

7-1-1954

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### Recommended Citation

Alan H. Dombrowsky, *Courts – Jurisdiction of County Judge: Homestead Matters*, 8 U. Miami L. Rev. 577 (1954)

Available at: <https://repository.law.miami.edu/umlr/vol8/iss4/6>

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# COURTS—JURISDICTION OF COUNTY JUDGE: HOMESTEAD MATTERS

## INTRODUCTION

There exists in Florida today, under the Florida Constitution, statutes, and cases that have arisen thereunder, an unsolved jurisdictional problem to wit: Does the County Judge have any jurisdiction over homestead property? There are constitutional provisions, statutes and cases which have established the County Judge's jurisdiction in this area; others say he has none. The ramifications of an open question of such import are indeed multifold. Customarily the County Judge, in practice, is necessarily concerned with homestead property, directly and indirectly. Should such intercourse be deemed unconstitutional it could create havoc with thousands of purportedly quiet titles in Florida. The circuit courts would be swamped with cases to determine these aforementioned titles and burdened with certain probate cases, merely on the ground that some remote question concerning land title or homestead is involved. Article 5, Section 11 of the Florida Constitution casts the shadow upon the power of the County Judge by delegating sole jurisdiction to the circuit court on matters concerning land title and boundaries, which logically includes homestead designations. Conversely, the constitution and statutes authorize the County Judge's jurisdiction to deal in these matters. Which construction shall govern? Must the jurisdiction of the County Judge fail?

As a prerequisite to approaching this problem a brief summary of the characteristics of homestead property, generally, is in order.

## HOMESTEADS

Homestead and exemption are statutory and constitutional creations<sup>1</sup> used to protect real and personal property from forced sale for debts of the head of the family.<sup>2</sup> The homestead shall consist:

. . . to the extent of 160 acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with \$1,000.00 worth of personal property, and the improvements of the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without joint consent of husband and wife when that relation exists.<sup>3</sup>

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1. FLA. CONST. Art. X; FLA. STAT. c. 222 (1953).

2. *Clark v. Cox*, 80 Fla. 63, 85 So. 173 (1920); *Armour & Co. v. Hulvey*, 73 Fla. 294, 74 So. 212 (1917).

3. FLA. CONST. Art. X, § 1.

A homestead is subject to mortgage<sup>4</sup> or alienation by deed duly executed in a manner prescribed by law.<sup>5</sup> The homestead may be alienated to some of the owner's children if done in good faith, for consideration and for no illegal purpose.<sup>6</sup> Homesteads are not exempt from: taxes, assessments, purchase money claims, expenses for improvements, or labor performed on homestead property.<sup>7</sup> Homesteads are not an estate in property.<sup>8</sup> At the death of the head of the family, leaving widow or lineal heirs, the homestead property is governed by the statutes of descent and distribution,<sup>9</sup> and cannot be devised by will.<sup>10</sup> The widow shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of death of the decedent.<sup>11</sup> The widow is not entitled to dower in homestead property.<sup>12</sup>

Having considered a few of the attributes of homestead, let us examine the statutory and constitutional provisions that shed light, even though in conflicting and complex rays, upon our jurisdictional problem. The approach will be such that the pertinent jurisdictional facets of the circuit court (that serve our purpose here) will be reflected; the jurisdictional sphere of the County Judge in the contested provinces will then be set forth so that the obvious and even the more nebulous inconsistencies and statutory repugnancies might be detected.

#### CIRCUIT COURT JURISDICTION

"The circuit courts shall have exclusive and original jurisdiction in all cases in equity . . . and of all actions involving titles or boundaries of real estate . . ." <sup>13</sup> The court has interpreted this strictly, and held that contests between the estate and third persons as to land title can only be decided in the circuit court.<sup>14</sup> It has also been emphatically held that County Judges have no jurisdiction in a case where boundaries and title to land are in question.<sup>15</sup> In an action on an instrument that raises a question as to title or boundary to real estate, the County Judge should decline to proceed further in the case.<sup>16</sup> Circuit courts can give

4. FLA. CONST. Art. X, §§ 1 and 4.

5. *Suttle v. Wold*, 117 Fla. 802, 158 So. 447 (1935).

