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State Homestead Exemptions

The purpose of this article is to make a general comparason of homestead exemptions in Montana with other states.

There are at least two different types of homestead laws, federal and state; the discussion herein relates to the latter. These laws must be distinguished from the federal homestead legislation which seeks to encourage the colonization of outlying districts by granting the qualified applicant a quarter section or less of unappropriated public land after he has occupied and cultivated it for a certain period. This land is exempt from all debts contracted prior to the acquisition of title but not from those incurred thereafter.¹ State homestead laws, on the other hand, affect land already owned by the beneficiary and only exempt it from debts incurred subsequent to its dedication.²

Homestead rights do not exist under the common law.³ They are, it seems, peculiar to America, and are dependent upon constitutional or statutory provisions.⁴ The purpose of the homestead statutes is to carry out the mandate of the constitution, "that the legislative assembly shall enact liberal homestead and exemption laws."⁵ As the homestead laws were enacted for the benefit of the debtor, they should be liberally construed in his favor.⁶

The statutes of the different states vary on the conditions which must be fulfilled before the homestead exemption may be claimed. As a rule, the homestead exemption is limited to persons who are residents of the particular state, who are heads of the family, and who own and occupy the realty in question as a home. The family headship is as important a condition as ownership and occupancy, and more generally required than declaration, when the privilege of homestead exemption is to be accepted under the statutory offer.⁷ The terms "householder" or

¹43 U.S.C.A. §161, 164, 175.

²WAPLES, HOMESTEAD AND EXEMPTION (1893) p. 924.

³First State Bank v. Fischer (1937) 67 N. Dak. 400, 272 N.W. 752, 110 A.L.R. 878.

⁴In re Trepp's Estate (1924) 11 Mont. 154, 227 P. 1005.

⁵MONT. CONST. Art XIX, §4, Mitchell v. McCormick (1899) 22 Mont. 249, 252, 56 P. 216.

⁶Oregon Mtg Co., Ltd., v. Dunbar (1930) 87 Mont. 603, 606, 289 P. 559.

⁷WAPLES, HOMESTEAD AND EXEMPTION (1893) p. 57.

"head of the family" when used in the statutes are not always defined, but where this is done, they are not limited to those in a marital or parental relationship and are made to include any person who as the result of close kinship is under the moral obligation of supporting those living with him under the same roof.⁸ Thus Montana has described by statute those persons who come within the definition of "head of the family" including among them every person who has attained the age of sixty years and actually resides on the premises.⁹ Under this provision it would seem that a marital relationship is not necessary and a bachelor might qualify by following the statutory requirements. It has been said that primarily, the husband, and not the wife is the head of the family.¹⁰ However, in Montana under Section 6969, the wife may become the head of the family where the husband fails to join in the declaration.¹¹ Some states do not require expressly that the owner of the land need be the "head of or a member of a family,"¹² and so hold that this is not a necessary condition to establishing the homestead.¹³

Occupancy is another condition upon which the privilege of exemption is tendered by the legislature. This condition is found in all the statutes, generally speaking, and no other feature of the homestead system approximates so closely in all.¹⁴ In the absence of statutory provisions prescribing the mode of selecting the homestead, occupation of the land with a bona fide intent to use it as a home, is sufficient to impress it with that character.¹⁵ But in Montana and some of the states mere visible occupancy and use as a home are not sufficient, and a declaration of homestead is required to be made in writing and filed for record.¹⁶ The declaration goes down on the title to the property the same as a deed. Also, the Montana statutes require that the declaration shall contain certain facts such as the estimated cash value and a description of the property.¹⁷ Under this provision the Montana Supreme Court has held that the declaration of homestead must contain the estimated value and not the statutory value.¹⁸ Further, a declaration of

⁸Georgia Code Annot. (1926) §3377.

⁹R.C.M. 1935, §6969.

¹⁰In re Bordelon (1924) 2 F. (2d) 164.

¹¹R.C.M. 1935

¹²Oregon Code Annot. (1930) §3-201.

