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Herbert Buchwald

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FLORIDA HOMESTEAD: A RESTRAINT ON ALIENATION BY JUDICIAL ACCRETION*

HERBERT BUCHWALD**

INTRODUCTION

The sanctity of the family and home has remained inviolate since biblical times; it is not surprising, therefore, that society has permeated its laws with special provisions regarding the family homestead.¹ The fundamental principle of "homestead law" is founded on the exemption of homestead property from forced sale to conserve the home,² protect the family from want,³ and shelter them by providing a refuge from the stresses and strains of misfortune.⁴

The first homestead provision in the United States was enacted in 1839,⁵ when the Texas legislature attempted to secure to each family a home and means of livelihood, irrespective of possible financial misfortune and beyond the reach of creditors. It is this need for security from the burden of pauperism and threat of destitution which has been the foundation of homestead exemption laws,⁶ and the principle underlying application of homestead provisions. Chief Justice Whitfield, a noted jurist in the field of homestead law, sagaciously noted: "Organic and statutory provisions relating to homestead exemptions should be liberally construed in the interest of the family home."⁷

With a view to realizing the basic objectives of homestead laws, in Florida, the constitution and statutes have placed certain express restrictions upon the alienation of homestead property, both by testamentary disposition and inter vivos deed. However, the nature, extent and

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** Member of the Editorial Board, *University of Miami Law Review*.

1. There are homestead exemptions throughout the United States with the exception only of Delaware, the District of Columbia, Maryland, Pennsylvania and Rhode Island. Haskins, *Homestead Exemption*, 63 HARV. L. REV. 1289 (1950). In addition, the following countries have adopted American type homestead exemption provisions with various limitations on the value exempt: Canada, New Zealand, Australia, Switzerland, France, Germany. 7 ENCYC. SOC. SCI. 441, 443-44 (1942).

2. WAPLES, *HOMESTEAD AND EXEMPTIONS* 3 (1893).

3. Beall v. Pinckney, 150 F.2d 467 (5th Cir. 1945).

4. Collins v. Collins, 150 Fla. 374, 377 So.2d 443 (1942).

5. Laws of the Republic of Texas, Act of January 26, 1839, 3d Cong., 1st Sess., 113.

6. West Fla. Grocery Co. v. Tutonia Fire Ins. Co., 74 Fla. 220, 77 So. 209 (1917).

7. Milton v. Milton, 63 Fla. 533, 536, 58 So. 718, 719 (1912); Chief Justice Randall had earlier observed:

[F]ew men would mortgage their household goods and their children's clothes to a hard creditor . . . but many thoughtless and improvident people might be induced to obtain credit by merely waiving the benefit of exemption and thus placing the last blanket and bed and their own and the children's clothing at the mercy of a hard creditor. Carters Adm'r v. Carter, 20 Fla. 558, 570 (1884).

effect of these limitations have become blurred by conflicting elements of public policy and doubtful interpretations of the organic law.⁸ It is the purpose of this article to examine a particularly distressing restraint on alienation—one that has emerged through judicial “accretions” over the past seventy-five years—involving the voluntary inter vivos conveyance of homestead property by the head of a family to the spouse in fee simple, or in an attempt to create a tenancy by the entireties. The practice of making inter vivos conveyances of the homestead is far from infrequent, thus rendering the problem all the more acute. In addition, the application of the judicially-created principles has posed an enigma that would perplex the most versatile tribunal, no less the common advocate. By deliberating the issues in this article, the reader, it is hoped, will gain a clearer understanding of the judicial trend.⁹

ALIENATION IN GENERAL

The numerous controversies that have arisen over conveyances of homestead are understandable. Homestead provisions, which have been adopted for the protection of the heirs of homesteaders, may not apply to property held *by the entireties*. Property held by the entireties can be disposed of as any other property not exclusively owned by a head of the family and occupied as a homestead.¹⁰ On the other hand, homestead property is a special kind of species of property.¹¹

The right of an owner to alienate his property is not conferred by constitutional or by legislative grace. It is an inherent right, being an incident to, or attribute of, the ownership of property.¹² In the absence of restricting statutes, the family head has as full and perfect a right to convey the homestead property as if it had not been a homestead.¹³ Since the power of alienation is an incident of the ownership of property, independent of the homestead law, the directions and prohibitions of the statutes are mere restrictions upon this antecedent power.¹⁴

8. Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption*, 2 U. FLA. L. REV. 12 (1949).

9. Although the scope of this article does not permit, it is important to recognize the problem of determining how much area of the property is exempt under the homestead provisions and exemption of the improvements thereon. See generally *Cowdery v. Herring*, 106 Fla. 567, 143 So. 433 (1932); *Anderson Mill & Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588 (1931).

10. *Denham v. Sexton*, 48 So.2d 416 (Fla. 1950).

11. *Reed v. Fain*, 145 So.2d 858 (Fla. 1962).

12. *Thomas v. Craft*, 55 Fla. 842, 46 So. 594 (1908).

13. *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897).

14. *Ibid.*; 40 C.J.S. *Homesteads* § 123 (1944); *Brannon v. Brannon*, 265 Ky. 394, 96 S.W.2d 1036 (1936); accordingly, where there is neither constitutional nor statutory prohibition or where there has been a compliance with applicable restrictions, the owner of a homestead may, as an incident to the right of ownership, sell or encumber it, and the sale or transfer, when evidenced by a proper conveyance, will be as valid as though the property had not been set apart as a homestead. *Coakley v. Swim*, 218 Cal. 340, 23 P.2d 518 (1933); *Farley v. Harvey*, 93 Colo. 105, 25 P.2d 185 (1933); *Lyle v. Roswell Store*, 187

ALIENATION BETWEEN HUSBAND AND WIFE

At common law, a conveyance from a husband to his wife was an impossibility since it constituted an admission that the wife had an *independent existence*. For the same reason, a wife could not convey to her husband.¹⁵ Only by means of a conveyance by both spouses to a third party and then by the third party back to one of them could a transfer be effected from one to the other.¹⁶ Today, statutes authorize conveyances directly from one spouse to the other,¹⁷ and some states even dispense with the requirement that the grantee spouse join in the conveyance.¹⁸

Similarly, at common law, the requirement that the traditional "unities" be present prevented an owner of land from creating an estate by the entirety by executing a deed to himself and his spouse. Although such a procedure would be a straightforward and logical method of creating such a tenancy, the effectiveness of such conveyances has been repeatedly challenged.¹⁹ The attacks have been founded on the proposition that every conveyance requires a grantor and grantee by which the grantor divests himself of title and the grantee thereby becomes vested. Therefore, it is argued, one cannot convey to himself that which he already owns.²⁰ The creation of a tenancy by the entirety requires for its creation the four unities of time, title, interest and possession.²¹ Consequently, the conveyance must fail at common law when the grantees do not have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. Conveyances have been held ineffective even where the intention of the parties was clear and expressed unmistakably.²² The quest for a means of circumventing the unity theory gave rise to the practice of conveying property to a third person or trustee, who, acting as a straw man, immediately conveyed the property back to the husband

Ga. 386, 200 S.E. 702 (1938); *Brannon v. Brannon*, 265 Ky. 394, 96 S.W.2d 1036 (1936); *United States Bldg. & Loan Ass'n v. Stevens*, 93 Mont. 11, 17 P.2d 62 (1932); *Birks v. Globe Int'l Protective Bureau*, 56 N.D. 613, 218 N.W. 864 (1928); *Oklahoma State Bank v. Van Hassell*, 189 Okla. 48, 114 P.2d 912 (1941); *Stewart v. Black*, 143 Ore. 291, 22 P.2d 337 (1933); *Grissom v. Anderson*, 125 Tex. 26, 79 S.W.2d 619 (1935); *Delfelder v. Teton Land & Inv. Co.*, 46 Wyo. 142, 24 P.2d 702 (1933).

15. A deed from the wife to anyone required her husband's joinder. If the husband joined in the wife's conveyance to himself it was said to be void since he could not convey to himself. See POWELL, *REAL PROPERTY* § 622 (1964).

16. 3 VERNIER, *AMERICAN FAMILY LAW* § 182 (1935).

17. FLA. STAT. § 689.11(1) (1963) is representative of the jurisdictions in providing: A conveyance of real estate, made by a husband direct to his wife, or by a wife direct to her husband, shall be effectual to convey the legal title to such wife, or husband, as the case may be, in all cases in which it would be effectual if the parties were not married. . . .

18. FLA. STAT. § 689.11(1) (1963), which states that "the grantee need not join in the execution of such conveyances," is typical.

19. PATTON, *LAND TITLE* § 394 (1938).

20. *Ibid.*

21. POWELL, *REAL PROPERTY* § 615 (1964).

22. BAYSE, *CLEARING LAND TITLES* § 278 (1953).

and wife as tenants by the entirety.²³ Modern legislation authorizing husbands and wives to contract directly with one another undoubtedly is sufficient to obviate the necessity of conveyancing through a third party in order to produce the desired results.²⁴ However, the refusal of some courts to adopt this view on their own has provoked legislation expressly authorizing conveyances by one party to himself and another, as joint tenants or as tenants by the entirety.²⁵ This makes possible a direct conveyance to create either kind of estate by a single instrument. In Florida²⁶ and many other jurisdictions²⁷ the unity theory argument may be readily discarded since its impact on the validity of a conveyance is no longer felt.

