10-1-1964

Restraints on Alienation and Devise of Homestead: Monsters Unfettered From Florida's Past

Marshall S. Shapo

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Marshall S. Shapo, Restraints on Alienation and Devise of Homestead: Monsters Unfettered From Florida's Past, 19 U. Miami L. Rev. 72 (1964)
Available at: http://repository.law.miami.edu/umlr/vol19/iss1/6

This Leading Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
There once was a king, so the minstrels sing,
Who a herd of elephants had,
A peasant poor, lived next door,
and wanted an elephant bad.
The generous king did a foolish thing
when he gave that peasant one,
For the elephant ate all night,
And the elephant ate all day,
Do what he would to furnish him food
The cry was still "more hay!"

Till he tore his hair in wild despair
And clacked his heckled glands,
And cursed the day that he had
an elephant on his hands.
You all no doubt have found out
without if's, but's or and's
To avoid the plight of the luckless knight
With an elephant on his hands.

INTRODUCTION

The song set out above is a relic from Florida's past. It was a
favorite number of a man named Willie Filer, who played the guitar
and sang at community singfests in Lemon City in the eighteen
nineties. Its antiquity as well as its theme defines the present state of Florida
homestead law as to limitations on conveyance and descent.

Something like the elephant of the fable, that law has become in-
sensible to human feelings, voracious in its appetite for litigation and
generally a misfit in its present surroundings. Like the song itself, its
scheme of development and its inner structure leave something to be
desired.

Those who first gave the people of Florida these laws, the makers
of the state constitution and state legislators, believed they were satis-
fying social needs. That may well have been true in the days when these
laws were originated, but society has changed.

It is the purpose of this article to analyze the strange and sometimes
irrational growth of the case law on Florida homestead in the areas men-
tioned above. We shall begin with a rather chronological politico-legal

* Member of the Florida Bar; formerly Editor-in-Chief, University of Miami Law
Review.
is the journal of the Historical Association of Southern Florida.)
history of the origin of these laws. We shall then examine briefly the social conditions which underlay that origin, in the belief that the description of these conditions will bring alive the problems created by the case law. Then the bulk of the article will analyze the cases.

I. THE BLACKLETTER LAW

A. Restraints on Alienation

The basis for restraints on the alienation of homestead in Florida is found in article X of the state constitution.

Section 1 of that article provides that a homestead "shall not be alienable without the joint consent of husband and wife, when that relation exists." Section 4 provides that

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.

It is necessary also to quote section 2 of that article, which on its face may read as if it has nothing to do with this subject, but which appeared in the cases for a while:

The exemptions provided for in section one [i.e., as to forced sale to creditors] 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.

B. Restraints on Devise

The restraints on devise are set out inferentially in section 4 of article X, quoted above, and also in two statutes. One of these is section 731.05(1):

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 the 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 the subject of devise, but shall descend as otherwise provided in the law for the descent of homesteads.

The other is section 731.27:

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.

C. Origins of the Organic Law

Restrictions on alienation and devise of homestead have grown from roots of creditor exemption. That kind of exemption, in turn, is dusty in origin. Earlier research placed the beginning of the "true homestead exemption from forced sale" in article IX of the Florida Constitution of 1868. But the true beginnings were substantially earlier, separated from 1868 by the Civil War. Laws passed in 1843 exempted from execution various kinds of personalty, including bedding, kitchen furniture, the horse, saddle and bridle of clergymen, and such portion of the property of "every actual housekeeper, with a family . . . as may be necessary to the support of himself and his family, not to exceed in value one hundred dollars." A further law, passed a week after statehood in 1845, provided a two hundred dollar exemption on 40-acre tracts of land, at least ten acres of which were in cultivation. A companion statute provided that the proprietor of such property should have the power to devise it. If he died intestate, it was to descend to his issue, or to his widow if there were no issue.

Florida was the third state to enact some kind of homestead exemption, or the fourth if one counts Texas, which originally passed this kind of legislation while it was an independent state in order to encourage immigration. These laws spread through a total of twenty-six states before the Civil War. It has been suggested that their roots came from the Texas law mentioned above, but they were produced by a variety of motives. These motives were based in such historical factors as the crisis of 1837 and losses through wildcat banking and speculation. They may be summed up in the simple declaration that the exemption was "a device for the protection of debtors, and for securing the means of livelihood to their families."

The Civil War brought with it a rash of land-connected legislation. A veritable landmark was the Homestead Act of 1862, the statute of the one hundred and sixty acres of song and story. Based on the premise

4. Act of March 11, 1845, Sec. 1, Pamp. 23, reprinted in Thompson's Digest 357 (1847).
5. Act of March 11, 1845, Sec. 2, Pamp. 24, reprinted in Thompson's Digest 357 (1847).
7. Id. at 148.
that "the freeholder . . . is the natural support of a free government,"9
this act provided for a grant of one hundred and sixty acres to any head
of a family, on the condition that he would settle, cultivate and continu-
ously occupy the land for five years.10 A mighty tide of Americans
poured westward in these years, lured by the
incentive to virtue, industry and love of country [created by]
a permanent "home," around which gather the affections of the
family, and to which the members fondly turn, however widely
they may become dispersed.11

It was this Currier and Ives picture of simple pastoral joy upon which
the homestead legislation was founded, both as to creditor exemption and
restraints on alienation.

The first postwar chapter in the Florida law was enacted under
military supervision. The Constitutional Convention of 1868 was a wild
affair, enlivened by a temporary split into two conventions. A "seceders"
group bolted from Tallahassee to Monticello, eventually returned to Tal-
lahassee and at one point had two members of the opposing "rump"
convention arrested and dragged to the convention hall to make a ma-
jority. It seemed that the fundamental law of Florida was about to be
made by race riot, but the influence of General George Gordon Meade,
who shortly arrived in Tallahassee—and the presence in the chair of an
officer under his command—finally produced a reasonably competent
instrument of government.12 Although the influence of the carpetbagger
element was muted in the final document, it has been noted that this
constitution was "probably copied in large part from the midwestern
state constitutions in force at that time in the home states of several
of the carpetbaggers."13

This strange gathering produced a creditor exemption on one hun-
dred and sixty acres, or half an acre within a city or town, plus one
thousand dollars' worth of personalty. There was also a provision that
"the real estate shall not be alienable without the joint consent of hus-
band and wife, when that relation exists."14 Further, the homestead
article set forth that:

The exemptions provided for in section 1 . . . shall accrue

9. BENTON, THIRTY YEARS IN THE SENATE 103, 104, quoted in THOMPSON, HOMESTEAD
AND EXEMPTIONS § 1, at 2 (1886) (hereafter referred to as "THOMPSON").
10. For the background of this legislation, see HIBBARD, A HISTORY OF THE PUBLIC LAND
POLICIES, Ch. 17 & generally, passim (1939); see also THOMPSON 37.
12. For accounts of this donnybrook, see DAVIS, THE CIVIL WAR & RECONSTRUCTION
IN FLORIDA 491-514 (1913); ABBEY, FLORIDA: LAND OF CHANGE 307-08 (1941); CASH, THE
STORY OF FLORIDA 471 (1938); DOVELL, FLORIDA, HISTORIC, DRAMATIC, CONTEMPORARY
554-56 (1952).
13. DOVELL, op. cit. supra note 12, at 555.
14. FLA. CONST. art. IX, § 1 (1868).
to the heirs of the party having enjoyed or taken advantage of the benefit of the exemption. . . .\textsuperscript{15}

The chronology was filled out by the Constitution of 1885, which was called among other reasons in response to pressures for reduction of legislators' salaries and for the local election of more officials.\textsuperscript{16} It is article X of this document which is the present provision. It begins, as did its predecessor, with a creditor exemption.\textsuperscript{17} As to restrictions on inter vivos alienation, its effect is the same as the 1868 provision; it does add a clause\textsuperscript{18} which implies a restraint on devise when there are children. Generally, it may be said that the 1868 provision was pretty much the basis for the 1885 article.

The first explicit statutory restraint on devise was passed in 1899.\textsuperscript{19} This act provided for descent to the widow if there were no children, or an election in the widow between dower and a child's part if there were children. The change to the present wording, giving the widow a life estate with remainder to the children, came into the law in 1933.\textsuperscript{20}

The discussion above presents all the organic and statutory law on the subject, from the beginnings in 1843 to the present law under the constitution of 1885 and the statutes of descent, sections 731.05(1) and 731.27.

II. THE FABRIC OF HISTORY

Our present task is not one which lends itself to easy generalizations and exact description. It is to sketch a picture of the Florida which existed at the time of the passage of the early homestead laws. We have seen that the first true homestead creditor exemption was a product of the eighteen-forties;\textsuperscript{21} that the theory of both creditor exemption and restraint on alienation found its way into both the constitutions of 1868 and 1885;\textsuperscript{22} and that restraint on devise first was legislated in 1899.\textsuperscript{23} It would seem reasonable to inquire into the makeup of Florida in the years between the Civil War and the constitutional convention of 1885, in order to ascertain the social basis for this group of laws.

The first restraint on alienation was embedded in the constitution three years after the Civil War. This was done not only at a convention with a federal military officer presiding, but against a background of

\textsuperscript{15} FLA. CONST. art. IX, § 3 (1868).
\textsuperscript{16} DOVELL, op. cit. supra note 12, at 653-54; ABBEY, op. cit. supra note 12, at 328-29.
\textsuperscript{17} FLA. CONST. art. X, § 1.
\textsuperscript{18} The last sentence of FLA. CONST. art. X, § 4, quoted in text with section I (A) of this paper.
\textsuperscript{19} FLA. LAWS 1899, ch. 4730.
\textsuperscript{20} FLA. LAWS 1933, ch. 16103, § 28.
\textsuperscript{21} See text accompanying notes 3 & 4 supra.
\textsuperscript{22} See text accompanying notes 14 through 18 supra.
\textsuperscript{23} See text accompanying note 19 supra.
desolation. The assessed valuation of property, not even including slaves, had fallen by almost half. Cotton had been burned and sawmills razed; livestock was depleted by raiders and deserters. Fields had succumbed to briars and oak shrubs.24 The major towns of Florida, such as they were, were village crossroads in terms of today’s populations: Jacksonville, 6912; Key West, 5016; Pensacola, 3347; Tallahassee, 2023; Tampa, 796.25 The population to the square mile was 3.46.26 The account book of Fred Varn, who operated a tannery and store near Fort Meade, displayed vividly the life of society. Varn’s account with W. Willingham in August and September of 1870 showed entries of this nature:27

<table>
<thead>
<tr>
<th>DR</th>
<th>Repair saddle $10.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>CR</td>
<td>3 bu. potatoes $1.50</td>
</tr>
</tbody>
</table>

In short, large sections of Florida had a barter economy.

In and between the lines of the reports of those who lived these years and the historians who have written about them, a picture begins to emerge. It is a picture of an agricultural society, ridden with post-war misery, doubtless saddled with debt, and surely lacking the modern city as Florida knows it today.