6. FLA. CONST. Art. X, § 4.

7. FLA. CONST. Art. X, §§ 1, 2, 3.

8. *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914); *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897).

9. FLA. STAT. §§ 731.23, 731.27 (1951).

10. FLA. STAT. § 731.05 (1951); *Shone v. Bellmore*, 75 Fla. 515, 78 So. 605 (1918); *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914).

11. FLA. STAT. § 731.27 (1951).

12. FLA. STAT. § 731.34 (1951).

13. FLA. CONST. Art. V, § 11.

14. *In re Lawrence's Estate*, 45 So.2d 344 (Fla. 1950).

15. *Mott v. First Nat. Bank of St. Petersburg*, 98 Fla. 444, 124 So. 36 (1929); *Welch, County Judge v. State ex rel. Johnson*, 85 Fla. 264, 95 So. 751 (1923).

16. *South Fla. Amusement & Development Co. v. Blanton, County Judge*, 95 Fla. 885, 116 So. 869 (1928).

relief in cases of mismanagement of estates, by administrators, executors and trustees, particularly where probate courts cannot give adequate relief.<sup>17</sup> Should the parties be dissatisfied with the county court's judgment, the circuit court has appellate jurisdiction.<sup>18</sup> Disqualification of the County Judge also vests jurisdiction in the circuit court.<sup>19</sup>

The Florida statutes have conclusively given the circuit courts equity jurisdiction to order and decree the setting apart of homesteads and of exemptions of personal property from forced sales.<sup>20</sup> The court in *McMichael v. Grady*<sup>21</sup> went further and held that the circuit court shall determine all homestead and exemption of personal property matters. The County Judge has no jurisdiction to designate or set apart the homestead;<sup>22</sup> no conduct of the parties can confer jurisdiction.<sup>23</sup> It would seem by these cases that homesteads are within the sole province of the circuit court. In *Bennett v. Bogue*<sup>24</sup> it was held that the circuit courts have full and complete jurisdiction over homestead and the rights of the parties in connection thereto. In summation, it would seem that the County Judge is being forced further and further from homestead jurisdiction. The court did concede that the circuit court should not attempt to oust the jurisdiction of the County Judge as to probate matters.<sup>25</sup> In the absence of some special equity, the County Judge, not the circuit court, has original jurisdiction over the contests of wills.<sup>26</sup>

#### COUNTY JUDGES JURISDICTION

The Constitution of Florida states:

The County Judge shall have jurisdiction of the settlement of estates of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate.<sup>27</sup>

In *re Warner's Estate*<sup>28</sup> construed this provision giving the County Judge a ". . . broad grant of power and clothes the probate court with plenary power to adjudicate any matter arising in the settlement

17. *Wallace v. Luxmoore*, 156 Fla. 725, 24 So.2d 302 (1946); *Lykes Bros. Fla. Co. v. King*, 125 Fla. 101, 169 So. 595 (1936); *Opitz v. Morgan*, 68 Fla. 469, 67 So. 67 (1914).

18. *American Surety Co. of N.Y. v. Andrews*, 152 Fla. 638, 12 So.2d 599 (1943).

19. *State ex. rel. Perry v. Home*, Circuit Judge, 86 Fla. 309, 98 So. 330 (1923).

20. FLA. STAT. § 222.08 (1953); *Milton v. Milton*, 63 Fla. 533, 58 So. 718 (1912); *Camp v. Mullen*, 46 Fla. 498, 35 So. 399 (1903).

21. 34 Fla. 219, 15 So. 765 (1894).

22. *Smith v. St. Petersburg Novelty Works*, 94 Fla. 540, 113 So. 769 (1927).

23. *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (1938).

24. 88 Fla. 109, 101 So. 206 (1924).

25. *McQueen v. Forsythe*, 55 So.2d 545 (Fla. 1951); *Tyre v. Wright*, 144 Fla. 90, 197 So. 846 (1940); *Crosby v. Burleson*, 142 Fla. 443, 195 So. 202 (1940).

26. *Roberts v. Coram*, 72 Fla. 225, 72 So. 668 (1916).

