Probate Jurisdiction -- Limitations in Questions of Title -- A Call for Reform

Donald I. Bierman

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

Recommended Citation
Donald I. Bierman, Probate Jurisdiction -- Limitations in Questions of Title -- A Call for Reform, 19 U. Miami L. Rev. 637 (1965)
Available at: http://repository.law.miami.edu/umlr/vol19/iss4/6

This Comment 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.
Like any lengthy and complex document, the Florida Constitution is replete with contradictions. One of the most significant of these conflicts, to a widow or heir seeking a speedy, efficient and expeditious handling of an estate, is the probate jurisdiction dispute. This dispute exists because of the general grant of probate powers to the county judge's court as contrasted with the grant of exclusive original jurisdiction “in all actions involving the titles or boundaries of real property” to the circuit court. Florida's most recent treatise on probate law points up the continued existence of this problem. This article will discuss the initial judicial solutions of this apparent conflict, the extension of these solutions, problems created from the solutions, and a suggested constitutional judicial reform.

* Formerly Managing Editor, University of Miami Law Review; Student Assistant in Instruction for Freshmen, University of Miami; Member, Florida Bar.

1. Fla. Const. art. V, § 7(3) provides the following:
The county judge's court shall have jurisdiction of the settlement of the estates of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship and to discharge the duties usually pertaining to courts of probate. (Emphasis supplied.)

2. Fla. Const. art. V, § 6(3), provides the following:
The circuit courts shall have exclusive original jurisdiction . . . in all actions involving the titles or boundaries of real estate . . .

The extent of the county judge's jurisdiction in situations pertaining to real property has not been clearly delimited by the courts. As a result considerable doubt exists in such cases because of the applicability of two broad propositions of law. One of the propositions confers upon the County Judge's Courts jurisdiction of all things reasonably related to the probate of wills and the settlement or administration of decedents' estates. The second proposition is a result of an express constitutional provision conferring upon circuit courts exclusive original jurisdiction in all actions involving the titles or boundaries of real estate. (Footnotes omitted.) (Emphasis supplied.)
II. GENERAL HISTORY

A. Probate Jurisdiction

England had a minimum of probate proceedings between the Norman conquest and the adoption of the Statute of Wills in 1540. Certain possessory writs served probate functions such as determining who was a lawful heir. England's second major probate legislation was the Statute of Frauds, which required all wills of realty to be in writing and restricted the use of oral wills of personality?

Florida lawmakers have been interested in probate since pre-statehood days. The first territorial legislative council, under the American flag, vested general probate jurisdiction in the then newly created circuit courts; however, the following year county courts were created and given the power to adjudicate probate matters. Florida probate jurisdiction has been couched in its present broad terms since earliest statutory declarations. It has been vested in the county judge's court since the adoption of the present constitution.

4. The Norman conquest of 1066 introduced feudalism into England and thus took succession to real property out of the control of the holder of the fee. Prior to the Norman conquest the secular courts adjudicated succession to realty and ecclesiastical courts adjudicated succession to personalty. Proof of the validity of wills as to personalty remained in the church courts until 1540. Haertle, The History of the Probate Court, 45 Marq. L. Rev. 546 (1962).

5. Statute of Wills, 1540, 32 Hen. 8, c.l.

6. Notwithstanding the inability to devise land between 1066 and 1540 there were remedies and actions available to heirs. The Assize of Mort d'Ancestor enabled a lawful heir to regain seisin of real property when a stranger or unlawful heir had taken seisin. The writ presented the following questions: "Whether M, the father, mother, brother, sister, uncle or aunt of A, the plaintiff, was seised in his demesne as of fee of the land in question now held by X (any person not the lawful heir) and whether M died within the time limited for bringing the action, and whether A is M's next heir."

This writ was introduced between 1154 and 1189. In 1237 it was extended to other relatives through writs of Aiel (grandfather), Besail (great-grandfather) and Cosinage (cousin). Maitland, The Forms of Action at Common Law 29, 31 (1962).

7. Statute of Frauds 1677, 29 Car. 2, c. 3, §§ 5, 19-21. This area of English history is important because of the distinction made between real and personal property. This distinction was apparently adopted in Florida because Fla. Const. art. V., § 6(3), supra note 2, which gives the circuit court exclusive jurisdiction of title questions, deals only with realty. For a discussion of the extension of this concept to personalty see the textual discussion in this article of In re Brown, 134 So.2d 290 (Fla. 2d Dist. 1961), Section IV infra.

8. The second legislative act passed by the first territorial legislative council of Florida was, "an act Regulating Descents." Fla. Laws 1822, p. 6.


10. Fla. Laws 1823, p. 8. Prior to the enactment of these statutes, supra note 9, probate proceedings were conducted by local Spanish officials called alcaldes. This was done pursuant to an ordinance promulgated by Andrew Jackson who served as the first territorial governor of Florida. For an interesting historical summary of this period see, Redfearn, History of the Probate Laws of Florida, 21 Fla. Stat. Ann. 19 (1964), reprinted in 18 Fla. B.J. 154 (1944).

