Oral argument
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Div A

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALICE LETTIG HASKIN, also known as ALICE LETTIG SIEMS, Appellant, - vs - WALTER E. HASKIN, individually and as administrator of the Estate of Edwin Easter Haskin, deceased, and LORAINE HASKIN EVANS, Appellees.	)	NO. APPEAL TO THE SUPREME COURT, E

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALICE LETTIG HASKIN, also known as ALICE LETTIG SIEMS, Appellant, - vs - WALTER E. HASKIN, individually and as administrator of the Estate of Edwin Easter Haskin, deceased, and LORAINE HASKIN EVANS, Appellees.	)	APPEAL TO THE SUPREME COURT FROM AN ORDER OF THE CIRCUIT COURT AFFIRMING A FINAL ORDER AND JUDGMENT OF THE COUNTY JUDGE'S COURT

HISTORY OF THE CASE

This is an appeal from the Final Judgment or Order of the Honorable C. E. Chillingworth, one of the Circuit Judges of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County, dated July 2, 1952, and recorded in Chancery Order Book 224, at page 598, which said Final Judgment or Order affirmed the Final Order of the Honorable Richard P. Robbins, County Judge, dismissing the Petition for Revocation of the Appointment of Administrators, dated the 12th day of June, 1952.

Edwin Easter Haskin, the deceased, died intestate on October 23, 1949 and the Honorable J. K. Williamson and George W. Coleman were appointed administrators pursuant to a petition filed in the County Judge's Court by Walter E. Haskin and Loraine Haskin Evans, the surviving brother and sister of the deceased. On May 15, 1950 the appellant made an unsuccessful attempt to prove an oral agreement to make a will by which she claimed the entire estate of the decedent. On June 4, 1952 the appellant filed her Petition for Order Revoking the Appointment of Administrators and other Relief. This Petition may be found on pp. 1 - 4 Tr., and it alleges, among other things, that the

appellant is a widow of the decedent and that she is entitled to his estate. She further sets forth in said Petition a common law marriage which was entered into on or about the 20th day of October, 1942 and avers that there was cohabitation between herself and the decedent until the 23rd day of October, 1949, the day on which the decedent died. In her Petition the appellant prays for the removal of administrators and that she be appointed in their place. She further prays for an accounting of all the assets belonging to the estate.

On June 6, 1952 the appellees filed and set forth their joint defenses to the Petition for Order Revoking the Appointment of Administrators and Other Relief in a pleading they entitle Motion to Dismiss Petition for Revocation of Appointment of Administrators and Other Relief. The said Motion is found on pp. 5 - 10 Tr. This alleged Motion to Dismiss Petition for Revocation of Appointment of Administrators and Other Relief contains and sets forth two pleas of res adjudicata and one plea of estoppel, and the appellees who were the respondents in the Lower Court averred in the said Motion to Dismiss that the Petitioner did not file her claim within the pe riod allowed by Sec. 733.16 Florida Statutes. On June 6, 1952 the respondents gave notice of hearing on the Petition before the County Judge and pursuant to said notice of hearing the attorneys of record for the appellant and appellees appeared and presented their argument for and against the Petition for Order Revoking the Appointment of Administrators and Other Relief. On June 12, 1952 the Honorable Richard P. Robbins, County Judge, made and entered his Final Order Dismissing Petition for Revocation of Appointment of Administrators; said Final Order is dated the 12th day of June, 1952 and is found on p. 11 Tr. The appellant being aggrieved by this Final Order Dismissing Petition for Revocation of Appointment of Administrators prosecuted her appeal

to the Circuit Court where it was affirmed on the 2nd day of July, 1952 by the Honorable C. E. Chillingworth, Circuit Judge, and recorded in Chancery Order Book 224, at page 598. Said Order Affirming Order of County Judge's Court is found on p. 15 Tr. After the appellant had given her Notice of Appeal to Circuit Court the Honorable J. K. Williamson and George W. Coleman, administrators, tendered their resignation as administrators. That the said resignation was accepted by the Court and said administrators, as well as their attorneys, were paid the balance of their fees in full from the funds belonging to the estate and Walter E. Haskin, the brother of the deceased, was thereupon appointed administrator of the estate.

Since no testimony was taken in the Lower Court in support of or against the Petition for Order Revoking the Appointment of Administrators and Other Relief, or in support of or against the pleas set forth in the alleged Motion to Dismiss Petition for Revocation of Appointment of Administrators and Other Relief, the matter is now before the Supreme Court of the State of Florida on the pleadings heretofore described.

QUESTIONS OF LAW INVOLVED

I. WHETHER THE BROTHER AND SISTER OF A DECEDENT, WHO WERE MADE RESPONDENTS IN A SWORN PETITION FILED IN THE COUNTY JUDGE'S COURT, HAVE ANY FURTHER STANDING IN COURT TO CLAIM THE ESTATE AFTER ADMITTING THE PETITIONER'S ALLEGATION THAT SHE IS THE WIDOW OF THE DECEDENT AND IS ENTITLED TO THE ESTATE?

