CHARLES W. DUNCAN, Appellant, v. **MARTIN SCEAH KARPEH**, heir and legatee under the Will of the Late ROBERT S. KARPEH, deceased, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 24-26, 1949. Decided December 16, 1949.

1. It is reversible error to sustain two counts in the rejoinder, the last pleading, and rule out the reply and then to dismiss the answer and rejoinder. However, where the defendant was permitted at trial to defend the denials in his answer and thus got a fair trial, and where a remand would mean unnecessary expense to the parties, the Court will not order a remand.

2. The intent of the testator is to be determined from the whole will.

3. Every word in a bequest or devise in a will shall have effect if it can be given without defeating the general purpose of the will, but where it is impossible to form a consistent whole the latter part will prevail.

On appeal from a favorable judgment in an action of ejectment, *judgment affirmed.*

M. S. Cooper and *Nete-Sie Brownell* for appellant. *T. G. Collins* for appellee.

MR. JUSTICE REEVES delivered the opinion of the Court.

This action of ejectment was instituted by Martin Sceah Karpeh, heir and legatee under the will of the late R. S. Karpeh, deceased, and plaintiff, now appellee, in the Civil Law Court of the Sixth Judicial Circuit, Montserrado County, in its law division of May 15 in the June term, 1947, against Charles W. Duncan, defendant, now appellant. The case, however, did not terminate until the December 1948 term of said court, in appellee's favor, he being the successful party. The defendant, now appellant, dissatisfied with the several rulings, verdict of the jury, and the judgment of the court below, promptly excepted and prayed an appeal to this honorable Supreme Court for review.

Appellant, in his bill of exceptions which is the foundation of his appeal and upon which he desires this Court to pass, has embodied his dissatisfaction in seven counts. It becomes necessary, therefore, in order to abridge our opinion as far as possible,

that we review said cause exclusively upon said seven counts, the first of which reads as follows :

"This action was regularly commenced on the 15th day of May, A.D. 1947, by means of a writ of Summons. The defendant appeared and filed Answer, after which pleadings were conducted as far as the Rejoinder. Said Law Issues were disposed of by His Honour Charles T. O. King during the September 1948 Term of this Court, who dismissed the Answer and Rejoinder of defendant, thereby ruling him to the bare denial of the facts in plaintiff's complaint stated to which defendant then and there excepted."

This count in defendant's bill of exceptions is well taken, in our opinion, for it is inconceivable that Judge King of the lower court took such a position by ruling out appellant's answer and rejoinder, thereby ruling him to the bare denial of the facts set forth in the complaint, after sustaining counts one and two of said rejoinder and over-ruling the reply of plaintiff, now appellee. The answer, if defective, had definitely been relieved of appellant's attacks against same, there being no other pleading of appellant setting forth any objectionable features of said answer. The issues raised in said answer and those in the complaint should have been considered at the trial. This error committed by Judge King is reversible, but from our perusal of the records of the trial, appellant did not suffer thereby because at said trial before Judge Phelps in the December term 1948 appellant was permitted to produce witnesses in defense of his denials pleaded in said answer, thereby giving him the opportunity to have a fair and impartial trial by jury. This Court is further of the opinion that to remand this cause would mean that the parties would only be incurring more expenses unnecessarily; and in view of the fact that appellant was permitted to and did submit all necessary evidences in support of his denials, he can do nothing else. This Court also feels it to be its duty to discourage and avoid as much as possible unnecessary and expensive suits.

The Court sustains the ruling of the judge of the lower court with reference to counts two and three of appellant's bill of exceptions.

We must now consider count four which we quote hereunder:

"AND ALSO BECAUSE when on the 30th day of December, A.D. 1948 in your written Charge to the Petit Jury Your Honour instructed the said jury inter alia, that testator Robert S. Karpeh in Clause i of his Will `only intended the occupant now Defendant to live in the house during the minorship of the legatee, Plaintiff; the

legatee arriving at full age the occupancy ceased.' And that. . . . 'when the Plaintiff reached his majority the possession and occupancy of Defendant under the Will ended', to the whole of which Written Charge of Your Honour Defendant then and there excepted."

Since this count is taken from the exception to the judge's charge to the jury with respect to clause eleven of said will in question, it is necessary that we endeavor to construe said clause eleven of the will in the legal and proper manner to ascertain what was the intention of said testator in said clause. Judge Bouvier states the following applicable principles :

"*First,* the technical import of words is not to prevail over the obvious intent of the testator. . . . *Second,* where technical words are used by the testator, or words of art, they are to have their technical import, unless it is apparent they were not intended to be used in that sense. . . . Words are to be construed with reference to the surrounding of the testator when the will was made. . .. The particular intent will always be sacrificed to the general intent. . . . *Third,* the intent of the testator is to be determined from the whole will. . . . In ascertaining this intention, courts should not seek it in particular words and phrases, or confine it by technical objections, but should find it by construing the provisions of the will with the aid of the context and by considering what seems to be the entire scheme of the will. . . . and should put itself in the position occupied by a testator. . . . *Fourth,* every word shall have effect, if it can be given without defeating the general purpose of the will, which is to be carried into effect in every reasonable mode.. . . But where it is impossible to form a consistent whole the latter part will prevail. . . . *Fifth,* the will be favorably construed to effectuate the testator's intent, and to this end words may be transposed, supplied, or rejected. . . . it will be so construed when not inconsistent with rules of law. . . ." 2 Bouvier, Law Dictionary 1901 *Construction of Legacies* (Rawle's 3d rev. 1914) .

