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Montana Homestead Laws: Their Relationship to Bankruptcy

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and the Wyoming Constitution, which was adopted in 1889, are very similar to ours. In each of these constitutions the articles pertaining to the legislature are expressed in the negative language of limitation, while the articles pertaining to the executive are expressed in the affirmative language of grant.

A good case could be made for following their interpretation. But such a rule in view of our present stage in understanding the Montana Constitution is too glib to be reliable. It seems that we can better arrive at the nature of the Montana Constitution by a piecemeal approach. Each of the executive offices and the court systems should be separately analyzed to determine the nature of their particular powers. Appeals in the offing concerning the Attorney General's power should prove helpful. In the meantime, it would be best to return to the earlier Montana holding that the Constitution is a limitation upon legislative authority. And almost certainly at least that much is true.

LOUIS FORSELL

MONTANA HOMESTEAD LAWS; THEIR RELATIONSHIP TO BANKRUPTCY

I. In General: The Homestead Laws of Montana.

At the common law some exemptions from execution were known both in England[1] and the United States[2] but there was no generally recognized right of homestead. The Republic of Texas in an act dated January 26, 1839 produced the first actual legislation on the subject.[3] In our own state the Constitution specifies that "the legislative assembly shall enact liberal homestead and exemption statutes."[4] Subsequently laws were passed following this general mandate[5] and the Supreme Court in the case of *Mitchell v. McCormick* announced that the statutes then in effect were to carry out that purpose.[6] The laws were enacted for the debtor and were to be liberally construed.[7] The needs served by the allowance of the realty exemption are usually stated to be security of the home, the encouragement of building the home, attraction of people to unsettled areas, the general building up of the community through the absence of pauperism and the con-

[1]Blackstone, III Commentaries (4th) 412 ff.
[2]Haskins, G. L., *Homestead Exemptions*, 63 HARV. L. REV. 1291.
[3]*id.* Source: Laws of Texas, 3rd Congress, 1st session.
[4]Constitution of the State of Montana, Art. XIX, § 4.
[5]First noted in the Montana Code in 1895. But note that Montana homestead laws date from the Bannack statutes of the Sixties.
[6]22 Mont. 249, 56 Pac. 216 (1899).
[7]Oregon Mfg. Co. v. Dunbar (1930) 87 Mont. 603, 289 Pac. 559.

sequential lowering of the burden upon the public and the general security and independence of the members of the family.[8]

In regard to the extent of the allowance, something different prevails in Montana than is the usual rule in other jurisdictions.[9] Here urban homesteaders have an area allowance of one-fourth acre while their neighbors in the country are allowed a maximum of 320 acres. Either can have a dwelling house upon the property, but in neither case can the value of the land and dwelling exceed $2,500. Seemingly the code by the use of the language "provided, however, that in any proceedings instituted to determine the value of such homestead, the assessed value of such land, with included appurtenances, if any . . . as appears on the last completed assessment roll . . . shall be prima facie evidence of the value of the property claimed as a homestead" fixes the time at which the value is determined as that of the institution of proceedings.[10] California by very express provision fixes the value as of the time of any levy of execution thereon.[11] No penalty would result to the declarant if too little land or value was declared; there are, however, express prohibitions on excessive declarations. Such excessive declarations can be of two classes: first, the claiming of property worth more than the statutory allowed value ($2,500) and secondly the claiming of a greater area of land than is specifically allowed. The latter type of claim has uniformly been held to be fatal to the existence of any homestead,[12] while the former problem is met by the setting aside a part of the property—a dwelling and lot—if the property is so divisible,[13] or if it is not, by sale of the land and dwelling,[14] paying from the proceeds thereof the value of the homestead exemption maximum ($2,500) to the debtor and then the excess to the creditor.[15] Note that the payment to the debtor is exempt from further process for a period of six months, during which time he can turn the cash into another homestead.[16] The reason for the distinction between the two excessive declaration situations is probably first that there is a method for the creditor to petition the district court for the appointment of appraisers when he has a judg-