II. WHETHER THE RESPONDENTS NAMED IN A PETITION FOR REVOCATION OF APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF FILED IN THE COUNTY JUDGE'S COURT ARE REQUIRED TO SET FORTH ALL THEIR DEFENSES IN THE ANSWER?

III. WHETHER A MOTION TO DISMISS SHOULD BE GRANTED IF ON ANY REASONABLE HYPOTHESIS EQUITY IS SHOWN TO EXIST?

Q. IV. WHETHER THE WIDOW WHO FILES A PETITION IN THE COUNTY JUDGE'S COURT TO REVOKE THE ORDER APPOINTING THE ADMINISTRATORS AND FOR OTHER RELIEF IS ENTITLED TO THE LETTERS AND TO THE RELIEF SOUGHT IN HER PETITION WHEN THE MATERIAL ALLEGATIONS AND FACTS SET FORTH IN THE SAID PETITION ARE NOT DENIED BY THE RESPONDENTS WHO SET THE MATTER DOWN ON THE PETITION FOR HEARING BEFORE THE COURT?

Q. V. WHETHER THE PLEAS SET FORTH TO BAR THE ACTION SHOULD BE SUSTAINED WHERE THEY SHOW ON THEIR FACE THAT THEY ARE FRIVOLOUS AND DUPLICIOUS?

(UNDER SECOND ASSIGNMENT OF ERRORS)

Q. I. WAS IT AN ERROR FOR THE COUNTY JUDGE TO SUSTAIN THE PLEAS OF RES ADJUDICATA SET FORTH BY THE RESPONDENTS IN PARAGRAPH 1 OF THEIR JOINT DEFENSES, IN A PLEADING THEY ENTITLED MOTION TO DISMISS PETITION FOR REVOCATION OF APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF?

Q. II. WHETHER A PETITIONER WHO FILES A PE TITION FOR ORDER REVOKING THE APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF IN THE COUNTY JUDGE'S COURT, IN WHICH SHE SETS FORTH THAT SHE IS THE WIDOW OF THE DECEDENT WHO DIED WITHOUT ISSUE AND THAT SHE IS ENTITLED TO THE ESTATE AND PRAYS THAT SHE BE APPOINTED ADMINISTRATOR AND FOR AN ACCOUNTING, IS BARRED BY PROVISIONS OF SECTION 733.16 FLORIDA STATUTES?

(UNDER THIRD ASSIGNMENT OF ERRORS)

Q. I. SHOULD THE COUNTY JUDGE HAVE TREATED THE ALLEGED MOTION TO DISMISS THE PETITION FORREVOCATION OF APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF AS AN ANSWER?

(UNDER FOURTH ASSIGNMENT OF ERROR)

Q.I. WHETHER THE RELIEF SOUGHT IN THE PE TITION FOR ORDER REVOKING THE APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF SHOULD BE GRANTED WHERE THE MATERIAL ALLEGATIONS WERE NOT DENIED AND THE MATTER WAS SET DOWN FOR HEARING BEFORE THE COURT BY THE RESPONDENTS?

(UNDER FIFTH ASSIGNMENT OF ERROR)

Q. I. WHETHER THE APPELLANT HAS HAD HER CAUSE DETERMINED UNDER THE PROCEDURE APPLIED TO OTHER SIMILAR CASES IN THE COUNTY JUDGE'S COURT?

(UNDER SIXTH ASSIGNMENT OF ERROR)

Q. I. WAS IT AN ERROR FOR THE COUNTY JUDGE TO SUSTAIN THE MOTION TO DISMISS THE PE TITION FOR REVOCATION OF APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF AND TO DISMISS SAID PE TITION WITH PREJUDICE?

(UNDER SEVENTH ASSIGNMENT OF ERROR)

Q. I. WHETHER THE FINAL JUDGMENT OF THE COUNTY JUDGE'S COURT, MADE AND ENTERED ON THE 12TH DAY OF JUNE 1952 (p. 11 Tr.) IMPAIRED THE OBLIGATION OF THE COMMON LAW MARRIAGE CONTRACT, DENIED THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES?

FIRST ASSIGNMENT OF ERRORS

The first assignment of error is a Final Judgment or Order of the Honorable C. E. Chillingworth, one of the Circuit Judges of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, dated July 2, 1952, and recorded in Chancery Order Book 224 at page 598, which said Final Judgment or Order affirmed the Final Order of the Honorable Richard P. Robbins, County Judge, dismissing the Petition for Revocation of Appointment of Administrators and Other Relief, dated the 12th day of June, 1952.