The state’s recovery through the eighteen-seventies was very gradual indeed. An English observer in the mid-seventies, commenting on the claim by Florida land agents that a railroad would be built to Miami, said there was “no reason to suppose that such a line is ever likely to be built as long as Florida remains in her present bankrupt and impoverished condition.”28 The truly significant stimuli to Florida’s economy did not occur until the next decade. As the span of the eighties began, a chart of the distribution of population in Florida shows a small arc in the panhandle with a density of 18 to 45 to the square mile; a virtual desert in the southern third of the state, where the density is less than two; and a showing of between 6 and 18 for the rest.29

What was the social picture in physical terms? It was a society in which “even well-to-do cattlemen . . . lived in double-penned log houses with stick-and-dirt chimneys,” and people still used flint and steel to kindle fires.30 It was a society in which people were just beginning to

bring cisterns into general use, because they found that when they used cisterns they were free of the chills and fever they got with well water.\textsuperscript{81} The city of Jacksonville, Florida’s second metropolis with a population of 7,650 in 1880,\textsuperscript{82} boasted seventeen miles of streets, none of which were paved, and a city market. The market, with sixteen stalls for meat, eight for vegetables and three for fish, was the source of nearly all of the retail supply for those foodstuffs. It was provided by law that the carcass of any animal dying in the city must be removed and buried at least a mile outside its limits. One-third of the city-dwellers used privy-vaults, a few had water-closets and the rest “depend mostly on surface- or box-privies.”\textsuperscript{83,88}

Prisoners in Pensacola, Florida’s third city with a population of 6,845, were detailed to clean the gutters each spring to remove sediment and vegetable matter which had accumulated, since there were no sewers.\textsuperscript{84} On Biscayne Bay, a couple of post offices which had been opened in Miami and Coconut Grove in the eighteen-fifties had been shut down, not to reopen again until the eighties.\textsuperscript{85} The largest city in the state was Key West, population 9,890, and accessible only by boat. The population per square mile had climbed to 4.97.\textsuperscript{86} Patrick’s simple summary aptly describes “a few cities on the coasts, a developed agricultural area, and an almost uninhabited region in the south.”\textsuperscript{87}

Most historians of Florida are agreed that at least two groups of events were prerequisites to providing the state with the beginnings of the stimulus toward a mature economy. One of these was the sale of about four million acres by the moribund and debt-laden state Internal Improvement Fund, to financier Hamilton Disston of Philadelphia. The price was one million dollars, which relieved the I. I. Fund of its interest obligations.\textsuperscript{88}

The other was the coming of the railroads through Florida. It is useful to mention three of these roads, each built by a different entrepreneur, and each with a story to tell about social life in Florida during the last two decades of the nineteenth century. William D. Chipley’s Pensacola & Atlantic began construction eastward from Chattahoochee in the early summer of 1881. “For more than a hundred miles, from

\begin{itemize}
  \item 32. \textit{Statistics, Tenth Census, op. cit. supra} note 26, at 117.
  \item 34. \textit{Id.} at 187-88.
  \item 35. Merrick, \textit{Pre-Flagler Influences on the Lower Florida East Coast,} \textit{1 Tequesta} 1, 8 (1941).
  \item 36. \textit{Statistics, Tenth Census, supra} note 26, at 668.
  \item 37. \textit{Patrick, Florida Under Five Flags} 82 (1945).
  \item 38. See, \textit{e.g., Abbey, op. cit. supra} note 12, at 346-52; \textit{cf. Dau, Florida Old & New} 251-52 (1934).
\end{itemize}
Milton to Marianna," its route through the pine barrens of West Florida "did not pass through a single settlement." Henry B. Plant's railroad reached Tampa in 1884, after a progression which took it from Jacksonville to Palatka, then from Palatka to Sanford, and finally to Tampa. In 1880, Tampa's population totalled 720.

Finally, there was Mr. Flagler's railroad, which arrived in Miami in 1896. Eleven years before, when the present constitution was being written, Miami had an estimated population of 150, two stores and a steam starch factory, and land was selling at $1.25 an acre. The conditions of life on today's Gold Coast, which now claims three of the eight "Standard Metropolitan Statistical Areas" of the Florida census, are described by a woman whose family came in 1892 to a one hundred and sixty acre homestead "about five miles northwest of Lemon City." In a memoir dripping with color, Mary Douthit Conrad recalls that her family came from North Carolina to Tampa on a wood-burning train, looking out the window "at the long stretches of palmettoes and pines," and noting that there were "few towns and few farms." From Tampa there was a steamer to Key West—an eighteen-hour voyage to the undisputed metropolis of Florida—and from there a five-day schooner trip to Cape Florida lighthouse.

Once the family had arrived in Miami, "foods had to be wrestled from nature and converted into palatable dishes." More than occasionally, though, the dishes included such delicacies as turtle steak, quail and venison, procured by hunting or from the Indians by barter. Vegetables had to wait for a garden, and in the meantime the family relied on staples—ham, dried beans, green coffee, sugar, salt and grits—some of which were brought with the family from Key West. Meals, including sourdough bread—another standby—were cooked over an open fire for a year until a separate kitchen was built, and eaten under a tarpaulin stretched from one side of the house. Women's work included the making of starch by grinding the wild coontie root, washing out the starch and then drying it.

Perhaps most revealing of all for the purposes of the present article is the fact that as Mrs. Conrad and her brother came of age, each received a homestead of his own. Hers was a one hundred and twenty acre tract near what is today Miami’s Greynolds Park, where the family helped

41. Statistics, Tentie Census, supra note 26, at 118.  
44. The reminiscences that follow are taken from Conrad, Homesteading in Florida During the 1890's, 17 Tequesta 3 passim (1957).  
her to clear the land and build a 20 \times 20 log cabin: "It had a hip roof and a loft because I didn't like sleeping on the ground floor because I was afraid of snakes."

This last episode may best describe the Florida of that time—the time of the drafting of the constitution which presently governs the homestead law of the state. For this was a state which was still struggling with what in our terms was an underdeveloped economy, a state which was still almost entirely an agricultural society. Land was so plentiful that a separate homestead of substantial acreage could be set aside for a young woman when she reached the age of twenty-one. Railroads were run through nowhere to towns which in present-day terms were little more than hamlets. The largest city in Florida was accessible only by water.

These facts may be combined with two photographs of a main intersection of Clearwater, circa 1938 and circa 1888. The older picture has a distinctly rural flavor to it; indeed, there are only three buildings in it, one of them a clothing store, the others not readily distinguishable as to use. The rest of the picture is grass, shrubbery and sky. The same view, fifty years later, reveals a street lined with buildings and automobiles.

This lesson is thrown into even sharper focus by this comparison of the census figures of 1890 and 1960:

<table>
<thead>
<tr>
<th>City</th>
<th>1890</th>
<th>1960</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jacksonville</td>
<td>17,201</td>
<td>201,030</td>
</tr>
<tr>
<td>Key West</td>
<td>18,080</td>
<td>33,956</td>
</tr>
<tr>
<td>Miami</td>
<td>364</td>
<td>291,688</td>
</tr>
<tr>
<td>Pensacola</td>
<td>11,750</td>
<td>56,752</td>
</tr>
<tr>
<td>Tallahassee</td>
<td>2,934</td>
<td>48,174</td>
</tr>
<tr>
<td>Tampa</td>
<td>5,532</td>
<td>274,970</td>
</tr>
</tbody>
</table>

A further contrast is provided by the fact that the population density of Florida was 91.3 per square mile in 1960, as compared with less than five per square mile seventy years before. Additionally, it is note-
worthy that while rural Florida totalled ninety per cent of the population in 1880 and eighty per cent in 1890, its share was but thirty-seven per cent at the time of the last census.\textsuperscript{53}

The relevance of this social history and demographic analysis is this: We are dealing with a land law. It was passed when the residential use of land was governed, and when the way that people thought about land was shaped by an economy and a society which were very different from those which exist in Florida today. The old society has gone on the winds of change. But the laws it produced linger with us, and the clash of old laws and new conditions of life has produced a confusion of concepts. The story of how those concepts developed, and became tangled, forms the rest of this article.

III. QUAGMIRE: THE DEVELOPMENT OF CASE LAW

This section will analyze the relevant Florida case law in the following fashion: First, we shall examine the testamentary restraints as they developed from the nineteenth century up to the late nineteen-forties. Then we shall examine the parallel development in the inter vivos restraints up to the same period. It was at that point that two dissenting opinions questioned the fundamental premises of the cases that had built up over more than fifty years—in one case as to the testamentary restraints and in another as to the inter vivos restrictions. Using these dissents as bench marks, we shall then examine the law of the fifties and the early sixties on each of these two subjects. We shall use a rather, close analytical microscope on seven or eight cases which point up the conceptual problems now embedded in an area of the law which has become pretzeled with twists and hairpin turns. As a general summary of the material which follows, the laconic comment of a nineteenth century expert is almost humorous in its understatement: "[T]he courts have not been able to seize upon, or keep hold of, governing principles."\textsuperscript{54}

The Basic Definition

We may begin with the question, What is a homestead? This inquiry in itself has given rise to mountains of litigation.\textsuperscript{55} At the outset, there was a simple answer, albeit based on a circuitous definition. The Florida court in 1882 decided negatively the question of whether a debtor and his family residing in a town could claim homestead in cultivated lands outside of the town which they did not actually occupy.


\textsuperscript{54} THOMPSON vi. For a rather more outraged and pungent critique, rendered at an interestingly early date, see Barney v. Leeds, 51 N.H. 253, 261 (1871), quoted in THOMPSON, supra.

\textsuperscript{55} On various issues concerning the basis of homesteadship, see Crosby & Miller, Our Legal Chameleon, The Florida Homestead Exemption: I, 2 U. FLA. L. REV. 11, 29-31, 37-52 (1949).
Noting that the constitution had failed to define the word, the court said that it was to be understood according to its common meaning, and gave several such meanings: "The dwelling-house at which the family resides"; "the home place, the place where the home is"; "the place of the home."  

A. TESTAMENTARY RESTRAINTS: THE FIRST SIX DECADES

The first case which arose on testamentary disposition was brought under the Constitution of 1868. This case, *Wilson v. Fridenburg*, 57 was an action to foreclose a mortgage against the decedent's widow, his executrix, to whom he had given a power of sale over all his realty. Holding that the decedent's children were necessary parties, the court noted that "the authorities are in point that the husband cannot devise the homestead," because "the existence of such a right in the wife and children . . . is clearly incompatible with the exercise of such power over it by him." To this proposition the court cited cases from three other jurisdictions—Massachusetts (1868), Vermont (1865) and Texas (1860), all of which were based on state statutes. The quotation itself was from a treatise, *Thompson on Homestead*, and from the context of the original, the right referred to apparently was the right of exemption.

It thus appears that the early foundation for Florida homestead law was laid on the basis of what might be called statutory common law—*i.e.*, common law based on the statutes of other jurisdictions, and formulated in Florida as a common law proposition.

The same principle was applied shortly thereafter in a case involving a second wife's attempt to take "a homestead estate" against a will leaving the husband's property to his wife and children, share alike. 58 The court noted that this was a descent question and said that the title of homestead descended to the heirs, subject to the widow's dower rights. It emphasized that in the earlier *Wilson* case it had been decided that under the Constitution of 1868 the exemption of homestead from forced sale "is all that enures to the heirs of the owner upon his decease."

Thus, before the passage of the present constitution, the state of the law seemed to be this: It was recognized that the exemption granted by the Constitution had nothing to do with testamentary disposition, but it was held that there were restrictions on alienation by will, which were derived (as nearly as one can tell) from the statute-based cases of other jurisdictions.

---

57. 19 Fla. 461 (1882), aff'd, 21 Fla. 386 (1885).
58. *I.e.*, THOMPSON §§ 540-44.
Then came article X of the Constitution of 1885, the passage of the first descent-of-homestead statute in 1899, and with them the beginnings of great confusion. One of the first important essays at definition came after the passage of the 1885 constitution, but before the statute. This was a dictum which emphasized that since the "inuring" of the homestead exemption was an inurement of an exemption from forced sale, it was not an estate. However, the court also said in effect that the heirs did have a distinguishable interest in the homestead. Shortly another case emphasized that "inures" was not at all synonymous with "descends."

The rule was based on this rather reasonable interpretation for about seven years, during which the court applied the common—and now statutory—law on descents to two cases involving devoted daughters. The problem in both cases was that in applying the law correctly, the court arrived at a preposterous result. In each case, the mother had devised the homestead to two daughters. In one case, one of the devisees, and in the other case both of them, had lived with the mother and cared for her.

It was argued in one of these cases, decided in 1901, that the word "children" in article X, section 4 of the constitution referred to minor children—but the court refused to accept this view. Interesting also is the fact that this case did not mention the statute, which, having been passed in 1899, was already on the books, but said that it was the "settled law" that homestead descended to the heirs at law. This confirms the idea that the statute was simply descriptive of a situation which already had evolved from gelatinous origins.

60. Fla. Laws 1899, ch. 4730. The case history which preceded this statute, text accompanying notes 57-59 supra, and the confusion of purpose between the statute and the constitution (see, e.g., notes 69-73 infra), are especially interesting in view of a comment made long ago by Thompson:

|The homestead exemption would be deprived of the feature which chiefly recommends it to favor, if upon the death of the head of the family, it should be withheld from his widow and children, and subjected to administration for the payment of his debts. Accordingly, nearly all the statutes of homestead, after creating and defining this reservation, provide for the transmission of it, upon the death of the head of the family, to the surviving constituents thereof. . . .|

THOMPSON § 540, at 454 (1886).