23. WILLIAMS & EASTWOOD, REAL PROPERTY, 445 (1933).

24. The English Conveyancy Act of 1881 permitted land to be conveyed by one person to himself and another as joint tenants without the inclusion of the "use expression." 44 & 45 Vict. c. 41, § 50 (1881), now replaced by Law of Property Act 1925, 15 Geo. V, c. 20, § 72 (2).

25. CAL. CIV. CODE § 683 (1963) (Conveyances to self and another or to self and wife in joint tenancy); COLO. REV. STAT. 118-2-1 (1953) (Conveyances to self and another or from two or more grantors to themselves in joint tenancy); FLA. STAT. § 689.11 (1963); ME. REV. STAT. ch. 168, § 13 (1954) (Conveyances to self and another in joint tenancy); MD. ANN. CODE art. 50, §§ 10-15 (1957) (Model Interparty Agreement) (Conveyances to self and another in joint tenancy or otherwise); MASS. GEN. LAWS ANN. ch. 184, § 8 (1958) (Conveyances to self and spouse as tenants by entirety or to self and another in joint tenancy); MICH. STAT. ANN. § 565.49 (1955) (Conveyances to self and another as joint tenants or to self and wife as tenants by entirety); MISS. CODE § 834 (1942) (Conveyances to self and another as joint tenants or to self and spouse as tenants by entirety); MO. ANN. STAT. § 440.025 (1963) (Conveyances to self and another or to self and spouse in joint tenancy or as tenants by entirety, in common or in partnership, with same effect as if made from a stranger to grantee); NEB. REV. STAT. § 76-642 (1943) (Conveyances to self and another in joint tenancy); NEV. REV. STAT. §§ 102.010-.060 (Model Interparty Act) and § 111.065 (1963) (Conveyances to self and another in joint tenancy or otherwise); N.Y. CONSOL. LAWS § 240-B (1963) (Conveyances to self and another in joint tenancy or to self and spouse as tenants by entirety); N.C. GEN. STAT. § 39-13.3 (1957) (Conveyances from one spouse to another); N.D. CENT. CODE § 47-1023 (1943) (Conveyances to self and another or to self and spouse in joint tenancy); ORE. REV. STAT. § 108.090 (1964) (Conveyances to spouse indicating an intention to create estate by entirety); PA. STAT. ANN. tit. 21 § 551, tit. 48 § 71, tit. 69 § 541 (1955) (Model Interparty Agreement Act) (Conveyances to self and another in joint tenancy or to self and wife if tenants by entirety); R.I. GEN. LAWS § 34-11-3 (1956) (Conveyances to self and another or to self and spouse as cotenants under any tenancy allowable by law); TENN. CODE ANN. § 64-110 (1964) (Conveyances between spouses of interest in property held as tenants by entirety); UTAH CODE ANN. § 57-1-5 (1953) (Conveyances to self and another in joint tenancy); VA. CODE § 55-9 (1950) (Conveyances to self and another in joint tenancy or otherwise); WIS. STAT. ANN. § 230.45 (1958) (Conveyances to self and another or to self and spouse in joint tenancy).

26. *Croker v. Croker*, 9 F.2d 409 (S.D. Fla. 1925); *see also*, FLA. STAT. § 689.11(1) (1963), which now expressly provides:

An estate by the entirety may be created by the spouse holding fee simple title conveying to the other by a deed in which the purpose to create such estate is stated.

27. It is now well settled that a conveyance by a husband to his wife without the intervention of a third person or trustee, where suitable and meritorious and not in fraud of creditors, will be upheld in equity. *Thomas v. Hornbrook*, 259 Ill. 156, 102 N.E. 198 (1913); *Hunt v. Johnson*, 44 N.Y. 27 (1870). In those states where the legal identity of husband and wife is no longer recognized, or where specific statute permits, such conveyances may be good at law. FITCH, ABSTRACTS AND TITLE TO REAL PROPERTY § 242 (1954).

CONSTITUTIONAL RESTRAINTS AND STATUTORY REQUIREMENTS

Homestead property was unknown at common law. In Florida, the concept of homestead is a creature of the constitution.²⁸ The constitution places only one *express* limitation on alienation of homestead property while the owner is alive, namely, that whenever he or she has a living spouse, the joint consent and due execution by both is required.²⁹ It specifically contemplates the alienation of the homestead by husband and wife by providing in Article X:

Sec. 4. Nothing in this Article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists; nor if the holder be without children to prevent him or her from disposing of his or her homestead by will in a manner prescribed by law.³⁰

Voluntary transfers of homestead property are not prohibited by the constitution or legislature. The constitution merely attempts to protect the family by requiring the spouse of the homesteader to join in any conveyance alienating the homestead.³¹

The Florida Constitution, in article X, section 1, also provides that "a homestead shall be exempt from forced sale under process of any court." Whenever the realty in question is held by its owners under such circumstances as to make it exempt from forced sale, it is also subject to the restrictions on alienation laid down by the Florida Constitution and statutes.³²

It would appear that the framers of the constitution clearly manifested the extent to which they intended to restrain the alienation of homestead property. However, doubt has arisen due to its inclusion of section 2, which provides:

Sec. 2. The exemptions provided for in section one shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts, except as specified in said section.

28. FLA. CONST. art. X.

29. FLA. CONST. art. X, § 1 provides:

A homestead . . . shall not be alienated without the joint consent of husband and wife, when that relation exists.

30. There are no constitutional restrictions on bequests of homestead *personalty*. The true principle of law is that once homestead realty is duly alienated during the life of its owner, any proceeds other than real property received in exchange are governed by the homestead provisions relating to *personalty*. In *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897), the general principle that ownership of property by a living person comports an inherent right to manage and transfer that property, is clearly recognized although the decision has been, on occasion, distinguished in homestead discussions on the ground that it deals only with personal property.

31. FLA. CONST. art. X, § 1.

32. The authority of the legislature to deal with alienation of homestead is derived from FLA. CONST. art. X, § 6.

Presumably, the constitution provided for the *exemptions* to inure to the benefit of the "widow and heirs." The broad judicial interpretation given this section has been unfortunate.

The words "alienable" and "alienating" as used in the constitution in connection with the transfer of homesteads refer to the conveyance and transfer of legal title or any beneficial interest in the exempt homestead real estate during the life of the owner.³³ In any event, the deed or mortgage purporting to alienate the homestead must be "duly executed."³⁴ If the requirements of the constitution and statutes are not complied with in "alienating" homestead real estate, the attempt is a nullity as to the "heirs" of the homesteader and also as to the husband and wife.³⁵ In order to be "duly executed," the instrument must be signed in the presence of two subscribing witnesses, attested as to each signature,³⁶ and, as to relinquishment of a wife's dower, a statutory "acknowledgment" is part of the due execution of a deed or mortgage.³⁷

The constitutional exemptions apply only to property owned by the head of the family.³⁸ The methods prescribed for the alienation of the exempted real estate are restrictions designed for the protection of the beneficiaries of the exemption. However, the courts have held that these methods are as essential when the homestead real estate is alienated to members of the family as it is to others.³⁹ Since the method by which the homestead shall be alienated are expressly and specifically described in the constitution, all other methods of alienation are inhibited.⁴⁰

The importance of observing the formalities in the execution of instruments alienating the homestead was painfully illustrated in 1920 when a mortgagee attempted to foreclose a mortgage lien upon homestead real estate. The wife admitted the signature was authentic, but denied that she had ever acknowledged it. The court, in holding the mortgage unenforceable, stated it was void for failure to have been "duly executed."⁴¹ The occurrence is not uncommon. The court has found conveyances of homestead invalid for failure of the wife to join in the execution of a deed when *she* was the grantee.⁴²

In most jurisdictions, as in Florida, the provisions creating the *right* of homestead effects a *restriction* on alienation of the property. Generally, the instrument of conveyance or encumbrance must represent the joint

33. *Hutchinson v. Stone*, 79 Fla. 157, 84 So. 151 (1920).

34. *Ibid.*; *Byrd v. Byrd*, 73 Fla. 322, 74 So. 313 (1917).

35. *Hutchinson v. Stone*, *supra* note 33.

36. FLA. STAT. § 689.01 (1963).

37. FLA. STAT. § 693.03 (1963).

38. *Thomas v. Craft*, 55 Fla. 842, 46 So. 594 (1908).

39. *Ibid.*

40. *Ibid.*

41. *Hutchinson v. Stone*, 79 Fla. 157, 84 So. 151 (1920).

