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Homestead Exemption: What Protection for the Widow and Heirs?

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CASE COMMENTS

HOMESTEAD EXEMPTION: WHAT PROTECTION FOR THE WIDOW AND HEIRS?

Aetna Insurance Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969)

Respondent, subject to an outstanding judgment recorded in 1961, was separated from her husband and lived with her fourteen-year-old daughter. When respondent's father died in April 1965, leaving her mother a life tenancy in his homestead property and respondent the vested remainder, respondent abandoned her marital residence and moved with her child into the parental home to care for her invalid mother. After the invalid mother died in September 1965, the judgment creditor, Aetna, executed judgment against respondent's interest in the property.[1] Following respondent's claim of homestead exemption, Aetna sought a declaration that its judgment lien was superior to the homestead claim. Following judgment in favor of Aetna, respondent appealed. The Second District Court of Appeal, finding the time the recorded judgment attached to the remainder interest to be "wholly immaterial," reversed, holding that because no levy, prerequisite to a forced sale, was made until respondent had become the owner in fee, the homestead claim was superior.[2] On certiorari, the Supreme Court of Florida reversed and HELD, with Justices Ervin and Roberts dissenting, that while a remainder interest will not support a claim of homestead, at the inheritance the prior recorded judgment created a lien *eo instanti* upon the respondent's remainder interest in the property.[3]

Despite the fact that homestead exemption in Florida has long been the subject of confusion to lawyers and laymen alike,[4] its primary purpose has never been questioned. The law had its origin in the theory that the state's prosperity and the citizens' independence required that each citizen have a home where his family could live sheltered from financial misfortune.[5] Thus, the policy of homestead exemption is to insure the preservation of the family home despite the just demands of creditors.[6] In pursuit of this, homestead exemption provisions have been liberally construed in the interest of those claiming the benefit.[7] The homestead provisions, however, cannot be utilized

1. Aetna had served as surety for the bonds furnished by the construction company of respondent's husband. Respondent, as well as the other wives of the company's officers, had signed an indemnity agreement in relation to the suretyship. Upon default, Aetna in 1961 recovered a judgment against all of the indemnitors.

2. LaGasse v. Aetna Ins. Co., 213 So. 2d 454, 457 (2d D.C.A. Fla. 1968).

3. 223 So. 2d 727 (Fla. 1969).

4. For a general discussion of homestead exemption, *see* Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption,* 2 U. FLA. L. REV. 12, 219, 346 (1949).

5. Hill v. First Nat'l Bank, 79 Fla. 391, 399, 84 So. 190, 192 (1920).

6. *Id.*

7. Graham v. Azar, 204 So. 2d 193 (Fla. 1967); Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So. 2d 832 (1946); Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917); Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912).

to foster a fraudulent means of escaping the payment of obligations.[8] In addition, the exemption does not protect against execution for taxes or for any other obligation incurred in relation to the homestead property.[9] Aside from these exceptions, any landowner who resides in the state and is the head of a family may avail himself of the benefits of homestead exemption by designating what constitutes his homestead either before[10] or after levy is made upon his property.[11] Once such a designation is made, the homestead together with 1,000 dollars worth of personal property is exempt from forced sale under process of any court.[12]

Although the constitution places limitations upon the amount of land that may be exempted,[13] there is no definition or limitation of estates in land to which a homestead exemption may apply. Thus, Florida courts have allowed the homestead exemption to attach to *any* estate in land, whether freehold or less, owned by the head of a family residing in Florida.[14] Even the mere possession of land with the consent of the owner has been deemed of sufficient value to the occupant to support a claim of homestead exemption.[15] Thus, any interest in the claimed homestead, either equitable or legal, will support the exemption.[16]

A frequent source of confusion regarding homestead lies in determining when the provisions of the exemption take effect. Because homestead exemptions come into being only in relation to a debt,[17] the status of liens is of great importance. Judgments and decrees become liens upon the real estate of the debtor when they are properly filed in the county records.[18] Such a lien also instantly attaches to and binds any real estate subsequently acquired by the debtor.[19] The debtor's homestead is protected from such liens at any time after homestead status has been established, but homestead status may not be brought into being to defeat a preexisting lien.[20] Thus, under Florida law a prior recorded judgment lien against a piece of property will prevail

8. Cases cited note 7 *supra*.

9. FLA. CONST. art. X, §1 (1885); FLA. CONST. art. X, §4 (a) (1968).

10. FLA. STAT. §222.01 (1967).

11. FLA. STAT. §222.02 (1967). It should be made clear that this statute refers only to the time that one may designate a homestead for exemption and does not refer to when homestead status must be established.

12. FLA. CONST. art. X, §1 (1885); FLA. CONST. art. X, §4 (1968).

13. One hundred and sixty acres of contiguous land outside of a municipality or half of one acre within the limits of any incorporated city or town. FLA. CONST. art. X, §1 (1885); FLA. CONST. art. X, §4 (a) (1968).

