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RECENT DEVELOPMENTS AND THE PRESENT STATUS OF THE FLORIDA PROBATE LAW*

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Although the Probate Law in Florida is essentially a creature of statutory origin and, as such, quite well fixed, it is nevertheless a subject far more dynamic than we are prone to imagine. Through the institution of judicial review we are presented with a flexible and changing picture, as the Supreme Court of Florida endeavors to extend the Florida statutory law to cover the variety of factual situations with which it is faced. Regardless of the source of the law, whether organic or constructive, it clearly appears that the bulk of the present and prospective activity within the field of Probate Law is concerned with the subjects of estates by the entireties, homestead, and dower.

Estates by the Entireties

The question of what constitutes an estate by the entireties and the consideration of its common law derivation introduces a very interesting and important phase of the field of Probate Law. We can say, as a matter of fact, that a tenancy by entirety is presumed when no contrary intent is expressed in a conveyance to a husband and wife.[1] But sometimes even a simple statement like that can become confusing. For example, just recently the Probate Court was faced with an unusual situation in which a deed was executed conveying property to a husband and wife and a minor child. The question presented was what interests were held in the property upon the death of the husband. Was the property to be divided into undivided one-third interests; was it to be divided into moieties, the husband and wife to take one half by the entirety and the child to take one half; or was there to be some other disposition? Under these facts, it appears that the property is divided into moieties, that the husband and wife take one-half as an estate by the entireties, and the child takes the other one-half; therefore, the survivor of the husband and wife, or the wife in this case, took one-half of the fee with the minor child receiving the other half. Author-

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1. Knapp v. Fredricksen, 148 Fla. 311, 4 So.2d 251 (1941); see also Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932).

ity for this conclusion seems to be pretty well established throughout the country.[2]

DISPOSITION OF THE ESTATE: *Homestead.* A homestead may be held in an estate by the entirety. However, upon the death of the head of the family the estate by the entirety does not descend according to the statutes providing for descent of homesteads.[3] That statute provides for the descent of homesteads and, to the extent of the homestead property, makes every testator die intestate; but where we have an estate by entirety constituting a homestead it does not descend according to the law for descent of homesteads, as set forth in the statute, but it goes to the survivor as an ordinary survivorship by the entirety.[4] The estate by the entirety loses its homestead characteristics upon the death of the head of the family, unless the survivor then becomes the head of a family as required by law to constitute a homestead.[5]

In *Wilson v. Florida National Bank,* the husband and wife had acquired the five acres of land upon which they built their home as an estate by the entirety. At a subsequent date the husband acquired the adjoining and contiguous thirty-five acres, making a forty-acre tract in all, and surrounded all of it by a fence. There was some evidence to the effect that a well which supplied water to the residence was sunk on the adjoining thirty-five acres and that one of the utility buildings on the home property may have encroached slightly upon part of the adjoining thirty-five acres. Upon the death of the husband, the wife succeeded to the full title to the five acres as a survivor by the entirety notwithstanding the homestead characteristics but a problem arose as to the thirty-five acres that were in the name of the husband alone. The daughter of the deceased contended that it was homestead property in which the wife had a life estate with the remainder in fee simple going to the daughter. The wife, on the other hand, contended that in view of the facts that the residence was on the five acres, the daughter was an adult and had married and departed from the home, and the wife was left on the property alone, the homestead died and she had a right to claim dower in the adjacent thirty-five acres. The Supreme Court properly held that the question of homestead is not determined by what happens to the property after the death of the head of a family but what the status of the property is at the time the head of the family dies.

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2. Heatter v. Lucas, 367 Pa. 351, 80 A.2d 749 (1951); Madden v. Goztonyi Savings and Trust Co., 331 Pa. 476, 200 Atl. 624 (1938); Bartholomew v Marshall, Sup. Ct. App. Div. 13 N.Y.S 2d 568 (3rd Dep't 1939). (All determined this question of entireties in such manner.)

3. FLA. STAT. § 731.27 (1955).

4. Passmore v. Morrison, 63 So.2d 297 (Fla 1953); Wilson v. Florida National Bank and Trust Co., 64 So.2d 309 (Fla. 1953).