42. *Byrd v. Byrd*, 73 Fla. 322, 74 So. 313 (1917).

act of husband and wife, if that relation exists.⁴³ Provisions restraining alienation of the homestead without obtaining the consent of the wife do not impair the obligation of contract.⁴⁴

Restraints upon alienation of the homestead do not operate to destroy entirely the husband's authority respecting it.⁴⁵ The husband may, in some instances, alienate by his sole act. He may abandon it, taking the family with him, and then sell it subject to his wife's dower interest without her concurrence,⁴⁶ for by the act of abandonment the property ceases to be homestead.⁴⁷ However, saving the power to abandon and take the family with him, the general rule clearly is that a husband alone can do nothing by which the homestead will be divested.⁴⁸

It should be apparent that the *express* restraints on alienation of homestead are not complicated. The constitution imposes a single requirement upon inter vivos alienation of homestead property, the joinder of the wife. Although the formalities are not complex, they have been strictly construed,⁴⁹ and failure to comply renders the attempted conveyance a *nullity*.⁵⁰ Presumably, when the constitutional rights of the wife and children are involved, form is given great weight over substance.

43. THOMPSON, *HOMESTEAD AND EXEMPTIONS* (1878).

44. *Ibid.*; The Constitution of Nevada provides that the homestead, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife . . . provided, the provisions of this sentence shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife. . . . NEV. CONST. art. 4, § 30.

45. It should be noted that FLA. CONST. art. X, § 4 restricts the *devise* of a homestead if the head of the family has children. However, FLA. STAT. § 731.05 (1963) restricts the devise of a homestead whether there be a spouse or children. This has been held constitutional. *Saxon v. Rawls*, 51 Fla. 555, 41 So. 594 (1906); *Thomas v. Williamson*, 51 Fla. 332, 40 So. 831 (1906). If the head of a family dies owning a homestead and there is a surviving spouse but no children, title will vest absolutely in the spouse under the general rule governing the order of descent. FLA. STAT. § 731.23 (1963).

46. Agreements to convey *homestead* property must be signed in the presence of two witnesses, as required by FLA. STAT. § 689.01 (1963), to be effectual. *Zimmerman v. Deitrich*, 97 So.2d 120 (Fla. 1958).

47. Article XI of the Florida Constitution does not modify or effect the operation of Article X regulating the execution of conveyances and mortgages of homestead real estate, whether the wife or the husband is the head of the family and the owner of the homestead real estate. *Bigelow v. Dumphe*, 144 Fla. 330, 198 So. 13 (1940).

48. In *Wilson v. Florida Nat'l Bank*, 64 So.2d 309 (Fla. 1953), the court was confronted with a difficult problem of specific property constituting homestead. The dispute arose between a widow claiming dower and a daughter claiming the property by descent. The decedent had 40 acres, five of which were owned jointly with his wife, as tenants by the entirety, and the other 35 acres which were owned by him individually. The house was located on the five acre tract. The widow elected statutory dower in order to assert a right against the 35 acres. The court found the entire 40 acre tract constituted the homestead of the decedent. Although the five acre tract passed to the widow as the surviving tenant, the 35 acre tract, as homestead, descended to the daughter subject to a life estate in the widow.

49. *Hutchinson v. Stone*, *supra* note 41.

50. *Ibid.*

JUDICIAL RESTRAINTS AND IMPLIED REQUIREMENTS

The implied limitations contained in the constitution are as much a part of the organic law and are as effective as those which are expressed.⁵¹ However, while ownership of homestead property may be subject to the needs of society, it is questionable whether the judiciary should tamper with the right of an individual to alienate his property unless the necessity for the restraint is clearly indicated by constitutional or statutory provisions or the unequivocal mandate of public policy. Nevertheless, through a gradual evolution of decisions dealing with homestead property the judiciary has imposed an implied restraint on alienation, based on the presumed intention of the framers of the constitution, for the protection of the homesteader's children.

The Indestructible Homestead Interest

Notwithstanding the clarity of the express provisos of the constitution, the supreme court has seen fit to conceive a virtually indestructible homestead interest belonging to the children of the homesteader. This judicial creation has not been abruptly precipitated through a single erudite decision. Rather, it emerges from an impressive accretion of judicial decisions, which, taken in their entirety, effectively limit the inherent rights of ownership of homestead property as distinct from other real property. What the electorate chose not to prescribe, the bench has supplied by a process as clever as it was gradual and at least as doubtful as it was devious.⁵² The judicial artifice has been perpetrated in the name of protecting a somewhat illogical interest that children acquire by reason of their parents' ownership of homestead property and which result is inferred from article X, section 2 of the Florida Constitution, which provides, "the exemptions . . . shall inure to the widow and heirs of the party entitled to such exemption. . . ."⁵³

In 1897, the supreme court in *Hinson v. Booth*⁵⁴ was called upon to construe article X, section 2 of the Florida Constitution. Grandchildren had filed a claim against an estate for their share of personal prop-

51. *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931); *Jackson v. Jackson*, 90 Fla. 563, 107 So. 255 (1925).

52. A severe criticism of the judicial transmutation may be found in Tribble, *Homestead Law in Florida as a Restraint of Alienation*, 5 FLA. L.J. 37 (1931).

53. This provision of the constitution is a revised form of the original homestead provision contained in the Florida Constitution of 1868. FLA. CONST. art. IX, § 3 (1868) provided:

The exemptions provided for in sections 1 and 2 of this article, shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption, and the exemption provided for in section 1 of this article shall apply to all debts, except as specified in said section, no matter when or where the debt was contracted, or liability incurred.

It is significant to note that the exemption *to inure* as adopted in 1885, and as still applied today, added the "widow" to the provision which previously provided only for the "heirs."

54. 39 Fla. 333, 22 So. 687 (1897).

erty exempt from forced sale under the constitution by reason of the testator's position as the head of a household.⁵⁵ The grandchildren contended that the personal property descended to them under the Constitution, since section 2 provides that exemptions inure to the widow and heirs of the party entitled to such exemption.⁵⁶ Consequently, they contended, the 1,000 dollar personal property subject to the exemption descends by operation of law rather than by will. The court stressed that the exemption is merely from forced sale arising from the debts of the homesteader. It is only the *exemption* that inures to the widow and heirs by virtue of the Constitution. Therefore, the court concluded that there could be no reasonable construction which would grant title to either the widow or the heirs. The posture of the court is reflected in its reference to *Godwin v. King*,⁵⁷ which was quoted as follows:

The construction put upon the old constitution was that the exemption provided for was an exemption from sale for the debts of the homesteader, and that this exemption was all that inured to the heir after the death of the ancestor by virtue of the constitution. The provision in this constitution that the exemption should accrue to the heir did not cast upon him an estate in the exempt property, but was a shield for so much of his inheritance against the debts of his ancestor. The homestead article in the constitution of 1885 is no more a regulation of the descent of property than the former one of 1868.

Although the *exemption* inures to the widow and heirs, the respective rights to obtain the property must be ascertained from other sources. It was well recognized that homestead provisions do not undertake to bestow upon the widow or heirs an estate in the exempted property. All that inures to the widow and heirs is the *right to exempt* the property from forced sale for the debts of the deceased head of the family.

The court, in *Hinson v. Booth*, recognized that the "immunity from debt" that inures to the heirs is appended only to such property as the heirs acquire at the death of the ancestor.⁵⁸ This view has been adopted

55. FLA. CONST. art. X, § 1.

56. The word "heir" is ordinarily used to describe those persons who answer the description at the death of the testator, and in its strict and technical import it applies to the person or persons appointed by law to succeed to the estate in case of intestacy. *Williams v. Williams*, 149 Fla. 454, 6 So.2d 275 (1942). The provisions of the FLA. CONST. art. IX, § 3 (1868) that the exemption of a homestead should accrue to the heirs, includes an adult son, adult grandson, and the son of a daughter deceased at the death of the head of a family, notwithstanding that they were not, at his death, living at the home place. *Miller v. Finegan*, 26 Fla. 29, 7 So. 140 (1890).

57. 31 Fla. 525, 534, 13 So. 108, 110 (1893).

58. The Florida Probate Law Act, FLA. STAT. § 731.05 (1963), provides:

Any property, real or personal, held by any title, legal or equitable, with or without actual seisin, may be devised, or bequeathed by will; provided, however, that whenever a person who is head of a family, residing in this state and having a homestead therein, dies and leaves either a widow or lineal descendants or both surviv-

in virtually all jurisdictions having similar provisions.⁵⁹ In Texas, children have no interest in the homestead against a surviving parent by virtue of the homestead rights of the deceased parent.⁶⁰

The doctrine of *Hinson v. Booth* is sound. Children should not control the disposition of the homestead nor assert a right adverse to the acts of their parents. Certainly, the parent has a right to dispose of the homestead without consulting the children and whatever binds the head of the family is binding upon the children. The policy of statutes limiting alienation of the homestead is for the protection of the family in the possession and enjoyment of the homestead. They are not intended to interpose obstacles in the way of conveyancing—certainly not conveyances to the wife—whatever may be the form of such conveyance.⁶¹

The tenets of *Hinson v. Booth* remained unassailed for more than twenty years. However, early into the turn of the century, the court exhibited a propensity for strict construction of the homestead laws by invalidating a deed which was executed by the husband alone, even though the wife and the husband's two adopted children were the grantees.⁶² In 1914 the court still embraced the *Hinson v. Booth* doctrine:

The status of a homestead which the Constitution impresses upon property . . . does not change the nature of the estate . . . but merely exempts such property from certain liabilities to which it would otherwise be subject, and limits the owner's inherent power of alienation, by making such property "exempt from forced sale under process of any court," and by making the real estate "inalienable without the joint consent of the husband and wife, when that relation exists."⁶³

In 1920, commencing with *Hutchinson v. Stone*,⁶⁴ the court was con-

ing him, the homestead shall not be the subject of devise, but shall descend as otherwise provided in this law for the descent of homesteads.