I. WHETHER THE BROTHER AND SISTER OF A DECEDENT, WHO WERE MADE RESPONDENTS IN A SWORN PETITION FILED IN THE COUNTY JUDGE'S COURT, HAVE ANY FURTHER STANDING IN COURT TO CLAIM THE ESTATE AFTER ADMITTING THE PETITIONER'S ALLEGATION THAT SHE IS THE WIDOW OF THE DECEDENT AND IS ENTITLED TO THE ESTATE?

The County Judge ruled against the contention of the widow that the brother and sister had no further standing in Court.

ARGUMENT

1. Since the appellees, who were respondents in the Lower Court, set forth their joint defenses in a pleading entitled Motion to Dismiss the Petition for Order Revoking the Appointment of Administrators and Other Relief, and in said defenses they failed to attack the validity of the marriage, and failed to deny the existence of the widow or the relief she was seeking in her Petition for Order Revoking the Appointment of Administrators and Other Relief, the appellees, brother and sister, have no further standing in Court since the widow would be the sole heir to the estate.

2. In support of this contention we cite the case In Re Knight's Estate, 155 Fla. p. 869; 22 So. 2d 249. In this case the Supreme Court held that the petition having shown upon its face that the deceased died leaving a surviving spouse, the

brother and sister could not take under Statute Sec. 731.23 F.S.A. and that they have no interest in the estate.

3. In support of this contention we further cite the case of Hudnell v. Hamm, 183 Ill. 486, 56 N.E. 172, 175, 48, L.R.A. 557, 75 Am. St. Rep. 124. In this latter decision the Supreme Court of Illinois held that it is immaterial whether the widow has barred or estopped herself from taking or not, as her right to inherit does not under the Statute depend on any of her acts so to speak, but on her existence at the time of the death of the decedent. This case supports the contention of the appellant that the brother and sister are not heirs at law because the Petition shows on its face that the deceased left a surviving widow and the brother and sister in their joint defenses have admitted this fact.

4. We further cite the case of In Re Thompson Estate 145 Fla. p. 42, 199 So. Rep. p. 352. In this case the Supreme Court of Florida held:

> "The law is well settled that a common law marriage is recognized as a valid marriage in this state and it is also settled in all jurisdictions where common law marriages are recognized as valid that when such marital status once obtains it cannot be dissolved, except by death or by decree of a court of competent jurisdiction."

See Cargile v. Wood, 63 Mo. 501; Badger v. Badger, 88 N.Y. 546, 42 Am. Rep. 263; Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826; Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L.R.A. 384, 61 Am. St. Rep. 419; Peters v. Peters, 73 Colo. 271, 215 P. 128, 33 A.L.R. 24; Coad v. Coad, 87 Neb. 290, 127 N. W. 455.

5. We further contend that common law marriages are recognized and sustained by the laws of Florida and we cite the following decisions: Thompson v. Harris, et al 148 Fla. p. 329, 4 So. 2d 385; Mendel v. Mendel, Fla., 1 So.2d 571; Orr v. State,

129 Fla. 398, 176 So. 510; Garcia v. Exchange Nat. Bank, 123 Fla. 726, 167 So. 518; Catlett v. Chestnut, 107 Fla. 498, 146 So. 241, 91 A.L.R. 212; LeBlanc v. Yawn, 99 Fla. 328, 126 So. 789; Chaves v. Chaves, 79 Fla. 602, 84 So. 672; Madison v. Robinson, 95 Fla. 321, 116 So. 31; Warren v. Warren, 66 Fla. 138, 63 So. 726; Caras v. Hendrix, 62 Fla. 446, 57 So. 345; Daniel v. Sams, 17 Fla. 487.

II. WHETHER THE RESPONDENTS NAMED IN A PETITION FOR REVOCATION OF APPOINTMENT OF ADMINISTRATIORS AND OTHER RELIEF FILED IN THE COUNTY JUDGE'S COURT ARE REQUIRED TO SET FORTH ALL THEIR DEFENSES IN THE ANSWER?

The Lower Court ruled that the respondents were not required to set forth their defenses in the answer.

ARGUMENT

Sec. 732.08 F.S.A., under the title of Estates of Decedents, sets forth the following mandatory provision:

> "The answer shall in short and simple manner set up the facts constituting the defense."

However, the appellees erroneously attempted to set forth their defenses in their Motion to Dismiss Petition for Revocation of Appointment of Administrators and Other Relief. (pp 5 - 10 Tr.)

III. WHETHER A MOTION TO DISMISS SHOULD BE GRANTED IF ON ANY REASONABLE HYPOTHESIS EQUITY IS SHOWN TO EXIST?

The Lower Court ruled that the Petition for Order Revoking the Appointment of Administrators and Other Relief was without equity.

ARGUMENT

A motion to dismiss should not be granted if on any reasonable hypothesis equity is shown to exist. This principle conforms with our doctrine of Stare Decisis. In the case of Hannum, et al v. Hannum Co. 135 Fla. 1, 184 So. 765, the Court adhered to the following principle:

> "A motion to dismiss is a severe remedy and should not be granted if on any reasonable hypothesis equity is shown to exist."

