Promissory Note—Waiver of Homestead and Exemption Laws—Validity of.

A clause in a promissory note to the effect that the makers and endorsers jointly and severally waive the benefit of the homestead and exemption laws is null and void and of no force or effect.

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Cut Bank, Montana.

My dear Mr. Norman:

You have submitted me a form of promissory note used by the Marrers State Bank of Cut Bank, which bank is now under your charge as a representative of the State of Montana, the said note containing the following statement and printed on the face thereof:

> "The makers and endorsers jointly and severally * * * waive as to this debt all benefit of homestead and exemption laws."

Your question is whether the above clause is a valid waiver of homestead and other exemptions allowed a debtor under the laws of this State.

Under the laws of Montana (Sec. 4694, Rev. Codes of 1907):

> "The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

The homestead may be selected by the husband or other head of a family, or in case he fails to do so, the wife may make the selection. (Sec. 4719, Revised Codes of 1907; Mennell v. Wells, 51 Mont. 141). The declaration must be in writing, acknowledged and recorded as are other conveyances of real estate, and must contain a statement, showing that the person making it is the head of a family, or if made by the wife, that her husband has not made such a declaration and she

makes it for their joint benefit; that the person making it resides on the premises; a description of the premises; and an estimate of their actual cash value. (Secs. 4720 and 4721, Revised Codes of 1907.)

The homestead is exempt from execution or forced sale except for liens upon the premises filed before the declaration of homestead; debts secured by mechanics or vendors liens upon the premises; debts secured by mortgages on the premises, executed and acknowledged by husband and wife or by the unmarried claimant; or debts secured by mortgage upon the premises executed and recorded before the declaration of homestead was filed. (Secs. 4697 and 4698, Rev. Codes of 1907).

A homestead once declared can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife, if claimant is married, or by the claimant if unmarried. (Sec. 4700, Rev. Codes of 1907; Kerlee v. Smith, 46 Mont. 19).

The clause in a promissory note, therefore, waiving the right of homestead exemption, even if the wife joined in the note, would be without effect. It would not be an abandonment of a homestead declaration already filed, as it is not acknowledged as required by Section 4700, Revised Codes, above.

As a general rule a waiver by a debtor of his exemption right, by a stipulation or an executory contract such as a promissory note, is absolutely void. (18 Cyc. 1450.)

In the case of Kneettle v .Newcomb, 22 N. Y. 249, 78 Am. Dec. 186, the court, in holding that right of exemption cannot be waived by a clause in a promissory note reading, "I hereby waive and relinquish all right of exemption of any property I may have from execution on this debt," says:

> "The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of a prime necessity, to a limited amount, are based upon views of policy and humanity which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intentions of the legislature. If effect shall be given to such provisions, it is likely that they will be inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. * * *
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> "There is another consideration belonging to this subject, which should be referred to. These exemption laws apply only to householders who have families for which they provide. It is a fair inference from this feature that one object of the legislature was to promote the comfort of families, and to protect them against the improvidence of their head. * * * Assum-

ing this to be within the policy of the enactments, it is obvious that a contract like the one contained in these notes is subversive of it, and consequently illegal and void."

Similar holdings by the court appear in :

Levicks et al. v. Walker, 15 La. Ann. 245, 77 Am. Dec. 187;
Carter v. Carter, 20 Fla. 558, 51 Am. Rep. 618;
Reecht v. Kelley, 82 Ill. 147, 25 Am. Rep. 301;
Curtis v. O'Brien, 20 Ia. 376, 89 Am. Dec. 543;
Columbia etc. Co. v. Morgan (Ky.) 45 S. W. 65;
Wallingsford v. Bennett, 1 Mackey 303 (U. S.)

While this question is not without authority both ways, the tendency of the courts seems to be to hold with the principles above quoted. It has never been squarely before the Supreme Court of this State, but the language used in Mennell v. Wells, supra, seems to indicate that our court would hold that the waiver in a note was void. In referring to the exemption laws in the case of Mennell v. Wells, supra, the court says:

"These provisions were enacted by the legislature in obedience to the injunction of the Constitution: "The legislative assembly shall enact liberal homestead and exemption laws.' (Const. Art. XIX, sec. 4.) By a general consensus of opinion, the courts hold that such laws have for their purpose the maintenance and protection of the family and that they are subject to the rule of liberal construction, to the end that this purpose may be fully effected; and though the particular statute under consideration, as is the case here, makes the exemptions in favor of the judgment debtor eo nomine, the courts do not regard them as conferring a personal right upon the debtor, but rather as declaring a family right which may be asserted effectively by the wife or any other person upon whom, for the time, the care of the family has been cast."

The court quotes from Frazier v. Syas, 10 Neb. 115, 4 N. W. 934, as follows:

"The law is for the benefit of the family of the debtor, and its benefits may be claimed by the actual head of such family then residing in the state, although the husband may have absconded," and cites the following cases in support:

Linander v. Longstaff, 7 S. D. 157, 63 S. W. 775;
Freehling v. Bresnahan, 61 Mich. 540, 28 N. W. 531;
First Int. Bank v. Lee, 25 N. D. 197, 141 N. W. 716;
McCarthy's Appeal, 68 Pa. 217;
Meitzler's Appeal, 73 Pa. 368;
Scoville v. Wilson, 31 Neb. 462, 48 N. W. 147.

On the strength of these cases, the court held that the wife in this case had the right, in the absence of her husband, to claim homestead exemption, and says:

"The same rule must of necessity apply to the exemptions of personal property."

It is, therefore, my opinion that the clause referred to in the note form submitted by you is null and void; that it does not waive either the homestead or personal property exemptions of the maker, and that the wife, in the absence of her husband can claim the exemptions to which the family of the debtor may be entitled under the exemption laws of the State.

Very truly yours,

WELLINGTON D. RANKIN,

Attorney General.