FLA. STAT. § 731.27 (1963) expressly deals with the descent of the homestead:

The homestead shall descend as other property; provided, however, that if the decedent is survived by a widow and lineal descendants, the widow shall take a life estate in the homestead, with vested remainder to the lineal descendants in being at the time of the death of the decedent.

59. THOMPSON, HOMESTEAD AND EXEMPTION LAWS (1878).

60. *Johnson v. Taylor*, 43 Tex. 121 (1875).

61. Accordingly, in Wisconsin, a deed of an undivided interest to the wife and children was not held to be void, even for want of a wife's signature, since it would not constitute "an alienation" of the homestead within the meaning of the statutes. *Riehl v. Bingenheimer*, 28 Wis. 84 (1871).

62. *Thomas v. Craft*, 55 Fla. 842, 847, 46 So. 594, 596 (1908), in which the court remarked:

No instrument is effectual as an alienation of or a conveyance or transfer of title or any interest in homestead real estate, without the joint consent of husband and wife when that relation exists, which joint consent shall be evidenced by a deed or mortgage duly executed and acknowledged by the husband and wife with the formalities prescribed by law for conveyances by husband and wife.

See also: *Byrd v. Byrd*, 73 Fla. 322, 74 So. 313 (1917).

63. *Johns v. Bowden*, 68 Fla. 32, 44, 66 So. 155, 159 (1914).

64. 79 Fla. 157, 84 So. 151 (1920).

fronted with the first in a series of cases involving the alienation of homestead. Although the court did not expressly recede from its prior view, a change appeared in its attitude toward the constitutional right of the children of the homesteader.

The *Hutchinson* case involved a mortgagee's attempt to foreclose a lien upon homestead property. The wife contended that she had never acknowledged her signature on the mortgage. The court decided the mortgage was void since it was not "duly executed."⁶⁵ It is interesting that instead of sympathizing with the good faith mortgagee, the court concerned itself with the "heirs" of the homestead owner and their "interest in the homestead real estate that can be alienated only as provided in the Constitution."⁶⁶

In *Hutchinson*, the court germinated the seed of a judicial restraint on the alienation of homestead property justified only by a self-imposed duty to protect a newly recognized property "interest" in the heirs of the homesteader. Nevertheless, the court was confronted only with applying the constitutional provisions restricting alienation⁶⁷ and its decision implied no limitations not constitutionally expressed.

Just three years later, in *Norton v. Baya*,⁶⁸ the supreme court invalidated a deed duly executed by a husband and joined by his wife in an attempt to convey the homestead to the wife through a third person. The court, in a unanimous opinion, revealed its mutable views by commenting:⁶⁹

If given effect [the deed] would operate to transfer the legal title to the homestead from the husband to the wife, stripped of its homestead status or character, thereby converting her interest therein into absolute ownership, and divest his "children" who are his prospective "heirs," of the interest which, under the Constitution, inures to them.

Justice Whitfield concurred specially:⁷⁰

The statutory provision that a husband may by deed convey real estate direct to his wife, cannot affect the intent of the organic provisions that homestead real estate may be alienated only by a deed or mortgage jointly and duly executed by the

65. The significance of observing formalities required by statute is discussed in text accompanying note 39 *supra*.

66. In the *Hutchinson* decision the court propounded the general principle that "if the requirements of the constitution and statutes are not complied with in 'alienating' homestead real estate, the attempt is a nullity as to the 'heirs' of the homestead owner and also as to the husband and wife." *Hutchinson v. Stone*, 79 Fla. 157, 164, 84 So. 151, 154 (1920).

67. *I.e.*, the formalities of a "duly executed" instrument.

68. 88 Fla. 1, 102 So. 361 (1924).

69. *Id.* at 6, 102 So. at 363.

70. *Id.* at 11, 102 So. at 364.

husband and wife if such relation exists, and cannot affect the organic provision that homestead exemptions "shall inure to the widow and heirs" of the owner. The children of the owner who are his statutory "heirs" have a right and an interest in the homestead real estate exemptions that are secured by the Constitution, and the owner cannot transfer the property to another except by the alienation that is expressly provided for in which the wife must join.

In *Norton v. Baya* the court initiated the judicial gymnastics later relied upon as precedent. The court failed to note any distinction between the *exemption* inuring to the benefit of heirs, as opposed to the *property* itself. Specifically, the court renounced the logical contention that its position was inconsistent with the realities of acceptable voluntary conveyances.⁷¹ Notwithstanding Justice Whitfield's eloquent dictum, the deeds, which were not to become effective and were not recorded until the husband's death, were found to be testamentary in nature, and therefore, violative of the constitutional inhibition against the devise of homestead property when the testator leaves surviving children.⁷²

After *Norton v. Baya*, the court began seizing upon inapplicable situations to expound its theory of restraining alienation of homestead property. By way of its dicta, the court maintained that certain voluntary conveyances of homestead were in derogation of the children's rights.⁷³ It was not, however, until 1931 that the court was confronted with an appropriate factual situation. Interestingly, like in *Hutchinson v. Stone* where the rationale originated, the good faith mortgagee was again left holding the bag.

In *Church v. Lee*,⁷⁴ a husband had executed a deed of homestead

71. It is suggested that the constitution should not be held to forbid a voluntary transfer of homestead to the wife, even though the owner of the homestead has children, since the owner of the homestead and his wife might have duly alienated the homestead to others than the children of the owner or they might have abandoned the property as a homestead so that it could be disposed of as other real estate and the children would thereby have lost their interest; or the father might have survived his wife and his children being grown and living in their own home, the homestead character of the property would be lost, because the owner would then no longer be the head of the family, though he continued to occupy the property as his home. . . . [T]hese or other circumstances or contingencies do not afford authority for or justify a voluntary conveyance of a homestead to the wife. *Norton v. Baya*, 88 Fla. 1, 11, 102 So. 301, 365 (1924).

72. FLA. CONST., art. X, § 4. The statutes are not in conflict with the constitution in connection with their authority to alter the substantive rules of descent. *Nesmith v. Nesmith*, 155 Fla. 823, 21 So.2d 789 (1945), *Saxon v. Rawls*, 51 Fla. 555, 41 So. 594 (1906). The statutory terminology dealing with restrictions on the devise of homestead is narrower than that employed in § 2 of article X, which provides that the exemption shall inure to the "widows and heirs" of the head of the family, and yet, is somewhat broader than that of § 4 which uses the word "children" in imposing what has come to be regarded by the judiciary as an inferential restriction on the devise of homestead.

73. *Jordan v. Jordan*, 100 Fla. 1586, 132 So. 466 (1931); *Jackson v. Jackson*, 90 Fla. 563, 107 So. 255 (1925).

74. 102 Fla. 478, 136 So. 242 (1931).

property to his wife while he had living children and a daughter by adoption. He continued to live on the property until his death, at which time he left his wife, a son and the plaintiff in this action, his adopted daughter. The deed, executed in 1920 and purporting to convey the homestead, was not recorded until after the husband's death. The widow then executed a mortgage to encumber the property. An action to set aside the deed and mortgage and to obtain a partition of the property was initiated by the adopted daughter.⁷⁵ *Church v. Lee* became noted for its finding that a homestead cannot lawfully be alienated by a deed jointly executed by husband and wife to the wife. The property continues to be subject to inheritance by the surviving children, adults as well as minors, whether or not they were living on the homestead. Admittedly, the Constitution and statutes do not expressly prohibit a conveyance to the wife by a deed executed by the owner of a homestead and joined by his wife. Nevertheless, the court was firmly convinced that *such a prohibition necessarily may be implied*. Adroitly flexing its judicial muscles, the court⁷⁶ pronounced that:

the deed . . . to the homestead real estate was prima facie void as against the vested interests of complainant . . . ; such deed, under the Constitution and statutes of this state, was ineffective to transfer the fee-simple title; . . . such attempted "alienation" merely left the title to the homestead substantially where it was before, without divesting it of its character as a homestead.

Significantly, in *Church v. Lee*, as in *Norton v. Baya*,⁷⁷ the deed was not recorded until after the husband's death. However, the court refused to take notice of the testamentary character of the conveyance. Instead it applied its newly-founded principle to reach the same result.

Church v. Lee did not expressly overrule *Hinson v. Booth*,⁷⁸ nor did it attempt to reveal the nature and extent of the "vested interest" it had conferred upon the children of the homesteader. As a consequence, the doctrine of *Church v. Lee* left much to be desired as a rule of law. A deed which is "prima facie void" imports a presumption of invalidity that may be rebutted—a voidable deed rather than one which is void. On the other hand, the implication of a constitutional "vesting of interest" in the heirs would create a rule of descent rather than a rule of law.⁷⁹

Church v. Lee has been severely criticized.⁸⁰ Justice Terrell, vehe-

75. *Ibid.*

76. *Id.* at 488, 136 So. at 247.