[8]See Haskins, supra.
[9]R.C.M. 1947, § 33-124.
[10]*id.* See generally § 33-110 through 33-116 also.
[11]Civ. Code Calif. 1949, § 1260.
[12]Yerrick v. Higgins (1899) 22 Mont. 502, 57 Pac. 95 and McCarthy v. Kelley (1922) 63 Mont. 233, 206 Pac. 782.
[13]R.C.M. 1947 § 33-117.
[14]Id. § 33-118.
[15]Id. § 33-120.
[16]Id. § 33-120.

ment not of certain classes[17] to determine the *value* of the exemption, whereas nothing is said of area in the code. Secondly, it is fairly easy to determine the problem of acreage with a considerable degree of accuracy due to fixed and constant standards while the problem of value is always one of conjecture and opinion having little or no criteria. This is the view of Chief Justice Brantly in a Supreme Court decision.[18]

The filing of a homestead is limited expressly to the "head of a family" and *may* be out of the separate property of such person except in the case of married persons where the selection *may* be out of the separate property of the wife if she gives her consent.[19] On the other hand, the wife does not need the husband's consent to select a homestead out of his separate property.[20] The term "head of a family" includes the husband or the wife; or a person over 65 years of age; or a person residing on the premises and having under his care and maintenance a minor child of certain classes, a parent of certain classes, an unmarried sister or any of the other relatives mentioned who has attained the age of majority and is unable to care for himself.[21] The court has included in the definition an abandoned wife[22] in one instance and a father supporting minor children who had been awarded to the custody of the other spouse in a divorce decree in another instance.[23] A widow whose daughter was of age and working away from home was declared to be a "head of family" for exemption purposes when it was shown that the widow was caring for her granddaughter—a child of the working daughter—while the latter was away working.[24] The homestead declaration need only state that the person is the "head of a family" and does not need to go into the details thereof.[25]

[17]Specifically, those cases covered in § 33-105 which allow execution and forced sale on judgments obtained (1) before declaration of homestead, (2) on mechanic's and vendor's liens, (3) debts secured by mortgages on the premises executed by both husband and wife, (4) debts secured by mortgages before filing homestead for record.

[18]In Yerrick v. Higgins, supra. In that case, the court held that an average of 2100 square feet on a one-fourth acre declaration was too large for the court to overlook, despite the fact that the court would treat as vain small inconsequential matters.

[19]R.C.M. 1947, § 33-125. See generally § 33-102 and § 33-103. This is probably another example of where the code says "may" for "must."

[20]id. § 33-122 and § 33-126. Also see Mennel v. Wells (1915 51 Mont. 141, 149 P. 954.

[21]Specifically, a minor child of his own, or of his or her wife or husband, or former wife or husband; a minor grandchild, brother or sister or child thereof; a parent or grandparent of self or of husband or wife.

[22]Mennel v. Wells, supra.

[23]DeFontenay v. Childs (1933) 93 Mont. 480, 19 P. (2) 650.

[24]Esterly v. Broadway Garage (1930) 87 Mont. 64, 285 P. 172.

[25]id.

The estate in land which will be exempted varies from one jurisdiction to another; some require a fee simple, while others are willing to allow lesser interests to be declared.[26] If the mandate of liberal exemption laws is to be applied, it would seem that jurisdictions allowing the lesser interests to be declared are more in conformance with that spirit. On this point there is nothing definite to be found in the Montana Code, but it would seem that the cases would go along with the more liberal view. An early case held that the exemption could be had on lands belonging to the United States and "the homestead right given by statute is impressed on the land to the extent of the interests of the claimant in it, not on the title merely. The actual homestead, as against everybody who has not a better title, becomes impressed with the legal homestead right, by taking the proceedings proscribed by the statute." Again, "whether the title to land is good or bad is not a matter that concerns the creditor."[27] Thus we have naked possession alone without any title whatsoever giving the homestead exemption; this, of course, subject to the rights of the true owner. Further, the fact that the debtor owns the land in conjunction with another does not defeat the claim. An early case on this point said "there is no pretense that the word 'owner' cannot be applied to a tenant in common. There is no pretense that he cannot lawfully occupy all and every part of the premises, to the exclusion of all the world except his co-tenant. Why cannot 160 acres (note: the then existing area limitation) or the fourth part of an acre, more or less, be as easily set apart to the cotenant as well as to the owner of the entirety?"[28] Today it is certain that the undivided interest will be protected as a homestead.[29] It must be borne in mind, however, that the undivided interest must not exceed the maximum allowance of 320 acres or one-fourth acre as the case may be; these areas being the total that any homestead might affect. Thus a homestead declaration on an undivided interest in, say, 400 acres, would be void. Just as the cotenancy in land is recognized, similarly is the interest of a partner in the partnership estate.[30] Another word of caution here: there must be actual occupancy of the land claimed as a homestead in order to exempt it from sale or execution.[31]