IV. WHETHER THE WIDOW WHO FILES A PETITION IN THE COUNTY JUDGE'S COURT TO REVOKE THE ORDER APPOINTING THE ADMINISTRATORS AND FOR OTHER RELIEF IS ENTITLED TO THE LETTERS AND TO THE RELIEF SOUGHT IN HER PETITION WHEN THE MATERIAL ALLEGATIONS AND FACTS SET FORTH IN THE SAID PETITION ARE NOT DENIED BY THE RESPONDENTS WHO SET THE MATTER DOWN ON THE PE TITION FOR HEARING BEFORE THE COURT?

The Lower Court denied the relief sought in the Petition for Order Revoking the Appointment of Administrators and Other Relief.

ARGUMENT

Sec. 732.44 F.S.A. contains the following mandatory provision:

> "The surviving spouse shall first be entitled to Letters."

Sec. 731.23 F.S.A. contains the following mandatory provision:

> "The real and personal property of an estate shall descend and be distributed as follows: . . . if there be no lenial descendants, to the surviving spouse."

At the time the appellees filed their defenses to the Petition for Order Revoking the Appointment of Administrators and Other Relief (pp. 1 - 4 Tr.) they set the matter down for hearing on the said Petition and appeared in Court and presented their arguments in favor of their defenses to the Petition for Order Revoking the Appointment of Administrators and Other Relief (pp. 1 - 4 Tr.). Since the respondents did not question the validity of the marriage, or deny the existence of the widow or the right to the relief sought in her Petition for Order Revoking the Appointment of Administrators and Other Relief, the Lower Court should have then and there issued Letters to the Petitioner and granted the other relief prayed for. At common law she was entitled to a judgment nil dicit.

The appellees waive the benefits of the Statute requiring the expiration of ten (10) days from date of filing of answer before the cause stands at issue, where they appeared and participated in the hearing, especially since they set the matter down for hearing. The presumption is that all their defenses were before the Court for adjudication.

In support of our contention we cite the case of Fleming, et al v. Ossinsky, 158 So. p. 116; 117 Fla. 348. Also the case of Waring, et al v. Bass, 80 So. 514, 76 Fla. 583.

We further contend the appellant, in her Petition for Order Revoking the Appointment of Administrators (pp. 1 - 4 Tr.) complied with Statute 732.08, wherein it provides:

> "The petition shall state in short and simple manner the facts constituting jurisdiction of the court and the ground of the proceedings, and shall pray for such relief as is desired."

This Section further provides that:

> "No defect or form shall impair substantial rights."

V. WHETHER THE PLEAS SET FORTH TO BAR THE ACTION SHOULD BE SUSTAINED WHERE THEY SHOW ON THEIR FACE THAT THEY ARE FRIVOLOUS AND DUPLICIOUS?

The Lower Court denied the contention of the appellant that the pleas set forth to bar the action were frivolous and duplicious.

ARGUMENT

The appellant was not allowed the time or the opportunity to file a motion to strike the pleas or to offer evidence and testimony to show why said pleas should not be sustained.

SECOND ASSIGNMENT OF ERRORS

It was error to sustain the motion to dismiss which contained pleas of res adjudicata, estoppel and inconsistent remedies in bar of the relief sought in the petition, all in violation of the laws of pleading and the rules of practice.

Q. I. WAS IT AN ERROR FOR THE COUNTY JUDGE TO SUSTAIN THE PLEAS OF RES ADJUDICATA SET FORTH BY THE RESPONDENTS IN PARAGRAPH 1 OF THEIR JOINT DEFENSES, IN A PLEADING THEY ENTITLED MOTION TO DISMISS PETITION FOR REVOCATION OF APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF?

The Lower Court sustained the pleas over the objection of the appellant.

ARGUMENT

The pleas of res adjudicata and estoppel failed to set forth the answers and failed to aver that answers were filed, and further failed to aver that the allegations as to the title of relief against the respondents were substantially the same as in the cause of action before the Court. In support of this contention we cite Lindsay, et al v. McIver, et al 51 Fla. 463; 40 So. Rep.619. In the case of DaCosta v. Dibble 40 Fla. 418, 24 So. 911 the Supreme Court of this state held that:

> "A plea setting up a former decree in bar must set forth so much of the bill and answer as will suffice to show the same point was then at issue and should aver that the allegations as to the title to relief as against the defendant were substantially the same as in the second cause of action."

This is a controlling case and it goes on to cite a number of controlling decisions from other states and from other authorities. The pleas of res adjudicata and estoppel do not show on their face that a bill of complaint or petition have been filed in any of the former causes of action setting forth common

law marriage, the existence of a surviving spouse or a prayer for Letters, the removal of the administrators and an accounting of the administrators. Therefore, the pleas set forth to bar this cause of action are frivolous and bad and do not conform with our doctrine of Stare Decisis.