77. See note 68 *supra*.

78. 39 Fla. 333, 22 So. 687 (1897).

79. The court was later to recede from this statement by pronouncing the interest to be "inchoate." *Reed v. Fain*, 145 So.2d 858 (Fla. 1962).

80. *Denham v. Sexton*, 48 So.2d 416 (Fla. 1950); *Scoville v. Scoville*, 40 So.2d 840 (Fla. 1949); *Florida Nat'l Bank v. Winn*, 158 Fla. 750, 30 So.2d 298 (1947).

mently dissenting in *Florida Nat'l Bank v. Winn*,⁸¹ recognized that homestead provisions were designed for the benefit of the family, to preserve its finest traditions. There is nothing in the constitution to warrant the suggestion that a child may thwart the desire of a parent in the matter of disposing of the homestead by deed. Justice Terrell cleverly noted:⁸²

The makers of the constitution did not know much about formal ethics but they knew their own mind and ruled their own household. It is contrary to all human experience to contend that they wrote anything in the constitution that would warrant one in thinking that a child long departed from the family tree might return and thwart a transaction made like this in good faith. They were not a breed that subscribed to junior rule. The more persistent one pursues such a theory the deeper it penetrates the fog of obscurity.

Shortly after the *Winn* case, in *Scoville v. Scoville*,⁸³ a deed was executed several hours *before* the wedding ceremony. The court in dictum utilized the opportunity to recede tentatively from its *Church v. Lee* doctrine when it stated:

These sections [Fla. Const. art. X, § 1, § 2 and § 4] place but one limitation on the alienation of the homestead property by deed while its owner is alive, namely, that if the homestead owner has a spouse, the joint consent of both and due execution of the deed by both, are absolutely necessary. The fact that the homesteader may have children or other dependents in being at the time of the execution of the deed is wholly immaterial in this connection. . . . Aside from these limitations, a deed which has as its object the conveyance of homestead property to a grantee other than the living spouse *should be treated as any other inter vivos transfer of real property* . . .⁸⁴

Although later cited in numerous decisions, *Scoville* never developed to overthrow the *Church v. Lee* doctrine. Today, this view, following the dissent in *Winn*, is relegated to the minority.

A futile but ingenious application of the *Church v. Lee* doctrine recently confronted a federal court.⁸⁵ The defendant resisted a federal income tax lien against homestead property by contending that the children's *vested property interest* was not subject to levy for the satisfaction of the head of the family's tax liability. It was argued that the property interest of the widow and children could not be attached for obligations they did not incur and for which they were not liable; only the husband's

81. 158 Fla. 750, 30 So.2d 298 (1947).

82. *Id.* at 752, 30 So.2d at 299.

83. 40 So.2d 840 (Fla. 1949).

84. *Id.* at 842. (Emphasis added.)

85. *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962).

interest in the property was subject to levy. The court held that the husband was vested with full property rights in the homestead. In Florida, as in every other jurisdiction, the constitutional and statutory restrictions upon the power to convey or devise the homestead do not prevent a tax lien from attaching.⁸⁶ It is interesting to note that the court relied on *Hinson v. Booth*, the unrepudiated doctrine originally asserted in 1897, when it observed that "it has long been settled that the Florida Constitution does not create property rights in the husband, wife or children."⁸⁷ The federal court in applying state law, totally ignored *Church v. Lee* by concluding that the children's interest was "remote, uncertain and a mere expectancy or possibility and not a vested property right, interest or title."⁸⁸

The importance of the *Weitzner* decision lies in its logic, rather than in its binding authority. As a rule of law, the rationale of the court was sound, as ultimately borne out by the Florida Supreme Court later the same year in *Reed v. Fain*,⁸⁹ the most recent pronouncement on the subject.

Reed v. Fain involved a husband who conveyed the homestead to his son, joined in the deed by his wife, and had the son immediately reconvey in an attempt to create an estate by the entirety. The conveyances were without consideration.⁹⁰ After the father died, his daughter initiated an action to obtain cancellation of the deeds as being violative of her homestead rights under article X of the Florida Constitution. In defense, the defendant-wife interposed the statute of limitations.⁹¹ Initially, the court held that the deed was subject to the statute.⁹² Justice Thornal, speaking for the court, relied on its prior decision in *Thompson v. Thompson*⁹³ in which the statute of limitations was held to bar an assault against a deed of homestead property after twenty-five years. However, on rehearing, a new majority of the court expressly overruled *Thompson v. Thompson*.⁹⁴ In *Reed v. Fain*, the court determined clearly

86. "It is well settled that state exemption laws do not protect property against federal tax liens . . . nevertheless, there is a conflict in the cases as to whether a tax lien is valid upon a homestead interest." 9 MERTENS, FEDERAL INCOME TAXATION § 54.52, at 102 (1958).

87. *Weitzner v. United States*, *supra* note 85, at 47.

88. *Id.* at 48.

89. 145 So.2d 858 (Fla. 1962).

90. The importance of an appropriate consideration is dealt with in the text accompanying notes 102 through 132 *infra*.

91. FLA. STAT. § 95.23 (1963) which provides:

After the lapse of twenty years from the record of any deed or the probate of any will purporting to convey lands no person shall assert any claim to said lands as against the claimants under such deed or will, or their successors in title.

After the lapse of twenty years all such deeds or wills shall be deemed valid and effectual for conveying the lands therein described, as against all persons who have not asserted by competent record title an adverse claim.

92. *Ibid.*

93. 70 So.2d 555 (Fla. 1954).

94. *Reed v. Fain*, 145 So.2d 858, 869 (Fla. 1962).

and explicitly that the voluntary alienation of the homestead in derogation of the implied restraints imposed by the Constitution is a *nullity* and the attempt is *void*. Upon reaching this conclusion, it pronounced that the statute of limitations is inapplicable to *void* deeds. Justice Hobson, speaking for the new majority, stated:

The voluntary deed from George V. Reed executed and delivered to his parents in the year 1930 was an ineffectual and futile attempt to create an estate by the entirety because the voluntary deed made to him by his parents was and is *void—not merely voidable*.⁹⁵

The court emphasized its proposition that the deed was invalid and ineffectual because of the limitations imposed on alienation by the Florida Constitution.⁹⁶ In consequence, the statute of limitations no more could apply to a *void* deed than it could to a *forged* deed.⁹⁷

Justice Hobson went on to discuss the character of the children's interests and specifically to recede from *Church v. Lee*:

Commissioner Andrews, in the case of *Church v. Lee*, inadvertently employed the descriptive adjective "vested" in referring to the inchoate interest of an "heir" in homestead property. Clearly such an interest is not "vested," legally speaking, until the death of the head of the family. Prior to that inevitable event and during the lifetime of an "heir" such "interest," although actual as distinguished from imaginary, is not a "vested interest." It is incipient, dependent and contingent, yet *genuine*. It is *created* and *protected* by our Constitution.⁹⁸

The great difficulty with *Reed v. Fain*, as with its predecessor decisions, is its refusal to recede from *Hinson v. Booth*, thereby continuing the conflict with the broad principles propounded by the court in 1897 to the effect that only the *exemption* inures to the heirs in accordance with the constitution—not an *estate* or *property interest*. Presumably, to the extent a court determines that *Reed v. Fain* is inapplicable to a particular situation,⁹⁹ *Hinson v. Booth* would still control.

Consideration—An Implied Requirement

The Constitution does not expressly require that conveyances of the homestead be for an adequate or valuable consideration, although the tenor of earlier decisions indicates that consideration is essential.¹⁰⁰ Al-

95. *Id.* at 865. (Emphasis added.)

96. FLA. CONST. art. X, §§ 1, 2, 4.

97. Citing *Wright v. Blocker*, 144 Fla. 428, 198 So. 88 (1940).

98. *Reed v. Fain*, *supra* note 94 at 868. (Emphasis of the court.)

99. The *Weitzner* case, *supra* note 85, may be a good example, although it was decided several months before *Reed v. Fain*.

100. *Florida Nat'l Bank v. Winn*, 158 Fla. 750, 30 So.2d 298 (1947); *Jahn v. Purvis*,

though there have been several decisions regarding consideration as unessential to the conveyance of homestead property,¹⁰¹ in each case there were other grounds to justify the decision or the court did in fact find some consideration.