This is interesting because Florida originally did not "provide for the transmission of it" by statute, but the court derived a transmission from cases based on other statutes; and then, when Florida did get a descent statute, the court apparently escrowed it for a while, in favor of constitutional provisions which had at best a negative application. See the references cited earlier in this note.

63. De Cottes v. Clarkson, 43 Fla. 1, 29 So. 442 (1901); Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903).
64. De Cottes v. Clarkson, supra note 63.
65. See text accompanying notes 58-59 supra.
The other case of the devoted daughters involved a construction of article X, section 1, in which the court found that the mother was the head of a family by virtue of her daughters' residence with her, and that therefore her devise to them was void as against some other surviving children. Thus, ironically, the fundamental premises of the descent law, by now collaterally codified by statute, were revealed in all their illogic by a correct application of that law. The very fact of these daughters' devotion meant that the homestead had to be shared with others who had not lived with the mother and cared for her.

At this point we may only suggest that at least before 1899 there might reasonably have been a different interpretation as to the rights of at least adult children in homestead. And perhaps even after the passage of the statute in that year, judicial construction could have limited its application to minor children. The point is that the origins of what is regarded today as sacred by no means sprang from the most excellent precision of premise or foundation in history.

Within the decade after passage of the descent statute, its constitutionality was duly affirmed, a result to be expected since much the same result previously had been obtained without reference to the statute.

* * *

The decision in Palmer v. Palmer in 1904 gave a new dimension to the law. This was an ejectment action brought by a son against his mother, the father having devised the homestead in equal shares to them. The court held, inter alia, that the will was void as to the homestead—under article X of the constitution. The court noted that there had been a "radical departure" and "material changes" from section IX of the 1868 constitution to section X of the 1885 constitution. These changes included the addition of the last clause of section 4 of article X, which provided that nothing in the article should be construed, "if the holder be without children to prevent him or her from disposing of his or her

66. Caro v. Caro, supra note 63. Note the concurring opinion by Carter, J., and his linkage of the concept of restraint of devise against persons with children with the concept of inurement of the exemption. Compare the dicta on headship in Matthews v. Jeacle, 61 Fla. 686, 55 So. 855 (1911). For a potentially more just result, see Nelson v. Hainlin, 89 Fla. 356, 104 So. 589 (1925), the potential justness of which does not, however, justify the fundamental defects of the rule.

67. Thomas v. Williamson, 51 Fla. 332, 40 So. 831 (1906); Saxon v. Rawls, 51 Fla. 555, 41 So. 594 (1906).

68. See, e.g., De Cottes v. Clarkson, discussed at text with notes 63-64 supra. Compare—and question the implications of—the concurring opinion of Taylor, J., in Thomas v. Williamson, supra note 67.

69. 47 Fla. 200, 35 So. 983 (1904).
homestead by will." The problem was that the court used this language, in combination with that of section 2 of article X, to facilitate an easy glide over the difference between exemption and estate. Three times, the court used the words "inure" and "inurement" as the predicate of a sentence the subject of which was "the homestead," or "it," meaning "the homestead."\(^{70}\) In other words, by the beginning of the twentieth century, the court was well on the way to the equation of an exemption with an estate in land.

This reasoning was not only supported but extended in *Shone v. Bellmore,\(^{71}\) fourteen years later, in which the court held that a father’s will was "ineffectual" to deprive a child "of his right to the enjoyment of the estate secured to him by the Constitution."\(^{72}\) This remarkable language seems to have been based mostly on article X, section 2—the "inurement" clause.\(^{73}\)

* * *

It was not until a decade later that the court began to make the distinction between constitution and statute. It did that in a suit by the deceased husband’s grandchildren against the wife, to whom he had devised practically all his property. The court quickly held that the property "descended" to the children, subject to dower, presumably under the statute. It then stressed in a well-worded dictum that the intent of article X of the constitution was

not . . . to perpetuate or compel the occupation of the homestead by the widow and heirs as a homestead after the death of the head of the family whose homestead it was during his life, but to take away the power of testamentary disposition if there

---

70. The heart of the problem created by *Palmer, supra* note 69, and *Shone v. Bellmore, infra* note 71, is the confusion engendered by the use of the language of article X, section 2. It should be recorded that the *Palmer* court said its decision was based both on sections 2 and 4, but the "inurement" language is section 2 language. Further, the *Shone* case placed its strongest emphasis on section 2. This is particularly curious because in section 4, at least, there is a kind of testamentary restraint by strong negative implication.

71. 75 Fla. 515, 78 So. 605 (1918).

72. Id. at 526, 78 So. at 608. (Emphasis added.) As a tangential comment, it may be noted that where *Palmer, supra* note 69, had referred to "radical changes" and "material departures" between the constitutions of 1868 and 1885, *Shone* noted in passing (75 Fla. at 521, 78 So. at 607) that "the language of the Constitution of 1885 relating to homestead and exemptions is practically the same. . . ." Since this point was not at issue in *Shone*, the comparison of language is not entirely fair; however, it may serve to point out how the perspective of a court, like a camera with a jammed focal mechanism, tends to lose the clarity of the old distinctions, and to blur them over as time goes on.

73. Shortly thereafter, the Florida court cited article X, section 2, for the proposition that the homestead "descends to [a householder's] heirs exempt from liability for the indebtedness of the head of the family. . . ." *Hill v. First Nat'l Bank*, 79 Fla. 391, 399, 84 So. 190, 192 (1920). In view of the preceding cases, see text with notes 69-72 supra, this suggests that possibly the same old mistake was being made. However, it is possible to argue that the court may have been very quietly making the correct distinction: See the discussion of *Moore v. Price*, text with note 74 infra.
be child or children and pass the homestead on to the widow and heirs under the laws of descent and dower, freed from the debts of the decedent.\textsuperscript{74}

By the end of World War II, the court was staying straight on the target with a decision rejecting a curious latter-day challenge to the constitutionality of the descent statute.\textsuperscript{76} The court declared that the challengers, the decedent’s children, were “mistaken” in their belief that they had “a vested interest in the real property by virtue of” article X, sections 1 and 2.\textsuperscript{76} Interestingly, the court cited as its sole authority a case\textsuperscript{77} which had been decided before the Palmer and Shone cases.\textsuperscript{78}

\* \* \*

We may sum up the first sixty or seventy years of testamentary restrictions this way: The restraint grew originally from a rather loose basis of foreign precedent. It was then codified in positive Florida statute, after which the court apparently proceeded to confuse the effects of the statute and its preceding case law with the presumed effects of the constitution. Finally, the court righted its course, at least in terms of the law as written, and properly applied the statute.\textsuperscript{79} The problem, then, was not one of construction, but of substance. The statute was being properly applied, but there were cases that suggested that from the beginning the statute itself had needed revision, or a different interpretation.

To these cases was added the changing context of social and economic life in Florida, which compelled the conclusion that the image behind the statute of the “rooftree and family fireside”\textsuperscript{80} had itself become outworn.

\textsuperscript{74} Moore v. Price, 98 Fla. 276, 284, 123 So. 768, 771 (1929). This example of clear legal reasoning was spoiled only by the appearance, in the very next case in the Southern Reporter, of a case decided the same day, by the same judge, holding that the acceptance by children of legacies under a will does not stop them from claiming their clear legal rights in the homestead property. Waldin v. Waldin, 98 Fla. 344, 123 So. 777 (1929). What spoiled things was that the court indiscriminately cited: The statute; article X, § 4; and the Palmer case, discussed at text with note 69 supra.

\textsuperscript{75} For the purposes of chronological accuracy, it may be pointed out that it was in the interim, during the depression, that the statute was changed from the old wording, giving the estate to the children subject to the widow’s election of dower or a child’s part, to the present provision for a life estate in the widow and the remainder in the children. Fla. Laws 1933, ch. 16103, § 28. This change did not alter the path of the case law; its only potential effect was to foreclose rather drastically the possibility of judicial reform of the law.

\textsuperscript{76} Nesmith v. Nesmith, 155 Fla. 823, 21 So.2d 789 (1945).

\textsuperscript{77} Hinson v. Booth, discussed at text with note 62 supra.

\textsuperscript{78} See text accompanying notes 69-72 supra.

\textsuperscript{79} For a down-the-line postwar example, see Efstatthrow v. Saucer, 158 Fla. 422, 29 So.2d 304 (1947) (holding for the children's remainders in the face of the husband's attempted devise to his wife.)

\textsuperscript{80} This picturesque language, typical of the early cases, is from Caro v. Caro, supra note 63.
B. RESTRAINTS ON ALIENATION: A HALF CENTURY OF SPOUSES AND STRAWS

The restraints on alienation of homestead inter vivos are found in article X, sections 1 and 4 of the constitution. These statements combined yield a rule which prohibits alienation by a married person except by a "deed or mortgage duly executed" by himself and his spouse.

One long line of cases, relatively unimportant to the main stem of our discussion, involves questions of what constitutes execution or acknowledgment, many determinations of which have since been changed by statute.

The heart of the alienation question must be attacked through another series of cases, which got off on the wrong foot and never recovered. As we review this development, the constant question in the background of our discussion must be one of constitutional intention. It is perhaps apt to quote from a leading nineteenth century authority on the subject, in a treatise written just one year after passage of the present Florida constitutional restrictions on alienation of homestead:

The policy of these statutes which restrain the alienation of homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of the conveyance.

With this reasonable sounding premise in mind, we may turn to the case of Thomas v. Craft, the sire of a race of unruly children. This case concerned a deed executed by the husband alone, conveying land to his wife and two adopted children. The court held the deed void as an attempt to alienate homestead land without the joint consent of the

81. See: Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920) (taken over the telephone; no good); Shad v. Smith, 74 Fla. 324, 76 So. 897 (1917) (same); Adams v. Malloy, 70 Fla. 491, 70 So. 463 (1915) (instrument signed by both spouses but lacking wife's acknowledgment, ineffectual as conveyance); Hart v. Sanderson's Adm'r's, 18 Fla. 103 (1881) (wife's simple denial that acknowledgment to mortgage was voluntary; insufficient to prevent foreclosure). The most agonizing of this string is the appellate litigation in New York Life Ins. Co. v. Oates, a verbose and drawn-out commentary on the possibilities for delay in American justice, and really on little else. Five appeals revolved on the single question of whether a married woman who signed a mortgage instrument, but did not appear before the notary taking the certificate of acknowledgment, was estopped to deny that she had so appeared: I: 113 Fla. 678, 152 So. 671 (1934); II: 122 Fla. 540, 166 So. 269 (1935), rehearing, 122 Fla. 565, 166 So. 279 (1936); III: 130 Fla. 851, 178 So. 570 (1937); IV: 141 Fla. 164, 192 So. 637 (1939); V: 144 Fla. 744, 198 So. 681 (1940).

82. See cases cited with note 162 infra.

83. THOMPSON § 473, at 407 (1886).

84. 55 Fla. 842, 46 So. 594 (1908).
spouses. Saying that since the method of alienation was prescribed, "all other methods of alienation are inhibited," the court reasoned that "the methods prescribed for the alienation of the exempted real estate are restrictions designed for the benefit of the exemption." It will be noted that the court was able to separate easily the creditor exemption and the restriction on inter vivos alienation, although it clearly and properly related the two.

But the problem here exists with respect to the extent of the prohibition on alienation, and it is almost a problem of common sense. The court noted that the constitution prohibited alienation without the joint consent of husband and wife; so the court prohibited a husband from alienating to family members, including the wife. This rigid interpretation, almost unbelievable on its face, is rendered even stranger by its paternity. For the only authority cited for this proposition was a Mississippi case. That case, to be sure, involved a statute similar to the Florida constitution. But in that case, a note was given by the husband alone to a non-family third party, against whom the action was brought for cancellation of a decree which in effect declared a mortgage; here, there was a cozy intra-family transaction, which seemed to carry none of the policy justifications which lay behind the organic rule. Yet a fifty-six year span of case after frustrating case owes its origin to this seed, so weakly supported in a foreign analogy which was in terms no analogy at all.

This case was followed by a holding of partition for children against a wife, after a deed in which the husband conveyed to his wife, with a reservation of the use and occupancy in him for her life. The court relied heavily on Thomas v. Craft, quoting among others a statement from that case that the prescribed methods of alienation were as essential in intra-family transactions as in others. The theoretical question remains from the face of these decisions whether the court would allow the problem to be solved by the simple formal expedient of the wife joining in the original deed, and it would seem that these cases imply a serious conceptual error regarding the requirement of joinder.