14. Anemaet v. Martin-Senour Co., 114 So. 2d 23, 26 (2d D.C.A. Fla. 1959). Lack of occupancy here, however, caused the claim to fail.

15. Hill v. First Nat'l Bank, 73 Fla. 1092, 1101, 75 So. 614, 617 (1917). The court said here that if the claimant merely retains possession of the land it is of sufficient value to him to have it protected and it is of no concern to the creditor that another has superior title.

16. Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 39, 27 So. 2d 832, 833 (1946).

17. Crosby & Miller, *supra* note 4, at 23.

18. Giddens v. McFarlan, 152 Fla. 281, 284, 10 So. 2d 807, 809 (1943); FLA. STAT. §55.10 (1967).

19. Porter-Mallard Co. v. Dugger, 117 Fla. 137, 139, 157 So. 429, 430 (1934).

20. First Nat'l Bank v. Peel, 107 Fla. 413, 416, 145 So. 177, 178 (1932).

against the subsequent creation of homestead status in such property.[21] Only where the homestead status and the lien attach simultaneously, as in the case of a purchase or inheritance of land by a judgment debtor who immediately establishes residence as a homestead, will priority be accorded to the homestead claim.[22]

Respondent in the instant case based her claim of priority upon two distinct theories. Because Aetna failed to execute judgment against the property until after the fee ownership and accompanying homestead status came into being, respondent contended that the homestead claim would prove superior to the recorded judgment. In rejecting this contention, the Florida supreme court ruled that the prior recorded judgment became a lien on the land at the instant respondent acquired an interest in the property. Thus, the attachment of the lien upon respondent's remainder interest prevented any subsequent creation of homestead status.[23] This ruling assumed that no homestead right existed at the time of the inheritance, despite respondent's possession and role as family head, because a homestead claim cannot attach to a remainder interest.[24] Thus, the court ruled that because the recorded judgment attached to the remainder as soon as the remainder was acquired by the respondent, this particular estate prevented both a homestead claim based upon the remainder interest and a subsequent creation of homestead status once the fee title had vested.[25]

The respondent's alternative argument was that her actual possession following the death of her father was sufficient to support a claim of homestead. Although the court has held that any right or interest the head of a

21. Lyon v. Arnold, 46 F.2d 451, 452 (5th Cir. 1931).

22. Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431, 433 (Fla. 1968). *Cf.* Comment, *Homestead Exemption:Extension of Protection After Judgment*, 21 U. FLA. L. REV. 134 (1968).

23. Here the court ruled that after the lien automatically attached to respondent's remainder interest when it was inherited, Florida precedent proscribed any future creation of homestead status. A careful study of the cases cited by the court, however, reveals that in each instance the execution occurred *before* homestead status was established. In the instant case the execution levy did not occur until *after* homestead status became clearly established. Giddens v. McFarlan, 152 Fla. 281, 10 So. 2d 807 (1943); Porter-Mallard Co. v. Dugger, 117 Fla. 137, 157 So. 429 (1934); First Nat'l Bank v. Peel, 107 Fla. 413, 145 So. 177 (1932); Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917); Abernathy v. Gruppo, 119 So. 2d 398 (3d D.C.A. Fla. 1960).

24. As authority for this, the court cited: Anemaet v. Martin-Senour Co., 114 So. 2d 23 (2d D.C.A. Fla. 1959). Examination of that opinion reveals that the source of this conclusion was 26 AM. JUR. *Homestead* §61 (1940). Under the same title in *American Jurisprudence* 2d, however, this additional and more definitive passage is found: "If the remainderman becomes possessed of the property by determination of the life estate before the creditor enforces his lien, the debtor may claim a homestead right in the property and thereby arrest the creditor's right to sell on execution." 40 AM. JUR. 2D *Homestead* §59 (1968). The same view also appears in 40 C.J.S. *Homesteads* §82 (1944).

25. Note 23 *supra*. Although the court properly cites previous opinions, which held that homestead property is subjected to levy under judgments recorded prior to the time such property became the homestead of the judgment debtor, the rule appears to be dictum since the facts of each case indicate that the execution levy rather than the attachment of the lien was the element that precluded the subsequent establishment of a homestead.

family has in the land occupied by the family should be construed liberally to support a homestead claim,[26] in the principal case the court refused to find in the land the necessary present interest to support a homestead claim. Thus, despite the fact that the mother's infirmity precluded her right to claim a homestead in her life estate,[27] the court's opinion indicates that actual possession of the land with the permission of the life tenant is not an interest upon which a remainderman may claim homestead and thereby protect both the present occupancy and the future estate. Because a homestead claim must be based upon the right of possession resting in the head of the family,[28] the opinion indicates that in similar circumstances neither the life tenant nor the remainderman may benefit from the provisions of homestead exemption.