11. Fla. Laws 1832, p. 8 provided: "[T]he County courts hereby established, shall be the courts of probate within their several counties." Fla. Laws, 1833, p. 45, enumerated the duties of county court judges in probate matters concluding with the following: "and shall have and exercise general powers as a judge of probate." (Emphasis supplied.) Simi-
B. Dower Jurisdiction

Dower has presented intriguing questions of jurisdiction since the twelfth century in England. If a widow claimed dower, she had to choose between two forums, depending on whether she had or had not received any dower interest at the time of her petition. If an interest had been received, she was compelled to petition the lord's court; if she had received nothing, she had to purchase a Writ of Dower from the king's court.13

Florida probate courts have been given jurisdiction to award dower for over a century;14 yet, this power did not become exclusive until the adoption of the Florida Probate Law.15 The constitutionality of sections

lar provisions were found in subsequent Florida statutes and constitutions, e.g., Fla. Const. art. V, § 9 (1838), including the present constitution. See supra note 1. For further discussion see Redfearn, supra note 10, at 27-29.

12. See supra note 1. It is interesting to note that the general revision of Article V made in 1955 did not attempt to change probate jurisdiction. Since the main thrust of this amendment was aimed at appellate reform, little was done to probate on the trial level. Probate appeals were, however, directed to the district courts of appeal. Fla. Const. art V, § 5(3); In re Dahl, 125 So.2d 332 (Fla. 2d Dist. 1960); Clark v. State ex rel. Rubin, 122 So.2d 807 (Fla. 3d Dist. 1960) (mental incompetency); In re Grant, 117 So.2d 865 (Fla. 2d Dist. 1960) (Circuit court cannot hear probate appeals.). Prior to the enactment of the revised Article V, decisions of the county judge were subject to review by the circuit court. Fla. Const. art V, § 6 in enumerating the circuit court's jurisdiction omits the appellate and supervising jurisdiction over the probate court which obtained under Article V § 11 of the constitution as adopted in 1885. Concurrent probate jurisdiction existed for many years in equity problems. Green v. Price, 63 So.2d 337 (Fla. 1953); Deans v. Wilcoxon, 25 Fla. 980, 7 So. 163 (1889). Contra, Crosby v. Burleson, 142 Fla. 443, 195 So. 202 (1940); Security Trust Co. v. Cannon, 165 So.2d 834 (Fla. 3d Dist. 1964) (accounting); In re Dahl, supra (validity of a will).

13. The reason given for this distinction was that if a widow had received nothing then the heir might choose to deny the existence of the marriage and the king would be the only one able to compel the bishop to testify as to the marriage. Maitland suggests that this is a flimsy excuse for expanding the king's jurisdiction. MAITLAND, op. cit. supra note 6, at 36-37. An interesting parallel exists today in Florida. If a widow claims dower the county judge will award it unless a third person claims title to the property in which event only the circuit court may decide the issue. The king received money for his writs which quite naturally serve as a great impetus for expanding his jurisdiction. The impetus does not exist in Florida since its courts no longer operate on a "fee" basis. For further discussion see, infra sections III and VI of this article.

14. Act of November 7, 1828 § 3, Reprinted in THOMPSON'S DIGEST 184 (1847), provided that a petition for dower could be filed in the superior court or the probate court. This section was changed in 1892 to provide for a petition in the circuit court or the county judge's court. Fla. Rev. Stat. § 1836 (1892).

15. Fla. Stat. § 731.01 (1963) provides that chapters 731, 732, 733 and 734 will be known as the Florida Probate Law. Hereinafter citations to sections only will refer to the Florida Probate Law as in force in 1963 unless indicated otherwise.

Section 733.12(2) provides:
The county judge . . . shall have plenary jurisdiction to assign dower in all property, real or personal, located in any county in the state.
The adoption of this statute abolished the concurrent jurisdiction of the circuit court as to dower. Security Trust Co. v. Cannon, supra note 12; Crosby v. Burleson, supra note 12; REDFEARN, WILLS & ADMINISTRATION OF ESTATES IN FLORIDA 446 (1957). For a general history of dower see REDFEARN at 443. But see Green v. Price, supra note 12, holding that the circuit court has coordinate jurisdiction.
of this act have been questioned by legal writers; however, the courts have not given these challenges serious attention.

C. Homestead Jurisdiction

Early English common law did not deal with restraints on the devise of homestead property, since homestead is a distinctly American concept developed in the early 1840's. Florida was a pioneer state in homestead legislation; however, its early statutory and constitutional provisions were primarily provisions for debtor exemptions. The second section of the 1845 homestead exemption act specifically gave the homesteader the right to devise it. The constitution of 1868 implied a small restraint on testamentary alienation by providing that the heirs of a person with a homestead exemption would receive the benefits of that exemption. It was not until the end of the nineteenth century that the Florida legislature enacted a descent-of-homestead statute, which codified the then current case law. Since there is a minimum of express provisions for jurisdiction in homestead cases, there is a minimum of statutory history.

The one possible exception is Fla. Stat. § 734.08. Clark and Walrath, Questions Arising Under The Probate Act, 8 Fla. L.J. 77 (1934). The article suggests that since most dower questions exceed the 100 dollar limit for the county judge's general jurisdiction and Nebraska courts have held dower is not an ordinary probate question that there is no constitutional grant of power for this statute. The authors answered their own challenge by pointing to the general practice in 1885, the time of the adoption of the Florida constitution.

"Homestead property was unknown at common law." Buchwald, Florida Homestead: A Restraint on Alienation By Judicial Accretion, 19 U. Miami L. Rev. 114 (1964).

Acts of March 15, 1843 § 1, reprinted in THOMPSON'S DIGEST 356 (1847). The first statutes were Debtor's exemptions of certain personal and real property. This statute exempted 40 acres of land to the extent of $200 in value.