¹³Kaller v. Spady (1934) 148 Or. 65, 34 P. (2d) 663.

¹⁴WAPLES, HOMESTEAD AND EXEMPTION (1893) p. 57.

¹⁵2 THOMPSON, REAL PROPERTY (perm. ed. 1939) §987.

¹⁶R.C.M. 1935, §6970, Rev. Stat. of Fla. (1920) §3875, Rev. Laws of Nev. (1912) §3115, Va. Code (1930) §6532, W. Va. Code Annot. (1943) §3912.

¹⁷R.C.M. 1935, §6971.

¹⁸Mitchell v. McCormick (1899) 22 Mont. 249, 252, 56 P. 216.

homestead is valid and effective, though the estimated cash value is far in excess of the limit fixed in the statute, provided it contains the other statements required; but, as to area, the premises described must fall within the statutory limit, otherwise the declaration is ineffective to exempt the property claimed.¹⁹ It has been said that the requirements of the statute by which a homestead exemption right becomes fixed are mandatory and must be complied with.²⁰

The property with respect to which the homestead claim may be asserted is, by statutory provision, limited as to the quantity or value, distinctions being made by some of the states with regard to the character of the land as urban or rural. Some also allow only one comprehensive exemption. The various state statutes present many diversities.

A homestead exemption can not be claimed against debts and liens in existence prior to or at the time the exemption law takes effect.²¹ The statutes usually provide that the homestead may be subjected to sale for the non-payment of certain debts or liens. Pre-existing liens and taxes belong almost invariably to this category, and purchase-money mortgages, mechanics, laborers and materialmen's liens, when these are derived from improvements placed on the premises, are often given a privileged status.²² Effect must also be given to the laws creating these valid liens and to the rights acquired thereunder.²³ In Montana under Section 6949, ". . . the homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises; but no judgments obtained before this code takes effect shall constitute such liens . . ." ²⁴ Thus it was held that a judgment obtained prior to the time this statute went into effect was not a lien on the homestead subject to execution whatever its value; hence, a mortgage of the homestead given after the statute took effect was given precedence to the prior judgment.²⁵ Under Section 6949 it is to be noted that it refers to *judgments which are liens* on the premises. This section does not include attachments as a means of getting at the homestead for the payment

¹⁹Yerrick v. Higgins (1899) 22 Mont. 502, 508, 510, 57 P. 95.

²⁰Power v. Burd (1896) 18 Mont. 22, 43 P. 1094.

²¹2 THOMPSON, REAL PROPERTY (perm. ed. 1939) §991.

²²Calif. Civ. Code (Deering 1931) §1241, Ga. Code (1933) §51-101, Comment in 46 YALE L. J. 1023 (1936-7).

²³Supra, note 3.

²⁴Supra, note 11.

²⁵Vincent v. Vineyard (1900) 24 Mont. 207, 61 P. 131, 81 Am. St. Rep. 423.

of debts. Property seized under a writ of attachment is impressed with a lien from the date on which the writ is levied, and this lien continues in force until judgment.²⁶ The effect of this has been the Montana Supreme Court's holding that the filing of a homestead declaration after a writ of attachment had been levied upon the land exempts the land from sale on execution obtained after the declaration was filed.²⁷ Thus this section was liberally construed in favor of the debtor for whose benefit the homestead exemption was enacted. However, many jurisdictions include attachments with execution and forced sale²⁸ and therefore hold that the homestead right cannot be claimed against a prior attachment lien previously levied.²⁹

Whether one who has supplied materials may claim a lien under a statute which subjects homestead property to liability for the liens of mechanics or laborers is a question which has occasioned a conflict among the decisions.³⁰ In some states it is declared by constitutional provision that a homestead is not subject to a mechanic's lien.³¹ However, the Montana statute, *supra*, expressly makes the homestead subject to mechanics' liens upon the premises, and it was held that a homestead is subject to the lien of a mechanic for *material*, as well as labor, where the material is the object of the labor for which he claims his lien.³² But, in California it has been held under a similar statute, ". . . that no lien is given to material-men; nor does any other statute in California confer such a lien."³³ Regardless of this factor favoring a similar holding in Montana, the Montana Supreme Court has said that the homestead laws of Montana were not taken from California and that our courts are not bound by the California decisions on this point.³⁴ This difference in the decisions is probably due to the fact that Montana has special statutes on mechanics' liens expressly naming those who may be entitled to such a lien. These statutes include one who furnishes materials.³⁵

²⁶Moreland v. Monarch Mining Co. (1919) 55 Mont. 419, 425, 178 P. 175.