27. FLA. CONST. ART. V, § 17.

28. 160 Fla. 460, 35 So.2d 296, 298 (1948); *accord*, *Randall v. Randall*, 60 F. Supp. 308 (S.D. Fla. 1944).

of decedent's estate." The court held that granting the County Judge jurisdiction over litigation involving the restoration of lost documents, a matter cognizable in equity, was not a contravention of the constitution;<sup>29</sup> it was incidental to his probate power.<sup>30</sup>

"The County Judge shall have jurisdiction of the administration, settlement and distribution of estates of decedents, of probate of wills . . . and of all other matters usually pertaining to probate."<sup>31</sup> County Judges have jurisdiction to set aside dower.<sup>32</sup> In *Rinehart v. Phelps*<sup>33</sup> the court went on to reiterate, "The functions of the court are judicial, and not merely ministerial, resting on the discretion of the judge, not only in making the order of sale, but in executing titles." In another situation it was decided that the County Judge could order the sale of real estate.<sup>34</sup> Powers incidental to probate can include the order of the County Judge to administrate, to execute and deliver a proper deed;<sup>35</sup> to determine who the distributees shall be, and the designation of the distribution.<sup>36</sup> The court in *Barrs, Judge v. State ex rel. Britt*,<sup>37</sup> stated, "The words 'involving title or boundaries to real estate' as used in Section 11, Article 5, of the constitution of the state . . . do not necessarily mean that the Circuit Court shall have exclusive original jurisdiction." In light of decisions and dicta of this tenor, it would seem clear that the County Judge *does* have an area of concurrent jurisdiction over real estate, although these powers have been constitutionally delegated to the circuit court.

The Constitution of Florida has authorized the legislature,<sup>38</sup> to enact legislation necessary to enforce the homestead provisions.<sup>39</sup> The following statutes were enacted which have authorized the County Judge to determine whether or not the property in question was homestead. Section 731.05 Florida Statutes states:

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

The courts have almost unanimously held that although the deviser died testate, the homestead will be treated as though he died intestate.<sup>40</sup>

29. FLA. CONST. Art. V, § 11.

30. *In re Niernsee's Estate*, 147 Fla. 388, 2 So.2d 737 (1941).

31. FLA. STAT. § 732.01 (1951); *Wells v. Menn*, 154 Fla. 173, 17 So.2d 217 (1944); *Poumelle v. Baxter*, 142 Fla. 517, 195 So. 163 (1940).

32. *Johnson v. Hayes*, 52 So.2d 109 (Fla. 1951).

33. 150 Fla. 382, 7 So.2d 783, 786 (1942).

34. *Blanton, Judge v. State ex. rel. McMannus*, 158 Fla. 667, 29 So.2d 865 (1947).

35. *Mitchell v. Bogues*, 142 Fla. 787, 196 So. 306 (1940).

36. *Luther v. Florida Nat. Bank of Jacksonville*, 155 Fla. 240, 19 So.2d 796 (1944).

37. 95 Fla. 75, 116 So. 28, 29 (1928).

38. FLA. CONST. Art. X, § 6.

39. FLA. CONST. Art. X, § 1.

40. *Brickell v. Di Pietro*, 145 Fla. 23, 198 So. 806 (1940); *Hays v. Jones*, 122 Fla. 67, 164 So. 841 (1935); *Hamilton v. Morgan*, 93 Fla. 311, 112 So. 80 (1927);

Section 731.34 provides:

The homestead shall not be included in the property subject to dower but shall descend as otherwise provided by law for descent of homesteads.

Section 733.01 authorizes the personal representative to take possession of the entire estate of the decedent, *except* the homestead.

Assuming the County Judge has no jurisdiction over homestead matters, how can he fulfill the duties required in the probate of wills which involve the aforementioned statutes? Of necessity, when a will is presented to probate, and a homestead question is raised, it is the duty of the County Judge to determine if a homestead exists in the property devised, and to set it apart according to Section 733.01 of the Florida Statutes.

At this point, after perusing cases, statutory and constitutional provisions which vested the complete jurisdiction over distribution of homestead property in the circuit court, a statute that clearly gives the County Judge the power to distribute the homestead property crosses our path. The conflicts and repugnancies of this nature create the serious jurisdictional problem with which we are here confronted. Florida Statutes Section 734.08 states:

If at any time during the course of administration it is made to appear to the County Judge by petition that the estate consists of no more than the homestead and exempt personal property of the decedent, or in the event that the allegations of said petition are denied by trial of issues made, he may thereupon direct and order the distribution of said estate among the persons entitled to receive the same, and upon said distribution, may thereupon enter his order relieving, releasing and discharging the personal representative.