Acts of March 11, 1845 § 2, reprinted in THOMPSON'S DIGEST 357 (1847).

FLA. CONST. art. IX, § 3 (1868). A similar provision is found in the present constitution, art. X, § 2. The present constitution (1885) provides that the exemption "inures" to the heirs. There is no explicit requirement in either document that the testator leave his property to his lawful heirs.

FLA. Laws 1899, ch. 4730. See Shapo, Restraints on Alienation and Devise of Homestead, Monsters Unfettered from Florida's Past, 19 U. Miami L. Rev. 72, 82 (1964) for the interesting concept that Florida's pre-statutory case law restraints on alienation of homestead by will was based on a hybrid of statutory common law of other jurisdictions. Shapo refers to the "gelatinous origin" of the rule that homestead descends to the heirs at law. For a complete history of homestead and its relationship to carpetbaggers, pines and palmetto trees see Shapo, supra.

A student comment points out that the county judge has statutory jurisdiction to at least determine what property is homestead. The comment refers to § 731.05 which states that homestead is not subject to devise; § 731.34 which states that homestead is not subject to dower; § 733.01 which states that the personal representative takes possession of all property except homestead.

From the above statutes the commentator made the logical conclusion that the county judge must determine what property should not be subject to dower, devise or possession by the personal representative. The logic of this analysis seems patently correct; however logic is not always a strong tool when the courts are faced with possible constitutional conflict; FLA. Const. art. V, § 6(3), supra note 2, wherein the circuit court is given jurisdiction in questions of title. Courts-Jurisdiction of County Judge: Homestead Matters, 8 Miami L.Q. 577, 579-82 (1954). This same principal can be applied to FLA. STAT. §
which gives the county judge the power to distribute an estate if *all* property therein is either homestead or otherwise exempt from creditors.\(^{23}\)

### III. The Constitutional Conflict Faced

In solving the conflict between adjudicating probate issues and adjudicating the title to real property,\(^{24}\) it is necessary to determine when a question of title is involved. The Supreme Court of Florida defined the terms in a jurisdictional dispute involving the civil court of record and the circuit court. The court stated that the original and exclusive jurisdiction of the circuit court was not necessarily exclusive if only records of title are at issue.\(^{25}\)

A suit is one involving title to real estate, only where the necessary result of the decree or judgment is that one party *gains* or the other party *loses* an interest in the real estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves the judicial determination of such rights.\(^{26}\)

This definition, because of its broad terms, could have effectively destroyed almost all probate jurisdiction in cases in which a dispute arose and the decedent owned any real property. If a testator owned real property and devised it to one other than his statutory intestate successor, then any question as to the validity of the testator's will would necessarily bring the result that "one person gains or the other loses an interest in real estate." If a person died intestate owning realty, and there was a dispute as to his lawful heir then a dispute as to title would result. If the party claiming heirship lost, he lost realty. The results that flow from these examples and others like them may appear as strained and illogical conclusions, but this reasoning apparently appealed to Flor-

\(^{23}\) Section 734.08 (1963) was first adopted in 1933 and has not been changed in substance since its adoption. This statute gives the county judge power to distribute homestead in small estates but not large ones. It has not had extensive treatment on the appellate level. *In re Noble*, 73 So.2d 873 (Fla. 1954), held this statute constitutional reasoning that determining *status* of homestead is not the same as determining *title*.

\(^{24}\) An action for restitution was brought based upon a contract to buy land, for which the plaintiff had made a deposit. The contract of sale provided that the deposit would be returned if the title was found to be other than marketable. The suit was brought in the civil court of record, wherein the defendant placed the marketability of title in issue and then successfully moved to dismiss the suit for lack of jurisdiction. The Supreme Court affirmed a writ of mandamus, ordering the civil court of record to hear the case, thus rejecting the argument that "title" to real property was at issue. *Barrs v. State ex rel. Britt*, 95 Fla. 75, 116 So. 28 (1928). *But see*, *South Fla. Amusement & Dev. v. Blanton*, 95 Fla. 885, 116 So. 869 (1928).

\(^{26}\) *Id.* at 80, 116 So. at 29. (Emphasis supplied.)
ida's highest court. *Mott v. First Nat'l Bank*,
involved the claim of a
putative adopted child of the intestate decedent. The county judge's
court heard testimony and denied the validity of the adoption. This
judgment was vacated by the court, reasoning that the adoption question
involved title to real property; if the plaintiff was legally adopted, she
would take the real property as an intestate successor. Therefore, the
probate court must yield jurisdiction to the circuit court which has ex-
clusive jurisdiction in title questions.

The weight of the impracticality of this decision caused the pen-
dulum of interpretation to begin its necessary descent. A Florida woman
died intestate owning both real and personal property. The probate court
took jurisdiction and appointed a trustee for unknown heirs. The state
claimed escheat
and the trustee moved to dismiss for lack of juris-
diction. The court in *In re Monk*, rejected the broad restriction imposed
by *Mott* for a more moderate position upholding probate jurisdiction,
notwithstanding the effect the decision would have on title.
The above group of probate cases has one common factor; the "dispute" as to title
to the property does not question the title to the property held by the
decedent. This factor brings the cases clearly within ordinary probate
jurisdiction.