5. *Ibid.*

Consequently, the thirty-five acres were held as homestead property and not subject to dower.[6]

Devise. The devise of an estate by the entirety by last will and testament of either the husband or wife is a complete nullity.[7] Moreover, it appears that the proper way to attack such an attempted devise by either the husband or the wife in a last will would be by a petition for the construction of that portion of the will.[8]

Bigamous Marriages. Bigamous marriages present an interesting situation wherein a man who is married and a woman other than his lawful wife live and cohabit together as man and wife and acquire real property in both names as husband and wife. It has been held in such case that they were tenants in common and that one-half of the property passed to the real wife and one-half to the other upon death of the husband. The alleged common-law wife received only her half interest as a tenant in common and could take nothing from the alleged husband.[9] It would seem that herein the Florida Supreme Court reached a very splendid and clear-cut conclusion. Unfortunately this court can be confusing at times because just a short time later in the case of *Alexander v. Colston*[10] we find that it held that where a married man went through a ceremonial marriage with a woman other than his lawful wife, the second "wife" was entitled to the full fee in property acquired in their names as husband and wife by survivorship upon the doctrine of estoppel, although the second "wife" took nothing by dower or otherwise in property acquired in his name alone.

It might be oberved that this is one instance in which the Supreme Court seemed to distinguish between identical property right upon the basis of whether the illicit marital status as alleged was a common-law status or a ceremonial status. Actually the second "wife" in the ceremonial marriage was no more the wife of the decedent than the second wife in the common-law relationship. These decisions seem strange when it is recalled that our Supreme Court has often said that so far as the marriage relationship and the rights thereunder are concerned, once a common-law marriage is established it is just as binding as a ceremonial marriage.[11]

In these cases neither marriage was valid, common-law nor ceremonial, yet different results were obtained on the same facts except that one bigamous marriage was alleged to have been based upon common-law while the other was based upon a civil ceremony. Therefore it would be reasonable to conclude that where a client claimed to be the common-law wife of such

6. See also Nesmith v. Nesmith, 155 Fla. 823, 21 So.2d 789 (1945); Coleman v. Williams, 146 Fla. 45, 200 So. 207 (1941); Hinson v. Booth, 39 Fla. 333, 22 So. 687 (1897)

7. Hall v. Roberts, 146 Fla. 444, 1 So.2d 579 (1941).

8. *Ibid.*

9. Maliska v. Dion, 62 So.2d 4 (Fla. 1952).

10. 66 So.2d 673 (Fla. 1953).

11. Budd v. J. Y. Gooch Co., 157 Fla. 716, 27 So.2d 72 (1946); *In re* Thompson's Estate, 145 Fla. 42, 199 So. 352 (1940).

a spouse, her attorney might advise her that she was entitled to half of such property; but if she said that she and her husband went down to the County Judge and got married and that she didn't know anything about the other wife, then the attorney could be safe in telling her that she could get it all by estoppel.

Murder. Sometimes it becomes a serious question to determine what happens to an estate by the entirety on a relatively unusual termination of the tenancy — one that, although fortunately not too common, does happen on occasion. I have reference to termination by murder, such as a possible situation in Dade County when the wife is young and good looking and the husband is old and rich. Murder dissolves the estate by the entirety (that is putting it mildly) and creates a tenancy in common. As in the case of a divorce, the Supreme Court of Florida has decreed that such a dissolution by murder creates a tenancy in common with the heirs of the wife and the heirs of the husband each taking a one-half interest in the property formerly constituting the estate by the entirety. This was the holding in the murder and suicide case of *Ashwood v. Patterson.*[12] This holding by the Court, which follows the Missouri decisions,[13] thus has the advantage of depriving the wrongdoer of profit by his wrongful act and yet does not deprive him of property which is rightfully his.

Such a situation poses some very interesting questions. It should be noted, in passing, that it may be a little unusual to reach the same result upon the termination of a tenancy by the entirety by divorce and by murder, for in the latter instance somebody has been unlawfully killed. The policy of the State of Florida in its legislative enactments providing against an heir or a legatee or devisee taking by inheritance or descent any of the property of the deceased where murder has been committed apparently has not been carried over completely to this situation. On the same point, there arises the question of what the decision might be if one spouse, while insane, murders the other and no wrongful or illegal intent can be imputed to the killer by virtue of his condition of insanity. Such a problem has not reached the Supreme Court yet, and it is possible that by the time it does, the situation with reference to murder will have been straightened out. It appears, however, that the Supreme Court of Florida is committed to the doctrine that where there has been a termination of the tenancy by the entirety through the murder of a spouse by the survivor, the property will descend one-half to the husband's heirs and one-half to the wife's heirs.