The Montana Code states that the actual declaration must

[26]Anno. 89 A.L.R. 511 (1934).
[27]Watterson v. E. L. Bonner Co. et al (1897) 19 Mont. 554, 48 P. 1108.
[28]Lindley v. Davis (1887) 7 Mont. 206, 14 P. 717.
[29]McCarthy v. Kelley (1922) supra, Wall v. Duggan (1926) 76 Mont. 239, 245 P. 293.
[30]Furgeson v. Speith (1893) 13 Mont. 487, 34 Pac. 1020.
[31]Power v. Burd (1896) 18 Mont. 22, 43 P. 1094.

contain (1) a statement that the person is a head of household or in the case of the wife, that the husband has not made a declaration and that the same is for their mutual benefit; (2) a statement that the person is residing on the premises and claims them as a homestead; (3) a description of the premises; (4) an estimate of their actual cash value.[32] The declaration must be acknowledged with the same solemnity as a grant of real property,[33] and recorded with the county clerk of the county wherein the land is situated.[34] Note again the requirements as to area, value, and occupancy. The sole deviation allowed from the rule requiring declaration and recordation by the claimant is in the event a probate homestead should be allowed; in that case, it is incumbent upon the probate judge to file in the absence of the decedent's action.[35] This can be by the court's own motion or by petition.[36] The homestead thus authorized to be set aside by the probate court under probate exemption statutes is the homestead provided for in the regular homestead sections and must meet the requirements of value and area.[37]

The very heart of the existence of the right of declaration of homestead is the humanity resulting from the exemption from execution and forced sale. Our code reads "the homestead is exempt from execution or forced sale, except as in the chapter provided." Included exceptions are these: (1) where the judgment existed before the declaration was filed for record, which would be a lien upon the premises; (2) on mechanic's or vendor's liens; (3) on debts secured by mortgages upon the premises and signed by both the husband and wife; (4) on debts secured by mortgages made before the declaration was filed.[39] In those enumerated situations, then, the declaration would give no protection. Interpreting (1) above, the Supreme Court of Montana held that the filing of a homestead declaration after levy on a writ of attachment exempted land from sale under execution issued on judgment obtained after declaration was filed.[40] The code says judgment, and that is just what the court demanded. This treatment is to be contrasted with some jurisdictions where the criteria is sale. In the case under consideration, some weight

[32]R.C.M. 1947, § 33-127.
[33]id. § 33-126.
[34]id. § 33-128.
[35]id. § 91-2402. This is the "probate homestead" section, but note that other probate exemptions are included.
[36]Bullerdick v. Hermsmeyer (1907) 32 Mont. 541, 81 P. 334.
[37]In re Trepp's Estate (1924) 71 Mont. 154, 227 P. 1005.
[38]R.C.M. 1947, § 33-104.
[39]id. § 33-105.
[40]Wall v. Duggan, supra.

