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OUR LEGAL CHAMELEON, THE FLORIDA HOMESTEAD EXEMPTION: I-III

HAROLD B. CROSBY AND GEORGE JOHN MILLER

The Florida homestead exemption is at once the great bulwark of the individual homeowner and a formidable barrier to creditors and county and municipal fiscal authorities. To the intending alienor it is frequently a pitfall, and to many a testator or trustor it is the fatal rock upon which he is lured by the sirens of full and free choice in leaving his property. To the general practitioner, however, it is more often than not a chameleon, which changes color to accord with the background against which he is viewed.

The same individual, living on the same property, can enjoy a homestead exemption taxwise and yet find himself with no exemption from forced sale.¹ Conversely, the same individual, owning a house and grounds, may find that it is free from levy for all debts of his father, or mother, or both, but that he is nonetheless liable for taxes on its full assessed valuation.² He will discover in any event, whether he is entitled to a tax exemption or not, that freedom from execution never bars enforcement of a valid tax judgment. The homestead provisions do not constitute a law of descent, he is told, yet he dare not plan his estate, or while living convey his realty, without observing strictly the homestead limitations.³ Their influence extends even into the fields of federal taxation⁴ and Florida tax titles.⁵

Our chameleon does have form, however, and his alleged obscurity results in most instances from failure to determine at the outset the precise background upon which he is resting and to bear constantly in mind that

¹*E.g.*, a bachelor residing alone in Florida in a house that he owns.

²*E.g.*, assume father, mother and dependent son residing in the father's house in Florida. The father dies intestate and leaves the mother as head of the family. She dies soon afterward; the son goes to live permanently with an uncle and rents the former family home to tenants.

³Discussed in Part II *infra*. We shall see that as a practical matter the judiciary has gradually converted a part of the homestead provisions into a law of descent, in spite of reluctance to admit the metamorphosis.

⁴Discussed in Part V *infra*.

⁵*E.g.*, the ten-year redemption period granted a homesteader against a Murphy Act purchaser of a tax sale certificate; FLA. STAT. §192.36 (1941), *Golden v. Grady*, 34 So.2d 877 (Fla. 1948) (alternative holding), *Stewart v. Powell*, 158 Fla. 420, 28 So.2d 879 (1947).

as he moves rapidly from one setting to another the same form appears in strikingly different colors. At times, also, separate and distinct chameleons, one of one size and one of another, perch on a single object. Thanks to the early draftsmen in this field, who, if they did not write too well, at least refrained from writing too much, and to a Supreme Court that for decades has shown a high degree of sound common sense and logical consistency in the interpretation of most of the homestead provisions, there exist today definite contours that remain distinguishable amid the camouflage of varying factual situations.

Without purporting to anticipate every conceivable question that might be asked, this article does attempt to delineate the main principles. The sharpest conceptual distinction falls between exemption from forced sale and exemption from taxation; accordingly, Part V of this article deals with the latter. Part I analyzes the steps required for ascertaining the existence of the exemption of homestead realty from forced sale; Part II covers the inurement of this exemption and its influence on the transfer of homestead realty; Part III explains the difference between the realty and personalty exemptions from the standpoint of both forced sale and transfer; and Part IV takes up the procedural aspects of securing exemption, including the troublesome problem of jurisdiction.⁶

ORIGIN AND PURPOSE

Great though our debt is to the common law, the homestead and the extensive body of law that has developed around it are distinctly American. Although the so-called homestead tax exemption as applied to a portion of the assessed valuation of realty is nothing more than a mere residence exclusion,⁷ having no legal connection with family headship and confined to only a few states,⁸ the true homestead exemption from forced sale is a

⁶For convenience the current homestead provisions of the Constitution of the State of Florida are quoted in full at the end of Part III of this article, of which Parts I, II and III are included in this issue. Parts IV and V will follow in the next issue. Footnotes are numbered consecutively throughout the entire article, in the interests of clarity and consistency.

⁷For the term "residence exclusion" the authors are indebted to a former student, Louis W. Wallace, now of the Tampa bar. The tabulation of the laws of other states has been made possible by the research of Mandell Glicksberg, Irvin P. Golden and Mallory E. Horne, of the research staff of U. OF FLA. L. REV.

⁸Less than one fourth of the states, including Florida, permit this exemption; one of these limits it to veterans, while two confine it to state taxes only. Discussion appears in Part V *infra*.

fundamental part of the law in all but four states and the District of Columbia.⁹ In Florida it was introduced in 1868 and has remained with us ever since.¹⁰ The Florida provisions are worded in a manner all their own, and for this reason judicial constructions in other jurisdictions are not of great assistance;¹¹ but in any event a sizable body of Florida statutory and judicial material exists today, supplementing and expounding Article X of our Constitution.

The basic philosophy underlying the exemptions of both homestead realty and homestead personalty from forced sale, and the canons of construction governing interpretation of its constitutional and statutory formulation, were early and well set forth. In the words of Mr. Chief Justice Browne:¹²

“Their obvious purpose is to secure to each family a home and means of livelihood, irrespective of financial misfortune, and beyond the reach of creditors; security of the State from the burden of pau-

⁹Delaware, Maryland, Pennsylvania and Rhode Island allow no exemption of the homestead from forced sale. Indiana, like Florida, provides an exclusion for resident householders, but the amount is \$700 only. Of the states authorizing this exemption, over half limit it to \$2,500 or less. Florida has no valuation limit on property so exempted.

¹⁰The so-called exemption actually comprises several exemptions. The original protection against forced sale was embodied in the three sections of Article IX of the Florida Constitution of 1868. In the Constitution of 1885, adopted by the Convention held in that year and effective January 1, 1887, these provisions were perpetuated, as well as expanded in some respects, in the then six sections of Article X, which is the organic law of today. The 1868 Section 2, which created an additional exemption of \$1,000 in any of his property that the head of a family residing in Florida might select, was dropped. The new Section 2 stated that the exemptions in Section 1 should “inure to the widow and heirs,” in lieu of the 1868 provision that these should merely “accrue to the heirs. . . .”

On November 6, 1934, the basis of Section 7 of Article X, establishing what is generally known as the homestead tax exemption, was added by amendment; and in 1938, by further amendment, Section 7 in its present form was adopted, the exemption to apply “for the year 1939 and thereafter.” The statutory material supplementing the organic law of homesteads is collected chiefly in *FLA. STAT.*, cc. 222 (method of setting apart), 731 (descent), 192, 200 (tax) (1941), as amended and brought up to date periodically.

¹¹This was recognized in the early days of Florida homestead law. *See, e.g.*, *Smith v. Guckenheimer & Sons*, 42 Fla. 1, 12, 36, 27 So. 900, 914, 911 (1900); *McDougall v. Meginniss*, 21 Fla. 362, 369-372 (1885).

¹²*West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 74 Fla. 220, 229, 77 So. 209, 212 (1917), quoting *Hines v. Duncan*, 79 Ala. 112, 114-115 (1885).

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perism, and of the individual citizen from destitution. Such statutes are entitled to a liberal construction”

Again, as Mr. Chief Justice Buford aptly phrased it:¹³

“The purpose of the exemption laws is to prevent the unfortunate citizen, from being deprived of the necessities of life and to preserve for him and his family certain things reasonably necessary to enable him to earn a livelihood and where his livelihood is produced by his personal labor and services to so protect him and his family that such earnings may not be taken from them and they be left destitute and a charge upon charity.”

Mr. Chief Justice Randall, speaking of similar provisions in the Constitution of 1868, said:¹⁴

“The object of exemption laws is to protect people of limited means and their families in the enjoyment of so much property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasion of others.”

He distinguished as follows the lien of a mortgage upon specified property from a blanket waiver:¹⁵

“Few men would mortgage their household goods and their children’s clothes to a hard creditor with the inevitable result brought vividly to their understanding, but many thoughtless and improvident people might be induced to obtain credit by merely ‘waiving the benefit of exemption,’ and thus placing the last blanket and bed and their own and the children’s clothing at the mercy of a hard creditor, if an agreement like this should be sustained.”

A further caveat was succinctly expressed by Mr. Chief Justice Whitfield in *Milton v. Milton*:¹⁶

¹³*Patten Package Co. v. Houser*, 102 Fla. 603, 606, 136 So. 353, 355 (1931).

¹⁴*Carters Adm’rs v. Carter*, 20 Fla. 558, 569 (1884); *cf.* *Patterson v. Taylor*, 15 Fla. 336, 345-347 (1875).

¹⁵*Carters Adm’rs v. Carter*, 20 Fla. 558, 570 (1884).

¹⁶63 Fla. 533, 536, 58 So. 718, 719 (1912).

“Organic and statutory provisions relating to homestead exemptions should be liberally construed in the interest of the family home. But the law should not be so applied as to make it an instrument of fraud or imposition upon creditors.”

A word of explanation is due at this point. The important factor, in borderline situations involving either creation or abandonment of a homestead or debts possibly constituting exceptions to the exemption, is the intent of the homesteader. In the eye of the law, acquisition of homestead status deprives a creditor of nothing; he is presumed to know what the law authorizes, and should insist on a mortgage if in doubt as to the reliability of his debtor.¹⁷ The mere existence of a strong motive, whether it be the desire to obtain credit by holding out as non-homestead property a lot that the debtor intends at the time to occupy later as his residence, or the instinctive urge of a debtor to avoid levy by unsecured creditors if possible,¹⁸ or the natural determination of an intending alienor to avoid restraints arising by virtue of the homestead character of his property,¹⁹ is beside the mark provided there be shown of record the overt acts and the intent requisite to the creation or continuance of a home and a position as head of the family, or the contrary in the case of the intending alienor.

Such a motive is material, however, in reaching a decision as to the true intent of the claimant and the actual existence, at the precise time involved, of those factors essential to the creation or continuance of a homestead exemption, such as ownership of the property in question, residence thereon, headship of the family, a debt that is not within the classes excepted from the protection against forced sale, and absence of any equitable lien. This is amply demonstrated by an examination of what the Supreme Court of Florida and the local federal courts have done in

¹⁷Heddon v. Jones, 115 Fla. 19, 154 So. 891 (1934); Rigby v. Middlebrooks, 102 Fla. 148, 135 So. 563 (1931); see Sneed v. Davis, 135 Fla. 271, 184 So. 865 (1938), and opinions from other jurisdictions quoted with approval therein by a unanimous court.

¹⁸Heddon v. Jones, 115 Fla. 19, 154 So. 891 (1934) (exemption upheld although property was occupied to prevent attachment of judgment lien of creditor who had been led to regard this land as possible asset in event of default); contrast Read v. Leitner, 80 Fla. 574, 86 So. 425 (1920) (dubious claim to exemption sustained), with Murphy v. Farquhar, 39 Fla. 350, 22 So. 681 (1897) (abandonment of homestead found as a fact, primarily because of attempted conveyance to wife as insulation against creditors).

¹⁹Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932).

practice in close cases of various types;²⁰ in these is found the true significance of the statement that the homestead provisions are not to be used as a cloak for fraud and deceit.

A homestead is popularly conceived as a piece of realty or a slice of personalty; but once this has been said, the less the notion is pursued, the better. In the first place, the homestead may be a mere interest in realty. More important still, to the Florida resident—and therefore to his attorney—the significant factor is the homestead exemption. This exemption provides freedom from a particular type of legal process, or of taxation, or of both, accorded to particular legal types of individuals, owning realty within particular dimensions in particular localities or personalty within a particular assessed valuation, or both, under particular sets of conditions, at particular times, as regards particular kinds of debts, and with mandatory provisions for descent of the exemption—not the property—to particular classes of persons.²¹ To arrive at a meaning, or rather at the several meanings, of the term homestead exemption, each of the above components must be analyzed individually.

PART I—EXEMPTION OF HOMESTEAD REALTY FROM FORCED SALE

The steps in ascertaining the existence of the homestead realty exemption²² are these:

1. Is the obligation upon which the attempted forced sale is predicated one that gives rise to any exemption?
2. If so, was the obligor the head of a family?

²⁰E.g., *Crocker v. Crocker*, 51 F.2d 11 (C. C. A. 5th 1931); *In re David*, 54 F.2d 140 (S. D. Fla. 1931); *Parrish v. Robbirds*, 146 Fla. 324, 200 So. 925 (1941); *Bishop v. First Old State Bank*, 142 Fla. 190, 194 So. 488 (1940); *LaMar v. Lechliden*, 135 Fla. 703, 185 So. 833 (1939); *First Nat. Bank of Chipley v. Peel*, 107 Fla. 413, 145 So. 177 (1932); *Bess v. Anderson*, 102 Fla. 1127, 136 So. 898 (1931); *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931); *Anderson Mill and Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588 (1931); *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925); *Semple v. Semple*, 82 Fla. 138, 89 So. 638 (1921); *Rawlins v. Dade Lumber Co.*, 80 Fla. 398, 86 So. 334 (1920); *Pasco v. Harley*, 73 Fla. 819, 75 So. 30 (1917); *C. B. Witt Co. v. Moody*, 72 Fla. 459, 73 So. 582 (1916); *Florida Loan & Trust Co. v. Crabb*, 45 Fla. 306, 33 So. 523 (1903); *Drucker v. Rosenstein*, 19 Fla. 191 (1882).

²¹Descent of the exemption and descent of the homestead realty itself have been confused in several of the opinions; see Part II, 3 *infra*.

²²Throughout Parts I and II the term "exemption," unless otherwise specifically stated, is confined to the exemption from forced sale of homestead realty. In Part III it is limited to the exemption from forced sale of homestead personalty.

3. Did he reside in Florida on the property claimed as exempt?
4. Did he own any estate in such property?
5. Were these factors all in existence at the material time, and what is the physical extent of the property to which the exemption applies?

1. *The Underlying Obligation*

This problem is posed first, because if the underlying obligation be such that it does not fall within the exemption, the final decision can be reached immediately; forced sale is not forbidden. Article X, Section 1, of the Florida Constitution provides:

“. . . no property shall be exempt from sale for taxes or assessments or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same.”

Taxes and Assessments. The matter of taxes and assessments offers little difficulty, inasmuch as the term “taxes” here embraces any tax validly levied and does not contemplate the problem of what can be taxed and to what extent. The wording of Section 1 of Article X raises a doubt as to whether the taxes under consideration embrace all taxes or merely those levied against the homestead property itself. The question was left unanswered by the Supreme Court in *Florida Industrial Commission v. Coleman*,²³ although the chancellor took the latter position below. In any event, Section 1 is in no way modified by Section 7, which, broadly speaking, excludes from all “taxation,” other than assessments for special benefits, a certain amount of the assessed valuation of the realty owned and used as a home by any Florida resident, even though he or she resides alone. Nor is it affected by the exclusion of \$500 of personalty from the taxable base of the head of a family residing in Florida.²⁴ Whenever these limits are passed, the excess is subject to taxation; and forced sale of the homestead will follow unless such tax be paid. Assessments for special benefits apply to homestead and privately owned non-homestead property alike, and forced sale can always be used to collect them.

Purchase Obligations. The exception of purchase obligations is not so clear. While its basis is the obviously fair principle that one cannot, in

²³154 Fla. 744, 18 So.2d 905 (1944). That chancellor is now Mr. Justice Barns. The decree involved personalty and was affirmed on appeal, though on statutory grounds. The cogent reasoning in the decree, which is quoted in the opinion, is believed to express the sound view.

²⁴FLA. CONST. Art. IX, §11.

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the very acquisition of the homestead, secure it in practical effect free from liability for payment, the removal of this type of obligation from the exempted class is strictly construed against the creditor.²⁵ Purchase-money means money directly used in purchasing, and does not extend to refinancing operations after purchase. This issue arose specifically in *Wilhelm v. Locklar*,²⁶ in which the homesteader borrowed cash from a friend, giving his unsecured note in return, and used the cash to pay off at a discount a note originally delivered to cover a part of the purchase price of his homestead. The Supreme Court refused to allow execution against the homestead on the second note, although conceding that payment of the first note could have been so enforced. The following statement of principle was quoted with approval from *Lewton v. Hower*,²⁷ in which a general commingled claim "for work and labor and money expended" in improving the homestead land was denied enforcement by levy thereon:

"An indebtedness for money borrowed to purchase materials, or to pay for labor bestowed in improving lands, or money expended in the purchase of such materials, or in payment for such labor, is not an obligation contracted 'for the erection of improvements,' nor an obligation contracted for such labor, and is not within the exceptions of the constitutional provisions. The contract in such case is to repay money loaned or expended, and not a contract to pay for the erection of improvements, or for labor on the premises.

"The purpose of the exception of 'obligations contracted for the erection of improvements' and for 'labor performed on the same,' so that a homestead is liable for such debts, though not for debts generally, is that those who have furnished the materials and performed the labor may have their remedy upon the property they have in part created and enhanced by the bestowal of their labor and property, and in the absence of any provision giving the lender of moneys, which have been expended upon the property, the benefit of the exception, the courts are powerless to extend it to them."

The purchase money, once advanced, need not be used immediately, however. An elderly woman advanced funds to a young Polish immigrant in New York over a period of years, and also served as his housekeeper,

²⁵See *Citizens State Bank v. Jones*, 100 Fla. 1492, 1495, 131 So. 369, 371 (1930), and cases there cited.

²⁶46 Fla. 575, 35 So. 6 (1903).

²⁷18 Fla. 872, 882 (1882).

under an agreement that he would support her when she became too old to work.²⁸ They moved to Florida, where his business, a tourist camp outside Tampa in which they both resided, was acquired with funds obtained in substantial measure from her, and was maintained through their joint efforts. He later acquired a young wife and an aversion to his elderly benefactor. The Court upheld an equitable lien on his rural homestead in the amount of purchase funds advanced and value of services rendered by Mrs. Sonneman. The use of her funds in acquiring his homestead was "reasonably inferred from the testimony adduced"²⁹ The specific advances of cash occurred prior to the purchase of the tourist camp, while the services were rendered both before and after this date. These two sources of obligation, however, are placed together in the Florida Constitution as exceptions not confronted with the barrier of homestead exemption.

The obligation incurred in purchasing a homestead need not be based on money alone. In *Porter v. Teate*³⁰ the consideration given by Porter in acquiring from Teate 400 acres in Florida was a conveyance to Teate of certain Georgia lands, with full covenants. The title to the Georgia property failed, and Teate obtained judgment in Florida against Porter for breach of the covenants. When Teate bought Porter's 400 acres at execution sale, Porter claimed that 160 acres were exempt as his homestead. The claim was summarily rejected, not only as regards Porter but also as to the third party who had purchased this tract from him for value but with notice. The decision is logical as well as fair; the consideration agreed to as the purchase price was never furnished.

Labor. Obligations arising out of labor performed on the homestead, or out of the erection of improvements on the real estate, or out of repairs made to such improvements, present no serious problems. Indeed, the dearth of cases on these points indicates that the law is well understood. Payment for materials used in constructing or repairing improvements is of course obligatory,³¹ as is payment for labor; but enforcement of repay-

²⁸*Sonneman v. Tuszynski*, 139 Fla. 824, 191 So. 18 (1939).

²⁹*Id.* at 830, 191 So. at 20.

³⁰17 Fla. 813 (1880).

³¹In *Giddens v. Dickenson*, 60 Fla. 320, 53 So. 929 (1910), a carpenter purchased materials on credit, used these to construct a building, then claimed as against the suppliers a homestead personalty exemption of \$1,000 out of the money owed him by the owner of the building. His claim was rejected on the purchase-money theory; his \$1,000 of personalty was in fact created by his obtaining and using the materials.

ment of funds used for such payment runs afoul of the rule in *Lewton v. Hower*.³²

Nearly a quarter of a century ago, however, our Supreme Court nipped in the bud any fond notion that it was going to let this rule get out of hand. The president of a corporation facing bankruptcy fraudulently used over \$500 of its cash to effect substantial repairs to his house; and its trustee in bankruptcy, suing to recover this sum, was met by the claim of homestead exemption.³³ This answer was summarily brushed aside on the ground that this chicanery was no mere contract of loan; as a matter of equity the corporation was deemed to have furnished the materials and labor, in view of its ignorance of the financial transaction.

Partnership Obligations. Our chameleon adopts a different hue when he pauses in the partnership field. In a well-considered dictum an early opinion established in Florida the principle that partnership assets cannot be claimed by an individual partner as his homestead property prior to dissolution.³⁴ In a later case Joseph Platt purchased the entire interest of his brother in their general merchandising business, a co-partnership, in consideration of the payment of \$490 to his brother and the assumption of all of the partnership liabilities.³⁵ Joseph paid the \$490, but was unable to meet all the liabilities. His brother thereupon requested a receiver of the stock of merchandise remaining in Joseph's hands, as well as a declaration subjecting these assets to liability for partnership debts. Joseph claimed \$1,000 of such assets as his homestead exemption. Final decree in favor of his brother was affirmed on the ground that the assumption of the partnership liabilities was an integral part of the purchase price of the brother's interest.

This reasoning applies *a fortiori* against the owner of the home in which the materials are used; e.g., *Anderson Mill and Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588 (1931); *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925). Mere chicken-feed, insecticides, tonics and similar merchandise, however, furnished on credit to a homesteader engaged in the poultry business, are not materials used in the erection or repair of improvements, nor do they constitute labor. *Lamb v. Ralston Purina Co.*, 155 Fla. 638, 21 So.2d 127 (1945).