Simultaneous Death. Another unusual situation is that of common disaster or simultaneous death. How does that affect the termination of the tenancy by the entirety? There seems to be no decision of the Supreme

12. 49 So.2d 848 (Fla. 1951); *reaff'd* in Hogan v. Martin, 52 So.2d 806 (Fla. 1951).

13. Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948); Barnett v. Coney, 224 Mo. App. 913, 27 S.W.2d 757 (1930).

Court of Florida on this point, and it may never reach the Supreme Court because the Legislature wisely has anticipated the situation by providing for termination of a tenancy by the entirety through the simultaneous death or common disaster of a husband and wife, in Section 736.05, Florida Statutes 1955, that half shall go to the estate of the husband and half shall go to the estate of the wife.

PROBATE ADMINISTRATION: We may also run into the question of estates by the entireties insofar as they relate to *administration unnecessary*. It is well known that the husband and wife own the full fee simple title during their respective lives and that there is no distinction between the two, nor any division or partition. We also know that the survivor does not take the title in a tenancy by the entirety by inheritance or succession; he simply adheres to all of that which he formerly had, which was the entire fee simple title; and, therefore, no part or interest in the estate by the entirety can possibly go into the estate of the deceased spouse. Yet it appears to be good practice that where there is property held by the entirety and an attorney is able to bring an *administration unnecessary* proceeding, it is wise to set up, with particularity and full legal description, the property owned by the entirety and show that it was so owned and have the court adjudicate that the survivor owns the full fee simple title to that property and that the estate of the deceased takes nothing therein. As a result the public records will be cleared and a non-tax certificate can be obtained and filed.

HOMESTEAD

Now we come to the question of homestead. If there ever was an area of complete frustration in the law, it appears to be in trying to understand, much less to discuss, homestead. However, we do know that homestead, while never constituting a part of the decedent's probatable estate before the County Judge's Court, is nevertheless an almost constant element to be considered in probate proceedings, by attorneys in the handling of estate matters.

DETERMINATION OF THE STATUS: It is a strange thing that something that is not even a part of the estate for probate purposes should nevertheless be one of the most important items that we have to consider. What constitutes homestead real property as stated in the Constitution is fairly elementary.[14] It is the determination of the *homestead status* of real property that causes the vast litigation incident to it. If the property in question is a homestead, it is not subject to devise,[15] provided that the deceased head of a family dies leaving a widow or lineal descendants or both; neither is it subject to administration.[16]

14. See FLA. CONST., Art. 10, § 1.
15. FLA. STAT. §§ 731.05, 731.27 (1955).
16. FLA. STAT. §§ 731.27, 734.08 (1955).

It is well known that when the head of a family dies holding homestead property and leaving a widow and children surviving him, the widow takes a life estate in the homestead property and the fee simple title vests in the children as a remainder. If there are no children, the widow takes the fee simple title; if there is no widow, the children take the fee simple title.

Now, homestead is not title. It is a status of property or character of property to be determined at the time of the owner's death and it depends upon the property's use and the owner's position as the head of the family residing in this state. The title to the property is not affected by the use of it, nor is it affected by the status of the owner as the head of a family. The Supreme Court has stated this. Title is incidental to the homestead status. How the title shall descend or be transformed into a life estate and eventually vest in lineal descendants is purely consequential. Also it has finally been declared that the County Judge has jurisdiction to determine the issue of whether or not property is homestead.[18]

As late as 1953 or 1954 we were finding articles written in our law reviews posing the question of the right of the County Judge to determine the homestead status of real property. The question was, did the Constitution of the State of Florida, in placing the full and sole jurisdiction in the Circuit Court to determine boundaries and titles to real property, prohibit the County Judge from determining the status of homestead? An excellent discussion can be found in that famous treatise, "The Legal Chameleon",[19] on the case of *Spitzer v. Branning*,[20] in which it seems to have been indicated by the Supreme Court that the County Judge must keep a "hands off" policy on anything relating to homestead, notwithstanding that in some twelve to sixteen places in the Probate Law he was required to determine whether real proprty was homestead or not.