* * *

85. Id. at 847, 46 So. at 596.
86. Id. at 846, 46 So. at 595.
87. McDonald v. Sanford, 88 Miss. 633, 41 So. 369 (1906).
88. Could it be said seriously that the situation in Thomas v. Craft, supra note 84, would justify the Mississipp court's declaration in McDonald v. Sanford, supra note 87, that the "plain purpose of our statute . . . was to protect the wife in the shelter and refuge of a homestead"?
89. Byrd v. Byrd, 73 Fla. 322, 74 So. 313 (1917).
90. Text accompanying note 84 supra.
91. Compare the discussions of Church v. Lee with text following note 103 infra; and of Moorefield v. Byrne, text with notes 185-191 infra.
The essence of the problem—the error in fundamental policy—rises near the surface in *Norton v. Baya.* This case involved a conveyance by the homestead owner and his wife to a straw, who immediately reconveyed to the wife. Although the court is not specific on the point, being content to refer to the holding below, apparently this deed was to become effective only on the husband's death. The action was brought against the widow by the deceased husband's daughters by a prior marriage. The supreme court affirmed the chancellor's holding for the plaintiffs, subject to dower, on the theory that there had been a violation of the constitutional inhibition against the devise of homestead.

But there seemed to be a weaving together of the descent cases and the inter vivos cases. At one point the court said that the transaction, if given effect, would divest the children "of the interest" which (under article X, section 2) "inures to them." This mistake on the descent side of concretizing the exemption into an "interest [estate?]" was compounded upon the court's declaration as a general rule that when there are children, "homestead real estate may not be conveyed by deed made from the husband to the wife." In this respect, *Norton v. Baya* is a landmark for confusion of two concepts better kept separate, bound up with errors about the concepts themselves.

The mistake was solidified further by Justice Whitfield's concurring opinion, which took note of suggestions that the constitution should not be held to forbid a voluntary transfer of the homestead real estate by the owner to his wife, even though the owner... has children... because the owner... and his wife might have duly alienated the homestead to others than the children of the owner [or]... the father might have survived his wife, and, his children being grown and living in their own homes, the homestead character of the property would be lost because the owner would then no longer be the head of a family.

However, concluded Justice Whitfield,

these or other circumstances... do not afford authority for or justify a voluntary conveyance... to the wife. Such a conveyance... would destroy the rights of exemption, and thereby frustrate the organic intent that the homestead exemptions "shall inure to the widow and heirs."

---

92. 88 Fla. 1, 102 So. 361 (1924).
93. Id. at 6, 102 So. at 363. (Emphasis added.)
94. See the discussion in text accompanying notes 69-73 supra.
95. This latter statement—which is language from the inter vivos side of the question—is properly supported by citations from two inter vivos cases: Thomas v. Craft, supra note 84; and Byrd v. Byrd, supra note 89.
96. Listen for a faint echo of this line in *Moorefield v. Byrne*, discussed in text with notes 185-88 infra.
97. 88 Fla. at 12, 102 So. at 365.
Justice Whitfield's general emphasis was on what he called the "intent" of the constitution. This rather elongated excerpt from his opinion is interesting for two reasons. One is that there is relatively little discussion of *constructional* problems in the early cases. They purport to apply the constitution—and they emphasize that their interpretation is based on the "intent" of the constitution—but all the same it is a dogmatically derived intent. It does not start with a major premise; it starts with the conclusion.

The other reason for this long quotation derives from its author. It sheds a jurisprudential sidelight on this small corner of the law to note that the homestead law of Florida for more than a quarter century was, in large measure, the creation of Justice Whitfield. The concept of man-made law takes on functional significance with this kind of illustration. It was not merely a "court" which molded this law. In large measure it was the court's homestead specialist, Justice Whitfield, who wrote the decision in *Thomas v. Craft*, and who had a hand—sometimes writing for the court, sometimes concurring and occasionally dissenting—in most of the important opinions in this area of homestead. His scholarship was meticulous and admirable. But his approach to the interpretation of these provisions was unfortunately uncompromising. Strong-minded and scholarly judges are to be preferred to intellectual weak sisters, but when they are wrong, the damage they do is magnified in proportion to their powers.

Following an affirmance of the *Norton* case in another inter-spousal conveyance through a conduit, a new question arose: What about the validity of a direct inter-spousal conveyance? The court in *Church v. Lee* answered that question negatively—at least when there were children, whether the children were minors or adults. There had been an attempt to convey property to the wife as grantee. Holding that the children got a fee simple subject to dower in the property, the court referred to the "vested rights" of the children. This solidification on the inter

---


99. For an example of this approach, note his use of the word "mandatory" or a form thereof four times in a little over one page of the Southern Reporter report of Hutchinson *v. Stone*, 79 Fla. 157, 168-71, 84 So. 151, 154-55 (1920). It is to be admitted that in the context of this particular situation, which had to do with the constitutional requirement of "due execution," inflexibility was perhaps desirable; but this same basic approach characterized Justice Whitfield's attack on other homestead problems, in cases where dogmatism was not so great a virtue.


101. *102 Fla. 478, 136 So. 242 (1931).*
vivos side of an idea which was questionable even on the devise side was based on a rather casual statement in a previous case.\textsuperscript{102}

It is particularly sad to read this decision, because at one point in the road the court seems ready to interpret the purpose of the article X restraints correctly. That is, it takes a swipe at what it calls the "misinterpretations" of \textit{Thomas v. Craft}\textsuperscript{103} to the effect that observance of constitutional and statutory methods is necessary in intra family alienations, and says that "to require the wife to unite in executing a conveyance to herself would be to demand the performance of an absurd and idle act." It concludes that article X was "only intended to apply to bona fide alienations to third parties for a valuable consideration." And up to here, the reasoning is quite correct, for there should be common agreement that application of article X restraints to intra-family transfers is unreasonable. But then the court in effect says that the reason article X does not "apply" is because an intra-family transfer cannot deprive the children of their "vested rights." Thus, by 1931, a wisp of an idea has become a full-fledged property right.\textsuperscript{104}

* * *

The concept took on a possible new element—that of consideration—in a group of three cases over a decade, involving conveyances to children. First, a conveyance joined by both spouses to \textit{some} of their children was held valid when supported by valuable consideration.\textsuperscript{105} There followed a dictum—in respect to a conveyance and reconveyance to the spouses through a straw, remainder to \textit{some} children—that the bill was "devoid of allegation to show that the grantor could not" do what he had done.\textsuperscript{106} Then the court upheld a conveyance to two children

\textsuperscript{102} Hutchinson v. Stone, 79 Fla. 157, 84 So. 151 (1920) (in which the real issue was the validity of an acknowledgment, although the court did say that if the acknowledgment was improper, a mortgage was a nullity to the heirs).

\textsuperscript{103} A reading of \textit{Thomas v. Craft}, however, raises the question of whether it has in fact been misinterpreted. See text with note 84 \textit{supra}.

\textsuperscript{104} For apparent confirmation, see Miller v. Mobley, 136 Fla. 351, 186 So. 797 (1939). In this case, the husband and wife conveyed homestead property to a third party, who subsequently reconveyed to the spouses in exchange for the cancellation of indebtedness on the mortgage notes. The majority opinion was based on a factual finding of consideration on the reconveyance. The dissenting opinion, written by Chapman, J., joined by Justice Whitfield, said there had been no consideration, and spoke of the "\textit{interest and ownership}" of the children. (Emphasis added.) It is assumed that since the major quarrel was a factual one, the majority would have accepted this characterization, in view of the previous case law.

\textsuperscript{105} Daniels v. Mercer, 105 Fla. 362, 141 So. 189 (1932) (further, reservation of the use by the husband and wife during their lives "did not stop the passage of title" to the grantees, and therefore there was no violation of the \textit{devise} statute).

A creditor-exemption case decided the same year hides some rather startling implication of "either" and "or" behind a rather innocent screen. Fidelity & Cas. Co. of N.Y. v. Magwood, 107 Fla. 208, 145 So. 67 (1932); see also \textit{Id.}, 111 Fla. 190, 149 So. 29 (1933).

\textsuperscript{106} Jones v. Equitable Life Assur. Soc. of the United States, 126 Fla. 527, 171 So. 317 (1936) (holding based on laches).
for "one dollar" and "other good and valuable considerations," including the fact that the grantees cared for their parents and performed work on the property.107

* * *

Another interesting brace of cases involved the question of headship in the wife. The implications of Jones v. Federal Farm Mortgage Corp.108 showed the depths of illogic plumbed by the way the constitution was being interpreted. This was a foreclosure action defended by the heirs of the deceased mortgagor, their mother, who had died intestate. This woman had been a free dealer when she executed the mortgage, on lands which were in her name. She and her husband had lived on the land for years as their home; she had continued on the land when he moved away for "business reasons"; there had never been a divorce and the husband contributed to the support of the children. The court affirmed the chancellor's determination that the mother-mortgagor was not the head of a family and that she therefore could execute a mortgage. Thus we have it that a woman as a free dealer can mortgage land where she lives as her home and which she holds by herself, so long as she is not the head of the family—a situation which exists because she is married to a husband who is living apart from her. Yet it has also been held that if she is the head of a family including her husband, she cannot execute a mortgage without the joinder of her husband.109

* * *

The impact of divorce on homestead law had some interesting results in the nineteen-forties. One case110 involved a property settlement, giving the homestead to the wife with a reserved life estate in the husband. The deed was dated September 10th, the acknowledgment was dated the 11th, the divorce decree was granted on the 13th, and the deed was recorded and mailed to the wife on the 16th. The court held that although a deed to the homestead was void unless there was joinder by the wife, this one was valid because it was "executed and delivered after the settlement agreement [which obviously was the case], when the grantor was unmarried [which apparently was not the case] and when the lands had lost their homestead character."111 This case may be

---


108. 138 Fla. 65, 188 So. 804 (1939).

109. Which was the result in Bigelow v. Dunpfe, 143 Fla. 603, 197 So. 328, rehearing denied, 144 Fla. 330, 198 So. 13 (1940) (mortgagor-wife supported husband, incapacitated by illness; Held, mortgagee "may not indulge the presumption" that because mortgagor "executes a mortgage alone on property owned by her she is not the head of her family and the property is not a homestead." Id., 143 Fla. at 608, 197 So. at 330.)


111. Id. at 161, 13 So.2d at 910.
described as rightly stretching a point which it perhaps did not need to stretch in order to arrive at a reasonable conclusion. At any rate it did observe the realities of the situation, in contradistinction to the general flow of decisions which strain their legal premises to void anything which looks like an inter-spousal conveyance of homestead.

Another decision produced a result which created problems both in terms of homestead interpretation and basic premises of family law. The plaintiff, who was the defendant's ex-wife, sued for partition of what had been the homestead. A sale was held, one-half of the proceeds going to the plaintiff and the defendant's half share being impounded. The action was for the purpose of subjecting the impounded funds to the satisfaction of three judgments. A special master found that the property was "homestead property from the beginning until the time of the sale and that the proceeds of the sale, impounded in court, retained their homestead character." The supreme court held in effect that the wife could satisfy her judgments from the impounded fund, except for one thousand dollars—which it held to be the defendant's personal property exemption under the constitution. This finding was linked with the court's reluctant acceptance of the master's conclusion that the defendant was the "head" of a family, thus entitling him to the constitutional exemption, because he had not been relieved of his obligations toward his children. The court's own description of this holding was apt: "To [hold] so puts a strain on the scales of justice."

* * *

112. After the quotation in the text sentence preceding this note, the court cited Miller v. West Palm Beach Atl. Nat'l Bank, 142 Fla. 22, 194 So. 230 (1940), but in that case the court had decided clearly that there had been an abandonment in consideration of a separation agreement. This seems substantially different from a declaration that a married grantor, however close to divorce he may have been, was "unmarried," at least with respect to the time the deed was "executed." In the same paragraph the court also had said that "the deed was delivered after the divorce was granted and was executed in contemplation of divorce as per an agreement for that purpose," which is accurate. In any event, it seems reasonable that in Moore v. Hunter, supra note 110, there probably had been an abandonment, anyway.


114. Id. at 802.

115. FLA. CONST. art. X, § 1. It is perfectly obvious that the very first personalty exemption had nothing like this result in mind—Act of March 15, 1843, § 1, Pamp. 55, reprinted in THOMPSON'S DIGEST 356 (1847)—and there is no subsequent basis in history or logic for it. Cf. Crosby & Miller, Our Legal Chameleon, The Florida Homestead Exemption: I, 2 U. FLA. L. REV. 12, 80 (1949).