³²18 Fla. 872 (1882), discussed at p. 19, *supra*.

³³*Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925).

³⁴*See Peck v. Bowden*, 18 Fla. 17, 19-21 (1881).

³⁵*Platt v. Platt*, 50 Fla. 594, 39 So. 536 (1905). Although this case involves the personality exemption, the principle applies to the realty exemption as well.

The same reasoning was applied more recently by a federal court in meeting the same type of claim.³⁶ The partners had dissolved their partnership and partitioned its assets, the consideration from each being assumption of his pro rata share of the liabilities. Each partner then raised the bar of homestead exemption. The maneuver failed.

Lee v. Bradley Fertilizer Co.,³⁷ in which exemption was accorded assets of individuals obtained upon dissolution of their partnership during its insolvency but before judgment against it, does not lessen the force of the foregoing decisions. Counsel for plaintiff, the corporation, committed the tactical error of setting down the matter for hearing on his bill and the amended answer without replication and short of the time allowed for taking testimony, thereby admitting the Lee brothers' allegations of dissolution in good faith based on delivery of valid consideration. The maxim *lex nemini operatur iniquum* was applied, and both the partition and the subsequent acquisition of homestead exemption were accordingly upheld. The decision should not be construed, however, as authority for any substantive rule condoning dissolution and distribution of partnership assets in fraud of creditors.

Growing Crops. Shifting to a somewhat different setting, with our chameleon sitting first on a cotton boll³⁸ and then on a grapefruit³⁹ grown by a tenant, still another concept appears. Growing crops, whether regarded as *fructus naturales* or *fructus industriales*, are a part of the realty unless expressly reserved as between the parties, and accordingly cannot be claimed by the tenant against his landlord as exempt homestead property.

Prior Liens. Once again, our chameleon seems to scamper off—in any event, he cannot be found—when confronted with the prior lien of a validly executed mortgage of either specific realty or specific personalty, or with the prior lien of a judgment at law or a decree in equity, or with a statu-

³⁶*In re David*, 54 F.2d 140 (S. D. Fla. 1931).

³⁷44 Fla. 787, 33 So. 456 (1902).

³⁸*Hodges v. Cooksey*, 33 Fla. 715, 15 So. 549 (1894); *Cathcart v. Turner*, 18 Fla. 837 (1882) (both cases relating to levy by creditors).

³⁹*Adams v. Adams*, 158 Fla. 173, 28 So.2d 254 (1946). Fruit on the tree was declared homestead realty for purpose of descent. The opinion limited *Gentile Bros., Inc. v. Bryan*, 101 Fla. 233, 133 So. 630 (1931), strictly to the decision that homestead fruit, as distinct from the trees, can be mortgaged by the husband alone as personalty to secure payment for fertilizer, spray and insecticides furnished to produce and protect it.

tory lien attaching in spite of the protection of the homestead exemption. Analysis of these matters is pursued in connection with the problem of the material time and also in the discussion of personalty.⁴⁰ As will be shown, the chameleon does not really run away; there was nothing that he could crawl upon in the first place.

Homesteader-Debtor. Finally, a general word of caution regarding the debt itself does not come amiss. Our chameleon always perches on a property interest, but his parents are a homesteader and a debt. Neither alone can give birth to him. To ascertain who owes the debt is just as important as to decide who owns the property. It is basic that the debtor must be a homesteader; otherwise no exemption can possibly arise. This rule causes no confusion during the homesteader's life, because at this stage the elementary principle that the property of one person is not subject to execution in discharging the debt of another is easily applied.

When the homesteader dies and the exemption inures to his widow, however, the picture sometimes becomes blurred. Assuming no lineal descendants, the entire homestead property passes to her under the law of descent;⁴¹ and the exemption still clings to it as regards the debts of her husband,⁴² even though he is no longer in existence. But this exemption does not embrace her debts.⁴³ The property that constituted his homestead is now hers, with the chameleon resting permanently on it; but it is not necessarily her homestead. To free it from subjection to forced sale for her debts a new and different chameleon must be created for her, albeit as to the same property, by her becoming in turn the head of a family residing in Florida.⁴⁴ The question asked about him at the moment he

⁴⁰See Part I, 5 *infra* and Part III *infra*.

⁴¹FLA. STAT. §731.27, 731.23 (Cum. Supp. 1947), discussed in Part II *infra*. For a clear analysis of the principle that homestead property passes pursuant to the statutes governing descent and does not constitute a separate estate created by Article X of the Florida Constitution, see the classic opinion of Taylor, C. J., in *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897), recently cited as the controlling authority in *Nesmith v. Nesmith*, 155 Fla. 823, 21 So.2d 789 (1945).

⁴²FLA. CONST. Art. X. §2, *Raulerson v. Peeples*, 77 Fla. 207, 81 So. 271 (1919).

⁴³See, e.g., the opinion of Whitfield, J., on rehearing in *Seashole v. O'Shields*, 139 Fla. 839, 844, 191 So. 74, 76 (1939).

⁴⁴E.g., *Cowdery v. Herring*, 106 Fla. 567, 143 So. 433 (1932); cf. *DeCottes v. Clarkson*, 43 Fla. 1, 29 So. 442 (1901), applying the same reasoning to the problem of devise and descent; see *Menendez v. Rodriguez*, 106 Fla. 214, 222, 143 So. 223, 226 (1932). A sound analysis of the underlying theory by Brown, J., appears in *Moore v. Price*, 98 Fla. 276, 285, 123 So. 768, 771 (1929).

dies must accordingly be asked again about her as regards her debts. If she later dies as the head of a family the principles of analysis remain the same, but the ultimate result to children receiving his property and hers may be several chameleons at once.⁴⁵

2. *The Head of a Family*

Much of the homestead litigation has centered on the meaning of family headship. The decisions, though numerous, disclose two basic tests, which may be met together or in the alternative: (1) the legal duty to maintain arising out of the family relationship at law, and (2) continuing communal living by at least two individuals under such circumstances that one is recognized as the person in charge. Stated broadly, there must be a family at law, or a family in fact, or both.

In the normal situation of man and wife living together, with or without children, the issue has proved too simple to provoke litigation.⁴⁶ Conversely, divorce of husband from wife, with no dependents in the home, obviously eliminates family headship, there being no family in fact or at law. Even so, however, the inevitable close questions have at times arisen; and the opinions dealing with them are worth analysis.

Mere physical separation of husband and wife by reason of age and financial difficulties does not abolish the family relationship. A homesteader, as he passed eighty, became too old and feeble to care for himself, whereupon his younger and resourceful wife took boarders into his home and paid a third party to care for him properly elsewhere.⁴⁷ The principle involved in the decision, which reversed the dismissal of a bill praying that the executor under the old gentleman's will be enjoined from taking possession of his home, is succinctly set forth in the following passage from the opinion of Mr. Justice Whitfield:⁴⁸

"The homestead was the means of support for both the husband and the wife and the living apart was for mutual welfare, one remaining on the homestead and supporting the other from earnings made on and by the use of the homestead property, which was maintained as

⁴⁵A complicated example of shifting interests in property accompanied by changes in family headship is ably analyzed by Ellis, J., in *Hill v. First Nat. Bank of Marianna*, 73 Fla. 1092, 75 So. 614 (1917).

⁴⁶*Miller v. Finegan*, 26 Fla. 29, 7 So. 140 (1890).

⁴⁷*Nelson v. Hainlin*, 89 Fla. 356, 104 So. 589 (1925).

⁴⁸*Id.* at 359, 104 So. 590.

a home on which the wife lived and to which the husband went as he was disposed and able to do in his enfeebled condition during the last few years of his life, there being amicable relations between the husband and wife at all times."

One might assume that whenever the husband supports the wife on her property the same reasoning applies. The situation is not analogous, however, perhaps because sex rears its lovely head. Her separate property is not his, of course, and accordingly it cannot be his homestead.⁴⁹ But unless she supports the family he is the head; and the fact that the home is on her property,⁵⁰ or that he uses her property to support himself and her,⁵¹ does not alter his status as the head of the family. In a case directly in point,⁵² the wife had obtained the property from her father, and her husband had no equitable interest in it; accordingly the claim of homestead was rejected. The absence of any equitable interest on his part in this type of case is important; if he purchases the property and gives her the legal title, his equitable ownership provides a background on which the homestead chameleon can rest.⁵³

Nevertheless, a woman can be the head of a family for purposes of law, provided the facts substantiate her claim. A widow with dependent children, whether they be adults⁵⁴ or minors,⁵⁵ and a wife supporting an incapacitated husband,⁵⁶ are definitely in such a position. Furthermore, a widower who rears his granddaughter in his home at his own expense, after her mother dies and her father moves away from the grandfather's home, is the head of a family, even though he never formally adopts her.⁵⁷

⁴⁹Nelson v. Franklin, 152 Fla. 694, 12 So.2d 771 (1943).

⁵⁰Jones v. Federal Farm Mtg. Corp., 138 Fla. 65, 188 So. 804 (1939). It is obvious that the rather significant word "not" has been erroneously omitted in printing line 1 of 138 Fla. at 67 and line 13 of 188 So. at 805.

⁵¹C. B. Witt Co. v. Moody, 72 Fla. 459, 73 So. 582 (1916).

⁵²See note 49 *supra*.

⁵³Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So.2d 832 (1946).

⁵⁴Hillsborough Inv. Co. v. Wilcox, 152 Fla. 889, 13 So.2d 448 (1943); Davis v. Miami Beach Bank & Trust Co., 99 Fla. 1282, 128 So. 817 (1930); Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903).

⁵⁵Jetton Lumber Co. v. Hall, 67 Fla. 61, 64 So. 440 (1914); *cf.* Matthews v. Jeacle, 61 Fla. 686, 55 So. 865 (1911); *see* Jones v. Federal Farm Mtg. Corp., 138 Fla. 65, 66, 188 So. 804, 805 (1939).

⁵⁶Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328, *rehearing denied*, 144 Fla. 330, 198 So. 13 (1940).

⁵⁷Adams v. Clark, 48 Fla. 205, 37 So. 734 (1904).

The same result follows as regards a grandmother supporting her grandchildren in her home.⁵⁸ Indeed, even a single man supporting his mother and the children of a deceased sister in his home is the head of the family.⁵⁹

Still greater complications have arisen in connection with alleged families consisting of one elderly parent and an adult child living in the parent's home. Again, the influence of sex has left its mark. In *DeCottes v. Clarkson*,⁶⁰ early in the development of Florida homestead law, it was settled that factual dependency is not the sole legal test of family headship, that children living at home need not be minors or invalids to sustain a claim of headship on the part of their parent, and that a healthy adult female could be a dependent of her elderly mother even though she rendered substantial service in the household. Promptly thereafter this reasoning was slightly extended to uphold the family headship claim of Mrs. Caro,⁶¹ two of whose daughters, Georgia and Florida, acted as nurse, housekeeper and business manager, and earned all except their board by taking in sewing. Both were of age. But they lived in her home and accordingly were members of her family.

*Whidden v. Abbott*⁶² raised a similar issue as regards a son, an impoverished preacher of the gospel with a wife and four children. Upon the death of his mother he returned to live with his father in the family home after an absence of seventeen years. Although he testified that he considered his father the head of the family, the Supreme Court found a mere "arrangement for the mutual benefit of all parties concerned";⁶³ the father's claim of homestead was rejected. Within a few months this principle was applied in *Dania Bank v. Wilson & Toomer Fertilizer Co.*⁶⁴ The allegation of the father that he ran the business in which he and his son were engaged, as distinct from the home, was quite properly brushed aside as immaterial. The Supreme Court, in directing reversal of a decree exempting the alleged homestead from levy, emphasized the lack of "clear and convincing evidence" that the son had "abdicated the position as head of the family which the law cast upon him,"⁶⁵ even though all of the individuals concerned lived in his father's home.

⁵⁸Hill v. First Nat. Bank of Marianna, 73 Fla. 1092, 75 So. 614 (1917).

⁵⁹*Ibid.*

⁶⁰43 Fla. 1, 29 So. 442 (1901).

⁶¹Caro v. Caro, 45 Fla. 203, 34 So. 309 (1903).

⁶²124 Fla. 293, 168 So. 253 (1936).

⁶³*Id.* at 295, 168 So. at 254.

⁶⁴127 Fla. 45, 172 So. 476 (1937).

⁶⁵*Id.* at 52, 172 So. at 480.

Some two years later, however, the opposite conclusion was reached in *Cumberland & Liberty Mills v. Keggin*.⁶⁶ The vital distinction was said to lie in the fact that the son brought his wife to his father's home, in which he was already living when he married her, and in which they both remained until the father's death. This time the emphasis was placed on "the absence of a showing that the father and the married son did not regard the son and his family, while they lived on the father's homestead with him, as being of the family of the father . . ."⁶⁷

The lines of reasoning in the *Dania Bank* and *Cumberland* cases are difficult to reconcile. Mere continuity of residence with the father is indeed a slender reed.⁶⁸ The gist of the problem in every instance is not whether the owner of the property was formerly the head of a family, or whether he may perhaps become one later, but simply whether he is the head of a family at the time a lien attaches, or upon his death, as the case may be. In the *Dania Bank* case, the son's headship of his own family was presumed in the absence of convincing evidence to the contrary. Yet in the *Cumberland* case the presumption was just the opposite. With the authorities in this unhappy state, the principle of law applicable in borderline cases involving a determination of headship as between an adult male child, as distinct from a female, and an elderly parent, is anybody's guess. In its other aspects, however, the law as to headship is reasonably clear.

One further case should be mentioned in this connection.⁶⁹ A dutiful son acquired title to certain property while judgments were outstanding against him, after having supported his dependent parents on a separate parcel of property for several years. Subsequently he married. His claim of homestead was denied by a divided court. Although one may feel reluctant to approve the decision, it does follow the law. His marriage could not operate to defeat an existing lien. The obligation to support his parents was moral, not legal. And since he did not live with them, there was no family in fact.

⁶⁶139 Fla. 133, 190 So. 492 (1939).

⁶⁷*Id.* at 136, 190 So. at 493.

⁶⁸The absence of any evidence pointing to abandonment of his position as head of his own family by a son returning to live with and care for his aged and infirm mother, upon the death of her husband, was mentioned in *Shambow v. Shambow*, 153 Fla. 760, 15 So.2d 836 (1943); the facts obviously warranted the chancellor's finding that the mother was not the family head. Probably it is significant that this case involved a son rather than a daughter.

⁶⁹*Morehead v. Yongue*, 134 Fla. 135, 183 So. 804 (1938) (two justices dissenting).

The problem of dispersal of the family is but another aspect of the preceding discussion. The principle in itself is simple: no family, no head. That there once was a family is immaterial. The homestead provisions are designed to protect the family, not the aged. Regardless of how harsh the policy may seem, the law insists that an elderly parent, when left alone at the end of his span, is no longer entitled to the homestead exemption. Perhaps filial affection may effectively counteract the callous philosophy that an aged parent has served his purpose and is expendable, but the homestead provisions are of no assistance on this score. The issue was clearly raised and settled with finality at the turn of the century in *Herrin v. Brown*.⁷⁰

Legal separation of husband and wife, either when childless or after departure of their children to establish homes of their own, destroys the family.⁷¹ A question that might at first blush appear difficult is presented by divorce resulting in award of custody of the minor child to the mother. The family is dispersed in fact, yet the father nevertheless remains under a duty at law to support the child. The matter has been unanimously and logically decided; the father is still the head of the family for homestead purposes.⁷²

In instances of desertion the line is a thin one, but it has nonetheless been ably drawn. The husband retains his family headship even though the wife leaves him for reasons of cruelty and with her small daughter remains absent for ten years, provided she does not establish a domicile elsewhere and is privileged to return home at will.⁷³ If, however, the wife leaves her husband with an expressed intent not to return, removes to another city with her belongings, and engages counsel to procure a divorce, the family relationship is terminated in the absence of dependent children, and she cannot claim his property under the law of homestead.⁷⁴ The Supreme Court moted the "dearth of evidence" in the record to sub-

⁷⁰44 Fla. 782, 33 So. 522 (1902) (father left alone); *accord*, *Matthews v. Jeacle*, 61 Fla. 686, 55 So. 865 (1911) (mother left alone); *Jordan v. Jordan*, 100 Fla. 1586, 132 So. 466 (1931) (both left alone upon their separation after departure of adult children).

⁷¹*Miller v. West Palm Beach Atl. Nat. Bank*, 142 Fla. 22, 194 So. 230 (1940); *Jordan v. Jordan*, *supra* note 70. In the *Miller* case even a subsequent reconciliation following several months of living apart was held not to abrogate an executed contract, specifically a settlement by deed of property formerly homestead, executed by the husband alone to his wife.

⁷²*Osceola Fertilizer Co. v. Sauls*, 98 Fla. 339, 123 So. 780 (1929).

⁷³*O'Neal v. Miller*, 143 Fla. 171, 196 So. 478 (1940).

⁷⁴*Barlow v. Barlow*, 156 Fla. 458, 23 So.2d 723 (1945).

stantiate the "cruel treatment" alleged by her in this case.⁷⁵ Whether the decision be based on her establishment of a separate domicile or on reasoning similar to that which evoked the time-honored Statute of Westminster II⁷⁶ penalizing an adulterous and deserting wife with loss of all dower rights, the conclusion is not illogical and is obviously sound as a matter of policy.

Desertion by the husband does not render his wife the head of a family unless she supports dependents residing with her.⁷⁷ Does he remain the head of the family, however? If he establishes his domicile outside Florida, he is ipso facto no longer a resident, of course. And if he sets up his residence elsewhere within Florida, he cannot claim his former residence. Furthermore, during whatever time he lives apart he has no family in fact. The duty to support any children he may have remains, nevertheless, and so does his duty to maintain his wife until the chancellor decides otherwise. On principle, and by analogy to *Osceola Fertilizer Co. v. Sauls*,⁷⁸ he should be regarded as the head of the family if he in fact contributes to the support of any of its other members.

As a matter of strict logic the same reasoning would leave him as the head on the basis of legal duty alone; but, as a means of furthering the protection of the family from destitution by granting exemption, the inducement to contribute after desertion must be weighed against the wholesome deterring effect of realization on the part of a husband toying with such an idea that the chameleon rides in his pocket and disappears when he does. Of course, when there are children and the wife is in fact forced to support them, there is no valid reason why he should have an exemption in addition to hers; and furthermore, there cannot be two heads at any one time.⁷⁹ This rules out his exemption, it is submitted.

3. Residence in Florida on Property Claimed as Exempt

The mere establishment of family headship will not alone confer rights of exemption. The claimant must have a permanent residence, and it

⁷⁵*Id.* at 460, 23 So.2d at 724.

⁷⁶13 EDW. I, c. 34 (1285); *cf.* FLA. STAT. §65.08 (Cum. Supp. 1947), proscribing alimony award to adulterous wife, *Malby v. Malby*, 142 Fla. 656, 195 So. 601 (1940).

⁷⁷*Contrast In re Hallbauer*, 280 Fed. 118 (S. D. Fla. 1921) (no children) *with Jetton Lumber Co. v. Hall*, 67 Fla. 61, 64 So. 440 (1914) (children left dependent on deserted wife).

⁷⁸See note 72 *supra*.

⁷⁹See *Johns v. Bowden*, 68 Fla. 32, 45, 66 So. 155, 159 (1914).

must be in Florida.⁸⁰ Elementary though this may sound, one must never lose sight of the concept "home" in "homestead." What "home" connotes to the layman, the terms "domicile," "permanent residence" or "principal residence" denote to the lawyer.

It is fundamental that an individual can have only one domicile, or permanent residence, at any one time—at least for the same purpose within the same jurisdiction⁸¹—and accordingly a decision by the Florida judiciary that his domicile is at one particular location automatically forecloses every other as far as the law of Florida is concerned. This determination is a conclusion of fact, and the relevant factors are those considered in settling the issue of domicile for any other purpose. Citizenship may well have some slight bearing on the matter, but it is by no means conclusive.⁸² Nor is it prescribed by law.⁸³

Whether the question be one of residence within or without the State of Florida, or one of principal or permanent residence as between two or more locations within Florida, the usual indicia such as the situs of the claimant for purposes of taxation, his voting precinct, his physical presence during the major portion of the period involved, his formal declarations and informal statements, the actual location of his family, his participation in local politics, his club memberships, the situs of the major portion of his belongings, his telephone and mailing address, and the location of his business, his bank account and his safe deposit box, are all relevant.⁸⁴

Assuming the permanent residence of the claimant to be Florida, what of the phrase "head of a family residing in Florida"?⁸⁵ Fortunately,

⁸⁰FLA. CONST. Art. X, §1, Post v. Bird.); see, e.g., Williamson v. Osenton, 232 U.

⁸¹1 BEALE, CONFLICT OF LAWS 123 (1935 Dorrance's Estate, 115 N. J. Eq. 268, 170 S. 619, 625 (1914) (per Holmes, J.); *In re* v. Wurtz, 53 N. Y. 556, 561 (1873). Atl. 601 (Prerog. Ct. 1934) *passim*; DupuyA. 5th 1931).