The first plea of res adjudicata is joined with the second plea and two appeals in such a confusing manner that the Court would ordinarily be deceived into believing that the pleas have merit and should be allowed to bar this cause of action. It is apparent that the respondents intended to include both judgments and the two appeals in one plea in a manner which would hide their deficiencies as well as their total lack of merit.

In the case of Brundage, et al v. O'Berry, 101 Fla. 320, 134 So. 520, the Supreme Court defines res adjudicata and says that:

> "It involves concurrence of identity in thing sued for, identity of cause of action, identity of parties, and identity of quality in person for or against whom claim is made."

Therefore, the pleas of res adjudicata and estoppel set forth by the respondents to bar the present cause of action show on their face that they are frivolous and duplicious; that the pleas set forth to bar the action should not have been sustained by the Lower Court because they show on their face that they are so framed as to prejudice, embarrass and delay a fair trial in this cause.

In the case of Armstrong, et al v. the County of Manatee, et al, 49 Fla. 273; 37 So. 938, the Court held that:

> "There is no averment that such adjudication was on the merits, nor are the demurrers in the motion set forth so the court can say that the decree or matter have been on the merits."

In the case of Praal v. Praal 58 Fla. 496, the court held that:

> "It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment. If there is any uncertainty as to the matter formerly adjudicated, the burden of showing it with sufficient certainty by the record or extrinsically is upon the party who claims the benefit of the former judgment."

This is also a controlling case on this point and it cites a number of controlling decisions from other states in support of this contention.

This case also lays down the following principle:

> "In general a final judgment on demurrer is not a bar to a second suit or action for the same cause between the same parties as an estoppel by judgment because of the former adjudication."

We further cite Keen v. Brown, et al, 46 Fla. 487; 35 So. 401; Day v. Weaddock, et ux, 104 Fla. 251; 140 So. 668.

The plea of res adjudicata, which involved the matter of an unsuccessful attempt by the appellant to obtain a declaratory decree in the Circuit Court defining her marital status, shows on its face that it was not determined on its merits. The Circuit Court dismissed this cause of action because the Court did not have jurisdiction of that phase of the case. The plea did not set up the answer and neither did it aver that there was a final judgment in the prior action between the same parties for the same cause of action. We cite the case of Walton Land & Timber Co. v. Louisville & N. R. Co. 69 Fla. 472; 68 So. 445.

In the case of Mack v. U. S. 29 F. Supp. 65, the Court held that:

> "A dismissal on jurisdictional grounds does not deprive a plaintiff of right to bring another action."

The doctrine of res adjudicata is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available. See Sec. 210, p. 946 Am. Jur., which gives a long line of decisions from every section of the country in support of this contention. See also In Re Power 115 Fed. 69. In this connection we cite the case of Kent, et al v. Sutker, 40 So. 2d 145;

In the case of Bell v. Niles, 55 So. 392, 61 Fla. 114, the Supreme Court held that:

> "An order to sustain a contention of res adjudicata the complete record in the former suit, including the judgment therein, should be offered in evidence and not incomplete or detached portions thereof."

The judgment of the Circuit Court, dismissing the prior cause of action set forth by the respondents as a plea of res adjudicata, not only failed to set forth the answer or the motion, but it did not set forth the full bill of complaint and neither does it show on its face that the precise questions were involved This judgment recites that the matter was barred by res adjudicata, but this part of the judgment would be void because if the Circuit Court did not have jurisdiction of the subject matter then it had no power to say that the matter before it was res adjudicata. A judgment rendered without jurisdiction leaves the parties where the court found them. Such a judgment would have no value as a plea of res adjudicata. An absolute want of jurisdiction of the subject matter or cause of action cannot be waived, nor can the doctrine of estoppel be invoked to confer jurisdiction on a tribunal which has no jurisdiction of the subject matter. Sec. 1096 p. 1275 Puterbaugh C. L. Pl. & Pr. 10th Ed.

In support of this contention the appellant cites Sec. 430, p. 91, Am. Jur. Vol. 31, and this section goes on to say that:

> "A void judgment is not entitled to the respect accorded a valid adjudication but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it. It is attended by none of the consequences of a valid adjudication. It has no legal or binding force or efficiency for any purpose or at any place. It cannot affect, impair or create rights. It is not entitled to enforcement and is ordinarily no protection for those who seek to enforce it. All proceedings found on the void judgment are themselves regarded as invalid. In other words, a void judgment is regarded as a nullity. We are not speaking now of that part of the judgment which dismissed the case but that part of the judgment which took into consideration the doctrine of res adjudicata."

Sec. 431, p. 92 Am. Jur. Vol. 31 further states that:

> "A void judgment cannot be cured by subsequent proceedings. Such a judgment cannot be validated, corrected and even the legislature may not ratify a void judgment so as to impart validity to it."