In the same year that *Church v. Lee*¹⁰² was decided, consideration was implied as a requirement for the alienation of the homestead. In *Bess v. Anderson*,¹⁰³ the court announced that the alienation of homestead contemplated by the constitution is *not a conveyance without consideration*, even by an owner of the homestead directly to his wife.¹⁰⁴ Such a conveyance cannot be effectual because it would violate the organic command that the homestead exemption "shall inure to the widow and heirs of the property entitled to such exemption."¹⁰⁵ The court explained that a conveyance of homestead for proper consideration is constitutionally permissible since the consideration takes the place of the exempted property. The principle of consideration propounded in *Bess v. Anderson* has been adopted generally, although its application has caused considerable difficulty¹⁰⁶ and the policy generated severe criticism.¹⁰⁷

In 1939, eight years after *Bess v. Anderson*, the court was confronted with a difficult application of the consideration principle. In *Miller v. Mobley*,¹⁰⁸ fee simple title to the homestead was vested in the husband. The wife joined in a conveyance to sell the property for an agreed price of 35,000 dollars, of which 13,000 dollars was paid in cash and a purchase money mortgage payable jointly to the husband and wife was executed for the balance. The family then moved from the homestead. Three years later, the purchasers became financially unable to meet the payments on the purchase money mortgage. As a consequence, the property was reconveyed to Irvin Mobley and his wife, who, upon receipt of the deed, returned to the homestead, making it their home until the husband's death. An action seeking partition of the property was brought by the children of the husband's first marriage. The defendant-wife asserted

145 Fla. 354, 199 So. 340 (1940); *McEwen v. Larson*, 136 Fla. 1, 185 So. 866 (1939); *Norman v. Kannon*, 133 Fla. 710, 182 So. 903 (1938); *Bess v. Anderson*, 102 Fla. 1127, 136 So. 898 (1931); *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931); *Jackson v. Jackson*, 90 Fla. 563, 107 So. 255 (1925); *Norton v. Baya*, 88 Fla. 1, 102 So. 361, (1924). See also *Estate of Nelson v. Commissioner*, 232 F.2d 720 (5th Cir. 1956).

101. *E.g.*, *Denham v. Sexton*, 48 So.2d 416 (Fla. 1950); *Scoville v. Scoville*, 40 So.2d 840 (Fla. 1949).

102. 102 Fla. 478, 136 So. 242 (1931).

103. 102 Fla. 1127, 136 So. 898 (1931).

104. Nor by the husband and wife joining in a conveyance without consideration to a third person who reconveys the same property without consideration to the wife alone or to the husband and wife as tenants by the entireties.

105. *Jackson v. Jackson*, 90 Fla. 563, 107 So. 255 (1925); *Norton v. Baya*, 88 Fla. 1, 102 So. 361 (1924); *Hutchinson v. Stone*, 79 Fla. 157, 84 So. 151 (1920); *Thomas v. Craft*, 55 Fla. 842, 46 So. 594 (1908).

106. *Miller v. Mobley*, 136 Fla. 351, 186 So. 797 (1939).

107. *Florida Nat'l Bank v. Winn*, 158 Fla. 750, 30 So.2d 298 (1947).

108. *Supra* note 106.

her ownership as the sole surviving tenant by the entireties under the conveyance from the purchaser to her husband and herself. The court held that the conveyance to the husband and wife, as tenants by the entireties, was valid. The majority of the court emphasized that the husband and wife were the owners of the mortgage and note as an estate by the entireties. The wife had surrendered her interest in the mortgage and note as consideration for the conveyance of the property. The court regarded this "surrender" to be a good and valuable consideration¹⁰⁹

Justices Chapman and Whitfield dissented sharply. At no time prior to the sale of the property did the wife assert ownership of the homestead, at which time she agreed to join in the deed and release her inchoate right of dower provided the husband named her as payee of the purchase money mortgage and note. When the deed reconveying the homestead property was executed no money or other consideration moved from the wife to the former purchasers. The mortgage was cancelled of record and marked paid by the husband alone. The dissent went on to point out:¹¹⁰

[R]eleasing her possible dower is not a sufficient compliance with Article 10 of the Constitution of Florida. It is not within her power to defeat the provisions and requirements of Article 10, *supra*.

The *Mobley* decision reveals the inconsistency of the principle of consideration implied by article X and advanced in *Bess v. Anderson*. There are no constitutional prohibitions, express or implied, to prevent a husband's having property conveyed to him and his wife as tenants by the entireties.¹¹¹ Furthermore, there are no prohibitions, express or implied, to prevent alienation of the homestead by the husband, joined by his wife, when that relation exists, for a full and valuable consideration.¹¹² The problem arises, as in the *Mobley* case, when the husband does alienate for a full and valuable consideration and accepts personalty in return. May he effect a tenancy by the entireties of such personal property received from the homestead? Presumably he can.¹¹³ If so, does that imply that personalty derived from the sale of homestead property is subject to the exemption attached to the homestead real property? Only in rare cases does personalty assume the status of the real property from

109. Presumably this case is to be differentiated from those situations where the husband and wife convey without consideration to a third party as a conduit for the purpose of having the property reconveyed to the wife or to the husband and wife as an estate by the entireties. The general rule has no application, because there was a valid and binding sale of the property and a conveyance by the husband and wife in the manner provided by law for a good and sufficient consideration.

110. *Miller v. Mobley*, *supra* note 106, at 355, 186 So. at 799.

111. *Norman v. Kannon*, 133 Fla. 710, 182 So. 903 (1930).

112. *Norton v. Baya*, 88 Fla. 1, 102 So. 361 (1924).

113. Where the spouse simply sells the homestead, "the consideration takes the place of the exempted property and the constitution may not thereby be violated." *Norman v.*

which it is derived.¹¹⁴ In order to apply consistently the implied consideration requirement for the alienation of homestead property, it would appear mandatory that the exemption attach to the personalty to prevent the personal property from being used to reacquire the real estate and effect by circuitous means that which cannot be effected directly under the Constitution. Nevertheless, although the consideration received admittedly takes the place of the homestead,¹¹⁵ the doctrine of *Hinson v. Booth* disclaims any restraint on the alienation of *personal property* received in exchange for homestead property.¹¹⁶

There have been several instances in which the court has refused to impose the consideration requirement upon homestead conveyances. In *Denham v. Sexton*¹¹⁷ the court piously asserted that the only restriction on alienation of homestead property was that it not be alienable without the joint consent of husband and wife, regardless of whether it was deeded with or without consideration. In *Denham*, the homestead was held as an estate by the entireties. The husband and wife joined in gratuitous conveyances of some of the "homestead" land. After the husband's death, the widow conveyed *all* the property previously held by the entireties. The grantee sought to cancel the gratuitous conveyances and relief was denied. Ordinarily in cases concerned with such gratuitous conveyances, the complaining parties are the children of the homesteader claiming a protected interest under the Constitution. In *Denham* the plaintiff had no such interest. Moreover, the children had no cause to complain since the homestead had been originally owned by the entireties and would vest in the surviving spouse in any event.¹¹⁸

In a somewhat earlier decision, a deed was executed by a husband to his bride several hours before the wedding ceremony.¹¹⁹ The court held the deed valid by finding that the property was not homestead at the time of conveyance, since the husband was not head of a household.¹²⁰ In any event, the court indicated that the real consideration for the conveyance was the agreement of the bride to marry the grantor and this was a sufficient consideration for the deed, even if it were assumed there was no other, for marriage is deemed in law a consideration of the highest value, as effective as if the grantee had paid full value in money.

Kannon, *supra* note 111. See also *Bess v. Anderson*, 102 Fla. 1127, 136 So. 898 (1931).

114. *Kohn v. Coates*, 103 Fla. 264, 138 So. 760 (1931) (fire insurance proceeds).

115. *Norman v. Kannon*, *supra* note 111.

116. *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897).

117. 48 So.2d 416 (Fla. 1950).

118. See discussion on the right to bring the action in text accompanying notes 132 through 143 *infra*.

119. *Scoville v. Scoville*, 40 So.2d 840 (Fla. 1949).

120. Compare the holding of this case with *Semple v. Semple*, 82 Fla. 138, 89 So. 638 (1921), where the court held that the *intent* to create a homestead was controlling if the parties conduct was completely consistent with such manifested intention.

In the recent case of *Reed v. Fain*,¹²¹ the court noted that the words "appropriate consideration" are not spelled out in article X of the Florida Constitution. Therefore, they relied on *Jackson v. Jackson*¹²² as authority for the proposition that consideration constitutes an "implied" limitation upon the alienation of homestead property.¹²³ Justice Hobson continued:

The only instances which we can envisage at the moment, wherein one can attain the status of an innocent third party in transactions involving homestead property owned by the head of a family with a child or children then living, would be; First—acceptance of a deed or mortgage predicated upon a valuable consideration and executed by both husband and wife. . . .¹²⁴

The extent and nature of the implied requirement of consideration for conveyances of homestead property is illustrated by the posture of the court in connection with the burden of proof. The general rule that consideration shall be presumed in the conveyance of property does not apply. In an old decision, *Clafin v. Ambrose*,¹²⁵ the court established that the burden was on the wife to prove a consideration not materially disproportionate to the value of the property conveyed. This rule was reaffirmed in *Church v. Lee*¹²⁶ when the court provided that where payment of a valuable consideration for conveyance of homestead to the wife becomes a material question, it must be affirmatively proven by the party relying upon the validity of the consideration.

Although there has been considerable judicial dissatisfaction with the decisions implying that homestead can be conveyed only if supported by valuable consideration,¹²⁷ it is unlikely that in the future the trend will become more liberal.¹²⁸ Established precedent appears too strong to validate a gratuitous conveyance of homestead property to the spouse. Of course, the courts may become more adept at finding consideration.¹²⁹

From a policy viewpoint there is support for either side of the consideration argument. Whereas gratuitous conveyances might be considered a fraud on the children's rights,¹³⁰ conveyances for a valuable

121. 145 So.2d 858 (Fla. 1962).

122. 90 Fla. 563, 107 So. 255 (1925).