In 1954 *Wakeman v. Noble*[21] presented the perfect case by which the Supreme Court could be asked to pass upon the point. The Supreme Court held that the County Judge did have jurisdiction to determine the status of homestead property and to finally adjudicate that question. It was in the same case that the Supreme Court stated that the County Judge was not involved with title but was concerned solely with determining the question of use, and the question of whether the owner was the head of a family residing in this state. When the County Judge had determined those two questions then the question of who had title or whether it was transformed from a fee to a life estate with remainder over in fee was merely conse-

17. Wakeman v. Noble, 73 So.2d 873, 874 (Fla 1954).
18. *Ibid.*
19. Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption*, 2 U. FLA. L. REV. at 227, 229 (1949).
20. 135 Fla. 49, 184 So. 770 (1932).
21. 73 So.2d 873 (Fla. 1954).

quential and incidental to the determination of the real questions — *i.e.*, "use" and "head of family" status.[22]

Therefore we can safely say that *Wakeman v. Noble* finally adjudicated the question of whether the County Judge in Florida has the right to determine the homestead status of property and make appropriate orders relating thereto. In such a situation it should be fundamentally recognized that the County Judge, in passing on that issue and adjudicating it, must be cautious that all parties in interest and who will be affected by the decision must be brought into the proceeding so that due process of law is had.

"Head of the Family." Much of the homestead litigation that we have found in the courts has centered on the meaning of the term, "head of the family". Where a man and wife live together with or without children the problem is simple; likewise where a father or mother live together in the home with minor dependent children. The difficulties attendant upon determining when one is the "head of the family' appear in the many situations possible in human relationships where persons live under one roof and yet are somehow divided; or where they do not live under one roof and yet, for homestead purposes, are not legally divided.

A married woman can be the "head of the family", such as a wife supporting an incapacitated husband.[23] A widow with dependent children, even though they may be adults, can be the "head of the family."[24] Grandmother and grandchild; aunt, nephew and niece, or any family relationship where one is the head of the family and the others look to him and are dependent upon him as such, are other examples. One of the most perplexing situations to determine and one in which the Supreme Court appears to have been somewhat inconsistent is the question of the head of a family where the father or mother and an adult child or children constitute the family relationship.

In *DeCottes v. Clarkson*[25] it was held that actual dependency is not the sole (and this point should be emphasized) legal test of family headship and that children living at home need not be minors or invalids in order to sustain a claim of family headship on the part of their parent. A healthy adult female could be dependent on her elderly mother even though she rendered substantial services in the household. In the case of *Caro v. Caro*,[26] the Court held that a mother who lived with her two grown daughters who earned all their own expenses except their board was the head of a family.

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22. *Id* at 874.
23. Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (1940).
24. Hillsboro Investment Co. v. Wilcox, 152 Fla. 889, 13 So.2d 448 (1943).
25. 43 Fla. 1, 29 So. 442 (1901).
26. 45 Fla. 203, 34 So. 309 (1903).

The same rulings do not readily appear to apply where adult sons are involved. In *Whidden v. Abbott*[27] and in *Dania Bank v. Wilson and Toomer Fertilizer Co.*[28] the homestead was not sustained where adult sons were involved although very little difference in family relationship could be observed in the rulings. However, in *Cumberland and Liberty Mills v. Keggin*[29] the Court held that a homestead status did exist on property of the father notwithstanding that the son brought his wife to the father's home when he married her and they all lived together until the father's death.

Termination of the Status. The only apparent distinction between the *Cumberland and Liberty Mills* case and the *Dania Bank* case seems to be that in the latter case the son went away and got married and then came back home with his wife; whereas in the former case the son stayed home all the time—he just brought a wife into the house.

Where the family relatonship has been severed by divorce of the husband and wife and there are no children, the termination of the homestead status is obvious, but where the family relationship is terminated by divorce and there are minor children we find an entirely different situation. Where a husband and wife were divorced and the wife awarded custody of a minor child and the wife and child took up separate residence apart from the home of the husband, it was held, in the case of *Osceola Fertilizer Co. v. Sauls*,[30] that the homestead status of the husband's home was maintained and that he was still considered the head of the family and entitled to all the homestead benefits and exemptions. In that particular case the Supreme Court dwelt somewhat upon the fact that the homeplace was an orange grove and that the livelihood of the husband, from which he obtained money to support the minor child under the decree of divorce, was obtained from that property. That may have influenced the Court in arriving at its decision. The Court in the decision, however, did recite with approval many other decisions of other jurisdictions holding to the same effect.[31]

The duty of a parent to support a child, whether by decree of divorce or by his general legal responsibility, appears to have great influence in the decisions. Although the Supreme Court apparently embraces the theory of preserving the homestead status regardless of whether or not the decree of divorce ordered support for the child, contribution for support of the child is an element for consideration in these instances but is not necessarily controlling.