In *Seashole v. O'Shields*,<sup>41</sup> the aforementioned statute was applied to cast upon the County Judge the duty of distributing all exempt personal property to the proper persons. This case, although the court quotes the statute, makes no mention of its application to the distribution of real property. In *Hillboro Investment Co. v. Wilcox*,<sup>42</sup> the court refused to rule on the constitutionality of this provision. Here, the County Judge's jurisdiction was collaterally attacked by one whose interest was not directly affected. Neither of these cases conclusively say that the statute is invalid; they do not say the County Judge has been divested of jurisdiction pertaining to the designation of homestead property. The question of the County Judge's jurisdiction over homesteads is still unsolved.

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Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918); Johns v. Bowden, 68 Fla. 32, 66 So. 155 (1914); Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903); Scull v. Beatty, 27 Fla. 426, 9 So. 4 (1891).

41. 139 Fla. 839, 191 So. 74 (1939).

42. 153 Fla. 9, 13 So.2d 448 (1943).

The aforementioned statutes and cases have shown that the County Judge has been authorized jurisdiction over homestead property. Even though "homestead" is not title to land, the County Judge must ascertain who owns the homestead and set it apart while acting in his capacity as probate judge on wills involving this question. Here lies the constitutional inconsistency. When, as in this instance, constitutional provisions are repugnant to one another, what solutions are open for reconciliation or repudiation of the provisions?

#### CONSTITUTIONAL CONFLICTS AND INTERPRETATION

In the interpretation of the constitution the court shall adhere to substance rather than form.<sup>43</sup> Rather than a strict construction being invoked the real intention of the people should be carried out.<sup>44</sup> Before the court departs from the plain language of a constitutional provision, it must be certain that the people didn't mean what they said in the provision.<sup>45</sup> Constitutional provisions and statutes are generally construed by the same rules.<sup>46</sup>

The court in *State v. Dade City*<sup>47</sup> said, "Constitutional mandates are wise in proportion to the manner in which they respond to public welfare and should be construed to effectuate that purpose when possible." In the question at hand, public welfare would certainly be in issue, considering the far reaching results of a decision on this problem. The court held in *Lathan v. Hawkins, Clerk of Circuit Court*<sup>48</sup> that constitutional and statutory provisions may be controlled by their practical effect. Practical effect in the adjudication of the present problem should present a very weighty factor. When general welfare is in question, constitutional problems should be approached from a pragmatic rather than legalistic point of view.<sup>49</sup> Provisions should be read in light of the former law and the existing system.<sup>50</sup> Considerations of convenience, due administration of justice, and sound public policy should never be controlling in the construction of provisions, but may be of great assistance, where uncertainty of language exists.<sup>51</sup>

The court in *Board of Public Instruction v. Board of County Commissioners*,<sup>52</sup> approached the problem of conflicting constitutional and

43. *State v. Miami*, 113 Fla. 280, 152 So. 6 (1934).

44. *Tampa v. Tampa Shipbuilding and Engineering Co.*, 136 Fla. 216, 186 So. 411 (1939).

45. *Jacksonville v. Glidden Co.*, 124 Fla. 690, 169 So. 216 (1936).

46. *State ex. rel. McKay v. Keller, Tax Collector*, 140 Fla. 346, 191 So. 542 (1939); *Mugge v. Warnell Lumber & Veneer Co.*, 58 Fla. 318, 50 So. 645 (1909).

47. 157 Fla. 859, 27 So.2d 283, 285 (1946).

48. 121 Fla. 324, 163 So. 709 (1935).

49. *State v. State Board of Administration*, 157 Fla. 360, 25 So.2d 880 (1946).

50. *Sylvester v. Tindall, Sheriff*, 154 Fla. 663, 18 So.2d 892 (1944).

51. *Hall v. State*, 136 Fla. 644, 187 So. 398 (1939).