⁸²Crocker v. Crocker, 51 F.2d 11 (C. C. in Florida as a prerequisite to homestead

⁸³Citizenship never has been prescribed ally included in the 1934 amendment creating exemption from forced sale. It was specific *Steuart v. State ex rel. Dolcimascolo*, 119 Fla. 117, 161 So. 378 (1935), but it was deleted in the current amendment adopted in 1938.

⁸⁴On the question of the factors considered in establishing domicile, see the excellent analyses by Hutcheson, Circ. J., in *Crocker v. Crocker*, 51 F.2d 11 (C. C. A. 5th 1931), and by Chapman, J., in *Miller v. Nelson*, 35 So.2d 288 (Fla. 1948), as well as those in *Smith v. Croom*, 7 Fla. 81 (1857), and *In re Dorrance's Estate*, 115 N. J. Eq. 268, 170 Atl. 601 (Prerog. Ct. 1934), *aff'd mem. sub nom.* Dorrance v. Martin, 13 N. J. Misc. 168, 176 Atl. 902 (Sup. Ct. 1935), 116 N. J. L. 362, 184 Atl. 743 (Ct. Err. & App. 1936), *cert. denied*, 298 U. S. 678 (1936), *rehearing denied*, 298 U. S. 692 (1936).

⁸⁵FLA. CONST. Art. X, §1.

although this expression is hardly a model of linguistic accuracy, confusion can seldom arise as a practical matter. Normally the permanent residence of a man's family is his residence, even though some or all of his family may leave the home temporarily. The absence may be prolonged, but *O'Neal v. Miller*⁸⁶ demonstrates that if he is a Florida resident and the family relationship continues legally, then the homestead requirements are met. Assume, however, that he resides outside Florida and his family establishes a separate domicile here. Grammatically, there is a "family residing in Florida," although its head is not a resident. It is submitted that on principle he is not entitled to a homestead exemption as regards his Florida property. If he resides permanently elsewhere, the house here is not his "home"; either the permanent residence of the family is his foreign domicile, or there are two separate domiciles, with the result in either event that the husband himself is not the head of a family residing in Florida.

4. Ownership of the Estate in Question

Family headship and Florida residence do not alone establish exemption. The interest claimed as homestead must be owned by the claimant, or in other words headship and ownership must be joined in one individual. When the husband is the head and the property is his, no question arises. The determination is equally simple when the wife supports him on her property. If he is old enough, or clever enough, to induce her to support him on his property, he may still remain the head in the eye of the law;⁸⁷ but if he supports her on her property there can be no homestead exemption, because he is the head and yet she is the owner.⁸⁸ The same reasoning applies as between parent and child.⁸⁹ The problems involved in partnerships have already been discussed.⁹⁰

Since there can be only one head of a family, it follows as a corollary that there can be only one homestead per family. It also follows that there may on occasion be no homestead at all, as we have noted in the preceding paragraph, even though a family does exist.

⁸⁶143 Fla. 171, 196 So. 478 (1940).

⁸⁷See note 47 *supra*.

⁸⁸*Nelson v. Franklin*, 152 Fla. 694, 12 So.2d 771 (1943); *C. B. Witt Co. v. Moody*, 72 Fla. 459, 73 So. 582 (1916); see *Semple v. Semple*, 82 Fla. 138, 148, 89 So. 638, 641 (1921).

⁸⁹See notes 62, 66, 68, 69 *supra*.

⁹⁰See text *supra* p. 21.

Property is, of course, the background on which our homestead chameleon lies, and accordingly the nature of the property interest is an important consideration. The meaning of the term "homestead" connoted by the words "to the extent of one hundred and sixty acres of *land*, or the half of one acre within the limits of any incorporated city or town, *owned*"⁹¹ is misleading without an analysis of the relevant decisions. The mind of a lawyer naturally turns to fee simple when ownership of land is mentioned. This is the wrong turn, however, in analyzing the homestead exemption.

The "homestead" to which the exemption applies is an estate, and this may be less than the fee simple. It may consist of the equitable or beneficial ownership of the physical property,⁹² or an undivided one-half interest,⁹³ or a one-fourth interest as coparcener,⁹⁴ or a one-third interest as tenant in common,⁹⁵ or mere possession either as licensee⁹⁶ or without objection on the part of the legal owner,⁹⁷ or the equity of redemption that a deserted wife supporting minor children has in two encumbered business automobiles abandoned by her absconding husband, an interest in personalty that the Supreme Court found without describing.⁹⁸ Mr. Justice Terrell, speaking of realty, recently summarized the law in his statement that "a homestead exemption extends to any right or interest the head of a family may hold in land."⁹⁹

In addition to the foregoing interests in property, the law of Florida furnishes a rather unusual perch for our chameleon in the form of an es-

⁹¹FLA. CONST. Art. X, §1 (italics supplied).

⁹²Beall v. Pinckney, 150 F.2d 467 (C. C. A. 5th 1945); Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So.2d 832 (1946).

⁹³Morgan v. Bailey, 90 Fla. 47, 105 So. 143 (1925).

⁹⁴Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912).

⁹⁵Hill v. First Nat. Bank of Marianna, 73 Fla. 1092, 75 So. 614 (1917).

⁹⁶Anderson Mill and Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931). FLA. STAT. §222.05 (1941) authorizes exemption of a house owned and occupied as one's home though located on property not owned but merely lawfully possessed.

⁹⁷Hill v. First Nat. Bank of Marianna, 73 Fla. 1092, 75 So. 614 (1917).

⁹⁸Jetton Lumber Co. v. Hall, 67 Fla. 61, 64 So. 440 (1914) (precise type of interest of wife doubtful in view of express refusal to base decision on title to automobile in wife; with title in husband, her interest is limited to mere right of possession, since she did not claim on basis of his family headship but rather on hers); see Pasco v. Harley, 73 Fla. 819, 829, 75 So. 30, 34 (1917).

⁹⁹Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 39, 27 So.2d 832, 833 (1946); cf. Miller v. Finegan, 26 Fla. 29, 7 So. 140 (1890).

tate by the entirety.¹⁰⁰ Such property cannot be sold to pay the separate debts of either spouse while they are both living,¹⁰¹ nor does any interest or right of the deceased spouse remain to be levied upon when

¹⁰⁰On the nature in general of the Florida tenancy by the entirety see Note, 1 U. OF FLA. L. REV. 433 (1948), as well as the helpful summaries by Sibley, *Circ. J.*, in *Sheldon v. Waters*, 168 F.2d 483, 484 (C. C. A. 5th 1948), and by Whitfield, *J.*, in *Newman v. Equitable Life Assurance Soc'y*, 119 Fla. 641, 160 So. 745 (1935), and in *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925). This latter case and *Dodson v. National Title Ins. Co.*, 31 So.2d 402 (Fla. 1947), affirm the possibility of a tenancy by the entirety in personalty as well as realty. Further concise analysis is found in the opinion of Thomas, *J.*, in *Andrews v. Andrews*, 155 Fla. 654, 21 So.2d 205 (1945), holding that a wife cannot acquire title in herself alone by purchasing, at tax sale following delinquency, realty held by herself and husband as tenants by the entirety. More specifically, FLA. STAT. §689.11 (Cum. Supp. 1947), authorizing conveyance of real estate from either spouse direct to the other, cannot constitutionally embrace homesteads because of FLA. CONST. Art. X, §4, *Estep v. Herring*, 154 Fla. 653, 18 So.2d 683 (1944); *Jahn v. Purvis*, 145 Fla. 354, 199 So. 340 (1940).

The interest of the husband in non-homestead property held by the entireties can be released to his wife, however, for the reasons ably set forth by Buford, *J.*, in *Hunt v. Covington*, 145 Fla. 706, 200 So. 76 (1941). Divorce automatically renders the two spouses tenants in common, FLA. STAT. §689.15 (1941), *Markland v. Markland*, 155 Fla. 629, 21 So.2d 145 (1945), following *Strauss v. Strauss*, 148 Fla. 23, 3 So.2d 727 (1941); therefore a deed from husband to wife of his interest in entirety property is valid if placed in escrow and not delivered until after grant of divorce, at which time he is a mere tenant in common; and, even though they have minor children at the time, such a deed may properly embrace the former family home, as *Weigel v. Wiener*, 149 Fla. 231, 5 So.2d 447 (1947), holds; *accord*, *Moore v. Hunter*, 153 Fla. 158, 13 So.2d 909 (1943) (homestead owned by man alone and conveyed to ex-wife though he had lineal descendants).

Can a wife release her interest in homestead entirety property to her husband prior to divorce, provided he is the family head? With no lineal descendants, no one else has any interest in the matter until both spouses die. Assuming lineal descendants, however, he as family head still cannot alienate without her joinder; and as a practical matter expectancies by survivorship, previously impossible, are created in these descendants upon vesting of the whole homestead property interest in him alone. From a strictly legalistic standpoint, she cannot be the head while he is; and what she releases vests in her husband as an incidence of the original title. It is not homestead property; rather it is her non-homestead share of the usufruct of what is homestead property by virtue of his interest therein. For a related analysis see the opinion of Whitfield, *C. J.*, in *Newman v. Equitable Life Assurance Soc'y*, 119 Fla. 641, 160 So. 745, 748 (1935).

¹⁰¹*Richardson v. Grill*, 138 Fla. 787, 190 So. 255 (1939); *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 So. 376 (1920).

he or she dies.¹⁰² Up to this point there is no need for the protection of the homestead exemption. A joint debt, however, can be collected by levying on property held by the two as tenants by the entirety,¹⁰³ and in such instances the homestead exemption becomes vital.

To be sure, the incidence of survivorship in joint tenancies exists today in Florida, if, and only if, provided for expressly in the instrument creating the estate;¹⁰⁴ but in the venerable common-law fusion of two physical persons into one legal person known as a tenancy by the entirety the whole title continues in the remaining spouse as an incidence of the original title.¹⁰⁵ The essence of this estate is ownership *per tout et non per my*; in other words, neither the husband nor the wife owns the property, but rather a single legal person consisting of both husband and wife is the owner.¹⁰⁶ At the same time, it is obvious that this legal unit cannot be the head of a family, nor can both the husband and the wife, if regarded as two distinct persons, be the head at any one time. Logically, therefore, it might be argued that the true owner of the property as a matter of law cannot be the head of a family, and that accordingly there can be no homestead exemption.

Our Supreme Court met this cerebral legerdemain in sound practical fashion. To accept such a contention would deny the homestead exemption to all families cursed with an estate by the entirety. On the other hand, to deny to the surviving spouse title to the whole homestead estate held at the death of the other spouse by the two spouses as tenants by the entirety would crack a pillar of Florida property law. Our bench has accordingly established two definite principles: the surviving spouse takes all upon the death of the other,¹⁰⁷ but the exemption from forced sale

¹⁰²See, e.g., *Ohio Butterine Co. v. Hargrave*, *supra* note 101; *English v. English*, 66 Fla. 427, 431, 63 So. 822, 823 (1913).

¹⁰³E.g., *Stanley v. Powers*, 123 Fla. 359, 166 So. 843 (1936).

¹⁰⁴FLA. STAT. §689.15 (1941); see *Kozacik v. Kozacik*, 157 Fla. 597, 601, 26 So.2d 659, 661 (1946).

¹⁰⁵E.g., *Palm Beach Estates v. Croker*, 106 Fla. 617, 632, 143 So. 792, 797 (1932). At times language will be found implying that the interest of the deceased spouse in tenancies by the entirety passes by survivorship; see, e.g., *Coleman v. Williams*, 146 Fla. 45, 47, 200 So. 207, 208 (1941). In a physical sense this is true; the fact that one spouse dies and the other survives results in full title in the survivor. But such phraseology is misleading to a lawyer. In a legal sense the resultant full title is not produced by survivorship, but rather as an incidence of the original title in this unique type of estate.

¹⁰⁶See note 100 *supra*.

¹⁰⁷*Knapp v. Fredricksen*, 148 Fla. 311, 4 So.2d 251 (1941); *Coleman v. Williams*,

attaches as a shield by virtue of the property interest of the spouse serving as head of the family during his or her life.¹⁰⁸ This result is not merely practical; it is also logical, once one admits that the protected homestead interest need not be so extensive as sole ownership in fee.

To go a step further in analysis, when the head of the family dies, an estate held by the two spouses as tenants by the entirety remains free from liability for the debts of the decedent, not because his exemption passes but rather because property of another, namely, the surviving spouse, cannot be sold to pay his separate debts. Similarly, from the standpoint of descent, the survivor takes the entire estate immediately and automatically by operation of law, and the heirs do not acquire any interest or expectancy to which an exemption can attach.

5. *The Material Time and the Physical Extent*

Time may or may not be of the essence in contracts, but it is always of the essence in the matter of homestead exemptions. Catch phrases such as "once a homestead, always a homestead" are best forgotten; they constitute the exception rather than the rule.

Attachment of Lien. Subject to the specifically favored classes of obligations previously detailed,¹⁰⁹ which are always protected by the remedy of forced sale, unsecured debts are not recoverable by levy on the homestead. Neither are secured debts in many instances. The material time is that of attachment of lien: if the lien precedes the establishment of the homestead, forced sale is permitted; if the establishment of the homestead is prior and the homestead status has not ceased by the time the lien attaches, then forced sale is barred.¹¹⁰

Although detailed discussion of attachment and enforcement of liens in general is beyond the scope of this article, a judgment at law or a

¹⁰⁶ Fla. 45, 200 So. 207 (1941); *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932). The dictum, purporting to summarize the *Menendez* holding, appearing in the Knapp opinion at 148 Fla. 315, 4 So.2d 252, to the effect that "the homestead status continued to exist and inure to the surviving wife," is not only a patent misstatement of the decision and opinions but is contrary to the basic characteristic of an estate by the entirety.

¹⁰⁸ *Harkins v. Holt*, 124 Fla. 774, 778, 169 So. 481, 482 (1936) (decision on cross-assignment of error by appellee).

¹⁰⁹ See Part I, 1 *supra*.

¹¹⁰ Contrast, e.g., *Pasco v. Harley*, 73 Fla. 819, 75 So. 30 (1917) (lien did attach) with *Milton v. Milton*, 63 Fla. 533, 58 So. 718 (1912) (lien did not attach).

decree in equity rendered on or after June 5, 1939, does not in itself create a lien; the lien attaches upon recordation and extends to all land of the judgment debtor in each county in which the judgment is recorded.¹¹¹ Judgments or decrees of Florida circuit courts rendered prior to this date, however, became upon their mere entry a lien on all property located within the county in which such judgment was rendered,¹¹² and elsewhere by recordation. This applies to judgments of federal courts as well as to those rendered by Florida courts.¹¹³ A creditor's bill in chancery, when properly used as an ancillary remedial measure to reach equitable interests in conjunction with an action at law already instituted,¹¹⁴ is useful in that the lien attaches as of the date of filing the bill.¹¹⁵ Attachment is also helpful; the lien dates from the attachment.¹¹⁶

Judgments or decrees obtained merely to enforce liens based on contract or mortgage, however, are not limited by the provisions of the recordation statute; it was enacted to govern solely the establishment of liens, as distinct from judicial enforcement of those already in existence.¹¹⁷ Seventy-five years ago decrees authorizing foreclosure by mortgagees were directed on appeal both as to personalty and later as to realty¹¹⁸ on the

¹¹¹FLA. STAT. §§55.10, 28.21(11) (1941); *cf.* *Giddens v. McFarlan*, 152 Fla. 281, 10 So.2d 807 (1943). The judgment lien does not, however, extend to property unrelated to the liability and to which the debtor holds mere legal title while a third party not estopped is the beneficial owner. *Michaels v. Albert Pick & Co.*, 158 Fla. 877, 30 So.2d 498 (1947).

¹¹²FLA. STAT. §55.08 (1941).

¹¹³*B. A. Lott, Inc. v. Padgett*, 153 Fla. 304, 14 So.2d 667 (1943); *cf.* FLA. STAT. §28.21(11) (1941).

¹¹⁴FLA. STAT. §62.37 (1941); *cf.* the succinct analyses of a creditor's bill in Florida by Strum, J., *In re Porter*, 3 F. Supp. 582 (S. D. Fla. 1933), by Brown, J., in *Riesen v. Maryland Casualty Co.*, 153 Fla. 205, 14 So.2d 197 (1943), and by Davis, J., in *B. L. E. Realty Corp. v. Mary Williams Co.*, 101 Fla. 254, 134 So. 47 (1931).

¹¹⁵*Bessemer Properties, Inc. v. Gamble*, 158 Fla. 38, 27 So.2d 832 (1946); *Second Nat. Bank of Washington v. Richter*, 110 Fla. 237, 148 So. 517 (1933); *First Nat. Bank of Chipley v. Peel*, 107 Fla. 413, 145 So. 177 (1933).

¹¹⁶*See Heddon v. Jones*, 115 Fla. 19, 20, 21, 154 So. 891, 892 (1934); *cf.* FLA. STAT., c. 76 (1941), *re* attachment generally.

¹¹⁷*Nassau Realty Co. v. Jacksonville*, 144 Fla. 754, 198 So. 581 (1940). For a clear-cut delineation of the distinctions between judgment liens and mortgage liens see the discussion by Thomas J., in *Gilpen v. Bower*, 152 Fla. 733, 735, 12 So.2d 884, 885 (1943). The problems raised by these liens when the debtor dies are discussed in *Wilson and McGehee, Probate Claims in Florida*, 1 U. OF FLA. L. REV. 1, 8-11 (1948).

¹¹⁸*Patterson v. Taylor*, 15 Fla. 336 (1875) (personalty); *Hart v. Sanderson's Adm'rs*, 18 Fla. 103 (1881) (realty).

ground that this did not constitute a "forced sale" proscribed by the 1868 homestead article;¹¹⁹ and this principle of law has never been seriously questioned by the courts since then. The date of attachment of the mortgage lien, and not the date of foreclosure, is the material time.

Establishment of Homestead Status. This date of lien does not of itself solve the problem, however; it must be checked against the date of creation of homestead status. This latter involves two things: assumption of headship of a family, and acquisition of an estate. Neither is sufficient by itself. The gay bachelor or allegedly morose spinster without dependents, and the plodding family man without a home, must all pay their debts.

Furthermore, the mere presence of these two prerequisites at some one time is not conclusive. They must exist at that precise moment when the exemption is alleged to apply. In short, one or more of the characteristics essential to the existence of a homestead may have appeared and vanished. As has been noted previously, the homesteader may have ceased to be the head of a family, or he may have moved to a location outside Florida, or his interest in an estate by the entirety may have been terminated by his death.¹²⁰

Physical Abandonment. The foregoing factors are not the only ones to be considered. A homestead can be physically abandoned. In the simplest instance, a man owning two separate pieces of property in Florida may move from one to the other. Obviously he cannot have two homes, in the required sense of permanent residence, at the same time in the same jurisdiction. In establishing the second residence he loses the first. He may do precisely this unwittingly.

One Farquhar and his wife acquired a parcel of country land, onto which he moved with his wife; and within a few months he attempted to convey it to her by deed from him alone.¹²¹ After residing there for three years he joined her in conducting a grocery business in a two-story building owned by her separately and located some two and a half miles away. Throughout the ensuing five years they lived in furnished rooms above the store, although they visited the other property frequently on week-ends, taking their provisions with them. The evidence was found to establish the inference that these visits "were of about the same frequency and

¹¹⁹FLA. CONST. Art. IX, §1 (1868), carried over in 1885 as FLA. CONST. Art. X, §1.

¹²⁰See pp. 24 *et seq.*, 29 *et seq.*, and 32 *et seq.*, *supra*.

¹²¹Murphy v. Farquhar, 39 Fla. 350, 22 So. 681 (1897).

character as any one would ordinarily make for the purpose simply of looking after" such property.¹²² The Farquhars furnished the store property as a home, and even took in boarders. Meanwhile the community in which the store was located was incorporated as the town of Tarpon Springs. Farquhar participated in organizing the municipality, voted as a resident, and served as town marshal.

The country lot was sold to satisfy a judgment, and the Farquhars filed a bill requesting that the deed be set aside and their homestead rights upheld. In directing dismissal of the bill the Supreme Court stressed two facts prompting reversal of the decree below: the attempt to convey the property to Mrs. Farquhar, indicating an opinion by her husband that the property would in fact be abandoned and would accordingly no longer be protected as his home after the two moved into the store; and his participation in public affairs, including voting, in Tarpon Springs.

On facts strikingly similar, the same conclusion was later reached in *McGregor v. Kellum*.¹²³ Conveyance of an alleged homestead by the husband alone direct to his wife was sustained in *Rawlins v. Dade Lumber Co.*¹²⁴ The opinion of the majority gets into difficulties in attempting to uphold such a conveyance, merely on the ground that there were no

¹²²*Id.* at 359, 22 So. at 684.

