either failed to catch a mistake or exceeded its authority under SL 1901, ch 183.

E-Mail from Lila Hambleton, Thompson Reuters, to Doug Decker, Code Counsel, S.D. Legislative Research Council (Apr. 6, 2017, 11:59 MST) (on file with author).

Based on Ms. Hambleton's convincing rationale and penetrating analysis, the Code Commission determined to leave the constitutional text as it currently reads in its contemporary sources—without the semicolon. *See* S.D. LEGISLATURE LEGISLATIVE RESEARCH COUNCIL, MINUTES OF THE SOUTH DAKOTA CODE COMMISSION (June, 21, 2017),

It was thus unaltered from the version enacted at the second convention. The sixty words of article XXI, section 4 remain unchanged today, although two unsuccessful attempts to revise it have been made.⁸⁶ Following South Dakota's admission into the Union, the first state legislature reenacted the territorial statutory framework for homestead laws, setting the homestead exemption equity limit at a relatively modest \$5,000.⁸⁷ Unlike sister states' constitutional homestead provisions, which have undergone numerous amendments and changes over the years, South Dakota's homestead provision retains its original unaltered language.⁸⁸

<http://www.sdlegislature.gov/docs/Interim/2017/minutes/MCOD06212017.pdf>. The Commission's minutes explain:

Professor Tom Simmons of the University of South Dakota Law School has noted what appeared to be an error in the reprinting of the South Dakota Constitution in 1903 and asked the Code Commission to review what he'd found.

Article XXI, Section 4 of the South Dakota Constitution was approved by voters in 1889 and recognizes homestead and personal property exemptions. A semicolon was present between the words "laws" and "exempting" in the 1889 "Session Laws" book where the Constitution was proposed. The semicolon placement is repeated in the reprinted South Dakota Constitution in the 1890 "Session Laws" book. In 1903 a new code was published—including the South Dakota Constitution—and the semicolon was omitted in that printing; the omission carries forward to today.

In an email to Chair DeMersseman, Professor Simmons commented that the omission of the semicolon made a substantive difference in the text that the commission may need to address.

Additional research by Ms. Hambleton, a Thomas [sic] Reuters editor for the South Dakota Code, indicated the removal of the semicolon may not have been inadvertent but was done on purpose by the Commission appointed under SL 1901, ch 183. The Commission had broad revisor powers to include removing an unnecessary semicolon in the Constitution. Another explanation is that the 1901 Commission analyzed the sentence and concluded the semicolon did not add anything and its use was not grammatically correct because the phrase starting with "exempting" is not a clause that can stand on its own.

With or without the semicolon, it is clear that what is doing the exempting is the word "laws" that precedes "exempting." Hambleton also noted the noun "laws" is modified by the adjective "wholesome" which grammatically does not modify anything other than the word "laws". [sic] To read it the way Professor Simmons is reading it, something other than "laws" would have to be doing the exempting in the case of personal property.

The Code Commission reviewed and discussed the commentary from Professor Simmons and Ms. Hambleton regarding the missing semicolon. They generally agreed with Ms. Hambleton and took no action on the issue because there was not sufficient evidence to conclude that the 1901 Commission either failed to catch a mistake or exceeded its authority under SL 1901, ch 183.

Id.; see also S.D.C.L. § 2-14-8 (2012) ("Punctuation shall not control or affect any provision when any construction based on such punctuation would not conform to the spirit and purpose of such provision.").

86. See Simmons, *supra* note 2, at 379 (narrating the two failed attempts at constitutional homestead revision in 1894 and again in 1975).

87. 2 STATUTES OF THE STATE OF SOUTH DAKOTA § 6345, at 1593-94 (Edwin L. Grantham, ed., 1899).

88. Texas, for example, has modified its state constitutional homestead exemption language over time, as has Florida. See Julie B. Schroeder, Comment, *Perspectives on Urban Homestead Exemptions—Texas Amends Article XVI, Section 51*, 15 ST. MARY'S L.J. 603 (1984) (describing a Texas constitutional amendment in 1983); TEX. CONST. art. XVI, § 51 (amended 1999) (providing that a rural homestead may exceed 200 hundred acres); Donna Litman Seiden, *There's No Place Like Home(Stead) in Florida—Should it Stay that Way?*, 18 NOVA L. REV. 801, 824-28 (1994) (tracing the numerous amendments to Florida's constitutional homestead exemption); see also *State Homestead Exemption Laws*, 46 YALE L.J. 1023, 1037 n.106 (1934) (noting failed homestead constitutional amendments).

III. JURISPRUDENCE POST-1889

With the state constitutional homestead provision in place, jurisprudence began to accumulate. This section provides summaries of eighteen cases which invoke, either in passing or directly, the constitutional limits and mandates of statutory homestead law. The cases begin six years following statehood with the 1895 decision of *Sundback v. Griffith*.⁸⁹ The cases conclude—for the time being—with a 2006 decision, *Wisner v. Palvin*.⁹⁰ Some of these decisions invoke homestead constitutional protections, others exempt personalty. Because of the linkage and proximity of constitutional homestead and personal property exemptions in the text of article XXI, section 4, both must be considered in tandem.

A. *SUNDBACK V. GRIFFITH* (S.D. 1895)

In *Sundback v. Griffith*, the South Dakota Supreme Court considered the effect of the constitutional exemptions provision on a pre-constitutional statute suspending exemptions in the case of a debt incurred under false pretenses.⁹¹ There, the defendant had misrepresented the extent and value of his property to obtain credit.⁹² The plaintiff obtained a money judgment for the sum of the debt obtained under false pretenses and levied on property which the defendant claimed as exempt.⁹³ The nature of the property claimed as exempt is unidentified in the opinion. It may or may not have included the homestead exemption. It may have been exempt personalty.

The court considered the application of section 5139 of South Dakota law, which provided for the suspension of exemption protections “against an execution or other process issued upon a debt incurred for property obtained under false pretenses.”⁹⁴ The plaintiff argued that the State Constitution had served to invalidate this exception to exemptions.⁹⁵ Concerned that adopting this conclusion would serve to impair or even destroy preexisting contractual rights, the court reasoned that the constitution had not worked a repeal of the pre-

89. 63 N.W. 544 (S.D. 1895).

90. 2006 SD 64, ¶ 5, 719 N.W.2d 770.

91. *Sundback v. Griffith*, 63 N.W. 544, 545 (S.D. 1895).

92. *Id.* More accurately, the defendant had defaulted on the plaintiff's complaint alleging that the debt had been obtained because of misrepresentations. *Id.* The court denied the defendant's motion for relief from the judgment, where he claimed that his representations had been truthful; this denial was affirmed on appeal. *Id.*

93. *Id.*

94. *Id.* (quoting THE COMPILED LAWS OF THE TERRITORY OF DAKOTA § 5139, at 880 (E.W. Caldwell & Charles H. Price, eds., 1887) (current version at S.D.C.L. § 43-45-9 (2004))). Today, that exception no longer applies to the homestead and other absolute exemptions. *Simmons*, *supra* note 2, at 352.

95. *Sundback*, 63 N.W. at 545-46.

constitutional statute, at least as to pre-constitutional contracts.⁹⁶ The court left for another day “the question of its general effect upon such section.”⁹⁷

B. *SKINNER V. HOLT* (S.D. 1896)

The next frontal state constitutional challenge to South Dakota exemptions expressly implicated the personal property exemptions. John Skinner had died without a will in 1893, survived by his wife Bertha and their two minor children.⁹⁸ The wife and two children were the sole heirs in intestacy, and the only asset of the estate was a \$2,000 policy of insurance on John Skinner’s life, payable to his estate.⁹⁹ After the payment of certain preferred claims, there remained enough to pay his creditors \$0.63 of each \$1.00 owed; his estate was partially insolvent.¹⁰⁰ The trial court had denied the creditors’ claim on account of a state statute which provided:

A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liabilities from any of his or her debts.¹⁰¹

The South Dakota Supreme Court read this statute against article XXI, section 4, and rejected the statute as unconstitutional. The court found that “[a] law which exempts to the debtor or his family all the money obtained from the policies of all the life insurance companies in existence . . . is manifestly unreasonable”¹⁰² It “is neither ‘wholesome’ in character nor ‘reasonable’ as to amount, and is far too generous to be just.”¹⁰³ Although the Constitution

96. *Id.* at 546.

97. *Id.*

98. *Skinner v. Holt*, 69 N.W. 595, 595 (S.D. 1896).

99. *Id.*

100. *Id.* at 596.

101. *Compare id.* (quoting 1890 S.D. Sess. Laws ch. 51, § 21, 130) (“A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liabilities from any of his or her debts.”), with S.D.C.L. § 43-45-6 (Supp. 2017) (recognizing an exemption for up to \$10,000 in life insurance proceeds payable to a decedent’s estate when survived by “a surviving widow, husband, or minor child or children”), and S.D.C.L. § 58-12-4 (2004) (exempting \$20,000 of life insurance proceeds for a surviving spouse or children, protecting \$20,000 “of an endowment policy, payable to the insured on attaining a certain age . . . from the debts of such spouse or children,” as well as exempting “the avails of any life or health insurance or other sum of money not exceeding [\$20,000] made payable by any mutual aid or benevolent society to any member or beneficiary spouse or children”), and S.D.C.L. § 54-9-6 (2017) (providing that “insurance upon the life of the assignor, to the extent of [\$5000], do[es] not pass to the assignee by a general assignment for the benefit of creditors”); see also S.D.C.L. § 58-12-6 (2004) (proclaiming a general exemption for annuity contracts, subject to certain exceptions).

102. *Holt*, 69 N.W. at 597.

103. *Id.* (citing *How v. How*, 61 N.W. 456 (Minn. 1894)). The *How* court reasoned that an unlimited life insurance exemption was unconstitutional under the Minnesota Constitution’s dictate that only a “reasonable” amount of personal property may be exempt. *How*, 61 N.W. at 457.

requires "reasonableness" as to the amount of exempt personal property, it lacks that same requirement as to the homestead. The requirement that exemptions be "wholesome" applies both to personal property exemptions and the homestead exemption.¹⁰⁴

Skinner demonstrates that there are constitutional constraints on exemptions which grant the debtor an "unwholesome" (i.e., excessive) degree of protection from creditors. An unlimited exemption, the court clarified, could not constitutionally qualify as wholesome.¹⁰⁵ This same reasoning would be resurrected 110 years later in the *Davis* decision.¹⁰⁶

C. *KARCHER V. GAINS* (S.D. 1900)

In 1885, four years before South Dakota's statehood, Frank Keys and his wife Hattie borrowed \$800 from Sarah Karcher.¹⁰⁷ Frank and Hattie signed a promissory note and a mortgage to their Pierre home occupied as their homestead.¹⁰⁸ When Frank and Hattie defaulted, Sarah foreclosed on the mortgage; following a two-year period of redemption, a sheriff's deed was issued to her.¹⁰⁹ Upon Sarah's forcible entry and detainer action when Hattie refused to vacate the premises, Hattie answered that the homestead exemption barred the judicial sale of her home.¹¹⁰

The South Dakota Supreme Court disagreed. It noted the constitutional language which exempts the debtor "from forced sale" of the homestead.¹¹¹ When the owner has authorized a lender, in the case of default, to sell the home, a sale conducted pursuant to the mortgage is not forced, but voluntary.¹¹² The court explained that "[w]hether the sale is voluntary or forced depends, not upon the mode of its execution, but upon the presence or absence of the consent of the owner."¹¹³ The owner has the right to mortgage her homestead; by doing so, the owner voluntarily consents to the homestead's sale if she defaults.¹¹⁴

104. See S.D. CONST. art. XXI, § 4 (mandating application of "wholesome laws exempting from forced sale a homestead . . . and a reasonable amount of personal property").

105. Compare *Holt*, 69 N.W. at 596 (rejecting a statute exempting any of debtor's life insurance), with *Schuler v. Johnson*, 246 N.W. 632, 634 (S.D. 1933) (upholding a statute exempting \$5000 worth of life insurance proceeds).

106. See *infra* Part III.R (providing summary of *Davis* opinion).

107. *Karcher v. Gans*, 83 N.W. 431, 431 (S.D. 1900).

108. *Id.* At some point, the couple divorced, as the opinion notes that Hattie Gans, "who was then [Frank Keys'] wife," executed the mortgage and note with her husband. *Id.* (emphasis added).

109. *Id.* at 432. State statutes then provided for a one-year period of redemption with an additional year if interest was paid. *Id.*

110. *Id.*

111. *Id.* (emphasis added) (quoting S.D. CONST. art. XXI, § 4).

112. *Karcher*, 83 N.W. at 432.

113. *Id.*

114. See *id.* (quoting SEYMOUR D. THOMPSON, A TREATISE ON HOMESTEAD AND EXEMPTION LAWS 395 (St. Louis, F.H. Thomas & Co. 1878)) ("The general rule is that statutes creating a homestead exemption do not operate to restrain in any particular the voluntary alienation or mortgage of the homestead . . .").

D. *SOMERS V. SOMERS* (S.D. 1914)

In three successive decisions, all captioned *Somers v. Somers*, the South Dakota Supreme Court construed the phrase "all heads of families" contained in article XXI, section 4.¹¹⁵ The legislature had defined the words "heads of families" expansively both before and after the adoption of the 1889 South Dakota Constitution.¹¹⁶ The definition included childless widows and widowers and even unmarried persons without children.¹¹⁷ It proclaimed that "[e]very family, whether consisting of one or more persons . . . shall be deemed and held to be a family" for purposes of the homestead exemption.¹¹⁸ The court declined to second-guess the legislature's expansive definition of a family:

The homestead right . . . within constitutional limitations, is one clearly a matter of legislative discretion, and may be conferred upon any person or class of persons of its own choosing. Where the right is conferred upon the head of a family, it may declare who shall be considered the head of a family. Where it is conferred upon the family, it may declare of whom the family shall consist.¹¹⁹

The court, however, found under the facts presented, that a married woman—estranged from her husband—did not qualify as the head of a family, despite the fact that she lived with her children.¹²⁰

Lafayette Somers homesteaded on a quarter section of land in Brule County, South Dakota in 1881, receiving a patent deed in 1883.¹²¹ In 1885, he conveyed the land, on which he lived with his spouse and young children, to his wife, Elizabeth Ann Somers.¹²² In 1883, following a violent quarrel, he abandoned her.¹²³ Although they never reconciled, they remained married until Elizabeth's death twenty-one years later.¹²⁴

By 1889, Elizabeth Somers' children were older, and so she filed a homestead claim on another parcel of ground in an adjoining county.¹²⁵ To do so, she crossed the Missouri River from Brule County (on the east bank) to Lyman County (on the west).¹²⁶ After proving up on the claim, she moved back to the original

115. *Somers v. Somers*, 131 N.W. 1091, 1093 (S.D. 1911) [hereinafter *Somers I*]; *Somers v. Somers*, 146 N.W. 716, 718 (S.D. 1914) [hereinafter *Somers II*], on rehearing 149 N.W. 558, 560 (S.D. 1914) [hereinafter *Somers III*].

116. See *Somers III*, 149 N.W.2d at 560 (parsing the legislative changes with regards to its use of the terms "families" and "heads of families").

117. *Id.*

118. *Somers II*, 146 N.W. at 718 (quoting S.D. Rev. Code Pol. § 3235 (1903)).

119. *Id.*

120. See *Somers I*, 131 N.W. at 1095 ("Who was the head or manager in the year 1908 at time [sic] the deed defendants was executed? Was it not Fred Somers rather than his mother?").

121. *Somers II*, 146 N.W. at 717; *Somers I*, 131 N.W. at 1092.

122. *Somers I*, 131 N.W. at 1092.

123. *Somers II*, 146 N.W. at 717; *Somers I*, 131 N.W. at 1092.

124. *Somers I*, 131 N.W. at 1092.

125. *Id.* at 1094-95.

126. *Id.* Elizabeth Somers "had a house on that homestead and a little furniture She had a stove, bed, she slept there and lived there." *Id.* at 1095.

homestead in Brule County.¹²⁷ She lived on the original homestead with her unmarried son along with her married son and his wife.¹²⁸ She remained there for the rest of her life.¹²⁹

In 1908, perhaps sensing her mortality, Elizabeth executed a deed of the original Brule County homestead property to her sons, Peolia and Fred, delivering the deed to a Chamberlain, South Dakota bank to be held in escrow until her death.¹³⁰ The next year, she died and the deed was released and recorded.¹³¹ Lafayette Somers, the long absent husband, then reappeared on the scene and brought a quiet title action against his sons, asserting a life estate in the original homestead property.¹³² He averred that the 1908 deed from Elizabeth to her two sons was void since he, as her husband, had not joined in the conveyance.¹³³ Lafayette therefore claimed inheritance rights to the property (amounting then to one-third of Elizabeth's estate) in addition to a life estate of the homestead on account of his spousal homestead descent rights.¹³⁴ The trial court found in his favor as to his assertion of intestate inheritance rights, but against his claim of a life estate by means of homestead descent.¹³⁵ The South Dakota Supreme Court reversed.¹³⁶

When Elizabeth Somers had left her original Brule County homestead and moved onto the second parcel of land across the river for several years, "she of necessity abandoned her homestead rights in the land involved" in the husband's quiet title action.¹³⁷ The question then became whether Elizabeth Somers had reacquired homestead rights in the first parcel when she returned to it; whether she could be properly characterized as the "head of the family."¹³⁸ The Supreme Court remanded for a determination on this point.¹³⁹

On remand, the trial court received additional testimony.¹⁴⁰ It found that Elizabeth Somers, upon returning to her first home in 1906, had acquired a new homestead right.¹⁴¹ The trial court found that Elizabeth Somers had "resumed and exercised the same authority and control over [the land] as she had exercised at the time her husband left her in 1888 . . ."¹⁴² Although her sons were grown, she

127. *Id.* at 1092.