116. Olsen v. Simpson, supra note 113 at 803. Cf. a creditor-exemption case, Osceola Fertilizer Co. v. Sauls, 98 Fla. 339, 123 So. 780 (1929), which upheld the argument of a divorced judgment creditor, contesting a levy of execution on his lands, that he retained headship and homestead. The Osceola court cited, inter alia, a Texas case, Hall v. Fields, 81 Tex. 553, 17 S.W. 82 (1891), which in turn cited another Texas case, Foreman v. Meroney, 62 Tex. 723 (1884). This latter case emotionally ("the mother and little children cannot cultivate the soil") upheld a homestead in a woman who had been widowed while living on the homestead, remarried and went to live in a different county with "no definite purpose to return." If the Osceola result had a certain logic, see Crosby & Miller, supra
A group of cases over the decade 1931-1941 discussed the relationship of homestead to tenancy by the entireties. In line with its usual policy, the court refused to allow the creation of a tenancy by the entireties by a conveyance and reconveyance through a straw without consideration. It was the factor of no consideration which bottomed the court’s decision, said Justice Whitfield in Norman v. Kannon, for if a homestead is conveyed for “a proper consideration . . . the consideration takes the place of the exempted property and the constitution may not thereby be violated.” The case seemed to confuse fundamentally the language and purpose of article X, section 4, with that of section 2.

Justice Whitfield’s concurring opinion in another case supplied an important but less controversial distinction, which was that land concededly owned by the entireties could still qualify for the homestead exemption. But there was some variance between this opinion and a subsequent decision as to the “inurement” of this exemption to the survivor.

Temporary Summing-up: A Principle Unblemished

Four decades of homestead conveyances were met in Estep v. Herring in 1944, and the principle of Thomas v. Craft emerged unnote 115, at 28, yet it sprang from a heritage of cases with somewhat different roots. See also the creditor-exemption case of Anderson v. Anderson, 44 So.2d 652 (Fla. 1950).

Another case springing from a divorce situation presents some confusion because of certain inner contradictions. Gilmore v. Gilmore, 123 Fla. 28, 166 So. 214 (1936). This was an action by a divorcing husband to have a deed voided on the grounds that he had conveyed to his wife in violation of article X, section 4. The court found no reversible error in the chancellor’s finding against a headship in the husband. But one must examine the contradictory way it describes the facts: The husband

1) Lived a “ubiquitous life”
2) But he had been a “perennial visitor” to the Florida home
3) There was “ample support” for an inference that he regarded himself only as resident in a “transient sense”
4) But the parties “never together spent as much as a week under any other roof than at the Fort Myers residence.”

The cloak of “ample support for inferences” is a broad one; but language of this sort pulls the mind the other way.


119. See the quotation in text accompanying note 118.

120. The court said that such a conveyance could not be effectual because “[I]t would violate the organic command that the homestead exemptions ‘shall inure to the widow and heirs of the party entitled to such exemption. . . .’” (citing cases). See Norman v. Kannon, supra note 117, at 716, 182 So. at 905.

121. Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932).

122. Knapp v. Fredricksen, 148 Fla. 311, 4 So.2d 251 (1941).

123. Compare the language of Menendez, note 121 supra, 106 Fla. at 221, 143 So. at 226, with that of Knapp, note 122 supra, 148 Fla. at 315, 4 So.2d at 252. Knapp quotes the concurring opinion in Menendez, but Knapp’s independent discussion of the subject contains suggestions of a differing interpretation.

124. 154 Fla. 653, 18 So.2d 683 (1944).

125. 55 Fla. 842, 46 So. 594 (1908), discussed in text accompanying notes 84-88 supra.
blemished. The case involved a suit for performance of a contract to convey homestead land which had been conveyed from husband to wife. The plaintiff relied on section 689.11 of Florida Statutes, which had been enacted to authorize inter-spouse conveyances without the necessity of the grantee spouse joining in the execution. But the court said bluntly that this statute did not affect the conveyance of homestead. Its citation to *Thomas v. Craft* was eloquent testimony to the straight and narrow road which the court had traveled. Florida homestead law was generously supplied with whatever virtue existed in a consistently erroneous interpretation.

C. DEVISE AND DESCENT: A LATTER-DAY TALE OF THE SAME OLD WOES AND SOME NEW PROBLEMS

A dissenting opinion in a 1949 devise case\(^2\) provides a ray of light through the forbidding gloom of the statute. The testatrix had made what the three heirs considered an “equal division” of property, which included a devise of the homestead to one of them. However, one of the devisees who had not been devised the homestead subsequently brought a suit, and the supreme court held that each of the three had an undivided one-third interest in the homestead. Justice Barns dissented on the principle of equitable election,\(^1\) a theory which in turn was based on the legal presumption that a testatrix intends to treat her children equally. Albeit limited to the unusual fact situation, the dissent showed a crack in the wall of literal statutory construction.

*Confusion Laid Bare: Passmore v. Morrison*

Then came two cases which illustrated just how muddied the waters had become. The first, and most curious, was *Passmore v. Morrison*.\(^3\) This case involved a child who had been adopted by the Passmores when he was an infant. Subsequently he proved incorrigible, and when the Passmores died within a few months of each other he had been shunted about through a succession of foster homes and agencies and had been absent from the Passmores’ home for two years. On two occasions they had released all claim to an interest in him. A petition for adoption by his paternal grandmother was pending, but the State Welfare Board recommended that it be dismissed, because he had run away from her home. The suit which constituted the basis of this appeal was a declaratory action brought by the devisee of Mrs. Passmore, who had succeeded her husband in death. The claim was that Mrs. Passmore could will the property where she lived because she had taken as a surviving tenant by the entireties. The child, defending, contended that the

---

127. For which he cited a dictum from *Palmer v. Palmer*, 47 Fla. 200, 35 So. 983 (1904).
128. 63 So.2d 297 (Fla. 1953).
place had never lost its homestead character, and therefore was not subject to devise.

The decision went for the plaintiff, four to three, with a concurring opinion making the fourth. Each opinion deserves separate analysis, for reasons to become apparent. The majority opinion, written by Justice Terrell, was based partially on a concise generalization about the necessity for headship in homestead. It found that there was no headship, and therefore no homestead, but then proceeded to give a passel of other reasons for denying that there was an interest in the child. These reasons may be summed up by saying that for practical purposes, he had "no basis of law or morals for an expectancy" from the Passmores. One can only say that this presented something of a contrast to the careful analysis of these problems which had characterized Justice Terrell's opinions in the area.\footnote{129. Id. at 299.}

Justice Drew concurred to make a majority. He squarely hit the headship issue, upholding the finding below that the property had "never acquired the status of the homestead of the head of a family," so as to prohibit its disposition by Mrs. Passmore's will. But he then quoted from Justice Whitfield's concurring opinion in a previous conveyance case—a quotation which cited article X, section 2 of the constitution, the clause concerning the inurement of the creditor exemption.\footnote{130. See the discussions of his dissent in Stephens v. Campbell, 70 So.2d 579 (Fla. 1954), another devise case, at text succeeding note 138 \textit{infra}; and of his dissent in Florida Nat'l Bank v. Winn, 158 Fla. 750, 30 So.2d 298 (1947), a conveyance case, at text with notes 159-60 \textit{infra}.}

This was followed by Justice Hobson's dissent, which emphasized that the boy was still the adopted son of the Passmores, and that their responsibility toward him was as great during the lifetime of each as it would have been had he been born of their marriage. All homestead exemptions are founded upon the laudable desire to have the home protected so that it may be available as a shelter or haven for the family. Certainly it cannot be said that this lad, who is still a minor, can be charged with having abandoned the family home, nor did he relieve, if indeed he could have relieved, his adopted mother of her duty under the law to provide him with the necessities of life, including the shelter of a home.\footnote{131. "If the widow \textit{acquired} and \textit{retains} homestead exemption rights in property after the death of the husband, such exemption, \textit{if existing at her death}, would inure to her heirs. Section 2, art. 10, Constitution." Justice Drew, in Passmore v. Morrison, 63 So.2d at 300, quoting Justice Whitfield in Menendez v. Rodriguez, 106 Fla. 214, 222, 143 So. 223, 226 (1932) (Justice Drew's emphasis). \textit{Menendez, supra}, is discussed briefly at text with note 121 \textit{supra}.}

\footnote{132. The majority never did go quite this far, however.}

\footnote{133. Passmore v. Morrison, \textit{supra} note 128, at 301-02.}
For partial support of this position, which is eminently sensible in view of the wording of the statute, Justice Hobson called on another conveyance case, for language that

> there would be no homestead exemption in the property [taken originally by the entireties] after the death of the husband, unless the widow became the head of the family and continued to occupy the property with her family as a homestead; and if not duly alienated by her, the property would at her death inure or descend to her heirs.\(^8\)

We begin to see here the compounding of error. First of all, the courts in article X conveyance cases may well have made a misinterpretation of the meaning of the article X restrictions. To build upon this, we have the fact that there is an obvious conceptual difference between article X on conveyance and section 731 on devise—and yet here, the erroneous metamorphosis of exemption-to-property-right developed in the article X decisions becomes used as a rationale in arguments—both Justice Drew’s and Justice Hobson’s—in a section 731.27 case. Thus we must add these arguments to the very strange language of Justice Terrell about expectancies—language added when he could have stopped with a concise and accurate description of the law—and we must reach the following conclusion:

By the time of Passmore v. Morrison, the common law confrontations of three score and more litigants over more than a half century, and the concomitant attempts of judges both to “do justice” and to set up a consistent conceptual structure, had come a-cropper. They had produced a situation in which no one knew any more what a homestead was. This is proved by the melancholy fact that the three separate opinions in Passmore contained at least one fundamental conceptual error apiece. The reason was that no one knew what the concept was any more, for it had become so pockmarked in the old battles. It was impossible to say which opinion was “right”; about all that could be said was that whichever was “right,” and whichever was “wrong,” it was for the wrong reasons!

Questions, and Quicksand: Stephens v. Campbell

Another noteworthy case, decided the next year, was Stephens v. Campbell.\(^135\) This case involved a challenge by a dependent husband to the will of his wife, who had left the homestead to her two children by a previous marriage. The court held for the husband,\(^136\) placing its

---

134. *Id.* at 301, quoting from Justice Whitfield’s decision in Norman v. Kannon, 133 Fla. 710, 715, 182 So. 903, 905 (1938) (Justice Hobson’s emphasis, except for the italicization of the last “her,” which is Justice Whitfield’s emphasis). (The Norman case is discussed with note 118 *supra*).

135. 70 So.2d 579 (Fla. 1954).

136. There is no indication of whether the husband takes a life estate or becomes co-heir with the children.
emphasis on the implications of article X, section 4 of the constitution.\textsuperscript{137} It did not refer to the devise statutes. It stressed that while the children were not minors or dependents, they were still the wife's children, and concluded that this fact prevented the alienation of the homestead.

Justice Terrell did some notable dissection in his dissent, but raised perhaps more questions than he answered. Speaking of sections 731.05 and 731.27, he said that these provisions revealed

no restraint on alienating the homestead by will except where the owner is survived by his wife and lineal descendants. In this case the wife owned the homestead and died leaving lineal descendants by a former husband who are of age and are not contesting the will. The law imposes no restraint on her disposing of her property as she desires, free of any claim on the part of her surviving husband. No surviving minor children or dependent adult lineal descendants are involved in this case.\textsuperscript{138}

He concluded as did the majority that the answer to the question turned on the interpretation of article X, section 4, which he said provided that

nothing therein shall be construed to prevent the wife, if the husband is deceased, from alienating her property or from disposing of it by will in the manner provided for by law provided she is without children.\textsuperscript{139}

There was thus created this problem: The dissent turns in large measure on the literal interpretation of the word "widow" in the statute. But there is a suggestion in Justice Terrell's language that he might interpret "lineal descendants" in sections 731.05 and 731.27 to mean "minor children" or dependent adult lineal descendants, and "children" in article X, section 4 to mean the same thing. It has in fact been suggested in this paper\textsuperscript{140} that this probably should have been done long ago, and more easily could have been done then. On the other hand, Justice Terrell's emphasis on the fact that the children were not contesting under the will implies that if their mother had tried to devise to someone else, and they had contested, then section 731.27 would be applied literally, without qualifications as to minority or dependency. Thus, it was suggested once that adult children had no vested interest at all, and once that they had a kind of vested interest subject-to-divestment-by-not-challenging-the-will.