²⁷Wall v. Duggan (1926) 76 Mont. 239, 244, 245 P. 953.

²⁸Colo. Stat. Ann. (1935) Ch. 93, §23, Conn. Gen. Stat. (1930) §5042.

²⁹Robinson v. Wilson (1875) 15 Kans. 448, 22 Am. Rep. 272, Kelly v. Dill (1877) 23 Minn. 435.

³⁰65 A.L.R. Annot. 1198.

³¹Morgan v. Bentheim (1898) 10 S. Dak. 650, 75 N.W. 204, 66 Am. St. 733, Volker-Scowcroft Lbr. Co. v. Vance (1907) 32 Utah 74, 88 P. 896, 125 Am. St. 828.

³²Merrigan v. English (1889) 9 Mont. 113, 125, 22 P. 454.

³³Richards v. Shear (1886) 70 Calif. 187, 11 P. 607.

³⁴Lindley v. Davis (1887) 7 Mont. 206, 212, 14 P. 717, 719.

³⁵R.C.M. (1935) §§8338-8350.

In the absence of constitutional or statutory restrictions, the owner of premises which have been occupied in circumstances entitling him to assert the claim of homestead in respect thereof may mortgage the property, and thereby subject it to sale under foreclosure proceedings.³⁶ The laws of some states, however, forbid the mortgaging of homestead property, declaring invalid a mortgage or trust deed thereof.³⁷ It is a general rule that both husband and wife must join in or, at least, consent to a conveyance of the homestead to a third person.³⁸ Where this rule prevails, it is generally held that the husband cannot mortgage the homestead without her joining in the manner prescribed by law.³⁹ In Montana the homestead is subject to

" . . . judgments obtained; 3. On debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, . . . ; 4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."⁴⁰

In this connection it was held that a mortgage on property exempt from forced sale, whether involving homestead or personalty, being specific, constitutes at least a waiver of exemption and is permissible if statutory restrictions are observed.⁴¹ But, where the acknowledgement of the wife in the mortgage of the homestead was substantially defective, the mortgage was held void.⁴² Also, it was held that when a wife did not sign otherwise join her husband in the execution of a chattel mortgage on improvements on their land, and, after her husband deserted her, filed a homestead claim on such land, the mortgage was void.⁴³ Section 6949 contemplates a live mortgage at the time of execution and not one the lien of which has been barred by a special statute of limitations prior to declaration of homestead and before final judgment.⁴⁴ These decisions show that it is absolutely necessary in Montana for the husband and wife to join in any conveyance or encumbrance of their homestead before

³⁶AM. JUR., **Homesteads**, §123.

³⁷Sampson v. Williamson (1851) 6 Tex. 102, 55 Am. Dec. 762.

³⁸THOMPSON, REAL PROPERTY (perm. ed. 1939) §1005.

³⁹Watterson v. E. L. Bonner Co. (1897) 19 Mont. 554, 48 P. 1103.

⁴⁰Supra, note 25.

⁴¹U. S. Bldg. & Loan Assn. v. Stevens (1932) 93 Mont. 11, 16, 17 P. (2d) 62.

⁴²American Sav. & Loan Assn. v. Burghardt (1897) 19 Mont. 323, 48 P. 391, 61 Am. St. Rep. 507.

⁴³Supra, note 40.