was given to the constitutional mandate of liberality. The court also listened to argument that the general attachment statutes would govern their decision but held that the specific homestead statutes would control. Further, it indicated that holding attachments not an exception to the general exemption section did not take from the plaintiff any vested right he had in the homestead property. The exemption statutes entered into and constituted a part of the contract between the parties. This case, then, fixed the rule regarding the time limit for filing in cases of attachment. Regarding (2), the mechanic's and vendor's liens, the Montana court has held that the homestead is subject to the lien for material as well as labor where the material and labor were both furnished by the plaintiff.[41] And in a later case the furnishing of material was held sufficient to raise a mechanic's lien.[42] But money loaned to another cannot, under the doctrine of subrogation, be used to impress a vendor's lien where there is no showing that the money was loaned for the purpose of purchasing a homestead.[43] Still another case held similarly where the loaned money was traced to the purchase of the homestead.[44] (3) There is no reason why a proper mortgage on the homestead duly executed by both the husband and wife and acknowledged should not be subject to the usual process. To hold otherwise would let the debtor eat his cake and have it; special laws should not provide a hiding place for him. The court will scrutinize the form carefully, however, and in one case protected the wife in her enjoyment of the homestead against a mortgagee seeking to foreclose, it having been shown that she did not join in the execution of the mortgage instrument.[45] In another case there was an ineffective mortgage on a homestead while it was occupied; upon the abandonment of the homestead, the court said the mortgage did not gain validity.[46] The treatment of exception (4) above has likewise been uniform by the court. Mortgages made before declaration could hardly be deprived of their already vested interest by any act of the debtor; the mortgaging party has already given away a security interest in the property and it would be against the spirit of the law—in spite of humanitarian concepts—to deprive the mortgagee of that right. Where, however, the mortgage had lapsed as security and ceased to be a mortgage and suit

[41]Merrigan v. English (1889) 9 Mont. 113, 22 P. 454.
[42]Bonner v. Minnier (1893) 13 Mont. 269, 34 P. 30.
[43]DeFontenay v. Childs, supra.
[44]Mitchell v. McCormick, supra.
[45]Watterson v. E. L. Bonner Company, supra.
[46]American Savings and Loan Assn. v. Burghardt (1897) 19 Montana 554, 48 P. 1108.

was brought upon the mortgage note, the court refused to recognize the security interest and held that an intervening declaration was effective.[47]

Included in the exemption is not only the house and the land upon which it stands, but other appurtenances attached thereto including outbuildings, fences, and other improvements.[48] It would be a strange kind of benefit to confer upon a farmer a house and land free from sale under legal process and then refuse him a fence to protect the crops grown upon his homestead. Our code is silent on the subject of rents derived from the premises and status of growing crops thereupon, but if the pattern of the other jurisdictios is followed, and absent code provision there is no reason for it not to be, rents and crops will be subject to the usual course of sale for satisfaction of judgments.[49]

II. The Relationship of the Homestead Exemption to Bankruptcy.

The National Bankruptcy Act provides that the act shall not affect the exemptions which are prescribed by the laws of the filing of the petition if the bankrupt has lived in that state for six months preceeding the filing of the petition.[50] At the time the petition is filed, the trustee is vested with the bankrupt's title to all property "except insofar as it is to property which is held to be exempt."[51] This relationship of state and Federal law has been frequently before the courts; the most common question being just when homesteads must be filed in order for it to have the effect of protecting the bankrupt. The Supreme Court of the United States ruled on this point in the case of *White v. Stump*.[52] That case arose in Idaho under statutes conforming practically to the letter to ours, section 5441 providing that the homestead was subject to forced sale in satisfaction of judgments obtained before the declaration was filed for record[53] and section 5469 dating the exemption from the time of such filing[54] The defendant's wife filed a homestead declaration two months after the defendant was adjudged a bankrupt on his voluntary petition. The referee disallowed the exemption. On certiorari, the Supreme Court affirmed the referee saying that when the bankruptcy act

[47]Siru v. Sell (1937) 108 Mont. 438, 91 P. (2d) 411.
[48]Watterson v. E. L. Bonner Co., supra.
[49]We could well use the California Code as a model on this point; their code uses the words "products, issues, or profits" of the homestead in describing the exemptions allowed. Civ. Code Calif. 1949, § 1265.
[50]The Bankruptcy Act of 1898, § 6. (11 USCA 24).
[51]id. § 70. (11 USCA 110).
[52]266 US 310, 69 L.Ed. 301, 45 S.Ct. 103. (1924)
[53]Rev. Code Idaho 1919, § 5441; cf. § 33-105 R.C.M. 1947.
[54]Rev. Code Idaho 1919, § 5469; cf. R.C.M. 1947 § 33-129.