123. This "implied" limitation when judicially declared becomes and remains "a part of the organic law."

124. *Reed v. Fain*, 145 So.2d 858, 867 (Fla. 1962); the second instance envisioned by the court was by tax deed.

125. 37 Fla. 78, 19 So. 628 (1896).

126. 102 Fla. 478, 136 So. 242 (1931).

127. The Constitution does not require consideration as a basis of alienation of the homestead. This idea was doubtless injected into some of the decisions because of fraud or overreaching, otherwise it was mere surplusage and has no application here. *Florida Nat'l Bank v. Winn*, 158 Fla. 750, 752, 30 So.2d 298, 300 (1947).

128. *Porter v. Childers*, 162 So.2d 301 (Fla. 3d Dist. 1964).

129. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS*, 470, 471 (1964).

130. *Rigero v. Daugherty*, 69 So.2d 178 (Fla. 1953).

consideration do not materially work to the detriment of the children's interest, since the consideration received presumably takes the place of the homestead.¹³¹ On the other hand, the Constitution authorizes conveyances and encumbrances of the homestead without specifically requiring consideration. It may be to the advantage of dependent minor children for title to the homestead to be vested in the surviving parent. If the children are independent adults, there would seem to be no necessity to protect their inheritance rights in this manner. In any event, it should be a matter dealt with by constitutional amendment or legislative enactment rather than by judicial decree.

RIGHT OF ACTION

Any thorough examination of the implied restraints governing alienation of the homestead would be incomplete without also investigating the principles governing the application of the doctrine. *Who* shall bring an action disputing the validity of the ignominious deed: The children? Husband? Wife? *When* does the cause of action accrue? At the death of the head of the family, or upon execution and delivery of the deed?

The evolution of the limitation on alienation, culminating in the notable case of *Reed v. Fain*,¹³² presumably settles the issue, so that a voluntary conveyance of the homestead, without an appropriate consideration, in an attempt to create a tenancy by the entireties is a nullity,¹³³ ineffective to convey legal title¹³⁴ and void—not merely voidable.¹³⁵ The controversy continues, however, with regard to determining *who* has standing to challenge the validity of the deed and when such action may be initiated. Unfortunately, there have been few decisions bearing on this aspect of the problem, and some of those are in conflict.¹³⁶ In any event, it might reasonably be anticipated that future litigation will center on these problems.

In General

The doctrine of the invalidity of the homestead deed is strictly, if not puritanically, applied. A conveyance of homestead property, void at the time of execution and delivery, is not cured by subsequent abandon-

131. *Norman v. Kannon*, 133 Fla. 710, 182 So. 903 (1930). In this regard, it is significant to recognize that the full nature, extent and meaning of what constitutes an "appropriate consideration" has yet to be clearly resolved. In dealing with the precious homestead interest of children, so zealously protected by the judiciary, it will be intriguing to see if the traditional concept of consideration will be found adequate when applied to transactions between husband and wife. Cf. 41 C.J.S., *Husband and Wife* § 136(c) (1944).

132. 145 So.2d 858 (Fla. 1962).

133. *Hutchinson v. Stone*, 79 Fla. 157, 84 So. 151 (1920).

134. *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931).

135. *Reed v. Fain*, *supra* note 132.

136. Compare *New York Life Assur. Co. v. Oates*, 141 Fla. 164, 192 So. 637 (1939) with *Hutchinson v. Stone*, 79 Fla. 157, 84 So. 151 (1920).

ment of the premises,¹³⁷ divorce of the parties,¹³⁸ or death of spouse.¹³⁹ Failure to resist a forced sale of the homestead will not constitute a waiver of the homestead rights conferred by the Constitution.¹⁴⁰

Misconduct may act as a bar to the assertion of a homestead claim, but the requisite degree of misconduct is unsettled. Clearly, a wife who wilfully deserts her home would not be permitted to claim homestead upon the death of the husband,¹⁴¹ nor would a wife or heir convicted of murdering the homesteader.¹⁴² Current authority prevailing in other jurisdictions involving non-homestead properties seems to indicate that less serious misconduct ordinarily would not bar a claim to homestead property.¹⁴³ There have been no decisions in Florida.

Heirs

The Constitution seeks to protect the heirs of the homesteader.¹⁴⁴ Generally, the majority of cases controverting the validity of homestead conveyances have been initiated by the heirs¹⁴⁵ or the invalidity of the conveyances have been used by them as an absolute defense.¹⁴⁶

In the event there are no children, the homestead descends to the widow,¹⁴⁷ and the other heirs of the homesteader have no right to challenge a conveyance duly made by the owner of the homestead to his wife.¹⁴⁸ However, when there are children, other heirs have standing. In an early supreme court decision under the constitution of 1868¹⁴⁹ the court decided that the exemption of the homestead accruing to the heirs accrues to an adult son, adult grandson, and the son of a daughter deceased at the death of the homesteader.¹⁵⁰

The *who* issue becomes obscure when the deed is executed to the wife for life and remainder to the children. Certainly, pretermitted children, grandchildren, and other lineal descendants are prejudiced by the conveyance. However, it is unclear whether the protection intended by the Constitution extends a right of action to them. In 1932 the court refused

137. *Newman v. Jacobson*, 108 Ark. 297, 158 S.W. 134 (1913).

138. *Lynne v. Senter*, 193 Ill. 382, 55 N.E. 838 (1899).

139. *Mason v. Dierks Lumber & Coal Co.*, 94 Ark. 107, 125 S.W. 656 (1910).

140. *White v. Posick*, 150 So.2d 263 (2d Dist. 1963); *Albritton v. Scott*, 73 Fla. 856, 74 So. 975 (1917).

141. *Barlow v. Barlow*, 156 Fla. 458, 23 So.2d 723 (1945).

142. FLA. STAT. § 731.31 (1963).

143. REDFEARN, WILLS & ADMINISTRATION OF ESTATES IN FLORIDA 565 (2d ed. 1946).

144. FLA. CONST. art. X, § 2.

145. *Reed v. Fain*, 145 So.2d 858 (Fla. 1962); *Wilson v. Fla. Nat'l Bank & Trust Co.*, 64 So.2d 309 (Fla. 1953); *Norton v. Baya*, 88 Fla. 1, 102 So. 361 (1924); *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897).

146. *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931).

147. FLA. STAT. §§ 731.23-27 (1963).

148. *Rawlins v. Dade Lumber Co.*, 80 Fla. 398, 86 So. 334 (1920).

149. FLA. CONST. art. IX, § 3 (1868).

150. *Miller v. Finegan*, 26 Fla. 29, 7 So. 140 (1890).

to invalidate a homestead conveyance creating a life estate with a vested remainder to the children.¹⁵¹ This decision may provide a predicate for a holding that the consent of living children could make an otherwise void deed valid, although such a result would be wholly inconsistent with the *Reed v. Fain*¹⁵² doctrine and the relief it allegedly affords.

Another difficult problem involves *when* the right of action accrues. The issue was posed in *Reed v. Fain* when the court was confronted with the application of the statute of limitations to an illicit deed. Unfortunately, the court avoided the issue. Justice Hobson stated:

The real question in this case is not: "When did the twenty year period set forth in Section 95.23 F.S. begin to run?" But rather: "Were the provisions of Section 95.23 F.S. intended to be applicable to a 'void' deed . . . ?"¹⁵³

By way of dictum, Justice Hobson expressed apprehension at permitting children to have an immediate right of action against their parents upon execution and delivery of a void "homestead" deed.

[W]e have misgivings concerning the statement in the original majority opinion to the effect that Mrs. Fain could have "immediately" . . . "entered a court of equity to *establish* [her] interest in the subject matter."¹⁵⁴

From a policy viewpoint, there is no necessity to permit children of the homesteader a right of action immediately upon happening of the "event." By its enlightening description, *Reed v. Fain* verified the inchoate nature¹⁵⁵ of the children's interest in the homestead property:

[A]ctual as distinguished from imaginary, is not a "vested interest." It is incipient, dependent and contingent, yet *genuine*. It is *created* and *protected* by our Constitution.¹⁵⁶

The interest created by the Constitution is protected by it.¹⁵⁷ It seems unwise to create any right of action until the children's interest vests.

Husband

The competency of the children to contest the validity of a homestead conveyance is primarily a matter of the *time* the right of action accrues. On the other hand, it is questionable whether a husband has a

151. *Daniels v. Mercer*, 105 Fla. 362, 141 So. 189 (1932).

152. 145 So.2d 858 (Fla. 1962).

153. *Id.* at 864.

154. *Id.* at 868.

155. "Like *inchoate dower* . . . ownership is *remote, uncertain and a mere expectancy or possibility and not a vested property right, interest or title.*" *Weitzner v. United States*, 309 F.2d 45, 48 (5th Cir. 1962).

156. *Reed v. Fain*, *supra* note 152, at 868. (Emphasis of the court.)