The Stephens case may be summed up by saying that by this point

\textsuperscript{137} For this proposition the court cited \textit{De Cottes v. Clarkson}, discussed at text with notes 63-64 \textit{supra}.
\textsuperscript{138} Stephens v. Campbell, \textit{supra} note 135, at 581.
\textsuperscript{139} \textit{Ibid}.
\textsuperscript{140} See, \textit{e.g.}, text following note 66 \textit{supra}.
the problem was that people who tried to do something constructive with
the situation ended up in a kind of jurisprudential quicksand. Their
valiant efforts mired them even deeper because of the nature of the
environment.

A group of other cases in the nineteen-fifties and early sixties defined
various other aspects of the character of homestead, sometimes reason-
ably in view of the statute, sometimes indulging in the old errors. An
example of the latter problem was a dictum in a rather conventional case
finding that certain property was homestead. This dictum concerned
property which had been conceded by the plaintiff child to be held by
the entireties. It not only equates inurement with descent, but in the
passage set out in the accompanying note, it suggests, between the
lines, that entireties homestead property which has gone to the surviving
spouse will somehow descend from the survivor by virtue of the entirety-
ship!

Another case concerned the effect of divorce on the nature of a
child's interest in homestead under the devise statute. The divorce
was granted by a decree requiring the father to support his daughter and
awarding her custody to the mother. The father subsequently bought a
three-story apartment house, and lived on one story with a woman he
held out as his wife. He devised the building to this woman. The suit was
brought against the daughter by this woman's devisee. The daughter was
successful, the court basing its decision on the ground that when the
father died he was the head of a family, consisting of himself and his

141. Wilson v. First Nat'l Bank & Trust Co., 64 So.2d 309 (Fla. 1953).
142. For the same mistake in a contemporary federal dictum, see Doing v. Riley,
176 F.2d 449 (5th Cir. 1949). This case, like some of the other federal decisions discussed
infra, points up the conceptual problems which had evolved by this time, e.g., at one
point it makes the correct distinction between forced-sale and tax exemption, and
between tax exemption and descent, and then it turns around and confuses both creditor
exemption and tax exemption with descent.
See also Marsh v. Hartley, 109 So.2d 34, 37 (Fla. 2d Dist. 1959), a conveyance case
in which the holding is based on the premise that:
Under the probate statute, when the owner of a homestead dies and is survived
by his widow, the homestead inures to the benefit of the widow as a life estate,
while the remainder inures to his lineal descendants in being at the time of his
death. Section 731.27 Florida Statutes. (Emphasis added.)
143. This court has repeatedly held that if a husband and wife acquire property
as an estate by the entirety, although it be a homestead upon which the husband,
the wife and their child or children reside, and remains such until his death,
at the time of his death the widow will take the entire property by right of
survivorship, to the exclusion of her deceased husband's heirs, and no homestead
exemption exists in the property after the death of the husband, unless there-
after the widow becomes the head of the family and continues to occupy the
said property with said family as a homestead. Moreover, unless duly alienated
by her, the property which passes to her by operation of law upon the death
of her husband will, at her death, inure or descend to her heirs. Wilson v. First
Nat'l Bank & Trust Co., supra note 141, at 312. (Emphasis added.)
144. Brodgon v. McBride, 75 So.2d 770 (Fla. 1954).
minor daughter, that his apartment house was homestead, and that therefore, it was not subject to testamentary disposition. In the particular facts of the matter, this may have been equitably a good result, but the piling of the descent statute upon this situation makes for a family law based on a strained conception of the family.

On another subject, it has been noted that although the courts "do not favor a release of homestead rights . . . . [T]his is not to say that homestead rights cannot legally be dealt with by a widow in whom they have vested." A First District case is simply descriptive of the statutory distinction between the direct descent of homestead to the heir, and the taking of possession of all other realty by the personal representative. Another case noted the obligations of remaindermen to pay principal on a mortgage of homestead under section 731.27 when the mortgagee does not file a claim against the estate, and looks only to the security under the mortgage.

Literal Application Revisited: Reductio Ad Absurdum

Two cases since 1960 involved correct literal applications of the statute, both of which served to point up the absurdity of the results it fosters.

One of these, Quinn v. Miles, did not even directly concern an argument about the statute itself, but the results were an interesting commentary on its capricious possibilities. The supreme court was asked

---

145. The court cited as authority a concurring opinion in the creditor-exemption case of Osceola Fertilizer Co. v. Sauls, discussed in note 116 supra, drawing the distinction that the absence of the child from her father's home was "decreed by law for her welfare and is not from her intent to sever the family relation to her father."

146. Compare the holding in the creditor exemption case of Barnett v. Pan Am. Sur. Co., 139 So.2d 192 (Fla. 3d Dist. 1962). In this case the debtor had been divorced and remarried. Her new husband moved into her home with her and her two children. She fought a levy on the home on the grounds that in effect there "were in fact two families; that is, the appellant and her husband, and the appellant and her children by her first marriage." Denying her plea for exemption, the court said:

We must reject this contention because it carries with it the connotation of a divided household and divided authority which is not in keeping with the idea of a family unit. The home and family as a unit is too basic to our way of life for the courts to advocate a principle which might disrupt it. Id. at 195.

Another potentially interesting homestead-divorce situation slid into oblivion on the back of an insufficient allegation in Banks v. Banks, 98 So.2d 337 (Fla. 1957).

147. Youngelson v. Youngelson's Estate, 114 So.2d 642, 644 (Fla. 3d Dist. 1959) (settlement agreement by widow with husband's personal representative and other heirs). Accord, Johnson v. Johnson, 140 So.2d 358 (Fla. 2d Dist. 1962) (antenuptial agreement).


149. Furlong v. Coral Gables Fed. Sav. & Loan Assn., 121 So.2d 797 (Fla. 3d Dist. 1960) (wife as executrix obligated only for the interest). See also In re Comstock's Estate, 143 Fla. 500, 197 So. 121 (1940); In re Simpson's Estate, 12 Fla. Supp. 183 (Pinellas County J. Ct. 1958), aff'd, 113 So.2d 766 (Fla. 2d Dist. 1959).

150. 124 So.2d 883 (Fla. 1st Dist. 1960).
to decide who was the "widow" of a man who had died in 1958. The plaintiff in a possessory action was a woman he had married in 1905, who had borne him five children. They separated after he beat her with a cow bell when she was pregnant. He later "married" another woman, with whom he lived for many years until she died, and subsequently "married" the defendant, who was at the time of the suit occupying the homestead. The plaintiff herself also had "remarried," and bore several children to her second "husband."

The plaintiff showed that there was no record of a divorce in the two counties where the decedent had lived and worked all his life, and no record of a divorce secured by either party with the Florida Bureau of Vital Statistics. On this basis, the court decided that the plaintiff's showing that the decedent had not obtained a divorce overcame the presumption of the validity of the last marriage, and that the plaintiff was his "lawful wife" at his death—thus giving her a statutory life estate. It is hard to square this result with the image of a cozy family fireside which lies crackling behind the statute.

The other decision in this category was Moorefield v. Byrne. In this case, the deceased father had been divorced from the mother of his children, who were the plaintiffs. He then moved to Florida, acquired the property in question, married again, and began to live on the property with his new wife and her daughter by a previous marriage. The daughter was the defendant, claiming under her mother's will. After disposing of some conveyancing issues which are discussed later in this article, the court turned to the question of the husband's will, which had devised all his property to the defendant's decedent—the second wife. The will was "ineffective" under the descent statute, the court concluded, saying:

The appellant's argument, that the plaintiffs could not inherit under the homestead statute of descent because their parents were divorced and they were nonresidents of Florida and had not resided on the property, is rejected as without merit. Plaintiffs came within the statute as "lineal descendants in being at the time of the death of the decedent."154

This case is remarkable not for a bold declaration of policy, but rather because it declares nothing except that the facts come within the meaning of the legislation. The simple fact shows the bankruptcy of...
the present rules in an age when, as in this case, mobility is a prime
fact of life, the separation of grown children from parents the definite
rule rather than the exception, and divorce is relatively common. The
legal situation is status quo 1900, but the sharpness of these factual
situations lends a special poignancy—and urgency—to the all-too-ob-
vious lesson: The law should be changed.

D. THE CONTINUED SANCTIFICATION OF A MISTAKE:
THE POSTWAR CONVEYANCE CASES

Hope . . . and Hope Forlorn

The postwar conveyance cases opened on the note of a dissent
which carried hope of a new era in interpretation, but the hope was vain.
That dissent was rendered by Justice Terrell in Florida Nat'l Bank v.
Winn. In this case the father had remarried after the death of his
first wife, who had borne him a daughter and died a few days there-
after. He lived with his second wife for forty years. During this period,
the husband and wife executed a conveyance and reconveyance of the
homestead through a straw, purporting to create a tenancy by the
entireties. There apparently was an agreement between the couple that
when the survivor died, the realty would go to the city as a memorial in
their honor. The wife died after the husband, and this action was brought
by the husband's daughter by his first marriage against the trustee under
the wife's will. The supreme court affirmed a decision for the daughter
in a one-sentence per curiam opinion citing a group of cases previously
discussed in inter-spouse conveyances.

Justice Terrell's dissent was a notably crisp opinion, drawn both
from life and from a sensibly restrained reading of the literal wording
of the constitution. He began with the contention that "many unwar-
ranted inferences" had been drawn from two of the cases decided in the
twenties:

Certainly the homestead was designed for the benefit of the
family, to preserve its finest traditions, but the constitution im-
poses only two limitations on its preservation; 1) Exemption
from forced sale under process of any court, and 2) Alienation
by joint consent of husband and wife if that relation exists.

156. See also Wagner v. Moseley, 104 So.2d 86 (Fla. 2d Dist. 1958). On general
policy implications, see Justice Hobson's remarks on "our modern peripatetic society"
in the creditor exemption case of Orange Brevard Plumbing & Heating Co. v. La Croix,
137 So.2d 201, 206 (Fla. 1962). Collaterally, for a declaration which at least suggests an
extension of the law hitherto undreamed-of, note 1961 Fla. ATT'Y GEN. BIENNIAL REP. at
89, on cooperative apartments ("under No. 731.05, F.S., a homestead may not be willed
whether the homesteader has children or not").
157. 158 Fla. 750, 30 So.2d 298 (1947).
158. Norton v. Baya, supra note 92 and text following; Jackson v. Jackson, supra
note 100; and Bess v. Anderson and Norman v. Kannon, supra note 117.
159. Florida Nat'l Bank v. Winn, supra note 157, at 752, 30 So.2d at 299.
There was "not a word in the Constitution," he continued, to warrant the suggestion that an adult child may thwart the desire of a parent in the matter of disposing of the homestead by deed. . . . The fact that exemption from forced sale may inure to the widow and heirs imposes no restraint on alienation. . . . The "exemptions" and not the "homestead" inures to the widow and children.\textsuperscript{160}

The earthy mixture of moralism and realism which characterized many of Justice Terrell's decisions appeared in his finely scornful declaration that it was "contrary to all human experience" to contend that the makers of the constitution intended that "a child long departed from the family tree might return and thwart a transaction like this in good faith." The constitution makers were not, he concluded, "a breed that subscribed to junior rule."

Finally, Justice Terrell emphasized that the constitution did not require consideration "as a basis for alienation of the homestead," although he did point out that the establishment of a memorial to the couple was "a very material consideration," though intangible.