spoke of property which was exempt, it referred to some point of time; that time here was when the property passed out of the control of the bankrupt except for his exemptions. The exemptions allowed were those which would exempt the property from levy and sale under state judicial process; the one claimed here would not. Just as the exemption could not be claimed against a creditor who levied on the property before a declaration was filed, so too the exemption is lost against the trustee in bankruptcy who represents all creditors. Thus we have emerging the general rule that where the homestead is filed before the petition in bankruptcy it will be protected; where it is filed after petition it will be of no legal force.

Some states have a different doctrine in regard to the extreme point of time at which the exemption will be recognized.[55] Nevada is one such state, allowing the assertion of the homestead against levying creditors at any time up to the actual sale of the property.[56] This ought to have its recognition in the courts of bankruptcy and, as a matter of fact, did in the case of *Meyers v. Matley*.[57] In that case, the wife of a bankrupt filed a statutory declaration a month after the involuntary petition was filed and the husband adjudged a bankrupt. The Supreme Court of the United States allowed the homestead, differentiating the situation here from that in *White v. Stump* on the basis of the state law involved.[58] They said that the right to declare a homestead existed just as it would have if there had been a levy upon the property under state law, and in Nevada this declaration could be made at any time before the sale of the property in the execution. It was pointed out that the trustee is vested only with the rights of a creditor holding an equitable or legal lien upon the property and not with the rights of a purchaser.

Still another situation has arisen under the California judgments act which states that a judgment lien does not automatically attach by docketing in the office of the clerk of court but an abstract of the judgment must be recorded with the local county recorder in order to have a lien attach to the property of the de-

[55]See the Anno. 145 A.L.R. at 502.

[56]Nev. Comp. Code (Hillyer, 1929) § 3315, provides that the homestead "shall not be subject to forced sale on execution or final process from any court." See also Hawthorne v. Smith (1867) 3 Nev. 182 and Lachman v. Walker (1880) 15 Nev. 422 holding that the filing at any time prior to sale forestalls the sale on execution. After sale, the property is not exempt.

[57](1943) 318 U.S. 622, 87 L.Ed. 1043, 63 S.Ct. 780.

[58]Accord: Palias v. DeJarnette (1944) 145 F.(2) 953; Holahan v. Nugent (1952) 198 F.(2d) at 658.

fendant.[59] This device is thought by the experts to be far in advance of the system which prevails in most of the other jurisdictions in that it provides a single office for the filing and locating of all judgments and liens—local and federal. Thus, it is convenient for title searchers; at the same time, it eliminates the likelihood of claimed discrimination or favoritism among courts, state and federal, by which it is alleged a creditor may establish a lien more easily in one court than another.[60] However, in 1950 a bankruptcy court tested the right of a bankrupt to file a homestead after petition and adjudication because the judgment therein was not filed for record. Previous to *White v. Stump,* it was thought that a bankrupt might declare a homestead in California after petition provided he proceeded to perfect his right within a reasonable time;[61] after *White v. Stump,* it was thought that state followed the White doctrine.[62] The 1950 case in the district court expressed the view that a judgment lien in California does not automatically attach either upon rendition or entry of judgment but that it was necessary that an abstract be recorded before any lien attaches.[63] The court then distinguished the case at bar from *White v. Stump* and said it was governed by *Meyers v. Matley* unless the recordation of an abstract of judgment could be said to be a part of the legal or equitable proceedings in which the judgment might have been obtained. The court concluded that it was not, but rather is a voluntary act on the part of the person making it. On review, the Ninth Circuit Court affirmed the lower court's finding.[64] The court held that the determination of the cause rested upon whether the trustee's title was the same as that of a creditor "holding a lien thereon by legal or equitable proceedings." It said that if the words connoted judicial proceedings, the language did not cover such liens as the trustee seeks to assert. Only by recordation of the judgment abstract does the creditor acquire a lien. In answering the contention that the California judgment is still good between the parties even without recordation, the court said "we think Congress specified something different from any valid lien when it

[59]Calif. Code Civ. Proc. 1949, § 674; cf. R.C.M. 1947 § 93-5712. California contemplates recording with the county recorder, whereas Montana requires filing with the Clerk of Court.