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27 124 Fla. 293, 168 So. 253 (1936).
28. 127 Fla. 45, 172 So. 476 (1937).
29. 139 Fla. 133, 190 So. 492 (1939).
30. 98 Fla. 339, 123 So. 780 (1929).
31. See also Redfern v. Redfern, 38 Ill. 50 (1867); Roberts v. Moudy, 30 Neb. 683, 46 N.W. 1013 (1890); Speer & Goodnight v. Sykes, 102 Tex 451, 119 S.W. 86 (1909); Hall v. Fields, 81 Tex. 553, 17 S.W. 82 (1891).

That the head of a family does not have to be a citizen of the State of Florida to enjoy a homestead status of his property is well established. *Croker v. Croker*[32] contains an excellent discussion of the distinction between residing in this State and being a citizen of the State and shows clearly that citizenship is not required for one to obtain and enjoy the benefits of homestead under the laws of the State of Florida. All that is necessary is that the head of a family own property and that it be his home or usual place of abode.

The *Wilson v. Florida National Bank*[33] case has already been discussed, with regard to the conflicting claims of a widow for dower and a daughter for homestead, while discussing estates by the entireties earlier, so it is not necessary to go into that phase again. However, it is difficult to leave the question of homestead in its relationship to estates by the entirety without discussing *Passmore v. Morrison.*[34] That case was a recent decision of the Supreme Court of Florida involving the question of homestead in which a husband and wife, owning property by the entirety which constituted their homestead, adopted a nine-year-old boy who lived with them for some time upon the land in question. As the boy grew up he became a problem child and was frequently placed in Juvenile Homes for correction and detention. While he was sojourning in one of those places under order of court, the husband passed away and left the wife living alone in the home place, the full fee title to which she took and continued to hold by virtue of her survivorship.

At that time the boy had not been home (he had been incarcerated) for about two years. He was still incarcerated three months later when the adoptive mother passed away and left a last will and testament in which she devised the home in which she lived to her sister. The question arose as to whether the devise of the homeplace by the adoptive mother was good as against the claim of homestead and the right of descent of the homestead property by the little incorrigible. The Court said that by virtue of the fact that the mother did not recognize her responsibilities to the child and because there was no love and affection existing between them, it was not homestead property — therefore the devise was good. The Court further said that the child had abandoned the home-place although it seems unlikely, if not impossible, that a minor who had been sent to reform school can be said to have wilfully abandoned his home. The mother took the full title or retained the full title in the property because it was an estate by the entirety. Now that was absolutely correct, but the decision also stated that: "We know that the homestead status terminates upon the death of the head

32. 51 F.2d 11 (5th Cir. 1931).
33. 64 So.2d 309 (Fla. 1953).
34. 63 So.2d 297 (Fla. 1953).

of a household unless the survivor in title (here the wife) immediately creates a new homestead by virtue of her continued living there in a 'head of a family' status" and that by virtue of the facts that the little boy was in reform school and she died in three months time so that he had never been able to get home, there never was a family residing on the property; therefore, it was not homestead.

That case provides a very good example of one of the reasons why a Judge may be reluctant to determine whether anything is or is not homestead until the Supreme Court has passed on it. In the words of Mr. Justice Hobson in a dissenting opinion[35] rendered in that case: "It is indeed hard to see where the fact that an adoptive mother refused to recognize her legal responsibility towards her wayward son would have anything to do with it. It is hard to see where a minor child could possibly be said to have abandoned his home when he was sent to a correctional institution under order of court." In short, *Passmore v. Morrison* ought not to be given any substantial weight or significance in the determination of what constitutes a head of a family in Florida. The implications and possible consequences thereof make the holding very dangerous and susceptible of grave abuses. Consider, for example, what might happen in a not too uncommon situation where a husband and wife own a home as an estate by the entirety and have a son who is attending some out-of-town college; if the husband were to die, and the wife were to pass away before the son could return home, the way would then be open for creditors to take the home away from the son because he never had a chance to live there with the mother as head of the family before her death. There are other possible difficulties that may arise also; so it is not difficult to see why a holding that may lead to possible injustices and inequities should be scrupulously avoided in the interests of good law.