---

27. 98 Fla. 444, 124 So. 36 (1929). The plaintiff had been adopted at age 33 in
Connecticut and sought to prove her legal status in the county judge's court. When she
failed in this attempt she appealed claiming lack of jurisdiction. It is interesting to note
that the effect of a reversal is to give the plaintiff a second chance in another court where
the same issues will be tried again. *Cf.* South Fla. Amusement & Dev. Co. v. Blanton,
*supra* note 25 (unlawful detainer on lease versus contract to sell).

28. Section 731.33 provides that if there are no known heirs of a decedent his estate
shall escheat to the state. This statute also specifically gives the county judge jurisdiction
to determine when no heirs exist notwithstanding the possible effect on title.

29. "The County Judge's Court, generally speaking, has the exclusive power to do all
things necessary in the settlement of an estate of a decedent . . . ." 155 Fla. 240, 245, 19
So.2d 796, 798 (1944). The court distinguishes *Mott* v. First Nat'l Bank, *supra* note 27, on
the basis that validity of adoption is generally adjudicated in the circuit court.

30. "[W]here jurisdiction is conferred over any subject-matter (decedent's estates)
and it becomes necessary in the adjudication thereof to decide issues collateral or incidental
matters over which no jurisdiction has been conferred, the court must, of necessity, decide
such collateral issues." *Moerner, American Law of Administration* 483 (3d ed. 1923).
See also, Ullendorff v. Brown, 155 Fla. 655, 24 So.2d 37 (1945); *In re* Niernsee, 147 Fla.
388, 2 So.2d 737 (1941); *In re* Dahl, 125 So.2d 332 (Fla. 2d Dist. 1960). *But cf.* Krivitsky
v. Nye, 155 Fla. 45, 19 So.2d 563 (1944).

31. 158 Fla. 667, 29 So.2d 865 (1947).

32. The husband directed that "what remains" of the estate go to the couples' children.
Certain of the children who were not favored in the wife-mother's will made a claim,
through the administration of their late father's estate, that the mother held only a life
husband had directed. The administrator of her late husband's estate claimed that the testator did not own a fee simple estate and therefore could not dispose of the property by will.\textsuperscript{33} The court held that the county judge had plenary jurisdiction to decide the issue. When a question of title is only \textit{incidental} to a probate question, the limitations of Article V, section 6, do not apply.\textsuperscript{34} This case represented an arc of bright light that was quickly darkened.\textsuperscript{35}

The court was directly faced with a claim by a third person, adverse to the estate, in the area's leading case, \textit{In re Lawrence}.\textsuperscript{36} A widow claimed dower in realty in which her deceased husband had claimed beneficial title. The legal title holder, a stranger to the estate,\textsuperscript{37} claimed he owned both the legal and equitable title and also maintained that the county judge's court did not have jurisdiction. The court made a clear statement, holding that when a third party "asserts title \textit{adverse to the estate} in real estate claimed by the personal representative or beneficiaries as part of the estate, resort must be had to the Circuit Court."\textsuperscript{38} This decision was based on the clear \textit{constitutional mandate} requiring the circuit court to decide all questions of title to real property.\textsuperscript{39} It is suggested that the \textit{Lawrence} decision represents a limitation on probate jur-

\begin{itemize}
\item \textsuperscript{33} The administrator of the father's estate amended his petition and made it possible for the county judge to reconstrue the father's will. Thus he had changed his position from an adverse claimant to an heir seeking an interpretation of a will. The court did not make it clear whether it was ordering the relitigating of the husband's will in its entirety or simply ordering the interpretation of it as a necessary step in deciding on the dissatisfied son's petition. This unanswered question is important in determining whether the husband's administrator was an adverse party or whether everyone involved was claiming under the husband's will. The fact that the husband died in 1939, whereas the wife died in 1945, would indicate the former to be the case. For a discussion of adverse parties see note 37 \textit{infra}.
\item \textsuperscript{34} FLA. CONST. art. V, § 6. See note 2 \textit{infra}.
\item \textsuperscript{35} Just three years after \textit{McManus}, the court held, on similar facts, that the county judge's court did not have jurisdiction when questions of title were involved. \textit{In re Lawrence}, 45 So.2d 344 (Fla. 1950). In arriving at the opposite result the court did not even mention the \textit{McManus} case by name or factual situation. "[B]asically it is difficult to distinguish between these two cases as (to) questions of title." DowLING, A \textit{PROBATE WORKSHOP} 3 (Feb. 1965) (handbook of limited circulation published in conjunction with the Dade County Bar Ass'n Program of Continuing Legal Education).
\item \textsuperscript{36} 45 So.2d 344 (Fla. 1950). The courts have cited \textit{Lawrence} in almost every subsequent probate jurisdiction question. See, e.g., Zinnser v. Gregory, 77 So.2d 611 (Fla. 1955); \textit{In re Coffey}, 171 So.2d 568 (Fla. 3d Dist. 1965); Moskovits v. Moskovits, 112 So.2d 875 (Fla. 1st Dist. 1959); \textit{In re Coleman}, 103 So.2d 237 (Fla. 2d Dist. 1958). See generally, THOMAS, \textit{op. cit. supra}, note 3.
\item \textsuperscript{37} In probate proceedings a third person is a party who is not claiming under a will or through a statutory right of descent. Lambeth v. Capell, 146 So.2d 386 (Fla. 2d Dist. 1962) (account co-tenant); Moskovits v. Moskovits, \textit{Ibid}. A person claiming property under the will, is considered a third person insofar as claims are made \textit{against} the estate. \textit{In re Donaldson}, 147 So.2d 552 (Fla. 2d Dist. 1962) (daughter claiming adversely); \textit{In re O'Neil}, 142 So.2d 315 (Fla. 2d Dist. 1962) (mother claiming adversely); \textit{In re Feldman}, 109 So.2d 407 (Fla. 2d Dist. 1959).
\item \textsuperscript{38} \textit{In re Lawrence}, \textit{supra} note 36, at 345.
\item \textsuperscript{39} See note 2 \textit{infra}.
\end{itemize}
isdiction commanded by the constitution. Since there is no public policy reason to limit probate powers, this decision should be strictly limited to its facts. The courts have tended to expand rather than restrict the Lawrence holding.