¹²³50 Fla. 581, 39 So. 697 (1905). The opinion, by Cockrell, J., illustrates in a brief statement at 584-585, 39 So. at 698, a recurring type of evidentiary factual situation establishing the conclusion of fact termed abandonment:

"It is shown conclusively that Dr. James Kellum lived for ten years or more with his wife and children on the property, cultivating with little success a small grove, but was persuaded in 1886 to move to the town of Fort Myers where the greater population would enable him to utilize his profession, that of a practicing physician, to greater advantage; that he remained at Fort Myers continuously with his family until his death in 1890, and was there buried with his wife whose death preceded his a year or more; that he left a portion of his household goods at the old place, but these were all moved to Fort Myers in 1888, after a fire had destroyed an outhouse; that he made some attempt to keep up the orange grove for about two years, when all attempts were abandoned, and the only attention paid to the place was the voluntary act of a neighbor who occasionally went over there to secure some slight fire protection, and that during the four years and more intervening the move to Fort Myers and the mortgagor's death neither he nor any member of his family ever saw the old place. On the contrary, he entered at once into the active life of the town, remained there continuously, maintained himself and family by the practice of his profession there, and took an unusual amount of interest in its public affairs and local politics."

¹²⁴80 Fla. 398, 86 So. 334 (1920).

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children, when faced with the express prohibition in Section 1 of Article X of the Florida Constitution. The decision is obviously sound, however; before executing the deed Rawlins left his wife and the homestead property with the intention of living elsewhere permanently. He carried out this intent; and a suit for divorce, ultimately successful, was pending at the time of conveyance. The record, considered on the whole, establishes abandonment.

In a fairly recent case,¹²⁵ on the other hand, the claim of homestead was sustained against a creditor alleging abandonment. The record contained the testimony of numerous witnesses that "in passing or visiting . . . some member of the family would be seen about the Marshall home."¹²⁶ At certain times of the year Marshall spent the major portion of each week in Jefferson County managing and directing operations on a large farm owned by a Florida corporation of which he was president and his wife the sole stockholder. During such period his wife accompanied him and they lived in an old house on the farm; his children remained in the city. Marshall voted in Orlando and took an active part in local politics. Said the Court:¹²⁷

"Common necessity frequently requires the bread earner to labor away from his family and home so as to sustain dependents . . ."

Temporary absence of the head of the family for reasons of business, health or pleasure does not constitute abandonment.¹²⁸ Determination as to abandonment, like ascertainment of the establishment of a homestead, is a conclusion of fact logically inseparable from the concept of domicile; and no single evidentiary fact is decisive. Indeed, in *Read v. Leitner*¹²⁹ the rural homestead did not lose its character even though the owner voted for a time in the city; voting residence, while highly persuasive, is not conclusive. The principle is set forth with customary thoroughness by Mr. Justice Whitfield, speaking for a unanimous court:¹³⁰

"The Constitution does not expressly require the owner of a home-

¹²⁵*United States Fidelity & Guaranty Co. v. Marshall*, 148 Fla. 286, 4 So.2d 337 (1941).

¹²⁶*Id.* at 291, 4 So.2d at 338.

¹²⁷*Id.* at 292, 4 So.2d at 339.

¹²⁸*See Lanier v. Lanier*, 95 Fla. 522, 525, 116 So. 867, 868 (1928).

¹²⁹80 Fla. 574, 86 So. 425 (1920).

¹³⁰*Id.* at 577, 86 So. at 426.

stead or his family to occupy the home place that may be exempt from forced sale, but the word 'homestead' implies occupancy as the home place, though having once in good faith been occupied as the home place, it is not essential that the occupancy should be continuous, provided the intent to return to it as the homestead continues, and the absence therefrom is reasonably shown to be for the temporary benefit of the family. Having once occupied the place as a homestead, the period of absence and the use of the place must be consistent with a bona fide intent to return and with the purpose of the absence, all the relevant circumstances being evidentiary in determining each case on its merits."

Functional Abandonment. When the homestead amendment was adopted in 1868 Florida was decidedly a frontier community. The aim of the amendment was to preserve for the family not only a place in which to live but also certain minimum physical necessities for producing a living.¹³¹ The rural homestead accordingly embraced the essentials of the farm—in short, all "the improvements on the real estate."¹³² In order to even the score, the urban dweller was in turn allowed exemption of improvements to the extent of his "residence and business house,"¹³³ but no more. This short phrase, innocuous though it sounds, has produced several hundred pages of conflicting judicial pronouncements and decades of litigation. Even today no reliable solution exists, but an analysis of the various underlying theories advanced from time to time should at least serve to outline the nature of the problem—the which is ever the first step toward solution.

Of all the cases involving functional abandonment, one in particular stands out as a landmark.¹³⁴ Shortly before the turn of the century one Smith sought an injunction restraining Guckenheimer & Sons from levying upon his property to satisfy judgment following attachment. The issue of urban homestead was squarely raised. As might be expected in that period, the residence and business house were one building, a two-story frame structure found as a fact to be physically indivisible without destruction. Smith, his wife and eight children lived in nine of the ten rooms constituting the top floor; of the five larger rooms below, Smith ran a restaurant in one and rented the other four to business tenants.

¹³¹Discussed under Origin and Purpose *supra*.

¹³²FLA. CONST. Art. X, §1.

¹³³*Ibid.*

¹³⁴Smith v. Guckenheimer & Sons, 42 Fla. 1, 27 So. 900 (1900).

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He occasionally took in lodgers upstairs. The chancellor accorded Smith the privilege of selecting a portion of the building as his homestead, his living quarters to be directly over his place of business. Smith declined. The chancellor thereupon, as requested by cross-bill of the Guckenheimers, allotted to Smith as homestead the two south ground-floor rooms, the portion above, the soil underneath, and all vacant land. The remainder was declared free of exemption. From this decree Smith appealed, raising no objection to the method of division but insisting rather that the entire building and lot were exempt. The decree was affirmed by a divided Court. All admitted that in every case "improvements or buildings detached from and other than the residence and business house . . . together with the land supporting them, become subject to execution sales";¹³⁵ but here agreement ceased.

Mr. Chief Justice Taylor regretted that the chancellor had stopped short of subjecting to levy all land covered at any building level by rented rooms, inasmuch as any such use of any individual room should determine the use of the underlying soil, and in his opinion "permanent occupancy by others for purposes of revenue" to the homesteader "is not a legal use that can be invoked to maintain the status of exemptor."¹³⁶

¹³⁵*Id.* at 53, 27 So. at 905.

¹³⁶*Id.* at 17, 27 So. at 915. He summarized his views as follows at p. 18, 27 So. at 915:

"The result of the discussion is, in short, that in cases of separate or detached buildings upon the urban half acres, that are not the residence or business house of the owner, nor necessary outbuildings used in connection therewith, such separate or detached buildings, together with the ground that they occupy and the ground around them separately devoted to their use, are not exempt. In those cases where the *non-exempt improvement* or building is combined in a single structure that likewise constitutes the residence or business house of the owner, *the soil perpendicularly under and covered by any such non-exempt improvement* is improperly dedicated to other uses than are consistent with the constitutional right of exemption thereof, and is, therefore, *not* exempt, and this whether such non-exempt improvement be situated upon the first, second, third, fourth or tenth floor of a many storied building, and notwithstanding the fact that the space perpendicularly above or below such non-exempt improvement may be properly utilized by the owner for legitimate residence or business purposes; and the loss by such *soil* of the quality of exemption carries with it, under the maxim, *cujus est solum ejus est usque ad coelum*, the loss of the quality of exemption to everything perpendicularly *above* such soil. It may be that in the application of this rule the whole of the residence or business house exemption may be taken away and defeated, but, in such case, the blame must fall upon the exemptor who thus devotes the same soil to the two *inconsistent uses*, the

Mr. Justice Mabry dissented on the ground that occupancy of part of an indivisible building as one's residence or for carrying on one's occupation imparts homestead character to the entire building.

Mr. Justice Carter, in a separate concurring opinion, stressed the absence of any objection to the method of dividing the property, and agreed that division in some manner was mandatory upon an equity court:¹³⁷

"To give a creditor in such a case the right to sell the entire property would deprive the debtor of his homestead and enable the creditor to sell property forbidden by the constitution. To give the debtor the entire property would exempt to him property expressly forbidden by the constitution and deprive the creditor of a right given him by law, without constitutional or statutory warrant. The fact that a building is incapable of division does not necessarily prevent the sale under execution of a particular part of the land covered thereby with the part of the building situated thereon, for it is wholly unnecessary to 'physically divide' the building to do that, but the anomalous relations of the co-owners of the building after such sale and the mutual rights and duties of each, and the specific method of determining just what portion of the land and building ought to be set aside to the debtor as part of his homestead, would seem to be proper subjects for legislation under section 6 of the Homestead Article of the constitution."

Unfortunately this timely suggestion has for nearly half a century fallen on deaf ears.

Some ten years later the question of abandonment became decisive as regards the right of a widow to devise a house by will.¹³⁸ She had lived there with her first husband, but after his death she had remarried and moved off the property in order to derive rental income from it. Upon the death of her second husband she had continued to obtain such income from this property and had lived in a less expensive cottage rented from a third party. On these facts abandonment and freedom from exemption were readily found and decreed; the widow's residence was the cottage on the other lot.

The 1931 case of *Jordan v. Jordan*¹³⁹ is often cited in connection with

one legally sufficient to support the exemption contended for, the other legally sufficient to defeat or destroy it."

¹³⁷*Id.* at 39, 27 So. at 912.

¹³⁸*Matthews v. Jeacle*, 61 Fla. 686, 55 So. 865 (1911).

¹³⁹100 Fla. 1586, 132 So. 466 (1931).

this problem, although the true basis of decision was that, since the children had all left home and the husband and wife had officially separated, he could no longer be regarded as the head of a family. To be sure, he and his wife managed to bury the hatchet to the extent of collaborating in paying taxes and costs of maintenance on the apartment house, and each occupied an apartment; but the case throws little light on functional abandonment. Indeed, the opinion refers at times to one house and at other times to one house consisting of two buildings.¹⁴⁰

A year later, however, a lumber company sued a homesteader to foreclose against his entire property a materialman's lien for building supplies used without his knowledge in constructing a small house on a corner of the lot.¹⁴¹ The homesteader and his wife had allowed their son-in-law as licensee to build the house, with the understanding that it would go with the realty if the homesteader sold his property. A unanimous court called this abandonment of the portion in question; and enforcement was quite properly allowed against the small house and the land on which it stood, even though the parents had taken no part in procuring the material and knew nothing of that transaction.

Up to this time the soundness of *Smith v. Guckenheimer & Sons* had stood unquestioned. In 1932, however, storm clouds appeared. An impoverished widow was doing her best to make both ends meet for her daughter and herself by obtaining what little income she could from rentals of parts of the old family estate.¹⁴² The rented property comprised two buildings: a two-story brick garage, used in part for storing her car but principally as the repair shop of a tenant, and a one-story frame building used by her to store flower-pots and by a tenant as a sign-painting shop. Originally the latter had been constructed as the family garage. Both buildings were completely detached from the residence, although this fact is not infrequently misstated. The equities were obviously with the unfortunate widow, and in reversing the chancellor and holding these rented buildings free from levy, a divided court introduced a new test:¹⁴³

"The term 'business house' is not defined in the Constitution relating to urban homestead exemptions, but it is plain that the intend-

¹⁴⁰*Id.* at 1591, 132 So. at 468.

¹⁴¹*Anderson Mill and Lumber Co. v. Clements*, 101 Fla. 523, 134 So. 588 (1931).

¹⁴²*Cowdery v. Herring*, 106 Fla. 567, 143 So. 433 (1932).

¹⁴³*Id.* at 571, 143 So. at 435.

ment is to preserve as exempt, a reasonable portion of the homestead improvements, in addition to the owner's actual residence, when it appears that the improvements concerned *are being used as a means of making the owner's livelihood.*

"Here the garage and paint shop in effect constitute a portion of the widowed homesteader's 'business house' under the circumstances, because it was not already shown that the widow, upon whose homestead land these rented structures were located, had any other real 'business house.' On the other hand it was shown that Mrs. Cowdery depended principally upon the rents from these structures as her means of living."

On rehearing¹⁴⁴ the thrust of this concept was deflected somewhat by a per curiam opinion pointing out that a homestead of less than one-half acre had been admitted, that the creditor had the burden of proving that there were more improvements or buildings thereon than the residence and business house of the widow, and that this burden had not been met. Just why it had not been met, when existence of the two buildings, physical detachment, and rental to others were established, was discreetly left unanswered.

The reaction of the bar was precisely what one would anticipate. One Larson, owner in fee simple of a lot admittedly homesteaded, constructed an apartment house and garage for rental purposes on its south end, and later conveyed the entire property to his wife via a third party in one day.¹⁴⁵ The decree of the chancellor upholding the validity of a mortgage made by Larson's widow on the whole lot was unanimously affirmed as to the apartment house, garage, and underlying soil, but reversed as to the rest. *Cowdery v. Herring* was cavalierly distinguished on the ground that "the owner living on her homestead merely rented for a tool house a small garage that had been used as a part of the city homestead property." In a direct reversal of the ratio decidendi of the *Cowdery* case, the Court stated emphatically:¹⁴⁶

"An apartment house for renting purposes is not a 'business house of the owner' of a homestead within the meaning of Section 1, Article X, of the constitution of Florida."

¹⁴⁴106 Fla. 574, 144 So. 348 (1932).

¹⁴⁵*Id.* at 6, 185 So. at 868.

¹⁴⁶*McEwen v. Larson*, 136 Fla. 1, 185 So. 866 (1939).

This decision, in turn, led quite logically to *O'Neal v. Miller*,¹⁴⁷ in which the appellants relied on *Cowdery v. Herring* and the appellees on *McEwen v. Larson*. The facts were rather complicated. Rosa Devoe left her husband for the alleged reason of cruelty, taking their small daughter with her, and did not return until after his death. Nevertheless the marital relation continued as a matter of law, and she did not acquire another home elsewhere. Her husband meanwhile mortgaged his own residence, four small houses, and a fish store, all on the homestead property and all rented to others except his residence. Rosa Devoe, who re-occupied the residence upon her return, testified that her husband's sole income was derived from these rentals. A divided court held that the residence alone was exempt. In the concurring opinion a further basis of distinction was propounded, namely, the use to which the tenant puts the rented structures.¹⁴⁸

In 1945 still another principle was evolved in *Lockhart v. Sasser*:¹⁴⁹ the vertical-line theory. The devise of his apartment house by a homesteader was voided by a majority on the ground that the entire building was homestead. It contained six apartments, and the testator lived in the one on the ground floor. Oddly enough, *Cowdery v. Herring* was distinguished, in spite of the fact that the same conclusion was reached in that decision even as to separate buildings. *Smith v. Guckenheimer* was differentiated on the ground that "the improvement was shown to be such that it was divisible by a perpendicular line."¹⁵⁰ This statement, unfortu-

¹⁴⁷143 Fla. 171, 196 So. 478 (1940).

¹⁴⁸*Id.* at 182, 196 So. at 482. The language is:

"In the Cowdery case the garage and paint shop were improvements in the form of commercial establishments, from which the owner derived her principal means of livelihood, and as such were held to constitute a 'business house' within the intendment of the Constitution. In the McEwen case, while it is true that the apartment house was a source of income, such income was derived from persons who came to reside on the property, and the apartment house and land required for its operation and maintenance were held to have been abandoned as homestead property.

"Applying the principles in the above cases, our conclusion is that the houses which were built and maintained for residential purposes by Herman [*sic*] Devoe did not constitute homestead property at the time of the execution of said mortgage on December 9, 1927."

¹⁴⁹156 Fla. 339, 22 So.2d 763 (1945). Although the point was not specifically discussed on appeal, the chancellor evidently used this vertical-line theory in *Efstathion v. Saucer*, 158 Fla. 422, 29 So.2d 304 (1947).

¹⁵⁰*Id.* at 340, 22 So.2d at 764.

nately, alleges the exact opposite of the facts. Smith's building was legally divided solely because the chancellor chose to divide it; the building was specifically found not divisible without destruction, and in drawing the perpendicular line the chancellor cut off several of Smith's family bedrooms on the top floor and allotted him in return a large storeroom, previously rented out, on the ground floor. The conclusion is inescapable that *Lockhart v. Sasser* overrules for all practical purposes *Smith v. Guckenheimer* and follows the dissent of Mr. Justice Mabry therein; but the fact remains that the opinion does not so state.

Summarizing the issue of functional abandonment, five theories have been advanced for determining whether a building is homestead:

1. the use made of it by the homesteader, qualified by the rule that any portion not occupied by the homesteader either as his residence or as the place in which he exercises his calling is not exempt;
2. the use made of it by the homesteader, qualified by the rule that if any part of a building is occupied by the homesteader either as his residence or as the place in which he exercises his calling, the entire building is exempt;
3. the recognition that renting is one's business at law whenever it is one's business in fact, with the corollary that a building rented is in such instances one's "business house";
4. the use made of the building or portion in question by the tenant; and
5. the vertical-line theory.

Each theory can muster some support, but all are subject to serious criticism. The vertical-line theory, for example, accords exemption to an enormous apartment house, provided the owner occupies the entire top floor as a penthouse. Yet his neighbor with two small parallel duplex apartments in one building loses exemption as to the rented half. Admittedly a line should be drawn somewhere, but no valid reason has been offered for making it vertical, or indeed for making it a straight line at all. Estates less than sole ownership in fee of one building are not unknown to the law.

The tenant-use theory drives a sharp wedge between a warehouse rented out and an apartment house, assuming in each instance that the renting of the building in question is the owner's only business.

Any line finally drawn will of necessity be arbitrary, and the basic motivating factors are matters of broad social policy, better determined by the legislative process. On the one hand it is usually conceded, even

today, that a man should pay his debts. On the other hand, our source of supply of cannon-fodder must not be endangered. The family can readily be preserved, however, without making owners of huge estates, large apartment houses and department stores judgment-proof to the extent of these entire buildings. A workable compromise might be reached by an amendment to the Florida Constitution, placing a value limit on the property subject to exemption¹⁵¹ and exempting rented structures when their rental is in fact the business of the claimant. Even without amendment, the Legislature should by now be able to define "business house." Failing this, the Supreme Court of Florida could return to the ratio decidendi of the *Cowdery* case,¹⁵² and hold once again that renting, if it be one's principal business in fact, is also one's business at law. In any event, rented structures or rented portions thereof could consistently be separated, regardless of whether the line be vertical, horizontal or jagged. In basic property law, certainty is an element that should not be cast lightly aside or left to the vagaries of architectural design.

Contiguity. Turning now to rural property, when a homesteader resides outside the limits of an incorporated city or town he may claim as exempt up to 160 acres of land, as well as "the improvements on the real estate. . ."¹⁵³ As a further protection, no homestead may be reduced in area by inclusion within the limits of an incorporated city or town without the consent of the owner.¹⁵⁴ Fortright though this phraseology may seem, interpretation has nonetheless proved necessary. In the main it has been strictly logical.

Suppose a homesteader owns a lot in town and also a tract in the country, both of which do not exceed 160 acres. Can he claim both parcels as his homestead? We have seen that he can have but one home, and that if he should happen to possess two or more houses the designation of one as his home, or principal residence, is a question of fact. Furthermore, the land and house in town are not "on the real estate" outside the town, nor is his business house "on the real estate" within the town if it is on the country land. Obviously one parcel or the other is his residence, and only that one can be his homestead. Our Supreme Court settled this question in an early decision.¹⁵⁵

¹⁵¹A majority of the states do this; see note 9 *supra*.

¹⁵²See note 142 *supra*.

¹⁵³FLA. CONST. Art. X, §1.

¹⁵⁴FLA. CONST. Art. X, §5.

¹⁵⁵*Oliver v. Snowden*, 18 Fla. 823 (1882).

Assume, however, that the homesteader owns more than 160 contiguous acres in the country. In such event, he may select any 160 acres, contiguous each to another;¹⁵⁶ but should he refuse to designate such homestead portion or designate it to the dissatisfaction of his creditor, the latter may request a survey, and in the event of dispute the chancellor will make the choice.¹⁵⁷ The use made of those portions of the tract that are not physically occupied as the residence is immaterial; indeed, such other parcels need not be enclosed or cultivated.¹⁵⁸ All that is necessary is that there be one tract or contiguous tracts not exceeding 160 acres, and perhaps that the homesteader occupy some part of it as his principal residence.

The word "perhaps" is used because of the inept phraseology of Section 222.03 of Florida Statutes 1941, quoted below.¹⁵⁹ This enactment, which is hardly a model of draftsmanship, not only contains the ambiguity re-

¹⁵⁶FLA. STAT. §§222.01, 222.02 (1941); see *Yowell v. Rogers*, 128 Fla. 881, 882, 175 So. 772, 773 (1937). The first six sections of Article X of the Constitution do not mention contiguity. Section 7, however, creating the tax exemption, places it on the "home and contiguous real property, as defined in Article 10 [*sic*], Section 1," thereby indicating that contiguity is implied in Section 1. The Legislature has expressed its view after a fashion in FLA. STAT. §222.03 (1941), quoted *infra* in note 159, but at best the section is ambiguous. It is ably criticized in REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 397 n.25 (2d ed. 1946).

¹⁵⁷FLA. STAT. §§222.03, 222.08-222.10 (1941); cf. *Fort v. Rigdon*, 100 Fla. 398, 129 So. 847 (1930); *Smith v. Guckenheimer & Sons*, 42 Fla. 1, 27 So. 900 (1900).