The principal decision may be criticized on several different grounds: (1) The court has ruled in the past that any interest in land, including mere possession with the consent of the owner, is sufficient to support a claim of homestead by the occupant.[29] By holding that a remainder interest, even when coupled with actual possession, will not support a homestead claim, the court is not only going against its own precedents, but also is narrowing the scope of the homestead exemption.[30] In effect, the court has established a new rule applicable to remaindermen, who are now excluded from the liberal interpretation of ownership accorded to other homestead claimants. (2) The principal case can readily be distinguished from those cited by the court as authority for the proposition that once a judgment lien attaches to the land, a subsequent homestead cannot be established to defeat the lien.[31] In each of the cited cases, both the lien and the execution levy had been established prior to the homestead claim. In addition, each of the cases involved a fact situation wherein the claimant sought after execution to establish homestead status solely to defeat the lien and protect the land.[32] Thus, these cases are inappli-

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26. Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 39, 27 So. 2d 832, 833 (1946).

27. The constitution requires that one be the head of a family in order to claim a homestead. FLA. CONST. art. X, §1, (1885); FLA. CONST. art. X, §4(a) (1968). Here, respondent became the head of the family by right of her support of her invalid mother and infant child.

28. Abernathy v. Gruppo, 119 So. 2d 398, 399 (3d D.C.A. Fla. 1960); Crosby & Miller, *supra* note 4, at 31. *But see* Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So. 2d 832 (1946).

29. Hill v. First Nat'l Bank, 73 Fla. 1092, 1101, 75 So. 614, 617 (1917).

30. The reasoning of the present court is that because a remainder interest creates no present right to possession, the use essential to a homestead claim is not present. Yet here the occupancy and use that are deemed necessary to make the land sufficiently valuable to the claimant are, in reality, present.

31. The court cited: Giddens v. McFarlan, 152 Fla. 281, 10 So. 2d 807 (1943); Porter-Mallard Co. v. Dugger, 117 Fla. 137, 157 So. 429 (1934); First Nat'l Bank v. Peel, 107 Fla. 413, 145 So. 177 (1932); Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917); Abernathy v. Gruppo, 119 So. 2d 398 (3d D.C.A. Fla. 1960).

32. In each instance there was no intent to occupy the land as a homestead until after the lien. In *Abernathy* and *Giddens* no actual homesteads were ever created. In *Porter-Mallard* the judgment debtor first attempted to erect a home on the land after the judgment. In *Pasco* the judgment debtor was married two weeks after the execution levy. In *First*

cable to the present situation where the creation of the homestead status, in fact if not in law, occurred simultaneously to the attachment of the lien, and a legal homestead claim preceded the execution. (3) Rather than distinguish between liens incurred through the purchase or improvement of the land and liens bearing no relation to the land, the court has subjected the homes of judgment debtors to forced sale by general creditors.[33] In the case of remainder interests, which are established by statute to guarantee that the heirs inherit the homestead of their ancestor, an unencumbered inheritance becomes impossible when the heir is a judgment debtor.[34] Thus, the instant decision expressly negates the legislative intent of the descent statute. (4) Of the greatest significance, however, is the fact that the principal opinion clearly goes against the intent of the homestead provisions of the constitution. The decision does not reflect the strengthened language of the new constitution,[35] but construes the law to the detriment of those in greatest need of the homestead benefits. The constitution clearly provides that homesteads be protected from *both* forced sale *and* the attachment of judgment liens.[36] Seemingly, this would mean that a judgment creditor could not submit to forced sale a piece of property even if his lien preceded the establishment of homestead. Once a homestead is established, the constitution clearly provides that it cannot be subjected to forced sale. The dissenting opinion of Justice Roberts, concurred in by Justice Ervin, suggests this approach:[37]

> The humane reasons for this protection of the home against general creditors have been announced many times. The respondent LaGasse was head of a family composed of herself and an infant child. She has a judgment creditor who seeks to levy on a homestead owned and occupied by her. In my opinion, Section 1, Article X, Florida Constitution 1885, and Section 4, Article X, Florida Constitution as Revised 1968, clearly prohibit the levy of execution.

The present holding is contrary to both Florida judicial precedent and, of greater significance, the intent of the people of Florida as reflected in their adoption of the new constitution. Homesteads established before the execution levy should be protected against forced sale by general creditors. Prohibiting the subsequent establishment of the homestead status after the attach-

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National Bank the judgment debtor moved his family onto the land after the execution. Thus, each of these cases differs factually from the instant case.

33. *Compare, e.g.*, Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917), *with* Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912).

34. FLA. STAT. §731.27 (1967) provides that the homestead shall descend to the widow for life with a vested remainder to the heirs in being at the time of the death of the decedent. Thus, in the context of the present situation, rather than guaranteeing that the homestead will descend to the heirs, the decision allows the land to be taken by any general creditors of the devisees.

35. That the homestead "shall be exempt from forced sale under process of any court" has been revised and now reads: "There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon . . . ." FLA. CONST. art. X, §1 (1885); FLA. CONST. art X, §4(a) (1968).

36. FLA. CONST. art. X, §1 (1885); FLA. CONST. art. X, §4(a) (1968).

37. 223 So. 2d 727, 730 (Fla. 1969).