IV. FROM LAWRENCE TO BROWN

The most significant expansion of the Lawrence rule was made by In re Brown, a dower case in which title to personal property was at issue. The decedent, an attorney, had held and invested the plaintiff's funds as a fiduciary. When the attorney died, his wife claimed dower in these funds and the former client opposed the petition. The appellate court raised the question of the probate court's jurisdiction, notwithstanding the fact that it had not been raised below. The court used two theories for holding that a probate court does not have jurisdiction to decide claims of title to personal property made by third parties. The first approach used was a reliance on the language of the Lawrence case, which prohibited the probate court from adjudicating questions of title to real property. It is suggested that the court's approach was erroneous since Lawrence involved a topic specifically dealt with by the constitution. It is apparent that courts often extend the holding of a case without scrutinizing the rationale upon which it was based.

Secondly, the court analyzed the section of the constitution which empowers the county judge's court to "discharge the duties usually pertaining to courts of probate." This was followed by a supported conclusion that a probate court does not have jurisdiction if a claim by a stranger to the estate is disputed. These arguments coupled with a pointed quotation from a Florida statute were sufficient to convince the court

---

40. See section VII of this comment, infra, for strong practical and policy reasons for changing the constitution and section VIII, infra, for suggested changes.
41. It has been expanded to exclude probate jurisdiction over the status of growing fruit, Casey v. Smith, 134 So.2d 846 (Fla. 2d Dist. 1961); a settlement agreement; In re Feldman, 109 So.2d 407 (Fla. 2d Dist. 1959); an alleged constructive trust, Zinner v. Gregory, supra note 36; delivery of deeds for a gift of real property, In re Coleman, supra note 36. But cf., Johnson v. Hayes, 52 So.2d 109 (Fla. 1951) (refused to give circuit court dower jurisdiction).
42. 134 So.2d 290 (Fla. 2d Dist. 1961).
43. Id. at 297.
44. The court refers to Lawrence, supra note 36, several places and quotes from it extensively. Id. at 294.
45. For a full discussion of In re Lawrence, see section III, supra, of this comment. The Lawrence decision was based on the constitutional mandate, art V § 6(3), which gives the circuit court exclusive jurisdiction of title to real property. See text accompanying note 39, supra, for this commentator's viewpoint.
46. See the discussion of In re Coffey, 171 So.2d 568 (Fla. 3d Dist. 1965), infra § VI of this comment.
47. Fla. Const. art. V, § 7(3). The court also reviewed numerous cases which held that a probate court does not have general jurisdiction.
to increase the limits placed upon the probate jurisdiction of the county judge's court.\textsuperscript{48}

This commentator believes that the court was logically consistent in the use of its second approach; however, it is suggested the evident ramifications, \textit{i.e.}, multiple litigation and time consuming processes, were ignored by the court.\textsuperscript{49} In light of the added burdens placed upon estates, the court could have read in a legislative intent to create a probate court of wide jurisdiction.\textsuperscript{50} The Second District Court of Appeals has followed this decision in cases involving ownership of a business,\textsuperscript{51} stock,\textsuperscript{52} and a joint bank account.\textsuperscript{53}

\section*{V. Homestead and Logic Invacuo}

An outstanding Florida probate judge pointed out that homestead is "an almost constant element to be considered in the handling of estate matters."\textsuperscript{54} This statement was made with full knowledge of the current law that once homestead status has been determined by the county judge, he may no longer exercise jurisdiction over disputes regarding the property.\textsuperscript{55}

This paradoxical situation arises because the courts have held that the determination of \textit{who} shall receive an interest in homestead property is either a dispute involving title to real property,\textsuperscript{56} or a dispute involving property which is not cognizable in probate.\textsuperscript{57}