128. *Somers II*, 146 N.W. at 718.

129. *Somers I*, 131 N.W. at 1094.

130. *Id.* at 1092.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Somers II*, 146 N.W. 716, 718, 717 (S.D. 1914).

135. *Somers I*, 131 N.W. at 1092.

136. *Id.* at 1095.

137. *Id.* at 1094. On this point, the South Dakota Supreme Court reasoned, the trial court had erred. *Id.* Lafayette Somers, the court reasoned, had also lost his ability to claim homestead veto rights in the original homestead when he abandoned the land, his wife, and his young children without justification. *Id.*

138. *Id.*

139. *Id.* at 1095.

140. *Somers II*, 146 N.W. 716, 717-18 (S.D. 1914).

141. *Id.*

142. *Id.* at 718 (alteration in original).

still occupied the status of the head of the family. Therefore, her conveyance of that property—not having been joined by her estranged husband Lafayette—was void.¹⁴³ But once again, the South Dakota Supreme Court reversed in the second *Somers* decision.¹⁴⁴ The findings, the court concluded, were clearly against the evidence in the record.

The supreme court held that Elizabeth Somers was merely living with her adult sons, not acting as the head of a family.¹⁴⁵ The court suggested that income production and control of household decisions was the test for determining who was the family head: “The evidence conclusively shows that when she returned to the land in 1906, it was occupied by a married son and his wife, and another unmarried son, 27 years of age, living together as one family, and entirely self-supporting.”¹⁴⁶ The court found that Elizabeth did not “assume the functions of head of the family then occupying the land.”¹⁴⁷ Instead, Elizabeth’s two adult sons “exerted control, use, and management of the land”¹⁴⁸ Because Elizabeth had failed to “resume control of the land,” she failed to qualify as a “head of family” and therefore failed to achieve homestead status.¹⁴⁹ The court reversed and remanded for yet another new trial.¹⁵⁰ As a result, Lafayette Somers’ attempt to invalidate his wife’s deed to her sons was defeated.¹⁵¹

The *Somers* trio of decisions are frustrating in that they reveal a patriarchal view of Elizabeth Somers. Though the eventual outcome favored her property rights, it was reached only by a determination that the original homestead did not resume its homestead character. This determination thereby validated Elizabeth’s deed to her sons and freed her from the homestead veto constraints that would otherwise have been retained by her absent husband.

With grit and determination, Elizabeth ejected an abusive husband, raised small children on her own, and ventured out to secure additional property by proving upon an isolated parcel of ground, finally returning to her original home. Based simply on these facts, a picture of a woman of courage emerges. Despite what ought to be a deferential review of the factual findings of the lower court, the South Dakota Supreme Court felt compelled to reverse a finding that Elizabeth could have acted as the head of a household when she rejoined two of her sons in the original family home. Notably, the Supreme Court failed to cite any particular facts or aspects of the record to justify its reversal on this finding.¹⁵² Instead, the

143. *Id.* at 717.

144. *Id.* at 719.

145. *Id.* at 718.

146. *Id.*

147. *Id.*

148. *Id.* at 719.

149. *Somers III*, 149 N.W. 558, 560 (S.D. 1914).

150. *Somers II*, 146 N.W. at 719.

151. In the third *Somers* decision, the court affirmed *Somers II* upon a motion for rehearing. *Somers III*, 149 N.W. at 560-61.

152. See *Somers I*, 131 N.W. 1091, 1094-95 (S.D. 1911) (recounting defendants’ testimony but acknowledging that some evidence “might be construed as showing the mother to be the head of the family”). Indeed, Peolia Somers testified that, after his mother’s return to her original home, she “lived on the old home the same as she did before she left” *Id.* at 1095.

court simply assumed that Elizabeth's older son must have acted as the "head" on account of his gender.¹⁵³

Possible patriarchal prejudices aside, the *Somers* decisions demonstrate two key points. The first point is the South Dakota Supreme Court's willingness to find that a spouse's homestead descent rights can be forfeited by a wrongful abandonment. "There is no question," the court intoned in *Somers I*, "but that the trial court rightly held [Lafayette Somers] had forfeited all homestead rights in and to the premises; but, to support such a holding, the court should have made a finding to the effect that the husband's abandonment was wrongful."¹⁵⁴ However, abandonment would not disturb intestacy rights. Thus, if Elizabeth—after herself abandoning the original homestead to prove up a new claim on the opposite side of the Missouri River—reacquired a homestead as the head of her family when she returned, then her unilateral conveyance of that property to her sons would be invalid, and a portion of it would pass to Lafayette by means of intestacy.¹⁵⁵ The court thus expressed a willingness to allow the loss of homestead descent rights through wrongful abandonment, but not homestead veto rights.

E. *HANSEN V. HANSEN* (S.D. 1918)

In the *Hansen* case, Bergetta Hansen's husband, Nils, had died. Nils was survived by a minor child, Melvin, Bergetta herself, and other heirs.¹⁵⁶ Bergetta petitioned the probate court to set aside 158.10 acres of her husband's property as a homestead for her lifetime use and also for Melvin's use, during his minority.¹⁵⁷ The other heirs objected, arguing that because the homestead exemption protections from creditors was extended (then) only to the extent of \$5,000 in value, the widow and minor's homestead claim should be similarly capped, thereby reducing the acreage that could be claimed.¹⁵⁸

153. *Somers III*, 149 N.W. at 560. The court claimed that "[t]he preponderance of the evidence shows that [the mother] did not resume control of the land, nor did she become the head of the family She returned to and became a dependent upon her children" *Id.* For other case examples regarding state homestead provisions and gender-stereotyping, see *Bessemer Props., Inc. v. Gamble*, 27 So. 2d 832, 833 (Fla. 1946) (reasoning that a non-owner husband could claim homestead exemption status without holding title since he held an equitable interest by virtue of having contributed to his wife's ownership interest); *Howard v. Marshall*, 48 Tex. 471, 479-80 (Tex. 1878) (holding that a single man living with his former slaves does not constitute a "family" under Texas homestead law). Nineteenth century resistance to finding that a woman could function as a head of a family finds expression in other decisions summarized by Alison Morantz. Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 260-62 (2006).

154. *Somers I*, 131 N.W. at 1093 (citations omitted).

155. See *id.* (explaining that "if the wife had died without conveying the lands in question by deed or will, [Lafayette Somers] would, in spite of all his wrongdoing, have succeeded" to a share of her estate in intestacy).

156. *Hansen v. Hansen*, 166 N.W. 427, 427 (S.D. 1918); see also *Hansen v. Hansen*, 161 N.W. 188, 188-89 (S.D. 1917) (denying motion to dismiss appeal on the ground that the notice of appeal was untimely).

157. *Hansen*, 166 N.W. at 427.

158. *Id.*

The court rejected this argument, holding that the \$5,000 cap on homestead exemption protections from creditors "[did] not necessarily imply that the homestead can in no case exceed \$5,000 in value, or that the heirs have the same right to the excess over \$5,000 in value that is given to an execution creditor"¹⁵⁹ The heirs' misunderstanding, the court ventured, could be traced to the state constitutional provision admonishing the legislature to define and limit the homestead's extent.¹⁶⁰ Because the \$5,000 limit was contained within a chapter titled "Exemptions," it applied to limit the value of exemption protections from creditors.¹⁶¹ In contrast, the only limitation on homestead protections for surviving spouses and minor children were acreage limitations.¹⁶² Justice McCoy penned a rather truculent dissent.¹⁶³

F. O'LEARY V. CROGHAN (S.D. 1919)

In 1911, the South Dakota Legislature enacted chapter 150, providing:

Nothing in this chapter shall be so construed as to exempt any personal property from mesne or final process for laborers' or mechanics' wages or physicians' bills, or for the necessities of life, including only food, clothing and fuel, provided for the debtor or his family, except property absolutely exempt: *** Provided, that in case of physicians' bills or for necessities of life, there shall also be exempt household and kitchen furniture, including stoves, of the debtor, to an amount in value not exceeding four hundred dollars, and also two cows; provided, however, that the collection of physicians' bills shall not be enforced by legal process in less than six months from the accruing thereof except when the debtor is about to remove from the state.¹⁶⁴

In September of 1917, James O'Leary commenced an action against Owen Croghan on the basis of a promissory note and obtained a judgment against him

159. *Id.* at 428.

160. *Id.* (citing S.D. CONST. art. XXI, § 4).

161. *Id.* at 430.

162. *Id.*

163. *See id.* at 430-31 (McCoy, J., dissenting). Justice James McCoy reasoned that both the acreage limitation and the value limitation were coextensive. *Id.* at 431. He contended that, under the majority's reasoning,

a decedent who had an heir 60 years of age by a former wife, and who left surviving him a second wife 30 years of age, and where the only estate left by the decedent was 160 acres of land, of the value of \$1,000,000, outside the limits of a town plat, the 60 year old heir might be penniless, and might be thus deprived of his inheritance during his entire lifetime, by a holding that the surviving second wife could hold a homestead valued at \$1,000,000 during her lifetime.

Id. Justice McCoy was "loath to believe that the legislative framers of our homestead and probate laws ever contemplated any such unjust, absurd, or ridiculous results." *Id.* McCoy's expatiation, however, has not found additional adherents.

164. *O'Leary v. Croghan*, 173 N.W. 844, 845 (S.D. 1919) (alteration in original) (quoting S.D. Rev. Code § 2668 (1919)).

in the amount of \$552.49.¹⁶⁵ Owen Croghan was the head of a household consisting of himself, his wife, and his minor children.¹⁶⁶ The note had been given on account of groceries.¹⁶⁷ All of Owen's property, including "[t]hree small pigs," he claimed as exempt.¹⁶⁸ His creditor cited to the recently enacted chapter 150, suspending exemptions for creditors arising out of necessities and food.¹⁶⁹ Owen countered that the statute was invalid on account of the constitutional protections of a homestead and reasonable amounts of personalty.¹⁷⁰ Owen also cited the 14th Amendment of the U.S. Constitution as well as the privileges and immunities clause of the South Dakota Constitution.¹⁷¹ "The constitution," Owen asserted, "says the legislature shall pass laws exempting a reasonable amount of property from levy and sale. In the case of a grocery bill, as in this case, there are no exemption to Mr. Croghan."¹⁷²

Agreeing with Owen, the court in *O'Leary v. Croghan* set aside chapter 15 as unconstitutional, explaining:

The size and value of the homestead and the kind and value of the personal property that shall be exempt is left entirely to the wisdom of the Legislature. Its judgment on these matters is final. But whatever the value of the homestead and whatever the kind and value of the personal property that is allowed as exempt must be allowed to all debtors alike. The discriminations that have been attempted by the Legislature may be wise and in the interest of the public at large, but until the Constitution has been changed the Legislature is without authority to make them.¹⁷³

The court was troubled that one class of creditors should have advantages over another class, and that the amount of exemption should depend upon the nature of the debt.¹⁷⁴ None of the classifications—or "discriminations"—were authorized by article XXI, section 4, and they were expressly prohibited by the privileges and immunities clause of the South Dakota Constitution.¹⁷⁵ Although the court spoke

165. Appellant's Brief at 15, *O'Leary v. Croghan*, 173 N.W. 844 (S.D. 1919) (No. 4530).

166. *Id.* at 6-8.

167. *Id.* at 15-16.

168. *Id.* at 6-7. No homestead was involved. *Id.*

169. See Respondent's Brief at 3-4, *O'Leary v. Croghan*, 173 N.W. 844 (S.D. 1919) (No. 4530) (providing the legislative history of the law in question).

170. Appellant's Brief, *supra* note 165, at 18-19 (quoting S.D. CONST. art. XXI, § 4 (1889)).

171. *Id.* at 18-19, 34 (citing U.S. CONST. amend XIV; S.D. CONST. art. VI, § 18).

172. *Id.* at 27. Owen Croghan also cannily argued that legislative exceptions to personal property exemptions violated the state constitutional requirement that South Dakota's legislature enact "wholesome" exemption laws. See *id.* at 33 ("Would the Court call a law 'wholesome' that by manipulation deprives the debtor of every dollar in the world?").

173. *O'Leary v. Croghan*, 173 N.W. 844, 845 (S.D. 1919).

174. See *id.* (recognizing Owen Croghan's contention "that this law divides creditors into several classes").

175. *Id.* (citing S.D. CONST. art. VI, § 18, art. XXI, § 4). Article VI, Section 18 of the South Dakota Constitution provides: "No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. CONST. art. VI, § 18.

of "discriminations" among debtors, the challenged legislation created classifications of creditors, not debtors.¹⁷⁶

The court also reasoned that if the legislature could graft exceptions to the exemption laws (such as "a debt due for 'necessaries'"), then "it could except any or all other debts"¹⁷⁷ In this way, the legislature would have the power to "deprive a debtor of all benefit of the Constitution on this subject."¹⁷⁸ The holding of *O'Leary* thus rested both on the privileges and immunities clause and the constitutional homestead protections.

Justice Smith authored a concurring opinion.¹⁷⁹ He also blended a privileges and immunities analysis with an article XXI, section 4 discussion.¹⁸⁰ With regards to the latter, he emphasized that "[g]ranting an exemption to a debtor, with a provision under which it may be immediately seized and sold for a debt or class of debts, is equivalent to denying any exemption to such person."¹⁸¹ Justice Whiting, joined by Justice Gates, dissented in a lengthy opinion.¹⁸² They opined that the legislature had plenary powers to define a reasonable amount of personalty entitled to exemption status as well as circumstances and conditions under which the exemption applied.¹⁸³

G. SWAN V. GUNDERSON (S.D. 1927)

Swan merits brief mention here for its reference to the state constitutional homestead provision in making its point.¹⁸⁴ In *Swan*, Rasmus Peterson's will left a bequest of realty to his daughter, Ida Swan, among others, but purported to protect the bequest from the reach of any of her creditors.¹⁸⁵ The court rejected

176. See *O'Leary*, 173 N.W. at 846 (Smith, J., concurring) (emphasis added) ("The statute is a classification of *debts* and not of debtors.").

177. *Id.* at 846 (majority opinion) (citations omitted).

178. *Id.* (citations omitted).

179. *Id.* at 846 (Smith, J., concurring).

180. *Id.*

181. *Id.*

182. *Id.* (Whiting, J., dissenting).

183. Compare *id.* at 846-47 ("[T]he Legislature has plenary power to declare what to it seems "a reasonable amount of personal property" (section 4, art. 21, Const.) to be allowed as exempt upon certain "terms"—that is, under any certain named conditions, state, or circumstances—just so long as it applies to all persons alike when the conditions, state, or circumstances are the same."), with S.D. A.G. Op. 85-01 (1985) (quoting 40 AM.JUR.2d *Homestead* § 7) ("Subject to constitutional limitations, the legislative branch of government has the plenary power to create rights of homestead."). The Attorney General Opinion's quoted language has been deleted in the current text of the encyclopedia which states:

The legislature may, without violating constitutional rights of property take away a person's right to convey or encumber homestead property. A statute authorizing the forced sale of a homestead for a mortgage debt does not violate the state constitutional provision creating the homestead exemption, nor does it prevent debtors from enjoying the fruits of the federal bankruptcy law, and thus deprive them of their homestead property without due process.

40 AM.JUR.2d *Homestead* § 7 (2018).

184. See *Swan v. Gunderson*, 215 N.W. 884, 885 (S.D. 1927) (quoting S.D. Rev. Code § 2569 (1919)) (directing lower court to enter order sustaining defendant's demurrer).

185. *Id.* at 884-85. A codicil to the will stated: "I desire to go to each one respectively, as stated in the terms of the will, free and clear from any debts, or obligations for which any one of them might be

the effectiveness of the language, citing Article XXI, Section 4 of the South Dakota Constitution as it "impliedly contemplates that all property of a debtor, excepting the property exempted" such as a homestead, shall be subject to creditor claims against the debtor's property.¹⁸⁶

H. *FIRST NATIONAL BANK OF FRANKFORT V. HALSTEAD* (S.D. 1930)

The *Halstead* decision invokes exempt personalty. McClellan Halstead held a \$3,000 benefit certificate in a fraternal society, the Modern Woodmen of America, on which he named his wife Hannah as beneficiary.¹⁸⁷ After he died, the First National Bank attempted to garnish on the certificate in order to satisfy a \$3,553.02 judgment against the widow.¹⁸⁸ She claimed that the certificate was exempt.¹⁸⁹ The bank asserted that the exemption was unconstitutional.¹⁹⁰ The court disagreed.