With clarity and common sense, he had given the court a new point of departure. It appeared temporarily that his lead might be followed, but that hope was to fade. The hopeful signs originated in a strong dictum two years later, in a suit by the third wife of a decedent, brought against his children by his two previous marriages, to establish her rights in property which the husband had conveyed to her as a wedding gift. The decision, which went for the plaintiff, turned on the court's factual finding that there had been no homestead.\textsuperscript{161} But the court added, obiter, that even if headship and homestead were found, article X, sections 1 and 4 place but one limitation on the alienation of the homestead property by deed while the owner is alive, namely, that if the homestead owner has a spouse, the joint consent of both and due execution by both\textsuperscript{162} are absolutely necessary. \textit{The fact that}

\textsuperscript{160} Id. at 752-53, 30 So.2d at 300.
\textsuperscript{161} This decision should be very closely compared with Moorefield v. Byrne, the conveyance aspects of which are discussed at text with notes 185-88 infra. (Discussion of descent aspects at text with notes 152-53 supra.)
\textsuperscript{162} This phrasing forms part of the background for a group of cases on the perennially litigated subject of acknowledgment and execution. See Scott v. Hotel Martinique, 48 So.2d 160 (Fla. 1950) (contract for sale of homestead specifically enforceable if spouses execute jointly even though wife does not acknowledge), \textit{distinguishing} Jacobs v. Berlin, 156 Fla. 773, 24 So.2d 717 (1946);\textsuperscript{161} Scott, supra, was itself distinguished in Abercrombie v. Eidschun, 66 So.2d 875 (Fla. 1953) (summary judgment for defendants in specific performance when only one witness to signatures). \textit{Accord:} Perry v. Beckerman, 97 So.2d 860 (Fla. 1957); Lieberman v. Burley, 100 So.2d 88 (Fla. 2d Dist. 1958). The plaintiffs won specific performance on an estoppel theory, despite the fact that the execution was not in the presence of the attesting witnesses, in Cox v. La Pota, 76 So.2d 662 (Fla. 1954). See also Zimmerman v. Diedrich, 97 So.2d 120 (Fla. 1957). For the earlier execution-and-acknowledgment cases, see note 81 supra.
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.\textsuperscript{168}

The sound of this dictum was echoed shortly afterwards in still another dictum in a case which validated a conveyance by both spouses to children of the husband, although the holding was based on the fact that the property was held by the entireties.\textsuperscript{164} It should be noted, however, that this dictum also contained a qualification, not fully spelled out, that raised the old colors.\textsuperscript{165}

By the end of the fifties, a Second District opinion\textsuperscript{166} indicated that the boat had stopped rocking. The court quashed an attempt to create a tenancy by the entireties by a conveyance and reconveyance of the homestead through a conduit, without consideration.\textsuperscript{167} The court simply cited the same group of old standbys\textsuperscript{168} which had been quoted in the Winn case, in which Mr. Justice Terrell's dissent had shown such promise of potential change.

\textit{Consideration}

However, during the middle of the decade of the fifties the element of consideration appears more clearly as a factor in the test of whether a conveyance can be made within the family.\textsuperscript{169} In \textit{Regero v. Daugherty},\textsuperscript{170} a mother had taken property as a surviving tenant by the entireties. A daughter, the defendant, had lived with her mother for ten years, performing various services for her and taking care of her in general. A year before the mother's death, she deeded the property—concededly being used as a homestead\textsuperscript{171}—to the daughter. The deed was upheld, on the basis that in article X, sections 1 and 4,

\begin{itemize}
\item \textsuperscript{163} Scoville v. Scoville, 40 So.2d 840, 842 (1949). (Emphasis added.)
\item \textsuperscript{164} Denham v. Sexton, 48 So.2d 416 (Fla. 1950). For a reverse twist, see Kinney v. Mosher, 100 So.2d 644 (Fla. 1st Dist. 1958) (attempt to defeat a holding by the entireties and thus to sustain a descent by homestead).
\item \textsuperscript{165} The Court reiterated that the “only restrictions” on alienation of homestead property were in article X, sections 1 and 4 of the Constitution—i.e., that there could be no alienation without joinder of the spouses, and that nothing should be construed to prevent the holders of homestead from alienating by deed executed by the spouses. However, the court added that the plaintiff, seeking cancellation of the deeds to the children, was not of that “limited class of persons who under exceptional circumstances may be heard to question the validity of a deed” to homestead. That group, the court said, included heirs “or other persons similarly interested,” when the deed was given without consideration, under circumstances indicating a fraudulent intention to circumvent the homestead laws.
\item \textsuperscript{166} Marsh v. Hartley, 109 So.2d 34 (Fla. 2d Dist. 1959).
\item \textsuperscript{167} The court also equated “inurement” with descent on the devise side. See note 143 \textit{supra}.
\item \textsuperscript{168} See cases cited note 158 \textit{supra}.
\item \textsuperscript{169} See text accompanying notes 105-07 \textit{supra} for earlier developments on the consideration element.
\item \textsuperscript{170} 69 So.2d 178 (Fla. 1954).
\item \textsuperscript{171} The court was careful to note that when a tenant by the entireties takes by
The only restriction in respect to the alienation of a homestead by deed or mortgage, duly executed by the husband and wife, or by the surviving spouse when such spouse is vested with the whole estate in the property, is that the conveyance may be subject to attack by homestead beneficiaries unless it is free from fraud... or duress and for a valuable consideration.\footnote{172}

The court specifically found that there was no duress or undue influence—and that there had been a “valuable consideration” because the services performed could only have been performed by someone with “a strong personal interest” in the mother’s welfare.

This case presents a striking contrast with a decision issued just four years previous. A divided supreme court decided in this prior case\footnote{173} that a nearly blind daughter’s services to her mother, given without a pre-existing contract for compensation for her services, did not constitute a valuable consideration for a note and mortgage, on which the daughter sought to foreclose. The final majority opinion, written by Justice Hobson on rehearing, said that if the foreclosure were to be approved, “an ingenious method of circumventing” article X, section 4 “would have the stamp of approval of this court.” Since the pre-existing contract problem was blended with several other reasons for the decision,\footnote{174} it cannot be said to stand completely opposed to the \textit{Regero} case.\footnote{175} However, in a functional view of the fact situations with respect to the conveyance factor, it would seem that the results are contrary.

The element of consideration was also the key factor in two federal cases in the nineteen-fifties. One of these\footnote{176} concerned a suit by children of a man’s first marriage against his second wife, to set aside a conveyance and reconveyance through a straw, back to a tenancy by the entireties. This had been done pursuant to an oral antenuptial agreement to sell the second wife’s home and live in the husband’s home, placing the latter dwelling in “joint ownership.” Pursuant to this agreement, the second wife sold her home, used part of the proceeds to repair the husband’s home, and placed all her separate funds in a joint bank account to which her husband had access. The court of appeals, in a fine job of analysis, apparently decided that consideration was the one factor

\footnote{172. \textit{Regero} v. \textit{Daugherty}, \textit{supra} note 170, at 181.}
\footnote{173. \textit{Florida Nat’l Bank} & \textit{Trust Co. v. Brown}, 47 So.2d 748 (Fla. 1950).}
\footnote{174. \textit{E.g.}, that the daughter was estopped from maintaining her action by her acts in probating the mother’s will, becoming executrix thereunder, and accepting the trusteeship of a testamentary trust as well as the benefit of the trust as life beneficiary.}
\footnote{175. \textit{Note} 170 \textit{supra}.}
\footnote{176. \textit{Hay v. Wanner}, 204 F.2d 355 (5th Cir. 1953).}
which seemed to make sense out of the body of existing state case law.\textsuperscript{177} It made the common sense notation that a husband and wife could convey to a stranger for consideration and thus terminate the interests of the children. It concluded that there was

no good reason why the wife can not be brought in with the husband as a tenant by the entireties in the homestead property when she pays therefor an adequate consideration from her separate estate, and the transaction is in all other respects bona fide and not merely an artifice to defeat the children.\textsuperscript{178}

The court then found that there had been plenty of consideration from the second wife—not only her promise of marriage, but “definite and adequate money consideration from her own separate funds.”\textsuperscript{179}

Another federal case seemed to support consideration as a valid base for a conveyance from the husband to himself and his wife as tenants by the entireties. This was \textit{Nelson's Estate v. Commissioner},\textsuperscript{180} which involved the action of the Commissioner in barring the marital deduction in a surviving wife with respect to a 55-acre citrus grove. The basis for his decision was that she had a statutorily proscribed “terminable interest,” presumably because the tract descended as homestead, giving her only a life estate—which under tax law is a “terminable interest.” This wife had performed “unusually valuable services” to a family partnership with her deceased husband, in managing the grove.\textsuperscript{181} One of the factors on which the court of appeals held for the wife was that these services constituted adequate consideration for the conveyance.\textsuperscript{182}

The problem with this case, which could be treated at great length by itself, is that although it is replete with careful analyses of the Florida law \textit{in vacuo}, it points up the confused state to which homestead law has developed. For in addition to the consideration issue, which seems

\begin{itemize}
    \item \textsuperscript{177} Citing, \textit{e.g.}, Daniels v. Mercer, \textit{supra} note 105, and Florida Nat'l Bank v. Winn, \textit{supra} note 157. It noted that in the \textit{Winn} case the cases cited by the majority had all had no consideration, whereas Justice Terrell had contended in dissent that there was consideration. However, it must be stressed that Justice Terrell did not think consideration a vital factor. See text following note 160 \textit{supra}.
    
    \item \textsuperscript{178} Hay v. Wanner, \textit{supra} note 176, at 358.
    
    \item \textsuperscript{179} On the devise issue, one may note at least in passing the federal court's observation by dictum regarding the Florida court's "solicitude" for the interests of children in homestead. The reason assigned is that under Article 10 . . . homestead exemptions "inure" to the heirs as well as to the widow, and that this \textit{interest} can be alienated only as prescribed in the Constitution. \textit{Id.} at 357. (Emphasis added.)
    
    \item \textsuperscript{180} 232 F.2d 720 (5th Cir. 1956).
    
    \item \textsuperscript{181} There had been a written partnership agreement for six years, and on successive tax returns approved by the Commissioner, the grove had been listed as a partnership asset.
    
    \item \textsuperscript{182} The court said that the motivating consideration for the conveyance was the husband's "apparent desire to insure continued recognition" of the wife's status "not only as a devoted wife and helpmate, but as a share and share alike business partner as well." \textit{Nelson's Estate v. Commissioner}, \textit{supra} note 180, at 723.
\end{itemize}
controlling, it flirts with the idea that there had been an "abandonment" of the homestead, and it seems to toy with the idea that somehow there may be a kind of percentage quantum of homestead use relative to a piece of property, from which a homestead ratio may be derived relative to that property. The end of the matter is that the court may be right, but one is unsure as to the basis of its decision. Admittedly, this kind of result is not uncommon in many fine opinions. But against the mottled background of the state law in this particular case, it serves further to confuse matters—or perhaps only to reflect their already confused state.

*   *   *

Two cases decided in 1962 showed that the old interpretations of the restrictions on conveyance had not changed, except possibly for the more rigid.

The Old Order Reaffirmed: Moorefield v. Byrne

One of these cases was Moorefield v. Byrne, the descent applications of which have been discussed earlier. This case originated with a divorce, a move to Florida by the husband, his purchase of the property in question and his subsequent remarriage. Living on the property with his new wife and her daughter by a previous marriage, he attempted to set up a tenancy by the entireties by a conveyance to himself and his wife "in which his wife did not join." The action was brought by the man’s five children by his first marriage, claiming under the descent statute against the wife’s devisee, her daughter. The plaintiffs were “non-residents of Florida and had not resided on the property.”

Without other comment on the issue, the Third District said that "the conveyance of the homestead by the husband without joinder by the wife" was void under article X, sections 1 and 4, and cited a list of cases extending back to the original sire, Thomas v. Craft. The court reiter-

183. Id. at 723 n.4 and at 726 n.9.
184. There also had been at issue the character of a five-acre tract on which the couple’s house stood. The court concluded, affirming the result below on this point, that the conveyance was ineffective under Florida law to divest the homestead character of the 5-acre residential site, both because of its purely homestead use and the valid presumption that Florine’s services there, as a wife rather than as a grove partner, were presumably gratuitous. Id. at 726. (Emphasis added.)
The use of the phrase “purely homestead use” raises all kinds of questions about the quantum of homesteadery needed to make a homestead. It is to be noted that any single piece of land must be either all homestead, or none of it is homestead. There cannot, for instance, be an undivided two-ninths homestead exemption, nor will an undivided three-fourths of a property descend because it is not “purely” used for homestead purposes.
185. 140 So.2d 876 (Fla. 3d Dist. 1962).
186. At text following note 153 supra.
187. 55 Fla. 842, 46 So. 594 (1908), discussed in text accompanying notes 84-88 supra.
ated a previous holding that section 689.11 of Florida Statutes, permitting creation of a tenancy by the entireties by conveyance from husband to wife, was "inapplicable to homestead property."\(^{188}\) As has been contended throughout this analysis, this kind of decision seems to be based on a wrong premise.