⁴⁴Siuru v. Sell (1939) 108 Mont. 438, 443, 91 P. (2d) 411, 123, A.L.R. 423.

it can become effective. A mortgage by the husband without the wife's acknowledgment creates no lien upon the homestead.⁴⁵ The reason for this attitude by the courts is probably because when the homestead dedication or occupation is one of the conditions to the enjoyment of exemption, a restraint upon alienation and encumbrance is imposed for the purpose of family protection and conservation.⁴⁶

The authorities are in conflict upon the question as to whether the lien of a judgment does or does not attach to the homestead of the debtor. The majority opinion seems to be that a judgment is not a lien against premises impressed with the homestead character and subject to the homestead use, and that an attachment or execution attempted to be levied thereon is absolutely void.⁴⁷ Other cases hold that the lien attaches, but it is dormant or in abeyance so long as the homestead continues.⁴⁸ The consequence of the former rule is that the purchaser of the homestead property will take title free and clear of all judgment liens or debts, except those enumerated in the statutes as exceptions to the exemption.⁴⁹ Whereas under the latter rule, when the homestead is conveyed, the lien becomes active and the grantee takes the property subject to such lien, and therefore the creditors of the grantor could realize upon their liens on the property.⁵⁰ In the Oregon case of *Hansen v. Jones*,⁵¹ the creditor of the homestead claimant had obtained a judgment against her and had filed the transcript of record in court. Thereafter the owner conveyed the land to her son who was living apart from her. A levy was then made upon the property and the property was reconveyed to the claimant. The court adopted the latter view above and held that

“. . . the judgment became a lien on the land . . . while it was in fact the claimant's homestead, although the judgment was incapable of enforcement while the land was so held. But, when the claimant conveyed the property the homestead right ceased to exist, and her grantee took the full title freed therefrom, but subject nevertheless to the judgment lien, which from that time, became superior in right.”⁵²

The conclusion that the grantee of the homestead property takes it subject to judgment liens was based mainly upon the ground that the statute providing, . . . “from the date of docketing a judgment . . . such judg-

⁴⁵Mont. Nat. Bank v. Schmidt (1887) 6 Mont. 609, 13 P. 382.

⁴⁶Supra, note 7, p. 383.

⁴⁷Supra, note 39, §992.

⁴⁸Id.

⁴⁹Gray v. Deal (1915) 50 Okla. 89, 151 P. 205.

⁵⁰Hansen v. Jones (1915) 57 Oreg. 416, 109 P. 868.

⁵¹Id.

⁵²Id.

ment shall be a lien . . .," was enacted prior to the homestead law and that, since the homestead act did not expressly provide for an exemption from a judgment lien, the homestead property was subject thereto.⁵³ However, another exemption statute was passed in Oregon after the above decision which exempts the homestead from the lien of every judgment;⁵⁴ therefore, this decision probably does not represent the present law in Oregon on this subject. Montana would probably follow along with the majority rule on this point, although there might be a little difficulty. It is provided by Section 6948 that "The homestead is exempt from execution or forced sale, except as in this chapter provided."⁵⁵ Section 9410 states that "A judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution or forced sale . . ."⁵⁶ These two statutes read together with the decision in *Vincent v. Vineyard*,⁵⁷ *supra*, are indications that Montana would follow the majority rule above. Furthermore, the appraisal statutes in Montana to the effect that if the property exceeds the statutory value, then it can be levied on, otherwise not,⁵⁸ would strengthen this position. The reason for the rule that a judgment is not a lien against the land claimed as a homestead is based upon the theory that a judgment is not a lien upon that which cannot be sold on execution. While both judgment liens and homestead exemptions are creatures of statute, the exemption being the later expression of the legislative intent and power, displaces the judgment lien, as both cannot stand together in their full extent.⁵⁹

It is generally recognized as an essential requisite of an abandonment of a homestead that there must be an actual relinquishment of possession of the premises and removal therefrom, coupled with an intention to remain away formed after such removal. A mere intention to abandon the homestead, without carrying such intention into effect by actual removal, is not abandonment.⁶⁰ The question of whether a homestead claimant has abandoned his homestead being mainly one of intent, no general rule of universal application can be enunciated, and the question must depend upon the peculiar facts of each case.⁶¹ In Montana and some

⁵³Marshall, *Homestead Exemption—Oregon Law*, 20 OREG. L. REV. 328 (1940-41).