Although the bank-creditor framed several arguments, the most germane of them was that because the exemption for fraternal benefits had no dollar cap, it violated the constitutional requirement that "the kind and value" of the personal property exemptions be "fixed" by statute.¹⁹¹ Although the exemption statute failed to place any limit on the amount of the benefit enjoying exempt status, the court took "judicial notice that in almost all fraternal associations the amount of the insurance or benefit is limited to a comparatively small amount"¹⁹² Moreover, the record disclosed that Modern Woodmen's articles limited insurance to \$3,000.¹⁹³

The court acknowledged the bank's argument that if this reasoning were accepted then "there is nothing to prevent one from joining a large number of fraternal benefit societies and procuring the maximum benefit in each, and thus claim as exempt twenty or thirty thousand dollars or more."¹⁹⁴ Such facts, however, were not before the court. Constitutional questions, the court concluded, ought not to be determined upon suppositions.¹⁹⁵ *Halstead* is difficult to reconcile

liable at the time of my death." *Id.* at 884. The court ventured that the language might simply be precatory. *Id.* at 885.

186. *Id.* The court declared "[i]t is elementary that no testator or other nonsovereign donor, by a condition or restriction in a devise or gift of the absolute legal title to real property, can take such property out from under the operation of these statutes and pro tanto repeal them." *Id.* (citing HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY* § 592 (2d ed. 1920)).

187. *First Nat'l Bank of Frankfort v. Halstead*, 229 N.W. 294, 295 (S.D. 1930).

188. *Id.*

189. *Id.* at 295-96 (citing 1919 S.D. Sess. Laws ch. 232, § 21, 247).

190. The bank also argued that the exemption for insurance from a fraternal organization violated Article III, Section 23 of the South Dakota Constitution and the Preamble to the U.S. Constitution. *Id.* at 296.

191. *Id.* at 296-97 (quoting S.D. CONST. art. XXI, § 4); see also *supra* text accompanying note 85 (discussing article XXI, section 4).

192. *Halstead*, 229 N.W. at 296.

193. *Id.* at 297.

194. *Id.*

195. See *id.* (citing *Rowe v. Stanley Cty.*, 219 N.W. 122, 124 (S.D. 1928)) ("[C]onstitutional questions should not be determined upon supposititious cases.").

with the 1896 decision of *Skinner v. Holt*, unless *Halstead* simply rests on its factual record showing that as a practical matter the industry itself limited the value of the personalty in question.¹⁹⁶

I. *SCHULER V. JOHNSON* (S.D. 1933)

Schuler v. Johnson also concerned a life insurance benefit.¹⁹⁷ Following the South Dakota Supreme Court's decision in *Skinner v. Holt* declaring an unlimited exemption for life insurance proceeds unconstitutional, the legislature amended the statutory exemption and fixed the limit at \$5,000.¹⁹⁸ Catherine Schuler obtained a judgment against Ed Johnson in the amount of \$1,712.50.¹⁹⁹ Following a debtor's exam, it appeared that Ed's only property was a life insurance policy through Northwestern Mutual Life Insurance Company with a face value of \$10,000 and a cash surrender value of \$4,520.²⁰⁰ The current beneficiaries designated on the policy were Ed's children, his wife having recently passed on.²⁰¹ The trial court ordered Ed to surrender the policy for its cash value in order to satisfy his debt to Catherine.²⁰² The South Dakota Supreme Court reversed, upholding the constitutionality of the revised life insurance exemption statute and noting:

Within constitutional limitations the kind and amount of personal property that shall be exempt from the claims of creditors is a question of legislative policy. Section 4, art. 21, State Constitution, imposes the duty upon the Legislature of exempting from forced sale a reasonable amount of personal property, and of determining the kind and value of such property by law. Assuming without so determining, that the reasonableness of the action of the Legislature, when in the exercise of its judgment and discretion it has definitely fixed the maximum amount of a particular kind of personal property that may be exempted, is not final and conclusive, but is subject to judicial review, we are of the view that the amount fixed by the [statute] does not contravene the provisions of the Constitution.²⁰³

Thus, Ed was allowed to retain the life insurance policy, despite the fact that he could freely change the beneficiary designation from his children to other

196. See generally *Skinner v. Holt*, 69 N.W. 595 (S.D. 1896) (invalidating an unlimited exemption for life insurance).

197. *Schuler v. Johnson*, 246 N.W. 632 (S.D. 1933) [hereinafter *Schuler I*]; see also *Schuler v. Johnson*, 261 N.W. 905 (S.D. 1935) (constituting a second appeal concerning the ability of the creditor to recover from homestead property) [hereinafter *Schuler II*].

198. *Schuler I*, 246 N.W. at 633; see also *Skinner*, 69 N.W. at 596-97 (finding an unlimited exemption for life insurance to be "manifestly unreasonable").

199. *Schuler I*, 246 N.W. at 633.

200. *Id.*

201. *Schuler II*, 261 N.W. at 906; *Schuler I*, 246 N.W. at 633.

202. *Schuler I*, 246 N.W. at 633.

203. *Id.* at 634-35.

individuals. The creditor later attempted—again, unsuccessfully—to levy upon Ed's homestead.²⁰⁴

J. *IN RE CLOUSE'S ESTATE* (S.D. 1934)

Although the two *Clouse's Estate* decisions contain only a single, oblique reference to the constitutional basis for South Dakota's homestead protections, they still merit mention here.²⁰⁵ Joseph Clouse died in 1928, survived by two adult children and five grandchildren.²⁰⁶ His estate consisted of six quarter sections of land in Hand County plus livestock, implements, grain, and so on.²⁰⁷ One of these 160-acre quarter sections represented his homestead.²⁰⁸ Its value did not exceed the \$5,000 statutory dollar cap.²⁰⁹

Prior to Joseph Clouse's death, he purchased materials to construct a barn on the homestead on credit from a local lumber company.²¹⁰ Shortly after his death, the lumber company filed a mechanic's lien on the homestead.²¹¹ The effectiveness of a mechanic's lien is retroactive to the date the first material or labor is furnished on the premises.²¹² In other words, a timely filed mechanic's lien is "only for the purpose of preserving a lien already created" and "the lien is created by the delivering of material or the furnishing of labor or skill . . ."²¹³ Because no materials had been supplied after Joseph's death, the lien could not have attached to his homestead, even though he left neither a widow nor a minor child.²¹⁴ Based on this reasoning, the court invalidated not only a creditor's attempt to force a sale of the homestead, but even the mere attachment of a lien to the homestead.

In the second *Clouse's Estate* decision, the lumber company again attempted to satisfy its claim against the homestead property, this time relying not on the existence of a mechanic's lien but simply as an unsecured creditor with a recorded judgment.²¹⁵ Although the estate was comprised of six quarter sections, five of them were encumbered—only the homestead quarter section appeared unencumbered by competing lienholders.²¹⁶ The court was called upon to construe the statute which provides: "If there be no husband or wife surviving, and

204. *Schuler II*, 261 N.W. at 907.

205. *Botsford Lumber Co. v. Clouse*, 251 N.W. 801 (S.D. 1933) [hereinafter *Clouse I*]; *In re Clouse's Estate*, 257 N.W. 106 (S.D. 1934) [hereinafter *Clouse II*].

206. *Clouse II*, 257 N.W. at 106.

207. *Id.*

208. *Clouse I*, 251 N.W. at 802.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* (citing S.D. Rev. Code § 1646 (1919)).

213. *Id.*

214. *Id.*; see also *Fallihee v. Wittmayer*, 70 N.W. 642, 644 (S.D. 1897) (construing the nineteenth-century statutory rubric and concluding that "the intention of the lawmaking power to deprive mechanics and material men of their liens against the homestead seems quite apparent").

215. *In re Clouse's Estate*, 257 N.W. 106, 107 (S.D. 1934).

216. *Id.* at 106.

no issue, the homestead shall be liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead.”²¹⁷

Although the decedent had been survived by adult children as well as grandchildren that might ordinarily qualify as “issue,” the court concluded that the homestead descent protections should be “afforded to only the surviving spouse and children during minority.”²¹⁸ Joseph Clouse did not leave a wife or surviving minor children; as a result, the lumber company-creditor prevailed. Its judgment lien had attached at a time when the property did not enjoy characterization as a homestead.

K. *STATE EX REL. BOTTUM V. KNUDTSON* (S.D. 1937)

Bottum was an original proceeding in the state supreme court wherein a writ of mandamus was sought against the county auditor of Minnehaha County.²¹⁹ At issue was a law levying a tax on the assessed value of all taxable property in the state other than the homestead.²²⁰ The petitioner sought to compel the auditor to extend the levy against amounts in excess of the homestead value limitation of \$5,000 as it was then defined.²²¹ One Ole Gunderson intervened through Sioux Falls attorney Holton Davenport.²²² Ole Gunderson asserted the writ should be denied; his own homestead was assessed at \$9,300.²²³

The court denied the writ.²²⁴ First, as a matter of statutory construction, the court determined that the taxing statute contained no limitation on the value of the homestead, “although it is true that, if the homestead is worth more than \$5,000, over and above incumbrances, such excess in value is not by law exempt from the claims of execution creditors, and may be reached by them.”²²⁵ Second, the court determined that the tax was constitutional.²²⁶ The petitioner, citing *Skinner v. Holt*, argued that a tax exemption untethered by the \$5,000 cap on homestead exemption protections would violate the South Dakota constitution’s “wholesome” requirement.²²⁷ The court dismissed the argument: “It is hardly

217. *Id.* at 107 (quoting S.D. Rev. Code § 468 (1919) (current version at S.D.C.L. § 43-31-16 (2004))).

218. *Id.*

219. *State ex rel. Bottum v. Knudtson*, 276 N.W. 150, 151 (S.D. 1937).

220. *Id.*

221. *Id.*

222. Holton Davenport founded the Sioux Falls, South Dakota, Davenport Evans law firm two years after the *Bottum* decision when he formed a partnership with Ellsworth Evans. *Our Story: Davenport Evans Culture and History*, DEHS.COM, <http://dehs.com/our-story/> (last visited Jan. 3, 2018).

223. *Bothum*, 276 N.W. at 151.

224. *Id.* at 153.

225. *Id.* at 152 (quoting *Peck v. Peck*, 212 N.W. 872, 875 (S.D. 1927)) (reasoning that a transfer of a homestead cannot constitute a fraudulent transfer regardless of the value of the homestead).

226. *Id.* at 153.

227. *Id.* (citing *Skinner v. Holt*, 69 N.W. 595 (S.D. 1896)); see *supra* Part III.B (discussing the *Skinner* opinion).

necessary to state that the limitation upon exemptions contained in the constitutional provisions relating to homesteads has no reference to taxation."²²⁸

L. *HOME LUMBER CO. v. HECKEL* (S.D. 1940)

Heckel involved eighty acres on which Adolph Heckel and his wife Rose decided to build their home.²²⁹ They contracted with Home Lumber Company to construct a home on the land.²³⁰ When the company was not paid, it filed a mechanic's lien against the property and commenced foreclosure.²³¹ The trial court dismissed the complaint, reasoning that the homestead protections invalidated a statute permitting the forced sale of a homestead to satisfy a mechanic's lien associated with the "original erection and construction of buildings thereon."²³² The South Dakota Supreme Court agreed.²³³

Quoting Article XXI, Section 4 of the South Dakota Constitution and citing *O'Leary v. Croghan*, the court emphasized that the legislature has the power to define the homestead, specify the property which a homestead may encompass, and limit the value that may be exempt, "but having specified the property and limited the amount, the power of the legislature ceases."²³⁴ The court noted that a proposed constitutional amendment to create an exception for mechanic's liens had been defeated by the voters in 1894.²³⁵ Minnesota, by contrast, had amended its constitution to acknowledge an exception for mechanic's liens.²³⁶ South

228. *Bottom*, 276 N.W. at 153.

229. *Home Lumber Co. v. Heckel*, 293 N.W. 549, 549 (S.D. 1940).

230. *Id.*

231. *Id.*

232. *Id.* (quoting S.D.C. § 51.1707 (1939)); see also S.D.C.L. § 43-45-8 (2004) (providing that "[n]o exemption shall be allowed . . . for the agreed or reasonable cost of the material furnished or labor performed in the original erection and construction of buildings thereon, claimed to be exempt").

233. *Heckel*, 293 N.W. at 550.

234. *Id.*; see *supra* Part III.F (discussing the *O'Leary* opinion).

235. *Heckel*, 293 N.W. at 550.

236. *Id.* (citing *Coleman v. Ballandi*, 22 Minn. 144 (Minn. 1875)). The Minnesota Supreme Court reasoned that the legislature "may increase or diminish such amount from time to time, according to its own views of an enlightened public policy. Beyond this, however, it cannot constitutionally go." *Coleman*, 22 Minn. at 147. Minnesota's current constitutional homestead protection reads:

No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

MINN. CONST. art. I, § 12; see also Note, *The Minnesota Supreme Court 1963-1964*, 49 MINN. L. REV. 93, 100-05 (1964) (reviewing Minnesota homestead exemption in the context of *Denzer v. Prendergast*, 126 N.W.2d 440 (Minn. 1964)); see generally Gregory J. Duncan, *Home Sweet Home? Litigation Aspects to Minnesota's Descent of Homestead Statute*, 29 WM. MITCHELL L. REV. 185 (2002) (detailing historical development of Minnesota's homestead exemption law and analyzing arising issues); Ambrose Tighe, *The Minnesota Homestead Law*, 2 MINN. L. J. 195 (Aug. 1894) (advocating for revision of Minnesota homestead law). The *Heckel* court also noted that its earlier decision in *O'Leary v. Croghan* had cited to

attorney's fees.²⁴⁹ The South Dakota Supreme Court affirmed.²⁵⁰ The majority reasoned that the two lots passed free of the undischarged claim for probate attorney's fees.²⁵¹

The court quoted the constitutional basis for homestead protections in South Dakota and reiterated the legislative role in homestead laws as originally emphasized in *O'Leary v. Croghan*: "[H]aving specified the property and limited the amount, the power of the Legislature ceased."²⁵² Conceding "that the attorney's fees, expenses and costs of administration were brought about by the acts of the surviving wife," the court nevertheless concluded that it lacked the power to impress the homestead with that indebtedness.²⁵³ The homestead, in the circumstances of a surviving spouse or minor children occupying the property, should neither be inventoried as an asset of the estate nor administered.²⁵⁴ The sole function of the probate court "is to declare in whom title vests upon the death of the owner."²⁵⁵

Nor would the court allow the costs and charges of estate administration to attach when the property had been conveyed to a grantee.²⁵⁶ The court reasoned that this would place "an indirect charge on the family because a prudent purchaser will adjust the price accordingly."²⁵⁷ An aspect of homestead protections, then, was viewed as enabling the surviving family to sell the homestead and retain exempt sale proceeds for purposes of relocation.²⁵⁸

N. *IN RE SCHNEIDER'S ESTATE* (S.D. 1948)

Charles Schneider lived on a homestead valued at less than the exemption value cap with his wife.²⁵⁹ Beginning in 1936, he began receiving old age assistance from the State.²⁶⁰ In 1937, the legislature authorized the filing of a lien to recover old age benefits paid out, and permitting the foreclosure of the lien after

249. *Id.* at 10.

250. *Id.* at 13. Justice Herbert Rudolph dissented without a separate opinion. *Id.* (Rudolph, J., dissenting).

251. *Id.* at 11-12 (majority opinion).

252. *Id.* at 10.

253. *Id.*

254. *Id.* at 11.

255. *Id.* (citing S.D.C. § 35.1708 (1939)).

256. *Id.*

257. *Id.*

258. *Id.* The court explained:

The widow and heirs could have claimed immediate partial distribution while they were in occupancy and then have sold it. The statutes do not seem at all clear and are somewhat ambiguous. We prefer an interpretation which will further the manifest legislative purpose to protect the family as exigencies of its situation may require sale and change of location. They should be permitted so to do without subjecting the homestead to costs and charges of administration

Id.

259. *In re Schneider's Estate*, 31 N.W.2d 261, 262-63 (S.D. 1948).

260. *Id.*

the recipient's death.²⁶¹ That same year, a lien was filed against the Schneider homestead. Charles Schneider died in 1946, survived by his wife Bertha, who continued to live in the home.²⁶² The State's attempt to foreclose on its lien in *Schneider's Estate* was rebuffed by the trial court, and the South Dakota Supreme Court affirmed.²⁶³

The court rejected the State's argument that Charles and Bertha Schneider had waived their right to homestead exemption protections by virtue of having signed an agreement to be bound by all the provisions of the 1937 law.²⁶⁴ The State then argued that the lien could be sustained based on its theory that the lien lay dormant until the character of the property as a homestead ceased.²⁶⁵ The court rejected this argument too, based on both a construction of the statute and the fact that "[t]hroughout the entire history of this court no inroads upon the homestead exemption have been recognized except such as were clearly in accord with the constitutional mandate"²⁶⁶

O. *IN RE SNYDER'S ESTATE* (S.D. 1951)

Dorothy Snyder, of Martin, South Dakota, died intestate.²⁶⁷ She was survived by her husband, who was appointed as the estate's administrator.²⁶⁸ Dorothy Snyder's estate filed a state inheritance tax return reflecting her home's value at \$8,320, but her executor claimed that the value should be reduced by \$5,000, the homestead equity cap then in effect.²⁶⁹ The county court of Bennett County agreed; the circuit court affirmed, but the South Dakota Supreme Court disallowed the \$5,000 deduction.²⁷⁰

The administrator argued that the legislature lacked the power to impress any lien on a homestead for the inheritance tax, or to enforce it by means of a forced sale.²⁷¹ The South Dakota Supreme Court assumed (without deciding) that these contentions were correct and that the constitution invalidated the attempt to impress an inheritance tax lien on a homestead property.²⁷² Because the State was

261. *Id.* at 263 (citing S.D.C. § 55.3618 (1939)). The statute provided that "foreclosure shall not be commenced until one year after the discontinuance of assistance during the lifetime of the recipient or until after the death of recipient." § 55.3618.