157. *Reed v. Fain*, *supra* note 152.

right of action at all. Historically, the general rule developed to the effect that a deed which is void, even as to the husband himself, imposes an estoppel, both at law and in equity, effectively barring the husband from setting up any right or claim adverse to the deed, either in his own behalf or as trustee or representative of his wife and children.¹⁵⁸ Nevertheless, it has been recognized that estoppel does not apply to a husband who has given a deed which the law makes *absolutely void*.¹⁵⁹

In Florida the issue has never been resolved. In *Hutchinson v. Stone* the deed was described as "a nullity as to the 'heirs' of the homestead owner and also as to the *husband and wife*."¹⁶⁰ However, *Miller v. West Palm Beach Atlantic Nat'l Bank*¹⁶¹ ascribed to the rule that the husband was estopped to deny the title. In *Church v. Lee* the court straddled the issue:

While there might be instances where equity would decree as valid a deed to the homestead executed by the owner and wife to the latter, it is not essential in deciding the issues raised by the demurrer. . . .¹⁶²

In *Semple v. Semple*,¹⁶³ the court was directly confronted with circumstances that might give rise to an estoppel, yet it failed to recognize its possible existence. The validity of *his own prior deed* was challenged by a husband in a divorce proceeding. The husband, in a counterclaim, moved to set aside the deed which seemed to convey the homestead, on the basis that it was void under the Florida Constitution. Significantly, the court ignored any possibility of applying an estoppel against the husband's right to assert the invalidity of the deed. Instead, in a far reaching opinion, it found that the homestead character had not attached to the property at the time of the conveyance,¹⁶⁴ and that therefore the deed was valid. Justice Whitfield dissented, contending that homestead had certainly attached to the property by the time of the conveyance, and for that

158. WAPLES, HOMESTEAD AND EXEMPTION (1892); not only is the husband himself estopped by his own deed but he cannot set up against his grantee or mortgagee a right of homestead as existing in his minor children, because such right is personal to them, and even if pleaded by them during his lifetime would be no bar to a writ of entry. *Foss v. Strachn*, 42 N.H. 40 (1860).

159. *Housatonic Bank v. Martin*, 43 Mass. (1 Met.) 294 (1840); *Chandler v. Ford*, 30 Eng. C.L. (3 Adm. & Eccl. 649) 301 (1853).

160. 79 Fla. 157, 164, 84 So. 151, 154 (1920). (Emphasis added.)

161. 142 Fla. 22, 194 So. 230 (1940).

162. *Church v. Lee*, 102 Fla. 478, 488, 136 So. 243, 247 (1931).

163. 82 Fla. 138, 89 So. 638 (1921).

164. *Ibid.*; the case set the rule that *actual residence* is not a requisite of homestead attaching. It stands for the proposition that:

Where it is clearly the manifest intention of the owner to occupy the premises immediately as a home, and this intention is evidenced by specific acts . . . not compatible with a different intention, . . . or . . . inconsistent with the asserted intention to make the place his homestead, the homestead character will attach. *Id.* at 139, 89 So. at 639.

reason the deed was a nullity that should be set aside. Justice Whitfield never mentioned a potential estoppel, either.

The *Semple* case is significant in its silence rather than in its expression. The court easily could have reached the same result by applying the doctrine of estoppel. Generally, a void deed does not work an estoppel,¹⁶⁵ nor does estoppel render valid an act prohibited by express provisions of the law.¹⁶⁶ Perhaps, the *Semple* case presumes the general rule without expressing it. On the other hand, the court may have merely overlooked the issue.

Policy considerations suggest that there is some merit in permitting a husband to contest the validity of his own deed in order to clear title to the homestead, although by estopping him there would be no detriment suffered by the "established" interests¹⁶⁷ of the children. The value becomes apparent in a divorce action where *record* title reflects a tenancy by the entireties. In the event of divorce, the title is converted to a tenancy in common,¹⁶⁸ vesting equal undivided alienable interests in the husband and wife. To deny the husband's standing to determine the validity of his deed would mislead subsequent good-faith purchasers relying on record title. Logically, it follows that a divorcing husband should not be estopped to deny the validity of his void deed. Allowing the non-divorcing husband to clear title to the homestead property seems equally desirable. Certainly, it would not prejudice the children's established homestead rights, while it may obviate later litigation.

Wife

The supreme court is in conflict with regard to the competence of a wife to assert an exempt interest in homestead property in contradiction to her acts. Undoubtedly, the same principles of estoppel applicable to a husband-head of a family would also pertain to the wife. However, estoppel has been imposed where the wife attempted to interpose the invalidity of a deed in derogation of her representations to a bona fide party.

A bitterly fought 1936 case illustrates the application of an estoppel against a wife. In *New York Life Ins. Co. v. Oates*,¹⁶⁹ the wife had signed a mortgage on the homestead and willingly delivered it to her husband giving him the opportunity to have her signature acknowledged outside her presence, and to use it to induce good faith mortgagees to rely and give value therefore. The court, applying the doctrine of estoppel to bar the wife from asserting the invalidity of the mortgage, stated:

165. *Phillips v. Lowenstein*, 91 Fla. 89, 107 So. 350 (1926).

166. *Whitlock v. Gosson*, 35 Neb. 829, 53 N.W. 980 (1892); 12 FLA. JUR. *Estoppel and Waiver* § 10 (1957).

167. *Reed v. Fain*, 145 So.2d 858 (Fla. 1962).

168. FLA. STAT. § 689.15 (1963).

169. 141 Fla. 164, 192 So. 637 (1939).

[B]ut neither the constitution nor the statutes provide . . . and the organic and statutory provisions do not intend or contemplate that the required regulations may be so utilized as to mislead those who in good faith acquire such conveyances or mortgages. Nor do the constitution and statutes forbid the application of the principles of estoppel, laches, waiver, acquiescence or other principles of law in proper cases where conveyances or mortgages are alleged to have been defectively executed or acknowledged by married women or others when adverse interests are involved.¹⁷⁰

This decision is in conflict with *Hutchinson v. Stone*,¹⁷¹ where a wife also contended that she had not acknowledged her signature on the mortgage. The court, in that instance, ruled that the mortgage was void as not being "duly executed" and refused to inflict an estoppel against her. Significantly, the *Oates* decision, although 16 years later, did not overrule the *Hutchinson* case. If any inference is possible from *Reed v. Fain*,¹⁷² it is that further inroads by *Oates* are unlikely.

Creditors

Although there have been relatively few decisions, creditors of the husband, wife and heirs have not fared well in homestead litigation. In view of the nature of the property—exempt under the constitution from forced sale¹⁷³—the courts appear reluctant to extend a right of action to creditors of the family. Presumably, a creditor could be given recognition for his "expectant interest." Every creditor patiently awaits the time the property might lose its homestead character and have his judgment attach by operation of law.¹⁷⁴ The better rule, however, would permit a creditor a right of action only in the event the property actually loses its homestead character, for it is not until that time that the invalid alienation infringes on his rights.

In an early decision,¹⁷⁵ a judgment creditor levied against property that a husband had conveyed to his wife while the property constituted homestead. The creditor contended that the deed to the wife was void as being a fraud on his children's homestead rights. As such, the husband, being a party to the fraud, should be estopped from asserting homestead as a defense. The court logically decided that the attempted transfer of legal title by the husband to the wife could not give the judgment creditor a greater lien upon the property than he had before such attempted transfer. The right to the exemption of the homestead would not be for-

170. *Id.* at 176, 192 So. at 642.

171. 79 Fla. 157, 84 So. 151 (1920).

172. 145 So.2d 858 (Fla. 1962).

173. FLA. CONST. art. X, § 1.

174. FLA. STAT. § 55.10 (1963).

175. *Murphy v. Farquhar*, 39 Fla. 350, 22 So. 681 (1897).

feited in any event, and therefore, the creditor had no standing to challenge the deed. Generally, conveyances made to defeat creditors can be attacked, but not when the property is homestead.¹⁷⁶

CONCLUSION

The Florida Supreme Court is unique in the interpretation of its homestead provisions by creating an inchoate interest in the homesteader's children.¹⁷⁷ The interest is constitutionally protected and virtually indestructible. Although merely inchoate, it may be divested only by disposition of the homestead for value or by abandonment. The effect of the court's construction of the Constitution has created a significant restraint on the alienation of homestead property by inter vivos deed. It is unfortunate the court has seen fit to "legislate" in this sensitive area of family life. Assuredly, the legislature could supercede judicial precedent by the adoption of a constitutional amendment. The failure of the legislature to act often has given rise to a presumption of its approval. It is feared, in this instance at least, that the failure is due to a lack of comprehension of the issues rather than to its approval of the result.

The restraint on alienation imposed by the judiciary is as absurd as it is inconsistent. By stubbornly protecting an irrational proprietary interest impliedly intended by the founding fathers of our Constitution, the court has cast serious doubts which undermine the foundation of the very institution it seeks to preserve—the homestead. Incredibly, the court finds no inconsistency in its proposition that a husband may not gratuitously bestow a half interest in the homestead upon his wife¹⁷⁸ but may, with the blessing of the judiciary, sell the homestead and give her the entire proceeds.¹⁷⁹

176. *Cowdery v. Herring*, 106 Fla. 567, 143 So. 433 (1932); *Anderson Mill & Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588 (1931).

177. No other jurisdiction has similarly interpreted their homestead laws.

178. *Reed v. Fain*, *supra* note 172.

179. *See Miller v. Mobley*, 136 Fla. 351, 186 So. 797 (1939).