\begin{footnotesize}
\begin{itemize}
\item[48.] FLA. STAT. § 733.18 (1963) deals with the payment of claims by the personal representative of a decedent. The court quotes the wording of the statute which sets time limits "for filing appropriate suit, action or proceedings." It is suggested that this statute does not state that proceedings cannot take place in the county judge's court. See \textit{In re Brown}, supra note 42, at 296.
\item[49.] Section VII, infra, discusses the ramifications of jurisdictional "patchwork" and section VIII, infra, suggests needed reform in this area.
\item[50.] For cases holding that the probate court has wide jurisdiction see note 30, supra. One court, reasoning that it was good policy to litigate as much of the case as possible within the probate court, allowed the county judge to order the exhuming of a woman's body. This power, which is almost always exclusively in an equity court, was granted to allow the county judge to hear competent evidence on heirship. Ullendorff v. Brown, supra note 30.
\item[51.] The necessity of preserving the fiduciary trust placed in attorneys may well have prompted the decision in \textit{Brown}.
\item[52.] \textit{In re O'Neil}, supra note 37.
\item[53.] \textit{In re Donaldson}, supra note 37 (promissory note and cash also).
\item[54.] Lambeth v. Capell, supra note 37.
\item[55.] Dowling, \textit{Recent Developments and The Present Status of Florida Probate Law}, 11 MIAMI L.Q. 54, 58 (1956). The same judge has reiterated this position recently before the Probate Workshop of the Dade County Bar Association. "[T]he Probate Judge must have a solid workable knowledge of the law of Florida relating to homesteads in order to be able to determine that Homestead Status." Dowling, \textit{op. cit. supra} note 35, at 25.
\item[56.] Ibid.
\item[57.] In re Feldman, supra note 41; \textit{In re Rothman}, 104 So.2d 607 (Fla. 3d Dist. 1958) (antenuptual agreement); \textit{In re Weiss}, 102 So.2d 154 (Fla. 3d Dist. 1958), cert. discharged, 106 So.2d 411 (Fla. 1958).
\item[58.] Spitzer v. Branning, 135 Fla. 49, 184 So. 770 (1938). Certain statutes contain lan-
\end{itemize}
\end{footnotesize}
A county judge refused to determine the status of alleged homestead property on the ground that to do so would be an invasion into the exclusive jurisdiction of the circuit court. The necessity of characterizing the property arose because of a statute which requires the county judge to distribute the estate if it consists of only exempt personal property and homestead. The supreme court stated in In re Noble, that "the [county judge] was given jurisdiction primarily to fix the status of property from the circumstances of its use. The title is only of incidental concern." Thus, the court suggested that the probate court has power to declare status of real property and to declare title interests in it. This position, by Florida's highest court, appeared to be a spark of hope for the advocates of consolidated jurisdiction. Like all sparks it had to start a fire or be extinguished.

The spark was doused, the flame was extinguished and the fire-like qualities of Noble were denied by the subsequent case of In re Weiss. The parties had stipulated that the property in question was homestead; then the county judge ordered it to be divided between the son and husband of the decedent. The supreme court defined probate jurisdiction of homestead within strict limits. "When a county judge fixes the homestead status, he must place a period after his deliberations and cannot go further and declare the respective interest in the homestead . . . ." This conclusion is in logical accordance with article V, but it is logic invacuo. The result is that an estate may be probated in the county judges court, while major succession problems must be handled in the circuit court. The probate court might decide land is homestead and "place a period" after this decision, or it might decide the land is not homestead and distribute it. If the land is, in fact, homestead the order would be subject to collateral attack.

In summary, the county judge may determine status of property and either exclude it from the estate as homestead property, or include and distribute it as non-homestead with an order which will be subject to collateral attack.

---

58. See note 2 supra.
60. 73 So.2d 873, 874 (Fla. 1954). The court pointed out that the subsequent descending of title is "consequential."
61. Supra note 56.
62. Supra note 56, at 414. This case had an interesting appellate path. It was first appealed to the circuit court where the county judge was affirmed. An appeal was taken to the supreme court which transferred the cause to the district court. The district court reversed, then the supreme court affirmed the reversal.
63. Spitzer v. Branning, supra note 57. Conduct of parties cannot confer jurisdiction on the county judge's court. By implication a finding that the property was not homestead will not be binding in a collateral jurisdictional attack.
VI. COFFEY AND CONFUSION

A divided court decided that the claim of a lien holder against personal property was sufficient to defeat the probate court’s plenary power to assign dower. 64 This strange holding arose when a widow claimed dower in debenture bonds which her late husband had pledged to his fellow corporate directors. The loan which the pledge secured was not in default when the husband died. The above stated facts indicate that no question of title existed at the time of the decedent’s death; yet the majority stated that a question of title was involved. 65 The court approached the jurisdiction question by quoting from numerous decisions dealing with claims of title made by third parties for real or personal property of the decedents. The court concluded from these title cases that the county judge could not assign dower when a lien was asserted against personal property.

This decision, based on a faulty premise, solidifies past limitations on probate jurisdiction and extends these limits in a manner that makes it difficult to determine whether the probate judge has any power to adjudicate the make-up of the decedent’s gross estate. The result of Coffey, is great confusion. While it allegedly relied on Moskovits v. Moskovits, 66 it effectively overruled the “quasi administrative” power of the county judge to determine what assets are to belong to the estate. 67 The long range effect of Coffey is that any third person who is a security holder may defeat the county judge’s plenary jurisdiction to assign dower by either asserting his lien or holding a collateral sale of the security after the borrower’s demise.

Judge Pearson’s dissent pointed out that the county judge clearly has power to assign dower in property owned by the decedent at the time of his death and “such a holding is in accord with all of the authorities cited in the majority opinion.” 68 It is suggested that the dissent more correctly interpreted the past case law and also demonstrated a fuller understanding of the facts involved in this case. This commentator believes that both positions lead to unnecessary multiple litigation. 69

64. In re Coffey, 171 So.2d 568 (Fla. 3d Dist. 1965) (Pearson dissenting). The plenary power to assign dower is found in Fla. Stat. § 733.12 (1963) quoted supra note 15.