262. *In re Schneider's Estate*, 31 N.W. at 263.

263. *Id.* at 264.

264. *Id.* at 263-64.

265. *Id.* at 263.

266. *Id.* at 264. The court also noted that the states of Kansas, Minnesota, and Iowa had enacted laws allowing a lien for old age assistance, but that those statutes specifically provided that the lien could not be enforced during such time as the property remained a homestead. *Id.* at 263 (citations omitted).

267. *In re Snyder's Estate*, 48 N.W.2d at 238.

268. *Id.*

269. *Id.* at 239.

270. *Id.* at 238, 241.

271. *Id.* at 240; see *In re Schneider's Estate*, 31 N.W.2d 261, 264 (S.D. 1948) (invalidating homestead lien for old age assistance benefits); *Ramsey v. Lake Cty.*, 14 N.W.2d 125, 126 (S.D. 1944) (holding that a county's personal property tax lien against a homestead is invalid); see also *supra* Part III.N (discussing *In re Schneider's Estate*).

272. *In re Snyder's Estate*, 48 N.W.2d at 246.

not attempting to foreclose on the lien, however, and because the lien provisions were severable from the disallowance of a deduction on account of homestead status, the court considered only whether the legislature could constitutionally forbid any inheritance tax deduction for homestead property.²⁷³

The court noted that the state inheritance tax represented a tax on the privilege of inheriting property, not a tax on property *per se*.²⁷⁴ The legislature had clearly specified that in measuring the inheritance tax to be imposed, "no deduction shall be made by reason of any part of the property being claimed, used, or occupied as the homestead"²⁷⁵ This manner of measuring the inheritance tax to be calculated on account of the homestead's inclusion in an estate was held to be valid.²⁷⁶

P. BRODSKY V. MALONEY (S.D. 1960)

As the initial sentence in *Brodsky v. Maloney* reads, "This is another one of those cases in which the rights of a mechanics' lien claimant collide with the assertion that the premises are exempt from such encumbrance under our homestead laws."²⁷⁷ Herbert and Maryan Maloney, then renting their premises, took title to a vacant lot on November 13, 1956; there they intended to build their home.²⁷⁸ Beginning three days later, building materials were delivered to the site.²⁷⁹ The Maloneys moved into their new home in February the following year.²⁸⁰ When the materialmen went unpaid, mechanic's liens were filed and foreclosure commenced.²⁸¹

The South Dakota Supreme Court emphasized that homestead realty "may be impressed with the homestead character" even prior to the completion or occupancy of the home.²⁸² Thus, the premises were endowed with exemption

273. *Id.*

274. *See id.* at 239 (quoting *In re Jahn's Estate*, 271 N.W. 903, 904 (S.D. 1937)) ("Since the value of the privilege depends directly upon the value of the property transmitted, the fact that the amount of the tax is determined by an appraisal of the property does not transform the tax into a tax on property."). Effective in 2001, the state inheritance tax was repealed. *See* S.D. CONST. art. XI, § 15 ("No tax may be levied on any inheritance, and the Legislature may not enact any law imposing such a tax."). The disallowance of a homestead deduction from inheritance taxes remained on the books until the repeal of the tax. S.D.C.L. § 10-40-27 (2010) (repealed 2014).

275. *In re Snyder's Estate*, 48 N.W.2d at 240.

276. *Id.* at 241.

277. *Brodsky v. Maloney*, 105 N.W.2d 911, 912 (S.D. 1960).

278. *Id.*

279. *Id.* at 913.

280. *Id.* at 912.

281. *Id.* at 913. The Lampert Lumber Company claimed a lien, as did Walton Sheet Metal; First Federal Savings and Loan Association also claimed a mortgage which had been recorded on November 14, two days prior to Lampert Lumber's first delivery to the premises. *Id.* at 912-13. Although the mortgage was of record before either Lampert or Walton furnished any materials or labor themselves, they nevertheless claimed that their liens were superior to the mortgagee's because the mortgage had been recorded after the time when "actual and visible" improvements had commenced. *Id.* at 913. Neither the trial court nor the supreme court reached this contention. *Id.*

282. *Id.* The court noted that it "has consistently taken [this] view . . ." *Id.* (citations omitted). The supreme court also suggested that the Maloneys had taken "possession of [the home] by applying

protections at the moment when the owners took title to their lot and prior to the retroactive attachment of mechanics' liens.²⁸³ The homestead exemption would therefore invalidate the liens but for a statute in the 1939 Code providing: "If the property is not marked off, platted, and recorded as hereinbefore provided it shall not have the character of exemption rights of a homestead unless it is actually occupied as such by the owner."²⁸⁴ The Maloneys had neither marked nor occupied it until after the attachment of the mechanics' liens.²⁸⁵ The lien claimants argued that the failure to mark or occupy the premises deprived the owners of homestead privileges.²⁸⁶ The Maloneys argued that it was unconstitutional for the legislature to precondition homestead privileges with platting and occupation requirements.²⁸⁷

The court assumed *arguendo* that the legislature could require actual occupancy before homestead characterization would attach to property and limited its inquiry into the statute's second feature—the requirement that property also be formally selected by means of the owner having undertaken to mark, plat, and record a homestead declaration.²⁸⁸ The effect of the formal selection procedure, the court concluded, would be to permit those families whose owner adheres to the requirement to enjoy the protections of the homestead exemption, but not "those who neglect this precaution or are not aware of it."²⁸⁹ The court emphasized that these families were "those most in need of" the protections, "the families of the uninformed and indifferent."²⁹⁰

It was this classification of debtors—the savvy in one class, the indifferent in another—which offended the constitutional homestead: "It is palpable that this discrimination defeats the purpose of the founding fathers and results in a situation that is not wholesome."²⁹¹ The legislature's formal selection requirement was therefore invalid; it was constitutionally "unwholesome."²⁹² "Unwholesome" in

waterproofing material to the concrete basement" in November of 1956 even though they did not move in until February of the next year. *Id.* at 912 (emphasis added).

283. *Id.* at 912-13. It would seem that the homestead character of the property also predated the recording—if not the execution of the mortgage—since the deed was executed on November 13 and recorded November 14, while the mortgage was executed on November 10 and also recorded sometime on November 14. *Id.*

284. *Id.* at 913 (quoting S.D.C. § 51.1713 (1939)).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 914.

289. *Id.*

290. *Id.* at 914-15.

291. *Id.* at 915; *see also* S.D. CONST. art. XXI, § 4 (requiring debtor rights to "be recognized by wholesome laws exempting from forced sale a homestead") (emphasis added).

292. *Brodsky*, 105 N.W.2d at 915. Justice Frank Biegelmeier registered a dissent. *Id.* at 916 (Biegelmeier, J., dissenting). He felt that the mechanics' liens "became effective as of October 25, 1956." *Id.* at 917. The materialmen, he emphasized, ought to be "entitled to some notice of a possible homestead claim." *Id.* (citing *Jensen v. Griffin*, 144 N.W. 119, 122 (S.D. 1913)). To give effect to the owners' "secret intention to occupy the property, without having possession or occupancy," is a fraud, he reasoned. *Id.*

this constitutional context meant not too much exemption being afforded to homeowners, but too little.²⁹³

Q. *SCHUTTERLE V. SCHUTTERLE* (S.D. 1977)

The lengthy factual recitation provided by Justice Roger Wollman in *Schutterle v. Schutterle* paints an engaging picture of Ralph Schutterle, who died in 1972, survived by his second wife, Edna.²⁹⁴ Following the death of his first wife, Marie, in 1962, Ralph encountered Edna Engelson.²⁹⁵ In the spring of 1964, Ralph and Edna met with attorney Coe Frankhauser in Gettysburg, who drew up an antenuptial agreement providing, among other matters, that each party waived all homestead rights in the property owned by the other.²⁹⁶ After Ralph died in 1972, the district court initially decreed that 160 acres of the decedent's property in Potter County should be set aside as Edna's homestead.²⁹⁷ Ralph Schutterle's homestead descent waiver was upheld.

The decedent's minor granddaughter and sole heir, acting through her mother as guardian, commenced a quiet title action and prayed for specific performance of the antenuptial agreement.²⁹⁸ Although noting that other jurisdictions had held homestead waivers invalid, the court concluded "that the better rule is that homestead rights may be waived just as any other rights."²⁹⁹ The homestead waiver language in the contract was clear.³⁰⁰ Under the circumstances, there was "no compelling argument that the intended waiver of homestead rights does violence to the public policy of this state as expressed in article XXI, section 4 of our state constitution that wholesome laws be enacted providing for homestead rights."³⁰¹ The 160-acre homestead would instead pass to the minor granddaughter.³⁰²

293. *Id.* at 914-15 (majority opinion); see also *In re Estate of Darby*, 2010-CA-00335-COA (¶ 18) (Miss. Ct. App. 2011) (holding that Medicaid estate recovery efforts fail against an exempt homestead); *Hollman v. S.D. Dep't of Soc. Servs.*, 2015 SD 21, ¶ 12, 862 N.W.2d 856, 860 (holding that a Medicaid lien filed after a benefit-recipient's death could not attach to the recipient's interest). But compare *In re Estate of Darby*, 2010-CA-00335-COA (¶ 15) (agreeing with prior state supreme court cases that "held exempt property is not part of the estate to be administered and descends directly by statute; and this is true whether the estate is solvent or insolvent"), with *In re Wright's Estate*, 12 N.W.2d 9, 11 (S.D. 1943) (reasoning that "the Legislature did not intend that homestead property should be administered as a part of the estate and that the only function of the county court is to declare in whom title vests upon the death of the owner"); see also *supra* Part III.M (discussing *In re Wright's Estate*).

294. *Schutterle v. Schutterle*, 260 N.W.2d 341, 343-46 (S.D. 1977).

295. *Id.* at 343-44.

296. *Id.* at 344-45. The antenuptial agreement provided that it would "be construed as a waiver of all homestead rights in the real property owned by the other party at the date of" the contract. *Id.* at 345 n.2.

297. *Id.* at 346.

298. *Id.*

299. *Id.* at 354 (citations omitted).

300. *Id.*

301. *Id.* The court refused to "speculate whether a waiver of homestead rights would be effective if a widow with minor children were otherwise unprovided for." *Id.*

302. *Id.* at 355.

R. *IN RE DAVIS* (S.D. 2004)

Dorothy Davis, a seventy-five-year-old resident of Sioux Falls, South Dakota, filed for bankruptcy and claimed her homestead as exempt.³⁰³ The exemption statute then in force provided a cap on the homestead value of \$30,000 for owners seventy years of age or younger but an unlimited value for owners over age seventy (Davis's homestead equity surpassed \$30,000).³⁰⁴ The unlimited exemption for older owners had been enacted in 1980.³⁰⁵ The trustee objected to this unlimited exemption, relying on the state constitutional requirement that the homestead be "wholesome" as well as "limited and defined by law" by the legislature.³⁰⁶ District Court Chief Judge Lawrence Piersol certified the question to the South Dakota Supreme Court, which agreed with the trustee.³⁰⁷

Dorothy argued that the legislature had limited and defined the homestead by defining the maximum acreage that a homestead may comprise.³⁰⁸ The court reviewed the 1885 constitutional debates over whether a monetary limit should be a matter of constitutional mandate or left to the legislature.³⁰⁹ Although the convention ultimately deferred the question to the legislature, "the debates leave no question that the delegates contemplated that the Legislature would place a monetary limit on the exemption."³¹⁰ The legislature had failed to enact a monetary limit for the homestead exemption for older owners. Thus, the unlimited exemption violated the constitutional requirement.

The court also reexamined its prior case law with regards to the privileges and immunities clause.³¹¹ *O'Leary v. Croghan* had invalidated a legislative attempt to classify certain varieties of creditors and permit them preferential treatment under the exemptions rubric based in part on the privileges and immunities clause of the South Dakota Constitution.³¹² Since the doctrines giving

303. *In re Davis*, 2004 SD 70, ¶ 2, 681 N.W.2d 452, 454.

304. *Id.* ¶¶ 2, 20, 681 N.W.2d at 454, 460 (citing S.D.C.L. § 43-45-3(2) (1980)).

305. *Id.* ¶ 21, 681 N.W.2d at 460.

306. *Id.* ¶¶ 3, 11, 681 N.W.2d at 454, 456 (citing S.D. CONST. art. XXI, § 4).

307. *Id.* ¶¶ 1, 21, 681 N.W.2d at 453, 460.

308. *Id.* ¶¶ 16-17, 681 N.W.2d at 457-459; see also *Cogel v. Mickow*, 11 Minn. 475, 478 (Minn. 1866) (affirming that a Minnesota homestead may be limited by size only and not by value).

309. *In re Davis*, 2004 SD 70, ¶ 18, 681 N.W.2d at 459.

310. *Id.*

311. *Id.* ¶ 9, 681 N.W.2d at 455.

312. See S.D. CONST. art. VI, § 18 ("No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."). The *In re Davis* court incorrectly referred to the examined legislation in *O'Leary* as having "create[d] separate classes of debtors" when in fact, the legislation recognized different classes of creditors. *In re Davis*, 2004 SD 70, ¶ 9, 681 N.W.2d at 455 (emphasis added); *O'Leary v. Croghan*, 173 N.W. 844, 845 (S.D. 1919). In *In re Davis*, it is true that the overturned legislation had created two classes of debtors (i.e. homeowners "who have attained the age of seventy and those who have not.") *In re Davis*, 2004 SD 70, ¶ 6, 681 N.W.2d at 455. Applying the rational basis scrutiny to this classification, the *In re Davis* court concluded that "public policies assisting older South Dakotans to stay in their homes as they age is rationally related to a legitimate state interest." *Id.* ¶ 8, 681 N.W.2d at 455; see generally Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379 (1979) (outlining the evolution of the clause in federal constitutional jurisprudence across several legislative topics). The South Dakota Supreme Court took note of a point articulated in an

effect to the privileges and immunities clause had, since *O'Leary*, become much more deferential to legislative classifications which were free from suspect classes or fundamental rights, the *Davis* court overruled *O'Leary* insofar as that decision had applied constitutionally heightened scrutiny to ordinary classifications such as those based on age.³¹³

An aside here regarding the continuing precedential value of *O'Leary* is appropriate. *O'Leary* held that a statute which created an exception to the personal property exemptions for debts arising out of groceries was unconstitutional on account of the state constitutional privileges and immunities clause, but also because of article XXI, section 4's guarantee of wholesome laws exempting a homestead and reasonable personal property.³¹⁴ Given that the holding rests on two independent grounds, the precedential value of *O'Leary* is unimpaired insofar as it reasoned that legislative exceptions to the homestead and personal property exemptions were invalid if they could leave a debtor without "a homestead, the value of which shall be limited and defined by law . . . and a reasonable amount of personal property."³¹⁵ Legislative classification of debts which may avoid the homestead exemption, therefore, are constitutionally suspect not on account of the act of classification, as such, but rather on account of an erosion of the exemption.³¹⁶ It is the creation of exceptions where none are permitted—and not the classification of certain exceptions—which is constitutionally problematic, and remains problematic, even after *Davis*.³¹⁷

S. *WISNER V. PALVIN* (S.D. 2006)

Wisner v. Pavlin involved an unmarried couple, Ethel Pavlin and Francis Wisner, who purchased a Sioux Falls home in 1999, taking title as joint tenants with rights of survivorship.³¹⁸ In 2002, Francis unilaterally and secretly quitclaimed (as a gift) his one-half undivided interest in the homestead to his son,

amicus curiae brief from AARP that the income of elderly individuals is significantly less than the general population. *In re Davis*, 2004 SD 70, ¶ 7, 681 N.W.2d at 455.

313. See *In re Davis*, 2004 SD 70, ¶ 9, 681 N.W.2d at 455 (citing *City of Aberdeen v. Meidinger*, 233 N.W.2d 331 (S.D. 1975)) ("While the Constitution has not changed, our test for deciding when a statute violates the 'Privileges and Immunities Clause' has.").

314. See *infra* Part II.C.6 (discussing *O'Leary v. Croghan*).

315. S.D. CONST. art. XXI, § 4; see *O'Leary v. Croghan*, 173 N.W. 844, 846 (S.D. 1919) (Smith, J., concurring) (emphasizing that "the Legislature may [not] grant one person a reasonable exemption and deprive another of any exemption whatever"). "Granting an exemption to a debtor, with a provision under which it may be immediately seized and sold for a debt or class of debts, is equivalent to denying any exemption to such person." *O'Leary*, 173 N.W. at 846 (Smith, J., concurring).

316. See THOMPSON, *supra* note 114, at 23-24 ("So, if Constitution provided that the exemption should be good against all debts, the Legislature could not say that it should not be good as against a particular class of debts.").