DOWER

We now come to a very important, although somewhat obscure, subject of the law known as dower. Here, too, as with homestead, we have a field about which few are well informed. Although dower existed under the common-law in Florida it is entirely, in its present status, a creature of statute. The right of dower is exclusively in the widow and must, of course, be based upon a valid marriage. At times when we make a positive statement we must qualify it. For example, it was just stated that dower is exclusively in the widow. Subsequently, it will appear stated that it isn't; that in fact a remote relative, or a complete stranger to the widow, can have that right. Section 731.35, Florida Statutes, as amended in the Laws of 1951, gives to the guardian of a widow who is incompetent the right to

35 Justices Thomas and Roberts concurring in the dissent.
36. Laws of Fla. c. 26948 (1951).

elect to take dower on behalf of the widow at any time within which the widow might have so done.[37]

That is very fine for the widow. However, the legislature did not stop there. The Section further provides that if the widow *dies* within the time to elect and shall not have elected to take dower then the election to take dower may be filed by *any person* who has a *beneficial interest* in the widow's estate and such election shall be granted or rejected by the County Judge *as the best interests of the parties entitled to participate in the estate of the deceased widow may require.*

This appears to be carrying things quite far. The widow is dead. Dower is supposed to be for her protection and for her benefit so that she has something to live on for the rest of her life; the first part of the statute wherein incompetency is considered states that the election can be made on behalf of the widow and the County Judge shall determine that election as the best interests of the widow may require. Suppose we have the situation of a man and his wife with no children and they are both elderly but he has dearly beloved nephews and nieces on his side of the family and she does not have a relative in the world that she knows. However, in Italy or Switzerland or somewhere there is a third cousin twice removed and the husband dies. If the widow did not choose to elect to take dower, and subsequently she dies, under this statute one-third of his estate can go to that cousin, if a claim for dower is timely made. This remotely related person can come in and elect to take dower in that estate and deprive the close and beloved relatives of the husband of one-third of his estate. And it should be pointed out that this means not just one-third of his estate, but one-third of it free from debts and costs of administration. Such a statute perhaps needs investigation.

Section 733.13, Florida Statutes, amended in 1955[38] allows the County Judge to dispense with the appointment of Commissioners to allot dower when all parties in interest agree on the allotment of dower or that the assets are of such a nature that dower can be assigned without the appointment of Commissioners. That was a very fine piece of legislation because it allows the County Judge to save the estate expense in its administration and allows grown people to make decisions for themselves.

Dower, being a creature of statute, must be strictly construed. If the husband leaves realty and personalty, a widow electing to take dower must be awarded one-third of the realty and one-third of the personalty and it is error to award one-third of the gross estate from the personalty alone.[39] However, if the parties agree on it under the new statute it is perfectly all right.

37. This section reads: "The County Judge shall grant or deny the election as the best interests *of the widow* may require." (emphasis added.)
38. Laws of Fla. c. 29714 (1955).
39. *In re* Ginsberg's Estate, 50 So.2d 539 (Fla. 1951).

In the computation of dower to the widow upon her election, if she has been awarded a family allowance this cannot be charged against her dower but must first be deducted from the gross estate and then dower computed from the remainder. In other words, whatever family allowance the widow has drawn is taken off the top and then the remainder divided one-third to the widow and two-thirds to the remainders. It seems to be a fairly obvious conclusion, but nevertheless the question went all the way to the Supreme Court of Florida whether United States Savings Bonds in the name of the deceased but payable on death to the wife was not a part of the husband's estate for the purpose of computing the gross estate for the awarding of dower, since they never became a part of the estate and therefore could not be included.[41]

Another interesting recent case concerning dower was one in which a wife elected to take a child's share in the administration of the husband's estate, and after the estate was closed she came back and sought to have the County Judge award her dower in property conveyed by the husband during his lifetime (in which she had not joined or released her dower). This case appeared before Judge Blanton[42] and he dismissed that petition with prejudice. Upon the dismissal the widow then went into the Circuit Court and filed a suit in chancery to impress her dower upon the property that her husband had conveyed during his lifetime, in which she had not joined nor released her dower.