¹⁵⁸*Armour & Co. v. Hulvey*, 73 Fla. 294, 74 So. 212 (1917) (entire military academy held exempt); *McDougall v. Meginniss*, 21 Fla. 362 (1885) (unused land held part of homestead); cf. *Fort v. Rigdon*, *supra* note 157 (complaint of homesteader, seeking to have best portions set aside, rejected).

¹⁵⁹The full text reads (italics supplied):

"If the creditor in any execution or process sought to be levied is dissatisfied with the quantity of land selected and set apart, and shall himself, or by his agent or attorney, notify the officer levying, the officer shall at the creditor's request cause the same to be surveyed, *and when the homestead is not within the corporate limits of any town or city, the person claiming said exemption shall have the right to set apart that portion of land belonging to him which includes the residence, or not, at his option*, and if the first tract or parcel does not contain one hundred and sixty acres, the said officer shall set apart the remainder from any other tract or tracts claimed by the debtor, but in every case taking all the land lying contiguous until the whole quantity of one hundred and sixty acres is made up. The person claiming the exemption shall not be forced to take as his homestead any tract or portion of a tract, if any defect exists in the title, except at his option. The expense of such survey shall be chargeable on the execution as costs; but if it shall appear that the person claiming such exemption does not own more than one hundred and sixty acres in the state, the expenses of said survey shall be paid by the person directing the same to be made."

ferred to in footnote 156 *supra*, but also creates an even more serious problem. Does it mean simply that the debtor may elect to meet his obligation when sued and waive his homestead exemption at that time? If so, the provision cannot alter any of the rights already existing under the Constitution,¹⁶⁰ and, of course, it cannot limit waiver to country residents alone.

On the other hand, it may well mean that the rural debtor is privileged to claim property on which he does not reside.¹⁶¹ If so, however, the exemption is purely statutory, and obviously has nothing to do with homestead; a homestead without a home is about as readily perceived as a copyright without any copy. Accordingly, all the reasons sustaining the homestead exemption, including the specific constitutional authorization, vanish in this instance, a mere label being insufficient to change the true nature of this new statutory exemption; and the question at once arises as to whether owners of non-homestead property as a class can by mere legislative fiat be split so as to exempt some of them from the practical necessity of meeting their obligations and deny exemption to the others, solely on the basis of whether their property is located outside or inside a town or city. This patent discrimination cannot stand unless some reasonable ground for the differentiation be offered;¹⁶² and to date this has not been done.

Furthermore, in *Fort v. Rigdon*¹⁶³ appellants sought reversal of a decree allotting them the residence and a contiguous tract totaling 160 acres, their contention being that they should be allowed to choose the most valuable portions of an estate comprising 560 contiguous acres. The Supreme Court unanimously declared in its affirmance that the chancellor was bound to select the tract upon which the actual residence was located. Numerous dicta uniformly support this view.¹⁶⁴

¹⁶⁰As regards waiver see the early analysis in *Patterson v. Taylor*, 15 Fla. 336, 343 (1875) (personalty). *But cf.* *Hutchinson v. Stone*, 79 Fla. 157, 165, 84 So. 151, 154 (1920); *Albritton v. Scott*, 73 Fla. 856, 858, 74 So. 975 (1917) (realty).

¹⁶¹This interpretation, which is far sounder from a grammatical standpoint, is adopted by no less an authority than Redfearn in his *WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA* 412 (2d ed. 1946).

¹⁶²The pertinent provisions, commonly known as equal protection and substantive due process, are contained in FLA. CONST. Decl. of Rights §§1, 12 and U. S. CONST. Amend. XIV.

¹⁶³100 Fla. 398, 129 So. 847 (1930).

¹⁶⁴*See, e.g.,* *Yowell v. Rogers*, 128 Fla. 881, 882, 175 So. 772, 773 (1937); *Matthews v. Jeacle*, 61 Fla. 686, 691, 55 So. 865, 867 (1911); *Saxon v. Rawls*, 51 Fla. 555, 558, 41 So. 594, 595 (1906); *Brandies v. Perry*, 39 Fla. 172, 176,

Returning more specifically to the problem of contiguity, can two or more tracts of land in the country, covering 160 acres or less but not touching each other at any point, be lumped together as one homestead if owned by one family head and farmed by him as a unit? Or must they be contiguous? The Constitution is silent on the matter, but the early leading case of *Brandies v. Perry*¹⁶⁵ established unequivocally the necessity of contiguity in setting up a homestead. No question arose until 1920, when the following theory was advanced in *Clark v. Cox*, an abandonment dispute:¹⁶⁶

“. . . the question whether actual contiguity is required must be determined in each case on its peculiar facts.”

Unfortunately the opinion does not explain the distinction between “actual contiguity” and mere “contiguity,” perhaps because no such distinction can exist outside the realm of metaphysics. Two tracts of land either touch at one point or they do not. If they do, they are contiguous; if they do not, they are not contiguous. The answer is one of pure fact, and can be readily ascertained.

Quite probably the statement was intended to signify that contiguity is not always requisite as a matter of law. This is true, although in exceptional circumstances only, such as those exhibited in *Clark v. Cox*. A railroad had constructed its line completely across a homestead tract, and the homesteader and his wife had later conveyed in fee to the owners of the railroad a strip extending fifty feet on each side of the center of the track. There was also a county highway running along the strip. The rule laid down in *Brandies v. Perry* was not applied. The result is sound, but to maintain that determination depends “in each case on its peculiar facts” is to eliminate rules needlessly—and this should be resorted to in the law in only those instances in which formulation of principle is at the time impracticable.

22 So. 268, 270 (1897); *McDougall v. Meginniss*, 21 Fla. 362, 369, 372 (1885); *Drucker v. Rosenstein*, 19 Fla. 191, 195, 198 (1882); *Oliver v. Snowden*, 18 Fla. 823, 836 (1882); *Baker v. State*, 17 Fla. 406, 409 (1879). The earlier opinions were written during the effective period of the forerunners of FLA. STAT. §222.03 (1941), which corresponded exactly to the portion italicized in note 159 *supra* in words and meaning and differed in immaterial punctuation only, namely, FLA. REV. STAT. §2000 (1892) and Fla. Laws 1873, c. 1944. The latter, however, amended Fla. Laws 1869, c. 1715, §3, materially in the wording here analyzed.

¹⁶⁵39 Fla. 172, 22 So. 268 (1897).

¹⁶⁶80 Fla. 63, 69, 85 So. 173, 174 (1920).

Shortly before this decision, the problem had been considered in *Shone v. Bellmore*.¹⁶⁷ The bill to set aside certain land as homestead alleged the fact of contiguity specifically, and by demurrer to the whole bill the defendants admitted such allegation. The necessity of contiguity was accordingly not in issue, but in a dictum¹⁶⁸ the Court summarized the rule in *Brandies v. Perry* and cited the approval thereof by dictum in *Milton v. Milton*.¹⁶⁹ The opinion then suggested:¹⁷⁰

“ . . . there is no reason why the owner of a homestead which lies in a compact usual body may not sell such parts of it as he may desire and retain the remainder for his homestead so long as he does not separate one part of his homestead thus remaining from another by intervening lots or blocks which he has conveyed to others.”

It remained for a federal court, though quite properly attempting to follow the decisions of the Supreme Court of Florida as the final word on the meaning of any provision of Florida law, to hold without citation of authority that separation of some portions of a homestead tract from the rest by sale of land lying between does not constitute abandonment of such separated portions.¹⁷¹

The tax section of the Homestead Amendment, although it admittedly deals with a separate and distinct type of exemption and was added half a century later, may throw some light on the matter, in that it specifically refers to “the said home and contiguous real property as defined in Article 10 [*sic*], Section 1.”¹⁷² In the tax field there can accordingly be no doubt that contiguity is mandatory;¹⁷³ and the language just quoted contains at least an inference that the citizens of Florida regard contiguity as an integral part of the concept “homestead.”

Four theories, then, have been advanced as regards contiguity:

1. It is never necessary.
2. It is always necessary.
3. Acquisition and abandonment of the homestead are governed by different rules, contiguity being mandatory in the former instance but unnecessary in the latter.

¹⁶⁷75 Fla. 515, 78 So. 605 (1918).

¹⁶⁸*Id.* at 524, 78 So. at 607.

¹⁶⁹63 Fla. 533, 535, 58 So. 718, 719 (1912).

¹⁷⁰*Shone v. Bellmore*, 75 Fla. 515, 525, 78 So. 605, 608 (1918) (*italics supplied*).

¹⁷¹*Crocker v. Crocker*, 7 F.2d 218 (S. D. Fla. 1925).

¹⁷²FLA. CONST. Art. X, §7.

¹⁷³*State ex rel. Dunscombe v. Courson*, 144 Fla. 439, 198 So. 108 (1940).

4. Contiguity is necessary in all instances other than those in which abandonment is, or could be, compelled in the public interest, in which latter event the abandonment is limited strictly to the portion so transferred and does not destroy the homestead character of the remaining portions.

The first alternative leads to obvious absurdities; an individual could have small country homesteads all the way from Pensacola to Key West, provided they did not exceed a total of 160 acres. The second works a severe hardship in instances of loss of a transecting parcel by eminent domain, and necessitates overruling *Clark v. Cox* and disregarding the dictum in *Shone v. Bellmore*. The third principle introduces a distinction not as yet accepted by the Florida courts and unexplained in the one federal decision either by any reasons or by any Florida authorities. It would enable an individual to establish a homestead composed of separated parcels merely by acquiring intervening land temporarily. Having established contiguity, he could then sell the unwanted land without impairing the homestead character of the rest. No advantages likely to result from such a differentiation have been suggested.

The fourth basis of decision squares with what the Florida courts have consistently maintained as the Florida law, and results in fair treatment as well as uniformity. It protects a homesteader who happens to be singled out for condemnation proceedings, yet without making serious inroads on the uniformity of the requirements of contiguity. If he voluntarily splits his property, he has no one to blame but himself.

PART II—TRANSFER OF HOMESTEAD REALTY

Assuming that the realty in question is the homestead¹⁷⁴ of its owner, and subject to the predominating rules of property law previously discussed,¹⁷⁵ the Florida Constitution and statutes place certain restrictions upon its alienation, whether by testamentary disposition or by intervivos deed. The exact nature and effect of these restrictions, while generally filtered through the spectroscopy of judicial deliberation so as to produce a ray of pure and definite color, have on occasion become blurred by conflicting elements of public policy and shadowed by doubtful interpretation of the organic law.

¹⁷⁴Throughout Part II the word "homestead" is confined, in the interests of clear presentation, to real property alone unless a broader signification is specifically indicated. Homestead personality is dealt with in Part III *infra*.

¹⁷⁵See Part I, 4 *supra*.

It is beyond dispute that the principles discussed earlier in connection with the exemption of homestead property from forced sale apply here,¹⁷⁶ rather than the recent rules governing the exemption of homestead property from taxation. Whenever the realty in question is held by its owner under such circumstances as to make it exempt from forced sale, then it is subject to the restrictions on alienation laid down by the Florida Constitution and the statutes; and this is true regardless of whether its owner takes advantage of the \$5,000 exemption from taxation.¹⁷⁷

The Florida Constitution, following the custom among such instruments, deals with this phase of the homestead question in barest outline, leaving to the Legislature and the courts the task of implementing and delineating its intent. The authority of the Legislature to deal with this problem is found in Section 6 of Article X, and of course the Supreme Court has always conceded its own authority to interpret the Constitution.

The most fruitful approach to the question of alienation of homestead realty is to place the cart before the horse and to consider first the matter of devise and descent of the homestead, before looking into the restraints placed upon the owner of such property while he is still enjoying its use. The reason for this unnatural juxtaposition lies in the fact that the prohibition against the willing of homestead land in certain situations has been employed as a basis for subjecting its owner while living to restrictions on the use of his property that are not readily gathered from an uninspired reading of the Constitution.¹⁷⁸

1. Devise and Descent of Homestead Realty

The only light cast by the Florida Constitution on the ownership of the homestead after the head of the family dies is found in the statement in Section 2 of Article X that the exemption "shall inure to the widow and heirs of the party entitled to such exemption," and in Section 4, which contains the caveat:

"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

¹⁷⁶FLA. CONST. Art. X, §§1, 2, 4; see *McEwen v. Larson*, 136 Fla. 1, 7, 185 So. 866, 868 (1939).

¹⁷⁷FLA. CONST. Art. X, §7; see Part V *infra*. It is true, however, that the existence of the tax exemption may be of some evidentiary value.

¹⁷⁸See Part II, 3 *infra*.

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, of course, clear that the homestead exemption and the title to the physical property constituting the homestead are two distinct affairs.¹⁷⁹ And it is equally clear that an exemption cannot exist, in any real sense, in the absence of some property to which it may attach.¹⁸⁰ Unless the homestead, upon the death of the head of the family, passes to one or more of the persons to whom the homestead exemption inures, the exemption is lost. The question then becomes: Under what circumstances must title to the homestead, upon the death of the head of the family, pass to those to whom the exemption inures; and conversely, under what circumstances may the head of the family cause the title to pass to someone not entitled to the exemption?

Everyone admits that the Legislature, unless inhibited by the Constitution, has complete authority to determine what happens to one's property when he dies.¹⁸¹ The Florida Probate Law mentions the homestead¹⁸² in two places. The first provides:¹⁸³

"Any property, real or personal, held by any title, legal or equitable, with or without actual seisin may be devised or bequeathed by will; provided, however, that whenever a person who is head of a family, residing in this state and having a homestead therein, dies and leaves either a widow or lineal descendants or both surviving him, the homestead shall not be the subject of devise, but shall descend

¹⁷⁹*Coleman v. Williams*, 146 Fla. 45, 200 So. 207 (1941); *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932) (realty); see *Hinson v. Booth*, 39 Fla. 333, 346, 22 So. 687, 691 (1897) (dealing with exempt personal property).

¹⁸⁰*Ibid.*; see generally the opinion by Brown, J., in *Moor v. Price*, 98 Fla. 276, 123 So. 768 (1929), as to the distinction between exemption and property right. Another excellent discussion of this question is found in the opinion by Mabry, J., in *Godwin v. King*, 31 Fla. 525, 13 So. 108 (1893). See also *Wilson v. Fridenburg*, 19 Fla. 461 (1883).

¹⁸¹The relation of this general principle to the homestead provisions is pointedly analyzed by Sebring, J., in *Taylor v. Payne*, 154 Fla. 359, 17 So.2d 615 (1944). See also *Caro v. Caro*, 45 Fla. 203, 218, 34 So. 309, 314 (1903); REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA 26 (2d ed. 1946).

¹⁸²The term "homestead" here refers to realty only. See Part III *infra* as regards homestead personalty. Cf. *Adams v. Adams*, 158 Fla. 173, 28 So.2d 254 (1946).

¹⁸³FLA. STAT. §731.05 (Cum. Supp. 1947).

as otherwise provided in this law for the descent of homesteads.”

The second prescribes that whenever the property in question is homestead, and the head of the family¹⁸⁴ dies:¹⁸⁵

“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.”

These statutes are not in conflict with the Florida Constitution in respect of their authority to alter the substantive rules of descent,¹⁸⁶ but they do approach the question in a somewhat haphazard fashion. The use of the term “lineal descendants” in the statutes results from the provision in the Florida law of succession¹⁸⁷ that intestate property shall descend first to the surviving spouse and lineal descendants of a decedent. The statutory terminology dealing with restrictions on the devise of homestead is narrower than that employed in Section 2 of Article X,¹⁸⁸ which provides that the exemption shall inure to the “widow and heirs” of the head of the family, and yet is somewhat broader than that of Section 4, which uses the word “children” in imposing what has come to be regarded by the judiciary as an inferential restriction on the devise of a homestead. It is possible to envision many anomalous situations that might arise from this divergence in terminology; accordingly, at a time when constitutional revision is in the air, an attempt might well be made to achieve at least some degree of accuracy in expression and consistency in thought, preferably by conforming all statutory provisions to whatever is decided upon and then stated clearly in any new constitution.

Since the homestead law is designed to protect and preserve the family, its effect on the right to devise or inherit will be analyzed from the standpoint of each type of membership in the family.

¹⁸⁴See Part I, 2 *supra*. It should be recalled that a woman may be the head of a family, as in *Bigelow v. Dunphe*, 144 Fla. 330, 198 So. 13 (1940), yet she cannot leave a “widow.”

¹⁸⁵FLA. STAT. §731.27 (Cum. Supp. 1947).

¹⁸⁶*Nesmith v. Nesmith*, 155 Fla. 823, 21 So.2d 789 (1945); *Saxon v. Rawls*, 51 Fla. 555, 41 So. 594 (1906) (as to early statute); *cf.* note 179 *supra*.

¹⁸⁷FLA. STAT. §731.23 (Cum. Supp. 1947).

¹⁸⁸FLA. CONST. Art. X, quoted in full at the end of Part III.

Husband. The homestead law contemplates primarily the normal situation, in which the head of the family and the owner of the homestead is the husband. When he dies leaving either a widow or lineal descendants surviving, he is not permitted to alter by will the prescribed disposition of the property.¹⁸⁹ If, however, he outlives his wife and lineal descendants, even though he continues to occupy his dwelling as the head of a family composed of himself and other types of dependents, there is nothing to prevent his devising the homestead as he may choose.¹⁹⁰ Again, if he outlives his wife, and his children grow up and move away to homes of their own, leaving him with no dependents, he is then free to dispose of his dwelling by will, as well as by *intervivos* deed—not because his children are adults but rather because he is no longer the head of a family and consequently his dwelling is no longer a homestead.¹⁹¹

Turning to the problem of the *in terrorem* clause, may the husband require that his widow or lineal descendants forego their rights in the homestead as a prerequisite to receiving any benefits from the provisions of his will? There is authority in other jurisdictions that such an election may be forced by will.¹⁹² In *Palmer v. Palmer*¹⁹³ the Supreme Court of Florida expressly refrained from deciding this question and limited its decision to treating as a nullity the portion of a will attempting to devise the homestead when unaccompanied by any expression of intent to require an election on the part of those entitled to the homestead. Later, in *Shone v. Bellmore*,¹⁹⁴ the Court quoted with approval language from the *Palmer* case that, taken by itself, appears to deny the right of a testator to require

¹⁸⁹FLA. STAT. §§731.05, 731.27 (Cum. Supp. 1947); *Efstathion v. Saucer*, 158 Fla. 422, 29 So.2d 304 (1947); *Bess v. Anderson*, 102 Fla. 1127, 136 So. 898 (1931); *Shone v. Bellmore*, 75 Fla. 515, 78 So. 605 (1918); *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914); *Griffith v. Griffith*, 59 Fla. 512, 52 So. 609 (1910); *Saxon v. Rawls*, 51 Fla. 555, 41 So. 594 (1906); *Palmer v. Palmer*, 47 Fla. 200, 35 So. 983 (1904). Regarding the similar provision in the Constitution of 1868 see *Moseley v. Taylor*, 68 Fla. 294, 67 So. 95 (1914); *Wilson v. Fridenburg*, 19 Fla. 461 (1882). An unequivocal conveyance, though reserving a life estate, has been upheld as a present transfer; see note 297 *infra*. But a purported conveyance by either a revocable trust or a deed to be delivered after death has been stricken down as a testamentary disposition; see note 275 *infra*.

¹⁹⁰*Ibid.*

¹⁹¹See Part I, 2 *supra*.

¹⁹²See REDFEARN, *WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA* 302, 410 (2d ed. 1946).

¹⁹³47 Fla. 200, 35 So. 983 (1904).

¹⁹⁴75 Fla. 515, 78 So. 605 (1918).

such an election; but the express refusal in that case to decide the question was either overlooked or ignored.

The language in *Shone v. Bellmore* is likewise mere dictum, and the question today remains undecided in Florida. There is no cogent reason for striking down a will that requires such an election. The purpose of the homestead law is not defeated by a will of that character, since those entitled to the homestead are not likely to forego their rights unless their own advantage so dictates. Nor does public policy lend any support to the notion that a widow or lineal descendant should have his cake and eat it too.

In the normal situation the husband is the head of the family, in which event the family dwelling, if owned by his wife, cannot be homestead and therefore is not subject to the homestead restrictions at all.¹⁹⁵ Nevertheless, a wife can be the head of the family; and the dwelling owned by the wife is homestead property under these circumstances.¹⁹⁶ The rights of her surviving husband are not entirely clear. The Florida Probate Law¹⁹⁷ guarantees a surviving husband no mandatory share in his wife's estate corresponding to dower, although the statute governing descent¹⁹⁸ does give him a child's share in his wife's intestate property, a fact which may in a broad sense make him an "heir" of his wife.¹⁹⁹

It may at least be argued, then, that a surviving husband, if the homestead descends to him, obtains along with it the exemption from forced sale; but by no extension of implication can one validly contend that the terms of the Florida Probate Law require an estate in the homestead to descend to a surviving husband. Under the provisions of these statutes a wife owning a homestead upon her death and survived by her husband alone is free to devise such property in whatever manner she may choose.²⁰⁰ The statutes do forbid her to will her homestead when she is survived by lineal descendants;²⁰¹ and in such event a surviving husband

¹⁹⁵See notes 49-51 *supra*.

¹⁹⁶See note 56 *supra*.

¹⁹⁷FLA. STAT., cc. 731-736 (Cum. Supp. 1947); as to dower see §731.34.