317. See *Keleher v. Technicolor Gov't Servs., Inc.*, 829 F.2d 691, 692-93 (8th Cir. 1987) (quoting *In re Schneider's Estate*, 31 N.W.2d 261, 264 (S.D. 1948)) (noting the South Dakota Supreme Court has stated that "[t]hroughout the entire history of this court no inroads upon the homestead exemption have been recognized except such as were clearly in accord with the constitutional mandate, Art. XXI, § 4, Constitution of South Dakota, and found clear expression by the legislature").

318. *Wisner v. Pavlin*, 2006 SD 64, ¶¶ 1-2, 719 N.W.2d 770, 771-72.

Dennis Pavlin.³¹⁹ Two years later, Francis died, and Dennis brought an action against Ethel for partition.³²⁰

Two issues were presented on appeal: first, whether Francis' unilateral conveyance was void because it had not been joined by Ethel; second, if it was not void, whether the scope of homestead protections from creditors precluded an action for partition brought by one cotenant (who did not enjoy homestead protections) against another (who did).³²¹ No third-party creditors were involved. Before undertaking a review of the trial court's decision, which decided both questions in the negative, the South Dakota Supreme Court situated homestead laws in their constitutional framework and reiterated that it "jealously guards the homestead exemptions guaranteed in both our constitution and statutes."³²²

The court noted that, generally, the unilateral transfer by one joint tenant holding title with rights of survivorship to a third party terminates the joint tenancy and converts it into a tenancy in common.³²³ Ethel claimed that the restriction on a spouse's unilateral conveyance of a homestead interest should also apply to unmarried homestead co-owners.³²⁴ The court rejected her argument, noting that the unilateral conveyance limitation only applies to an "owner, if married" pursuant to South Dakota Codified Laws section 43-31-17.³²⁵

Next, the court considered whether partition was an available remedy to Dennis Pavlin, Francis' grantee.³²⁶ Here, Ethel elevated her argument to a constitutional level, noting that the South Dakota constitution commanded "wholesome laws exempting from forced sale at homestead . . ."³²⁷ A partition proceeding results in either a division (or partition) of the property held by cotenants or, if "a partition cannot be made without great prejudice" then a sale of the premises.³²⁸ Ethel averred that a partition sale ordered by a court amounted

319. *Id.* ¶ 2, 719 N.W.2d at 772; Brief of Appellant Ethel Pavlin at 3, *Wisner v. Pavlin*, 2006 SD 64, 719 N.W.2d 770 (No. 23904) [hereinafter *Wisner* Appellant's Brief].

320. *Wisner*, 2006 SD 64, ¶ 3, 719 N.W.2d at 772.

321. *Id.* ¶ 4, 719 N.W.2d at 772.

322. *Id.* ¶ 5, 719 N.W.2d at 772-73.

323. *See id.* ¶ 6, 719 N.W.2d at 773, 773 n.1 (quoting *In re Hoffman*, 2002 SD 129, ¶ 9, 653 N.W.2d 94, 98) ("Under South Dakota law, a joint tenant with right of survivorship has the right to unilaterally terminate the joint tenancy at any time without the knowledge or consent of the other joint tenants."); *see also* *Schimke v. Karlstad*, 208 N.W.2d 710, 711 (S.D. 1973) (reasoning that the same rule applies with regards to spousal joint tenancies).

324. *Wisner*, 2006 SD 64, ¶ 7, 719 N.W.2d at 773.

325. *Id.* ¶¶ 7-8, 719 N.W.2d at 773-74 (quoting S.D.C.L. § 43-31-17 (2004)). Because "the homestead interest is a privilege granted by the Legislature which wholly depends on constitutional and statutory provisions," the court "constrain[ed] [itself] to the dictates of the language." *Id.* ¶ 10, 719 N.W.2d at 774. *But see* *Daniels v. Katz*, 237 So. 2d 58, 60 (Fla. Dist. Ct. App. 1970) (concluding that a divorced man lacked the power to unilaterally encumber his homestead interest when his ex-wife still occupied the home).

326. *Wisner*, 2006 SD 64, ¶¶ 11-23, 719 N.W.2d at 775; *see also* S.D.C.L. ch. 21-45 (2004 & Supp. 2017) (describing partition actions).

327. *Wisner* Appellant's Brief, *supra* note 319, at 17-19 (quoting S.D. CONST. art. XXI, § 4).

328. S.D.C.L. § 21-45-1 (2004); *see also* S.D.C.L. § 21-45-28 (2004) (allowing a court to "order a sale" when a partition of "the property cannot be made without great prejudice"). Sale, as opposed to partition in kind, is justified where, for example, dividing the land into parcels will result in the value being substantially depleted relative to its value if held by one person. *Eli v. Eli*, 1997 SD 1, ¶ 9, 557 N.W.2d 405, 408.

to a “forced sale” prohibited by the constitution.³²⁹ The court read the constitutional provision in its full context, the preamble of which proclaims the right underlying the homestead: “[t]he right of the *debtor* to enjoy the comforts and necessities of life”³³⁰ Since Ethel was asserting homestead rights against a co-owner, not a creditor, the court reasoned that constitutional protections were not implicated.³³¹ Ethel’s homestead right consisted merely of her half undivided interest in the home, and the right to partition held by her cotenant could not be defeated by her homestead privilege.³³² The court did not consider whether an award of owelty would be consistent with homestead rights.³³³

IV. LOOKING FORWARD

At first glance, the basic societal values supporting the homestead exemption have remained relatively static since territorial times. Homestead protections themselves have remained static since 1889 in a constitutional sense; the two attempts to update and refresh the sixty words of the Article XXI, Section 4 of the South Dakota Constitution were both unsuccessful.³³⁴ To some, the nineteenth-century phrasings might seem like the quaint and outdated echoes of the same outmoded progressivism that resulted in a state-owned cement plant (also constitutionally enshrined) and protections against corporations.³³⁵ Constitutional protections from creditors, shielding the borrower from her own misjudgments, might seem old fashioned in a state which tends to favor economic

329. *Wisner*, 2006 SD 64, ¶ 12, 719 N.W.2d 770, 775.

330. *Id.* (emphasis in original) (quoting S.D. CONST. art. XXI, § 4).

331. *Id.*

332. *Id.* ¶ 16, 719 N.W.2d at 777; *see also* *Johnson v. Hendrickson*, 24 N.W.2d 914, 918 (S.D. 1946) (holding that partition by sale is permitted where co-tenant did not seek to avoid partition of the homestead, but argued that his homestead interest required an in-kind division). *But see* *Pascall v. Smith*, 588 S.W.2d 700, 700-01 (Ark. 1971) (holding that ex-wife could not partition homestead still occupied by ex-husband); *Wells v. Sweeney*, 94 N.W. 394, 395 (S.D. 1903) (holding that widower holding homestead with surviving minor children may not partition the property so long as it is occupied).

333. In Texas, owelty in connection with a homestead partition is permissible. Gus G. Tamborello, “*A House Divided*”: *The Rights and Duties of Homesteaders, Life Tenants & Remaindermen*, 9 EST. PLAN. & CMTY. PROP. L. J. 29, 34-35 (2016). However, a homestead may only be partitioned in limited circumstances. *Id.* at 37. The partition rules are statutory. TEX. PROP. CODE ANN. § 41.001(b)(4) (2016); TEX. EST. CODE ANN. § 102.006 (2016).

334. *See supra* note 85 (detailing failed attempts for constitutional reform).

335. *See* S.D. CONST. art. XIII, § 10 (amended 1918) (declaring the manufacture of cement to be a public necessity); S.D. CONST. art. XVII, § 5 (allowing cumulative voting for directors of corporations); *see generally* THE PLAINS POLITICAL TRADITION: ESSAYS ON SOUTH DAKOTA POLITICAL CULTURE (Jon Lauck, John E. Miller, & Donald C. Simmons, Jr., eds., 2011) (collecting essays detailing the state’s contrary, underlying political culture); R. ALTON LEE, PRINCIPLE OVER PARTY: THE FARMERS’ ALLIANCE AND POPULISM IN SOUTH DAKOTA, 1880-1900 (2011) (studying the anti-establishment Populist Party in South Dakota). The South Dakota Cement plant was sold in 2001 to Grupos Cementos de Chihuahua/GCC Dacotah, Inc. *See* *Breck v. Janklow*, 2001 SD 28, ¶¶ 5-6, 623 N.W.2d 449, 453 (describing the sale).

freedoms and the rights of individuals to control their own property and map their own fate.³³⁶

Generally, the trend in South Dakota has been towards reduced governmental protections and greater free choice and individual autonomy, although exceptions can be noted.³³⁷ It might be expected that a state's governance would follow a trajectory similar to an individual's development, advancing from authoritarian paternalism to greater permissiveness, with the occasional reassertion of parental control.³³⁸ That same trend away from regulated protections and towards free choice and economic development might be discerned in the judicial gloss imprinted on the homestead laws in the past few decades. The first three constitutional homestead cases discussed above, however, were hostile to the homestead protections insofar as ruling in favor of a contracted scope of exemption protections.³³⁹ The last three reported constitutional homestead cases similarly favored limitations, not expansions, of homestead protections.³⁴⁰ The fact that the South Dakota constitutional homestead provision has remained unchanged—but certainly not neglected—suggests that the provision does merit continuing recognition in its original form until such time as it is amended.

A. NON-INDIVIDUAL HOMEOWNERS

Perhaps the next homestead exemption issue on South Dakota's horizon will be whether homestead protections are available when the home is owned via a revocable trust or a limited liability company.³⁴¹ The revocable trust issue has

336. See, e.g., S.D.C.L. § 43-5-8 (2004) (abolishing the Rule Against Perpetuities); S.D.C.L. § 54-3-1.1 (2017) (abolishing usury laws); see also Steven Mercatante, *The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt*, 53 S.D. L. REV. 37, 51 (2008) (calling for the reenactment of usury laws for the "protection for individuals from being overwhelmed by imposed debts"). The abolishment of usury laws led to economic benefits to South Dakota when it attracted Citicorp. Mercatante, *supra*, at 41. The abolishment of the Rule Against Perpetuities resulted in significant economic development for the state in the form of trust business. See Robert H. Sitkoff & Max M. Schanzlebach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410-11 (2005) (determining that states that had repealed the Rule Against Perpetuities enjoyed \$100 billion more growth in their trust businesses than states that had not).

337. See, e.g., 2014 S.D. Sess. Laws ch. 226, § 20, 434-56 (rewriting S.D.C.L. § 55-16-15 to require spousal notifications to precede the effectiveness of transfers to a self-settled trust against claims arising out of a divorce, division of spousal property, or alimony); Liz Farmer, *Facing 652% Interest Rates, South Dakota Voters Regulate Payday Lending*, GOVERNING (Nov. 9, 2016), <http://www.governing.com/topics/elections/gov-south-dakota-payday-lending-ballot-measures.html> (describing a 36% interest cap for payday lending approved in a statewide ballot initiative by a 3:1 margin). These two examples illustrate the countervailing contemporary push which favors protections over individual property rights and unregulated freedoms in the state.

338. Cf. David M. Rabban, *The Historiography of the Common Law*, 28 LAW & SOC. INQUIRY 1161, 1174 (2003) (noting O.W. Holmes' references "to the Roman and German 'parents' whose 'offspring' took root 'on English soil'").

339. See *supra* Part III.A-C (analyzing the first three constitutional homestead cases).

340. See *supra* Part III.Q-S (analyzing the last three constitutional homestead cases).

341. Another unresolved issue that might be projected to arise is whether, where the surviving spouse remarries, the new spouse is entitled to claim the probate homestead. See Tamborello, *supra* note 333, at 37-38 (explaining that under Texas law, "once the surviving spouse dies, the homestead does not extend to the spouse from the second marriage").

been litigated repeatedly in Florida, possibly on account of its large population of retirees utilizing revocable trusts as an estate planning tool.³⁴² South Dakota law has wrestled with the application of exemptions to partnerships, but not with the application of exemptions when ownership is in a kind of "pass through" vehicle such as a revocable trust or single-member limited liability company ("LLC").³⁴³

In resolving these questions, two concerns will be in opposition. The first is the statutory language which gives exemption treatment to the home's "owner."³⁴⁴ If an individual is not the owner, but her trust or company is, her trust or company would seem incapable of ever vesting the realty with homestead characterization. An artificial legal person cannot occupy a home, at least in the traditional sense.³⁴⁵ After all, if Elizabeth Somers could not qualify as the head of a family, how could an LLC or a trust?³⁴⁶

Courts have reasoned that "a man cannot acquire a homestead right to land that he does not own"³⁴⁷ At the same time, courts have adopted liberal allowances for the property right which qualifies for exemption status, allowing life estates and even mere licenses or other rights to possession.³⁴⁸ Here, however,

342. BARRY A. NELSON, ASSET PROTECTION IN FLORIDA § 5.28 (2015).

343. See, e.g., *In re I.S. Vickerman & Co.*, 199 F. 589, 591-92 (D.S.D. 1912) (reasoning that neither the firm nor its partners may claim exemptions); *In re Abrams*, 193 F. 271, 273 (D.S.D. 1912) (reasoning that partners in an insolvent partnership have no interests of their own individually which are entitled to exemptions). South Dakota Codified Laws once provided:

The incidents of a tenancy in partnership are such that a partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representative of a deceased partner, cannot claim any rights under the homestead or exemption laws.

S.D.C.L. § 48-4-14 (1967) (repealed 2001); compare S.D.C.L. § 48-4-22 (1967) (repealed 2001) (stating a partner retained the "right, if any, under the exemption laws, as regards his interest in the partnership"), with S.D.C.L. § 48-7A-504(d) (2004) ("This chapter does not deprive a partner of a right under exemption laws with respect to the partner's interest in the partnership."). See also *Corrigan v. Testa*, 73 N.E.3d 381, 387 (Ohio, 2016) (recognizing an LLC which is "organized and treated as a pass-through entity for tax purposes").

344. See S.D.C.L. § 43-31-2 (Supp. 2017) (emphasis added) ("The homestead embraces the house used as a home by the owner of it"). But see S.D.C.L. § 43-31-1 (Supp. 2017) (emphasis added) ("The homestead . . . of every family . . . is exempt"); S.D.C.L. § 43-31-14 (2004) (defining the term "family" as "consisting of one or more persons in actual occupancy of a homestead").

345. But see *Douglass v. Pac. Mail S.S. Co.*, 4 Cal. 304, 305 (Cal. 1854) ("A corporation, being an artificial person, for all legal purposes, occupies in principle, the same position as a natural person, with some qualifications."). The definition of "family" in the homestead chapter clearly contemplates individuals, but it uses the word "persons" rather than "individuals." S.D.C.L. § 43-31-14 (2004). It states:

A widow or widower, though without children, while continuing to occupy the homestead used as such at the time of the death of the husband or wife, or any family, whether consisting of one or more persons in actual occupancy of a homestead as defined in this code, shall be deemed and held to be a family within the meaning of the laws of this state relating to homesteads.

Id. A "person" includes LLCs and corporations. S.D.C.L. § 2-14-2(18) (2012).

346. See *supra* Part II.C.4 (discussing the *Somers* cases).

347. *Smith v. Chenault*, 48 Tex. 455, 462 (Tex. 1878).

348. See *In re Wood*, 8 B.R. 882, 886-87 (Bankr. D.S.D. 1981) (stating that a license in land qualifies for homestead exemption); *Moncur v. Jones*, 31 N.W.2d 759, 765 (S.D. 1948) (citations omitted) (holding "that a future estate will not support a claim of homestead exemption during the continuance of the prior estate"); see also 40 C.J.S. *Homesteads* § 40 (2017) (collecting cases holding that a homestead may attach

the focus is not upon what is owned, but who owns it. If an individual—other than the spouse or minor child of an owner—does not have some ownership rights to a homestead *res*, then no homestead exemption can be asserted.³⁴⁹

to a leasehold interest). *But compare In re Tenorio*, 107 B.R. 787, 789 (Bankr. S.D. Fla. 1989) (finding no homestead exemption where debtor claimed a year-to-year condominium lease), *with Richardson v. Klaesson*, 210 F.3d 811, 813-14 (8th Cir. 2000) (holding, under Arkansas law, that a mere tenancy-at-will is entitled to homestead protections), and *Capitol Aggregates, Inc. v. Walker*, 448 S.W.2d 830, 836-37 (Tex. Ct. App. 1969) (holding month-to-month lease of trailer sufficient to sustain a homestead claim so long as the trailer was immobilized on cement blocks); *see also Fix v. First Bank of Roscoe*, 559 F.3d 803, 807 (8th Cir. 2009) (reasoning that where a homeowner deeded her life estate in exchange for "a future contingent right to possession of the home for the rest of her life in the event the Bank became the owner of the home" that her interest was personalty, not realty, and therefore not protectable as a homestead).

Perhaps a better test than whether the debtor has an estate is to ask whether she has a possessory right to her home. *See In re Perry*, 345 F.3d 303, 315 (5th Cir. 2003) (holding that a homestead exemption may attach to any possessory interest); *Davis v. Davidor*, 27 So. 2d 371, 373 (Miss. 1946) (noting that a mere trespasser cannot claim a homestead). As a bankruptcy court explained, under Florida law:

An individual must have an ownership interest in a residence that gives him or her the right to use and occupy it as his or her place of abode in order to qualify for Florida's homestead exemption. The individual claiming the exemption need not hold fee simple title to the property. Instead, it is sufficient if the individual's legal or equitable interests give the individual the legal right to use and possess the property as a residence.