65. Id. at 572. During the administration of the estate the appellants held a collateral sale of the bonds. They were the only bidders so they purchased the bonds for $50,000 leaving a deficiency of $50,000. Thus at the time of death the appellants were mere lien holders but at the time of assignment of dower they held title pursuant to the collateral sale. The law is clear that dower attaches as of the time of death. Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936). The dower statute speaks of property owned at the time of death. Fla. Stat. § 731.34 (1963). The court did not discuss this issue although it was raised in the appellee’s brief.

66. 112 So.2d 875 (Fla. 1st Dist. 1959).


68. In re Coffey, supra note 64, at 574.

69. The courts do not always resolve dower jurisdictional disputes in favor of the circuit court. A widow attempted to have the circuit court assign her dower in realty as
VII. ADDED EXPENSE AND MULTIPLE LITIGATION

A jurisdictional question arose in the probate court over the power to determine the validity of a settlement agreement among heirs. In rejecting the suggested limitation on probate power, the appellate court commented that to so limit the court "would attach a dignity to technical procedure that would draw a law suit to finality with the speed of Rip Van Winkle's siesta." A district court commented that "the subsequent trend of the statutory and case law has leaned towards making litigation for the settlement of decedents' estates the sole province of the County Judge's Court." These statements reflect a strong desire to consolidate the settlement of estates but, unfortunately, as this comment indicates, they are more a wish than a reality.

What is the result of dividing jurisdiction as the appellate courts have done? The procedural paths of factual situations such as the ones in *Lawrence, Brown, Coffey and Weiss* demonstrate the need for multiple litigation and great expense under the current system.

The *Lawrence* factual pattern involved a claim of title to real property by a stranger to the estate. The widow had claimed dower in the same parcel of land in the probate court which has exclusive jurisdiction to assign dower. The title claimant was directed to the circuit court by the decision in the *Lawrence* appeal. It is obvious that the circuit court must decide that the estate holds title to the realty or that the stranger holds title. If the stranger prevails, then the estate may be closed; however, if the estate prevails the widow must re-petition the probate court for assignment of dower. Thus, in the first situation there would be two legal proceedings and in the second there would be three. It is apparent that these jurisdictional rules impede simple and speedy handling of estates.

an incident to a quiet title suit. The appellate court vigorously rejected this attempt by which "the County Judge's Court could be deprived of jurisdiction for the allocation of dower in each instance solely through the device of asking for supplemental equitable relief. . . ." Quinn v. Lister, supra note 67, at 348.

70. This colorful language is typical of Justice Terrell and of the problem involved in probate limitations. Wells v. Menn, 154 Fla. 173, 177, 17 So.2d 217, 219 (1944).

71. Coleman v. Davis, supra note 67, at 86. An action for the assignment of dower was brought in the civil court of record. The appellate court ordered a dismissal with the right reserved to bring an action in the county judge's court.

72. In re Lawrence, supra note 36 and § III; In re Brown, supra note 42 and § IV; In re Weiss, supra note 56 and § V; In re Coffey, supra note 64 and § VI.

73. "Whatever the situation may have been prior to the enactment of . . . FLA. STAT. § 733.11–14 (1963), jurisdiction to assign dower is now vested exclusively in the County Judge's Court." Coleman v. Davis, supra note 67, at 86. (Emphasis supplied.) The circuit court once enjoyed concurrent jurisdiction to assign dower but this no longer exists. See note 15 supra.

74. In holding that the probate court could grant disputed attorney's fees the court stated: "Due course of law contemplates the shortest cut to justice consistent with reason and sound practice." In re Warner, 160 Fla. 460, 463, 35 So.2d 296, 298 (1948); In re Baxter, 91 So.2d 316 (Fla. 1956); In re Barker, 75 So.2d 303 (Fla. 1954).
The Brown factual pattern involved a fund held by the decedent in an alleged fiduciary capacity. This raises an additional problem under the current jurisdiction rules. If the decedent's ex-clients are found not to have title to the fund, then they would have to assert a claim against the estate in the county judge's court. This increases costs and complications since the estate would have to remain open for the duration of the circuit court litigation. If the litigation takes more than one year, the family might encounter extreme financial difficulties.\textsuperscript{76}

A more ludicrous situation arises when the factual pattern includes the claim of a personal property lienor, as in the Coffey case. The lienor must attempt to enforce his lien in the circuit court which might find it valid, yet would not directly reach the issue of property ownership. In what forum would the widow assert dower? The county judge cannot allot dower until the question of title is determined. The circuit court is not empowered to allot dower. Thus, the only alternative left to the widow is to seek a declaratory decree on the question of title. This alternative further increases costs in an already costly estate settlement. Assuming that the lien is found to be valid and the title held to be in the decedent, then the widow would have to re-petition the probate court for assignment of dower. If the remainder of the estate had already been distributed, the problem of satisfying the lien would be particularly acute.\textsuperscript{76}

Homestead or alleged homestead property presents another critical problem. If the probate court distributes property which is in fact homestead, the order is subject to collateral attack.\textsuperscript{77} This not only causes multiple litigation; but it also places a cloud upon the title of property which has been distributed by court order. If, for example, a high valued apartment building were held to be homestead by the county judge who then, in accordance with the Weiss rule,\textsuperscript{78} refused to distribute it, the widow might elect not to take dower in reliance on an expected life.