¹⁹⁸FLA. STAT. §731.23 (Cum. Supp. 1947).

¹⁹⁹See *Reimer v. Smith*, 105 Fla. 671, 679, 142 So. 603, 605 (1932). *But see* *Arnold v. Wells*, 100 Fla. 1470, 1482, 131 So. 400, 405 (1930). *Cf.* *Wilson v. Fridenburg*, 19 Fla. 461 (1882) (holding widow not "heir" under FLA. CONST. Art. IX, §3 (1868), which provided accrual of exemption to "heirs" without mentioning widow).

²⁰⁰FLA. STAT. §§731.05, 731.27 (Cum. Supp. 1947). FLA. CONST. Art. X, §4 does not forbid devise by either husband or wife when without children.

²⁰¹*Ibid.*

presumably takes his child's share²⁰² clothed with the exemption from forced sale. No provision is made for a life estate in the husband with vested remainder to the lineal descendants, as is prescribed for his wife when he dies first.²⁰³

This illogical and unrealistic discrepancy has never been explained. Since, as noted at the beginning of this article, the purpose of the homestead law is to protect and preserve the family—and not merely the very young, the very old, or the allegedly weaker sex—the law should extend its beneficence to a dependent, incapacitated and indigent husband. In such type of family the economic jolt occasioned by loss of the home is fully as severe as that suffered by the surviving wife in the normal family.

Wife. As has just been explained, the wife who is the head of a family and the owner of its homestead is expressly restricted as to devise in the one instance in which she is survived by lineal descendants; in such event the homestead must descend as intestate property.

For the wife of more docile temperament, however, who permits her husband to occupy at least the nominal headship of the family and to hold title to the family dwelling, Florida law provides adequate safeguards to protect her and the other members of the family. Her husband cannot will the homestead away from her, even though no lineal descendants be living at the time of his death.²⁰⁴ When she survives him and there are no lineal descendants, she takes his entire interest in the property upon his death by virtue of the law of descent. If she and lineal descendants both survive him, then she receives a life estate in the homestead, with vested remainders to the lineal descendants in being at the time of his death.²⁰⁵ Prior to the adoption of the present Probate Law in 1933, a widow in Florida had the option of asserting her right of dower or of claiming a child's part in her husband's homestead.²⁰⁶ The dower right consisted of a one-third interest for life in property of which her husband died seized or had conveyed without relinquishment of dower right by her; a child's

²⁰²FLA. STAT. §731.23 (Cum. Supp. 1947) gives the surviving spouse a child's part of the intestate property, or all of it when there are no lineal descendants.

²⁰³FLA. STAT. §731.27 (Cum. Supp. 1947).

²⁰⁴See note 189 *supra*.

²⁰⁵FLA. STAT. §731.27 (Cum. Supp. 1947).

²⁰⁶FLA. COMP. GEN. LAWS §§5484, 5493 (1927); discussed in *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931), and by Brown, J., in his masterful opinion in *Moore v. Price*, 98 Fla. 276, 123 So. 768 (1929). *Godwin v. King*, 31 Fla. 525, 13 So. 108 (1893), construes the Constitution of 1868 in relation to dower.

part was an absolute proportionate interest, which of course varied with the number of children.²⁰⁷

Today a widow has no dower right in her husband's homestead, and is given no option as to the share she will take in such property.²⁰⁸ Upon his death she takes either his entire interest in the homestead in the absence of lineal descendants, or a life estate when there are lineal descendants surviving him.²⁰⁹ Theoretically, at least, a widow need not take any affirmative action in order to secure her rights in the homestead.²¹⁰ As a practical matter, however, she may find that unless she asserts her claim to the homestead the probate court may include such property in the administration of the husband's estate and thus multiply the difficulties involved in establishing her claim.²¹¹

It is common practice in Florida today for a husband and wife to take title to their homestead as tenants by the entirety.²¹² Whenever the homestead is held in this manner, the entire interest in the property passes by operation of law to the surviving spouse upon the death of the other, and neither homestead nor probate provisions apply.²¹³

Lineal Descendants. Although the Florida Constitution provides simply that the homestead exemption "shall inure to the widow and heirs" of the homesteader²¹⁴ and refers only inferentially to the rights of "children" in homestead property,²¹⁵ the Probate Law employs the term "lineal descendants" in dealing with the devise and descent of homesteads.²¹⁶

²⁰⁷*Ibid.*

²⁰⁸FLA. STAT. §731.34 (Cum. Supp. 1947).

²⁰⁹FLA. STAT. §§731.27, 731.23 (Cum. Supp. 1947).

²¹⁰At common law this was true as to dower, but today FLA. STAT. §731.35 (Cum. Supp. 1947) requires the widow to file with the county judge an executed and acknowledged election to take dower within nine months after the first publication of the notice to creditors of her deceased husband's estate; otherwise the dower right is regarded as waived.

²¹¹See Part IV, 3 *infra*, dealing with laches. FLA. STAT. §95.23 (1941), a curative statute, was applied to homestead rights in *Barnott v. Proctor*, 128 Fla. 63, 174 So. 404 (1937), thus pointing up another danger inherent in delay.

²¹²See, e.g.: *Coleman v. Williams*, 146 Fla. 45, 200 So. 207 (1941); *Harkins v. Holt*, 124 Fla. 774, 169 So. 481 (1936); *Oates v. New York Life Ins. Co.*, 113 Fla. 678, 152 So. 671 (1934), *rehearing denied*, 116 Fla. 253, 152 So. 672 (1934); *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932); Part I, 4 *supra*, especially note 100.

²¹³*Ibid.*; see also Note, 1 U. OF FLA. L. REV. 433 (1948).

²¹⁴FLA. CONST. Art. X, §2.

²¹⁵FLA. CONST. Art. X, §4.

²¹⁶FLA. STAT. §§731.05, 731.27 (Cum. Supp. 1947).

The result is that only lineal descendants of the owner of a homestead in being at his death, as well as his widow of course, are guaranteed a property interest in the homestead realty. When he is survived by a widow, his lineal descendants in being at the time of his death take vested remainders in the homestead, subject to the widow's life estate.²¹⁷ If there be no widow, these lineal descendants take an immediate absolute interest,²¹⁸ divided among them according to the per stirpes rule.²¹⁹ The vested remainder may not be defeated by the devise of the husband; neither may the absolute interest be affected by the will of either a male or a female homesteader.²²⁰

Lineal descendants in this context include children of the decedent's own blood, whether already born or *en ventre sa mere* at the time of decedent's death,²²¹ and whether minor or adult.²²² An illegitimate child will not be included among the lineal descendants of its father for purposes of inheritance unless the father has acknowledged his paternity by a writing signed in the presence of a competent witness.²²³ An illegitimate child is, however, the heir of its deceased mother,²²⁴ while an adopted child of a deceased homesteader is his heir and lineal descendant for all purposes.²²⁵

The adopted child of a deceased lineal descendant is in a somewhat doubtful position with respect to the ancestor of such lineal descendant. An argument can, or could, be made, in the light of the liberal trend of the recent statutes, that the Legislature intended to include such a child among the heirs of its adopting parent's ancestor, but this contention has not prevailed to date.²²⁶

²¹⁷FLA. STAT. §731.27 (Cum. Supp. 1947).

²¹⁸FLA. STAT. §731.23 (Cum. Supp. 1947). Their absolute interest is of course limited to the homesteader's estate, which may be less than the fee.

²¹⁹FLA. STAT. §731.25 (Cum. Supp. 1947).

²²⁰Should our Supreme Court decide to give effect to the *in terrorem* clause, however, a means of inducing relinquishment of homestead rights would exist; cf. the discussion under Husband *supra* in this Part II, 1.

²²¹Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918).

²²²Cumberland & Liberty Mills v. Keggin, 139 Fla. 133, 190 So. 492 (1939); Church v. Lee, 102 Fla. 478, 136 So. 242 (1931).

²²³FLA. STAT. §731.29 (Cum. Supp. 1947).

²²⁴*Ibid.*

²²⁵FLA. STAT. §§72.22, 731.30 (Cum. Supp. 1947), construed as to an earlier statute, almost identical, in Church v. Lee, 102 Fla. 478, 136 So. 242 (1931); see *In re Brock*, 157 Fla. 291, 294, 25 So.2d 659, 661 (1946).

²²⁶*Ibid.* In spite of any implications that one might be tempted to draw from

Finally, it should be noted that under the per stirpes rule, which applies in Florida, a remote lineal descendant will become an heir of a deceased ancestor only if the intervening persons in the chain of descent have predeceased the ancestor.²²⁷

Other Heirs. Lineal ascendants and collateral heirs, although they may inherit the property of a decedent if he leaves no spouse or lineal descendants surviving,²²⁸ are guaranteed no part of a decedent's homestead. They will take the homestead accompanied by the exemption if they succeed to the property²²⁹ but the homesteader is free to will it away from them; and if he does so the exemption perforce comes to naught.²³⁰

The fact that the lineal descendants or other heirs have reached their majority does not alter the operation of the homestead law. The exemption and the property will pass to minor or adult heirs in precisely the same manner.²³¹ The only requirement is that the property in question be the homestead of the decedent at the time of his death.

An interesting question apparently not yet brought before the Court is the degree of misconduct that will bar an heir from asserting his claim to the homestead. It is clear that a wife who wilfully deserts her matrimonial home will not be allowed, upon the death of her husband, to assert any claim to the homestead;²³² and in this respect the Court has laid down a stricter rule than is generally applied to the descent of other types of property. An heir convicted of murdering the homesteader cannot claim any interest in the homestead property.²³³ Whether or not less

the dictum *In re Brock*, *supra* note 225, the more generally accepted view is that adoption statutes of this type do not extend the relationship for purposes of inheritance beyond the adopting parent, for the reasons set forth *In re Hewett's Estate*, 153 Fla. 137, 13 So.2d 904 (1943), cited with approval *In re Poole's Estate*, 153 Fla. 610, 15 So.2d 323 (1943).

²²⁷FLA. STAT. §731.25 (Cum. Supp. 1947), *Broward v. Broward*, 96 Fla. 131, 117 So. 691 (1928).

²²⁸FLA. STAT. §§721.27, 731.23 (Cum. Supp. 1947).

²²⁹FLA. CONST. Art. X, §2; *Hill v. First Nat. Bank of Marianna*, 73 Fla. 1092, 75 So. 614 (1917); *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914).

²³⁰FLA. CONST. Art. X, §4, *Purnell v. Reed*, 32 Fla. 329, 13 So. 874 (1893); see *Johns v. Bowden*, 68 Fla. 32, 44, 66 So. 155, 158 (1914).

²³¹*Cumberland & Liberty Mills v. Keggins*, 139 Fla. 133, 190 So. 492 (1939); *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931); *Miller v. Finegan*, 26 Fla. 29, 7 So. 140 (1890).

²³²*Barlow v. Barlow*, 156 Fla. 458, 23 So.2d 723 (1945); cf. note 76 *supra*.

²³³FLA. STAT. §731.31 (Cum. Supp. 1947). It seems obvious that "estate" in this statute includes homestead property. Less serious misconduct on the part of an

serious misconduct will cut off an heir's claim to homestead property, as it does in the case of a deserting wife, has not been decided in Florida; but the current of authority in situations involving other classes of property indicates that it would not.²³⁴ There is a sound social policy underlying this distinction between a wife and heirs. Wayward conduct on the part of a wife strikes a far more serious blow at the very heart of the family structure—that continuity of the home which the homestead law is designed to preserve.

From the standpoint of subjection to administration and probate proceedings, a decedent's homestead is not a part of his estate.²³⁵ This distinction is important, not only in the matter of substantive rights but also with regard to the jurisdictional and other procedural differences thus occasioned, discussed in Part IV *infra*.

2. *Intervivos Transfer of Homestead Realty*

The only express restrictions placed by Florida law upon *intervivos* transfer of homestead property are found in the following passages:

"... and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists."²³⁶

"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"²³⁷

These provisions lead to the conclusion that homestead realty may be conveyed away during the life of its owner by either deed or mortgage (1) provided that the instrument of conveyance be properly executed by the owner of the homestead; and (2) provided further that, if the owner have a husband or wife, the spouse consent to the transfer and exhibit

heir is not penalized by the Florida Probate Law.

²³⁴Early authorities were in conflict as to whether, in the absence of statute, an heir who murdered his ancestor in order to convert his mere expectancy into a vested interest was thereby barred from his inheritance; see REDFEARN, *WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA* 565 n. 30 (2d ed. 1946).

²³⁵*Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (1938), 139 Fla. 259, 190 So. 516 (1939); *Baker v. State*, 17 Fla. 406 (1879).

²³⁶FLA. CONST. Art. X, §1.

²³⁷FLA. CONST. Art. X, §4.

that consent by joining in the execution of the deed or mortgage. These constitutional provisions offer the advantages of brevity, reasonable clarity, and flexibility in interpretation and enforcement. To combine such linguistic virtues with the additional goal of propounding phraseology that leaves no room for doubt in any factual situation is obviously impossible, however; and, as might have been expected, the courts have found the precise meaning of Article X questioned in a variety of circumstances.

Execution. The meaning of the words "duly executed," as applied to the owner of the homestead, has caused no difficulty; the Supreme Court has held that a deed or mortgage of homestead property is duly executed when it complies with the statutory requisites for such instruments in effect at the time of execution.²³⁸ Under the present law the usual deed of homestead, like any other *intervivos* conveyance of "an estate or interest of freehold, or for a term of more than one year, or any uncertain interest of, in or out of" real property, must be evidenced by a writing signed by the grantor in the presence of two subscribing witnesses.²³⁹

Question may arise as to the enforcement of an equitable mortgage against homestead property. Section 697.01, Florida Statutes 1941, provides in effect that all instruments of writing conveying or selling property for the purpose of securing a debt shall be regarded as mortgages; and this statute has been applied to an absolute deed purporting to convey homestead property.²⁴⁰ The statute is simply a legislative adoption of a well-established principle of equity, by which a mortgage is created, regardless of the form of the instrument, whenever the transaction is in fact a security device.²⁴¹ To be sure, the statute does contemplate evidence by a writing; but parol evidence is admissible to show the true nature of the dealings between the interested parties.²⁴²

²³⁸*New York Life Ins. Co. v. Oates*, 122 Fla. 540, 166 So. 269 (1935), *remanded on rehearing*, 122 Fla. 565, 166 So. 279 (1936); *Shad v. Smith*, 74 Fla. 324, 76 So. 897 (1917).

²³⁹FLA. STAT. §689.01 (1941).

²⁴⁰*First Nat. Bank of Florida v. Ashmead*, 33 Fla. 416, 14 So. 886 (1894), in which case the wife joined in the execution of the absolute deed. FLA. STAT. §697.02 (1941) provides that a mortgage shall constitute a lien rather than a conveyance of title or of the right to possession.

²⁴¹*E.g.*: *Torreyson v. Dutton*, 145 Fla. 169, 198 So. 796 (1940); *Vanderpool Properties, Inc. v. Hess & Slager, Inc.*, 100 Fla. 933, 130 So. 457 (1930); *Pittman v. Milton*, 69 Fla. 304, 68 So. 658 (1915); *Connor v. Connor*, 59 Fla. 467, 52 So. 727 (1910); *Hull v. Burr*, 58 Fla. 432, 50 So. 754 (1909).

²⁴²*First Nat. Bank of Florida v. Ashmead*, 33 Fla. 416, 14 So. 886 (1894); as

Although in some jurisdictions an equitable mortgage of realty has been permitted to rest on a mere parol agreement accompanied by part performance,²⁴³ enforcement of such a mortgage against Florida homestead property in the normal course of events is unlikely. It is submitted that an equitable mortgage of a homestead estate in realty necessitates either (1) an obligation falling within the classes excepted by Section 1 of Article X,²⁴⁴ or (2) creation in accordance with the requirements of joinder and due execution. In each of the cases cited in note 241 *supra* a written instrument was signed by the owner of the homestead, as well as by the spouse of such owner whenever the relation of husband and wife existed. Nevertheless, provided a transaction itself can be accomplished by parol as a matter of property law, there is no logical reason why parol consent should not constitute due execution.

Since the Supreme Court of Florida has committed itself to the principle that the homestead provisions apply to any interest that the head of a family residing in Florida may have in his dwelling,²⁴⁵ it is reasonable to infer that leasehold interests for less than one year may be subject to the homestead laws and to assume that transfer of at least some such interests, including consent thereto, may be effected by parol.²⁴⁶ The same principle should apply in the case of other interests in land not covered by the Statute of Frauds²⁴⁷ or by other enactments of the Legislature. In the doubtful event that parol alienation should prove to be undesirable in such instances, correction should be made by statute; the judiciary should not be burdened with the task of excepting homestead property, on grounds of policy, from the established rules of property law.

Joinder of Spouse. To enjoy exemption as a homestead, and to be subject to the restraints placed upon its alienation, the dwelling need not be

stated in *Markell v. Hilpert*, 140 Fla. 842, 855, 192 So. 392, 398 (1939), this is the equity rule, quite apart from any statute.

²⁴³WALSH, MORTGAGES 45-46 (1934); 1 JONES, MORTGAGES §227 (8th ed. 1928).

²⁴⁴An equitable lien arising in part out of funds advanced without any writing and used in purchasing homestead realty was allowed in *Sonneman v. Tuszyński*, 139 Fla. 824, 191 So. 18 (1939); see *Porter v. Teate*, 17 Fla. 813, 818 (1880) (dealing with similar provisions of the Constitution of 1868); cf. the discussion of Purchase Obligations in Part I, 1 *supra*.

²⁴⁵See Part I, 4 *supra*.

²⁴⁶FLA. STAT. §689.01 (1941) requires a writing for only those terms of more than one year. See FLA. STAT., c. 83 (1941) for effect of oral lease.

²⁴⁷FLA. STAT. §689.01 (1941).

owned by a married person.²⁴⁸ A homesteader may convey or mortgage the homestead by means of an instrument executed by himself or herself alone if unmarried at the time; but when he or she does have a spouse, the Constitution requires that such spouse join in the execution of a deed or mortgage conveying or encumbering the property.²⁴⁹ The manner in which the joinder of a spouse must be evidenced is, like the manner of execution, determined by the law in effect at the time of alienation.²⁵⁰ The deed or mortgage should of course be signed by the spouse, and it is also customary to mention the spouse in the body of the instrument as a party to the transaction. Mere form, however, is not alone sufficient. The language of Section 1 of Article X indicates that something more than a mere form is contemplated. "Joint consent" of husband and wife is necessary. Thus, while the execution of an instrument by a wife is prima facie evidence of her joinder,²⁵¹ proof that the execution was not voluntary obviously invalidates the instrument.²⁵²

Joinder by the husband is necessary in the alienation of homestead property owned by his wife.²⁵³ The fact that the manner of joinder in such a case has not been seriously questioned, however, indicates that this phase of the matter is well understood. The alienation is effectual if the husband consents to the transaction and demonstrates his consent by signing the deed or mortgage. In so far as the body of the instrument is concerned, joinder by a wife is accomplished in exactly the same manner as joinder by a husband—consent evidenced by a voluntary signature; but for a long time in Florida acknowledgment on the part of a man and acknowledgment on the part of his wife were each governed by different rules.

²⁴⁸See Part I, 2 *supra*.

²⁴⁹FLA. CONST. Art. X, §§1, 4. These sections expressly require joinder when, and only when, the owner of the homestead has a spouse. That the homesteader has children or other dependents living with him is immaterial in this connection.

²⁵⁰See note 238 *supra*.

²⁵¹New York Life Ins. Co. v. Oates, 122 Fla. 540, 555, 166 So. 269, 275 (1935). This opinion of Whitfield, J., was approved on rehearing, 122 Fla. 565, 166 So. 279 (1936), as correctly stating the law. Ultimately, on the fifth appeal, a final decree for the mortgagee was affirmed, 144 Fla. 744, 198 So. 681 (1940).

²⁵²Shad v. Smith, 74 Fla. 324, 76 So. 897 (1917); *see* New York Life Ins. Co. v. Oates, 141 Fla. 164, 182, 192 So. 637, 645 (1939).

²⁵³FLA. CONST. Art. X, §4. The sex of the homesteader, who must be both the owner and the family head, is immaterial; *cf.* Bigelow v. Dunphe, 144 Fla. 330, 198 So. 13 (1940).

Acknowledgment. The general rule in Florida is that acknowledgment by the person executing an instrument is necessary for purposes of recordation only.²⁵⁴ Acknowledgment by a husband accordingly does not affect the validity of the instrument; his valid execution is sufficient to pass title to the property in question except as against subsequent creditors and good-faith purchasers, who are protected by the recording act.²⁵⁵

Prior to the year 1943 not only were separate examination and acknowledgment required of a wife not a free dealer²⁵⁶ in order that a deed be eligible for recording, but these steps were also treated as an indispensable part of the transfer, regardless of whether the wife was mortgaging her separate property²⁵⁷ or relinquishing her dower rights,²⁵⁸ or joining in the alienation as a tenant by the entirety²⁵⁹ or as the spouse of the owner of a homestead.²⁶⁰ A deed signed by the wife but showing no separate acknowledgment therefore failed to pass the wife's interest.²⁶¹

In 1943 the Legislature enacted a statute placing a married woman's acknowledgment on the same footing as that of a single person and dispensing with the requirement of a separate examination.²⁶² The last section of this statute contains a curative clause validating all prior acknowledgments taken in accordance with these provisions unless questioned in a court of competent jurisdiction within one year after May 13, 1943. There is no reason to question the prospective operation of this statute; and although attacks from the constitutional angle against the

²⁵⁴FLA. STAT. §695.01 (1941); *Black v. Skinner Mfg. Co.*, 53 Fla. 1090, 43 So. 919 (1907); *Licata v. de Corte*, 50 Fla. 563, 39 So. 58 (1905).