In clause eleven of the will, the testator said thus :

"It is my will and desire that the premises now occupied by the Rev. Chas. W. Duncan and his family being situated on lot No. 531, the same being herein bequeathed to my son Sceah, shall be continued to be occupied by the said Rev. Chas. W. Duncan and his family during his life time, or until he shall have built him a home. At which time if my son Sceah herein shall have come of age, he shall be put in possession of the property, otherwise the said property shall be administered by the said Rev. Chas. W. Duncan until my son Sceah shall have become of age at which time he shall be put in possession of the property."

Permitting ourselves to follow the third and fourth principles of law advanced by Judge Bouvier, *supra,* we readily arrive unequivocally at testator's intention in clause eleven of his will.

Inspecting the context of the will of testator, we discover that he makes a general distribution of his real and personal property among his children. For reasons unrevealed he mentions this son Sceah Karpeh, though a minor, as the owner of said lot Number 531 in the first clause thereof ; (1) "I will and bequeath to my son Sceah, whose mother is Worter, lot No. 531 situated in the City of Monrovia, County of Montserrado and Republic of Liberia, with dwelling house and all other appurtenances thereon and thereunto belonging to him and his heirs and in fee simple for ever." Clauses two, three, four, five, seven, nine, and ten are bequests to his children severally and jointly; count six, to a wife personally; count eight, to his family in general. Then comes clause eleven, *supra,* in which appellant claims a life interest was given him in said lot Number 531.

From clause eleven of the will, the intention of the testator can be clearly seen from the fact that when he said, "it is my will and desire that the premises now occupied by the Rev. Chas. W. Duncan and his family being situated on lot No. 531, the same being herein bequeathed to my son Sceah, shall be continued to be occupied by the said Rev. Chas. W. Duncan and his family during his life time," he did not intend same to be construed as a life interest; otherwise he would have never expressed in the same clause, "at which time if my son Sceah herein shall have come of age, he shall be put in possession of the property, otherwise the said property shall be administered by the said Rev. Chas. W. Duncan until my son Sceah shall have become of age, at which time he shall be put in possession of the property." To construe it as appellant contends, testator would be expecting both a physical and legal impossibility, in that appellant at such a time would be dead and could not function in administering the said property. Testator's intention is confirmed in that part of clause eleven of said will which reads thus :

"[O]r until he shall have built him a home. At which time if my son Sceah herein shall have come of age, he shall be put in possession of the property, otherwise the said property shall be administered by the said Rev. Chas. W. Duncan until my son Sceah shall have become of age at which time he shall be put in possession of the property."

This would consistently be requiring both a possible physical and legal execution

thereof by appellant. "[O]r until he shall have built him a home" is the latter clause, and Judge Phelps' construction finds support in fourth principle enunciated by Judge Bouvier, *supra:* "[E]very word shall have effect, if it can be given without defeating the general purpose of the will, which is to be carried into effect in every reasonable mode. . . . But where it is impossible to form a consistent whole, *the latter part will prevail. . . ."* (Emphasis added.) Judge Phelps did not err in his charge to the jury.

From the foregoing, this Court does not find it necessary to make any comment on the remaining counts of the bill of exceptions since they have no merit under the construction of clause eleven embodied in this opinion.

The Court observes that plaintiff below, now appellee, based his action of ejectment on the title deed executed by the executors of the will of his late father R. S. Karpeh of whom appellant Charles W. Duncan was one, which said deed appellant did not deny but contended could not vitiate the life interest he claims under clause eleven of the Will. We are of the opinion that appellee is lawfully entitled to said lot Number 531, and therefore affirm the judgment of the court below with cost against appellant. And it is hereby so ordered.
Affirmed.

MR. JUSTICE SHANNON dissenting.

From the majority opinion just read, it is readily gathered that my colleagues have conceded and pronounced that the trial of the case in the court below, both in the disposition of the legal pleadings and the taking of evidence, was very irregular. Notwithstanding this, they have been unwilling to correct the irregularities complained of and instead have affirmed the verdict and the judgment founded upon it.