\textsuperscript{75} A family allowance not to exceed $1200, is provided for by statute. It constitutes "one year's support" and no longer. Fla. Stat. § 733.20(1)(d) (1963). A supplemental allowance of $3000 may be paid in the judge's discretion provided that the preceding eight classes of payments can be met. Fla. Stat. § 733.20(1)(i) (1963). Thus if a suit is pending over a year the widow may have exhausted her right under the statute and be without funds until the litigation is completed.

It would be difficult for the family to expedite the claimant's suit in circuit court since the plaintiff-claimant would be in control. The claimant must file his suit in circuit court within two months of receiving an objection to it but he may delay after that as he wishes. Fla. Stat. § 733.211 (1963) bars a claim after 3 years only if no proceeding is pending.

\textsuperscript{76} The dower statute provides that nothing contained therein shall be deemed as exempting personal property from written security instruments. It does not provide for the method of satisfying these liens if the estate is solvent and the widow elects dower. Fla. Stat. § 731.34 (1963).

\textsuperscript{77} This line of reasoning is developed in section V supra, and text accompanying note 63 supra.

\textsuperscript{78} Supra note 56.
estate in the homestead. When the distribution of the property is sought in the circuit court, that court may hold that the property is not homestead. This would require a reopening of the estate in the probate court at a time when the widow's right to elect dower is barred because of her delay beyond the statutory nine month period.

The present law of probate jurisdiction, when it is discernible, creates the problems presented in this section. A second major problem area is created by the necessity of litigating the jurisdictional question itself. The Coffey litigation,\(^7^9\) which involved jurisdiction to assign dower, was commenced in probate in July, 1962, and the appellate decision was rendered in February, 1965. The legal process took over two years, yet the question of the widow's right to dower was never reached on the merits. Many of the cases discussed in this comment represent lengthy litigation on purely jurisdictional matters.\(^8^0\) It is obvious that litigation consumes time and money. These factors may force a widow or heir to give up a substantial right through a settlement, rather than face the costs of protracted litigation.\(^8^1\) The value of reaching a settlement without litigation is not disputed; however, it is suggested that the litigants ought to be faced with a reasonable choice.

VIII. SUGGESTED REFORM

A summary of the problems presented by this comment will reveal that they are two-fold. Both the need to ascertain what the jurisdictional rules are and the application of the rules as they stand today create multiple litigation. The purpose of this comment is not to urge that one court is more competent to handle the myriad of collateral issues raised in the settlement of an estate than another. It is suggested that they all should be handled by the same court.

Florida has many trial level courts,\(^8^2\) each with either a specific jurisdictional limit or general jurisdiction.\(^8^3\) In contrast to this problem-

---

79. Supra § VI.
80. See, "e.g.,” the cases listed supra note 72; Mott v. First Nat'l Bank, 98 Fla. 444, 124 So. 36 (1929) (validity of adoption of heir); Quinn v. Lister, 147 So.2d 347 (Fla. 1st Dist. 1962) (court court dismissed).
81. A settlement was reached after the appellate court held the probate court was without jurisdiction to assign dower. As a result of the settlement counsel for the widow did not seek certiorari to the supreme court and did not seek a declaratory judgment. Interview with George J. Talianoff, counsel for the appellee, Feb., 1965 in Miami Beach, Fla.
82. The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, [trial courts follow], circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justice of the peace, and such other courts . . . as the legislature may from time to time ordain and establish. Fla. Const. art. V, § 1.
83. The circuit courts are courts of general jurisdiction in law and equity. State ex rel. B. F. Goodrich Co. v. Trammell, 140 Fla. 500, 192 So. 175 (1939); Curtis v. Albritton, 101 Fla. 853, 132 So. 677 (1931); Chapman v. Reddick, 41 Fla. 120, 25 So. 673 (1899).
creating situation, Illinois has one trial level court with original general jurisdiction in law and equity. It is urged that Florida, through constitutional reform, adopt the entire unified trial court concept of Illinois.

A reasonable alternative to this, as far as probate is concerned, is to make the probate court a division of the circuit court. Either suggested reform offers a solution to the two main problems presented by this comment. They eliminate jurisdictional disputes because the court would have general jurisdiction. In addition they obviate the need to refile actions; if one division of the court is considered to be more competent in an area, the chief judge may simply transfer the cause to that division.

The unified trial court system can be recommended for its simplicity and uniformity. In the probate area it would eliminate the burdensome necessity of splitting different aspects of the same estate's probation. It would eliminate the need for jurisdictional appeals, lower costs and bring probate proceedings to a rapid conclusion—results which are consistent with the due course of justice.

84. ILL. CONST. art. VI, § 1. This 1962 amendment to the Illinois constitution replaced a system of trial courts similar to the Florida system. Mulliken, The Unified Trial Court, 50 Ill. B.J. 668 (1961-62). The article also pointed out that Roscoe Pound, noted legal scholar, suggested as early as 1906 that there should be no specialized courts, only judges with special skills who are available for all work.

85. ILL. CONST. art. VI, § 9.

86. The Illinois system creates one single court within each judicial circuit, with as many divisions as are needed to handle special problems. Each circuit has a "Chief Judge" who assigns the cases. See generally, Chandler, The New Judicial Article for Illinois, 50 Ill. B.J. 654 (1961-62); Fins, Analysis of Illinois Judicial Article of 1961, and Its Legislative and Judicial Implications, 11 De Paul L. Rev. 185 (1961-62); Mulliken, supra note 84.

87. SIMES & BASYE, PROBLEMS OF PROBATE LAW (1946) suggest that the probate court should be a division of the general trial court.