In paragraph 2 of the Motion to Dismiss Petition for Revocation of Appointment of Administrators and Other Relief (pp. 5 - 10 Tr.) the respondents reinstate the prior judgment set forth in paragraph 1. The appeals were also repeated in paragraph 2, but the respondents claim a different effect for this judgment and the appeals than they did for the same judgment and appeals in paragraph 1. In paragraph 2 they set the judgment up under the doctrine of estoppel and in paragraph 1 they set forth the same judgment and appeals under the doctrine of res adjudicata. The pleas are frivolous and duplicious. They are so framed that they may deceive the court into believing that they have merit. In setting forth their pleas the respondents do not conform to the doctrine of Stare Decisis and neither do they conform with the doctrine of res adjudicata. These pleas

are so framed that they prejudice, embarrass and delay a fair trial of the cause.

The respondents set forth in paragraph 2 certain allegations of an answer which the appellant is alleged to have filed in a prior cause of action and they now claim that her admissions therein will operate as an estoppel, but they failed to set forth her testimony in the same cause of action in which the appellant under oath explained her position. In her deposition taken in this matter at 10:00 o'clock A. M., February 16, 1951, her testimony showed that she did not understand it to mean that the deceased was unmarried at the time of his death, but under oath she testified that he was married and she further testified that she did not understand that the answer meant that she was single at the time Mr. Haskin died, but that she understood it to mean that she was single at the time she met Mr. Haskin.

In the deposition of Alice Lettig Siems, et al, taken on Monday, the 4th day of December 1950, on cross-examination, the appellant was asked the following questions by an attorney for the appellees in this case:

"Q. Now, did you ever enter into a marriage ceremony with Edwin Easter Haskin, the decedent?

A. By mutual agreement, yes.

Q. And where did this ceremony take place?

A. In October 1942.

Q. No, I said -- You just said when, now, will you tell us where?

A. In Palm Beach."

And prior to that, in another deposition, on page 3, one of the attorneys for the appellees asked the appellant the following questions:

"Q. Are you married?

A. I am a widow.

Q. Were you married before becoming a widow?

A. Yes.

Q. What was your husband's name?

A. Mr. E. E. Haskin was my husband, and before that I was married to Doctor H. B. Siems of Chicago.

Q. Were you divorced from Doctor Siems?

A. In November 1939."

The Court may take judicial notice of these depositions since the matter was before this Court prior hereto on appeal. The allegation of the answer relied upon by the appellees as an estoppel did not answer any allegations or matters set forth by the petitioners. If this part of the answer served any purpose whatever, it was to set up an estoppel in a subsequent cause of action. In any event the appellees should have set forth their entire answer in their plea or attached a copy thereto and the appellant should have been allowed the opportunity of explaining the allegations in this part of the answer when the matter came before the Lower Court on June 12, 1952.

In the case of Carter v. Bennett, 4 Fla. 283; 56 U.S. 354; 14 L. Ed. 727, the Court held:

> "The admissions of a party to a suit, either express or implied from his conduct are not conclusive against him, as he may explain them or show that he was mistaken though the admissions were under oath."

In the case of Coral Realty Co. v. Peacock Holding Co., 138 So. 622, 103 Fla. 916, the Court held that:

> "Estoppel by matter of record is such as arises from or is founded upon adjudication of competent court."

This principle is also adhered to in the case of Gray v. Gray, 107 So. 261; 91 Fla. 103.

In any event, matters which do not appear on the face of the petition may not be raised by motion.

The Supreme Court of Florida in the case of Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, held that:

> "Matters dehors the bill can only be raised by plea in order to be available. The very attempt to set them up in support of a demurrer is fatal to the demurrer."

It is elementary law that, where a plea does not state a complete defense or the necessary facts are to be gathered by inference alone, the plea should be overruled. In this connection the case of Hemphill v. Nelson, 116 So. 498; 95 Fla. 498, the Supreme Court had this to say:

> "Party in chancery must in pleading, state circumstance of written instrument relied on, and attach it or a copy thereof to the pleading, or allege satisfactory reason for non-production."

Q. II. WHETHER A PETITIONER WHO FILES A PETITION FOR ORDER REVOKING THE APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF IN THE COUNTY JUDGE'S COURT, IN WHICH SHE SETS FORTH THAT SHE IS THE WIDOW OF THE DECEDENT WHO DIED WITHOUT ISSUE AND THAT SHE IS ENTITLED TO THE ESTATE AND PRAYS THAT SHE BE APPOINTED ADMINISTRATOR AND FOR AN ACCOUNTING, IS BARRED BY PROVISIONS OF SECTION 733.16 FLORIDA STATUTES?

We believe that the Lower Court ruled that she was barred by this Statute.