Further, the apparent emphasis which has been placed on the failure of the wife to join\(^ {189}\) raises the question of whether her joinder would have made any difference.\(^ {190}\) Presumably, it would not, for other cases seem to indicate that the essential requirement, if anything, is consideration.\(^ {191}\) In keeping with Justice Terrell's dissent in the *Winn*\(^ {192}\) case, the writer would argue that this is an improper requirement, too. However, if argument were confined to that point, the issue would clearly be joined. A subsequent Third District opinion\(^ {193}\) does place its emphasis on consideration. This case affirmed a remainder in a married daughter by the husband's first marriage, as against his second wife, who claimed under a conveyance and reconveyance through a straw. This was a result rather revealing in itself.\(^ {194}\)

*An Addition to the Dialogue: Reed v. Fain*

Another 1962 case indicated that what started out as a simple mistake has become a conceptual nightmare.\(^ {195}\) This decision, *Reed v. Fain*,\(^ {196}\) concerned a conveyance by a man and his wife to their son, the defendant, who reconveyed to create a tenancy by the entireties. Both conveyances were without consideration. Subsequently the parents conveyed to the defendant, reserving life estates with survivorship, and after the husband's death the wife "conveyed her life estate" to the defendant. The suit was brought by a daughter, the defendant's sister, for cancell-

---

189. See both the *Moorefield case*, supra note 185, and the *Estep case*, supra note 188.
190. To base decisions on the purely formal requirement that the wife sign a deed conveying property which she does not own in the first place is to require an "absurd and idle act"—as even a previous case denying the validity of a conveyance has said. See the discussion of *Church v. Lee*, at text following note 103 supra.
191. See the discussion at text accompanying note 105-07 and notes 169-82, supra.
192. Discussed in text accompanying notes 157-60 supra.
193. Porter v. Childers, 162 So.2d 301 (Fla. 3d Dist. 1964).
194. It was conceded that when the first wife died, the husband took as surviving tenant by the entireties: "However, upon his marriage to the appellant and the resumption of residence with her on the property, the homestead character of the property was revived." *Id.* at 302. Thus, a man's second marriage to a woman with whom he wished to create a tenancy by the entireties "revived" a homestead *in favor* of a daughter who had moved away even while her mother, the first wife, was still living.
195. Another way to say this is Justice Drew's declaration that "our legal chameleon [citing Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption: I-V*, 2 U. FLA. L. REV. 12, 219, 346 (1949)] has taken on the additional characteristics of a contortionist and the size of a dragon." Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962) (dissent).
196. 145 So.2d 858, rehearing at 864 (Fla. 1962).
tion of the deeds. The defense was mounted on the basis that section 95.23 of Florida Statutes\textsuperscript{187} had validated the conveyances because they had been of record for twenty years without challenge.

A bitterly divided supreme court finally held for the daughter on rehearing after a decision had been written the other way. The court gave several reasons for its decision, based on the idea that section 95.23 was inapplicable to this situation. The prime reason was that the "critical deed was void" because it violated the "constitutional inhibitions regarding the alienation of homestead property," but the court also emphasized that, "Were this not so, it nevertheless is true insofar as the 'inchoate' interest in the homestead property of the 'heir' [i.e., the daughter] is concerned."\textsuperscript{188}

This "inchoate interest" idea was a noble attempt by Justice Hobson, writing for the court, to work a synthesis of the incredible line of cases which had preceded this decision. What were the characteristics of this "inchoate interest"? Justice Hobson noted that the court in a previous case had "inadvertently employed the descriptive adjective 'vested.'"\textsuperscript{189} Although he disagreed with this term, he yet stressed that the "interest" was actual as distinguished from imaginary. . . . It is incipient, dependent and contingent, yet genuine. It is created and protected by our Constitution.\textsuperscript{200}

It is useful to break into this discussion for a moment to quote the words of a federal case involving a homestead issue, decided just two days before Reed v. Fain. This case characterized the wife's rights during the husband's life as analogous to

inchoate dower . . . remote, uncertain and a mere expectancy or possibility and not a vested property right, interest or title.\textsuperscript{201}

\textsuperscript{197} 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. FLA. STAT. § 95.23 (1963).

198. Reed v. Fain, \textit{supra} note 196, at 865. The court backstopped these arguments with the reasons that the legislature did not intend § 95.23 to apply to homestead—and that if it were construed to apply it would be unconstitutional.

199. \textit{Id.} at 868. See the discussion of that case, Church v. Lee, at text with notes 101-03 \textit{supra}.


201. Weitzner v. United States, 309 F.2d 45, 48 (5th Cir. 1962). This was the government's suit to foreclose a tax lien attached to the decedent's property while he was still alive. The defendants were his wife, children and administrator. They contended that although state exemptions do not usually preclude the government from levying on property to satisfy tax liens, yet "at the time the property was acquired and occupied
A comparison of these passages, written at almost the same time by eminently competent jurists, will show the magnitude of the conceptual task of definition with which Justice Hobson was faced. Having set out the characterization quoted above, he spoke at another point in the case of "the heir's constitutionally created interest in homestead property," and finally described the interest as a "sacred birthright." Yet the power of this language is muffled by his declaration in conclusion that the deed, even "if not void ab initio . . . was and is void as to Mrs. Fain's 'inchoate' interest in the homestead which became 'vested' upon the death of her father." One is compelled to note the self-conscious placement in quotation marks both of the adjective which Justice Hobson formulated to describe the interest and of the adjective which he said was inadvertent and too strong.

To read this opinion is an exercise in frustration. It was perhaps the most competent and well-grounded attempt to place this area of the homestead law of Florida in a comprehensive analytical diagram. It was quite probably the best that could have been done under the circumstances. It sets a pragmatic test, which is that homestead cannot be alienated "so long as the head of the family with a child or children in esse, retains such status and continues to occupy the premises in conjunction with his wife or one or more members of his household." It makes the single exception of alienation for an "appropriate consideration."

And yet when the opinion attempts to define the legal quality of a homestead—the premise on which all these results are based—it fails. It fails because the law almost literally has passed understanding. It fails because the loose ends of several dozen cases have come together in a conceptual tangle. Given the path which the court had to travel, no one could have done more. The question now is whether it should make a fundamental change of direction, or whether a new road should be built.

as homestead, a vested property interest and estate [existed] which is separate and apart from the title of the husband." Id. at 46.

The court held for the government, emphasizing that, "The requirement for the consent of the wife to the alienation of the homestead does not create or recognize a property interest in her." Id. at 48. On the way to this decision, it drew with admirable clarity a distinction which has been more than occasionally misunderstood:

It has long been settled that the homestead provisions of the Florida Constitution do not create property rights in the husband, wife or children. They are exemption provisions and . . . inure to the widow and heirs if, by the laws of descent the homesteader’s title is cast upon them. Id. at 48.

202. Reed v. Fain, supra note 196, at 869.
203. Id. at 871.
204. Justice Hobson’s quotation from Macbeth regarding the collateral issue of recordation of a void deed ("a mere brutem fulmen, 'Signifying nothing'" [Act V, Sc. 5, line 26]) might well be matched on the general development of this area of the law by a phrase from Hamlet, admittedly torn from context ("sicklied o'er with the pale cast of thought" [Act III, Sc. 1, line 83]).
Conclusion

In order to propose answers, we must first ask some questions. The proper questions are these, with reference to the Florida law restricting the alienation of homestead by conveyance or devise: What was the original blackletter law? In what conditions was it formulated, and how validly did it fit those conditions? How was that positive law interpreted by the courts, and was the interpretation valid? How has the law come to be interpreted since its original statutory or constitutional formulation? How does the present interpretation line up with the original law and the probable intention of its makers, with the original judicial interpretation—and with the present social and economic conditions?

Restrictions on Devise

The very earliest legislation concerning the devise of homestead, passed with the coming of statehood, allowed the testator a free hand in testamentary disposition. An apparent common law development, fortified by negative constitutional implication and by statute at the end of the nineteenth century, changed this rule to require that the homestead devolve upon the children, subject to the dower rights of the widow. A later statutory modification made the wife's interest a life estate. The cases, in the face of the most compelling and outlandish fact situations, almost constantly applied these rules in the most literal fashion. Homestead after homestead went to grown children who had moved far away from the "rooftree and family fireside." The courts refused the possible escape hatch of construing "children" to mean minors or dependents. After the passage of the statute, the results described were mostly accomplished according to the statute, although for a while the court constructed a kind of remainder from certain constitutional provisions which were in fact focused on inter vivos alienation.

These interpretations had drawn some original strength from their social origins in a predominantly agricultural community, racked by the aftermath of war and limping only gradually toward industrial civilization. But even in that context, there were absurd results. Just at the turn of the century, we find daughters, devised their mother's property because they have cared for her in her last days, deprived of their legacy. They are deprived for the very reason of their devotion, in favor of other children who have lived apart for years. The results today have simply become aggravated by the increasing mobility of the population, the urbanization of society and the change in the nature of wealth. A man with millions in intangible personality may bequeath it all, subject to his wife's dower rights, but a small homeowner is deprived of the privilege of devising his house. It is understatement to say that this is an anomaly in the fundamental concepts of testacy, and an anachronism in the age of megalopolis.

* * *
The most direct solution to the present problems in the Florida law of descent of homestead is a change in the statute. The best idea would seem to be to remove homestead from its special category, allowing it simply "to descend as other property," to use the first words of the existing statute.

The only possible judicial solution would be to interpret the words "lineal descendants" in the statute to mean minor children or dependent adult lineal descendants. There is a faint suggestion of possible authority for this result, which could have been more easily accomplished under the old statute, which spoke of "children." However, under the circumstances of the present wording of the statute plus the force of stare decisis, this would seem a slender hope, as well as a somewhat strained construction.

Restraints on Alienation

The original creditor exemption for homestead, enacted with statehood, was broadened just after the Civil War to include a restriction on alienation without joinder of the spouses. This provision essentially obtains today. The early interpretations of this provision, at the opening of the century, prohibited any intra-family conveyance of homestead, gradually making an exception in the case where valuable consideration could be shown. As an accretion of cases built up, the theoretical rationalization of these interpretations became tortured.

It was ironic that the judges talked of the "organic law" as if they were interpreting the constitution with great literalness. It was ironic, for one thing, because the words of the constitution might well have been interpreted just as literally to reach the opposite result. It was ironic, also, because the judges actually were imposing a kind of received ideal in the form of a sentimentally based concept of homestead, or rather of what a homestead should be. That concept, as we have suggested, is based on an image of a shelter in the country—always, and primarily a shelter—on which vegetables can be grown and stock raised. It is a place to which any member of the family, sunk to destitution, might retreat and become self-sufficient. But the observation of any present-day traveler, a casual glance at the census figures, and a reading of Florida history should be convincing evidence that this image is fading.

It is not to say that the rural homestead has passed into oblivion when one notes that the fundamental social fabric behind these laws has changed. It is certainly safe to say that when almost two out of every three Floridians lives in a city, these laws are out of date. Indeed, recent case law is eloquent testimony to the idea that perhaps the law is not

205. See Mr. Justice Terrell's dissent in Stephens v. Campbell, discussed in text with notes 138-40 supra.
even an accurate index to reality in the case of the *rural* homestead. The ancient interpretation of these restrictions on alienation, which still rules today, is nothing more than a mocking voice from the past. If it once was justified—and it can well be contended that it never was—that justification has vanished.

* * *

The change which should be achieved in the restrictions on the alienation of homestead can be described simply: It should be made clear that the constitutional restraints presently contained in article X, sections 1 and 4 do not prohibit the intra-family conveyance of homestead, either with or without the joinder of the spouses. The most surgical way to accomplish this result would be by constitutional amendment. In this case, however, it would seem that a possible route lies open through the judicial process. The foundation has been set down, and the difficulty in finding a clear theoretical basis for the present law has symbolized the need for change. The time is ripe.

206. See the discussion of Nelson's Estate v. Commissioner, text accompanying notes supra.

207. In Mr. Justice Terrell's dissent in Florida Nat'l Bank v. Winn, discussed at text with notes supra.

208. Reed v. Fain, the most recent case to wrestle with the problem, is a graphic illustration of this point in its very valiant attempt to synthesize an impossible situation. See text with notes supra.