⁵⁴Oregon Code (1930) §3-201.

⁵⁵R.C.M. 1935.

⁵⁶*Id.*

⁵⁷*Supra*, note 26.

⁵⁸R.C.M. 1935, §§6953-6965.

⁵⁹*Supra*, note 48.

⁶⁰13 R. C. L. 108.

⁶¹*Stewart v. Pritchard* (1911) 101 Ark. 101, 141 S.W. 505, 37 L.R.A. (N.S.) 807.

other states it is expressly provided by statute that a homestead can be abandoned only by a declaration of abandonment or by a grant or conveyance of the property will not constitute an abandonment of the homestead right.⁶² Where the method of abandonment is expressly prescribed, it is the general rule that a homestead once lawfully created can be abandoned only in the manner pointed out.⁶³ Montana requires a declaration of abandonment of the homestead or a grant of it to be executed and acknowledged by both husband and wife,⁶⁴ and it is effectual only from the time it is filed in the office in which the homestead was recorded.⁶⁵ Thus, a creditor knows as of any time whether or not the property of his debtor is a homestead or if there is any encumbrance on the property. It has been held in Montana that in the absence of legislation to that effect, alienation of a homestead granted to a surviving wife does not constitute an abandonment of it.⁶⁶

The claim of homestead may be defeated if a release or waiver of the right to the exemption is shown.⁶⁷ But ordinarily, it is inconsistent with the statute to allow a waiver of the homestead right without a deed or mortgage.⁶⁸ Although waiver or release of the homestead exemption is not expressly provided for in Montana, it has been held that a mortgage operates as a waiver of the homestead exemption if it is properly executed and acknowledged by husband and wife.⁶⁹ In the case of *Vincent v. Vineyard*, *supra*, the Montana Supreme Court stated that

" . . . the mortgage operated as a waiver of the homestead exemption in favor of the *mortgagee* and those claiming under him, which waiver did not inure to the benefit of other persons."⁷⁰

Thus such a waiver of the exemption does not affect the homestead as to everyone, but it is effective only as to the particular mortgagee and those claiming through him. In some states a specific release or waiver of the homestead is necessary to the validity of a conveyance of homestead property⁷¹ and in others the homestead exemption may be waived merely by failure to make a written claim of the exemption when execution is attempted.⁷²

⁶²*Campell v. Largilliere Co.* (1927) 44 Ida. 293, 256 P. 371, *Brown v. Manco*, (1926) 140 Wash. 525, 250 P. 36.

⁶³*Supra*, note 61.

⁶⁴R.C.M. 1935, §6951.

⁶⁵*Id.*, §6952.

⁶⁶*Kerlee v. Smith* (1912) 46 Mont. 19, 23, 124 P. 777.

⁶⁷*Supra*, note 37, §192.

⁶⁸*Supra*, note 26.

⁶⁹*Supra*, note 42 and note 45.

⁷⁰*Supra*, note 26, p. 217.

⁷¹*Gillispie v. Fulton Oil & Gas Co.* (1908) 236 Ill. 188, 86 N.E. 219.

As was stated before, the homestead exemption statutes being enacted for the benefit of the debtor, should be liberally construed in his favor. It has been shown by statutes and court decisions that Montana has maintained this theory for the protection of the debtor's home and family. In some instances it has been a little more strict than other states and in others more liberal. Keeping in mind other statutes and rights arising thereunder such as the constitutional provision against impairment of contracts by the states,⁷³ it is only a matter of logical reasoning to see why the states cannot go beyond a certain limit in allowing such exemptions.

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⁷²Oreg. Code Ann. (1930) §204, *Coleman v. Birmingham Fertilizer Co.* (1922) 208 Ala. 160, 93 So. 904, *Andrews v. McCreary Lbr. Co.* (1924) 155 La. 730, 99 So. 579, 33 A.L.R. 608.

⁷³U. S. CONST. Art I, §10.