ARGUMENT

Sec. 733.16 of the Florida Statutes, among other things, provides as follows:

> "Nothing herein contained shall be construed to require any legatee, devisee or heir at law to file any claim for his share or interest in the estate to which he may be entitled."

In the case of Tibbetts Corner, Inc. v. Arnold, et al, 184 Fla. 239, the Supreme Court held as follows:

> "The statute of limitations or nonclaims does not apply because appellant is not a common creditor seeking to enforce a debt or demand against the estate."

The case of Henderson et al v. Chaire, 35 Fla. 423; 17 So. 574, is a ruling case on this point and it also covers many other vital points of law in connection with the case before the Court. The Court in this case held that the plaintiff was not barred even though the matter was filed several years after the notice of creditors was given. The Petition for Order Revoking the Appointment of Administrators (pp. 1 - 4 Tr.) shows on its face that the petitioner is not making any claims or demands against the estate, but rather she says that she is entitled to the estate. Therefore, she is not barred by the statute of nonclaims.

In the Henderson case last cited, the Court made the following observation:

> "Were it not for the fact that the complainant has been for more than 10 years persistently knocking at the doors of the courts for the enforcement of rights that for ought is shown to the contrary should voluntarily been accorded to her without any litigation at all we would have remanded the cause for further testimony and accounting."

And in this case the Court makes another important observation that the complainant widow became entitled to her interest in the estate at once upon the death of her husband.

The appellees further claim that the cause of action set forth by the Petition for Order Revoking the Appointment of Administrators (pp. 1 - 4 Tr.) is barred because it is inconsistent with the former remedy she was seeking. However,

the unsuccessful attempt to prove an oral agreement to make a will is not inconsistent with the cause of action now before the court. Had the petitioner been successful in establishing a will, even though the will did not give her all of the estate as she claimed, she might be barred by the decision. We contend that the pe titioner was mistaken in her remedy.

In the case of Capital City Bank v. Hilson, 60 So. 189; 64 Fla. 206, the Supreme Court of Florida held that:

> "If in fact or in law only one remedy exists, and a mistaken remedy is pursued, the proper remedy is not thereby waived. More than one remedy must actually exist. The doctrine of election of remedies does not apply to a case where a party in his first action mistook his remedy."

We again quote Sec. 210, p. 948, Am. Jur., Vol. 30.

Intent of laws is that every person shall have remedy by due course of law for every injury done him. (Const. Declaration of Rights).

It is further contended that the appellees did not raise the question of inconsistent remedies in proper form and manner. It is further contended that it, like the other pleas set forth, is both frivolous and duplicious.

THIRD ASSIGNMENT OF ERROR

It was error to sustain the Motion to Dismiss the Petition when said motion should have been treated as an answer.

Q. I. SHOULD THE COUNTY JUDGE HAVE TREATED THE ALLEGED MOTION TO DISMISS THE PETITION FOR REVOCATION OF APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF AS AN ANSWER?

The County Judge did not treat the Motion to Dismiss the Petition for Revocation of Appointment of Administrators and Other Relief as an Answer.

ARGUMENT

Sec. 732.08 F.S.A. makes the following provision under pleadings:

> "Either party may test the sufficiency of an adversary's pleading, or any part thereof by motion."

However, when the defenses are set forth, especially pleas of res judicata, estoppel, inconsistent remedies and the statute of limitations, as well as other matters dehors the petition they must be set forth in the answer.

Sec. 732.08 F.S.A. makes the following mandatory provision:

> "The answer shall in short and simple manner set up the facts constituting the defense."

In the case of Citizens Bank & Trust Co. v. Gray, 130 So. 274; 100 Fla. 958, the Supreme Court held as follows:

> "Defendant must answer positively when facts are within his knowledge, and evasive and qualifying answer constitutes admission."

FOURTH ASSIGNMENT OF ERROR

It was error for the Court to sustain the several pleas in bar set forth in the motion to dismiss; when said pleas should have been stricken, dismissed, and this cause then and there decided in favor of the appellant.

Q. I. WHETHER THE RELIEF SOUGHT IN THE PETITION FOR ORDER REVOKING THE APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF SHOULD BE GRANTED WHERE THE MATERIAL ALLEGATIONS WERE NOT DENIED AND THE MATTER WAS SET DOWN FOR HEARING BEFORE THE COURT BY THE RESPONDENTS?

The Court ruled against the appellant.

In addition to the fact that the material allegations in the Petition for Order Revoking the Appointment of Administrators and Other Relief were not denied the respondents set forth the doctrine res judicata, which in itself admits the validity of the common law marriage, the existence of the widow and the relief prayed for in the said Petition. Therefore, it would seem that it was mandatory on the part of the County Judge to grant the relief sought by the appellant since the matter was set down for hearing on the Petition by the respondents.

> "The defense of estoppel rests on doctrine that parties shall not be permitted to assert defense against another to latter's injury where it would be inequitable."
>
> See (21 C. J. 1119) p. 1441.