The Supreme Court of Florida held that she was estopped from claiming dower in the property conveyed by him during his lifetime when she elected to take the child's share and she was guilty of laches by waiting until after the time for filing claims against the husband's estate had expired before attempting to go against the property conveyed by him.[43]

One question that has harrassed the Bench and Bar of Florida is the allocation of dower in mortgaged property. A husband may acquire property which is already encumbered by a mortgage or a mortgage may be given to secure the purchase price of property, or a mortgage may be given to secure the proceeds of a loan made to the husband during his lifetime. These and other mortgage situations must be considered in awarding dower to a widow where mortgaged property is involved. By the common law of England and in many of the states, a mortgage is deemed to be a conveyance of title to land subject to redemption by payment of the mortgage. In Florida and in many other states—in fact, in most jursdictions in the United States—a mortgage is regarded merely as a lien for securing a debt so that upon the execution of a mortgage, the legal title remains with the

40. *In re* Gilbert's Estate, 160 Fla. 528, 36 So.2d 213 (1948).
41. *In re* Brock's Estate, 63 So 2d 510 (Fla. 1953).
42. County Judge, Dade County, Florida.
43. Johnson v. Hayes, 52 So.2d 109 (Fla. 1951).

mortgagor.[44] If a husband executes a mortgage on his property before marriage, or if during marriage he purchases property that is already encumbered by a mortgage, the wife's inchoate dower will attach to such property as against all but the mortgagee and those claiming under him. If a husband executes a mortgage on his real property during converture, his wife's right of dower is, of course, superior to the claims of the mortgagee unless she releases her inchoate right by joining in the mortgage. Even in this event, the wife is entitled to dower but her claim is subject to the right of the mortgagee.

Where a husband buys realty during coverture and gives back to the vendor a purchase money mortgage as security for the purchase price, the mortgage lien is superior to the wife's dower whether or not she joins in the mortgage. In those jurisdictions which recognize the validity of a vendor's lien upon real property for the purchase price thereof, the vendor's lien is superior to the wife's dower in the real property in question. In such case the wife's dower is limited to the interest which the husband actually acquires.

Conclusion

Perhaps one of the most important parts of probate law is something which does not relate to existing law or existing decisions but relates to something that the Real Property section of the Bar constantly brings to our attention — that is, better legislation to attain more just results. For example, under the laws of the State of Florida, as now provided, a widow has nine months from the first date of publication of notice to creditors in which to elect to take dower or to take under the will or by the laws of descent and distribution. It is probable that the reason this period was set at nine months was so that at the end of eight months the widow could have thirty days in which to view the estate and see whether it was to her best interests to take dower or to take under the will or by descent and distribution, but there is no provision in our present law whereby a widow can protect herself in a contested will situation where the contest will not be determined by the final appellate court in nine months. The same omission is noticeable with an after-discovered will, where a proper administration has progressed beyond that length of time. Judge Blanton[45] had a case not too long ago where an estate had been completely administered, down to the point of distribution, with the widow believing that she was the sole heir of a very substantial estate. While she was abroad on a pleasure trip a will was discovered which materially changed her position in that estate and which would have made it very advantageous for her to have taken dower if she had known about it. The nine months from date

44. See 59 C.J.S., *Mortgages* § 1 (1947).
45. See note 42, *supra*.

of lawful first publication of notice to creditors had elapsed. Consequently, one of the most needed pieces of legislation in probate law, if we are going to keep dower as part of our laws and if we honestly believe the widow is entitled to those benefits, is to have the law provide that she shall have the right to elect to take dower within a given period — perhaps thirty, sixty or ninety days after the final determination of any will contest, or within thirty, sixty or ninety days after the discovery and admission to probate of an after-discovered last will and testament. This is so that she may at all times be legally competent to determine what her rights and interests in the estate are under each situation and make an intelligent choice.

It is indeed a precarious position for an attorney to be in to have to advise a widow, in advance of a will contest which will occur beyond the election period, whether or not to file an election to take dower. It just cannot be done intelligently.

Attorneys have toyed with the idea of an alternative election: "I elect to take dower if the decision goes this way and I retract if the decision goes that way." That is a pretty silly way to have to practice law. This author would like to suggest to the Florida Bar members that we prepare well organized and well written legislation to correct and to implement our existing Probate Law. It is likely that we will all find the practice of Probate Law a much greater pleasure as a result.