²⁵⁵*Ibid.*

²⁵⁶*Cf.* FLA. STAT. §62.27 (1941); today §§62.38 - 62.46 (Cum. Supp. 1947) prescribe the procedure for becoming a free dealer.

²⁵⁷FLA. STAT. §693.03 (1941); see *Pritchett v. New York Life Ins. Co.*, 125 Fla. 653, 665, 170 So. 700, 705 (1936).

²⁵⁸FLA. STAT. §693.02 (1941), *Foxworth v. Maddox*, 103 Fla. 32, 137 So. 161 (1931).

²⁵⁹*Newman v. Equitable Life Assurance Soc'y*, 119 Fla. 641, 160 So. 745 (1935).

²⁶⁰*Hutchinson v. Stone*, 79 Fla. 157, 84 So. 151 (1920); *Shad v. Smith*, 74 Fla. 324, 76 So. 897 (1917).

²⁶¹One interesting distinction between a conveyance of homestead and of other real property owned exclusively by a husband is that in the latter case non-joinder or defective joinder by the wife renders the transaction ineffectual as to her dower interest only, while in the former case the entire transaction is void.

²⁶²FLA. STAT. §693.03 (Cum. Supp. 1947). This enactment, effective May 13, 1943, was not considered in *Berlin v. Jacobs*, 156 Fla. 773, 24 So.2d 717 (1945), with most confusing results from the standpoint of the practitioner; cf. *Comment*, 21 FLA. L. J. 216 (1947).

retroactive implications of its curative clause are possible, this danger is not of major proportions today.²⁶³

On May 11, 1943, an act was passed, effective immediately, purporting to authorize husband and wife to give powers of attorney to each other, and when thus empowered to execute and acknowledge deeds to property owned by either spouse separately or by both as tenants by the entirety.²⁶⁴ On June 4 of the same year this provision was included as Section 2 of a broader statute,²⁶⁵ which, however, provided in Section 3 that it was not to be construed as "dispensing with the joinder of husband and wife in conveying or mortgaging homestead property." The limitation was recognized in *Jacobs v. Berlin*²⁶⁶ as an essential step in upholding a decree of the chancellor denying enforcement of specific performance of a contract executed by a married woman alone to convey realty that was in part homestead.

3. The Supreme Court Rules of Descent

Second to only the Supreme Court Rules of Practice are the Supreme Court rules of descent, as far as the practitioner is concerned. The Constitution itself places but one limitation on the alienation of the homestead while its owner is alive, namely, that whenever he or she has a spouse the joint consent of both, and due execution by both, are required.²⁶⁷ Disposition by will is forbidden by the Constitution in a backhanded manner unless the homesteader is "without children,"²⁶⁸ while devise so as to cut off either his "lineal descendants" or his wife is checkmated by sta-

²⁶³Detailed discussion of this matter is outside the scope of this article; see generally FLA. CONST. Art. III, §33; *Mahood v. Bessemer Properties, Inc.*, 154 Fla. 710, 18 So.2d 775 (1944); *Campbell v. Horne*, 147 Fla. 523, 3 So.2d 125 (1941); *Lee v. Lang*, 140 Fla. 782, 192 So. 490 (1939); *Rogers, Florida Curative Statutes*, 22 FLA. L. J. 153 (1948).

²⁶⁴FLA. STAT. §708.09 (Cum. Supp. 1947), passed as c. 21696, §1, of Fla. Laws 1943.

²⁶⁵FLA. STAT. §§708.08-708.10 (Cum. Supp. 1947), enacted as Fla. Laws 1943, c. 21932; see Comment, 1 U. OF FLA. L. REV. 108 (1948), as to conveyance of homesteads held by the entirety.

²⁶⁶158 Fla. 259, 28 So.2d 539 (1946). The reasons given in this opinion explain correctly for the first time the practical result reached by inadvertence in *Berlin v. Jacobs*, 156 Fla. 773, 24 So.2d 717 (1945); cf. note 262 *supra*. Apparently the decisive issue of fact, namely, the homestead character of a portion of the property involved, was not raised by counsel at the outset.

²⁶⁷Art. X, §1 (consent), §4 (execution).

²⁶⁸FLA. CONST. Art. X, §4.

tute.²⁶⁹ "The exemptions . . . shall inure to the widow and heirs,"²⁷⁰ provided any property passes to them; but nowhere does the Constitution prescribe that any property must pass. What the electorate chose not to prescribe, however, the bench has supplied—by a process as clever as it was gradual, and at least as dubious as devious.²⁷¹

Early History. In 1897 Mr. Chief Justice Taylor, after analyzing the previous leading cases, concluded that they²⁷²

" . . . settled the doctrine in Florida that the homestead provisions of our Constitution *do not undertake to cast an estate* in the exempted properties upon the widow or heirs"

Some seven years later he succinctly stated the law as follows:²⁷³

²⁶⁹FLA. STAT. §§731.05, 731.27; cf. §731.34 (Cum. Supp. 1947); see note 189 *supra*.

²⁷⁰FLA. CONST. ART. X, §2.

²⁷¹A searching criticism of this judicial transmutation, even today unanswered from the standpoint of logic, is found in Tribble, *Homestead Law in Florida as a Restraint of Alienation*, 5 FLA. L. J. 37 (1931).

²⁷²*Hinson v. Booth*, 39 Fla. 333, 347, 22 So. 687, 692 (1897). Although the decision turned on the authority to will homestead personalty, the relationship between personalty and realty was carefully dissected. Speaking of the provisions governing both the realty and personalty exemptions, the opinion, immediately after the passage quoted above, continued:

" . . . or to regulate or establish their rights of property inheritance therein, but that such rights must be ascertained from other sources, *viz*: The statutes regulating dower and the laws of descent, but that all that *inures* to the widow and heirs under the second section quoted from the Constitution is the right to exempt the property from forced sale for the debts of the deceased head of the family. The widow and heirs, on the death of the *pater familias*, acquire their proprietary rights of property *in the things* exempted, not from the constitutional provisions quoted, but entirely from the statutes regulating dower and the descent of property, unaffected by such constitutional provisions, except that the latter instrument appends *to the things exempted*, in their transmission to the widow and heirs, the feature of *immunity from forced sale for the debts of the ancestor*."

In *Claffin v. Ambrose*, 37 Fla. 78, 88, 19 So. 628, 631 (1896), conveyance of the homestead by husband and wife to the wife via a third party, without consideration, was held not to constitute fraud on his creditors. In dismissing their bill the Court sustained the conveyance, but unfortunately the question of the claims of heirs, if any, did not arise. Noteworthy general analyses are listed in note 180 *supra*.

²⁷³*Palmer v. Palmer*, 47 Fla. 200, 204, 35 So. 983, 985 (1904).

OUR LEGAL CHAMELEON

"The effect of the constitution of 1885 in so far as the homestead is concerned, where the relation of husband and wife exists, and where there is a child or children, is to compel such homestead to inure to the widow as widow, and to the heirs, unless the consent of the wife can be obtained to its alienation in the lifetime of the husband, and where such alienation does not take place, compels *intestacy* so far as such homestead is concerned by prohibiting its alienation by will."

His summaries were strictly accurate at that time, and the Constitution has not been altered one iota since then as far as these provisions are concerned. The law, however, has been radically changed.

To be sure, the decisions themselves continued on a sound basis for many years. They involved either attempts at conveyance between husband and wife without the due execution by both expressly required by the plain English of Section 4 of Article X,²⁷⁴ or purported dispositions, in fact testamentary but feebly disguised as *intervivos* conveyances.²⁷⁵ The costume for the new principle, which finally appeared in full dress in

²⁷⁴*E.g.*, *Thomas v. Craft*, 55 Fla. 842, 46 So. 594 (1908). This was followed by *Byrd v. Byrd*, 73 Fla. 322, 74 So. 313 (1917), *Jahn v. Purvis*, 145 Fla. 354, 199 So. 340 (1940), and *Estep v. Herring*, 154 Fla. 653, 18 So.2d 683 (1944); in this last case the direct conveyance of real estate from husband alone to wife, allegedly made pursuant to FLA. STAT. §689.11 (1941), was invalidated as to homestead realty. The 1947 amendment to this section (Cum. Supp. 1947), discussed in Note, 1 U. OF FLA. L. REV. 433 (1948), is still governed by this holding, inasmuch as the Constitution cannot be changed by statute even expressly, much less by mere implication. The decisions upholding conveyance from husband alone to wife have rested on the factual finding below of abandonment of the property as the home prior to conveyance. *E.g.*: *Knowlton v. Dean*, 31 So.2d 58 (Fla. 1947), discussed in Comment, 1 U. OF FLA. L. REV. 108 (1948); *Lanier v. Lanier*, 95 Fla. 522, 116 So. 867 (1928); *Semple v. Semple*, 82 Fla. 138, 89 So. 638 (1921); *Rawlins v. Dade Lumber Co.*, 80 Fla. 398, 86 So. 334 (1920) (alternatively decision was based on consideration moving from wife plus absence of fraud, the attack on her title coming from creditors of ex-husband, who had conveyed homestead to her just before divorce and well prior to judgment for creditors).

²⁷⁵One such type, identified by failure to deliver the deed until the death of the grantor, was denuded in *Norton v. Baya*, 88 Fla. 1, 102 So. 361 (1924); another, characterized by reservation of the beneficial interest and power to revoke, came to grief in *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914), in which the alleged conveyance was judicially termed a testamentary disposition and the cause was remanded for determination as to whether the trustor was in fact the head of a family upon his death following that of his wife. He was later found not to be, 72 Fla. 530, 73 So. 603 (1916).

Church v. Lee,²⁷⁶ was carefully fabricated piece by piece in a series of dicta confusing the perch with our chameleon, that is, the homestead property with the homestead exemption, and gradually building up the impression that whenever a chameleon might conceivably appear a perch on which he could rest had to be furnished in order to comply with the dictates of organic law.

Consideration and Voluntary Transfer. Until the third decade of the century the sailing in homestead waters was reasonably clear. No one questioned the necessity of joinder by the wife in consenting to and executing a conveyance of the homestead, even when she was the transferee.²⁷⁷ And after *Palmer v. Palmer*²⁷⁸ there was no doubt as to the inability of a testator to devise his homestead realty when he left children surviving. That these two principles could be connected, however, was not realized until the doctrine of consideration was brought into the picture, in aid of the carefully nurtured fusion, or rather confusion, of the homestead property and the homestead exemption.

In *Hutchinson v. Stone*²⁷⁹ Mr. Justice Whitfield, speaking for the full Supreme Court, begins to develop the notion that the "exempt property is for the benefit of the 'heirs' as well as of the 'widow' of the owner." Within four months, in sustaining a conveyance to the childless wife by the husband alone in *Rawlins v. Dade Lumber Co.*,²⁸⁰ he inserts the dictum that the inurement of the exemption constitutes the "reason" for the rule that "when there are children or a child of the husband a conveyance of homestead real estate to the wife by the husband alone is void under the Constitution . . ." Of course, the obvious reason for requiring joinder of the spouses is that the Constitution specifically says so, prosaic though such a simple explanation may sound. Conveyance by the husband alone is forbidden regardless of whether his heir apparent is a son or only a beloved aunt. It might be added that the actual decision in the

²⁷⁶102 Fla. 478, 136 So. 242 (1931).

²⁷⁷See note 274 *supra*.

²⁷⁸47 Fla. 200, 35 So. 983 (1904). He must, of course, be the head of a family in order to qualify as a homesteader; see Part I, 2 *supra*.

²⁷⁹9 Fla. 157, 165, 84 So. 151, 153 (1920) (mortgage of homestead not a valid alienation unless acknowledged by wife pursuant to statute then in effect).

²⁸⁰80 Fla. 398, 403, 86 So. 334, 336 (1920) (conveyance of homestead to wife by husband alone held valid when he had left her permanently and was not residing on the homestead when he executed the deed).

case correctly rests on abandonment of the homestead by the husband.²⁸¹ The dissent of Mr. Justice Whitfield in *Semple v. Semple*²⁸² refers to the existence of children in *Byrd v. Byrd*,²⁸³ as contrasted with the *Rawlins* case. Once again the real issue was abandonment rather than the existence of offspring, but his dissent concludes with a passage emphasizing the presence of a child.²⁸⁴

In his concurring opinion in *Norton v. Baya* the transmutation takes on more definite form by proscribing a "voluntary" conveyance,²⁸⁵ especially when the following passage is examined:²⁸⁶

"The children of the owner who are his statutory 'heirs,' have a right and an interest in the homestead real estate exemptions that are secured by the Constitution, and the owner cannot transfer the property to another except by the alienation that is expressly provided for in which the wife must join. And the joint deed or mortgage of husband and wife required by the Constitution, necessarily contemplates an alienation to others than the wife, at least where the conveyance to her is without consideration and there are children to whom as heirs together with the widow the exemption by the express terms of the Constitution, 'shall inure' at the death of the owner."

In *Jackson v. Jackson*²⁸⁷ the Court was again confronted with a so-called voluntary transfer by both parents to a third party, who had in turn conveyed to the wife without consideration. In this case, for the first time, the issue of failure to deliver the deeds played no part in the opinion; no attempt was made to call them a mere testamentary transfer in fact. Nevertheless the Court unanimously affirmed their cancellation; and the opinion, again by Mr. Justice Whitfield, lays down the following principle:²⁸⁸

"The transaction in this case does not constitute 'such an aliena-

²⁸¹Whitfield, J., admits this himself in *Norman v. Kannon*, 133 Fla. 710, 716, 182 So. 903, 905 (1938). As to what constitutes abandonment see Part I, 5 *supra*.

²⁸²82 Fla. 138, 145, 89 So. 638, 640 (1921).

²⁸³73 Fla. 322, 74 So. 313 (1917).

²⁸⁴82 Fla. 138, 148, 89 So. 638, 641 (1921).

²⁸⁵88 Fla. 1, 10, 102 So. 361, 364 (1924).

²⁸⁶*Id.* at 11, 102 So. at 364.

²⁸⁷90 Fla. 563, 107 So. 255 (1925).

²⁸⁸*Id.* at 569, 107 So. at 257.

tion of the homestead as is required by the Constitution to accomplish that result. If given effect it would operate to transfer the legal title to the homestead from the husband to the wife, stripped of its homestead status or character, thereby converting her interest therein into absolute ownership, and divest his children, who are his prospective heirs, of the interest which under the Constitution, inures to them. This is so because the homestead must be owned by the head of the family and the exemption inure to his widow and heirs."

In spite of the cases cited in support of this view, a new concept here makes its way into Florida law. Our little chameleon, which less than twenty years before was only a gleam in the eye of our famous justice, has grown from a mere expectancy of exemption, on through the adolescent period of contingent remainder, sometimes in the exemption but gradually in the property, until now he becomes a full-fledged estate, a sort of vested remainder in the property, defeasible under certain conditions only.²⁸⁹ To the constitutional lawyer he may seem rather misshapen, and to the property lawyer he is no doubt a monstrosity, but at all events he is with us.

The stage is now set for the inevitable climax. The law professes to abhor fictions until popular desire for a different practical result demands recognition, whereupon some cloak must be produced to square the change with the time-honored theory of static rules, the doctrine that judges never make law—they merely apply it.²⁹⁰ The evil straw-man of *Norton v. Baya* and *Jackson v. Jackson*²⁹¹ can now be removed from the cast, and in the final scene the due alienation by husband and wife together, specifically authorized by Section 4 of Article X, is defeated in single combat by our hero, lack of consideration, with those ringing lines reminiscent of Daniel Webster:²⁹²

²⁸⁹The extreme to which this misconception has gone is well illustrated by the following sentence from the dissent in *Miller v. Mobley*, 136 Fla. 351, 355, 186 So. 797, 799 (1939): "Section 2 of Article 10 of the constitution of Florida provides that the homestead shall inure . . ." The exemption has become lost in the shuffle.

²⁹⁰For a realistic analysis of the judicial mind at work see Jerome Frank, *A Sketch of an Influence*, Max Rheinstein, *Who Watches the Watchmen*, and Carlos Cossio, *Phenomenology of the Judgment*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 189, 589, 85 (Sayre ed. 1947), reviewed in 1 U. OF FLA. L. REV. 111 (1948).

²⁹¹88 Fla. 1, 102 So. 361 (1924), and 90 Fla. 563, 107 So. 255 (1925), respectively.

²⁹²*Church v. Lee*, 102 Fla. 478, 486, 136 So. 242, 246 (1931) (holding for the first time that a duly executed conveyance by husband and wife direct to the wife, without consideration, is void when there are children).

“... if an act is not permitted to be done *indirectly* it follows that it may not be done directly.”

This judicial conversion of a constitutional exemption from forced sale into a rule of descent has been vigorously attacked right up to the present time, but with little or no success. Nor has it mattered whether the conveyance was direct to the wife²⁹³ or via a straw-man.²⁹⁴

How, then, can the head of a family avoid this rule of descent? For one thing, he and his wife can take the property as an estate by the entirety, provided they do so deliberately at the outset, before the head of the family has the misfortune to acquire the homestead in his own name. One would have expected to find this also condemned as a patent conspiracy to circumvent organic law, but the Supreme Court has balked at pushing its brainchild to a logical conclusion.²⁹⁵ Again, the homestead can be abandoned, in which event the head of the family can dispose of it without hindrance from our “constitutional” law of descent.²⁹⁶

²⁹³*Ibid.*

²⁹⁴Florida Nat. Bank of Jacksonville v. Winn, 158 Fla. 750, 30 So.2d 298 (1947); McEwen v. Larson, 136 Fla. 1, 185 So. 866 (1939); Norman v. Kannon, 133 Fla. 710, 182 So. 903 (1938); Bess v. Anderson, 102 Fla. 1127, 136 So. 898 (1931); Hart v. Gulf Fertilizer Co., 91 Fla. 991, 108 So. 886 (1926).

²⁹⁵Knapp v. Fredricksen, 148 Fla. 311, 4 So.2d 251 (1941); Menendez v. Rodriguez, 106 Fla. 214, 143 So. 223 (1932). In the latter case the facts include transfers through a third party from husband to wife, and later from the wife via a third party to husband and wife as tenants by the entirety, shortly before the lot was rendered homestead by construction of their home thereon; obviously the sole purpose of this double shuffle was to insulate the second Mrs. Rodriguez from any possible descent claims by the children of her husband's first marriage, but the process received judicial blessing. See Norman v. Kannon, 133 Fla. 710, 714, 182 So. 903, 905 (1938), in which the line is clearly drawn.

²⁹⁶In Miller v. Mobley, 136 Fla. 351, 186 So. 797 (1939), the Menendez v. Rodriguez maneuver described in the preceding footnote was again pulled off in favor of the second wife, this time by selling the home for 34 months and then buying it back, largely by cancelling the original purchase-money mortgage and notes (Chapman and Whitfield, J. J., dissenting). Prior to legal separation, in Jordan v. Jordan, 100 Fla. 1586, 132 So. 466 (1931), the departure of the second wife from the homestead, leaving her husband alone long enough to enable him to convey the home via a straw-man to himself and her as tenants by the entirety while he was not the head of any family, was unanimously held sufficient to cut off all homestead claims of his children by a former marriage. Following the transfer she returned to the apartment house, although according to the opinion marital relations were not resumed. Still another type of abandonment appears in Anderson Mill and Lumber Co. v. Clements, 101 Fla. 523, 134 So. 588 (1931).

Or the homesteader and spouse may prefer to deed it outright to some of their children for a consideration, reserving as grantors a life estate.²⁹⁷

Finally, of course, the spouses may simply sell the homestead, in which event it has been stated by way of dictum that "the consideration takes the place of the exempted property and the Constitution may not thereby be violated."²⁹⁸ Limited to nothing more than a pious hope that somehow the children will receive some benefit from the proceeds of the sale, this remark is accurate, though not of profound significance; but if construed to mean that the exemptions attaching to homestead realty follow the personalty derived from its sale, the statement is definitely misleading as regards both descent and exemption from forced sale. Only in exceptional instances does personalty step into the shoes of the realty from which it is derived.²⁹⁹

Article X specifically distinguishes between realty and personalty in creating the exemptions, and the personalty exemption is expressly limited to \$1,000. And, as we shall see in Part III, there are no constitutional restrictions on bequests of homestead personalty. The true principle of law is that, once homestead realty is duly alienated during the life of its owner, any proceeds other than real property received in exchange are obviously personalty, and are governed entirely by the homestead provisions relating to personalty.