[60]Rhea v. Smith (1927 274 U.S. 434, 47 S.Ct. 698; Lineker v. Dillon (N.D. Calif. 1921) 275 F. 460. For a treatment of Federal liens in Montana, see Weber, Fred, *Montana and the Federal Judgment Lien,* 8 MONT. L. REV. 65.

[61]Bryant v. Mayhew et ux; In re Mayhew (1914) 218 F. 422.

[62]145 A.L.R. at 504.

[63]In re Curmar Mfg. Co. et al (1950) 91 F. Supp. 647.

[64]Campsell v. Straub (1951) 189 F.(2d) 379. This is the same case as In re Curmar Mfg. Co. in the district court.

specified a lien 'by legal or equitable proceedings.'[65] It seems reasonable to construe the words last quoted as words of significant limitation rather than as surplusage.'' Further, the court felt that the natural connotation of the words suggest a lien which attaches by force of judicial process. If the Ninth Circuit had stopped at this point, it would have made a sizeable inroad to the *White v. Stump* doctrine, at least as far as California is concerned. On rehearing, however, the court reversed itself.[66] Again the question was the proper characterization of the lien. This time, the court held that although the recordation of the abstract is independent in the sense of being voluntary, it is incidental to judicial proceedings—in sense a device to give particular additional effect. The judgment is the basic fundamental source of rights whether generally before recordation or by way of lien afterwards. Decisions of state courts, however respected, cannot have the force of law in determining the federal decision. Upon examination of two sections of the National Act thought pertinent—Sections 3, sub a(3) and 67 sub a—the court indicated that a California judgment lien should be regarded as a lien obtained by ''legal proceedings'' within these two sections. Both sections noted are designed to keep creditors with non-preferred status from gaining that status through diligent resort to the courts, which would violate the policy of equality among the creditors. That policy would be as much violated by allowing the general creditor to become a lienor by getting a judgment and recording as it would be if he should achieve similar preferential status by obtaining judgment alone. The only reasonable construction of the two sections is that which includes a California judgment lien among liens obtained by ''legal proceedings,'' even though voluntary recordation is the essential final step. In regard to Section 70, the court said that it was designed to protect general creditors against secret liens. The trustee has the rights of a creditor who has levied attachment or execution on the property; the California judgment creditor who has recorded is protected against secret liens. It would thus seem that the bankruptcy trustee's assertion of rights of a California judgment lienor would be consistent with the Bankruptcy Act. The court then gave credence to the argument for consistency of interpretation of equivalent phrases, and reached the conclusion that their former view of the case should be abandoned. The California judgment lien, though perfected only by voluntary recordation

[65]Bankruptcy Act of 1898, § 70c. (11 USCA 110).
[66]194 F. (2d) 228.

is a lien by legal or equitable proceedings within the meaning of Section 70 sub c.[67]

Applying the White, Matley, and California decisions to Montana is somewhat difficult. The National Bankruptcy Act is a Federal Act, national in its scope. Yet the problem here is one of looking to the state law involved and fitting it to the national act. In the White case, we find that the state law upon which the decision turned is in accord with our own state law; that being true, the natural inference would be that the White case would govern.[68] There then would be little use to look to the Meyers case or the line of California decisions discussed above.[69] There is, however, a situation in the Montana law which must be examined. The 1926 case of *Wall v. Duggan* held that a homestead delcaration filed after attachment, but before judgment, was good and the homestead would be protected to its allowed valuation.[70] This is an anomaly contrary to the weight of authority and usual rule that the creditor secures a lien from the time of attachment. It might produce some interesting results. As an example, suppose that creditor A levied upon the land of debtor B. Thirty days later, B declared a homestead conforming to the requirements of the statute. In Montana, B would win out according to the above rule, and A could claim only if the value of the estate exceeded $2,500.[71] Now, suppose that thirty days later B would be adjudged a bankrupt. Then, in Montana, B would still get his homestead; the surplus, instead of going to A, would, under Section 67 of the Bankruptcy Act, go to the trustee in bankruptcy.[72] In the majority of jurisdictions, B would have secured no right under his declaration leaving A the sole claimant; in that case, the entire right would go to the trustee in bankruptcy.[73] This is