In re Alexander, 346 B.R. 546, 551 (Bankr. M.D. Fla. 2006). Of course, when a homestead is claimed by one asserting less than fee simple ownership, the exemption does not protect the claimant from rights asserted by another claiming superior property interests. George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1299-1300 (1950) The *Perry* court described Robert Perry's homestead rights as a tenancy-at-will on a tract of twenty-six acres:

Perry may thus claim a *limited* homestead interest in the 26-acre tract premised upon his at-will tenancy. A homestead interest in the possessory estate of a tenancy at will protects Perry's possessory interest in the 26-acre tract against all creditors—except the owner, or one with better title Thus, just as Perry currently remains on the 26-acre tract with the permission of the Corporation, his continued possession of the property will depend upon the will and whim of any subsequent owner.

In re Perry, 345 F.3d at 315 (emphasis in original) (citing *Cleveland v. Milner*, 170 S.W.2d 472, 475 (Tex. Comm'n App. 1943)); *see also Moncur*, 31 N.W.2d at 765 (noting that a tenant may not assert homestead rights to leased premises as against his landlord); *but see Grattan v. Trego*, 225 F. 705, 706 (8th Cir. 1915) (holding that under Kansas law, a homestead privilege may be claimed by a lessee). Some authority holds that a holder of a life estate may claim the homestead privilege. *Wilson v. Devasher*, 264 S.W. 1057, 1058 (Kan. 1924); *see also In re Kaufmann*, 142 F. 898, 899 (E.D. Wis. 1906) (reasoning that a tenant by the curtesy in possession may assert homestead rights). But the holder of a future remainder might not be able to claim a homestead in the property since it is not currently possessory. *Brooks v. Goodwin*, 186 S.W. 67, 68 (Ark. 1916).

349. *See In re Arnhoelter*, 431 B.R. 453, 454 (Bankr. E.D. Wis. 2010) (explaining that the "most basic requirement" for claiming a "homestead exemption is ownership of the property"); *Bessemer Properties, Inc. v. Gamble*, 27 So. 2d 832, 833 (Fla. 1946) (holding that it was not necessary for husband to hold title to homestead since he held an equitable interest by contributing to his wife's ownership interest, even though she did not qualify as the head of the family); *Denmon v. Atlas Leasing, L.L.C.*, 285 S.W.3d 591, 595 (Tex. Ct. App. 2009) (noting that possession of a homestead is not dependent on ownership in the case of a spouse's separate ownership). Not merely legal, but also equitable title, generally suffices. *See, e.g., Kleinsorge v. Clark*, 4 N.W.2d 433, 435 (Iowa 1942) (citations omitted) (reasoning that, even after a sheriff's deed had been issued to a bank's receiver for security, the homeowner "remained the equitable owner" and "equitable ownership was sufficient upon which to predicate his right of homestead"); *Gilpatrick v. Hatter*, 258 P.2d 1200, 1203 (Okla. 1953) (noting that equitable rights to property will support a homestead if legal title was transferred "even when done with the purpose and intent to defraud creditors" so long as possession is retained); *see also Roy v. Roy*, 172 So. 253, 254 (Ala. 1937) (noting that equity of redemption left in mortgagor qualifies as homestead interest for purposes of homestead descent rights); *Kitchens v. Jones*, 113 S.W. 29, 30 (Ark. 1908) (construing the equity of redemption as realty and vesting the same with homestead rights).

The second rule in opposition to the first is the liberal construction that the homestead exemption enjoys and which is to be applied in order to advance the aims of the exemption: protecting the family home from the owner's creditors and ensuring marital and family cohesion. Denying homestead exemption privileges because of technicalities—such as a narrow definition of “owner”—would defeat such aims. Moreover, sister-jurisdictions do not typically require any particular form of title or right before homestead exemption privileges can attach.³⁵⁰ Insisting upon a narrow construction of “owner” is inconsistent with the liberal construction that must be afforded to homestead laws in order to accomplish their stated objectives and aims.³⁵¹ The potential limitations on the construction of “owner” should give way to the general rule of liberal construction.

B. TRUSTS AS OWNERS

Revocable trusts are commonly utilized as will substitutes.³⁵² Revocable trusts also boast incapacity-planning advantages compared to simplistic durable powers of attorney and expensive and intrusive conservatorships.³⁵³ The primary purpose of a revocable trust is to avoid probate as a procedure by which assets are marshalled, creditors discharged, and assets distributed to devisees after death, substituting therefore the procedure of trust administration. Revocable trusts are common estate planning devices.³⁵⁴

One would expect a great many homesteads in South Dakota are actually owned by the owners' revocable trusts.³⁵⁵ Typically, the homeowner utilizing a

350. See, e.g., *Bessemer Properties, Inc.*, 27 So. 2d at 833 (reasoning that it is not necessary for an individual to have legal title in order to claim homestead rights); see generally W.W. Allen, Annotation, *Estate or interest in real property to which a homestead claim may attach*, 74 A.L.R.2d 1355 (1960) (collecting cases on the subject). Indeed:

Any interest which is of sufficient dignity to be assignable, or which is capable of being subjected to the payment of debts, is sufficient to support a claim of homestead. And in some of the decisions the courts have considered assignability or capability of subjection of levy to be a test by which it is to be determined whether a homestead claim may attach to the estate or interest in question.

In re Wood, 8 B.R. at 886-87 (quoting C.S. Wheatley, Jr., Annotation, *Estate or interest in real property to which a homestead claim may attach*, 89 A.L.R. 511 (1934)).

351. See *supra* Part II.A (outlining the aims of homestead rights).

352. WAYNE M. GAZUR AND ROBERT M. PHILLIPS, *ESTATE PLANNING: PRINCIPLES AND PROBLEMS* 155 (4th ed. 2015).

353. See David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 ELDER L.J. 1, 4 (2016) (arguing that typically, the settlor of a funded revocable trust is aiming for not just a will substitute, but also for a trust which can substitute for a conservatorship proceeding upon the settlor's incapacity).

354. See Bradley E.S. Fogel, *Trust Me? Estate Planning with Revocable Trusts*, 58 ST. LOUIS U. L.J. 805, 806 (2014) (noting that “[r]evocable trusts are probably the most ubiquitous estate planning tool”).

355. In Texas, homestead protections are retained if ownership is transferred to a trust so long as the trust is a “qualifying trust.” TEX. PROP. CODE ANN. § 41.0021 (2016). A “qualifying trust” is one which:

(1) in which the instrument or court order creating the express trust provides that a settlor or beneficiary of the trust has the right to:

- (A) revoke the trust without the consent of another person;
- (B) exercise an inter vivos general power of appointment over the property that qualifies for the homestead exemption; or

revocable trust will be the grantor, the trustee, and the sole lifetime beneficiary of her trust, retaining the right to amend or simply revoke and undo the trust if she tires of it.³⁵⁶ The homeowner who places her home in a revocable trust as part of an estate plan utilizing the revocable trust technique expects to retain—and does, in fact retain—full control and enjoyment of the property during her life, no different than if she had retained ownership in her own individual name.

For income tax purposes, the revocable trust is a nullity; no separate tax return or tax identification number during the grantor's lifetime is required.³⁵⁷ The taxpayer simply reports her income as if the revocable trust did not exist. There are no grantor asset protection advantages to titling property in a revocable trust; creditor rights are just as they would be if the owner retained individual ownership.³⁵⁸ Typically, after the grantor's death, the trust becomes irrevocable, and creditors of the grantor may exercise the same rights as they might in a probate proceeding.³⁵⁹

With regards to a home owned in trust, the broad application as to the interests of the owner which are protected by the homestead exemption shield strongly suggests that the exemption would apply.³⁶⁰ One could simply conclude that, for purposes of determining whether the revocable trust grantor maintains "owner" status of her home for homestead purposes, the revocable trust does not

(C) use and occupy the residential property as the settlor's or beneficiary's principal residence at no cost to the settlor or beneficiary, other than payment of taxes and other costs and expenses specified in the instrument or court order:

- (i) for the life of the settlor or beneficiary;
- (ii) for the shorter of the life of the settlor or beneficiary or a term of years specified in the instrument or court order; or
- (iii) until the date the trust is revoked or terminated by an instrument or court order recorded in the real property records of the county in which the property is located and that describes the property with sufficient certainty to identify the property; and

(2) the trustee of which acquires the property in an instrument of title or under a court order that:

- (A) describes the property with sufficient certainty to identify the property and the interest acquired; and
- (B) is recorded in the real property records of the county in which the property is located.

Id. at § 41.0021(a).

356. See Fogel, *supra* note 354, at 807 ("During the settlor's life, the settlor is frequently the trustee (or at least a co-trustee) and a beneficiary of the revocable trust."). The term "settlor" is synonymous with "grantor." *Settlor*, BLACK'S LAW DICTIONARY 1373 (6th ed. 1990).

357. See IRS, *Instructions for Form SS-4*, 4 (Dec. 2017), <https://www.irs.gov/pub/irs-pdf/iss4.pdf> (advising against obtaining an EIN for certain grantor-type trusts).

358. S.D.C.L. § 55-4-58(a) (2012); UNIF. TRUST CODE § 505(a)(1) (2001) (providing that "[d]uring the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors"); see also *Sowers v. Luginbill*, 889 N.E.2d 172, 178 (Ohio Ct. App. 2008) (allowing a tort claimant to pursue recovery from the assets of a revocable trust after the settlor's death).

359. See generally Lauren Ashley Gribble, Comment, *Justice Before Generosity: Creditors' Claim to Assets of a Revocable Trust After the Death of the Settlor*, 48 AKRON L. REV. 383 (2015) (arguing that Ohio legislature should permit creditor access to revocable trust assets in limited circumstances); compare S.D.C.L. § 55-4-58 (2012) (outlining creditor procedures following the death of the settlor of a revocable trust), with S.D.C.L. § 29A-3-801 *et seq.* (2004) (describing creditor procedures in probate).

360. *E.g.*, *Jelinek v. Stepan*, 43 N.W. 90, 90 (Minn. 1889) (reasoning that a trust beneficiary may claim homestead rights).

exist. The courts could "look through" the trust to determine its owner in fact, disregarding the revocable trust as insignificant.³⁶¹

But what of an irrevocable trust? Let's say that our homeowner has adopted an estate plan by which her home will be held for the benefit of her husband following her death. She dies, survived by her husband, and the home is now held by a local bank as trustee for the benefit of the widower as beneficiary. The trustee administers the home, along with certain other assets, for the man's benefit. The trustee permits the widower to reside in the home, and he does so. If a creditor of the beneficiary obtains a judgment against him, may the creditor foreclose its lien against the homestead?

In many circumstances, the question will be moot on account of enforceable spendthrift provisions within the trust. Most irrevocable trusts contain spendthrift provisions which prohibit the voluntary or involuntary alienation of trust assets by a beneficiary and bar creditors of a beneficiary from satisfying any claims from the trust estate.³⁶² The spendthrift protections are typically superior to the homestead exemption because they are not subject to any equity cap. Exception creditors are also less likely to be successful in challenging a spendthrift trust than they might be when challenging a homestead exemption.³⁶³ Thus, in most cases, the superior asset protection features of a spendthrift trust will render any comparison to homestead exemption status irrelevant.³⁶⁴

Assuming, however, that the trust lacks enforceable spendthrift protections, how would South Dakota courts construe the homestead exemption where the owner is a trustee and the individual residing in the home is a trust beneficiary?³⁶⁵

361. See, e.g., *In re Moffat*, 107 B.R. 255, 259-60 (Bankr. C.D. Calif. 1989) (holding that debtor was entitled to claim a homestead exemption for dwelling transferred to revocable trust because bankruptcy estate held various legal interests in the dwelling).

362. S.D.C.L. § 55-1-35 (2012).

363. S.D.C.L. § 55-1-34 (2012); accord UNIF. TRUST CODE § 502 (2001). Reformists occasionally suggest capping the amounts that can be protected by a spendthrift clause. E.g., Anne S. Emmanuel, *Spendthrift Trusts: It's Time to Codify a Compromise*, 72 NEB. L. REV. 179, 208 (1993) (proposing a statutory amendment to provide that a "spendthrift provision is not valid with reference to one-third of any distribution of principal or income to the beneficiary"); Justin W. Stark, Comment, *Montana's Spendthrift Trust Doctrine*, 57 MONT. L. REV. 211, 237 (1996) (proposing a statutory amendment to allow a spendthrift provision "valid as to [only] one-half of the beneficiary's interest in income or principal"). These proposals do not appear to have been acted upon in any U.S. jurisdiction, however, and spendthrift protections, while facing a host of "exception creditors" in some states, have not been capped. See Stark, *supra*, 225-26 (identifying various spendthrift trust exception creditors); see also John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege and Policy*, 61 WASH. & LEE L. REV. 159, 228 (2004) (noting that in enacting ERISA plans' asset protection features "Congress therefore consciously rejected any 'reasonably necessary' cap on the amount to be protected from creditors under an exclusion that clearly embraced the wealth-driven traditional spendthrift trust under state law") (emphasis in original).

364. Cf. *HCA Gulf Coast Hosp. v. Estate of Downing*, 594 So. 2d 774, 776 (Fla. Dist. Ct. App. 1991) (reasoning that home occupied by a spendthrift trust beneficiary ought to qualify for homestead exemption privileges).

365. See, e.g., *Cutler v. Cutler*, 994 So. 2d 341, 344 (Fla. Dist. Ct. App. 2008) (concluding that property held in an irrevocable trust may qualify for the homestead exemption). The *Cutler* court, however, went on to hold that the homestead exemption was waived by a provision in the testator's will directing the payment of debts. *Id.* at 345-46 (citing *Direction in will for payment of debts and expenses as subjecting exempt homestead to their payment*, Annotation, 103 A.L.R. 257 (1936)). This line of authority is especially troubling given that a directive to pay just debts seems to be boiler plate in nearly

The person occupying the home is technically not the owner.³⁶⁶ Rather, the occupant is a beneficiary who has an equitable interest in the home property.³⁶⁷ The actual owner is a trustee, but the trustee only has bare legal title.³⁶⁸ Thus, the trustee of a trust is said to be the legal owner, and the beneficiary is said to be the beneficial owner.³⁶⁹

It is clear that where the home's occupant is both trustee and beneficiary—both legal and equitable owner—homestead privileges ought not to be denied.³⁷⁰ It is less clear whether such privileges should be permitted in the instance of a trustee-owner and beneficiary-occupant. Because of the broad range of property interests that have been recognized as enjoying entitlement to the homestead exemption privilege, however, it can be predicted with some certainty that an equitable interest in the homestead would be deemed an interest which should enjoy the exemption's protections.³⁷¹

every will. See, e.g., Westlaw Practical Law Trusts and Estates, *Will for Single Individual: Basic (CA)* Art. VIII(D) ("I direct that all of my legal debts, funeral and testamentary expenses, costs, and expenses of administration of my estate shall be paid as soon after my death as in the opinion of my Executor is practical and advisable.").

366. Compare *In re Bowers*, 222 B.R. 191, 192-93 (Bankr. D. Mass. 1998) (rejecting a debtor's claim of a homestead exemption where the debtor had a one-third beneficial interest in a trust and the trust estate included realty that the beneficiary used as a residence since the debtor did not reside on his one-third interest in trust, but rather on real property constituting a portion of the trust *res*), with *Hutter v. Lake View Tr. & Sav. Bank*, 370 N.E.2d 47, 49 (Ill. App. Ct. 1977) ("A beneficial interest in a land trust is personal property and, to determine whether an estate of homestead attaches to such property, detailed facts pertaining to the creation of the trust must be alleged.").

367. See GEORGE T. BOGERT, TRUSTS 135 (6th ed. 1987) (concluding, after a substantive examination of the nature of a trust beneficiary's interest, "that while the right of the beneficiary was originally purely in personam against the trustee, it has become increasingly a right in rem and is now substantially equivalent to equitable ownership of the trust *res*"). Cf. S.D.C.L. § 55-1-27 (2012) (providing that, where a remainder interest in a trust "is not absolutely certain based on the language of the trust that the remainder interest will be distributed within one year, it may not be classified as a property interest").

368. See *Brown v. Hall*, 142 N.W. 854, 855 (S.D. 1913) (noting that the trustee is the legal owner of trust property, the beneficiary, and the equitable owner); see also *Witt v. Witt*, 223 S.W. 277, 278 (Tex. Civ. App. 1920) (reasoning that an individual holding title as trustee only has nothing to which homestead rights may attach). Where the trustee also is a beneficiary, however, a homestead may plainly be claimed. *Furman v. Brewer*, 177 P. 495, 498 (Cal. Ct. App. 1918). Some cases reason that effecting the purposes of homestead exemptions suggests that the exemption ought not to be suspended simply because the home occupant/trust beneficiary is not also the trustee. See *infra* note 369 (discussing *In re Estate of Donovan*).

369. But see *In re Estate of Donovan*, 550 So. 2d 37, 39 (Fla. Dist. Ct. App. 1989) (citation omitted) (reasoning that a homestead should be recognized where the trustee is also a beneficiary because "the legal and equitable estates have merged in her irrespective of the trust's terms").