52. 58 Fla. 391, 50 So. 574, 576 (1909).

statutory provisions by holding the latest enacted provision is the most recent expression of the people's will, and may repeal or modify the older inconsistent or repugnant provisions. A compromise could be made, in the words of the court, "Where an amendment contains no express repeal or modification of existing provisions, the old and new provisions should stand and operate together, if it can be done without contravening the intent of the law making power as fairly and duly expressed in later provisions." In *Neisel v. Moran, Sheriff*,<sup>53</sup> the Court held that the two provisions can stand and operate together if the old doesn't contravene the intent of the new; unless expressed there is no automatic invalidation. Prior provisions will be modified or superseded to the extent of the inconsistency or repugnancy.<sup>54</sup> The court in *State ex rel. West, v. Butler*<sup>55</sup> stated, "A construction that nullifies a specific clause will not be given to a constitution unless absolutely required by the context." Concerning a provisional repugnancy, in *Wilson v. Crews*,<sup>56</sup> it was stated, "Where there is repugnancy between a constitutional amendment and some provision in the original, which cannot be so construed as to have them both stand and leave a legitimate office to perform, the original must be deemed to have been repealed by the amendment. Distinct provisions of the constitution are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without later conflict." The implication of these two cases would seem to connote that constitution interpreters are reluctant to completely invalidate specific provisions, provided there exists a possibility of reconciling the conflicting clauses. The nullification of a clause would apparently represent a last resort.

### CONCLUSION

The obvious repugnancy that exists can be resolved by the invalidation of the County Judge's jurisdiction over homesteads and all questions concerning title and boundaries to real estate. This would present a strict adherence to Article 5, Section 11 of the Constitution. Result: Havoc. An inconceivable load of litigation would be thrust upon the circuit court, both in quieting the title of the estates previously adjudicated by the County Judge and all subsequent probate cases wherein *any* question of land titles or boundaries are involved.

The alternative is, as so held in some of the cases cited, to construe the provisions as to their practical effect and allow both to stand and

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53. 80 Fla. 98, 85 So. 346 (1920).

54. Advisory Opinion to the Governor, 152 Fla. 686, 12 So.2d 876 (1943).

55. 70 Fla. 102, 69 So. 771, 781 (1915).

56. 34 So.2d 114, 117 (Fla. 1948.)



operate concurrently. The result of this construction would facilitate the County Judge's maintaining jurisdiction over the homestead and real property matters incidental to the efficient and speedy disposition of estates.

Regardless of the construction applied by the court to this question, the problem exists and presents a real threat to all homesteads and real property handled in the course of probate proceedings by the County Judge. This controversy must be resolved, as a malignant ambiguity of this sort could undermine our probate system in Florida.

ALAN H. DOMBROWSKY

## FLORIDA GRAND JURY

### INTRODUCTION

Recently, in Florida, the functions and powers of "Le Grande Inquest"—as it existed in Medieval England—have been revitalized. The legislature has attempted to employ this old institution to solve contemporary criminal problems.

Attention will be directed toward some of the more important problems encountered by this functionary—which is commonly referred to as the Grand Jury. Whether or not the Grand Jury is the proper institution to cope with modern day exigencies will be left to the readers determination.

In the past the Grand Jury has been frequently described as a mere rubber stamp of the district attorney, a venerable nuisance, a relic of medievalism performing in a slow, costly, cumbersome manner.<sup>1</sup> It has been the belief of many writers and commentators that the Grand Jury should have "gone out with the horse and buggy."<sup>2</sup> The underlying rationale is that many innocent men have incurred irreparable injury as a result of presentments and indictments which were based on inadequate and inefficient investigations.

On the other hand, it has been argued in defense of the Grand Jury System, that it operates as a democratic guarantee against unfounded indictments. The private citizen is given the opportunity to investigate criminal conditions. The proponents of the Grand Jury System conclude

1. Fabisinski, *The Proposed Amendment of the Constitution Relating to Grand Juries*, 8 FLA. L.J. 43 (1934); Morse, *A Survey of the Grand Jury*, 10 ORE. L. REV. 101 (1931); Comment, 10 ST. JOHN'S L. REV. 219 (1936).

2. Morse, note 1 *supra* at 345; One judge wrote:  
The Grand Jury should have gone out with the horse and buggy. It provides an excellent way for 23 men to get together and spend as much time as they think the court will permit, investigating water melon stealing and other offenses. Some Grand Juries think every one must be indicted. Other Grand Juries think no one should be indicted.