[67]Certiorari denied (1952) 343 U.S. 927, 69 L.Ed. 1338, 72 S.Ct. 760.

[68]See 145 A.L.R. at 504. ". . . White v. Stump therefore applies to render ineffective declarations filed in California after bankruptcy. . . . This same rule applies in Montana declarations filed after bankruptcy. White v. Stump also overruled re Lehfeldt (D.C. 1915) 225 F. 681, 35 Am. Bankr. Rep. 716, which sustained a claim based on such declaration. In re Culwell (D.C. 1908) 165 F. 828, 21 Am. Bankr. Rep. 614 another Montana case, must be held to fall with the Lehfeldt case."

[69]Actually there is probably no separate "White v. Stump" nor "Meyers v. Matley" doctrine. The Supreme Court of the United States recognized the latter case as an extension of the former, distinguished on the basis of the state law involved.

[70]Wall v. Duggan, supra.

[71]See the Anno. 110 A.L.R. 904. Montana would line up on this point on the minority side along with California, Nevada, and Washington. Ten jurisdictions are contra, although some do not squarely face the issue.

[72]Provided, of course, that the attachment of the creditor always must come within the time requirements of § 67 of the act.

[73]Hemsell v. Rabb (1929) 29 F.(2) 915; In re Malone's Estate (D.C. Idaho, 1915) 228 F. 566.

by virtue of Section 67 sub a(1) making liens by legal proceedings within four months of the petition null and void, with the exception that the court may on due notice order any such lien to be preserved for the benefit of the estate under Section 67 sub a(3). But Section 6 provides that the Bankruptcy Act shall not affect the allowance to bankrupts of exemptions prescribed by state laws in force at the time of filing the petition wherein the debtor was domiciled over the longer part of the preceding six months.

Thus, where there is in sequence attachment, homestead filed, and subsequent bankruptcy, Montana lawyers would do well to look to the Meyers and California decisions and fit them to the doctrine of the Wall case. Otherwise, it is submitted that the doctrine of *White v. Stump* would require a holding that the homestead declarant must record by declaration prior to the date of the bankruptcy petition else the title of the bankruptcy trustee would be superior by operation of the Bankruptcy Act as related to local Montana law.

ROBT. M. HOLTER

COURT CONTROL OVER JURY VERDICTS

When, if ever, may a jury be overruled, assuming it has rendered a verdict on a material issue of fact, has long presented a problem in our system of trial by jury.

As noted in Scott's *Fundamentals of Procedure in Actions at Law,* from the beginning of the thirteenth century until about the nineteenth century a procedure was followed that where a verdict was false in fact, that is against the evidence, it could be set aside by attaint. Thereafter, a new jury could be summoned and if, upon consideration of the issues tried by the original jury, it found the verdict to be false, the verdict would be reversed. After which, the original jury would be harshly punished. The verdict would not be reversed if it had support either by evidence introduced or by facts not in evidence; the reason being that during this period of history the jurors were allowed to decide a fact considering both their own personal knowledge of the circumstances and the evidence introduced. This advice of controlling juries was used in this country until more modern and effective methods of control were developed.[1] Thus, it is apparent that there has long been a difficult struggle in an attempt to prevent jurors from rendering unreasonable verdicts.

In the year 1655, as reported in *Woody v. Guston,*[2] the power

[1]Scott, *Fundamentals of Procedure in Actions at Law,* 91-91.
[2]Style, 466; 82 Eng. Reprints, 867.