370. *Id.*

371. *In re Im*, 495 B.R. 46, 49-50 (Bankr. M.D. Fla. 2013); *Fitton v. Bank of Little Rock*, 365 S.W.3d 888, 893 (Ark. 2010); *Fisch v. Appel*, 13 Cal. Rptr. 2d 471, 473 (Cal. Ct. App. 1992); *Engelke v. Estate of Engleke*, 921 So. 2d 693, 696 (Fla. Dist. Ct. App. 2006); *Redmond v. Kester*, 159 P.3d 1004, 1010 (Kan. 2007).

C. LLCs AS OWNERS

A homestead owned by an LLC presents a different analysis and background.³⁷² A homeowner utilizing a revocable trust as part of an estate plan would not be personally seeking any asset protection benefits; assets in a revocable trust remain just as exposed to the owner's creditors during lifetime or after death as assets titled individually.³⁷³ The objectives with a revocable trust are typically incapacity planning, family wealth transfer, and probate avoidance, not creditor avoidance.³⁷⁴ The objectives behind titling personal use assets such as one's home in a business-planning entity such as an LLC may be less clear.³⁷⁵

Why would an individual place their home (or any personal use asset such as a car or a snowmobile) into a business entity? Very likely, it would seem, for asset protection purposes. An LLC is a limited liability entity.³⁷⁶ Creditors of the LLC may recover from LLC assets, but creditors of an LLC's individual member may not (unless the separate existence of the entity can be set aside under an "alter ego" or "piercing of the corporate veil" argument).³⁷⁷ Creditors of an individual member may proceed against that member's membership interest in a company, but here the creditors' remedies are limited to a charging order.³⁷⁸

372. See generally Patrick G. Goetzinger et al., *The South Dakota Limited Liability Company Act: The Next Generation Begins*, 44 S.D. L. REV. 207 (1999) (providing an early overview of South Dakota laws on LLCs).

373. See *supra* note 358 (citing South Dakota statutory section preserving creditor rights to assets titled in revocable trusts).

374. See Kent D. Schenkel, *The Trust-as-Will Portmanteau: Trill or Spork?*, 27 QUINNIPIAC PROB. L.J. 40, 61-62 (2013) (explaining how "the problem of probate could be solved by will substitutes, particularly the revocable trust").

375. See J. William Callison, *Nine Bean-Rows LLC: Using the Limited Liability Company to Hold Vacation Homes and Other Personal-Use Property*, 38 WM. MITCHELL L. REV. 592, 593 (2012) (arguing that "placing personal-use property in an LLC allows families to establish a coherent system for managing and controlling the property, restricting the transferability of ownership interests, providing a buy-out mechanism in the event a family member desires to withdraw from ownership, preventing and resolving disputes among family members, and providing estate planning and gifting options that do not involve real estate transfers").

376. S.D.C.L. § 47-34A-303(a) (2007); *GreenHunter Energy, Inc. v. W. Ecosystems Tech., Inc.*, 2014 WY 144, ¶ 12, 337 P.3d 454, 459 (Wyo. 2014); see also Thomas E. Rutledge, *Limited Liability (or Not): Reflections on the Holy Grail*, 51 S.D. L. REV. 417, 426 (2006) (noting that, "while a general model [of LLC statutes] is not available, and similar concepts are expressed in quite different ways across the states, the provision of limited liability to the members is universal").

377. See, e.g., *Baatz v. Arrow Bar, Inc.*, 452 N.W.2d 138, 141 (S.D. 1990) (considering piercing a corporation's veil of liability protections). There are no reported South Dakota Supreme Court decisions on piercing an LLC's veil, but there are in other jurisdictions. See, e.g., *In re Steffner*, 479 B.R. 746, 755 (Bankr. E.D. Tenn. 2012) (citing *Starnes Family Office, LLC v. McCullar*, 765 F. Supp. 2d 1036, 1049 (W.D. Tenn. 2011)) ("Despite the inapplicability of the remedy's name, the 'corporate veil' of a Tennessee limited liability company may also be pierced, utilizing the same standards."); *Martin v. Freeman*, 2012 COA 21, ¶¶ 4-7 (disagreeing with defendants' contention that lower court erred in piercing the "LLC veil"). Piercing might be more viable when an LLC holds personal use assets like a home. See Callison, *supra* note 377, at 596 (asserting "that some courts will be more likely to pierce in personal-use contexts").

378. See S.D.C.L. § 47-34A-504(a)-(b) (Supp. 2017) (limiting a member's creditors' remedies to a charging order which represents only a lien on the debtor-member's distributional interest); S.D.C.L. § 47-34A-801(a)(5) (2012) (allowing a transferee of a member's interest to seek judicial winding up of the entity's business only in limited circumstances); Phil Aurbach & Jonathan Lee, *The Charging Order: Another Tool in the Post-Judgment Remedy Toolkit*, 25 NEV. LAW. 8, 9 (2017) (observing the limited relief a creditor may enjoy with a charging order: "Even if the LLC has made distributions in the past, if the

Business entities like corporations and LLCs were not originally designed to hold personal use assets; they were designed for individuals having a business purpose in mind. An LLC is a kind of hybrid entity, halfway between a corporation and a partnership.³⁷⁹ Early South Dakota legislation and South Dakota Supreme Court decisions have considered the implications of partnership exemptions.³⁸⁰ Although there was considerable debate about whether a partnership represented an independent entity or merely an aggregate of its individual partners, a corporation has more consistently been considered a

LLC votes to stop future distributions, the judgment creditor has no power to force the entity to continue to make distributions [I]f the LLC is a single-member LLC and that single member is the judgment debtor, the single member will most likely discontinue any future distributions"; Herrick K. Lidstone, Jr., *Single-Member LLCs and Asset Protection*, 41 COLO. LAW. 39, 40 (2012) ("A charging order places the creditor at the risk of being allocated for tax purposes income or losses of the partnership or LLC, but with no right to receive any distributions [A] charging order does not ensure that there will be any distributions even if the LLC is operating profitably with surplus cash."); see generally Jay D. Adkisson, *Charging Orders: The Peculiar Mechanism*, 61 S.D. L. REV. 440 (2016) (discussing charging orders); Thomas Earl Geu et. al., *To Be or Not to Be Exclusive: Statutory Construction of the Charging Order in the Single Member LLC*, 9 DEPAUL BUS. & COM. L. J. 83 (2011) (assessing charging orders in the single member LLC context).

"The original policy reason for the charging order . . . does not exist with a single-member LLC." JAY D. ADKISSON & CHRISTOPHER M. RISER, *ASSET PROTECTION: CONCEPTS AND STRATEGIES FOR PROTECTING YOUR WEALTH* 219 (2004). A reliable treatment of LLC asset protection features is contained in Larry E. Ribstein, *Reverse Limited Liability and Design of Business Associations*, 30 DEL. J. CORP. L. 199 (2005).

379. *Gottsacker v. Monnier*, 2005 WI 69, ¶ 14, 281 Wis. 2d 361, 697 N.W.2d 436. South Dakota law has spoken to the intersection of homesteads and partnerships. See *supra* note 343 and accompanying text (detailing state legal history of partnership exemptions); see also *In re Novak*, 150 F. 602, 603-04 (D.S.D. 1907) (construing a now repealed South Dakota statute and concluding that a partnership is limited to a single \$750 exemption); *In re Lentz*, 97 F. 486, 488 (D.S.D. 1899) (construing South Dakota homestead protections, which "mentioned to two classes of persons; not to a debtor generally, as the old law read, but to the head of a family, and to a single person not the head of a family," which "certainly excludes a partnership firm, and is absolutely inconsistent and in conflict with any law that would allow an exemption to a partnership firm"). The statute reviewed in *In re Novak* read:

Except those made absolute, the exemptions herein provided for must not be construed to apply to the following persons, namely: (1) To a corporation for profit. (2) To a non-resident. (3) To a debtor who is in the act of removing with his family from the state; or (4) who has absconded, taking with him his family. (5) A partnership firm can claim but one exemption of seven hundred and fifty dollars in value, or the alternative property, when so applicable, instead thereof, out of the partnership property, and not a several exemption for each partner.

In re Novak, 150 F. at 603 (quoting S.D. Rev. Code Civ. Proc. § 363 (1903)).

380. See, e.g., *Ford v. Ford*, 124 N.W. 1108, 1111 (S.D. 1910) (applying estoppel in a co-partnership settlement involving a homestead claim); *Brady v. Kreuger*, 66 N.W. 1083, 1084 (S.D. 1896) ("The real property in controversy being partnership property, no homestead rights therein could be acquired by Mr. and Mrs. Kipp, as against the co-partner."); *Betts v. Letcher*, 46 N.W. 193, 199 (S.D. 1890) (considering the statutory \$750 exemption granted to partnerships); see also *In re Estate of Liike*, 776 N.W.2d 662, 666 (Iowa Ct. App. 2009) (citations omitted) ("One partner cannot, as against his copartner, acquire a homestead interest in real property belonging to the partnership, whether the title to the property is in the name of one partner or the partnership."); Annot., *Right of individual owner to exemption in partnership property*, 4 A.L.R. 300 (1919) (noting the majority rule "that an individual member of a partnership is not entitled to an exemption or a homestead out of the partnership property"). The reasoning which suspends exempt status to a partner as to partnership property is that no partner has rights to partnership property until creditors of the partnership are paid. *State ex rel. Billingsley v. Spencer*, 64 Mo. 355, 357 (Mo. 1877); see *In re Novak*, 150 F. at 603 (quoting S.D. Rev. Code Civ. Proc. § 363 (1903)) (reviewing an early entity exemption statute from South Dakota).

separate legal person.³⁸¹ Additionally, although there may be no bona fide business purpose with an individual simply placing their own home in an LLC, South Dakota LLC statutes do not specifically require a business purpose.³⁸² The use of an LLC to achieve greater asset protection features, therefore, ought to be acceptable even with regards to personal use assets like one's primary personal residence, subject to any "piercing the corporate veil" or "fraudulent transfer" assertions of an aggrieved creditor.³⁸³

A creditor is permitted to pierce the corporate veil when corporate formalities are disregarded.³⁸⁴ For this reason, the person placing her home in an LLC for purposes of asset protection would be advised to enter into an arm's length lease agreement with the company if she intended to continue to live in and enjoy the possession of her home property. Other corporate formalities such as keeping minutes of meetings and honoring the terms of the lease would also be advisable.³⁸⁵

Piercing possibilities aside, would South Dakota courts recognize homestead exemption treatment where the owner is an LLC? The IRS treats LLCs with only one member as "disregarded entities."³⁸⁶ For income tax purposes, the LLC with a single member is ignored, and taxation is calculated as if the member is the

381. See Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 286-87 (1990) (observing that under the "medieval notions of Roman law that underlie all Western legal systems, the corporation is conceptualized as a separate legal right-and-duty-bearing unit"). Indeed, separate personhood (or entity law) is necessary in order to ensure the limited liability characteristics of corporations and other limited liability entities: "Although entity law does not inevitably involve limited liability, limited liability cannot exist without acceptance of entity law." *Id.* at 286. Much of business organizations law in the twentieth century questioned whether the prime structure for small businesses—the partnership—was a collection of partners or an independent actor. Aggregate or entity; that was the question. In the United States, the Commissioners on Uniform State Laws' 1914 product—the Uniform Partnership Act (or UPA)—gave a mixed answer, suggesting that a partnership represented an independent "legal person" (an entity) but also that a partnership was an aggregate of flesh and blood persons oriented toward a shared aim. See UNIF. P'SHIP ACT § 6(1) (UNIF. LAW COMM'N 1914) (defining a partnership as "an association of two or more persons"). Some speculated that the hybridization of aggregate and entity theories in the UPA could be traced to the untimely death of Dean Ames, a proponent of the entity theory, about halfway through the project. See Walter George Smith, *Prefatory Note* to UNIF. P'SHIP ACT (UNIF. LAW COMM'N 1914) (narrating how the Dean of Harvard Law School had been secured in 1903 as the drafting committee's reporter but that he had died in 1910, after which the "experts present recommended that the act be drawn on the aggregate or common law theory"). A partnership is now firmly declared to be an entity, not an aggregate, as are corporations. See S.D.C.L. § 47-1A-140(12) (2007) (defining corporations); S.D.C.L. § 48-7A-201(a) (2004) (defining partnerships); see also S.D.C.L. § 47-34A-201 (2007) ("A limited liability company is a legal entity distinct from its members.").

382. See S.D.C.L. § 47-34A-112(a) (2007) (permitting the organization of an LLC "for any lawful purpose").

383. MARK A. SARGENT & WALTER D. SCHWIDETZKY, *LIMITED LIABILITY COMPANY HANDBOOK* § 4.4 (2016). However, "judges may feel that a liability shield is only appropriate for a legitimate business and refuse to recognize the liability shield of an LLC to the extent that it holds personal-use assets." *Id.* South Dakota's fraudulent transfer statutes are codified at S.D.C.L. ch. 54-8A (2017).

384. See Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 152 (2014) (rejecting "the generic justifications such as undercapitalization, failure to observe corporate formalities, and preventing injustice offered to justify piercing [as] unpersuasive").

385. The failure to observe corporate formalities is one factor in determining whether a court should pierce the corporate veil. *Farmers Feed & Seed, Inc. v. Magnum Enters., Inc.*, 344 N.W.2d 699, 701 (S.D. 1984) (citations omitted).

386. 26 C.F.R. § 301.7701-3(b) (2006).

owner of company assets.³⁸⁷ This treatment, if applied to a homestead analysis, would result in the original owner retaining homestead exemption benefits even after the title to the owner's home had been transferred to an LLC; the entity would be disregarded, and ownership would be treated as if it resided in the LLC's sole member.³⁸⁸

In the absence of any legislative directive, there ought not to be any public policy objections to individuals who wish to "double dip" when it comes to asset protection features of the law. If the law recognizes limited liability entities and also recognizes homestead exemptions, purposefully availing oneself of both protections can find no real objection. The more difficult question is whether an LLC-owned home would qualify for homestead characterization since the LLC—an artificial legal person—cannot in any traditional way occupy or enjoy the property.³⁸⁹ An equitable ownership analysis such as was proposed for trust ownership is unavailable. The member of an LLC lacks any equitable ownership in the LLC's corpus; the member's ownership rights are akin to those of a shareholder in a corporation or a partner in a limited partnership.³⁹⁰ An LLC member owns units in a company as legal owner of personal property.³⁹¹ An LLC member has no specific property interest in the property of the LLC (i.e., the homestead property).³⁹² The LLC in this scenario would own the home; the LLC member would own only personalty: membership units.³⁹³ Recognition of a

387. *Id.*

388. *But see* Lidstone, Jr., *supra* note 378, at 39 (noting that, while other states have more generous asset protection benefits for single-member LLCs, Colorado does not).

389. *See* U.S. Through Farmers Home Admin. v. Nelson, 969 F.2d 626, 631 (8th Cir. 1992) ("Homestead rights under South Dakota state law accrue only to owners who use the property as a home.") (citing S.D.C.L. § 43-31-2 (1983)).

390. *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999).

391. *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 4:1 (2016) ("All LLC statutes provide that a membership interest in a LLC is the member's *personal property*, and members generally have been found to have no interest in the LLC's assets; this includes, members who own all the interests in single member LLCs."). An LLC "member is not a co-owner of, and has no transferable interest in, property of a limited liability company." S.D.C.L. § 47-34A-501(a) (2007). Indiana specifically permits a homestead interest in the form of personalty. IND. CODE ANN. § 34-55-10-2(c)(1) (West 2017). Others reject homestead claims to personalty, such as a movable trailer, despite its function being essentially equivalent to that of a home. *See, e.g.,* Gann v. Montgomery, 210 S.W.2d 255, 260 (Tex. Civ. App. 1948) ("To hold that the homestead exemption applies to the trailer in the case before us would be to hold, as a practical matter, that it applies to almost every trailer which is occupied by the owners, if they constitute a family which does not own another home."). *But see* S.D.C.L. § 43-31-2 (Supp. 2017) (outlining the availability of homestead exemption to mobile homes); Haskins, *supra* note 348, at 1295 ("It would seem, however, that if the function of homestead legislation is protection of the home, it should be immaterial whether the home is a mere chattel or has achieved the dignity of an estate in land or a chattel real.").

392. *See In re Liber*, No. 08-37046, 2012 WL 1835464, at *10 (Bankr. N.D. Ohio May 18, 2012) ("A 'membership interest' in a limited liability company . . . does not confer upon the 'member' any specific interest in company property, whether personal property or real property. Such property is, instead, held and owed solely by the company.").