> "Parties are not bound by judicial allegations terminating unsuccessfully."
>
> See (21 C. J. 1079) p. 1439.

> "Failure promptly to assert marriage after the death of the husband and concealment of the precise nature of the marriage held not conclusive against the surviving spouse."
>
> See (38 C. J. 1344) p. 2303.

It has been repeatedly held that the common law wife does not have to assume the husband's name if the pleadings and proof show that they had entered into the marriage relationship pursuant to a marriage agreement. The sworn Petition for Order Revoking the Appointment of Administrators and Other Relief (pp. 1 - 4 Tr.) filed by the appellant in the County Judge's Court should be sufficient for an order granting the relief sought therein where the matters and facts set forth in said Petition are admitted by the respondent.

FIFTH ASSIGNMENT OF ERROR

It was error to sustain the motion to dismiss, and dismiss the pe tition with prejudice, sinc e the order or judgment pertaining thereto would prevent the appellant from having her day in Court and her cause determined on its merits.

Q. I. WHETHER THE APPELLANT HAS HAD HER CAUSE DETERMINED UNDER THE PROCEDURE APPLIED TO OTHER SIMILAR CASES IN THE COUNTY JUDGE'S COURT?

It is understood that the County Judge considered that her cause was determined under the procedure applied to under similar cases.

ARGUMENT

The appellant or petitioner in the Lower Court was denied the right to strike the pleas set forth in the Petition for Order Revoking the Appointment of Administrators and Other Relief (pp. 1 - 4 Tr.) and neither was she given the right to offer testimony in support of her Petition for Order Revoking the Appointment of Administrators and Other Relie f. It is further contended that the pe t itioner had a right to exp lain certain matters set up in the Motion to Dismiss the Petition wherein it was claimed that the pe t itioner was estopped to claim the relief sought in said petition. Therefore, the appellant was denied the right to have her cause determined on its marits.

SIXTH ASSIGNMENT OF ERROR

It was error to sustain the motion to dismiss and to dismiss the pe tition with prejudice; since the order or judgment pertaining thereto invaded the vested interest of the appellant in the Estate of Edwin Easter Haskin, deceased, in violation of the Constitution of the United States and the laws of Florida.

Q. I. WAS IT AN ERROR FOR THE COUNTY JUDGE TO SUSTAIN THE MOTION TO DISMISS THE PETITION FOR REVOCATION OF APPOINTMENT OF ADMINISTRATORS AND OTHER RELIEF AND TO DISMISS SAID PETITION WITH PREJUDICE?

The County Judge dismissed the Petition for Order Revoking the Appointment of Administrators and Other Relief with prejudice.

ARGUMENT

The dismissal of the Petition for Order Revoking the Appointment of Administrators and Other Relief with prejudice, without allowing the petitioner to be heard and offer testimony and proof in support thereof, was an invasion of the vested rights of the petitioner in the Estate of Edwin Easter Haskin, deceased.

Due process of law imports notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. A judgment pronounced without any judicial determination of the facts which alone can support it is wanting in due process of law and may be impeached.

Since the Courts of Florida recognize common law marriages it was error for the Lower Court to deny the appellant her right to her day in Court and to enter an order which would invade her vested rights.

SEVENTH ASSIGNMENT OF ERROR

It was error to sustain the motion to dismiss, and to dismiss the petition with prejudice; since the order or judgment pertaining thereto impaired the obligation to the common law marriage contract alleged in the petition, and denied the due process of law and equal protection of the law in violation of the Constitution of the United States and the laws of Florida.

Q. I. WHETHER THE FINAL JUDGMENT OF THE COUNTY JUDGE'S COURT, MADE AND ENTERED ON THE 12TH DAY OF JUNE 1952 (p. 11 Tr.) IMPAIRED THE OBLIGATION OF THE COMMON LAW MARRIAGE CONTRACT, DENIED THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES?

The County Judge ruled that this was not a violation of the Constitution of the United States.

ARGUMENT

Under the laws of the State of Florida the widow inherits the estate of a deceased husband, and the title to all his real and personal property is vested in her by operation of law at the time of his death. Therefore, until a court of competent jurisdiction has before it a bill of complaint or petition setting forth the common law marriage, the existence of the widow and the necessary jurisdictional facts, and that an issue is raised therein contesting the said facts, and that the court in its usual procedure finally determines that the complainant or petitioner was not the widow of the deceased or that the common law marriage was invalid, the court cannot render a final decision therein on the merits without denying and invading the vested rights of the widow and without denying her the equal protection of the laws. The brother and sister of the deceased should know that they cannot by technical pleading obtain a valid judgment or decree which could be legally substituted for a decree of divorce after one of the parties to the marriage contract is deceased.

Respectfully submitted,

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I do certify that a true copy of this Brief for the Appellant has been furnished to the following attorneys for the appellees, by mail this 17th day of September, A. D. 1952:

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