A peculiar legal anomaly was created during the trial of the case when the judge who disposed of the legal pleadings sustained counts one and two of the rejoinder against the reply and, upon the strength of this, the said reply was dismissed together with the rejoinder, counts one and two of which had already been sustained. Further, despite the dismissal of the reply, which left no attack against the answer, the said judge elected to independently traverse said answer and also subsequently dismissed it, leaving the defendant, now appellant, on the bare denial of the complaint. (See Judge's ruling as of record.) The defendant reserved exceptions to this peculiar position thus created and made it the first count of his bill of exceptions which reads as follows :

"This action was regularly commenced on the 15th day of May, A.D. 1947, by means of a writ of Summons. The defendant appeared and filed Answer, after which pleadings were conducted as far as the Rejoinder. Said Law Issues were disposed of by His Honour Charles T. O. King during the September 1948 Term of this Court, who dismissed the Answer and Rejoinder of defendant, thereby ruling him to the bare denial of the facts in plaintiff's complaint stated ; to which defendant then and there excepted."

As to this count, my colleagues have said as follows :

"This count in defendant's bill of exceptions is well taken, in our opinion, for it is inconceivable that Judge King of the lower court took such a position by ruling out appellant's answer and rejoinder, thereby ruling him to the bare denial of the facts set forth in the complaint, after sustaining counts one and two of said rejoinder and overruling the reply of plaintiff, now appellee. The answer, if defective, had definitely been relieved of appellant's attacks against same, there being no other pleading of appellant setting forth any objectionable features of said answer. The issues raised in said answer and those in the complaint should have been considered at the trial. This error committed by Judge King is reversible, but from our perusal of the records of the trial, appellant did not suffer thereby because at said trial before Judge Phelps during the December term 1948 appellant was permitted to produce witnesses in defense of his denials pleaded in said answer, thereby giving him the opportunity to have a fair and impartial trial by jury. . . ."

There is a common adage that two wrongs never make a right, so that even though I am in agreement with my colleagues that Judge King's position is without legal foundation, I am also confronted with the problem of whether or not an unwillingness to correct such a grave reversible error because of some subsequent happening which in its nature is also improper would be a fair and proper attitude for this Court of *dernier ressort* to assume. My colleagues' condonation of the situation and the reasons therefor find expression in their majority opinion from which I again quote :

"This Court is further of the opinion that to remand this cause would mean that the parties would only be incurring more expenses unnecessarily; and in view of the fact that appellant was permitted to and did submit all necessary evidence in support of his denials, he can do nothing else. This Court also feels it to be its duty to discourage and avoid as much as possible unnecessary and expensive suits."

To me such a position does nothing but encourage a series of wrongs and irregularities. We concede that Judge King was wrong in ruling out the rejoinder and answer in the manner done. We should be willing to declare Judge Phelps, who was circumscribed by the ruling of his colleague as long as it remained undisturbed and uncorrected, also wrong in permitting appellant to bring evidence of facts not permissible under the restriction imposed on him by the ruling of His Honor Judge King. Instead, such support of the verdict and judgment that have evolved out of these irregularities has a tendency to encourage them, so that the reason assigned by my colleague does not appear to me sufficient in law and practice.

In my dissents in *Liberty v. Republic,* 9 L.L.R. 437 (1947) involving assault and battery with intent to do grievous bodily harm, and *Firestone Plantations* Co. v. *Greaves,* 9 L.L.R. z5o (1947) , I have tried to advance and advocate the principle that in the decision of issues courts should not direct their line of thinking and argument from a principle to a specific case, but rather must, if possible, make sure that their application of a principle to a given and specific case also fits in with the application of that principle at large to other cases. Since the errors thus committed have not been corrected by reversal, this decision raises the question whether we will be able and willing always to apply the principle thus set by a refusal to correct other similar cases that might come before us. In addition, the question arises as to whether or not our unwillingness and refusal to sustain such reversible errors hereafter because of an indisposition to encourage "unnecessary and expensive suits" exposes us to the charge of apparently being partial to certain parties.

To me, a refusal to interfere with the irregularity complained of in count one of appellant's bill of exceptions on the ground that appellant went beyond the scope of the restrictions and limitations placed on him by the ruling of the judge in disposing of the legal issues in the pleadings and has not therefore been prejudiced would, besides serving as an encouragement to litigants in the loose handling of their causes, also make judges careless in the disposition of issues properly raised before them.

In this case, it is inexplicable that the judge was able to pass upon the answer and dismiss it, especially after having dismissed the reply and other subsequent pleadings. In the case *Clark v. Barbour,* 2 L.L.R. 15 (1909), it was held that courts will only decide upon issues joined between the parties which are specially set forth in their pleadings. In the same case it was held on page 16 that a *defense* not set up in the defendant's plea, should not be allowed. . . ." It is because of this latter principle that I have pointed out the impropriety of appellant attempting, and the trial judge permitting him, to introduce evidence on issues of fact not allowed because of the dismissal of the

answer in which they were raised.

It is my considered opinion that these several errors should have been reversed despite, whatever financial inconvenience or outlay it might have caused the parties, and because of this I have deemed it unnecessary to join my colleagues in the position taken to the extent of being willing to pass upon the issue of whether or not appellant Duncan had a life estate interest in and to lot Number 531 according to the eleventh clause of the last will and testament of the late Robert S. Karpeh.