393. Simply because an interest is personal rather than real, however, does not *per se* exclude it from homestead exemption treatment. *See, e.g.,* S.D.C.L. § 43-31-2 (Supp. 2017) (stating that a "homestead embraces the house used as a home by the owner of it, being either, real property or a mobile home"). "A mobile home may include any vehicle without motive power which can provide adequate, comfortable, all season quarters" so long as it is "larger than two hundred forty square feet, measuring at the base of the vehicle." *Id.*

homestead *res* is generally dependent upon characterizing the property as real and not personal.³⁹⁴

Without any bifurcation of legal and equitable title, the owner who has conveyed all of her property interests—even if to an entity wholly controlled by her—would seem to have ceased to have any ownership interests in the home *res* which would entitle her, as its occupant, to claim a homestead.³⁹⁵ The member's argument would depend on showing that she retained such unfettered control over the assets of the LLC that it amounted to the same as outright ownership of those assets. She would argue that the separate existence of the LLC should be disregarded.³⁹⁶ In most cases, it would seem, an LLC-owned home should not qualify for homestead protections.³⁹⁷ It would, however, endow the member with asset protection benefits which may exceed the relatively limited equity protections afforded by the South Dakota homestead exemption.³⁹⁸

394. See *id.* (emphasis added) (“The homestead embraces the house used as a home by the owner thereof, being either, real property or a mobile home . . .”). The statute suggests that if a homestead is not real property, then it may enjoy exemption status only if it is a qualifying mobile home. *Id.*

395. See *In re Breece*, 487 B.R. 599 (Table), No. 12-8018, 2013 WL 197399, at *5 (B.A.P. 6th Cir. Jan. 18, 2013) (reasoning that a home occupant’s membership units in a sole member LLC do not vest her with an “interest” qualifying for homestead treatment); *In re Stewart*, No. 09-37257, 2010 Bankr. LEXIS 6517, at *12 (Bankr. N.D. Ohio Oct. 1, 2010) (holding that an LLC-owned home does not qualify as a homestead). But compare *McKee v. Smith*, 965 S.W.2d 52, 53 (Tex. App. 1998) (finding that the “business homestead exemption applies to real property titled to a family member but leased to a corporation wholly owned by a family member”), with *Nash v. Conaster*, 410 S.W.2d 512, 521-22 (Tex. Ct. App. 1966) (holding that a corporate-owned home does not qualify for the business homestead exemption even where the corporation is wholly owned by a family member occupant).

396. Litigation makes for strange doctrinal bedfellows. In *In re Stewart*, the debtors invoked the alter ego doctrine (which is similar to the piercing doctrine mentioned *supra* note 379) so as to disregard their business entity’s technical ownership of their home and vest them with ownership, thereby engaging the shield of the homestead privilege. *In re Stewart*, 2010 Bankr. LEXIS 6517, at *9. The Ohio Supreme Court rejected their argument. *Id.* at *26. *In re Stewart* explained that it respected “the fundamental distinction between a limited liability company and its members.” *Id.* at *12. Deploying the alter ego doctrine as a shield rather than a sword in the entity-owned homestead context, however, has succeeded. See *In re Hecker*, 414 B.R. 499, 504 (Bankr. D. Minn. 2009) (discussing the two Minnesota “reverse pierce homestead exemption cases” of *Cargill v. Hedge*, 375 N.W.2d 477 (Minn. 1985), and *State Bank in Eden Valley v. Euerle Farms, Inc.*, 441 N.W.2d 121 (Minn. Ct. App. 1989)); see also Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 41-43 (1990) (reviewing the *Hedge* and *Euerle Farms* decisions).

397. See *In re Arnhoelter*, 431 B.R. 453, 455 (Bankr. E.D. Wis. 2010) (rejecting claim that debtor’s LLC could assert a homestead exemption). But see *In re Caldwell*, 545 B.R. 605, 612 (B.A.P. 9th Cir. 2016) (reasoning that the transfer of a home from an LLC to a trust within 1215 days prior to the bankruptcy petition date did not constitute an “interest” that was “acquired” by the debtor within the meaning of the Bankruptcy Code’s limitations on recently acquired homesteads where debtor had occupied the home for twenty years).

398. See *In re Kane*, No. 10-18898-JNF, 2011 WL 2119015, at *7 (Bankr. D. Mass. May 23, 2011) (concluding that debtors were unable to claim a homestead exemption in their LLC-owned home, but also that “the Property is not property of the bankruptcy estate”). “Rather,” the court noted, “the Debtors’ membership interests in the LLC are personal property which is property of their bankruptcy estate.” *Id.* The equity limits of the South Dakota homestead exemption are generally \$60,000. S.D.C.L. § 43-45-3 (Supp. 2017). The limits are \$170,000 insofar as a homestead of “a person seventy years of age or older, and the unremarried surviving spouse of such a person . . .” S.D.C.L. § 43-31-1 (Supp. 2017); S.D.C.L. § 43-45-3(2) (Supp. 2017).

V. CONCLUSION

As the late, great USD law school Dean Marshall McKusick once wrote in his South Dakota homestead primer: the homestead exemption exists “to preserve a home for the family even at the sacrifice of just demands.”³⁹⁹ The homestead privilege still echoes with the values with which it must have resonated in the era of the horseless carriage.⁴⁰⁰ The debtor—every debtor—has a constitutionally enshrined right “to enjoy the comforts and necessities of life.”⁴⁰¹ This right, the constitution ensures, “shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families”⁴⁰² The homestead takes shape as an exemption defined with reference to both acreage and equity, a veto power against unilateral spousal alienation, and a descent right to spouses and minor children.⁴⁰³ So defined, the exemption provides family refuge.⁴⁰⁴ Further definition has been added and subtracted over the decades with successions of legislation and judicial gloss, while the constitutional command has remained unmoved and seemingly unmovable. Under the South Dakota “Constitution and laws, the homestead right so firmly exists that nothing can deprive those entitled thereto of the right”⁴⁰⁵

The term “asset protection” did not exist in the Jacksonian or antebellum eras. Today, it is ubiquitous.⁴⁰⁶ Moreover, asset protection is widely condemned.⁴⁰⁷ South Dakota is often seen as one of the states at the vanguard of asset protection permissiveness, a policy that is justified by virtue of supporting its trust

399. MCKUSICK, *supra* note 1, at 1.

400. See *Pierce v. Wash. Mut. Bank*, 226 S.W.3d 711, 714 (Tex. App. 2007) (quoting *Estate of Johnson v. Comm’r*, 718 F.2d 1303, 1307 (5th Cir. 1983)) (calling homestead exemptions “a uniquely American institution”).

401. S.D. CONST. art. XXI, § 4.

402. *Id.*

403. See *supra* Part II.A (discussing the homestead exemption as it relates to spousal alienation).

404. Edward Hopper has observed:

State exemption laws give rise to fascinating reading, and a comparison between the states shows a definite trend toward liberalism as far as exemptions are concerned. The eastern states are the most conservative, following the English tradition, which was to allow little more than necessary to prevent the debtor from becoming a public charge. As one proceeds geographically from east to west to California, state exemption laws become more and more liberal.

Edward B. Hopper II, *Status of Exemptions in Indiana*, 38 RES GESTAE 14, 14 (1994) (citation omitted).

405. *In re Wright’s Estate*, 12 N.W.2d 9, 11 (S.D. 1943); see also *supra* Part III.M (discussing *In re Wright’s Estate*).

406. See generally John K. Eason, *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*, 61 WASH. & LEE L. REV. 159 (2004) (tracing the evolution of asset protection since 1974).

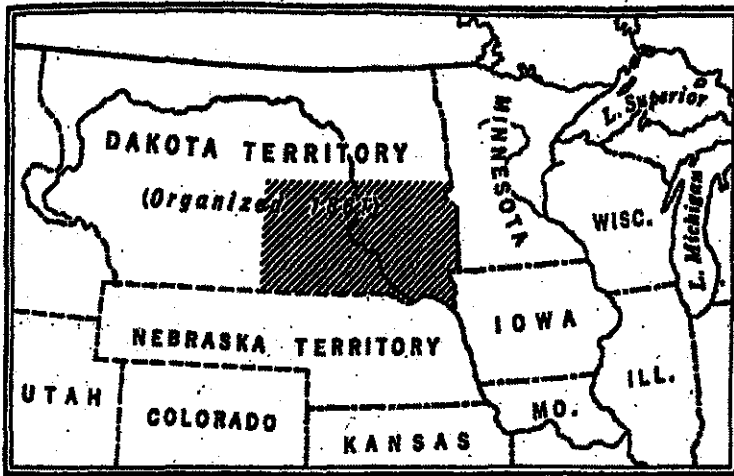
407. David J. Cook, *Hitting Bottom in 17 States and the Suppression of Liability*, 43 OHIO N.U. L. REV. 277 (2017); Randall J. Gingiss, *Putting a Stop to “Asset Protection” Trusts*, 51 BAYLOR L. REV. 987, 1018 (1999); Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 536-47 (2000); see generally Lynn Lopucki, *The Death of Liability*, 106 YALE L. J. 1 (1996) (criticizing current asset protection or “judgment-proofing” strategies for potentially defeating the liability system).

industry.⁴⁰⁸ It is difficult to find scholars defending the moral justifications of asset protection. Deep-seated public policy justifications for the homestead, however, are historical, although the homestead is not simply an historical artifact. It finds current policy support, bracketed as it now is by other varieties of asset protection with regards to retirement savings, business entities, and trusts.

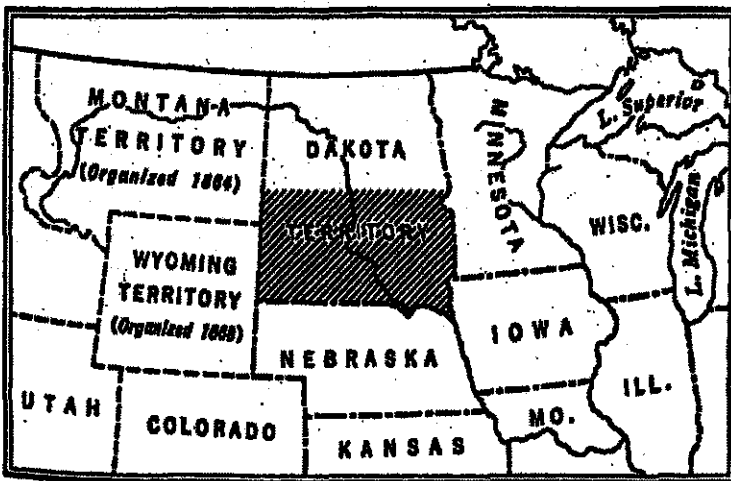
408. See Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L. J. 287, 287 (2002) (noting how "several states, most notably Alaska and Delaware, have enacted legislation to facilitate the creation of so-called asset protection trusts (APTs), which allow trust settlors to shelter their assets from the claims of most creditors"); see also Joseph M. Dylla, *A Case for the Adoption of the Revised Uniform Limited Liability Company Act in South Dakota*, 56 S.D. L. REV. 285, 313 (2011) ("South Dakota is already one of the leading asset protection jurisdictions in the United States."); Patrick G. Goetzinger, *The Dynamic Duo: South Dakota's Trust Laws & Business Entity Statutes*, 61 S.D. L. REV. 339, 339-40 (2016) ("As of July 2016, South Dakota possessed eighty-four state chartered, non-depository . . . trust companies with a total of \$226 billion in assets under management."). That number had grown to ninety-five trust companies just one year later. S.D. DEP'T OF LABOR & REGULATION, TRUST COMPANIES LICENSED TO DO BUSINESS IN SOUTH DAKOTA AS OF DEC. 31, 2017, http://dlr.sd.gov/banking/licensed_providers/state_chartered_trust_companies.pdf (last visited Feb. 5, 2018). Goetzinger explains: "The search for effective planning techniques to achieve the objectives of protecting family assets and family members from predators, creditors, in-laws, and outlaws has led families and their advisors to South Dakota . . ." Goetzinger, *supra*, at 359.

VI. APPENDIX

A. TERRITORIAL TERRITORIES



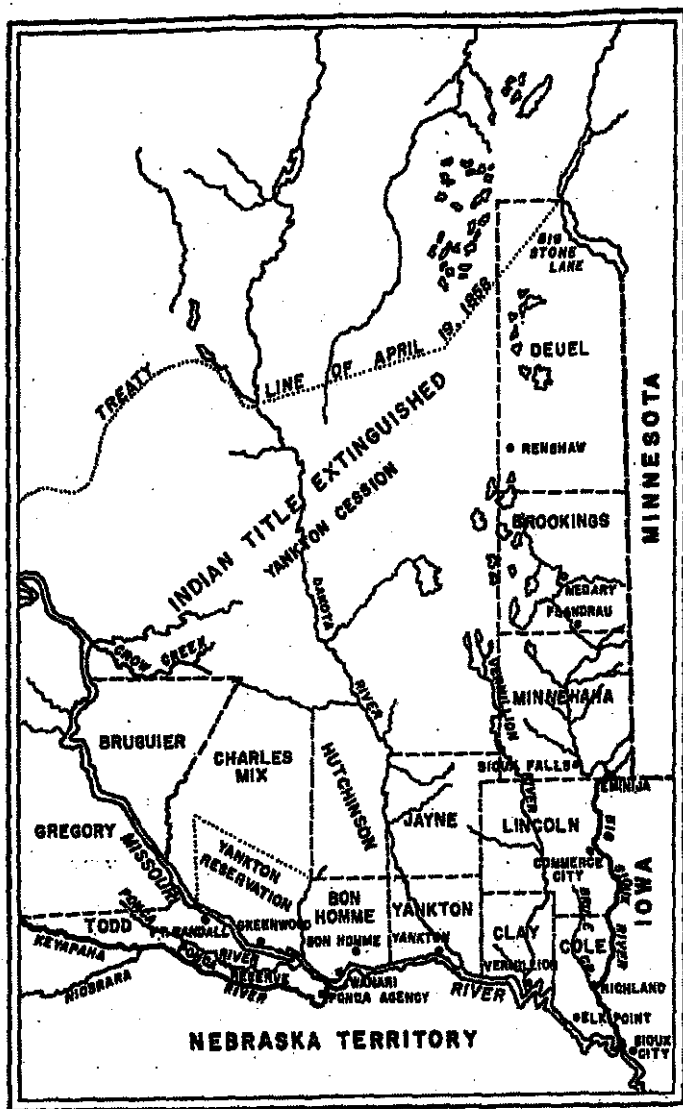
1861



1868

i. These two maps show the contradiction of the area encompassed by Dakota Territory from its original organization in 1861 (when it included present day Montana) to 1868 (when it encompassed present day North and South Dakota only).

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DAKOTA COUNTIES, 1862

ii. The Yankton Tribe's cession of land in the 1858 treaty can be seen here, along with the Yankton reservation and early Dakota Territory counties as they existed in 1862, such as Cole County (today, renamed Union County) and Jayne County (named after Territorial Governor Jayne; today, Turner County, in part).

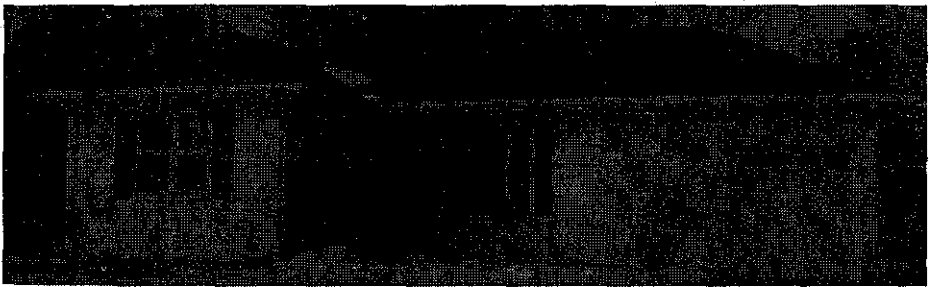
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B. THE HOMES OF MS. DAVIS AND MS. WISNER (RESPECTIVELY)



i. This homestead, at issue in *In re Davis*, has a street address of 2800 South Willow, in Sioux Falls, South Dakota.

Photograph by author.



ii. This property, at issue in the case of *Wisner v. Pavlin*, has the street address of 2113 South Lyndale Avenue, in Sioux Falls, South Dakota.

Photograph by author.

C. THE SOMERS DEED

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Warranty Deed
from
Elizabeth Ann Somers
to
Peolia R. and Fred D. Somers.

Know all men by these presents; that Elizabeth Ann Somers of Brule County, and State of South Dakota, in consideration of the sum of one dollar in hand paid by Peolia R. Somers and Fred D. Somers of Brule County, and State of South Dakota do hereby sell and convey unto the said Peolia R. Somers and Fred D. Somers, my sons jointly the following described premises, situated in said County of Brule and State of South Dakota to wit:

Lot No. five (5) and north west quarter of south west quarter of section three (3) said Lots no. four and five (4 & 5) of section four (4) in township one hundred and two (102) north of range seventy two (72) west of 5th P.M.

Containing 168 and 1/2 acres more or less according to Government Survey.

And I hereby covenant with the said Peolia R. Somers and Fred D. Somers that I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all taxes and encumbrances whatsoever except that I do not hold said land during my life time; and that this Deed is to be delivered to the said Peolia R. Somers and Fred D. Somers after my death.

And I covenant to Warrant and defend the title to the said premises against the lawful claims of all persons whomsoever.

Signed the 24th day of February A.D. 1908.

In presence of
W. J. Farmer
Peolia R. Somers
State of South Dakota, in
Brule County.

Elizabeth Ann Somers

On this 24th day of February A.D. 1908 before me, W. J. Farmer

This warranty deed from Elizabeth Somers to her two sons, Peolia and Fred, was signed in February of 1908, and recorded after Elizabeth's death, in March of 1909. Elizabeth's estranged husband, Lafayette Somers, did not join in the conveyance. The deed is handwritten, a copy made from the original instrument by the register of deeds, as was the practice at the time. The beginning of the next deed on the roll can also be seen.