The foregoing exposition of the method by which the judicial rules of homestead descent were established admittedly does not prove that the results are necessarily unfortunate or unwanted. Basically, the issue involves a determination as to whether the homestead provisions are designed primarily to enable the family breadwinner to continue to win bread, or whether they aim at another major objective, namely, to keep family property in the family from generation to generation.³⁰⁰ On principle, however, these rigid restrictions are difficult to justify. Unlike

²⁹⁷*Daniels v. Mercer*, 105 Fla. 362, 141 So. 189 (1932) (direct conveyance), followed in *Parrish v. Robbirds*, 146 Fla. 324, 200 So. 925 (1941), and *Jones v. Equitable Life Assurance Soc'y*, 126 Fla. 527, 171 So. 317 (1936) (alternative holding; also, conveyance was via third party). In the first two cases mentioned consideration was found; in the third it was overlooked, but the decision does not necessarily eliminate the necessity for consideration.

²⁹⁸*Norman v. Kannon*, 133 Fla. 710, 716, 182 So. 903, 905 (1938).

²⁹⁹*E.g.*, *Kohn v. Coats*, 103 Fla. 264, 138 So. 760 (1931) (fire insurance proceeds).

³⁰⁰As has just been noted, their efficacy in the latter event is seriously impaired by the use of the estate by the entirety, the doctrine of abandonment, and the lack of any constitutional restraint on testamentary disposition of homestead personalty.

the disposition of the estate of a decedent, which the Legislature may freely control,³⁰¹ the ownership of property by a living person comprehends an inherent right to manage and transfer that property.³⁰² Ownership is of course subject to the overriding needs of the society possessing jurisdiction of the property, but the judiciary should not lightly tamper with the right of an individual to alienate his property unless the necessity for restraint is made clear by constitutional or statutory provisions or by unequivocally expressed demands of public policy.

The fact remains that neither by the Florida Constitution nor by the acts of the Legislature is a voluntary transfer of homestead property expressly prohibited. Instead, the Constitution provides protection for the family by requiring the spouse of the homesteader to join in the execution of a deed or mortgage alienating the homestead. This important phase of the family welfare is left, as the framers of the Constitution obviously intended it should be, to the joint discretion of those who create the family. To circumscribe this discretion arbitrarily has quite the reverse of a beneficial effect on the family itself, in spite of the admitted fact that in the odd instance judicial condemnation has proved an effective means of forestalling a designing second wife seized of a husband whose chief virtue appears to be docility. The burden of ever-increasing taxation on the family as a whole is often relieved by a timely transfer of the homestead; and a widow may well live in misery under an expensive family roof, the grandeur of which vanishes with her husband.³⁰³ In the final analysis, these conflicting policies are best sorted by the electorate or by the legislature; the function is not one to be assumed by the bench.

An encouraging note was struck recently in the dissenting opinion of Mr. Justice Terrell, joined by Mr. Justice Chapman, in *Florida National Bank of Jacksonville v. Winn*, presenting for the first time in many years a realistic analysis of what was prescribed when the Constitution was adopted:³⁰⁴

"This court is committed to the doctrine that these provisions of the Constitution permit alienation of the homestead by deed or

³⁰¹See note 181 *supra*.

³⁰²In *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897), although the decision has been distinguished in later homestead discussions on the ground that it deals with personal property, this generally recognized principle is clearly expounded.

³⁰³*E.g.*, *Cowdery v. Herring*, 106 Fla. 567, 143 So. 433 (1932).

³⁰⁴158 Fla. 750, 752, 30 So.2d 298, 299 (1947). The decision permitted an adult

mortgage; that parents without children may dispose of it by will, but if they have children, minors or adults, they may not dispose of it by will, neither may they dispose of it through a conduit or otherwise without consideration. *Jackson v. Jackson*, 90 Fla. 563, 107 So. 255. Nor may a man with wife or child surviving him make testamentary disposition of the homestead. *Norton v. Baya*, 88 Fla. 1, 102 So. 361.

“In my view there have been unwarranted inferences drawn from these and other decisions affecting the homestead. Certainly the homestead was designed for the benefit of the family, to preserve its finest traditions, but the constitution imposes 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.”

Even so, however, this statement admits that the Supreme Court rules of descent remain in full force as applied to a voluntary conveyance from both spouses to the wife. In the language of laymen, the exemption is, at the outset, merely the tail on the dog; and obviously there can be no tail without a dog. By concentrating on the tail, one then easily slides into the notion that there can be no dog without a tail. Once this false

daughter, married and living apart for over twenty years, to burke a conveyance of the homestead by her widowed father and his second wife to the wife via a third party, followed by her promised devise thereof to the City of Cocoa for a public use. Terrell, J., continued:

“There is no suggestion here that the alienation by the Taylors was irregular or done for a fraudulent purpose. The Constitution does not require consideration as a basis of alienation of the homestead. This idea was doubtless injected into some of the decisions because of fraud or overreaching; otherwise it was mere surplusage and has no application here. There is not a word in the Constitution 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 Constitution imposes no limitation whatever on alienation and this court should impose none unless the purpose of the homestead is about to be overthrown. The fact that exemption from forced sale may inure to the widow and heirs imposes no restraint on alienation.

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

step in taken, the rest is simple. Since the tail and the dog are inseparable, therefore, wherever a tail might appear by inurement, there must be a dog on which to hang it. The result is that the tail wags the dog.

Today the one remedy, unless numerous precedents can be overruled, is the adoption of a constitutional amendment by the citizens of Florida, restating what they set forth in 1885, but so worded as to demonstrate clearly that they are creating an exemption from forced sale and not enacting by implication a rule of succession.

PART III—EXEMPTION AND TRANSFER OF HOMESTEAD PERSONALTY

1. *Exemption from Forced Sale*

In addition to the exemption from forced sale of realty and the improvements thereon, Section I of Article X of the Florida Constitution creates a personalty exemption. The pertinent language is "together with one thousand dollars worth of personal property . . ." At the outset it should be noted that the words "together with" do not mean "together with" at all; our chameleon can find adequate footing on personalty alone, and the lack of real property does not bar an exemption of the personalty.³⁰⁵

What constitutes personalty is admittedly not a simple problem, but it does not rest on any special characterization peculiar to the law of homesteads. Rather recently "paintings, etchings, statutory [*sic*], rugs, draperies, silverware, china, linens, and furniture" were categorized as personalty.³⁰⁶ In arriving at the \$1,000 limit, "cash, furnishings, or any other personalty"³⁰⁷ should be included in the inventory, including money and choses in action.³⁰⁸ Even issuance of a cashier's check, provided payment be stopped, does not prevent exemption of credit in the bank.³⁰⁹ Products of land on the land, to be sure, follow the land, and a lessee

³⁰⁵*Seashole v. O'Shields*, 139 Fla. 839, 191 So. 74 (1939); *Sneed v. Davis*, 135 Fla. 271, 274, 184 So. 865, 867 (1938) (allegation of ownership of "no property of value other than the stock in question" upheld as a valid defense against creditors; "property" of course includes realty as well as personalty).

³⁰⁶*Richards v. Byrnes*, 153 Fla. 705, 707, 15 So.2d 610 (1943). "Statutory" is an obvious misprint for "statuary." The question was certified to the Supreme Court as one without precedent, pursuant to Rule 38 of the Supreme Court Rules of Practice.

³⁰⁷*Id.* at 707, 15 So.2d at 611.

³⁰⁸FLA. STAT. §222.06 (1941).

³⁰⁹*Tracy v. Lucik*, 138 Fla. 188, 189 So. 430 (1939).

cannot claim them as personalty;³¹⁰ for the same reason they descend as homestead realty rather than as personalty.³¹¹

Since, however, the personalty exemption created by Section I of Article X does not bar the Legislature from creating other exemptions, the proceeds and cash surrender values of life insurance policies are separately placed beyond the reach of creditors of the insured unless effected specifically for their benefit;³¹² and as of June 9, 1941, this protection was extended to disability income benefits accruing from any form of insurance.³¹³ Constitutional objections to these statutes have been firmly rejected.³¹⁴

The freedom from garnishment or attachment of "any money or other thing due to any person who is the head of a family residing in this state" for labor or services³¹⁵ has been held by an equally divided Supreme Court,³¹⁶ affirming judgment below, to embrace salaries of "white-collar" workers, with the dissent bowing graciously to the insidious philosophy, palmed off in the United States during the past fifteen years, that the only person that renders services is one who uses his hands and his back almost exclusively and his head as little as possible.

Specific personalty can be mortgaged, for reasons thoroughly expounded in *Patterson v. Taylor*,³¹⁷ but a blanket waiver of the benefit of any law was flatly declared a nullity as against the homestead exemption as far back as 1884.³¹⁸ Both decisions stand unquestioned today.³¹⁹

³¹⁰*Hodges v. Cooksey*, 33 Fla. 715, 15 So. 549 (1894); *Cathcart v. Turner*, 18 Fla. 837 (1882); see *Howard v. Calhoun*, 155 Fla. 689, 693, 21 So.2d 361, 363 (1945); *Schofield v. Liody*, 35 Fla. 1, 2, 16 So. 780 (1895); as regards liens on agricultural products raised by a tenant today see FLA. STAT. §§83.08-83.11 (1941).

³¹¹*Adams v. Adams*, 158 Fla. 173, 28 So.2d 254 (1946). Note, however, the holding in *Gentile Bros., Inc. v. Bryan*, 101 Fla. 233, 133 So. 630 (1931), that a specific mortgage of fruit crops produced by cultivation of homestead groves is not an alienation of realty, and joinder of the spouse is not required.

³¹²FLA. STAT. §§222.13, 222.14 (1941). An excellent recent discussion, by one who knows Florida law, appears in the opinion of Waller, Circ. J., in *New York Life Ins. Co. v. Valz*, 141 F.2d 1014 (C. C. A. 5th 1944).

³¹³FLA. STAT. §222.18 (1941).

³¹⁴*Milam v. Davis*, 97 Fla. 916, 984, 123 So. 668, 692 (1929); *cert. denied sub nom. Tiffany & Co. v. Davis*, 280 U. S. 601 (1929).

³¹⁵FLA. STAT. §222.11 (1941).

³¹⁶*Wolf v. Commander*, 137 Fla. 313, 188 So. 83 (1939).

³¹⁷15 Fla. 336 (1875).

³¹⁸*Carter's Adm'rs v. Carter*, 20 Fla. 558 (1884).

³¹⁹E.g., *Richardson v. Myers*, 106 Fla. 136, 143 So. 157 (1932) (chattel mortgage

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Apart from mortgage liens and judgment liens, however, there remains the problem of statutory liens. The lien of a landlord for unpaid rent was recently considered in *Howard v. Calhoun*.³²⁰ A majority held premature an action brought by the absent tenant to replevy furniture, when it was commenced within three months of his departure from the apartment, specifically because the landlord had not resorted to forced sale and was permitted by statute to hold the furniture for three months. If limited strictly to the facts, the decision itself may perhaps be tenable, even though it avoids by only the narrowest of margins a collision with the unanimous refusal to limit the exemption to protection against formal and technical process alone, as enunciated in *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*³²¹

Long ago, in the interpretation of Chapter 3131 of the Acts of 1879, our Supreme Court soundly decided the issue of substantive law necessarily involved in sanctioning the sale of personal effects, in spite of the exemption, merely to collect hotel and apartment rentals. This cogent reasoning in *Hodges v. Cooksey* is accordingly quoted:³²²

"If the Legislature can declare a lien in favor of the landlord for his rent on all the property of his tenant other than agricultural products, and it follows that by entering into the rental contract alone the tenant thereby pledges his property to pay such claim and waives his constitutional right of exemption therein, then it seems to us that the Legislature can by providing similar liens to secure the payment of other debts avoid and annul not only the policy but the plain provisions of the Constitution on the subject of exemptions. Food and raiment are as essential to life as a habitation and shelter, and we might find insurmountable difficulty in discriminating against the lien for one class of demands in favor of the other. The claim for rent was highly favored at the common law, but we are unable to discover any purpose in the Constitution to except this demand from those against which the exemptions provided for may be claimed.

of specified homestead personalty held enforceable); *Lowe v. Keith*, 138 Fla. 654, 190 So. 67 (1939) (blanket waiver held ineffective to destroy exemption).

³²⁰155 Fla. 689, 21 So.2d 361 (1945), construing FLA. STAT. §§85.19, 86.02 (1941) in relation to FLA. CONST. Art. X.

³²¹74 Fla. 220, 77 So. 209 (1917).

³²²33 Fla. 715, 723, 15 So. 549, 552 (1894), followed in *Schofield v. Liody*, 35 Fla. 1, 16 So. 780 (1895).

The Constitution exempts to the person entitled thereto one thousand dollars' worth of personal property from forced sale under any process of law, and the Legislature cannot indirectly deprive him of such right any more than it can directly do it."

The forceful dissent of Mr. Justice Adams,³²³ in which Mr. Justice Buford joined, shows that the danger did not pass unnoticed in the *Howard* case. A piece of movable furniture is by no stretch of the imagination a *fructus* of the hotel or apartment in which it happens to be placed. Political scientists might within reason contend that the basic theory of homesteads is unwise; but to permit special favoritism to landlords alone, in the teeth of the express language of Section 1 of Article X, can follow only from disregard of the elementary principle of the superiority of constitutions over statutes. In practical effect the *Howard* decision permits any group of creditors able to exert the necessary pressure on the Legislature to rewrite the homestead provisions of the Constitution at will.

The homestead personalty exemption is not to be confused with personalty in the form of cash that in reality takes the place of exempt real property, whether the substitution be occasioned by destruction,³²⁴ or by sale of the realty of a deceased homesteader in appropriate circum-

³²³155 Fla. 639, 696, 21 So.2d 361, 365 (1945).

³²⁴*Kohn v. Coats*, 103 Fla. 264, 138 So. 760 (1931). *But cf.* *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 74 Fla. 220, 77 So. 209 (1917), in which these proceeds are regarded as personalty. The distinction made little practical difference in view of the amount involved, and the point was not carefully considered. *Kohn v. Coats*, *supra*, decides the issue squarely; the proceeds are clothed with the exemption of the destroyed realty. Lest one be lulled into a false sense of security as regards policies placed with insurers outside Florida, however, the warning contained in *Sanders v. Armour Fertilizer Works*, 292 U. S. 190 (1934), should not be neglected. The Illinois corporate creditor of *Sanders*, a Texas homesteader, garnished the Connecticut insurers in Illinois; and their subsequent interpleader proceedings in a federal district court in Texas resulted ultimately in a decree there devoting the insurance proceeds to payment of the Illinois default judgment obtained by *Armour* in spite of an injunction of the Texas court forbidding continuance of the Illinois attachment proceedings. Both the majority opinion and that of the four dissenters are a bit on the foggy side, but the significant factor is that such a decision can be reached only by holding that the Texas homestead exemption is procedural rather than substantive and accordingly need not be recognized elsewhere if contrary to the law of the forum.

stances,³²⁵ or in the form of damages for trespass upon realty.³²⁶ In these instances the \$1,000 limit does not apply, because the cash is realty in the eye of the law.

Procedurally, the statutes provide a method whereby a debtor may submit an inventory of all his personal property and then select a portion thereof for purposes of exemption; in the event of dispute between him and his creditor, appraisal follows. These provisions are well drafted, and accordingly their mechanics require no discussion here.³²⁷ It is settled that a bankrupt homesteader may schedule as exempt such of his property as is free of lien rather than encumbered items.³²⁸ Obviously, to avail oneself of the authorized exemption does not deprive creditors of any rights.

This is not to say, however, that transfers in fraud of creditors and concealment of assets are condoned; in such instances the courts regard the items unaccounted for as assets still within the control of the bankrupt.³²⁹ His selection of these as exempt is implied, and his total authorized exemption is pro tanto reduced. Alleged concealment must be demonstrated, of course; and in any event the total value of the property listed, plus that of the items unlisted but later discovered, must

³²⁵This is well brought out by Mabry, J., in *Scull v. Beatty*, 27 Fla. 426, 435, 9 So. 4, 6 (1891) (surplus from sale of homestead to satisfy mortgage upon death of mortgagor held not subject to disposition as personalty). A different though logically related situation is seen in *Donly v. Metropolitan Realty & Inv. Co.*, 71 Fla. 644, 72 So. 178 (1916) (authorizing judicial sale of homestead realty and partition of proceeds among heirs).

³²⁶In *Hill v. First Nat. Bank of Marianna*, 79 Fla. 391, 397, 84 So. 190, 192 (1920), our Supreme Court having forbidden execution of a judgment that was not a lien on homestead property, refused to allow this judgment to be set off against damages awarded for invasion of the homestead rights by the defendant bank, the gist of the opinion being:

"The actual damage sustained by her because of the injury suffered as a result of the trespass by defendants upon the exempt real property and the conversion by them of the exempt personalty, and the judgment recovered therefor partake of the nature of the homestead property and are also exempt."

³²⁷FLA. STAT. §§222.06-222.10 (1941); *cf.* §222.12 as to attachment of "money or other thing due . . . for the personal labor or services" of the head of the family.

³²⁸*Lowe v. Keith*, 138 Fla. 654, 190 So. 67 (1939); *Florida Loan & Trust Co. v. Crabb*, 45 Fla. 306, 33 So. 523 (1903); *McMichael v. Eckman*, 26 Fla. 43, 7 So. 365 (1890).

³²⁹*Florida Loan & Trust Co. v. Crabb*, *supra* note 328, followed as the law of Florida in *Libby v. Beverly*, 263 Fed. 63 (C. C. A. 5th 1920).

exceed \$1,000 before the unsecured creditors acquire any right thereto.³³⁰

In essence, the homesteader has a cushion of \$1,000 in value limit, upon which our chameleon permanently rests.³³¹ The substance of the cushion may vary from day to day, but the form and size remain the same.

2. *Transfer Inter Vivos*

In the last analysis, though our chameleon is visible in transfers *inter vivos*, the fact is that he remains at home on the \$1,000 cushion of the homesteader. His mission is merely to validate the conveyance; he does not follow the property. Of course, what the homesteader receives in return becomes stuffing for the cushion; and, as we have noted, fraudulent conveyances will not be tolerated. The specific portion of the cushion that is conveyed may seem at first to carry the chameleon with it, but in the hands of the transferee it is not guarded by the chameleon; its protection rests on the familiar principle that property of one individual cannot be seized to pay the debt of another.

To repeat, the cushion may not be overstuffed, nor may material not in it be transferred in fraud of creditors; but none of the stuffing ever belongs to the creditors, and accordingly this may be transferred at will.³³²

3. *Transfer at Death*

Our chameleon is rather like a faithful dog; when his master dies he either remains on the cushion or perishes with his master. He cannot steer the cushion, as he does in the case of realty; its future possessor is determined by the homesteader's will³³³ or alternatively by the law of intestate succession in Florida.³³⁴

In either event the only way to find the chameleon is to look for all or part of the cushion among the belongings of the widow, the heirs, or both. To the exact extent of the cushion or any piece of it in their posses-

³³⁰*Shollar Crate and Box Co. v. Passmore*, 148 Fla. 466, 4 So.2d 530 (1941); *Sneed v. Davis*, 135 Fla. 271, 184 So. 865 (1938).

³³¹*Ibid.*

³³²The matter is well analyzed by Buford, J., in *Sneed v. Davis*, 135 Fla. 271, 184 So. 865 (1938).

³³³This is settled in the classic opinion of Taylor, C. J., in *Hinson v. Booth*, 39 Fla. 333, 22 So. 687 (1897).

³³⁴FLA. STAT. §731.23 (Cum. Supp. 1947).

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sion, he retains his footing;³³⁵ but if his master wishes to bequeath the cushion to others the law imposes no bar, and the chameleon abdicates in favor of the rules governing bequests by testators not homesteaders.³³⁶ The cushion or portion thereof must then attempt to pass unescorted; a bequest to others than the widow or heirs unseats the chameleon at the very moment the testator dies, and the bequest may accordingly be compelled to yield to the claims of creditors against the estate.

³³⁵Seashole v. O'Shields, 139 Fla. 839, 191 So. 74 (1939).

³³⁶FLA. STAT. §731.05 (Cum. Supp. 1947); the inurement of the exemption is not accorded to others than the "widow and heirs" by FLA. CONST. Art. X, §2.

ARTICLE X

HOMESTEAD AND EXEMPTIONS

SECTION 1. *Exemption of homestead; extent.*—A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes or assessments or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate, exempted, or for house, field or other labor performed on the same. The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this Article.

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

SECTION 3. *Exemptions in former constitution; applicability.*—The exemptions provided for in the Constitution of this State adopted in 1868 shall apply as to all debts contracted and judgments rendered since the adoption thereof and prior to the adoption of this Constitution.

SECTION 4. *Homestead may be alienated by husband and wife.*—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.

SECTION 5. *Homestead area not reduced by subsequent inclusion in municipality.*—No homestead provided for in section one shall be reduced in area on account of its being subsequently included within the limits of an incorporated city or town, without the consent of the owner.

SECTION 6. *Legislature to enact laws to enforce article.*—The Legislature shall enact such laws as may be necessary to enforce the provisions of this Article.

SECTION 7. *Exemption of homestead from taxation.*—Every person who has the legal title or beneficial title in equity to real property in this State and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of Five Thousand Dollars on the said home and contiguous real property, as defined in Article 10, Section 1, of the Constitution, for the year 1939 and thereafter. Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than Five Thousand Dollars shall be allowed to any one person or any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. The Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption.

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