RICHARD J. WILES, Appellant, vs. **FLORENCE J. WILES**, Appellee.

[January Term, A. D. 1904.]

Appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County.

Partition—Homestead.

A homestead set apart under and by virtue of the "Homestead and Household Exemption Act" answers to an estate in coparceny. The estate constituting such homestead cannot be devised while there are living heirs of the original householder.

This case was brought in the equity jurisdiction of the Court of Quarter Sessions and Common Pleas of Montserrado County, at its March term 1903, by Florence J. Wiles, appellee (petitioner in the court below) , upon a petition in equity, for the partition of certain real property; to wit, lots 96 and 97, situated in the city of Monrovia, of which James T. Wiles, the father of appellee, was once seized, and which, during his residence thereon, that is to say, in May, 1899, he had set apart from the rest of his estate as a homestead for himself and his family, agreeable with the Homestead Exemption Act of 1889.

The pleadings appear to have stopped here, but when the petition was called up for hearing, Richard J. Wiles, the appellant before this court, appeared by counsel and objected to the granting of said petition, upon the ground that the said property which constituted the subject-matter of the petition had been devised by the will of James T. Wiles unto Richard J. Wiles, the appellant, and W. S. Wiles, his brother. The court below overruled the objections of the appellant and rejected the claim sought to be set upon said property by virtue of the will of James T. Wiles, and gave the following decree in the premises, to wit:

"That no one taking advantage of the said Homestead Exemption Act can afterwards dispose of said property by will or otherwise without having first

applied to a court having competent jurisdiction and annulling his said act with regard to said homestead. Therefore this court decrees that the said homestead of J. T. Wiles, viz., lots 96 and 97, be held by the said Florence J. Wiles and Richard J. Wiles, heirs of the said J. T. Wiles, equally between them, as they are the only surviving heirs of J. T. Wiles."

To this decree appellant excepted and has brought the case before this tribunal for review.

It having been admitted in the arguments by the learned counsels, first, that the said J. T. Wiles did place the estate in question under the Homestead Exemption Act, and secondly, that the said J. T. Wiles did afterwards devise said estate unto his two sons, W. S. and Richard J. Wiles, there remains no question on the facts averred on both sides for this court to consider, and therefore we proceed to examine and construe the law bearing on the case. To enable us to consider systematically the several doctrines of law involved, we deem it convenient to arrange the case under the following heads:

1. What is the legal status of an estate upon which a homestead has been declared under the Homestead Exemption law of the country?

2. Who are the parties whom the statute contemplates shall enjoy an interest and derive a benefit out of a homestead estate?

3. What kind of an estate, as between the parties interested, does a homestead create?

4. Does an ancestor or "head of family" who may place property under the above cited act still retain an absolute fee therein?

5. If not, can he at his option alienate such an estate by will or otherwise?

Before going further we would remark that the law of homestead exemption is of comparatively recent origin. Anterior to the last century this species of real estate was unknown to the law. It is one of the two great doctrines which have been introduced into the law during the nineteenth century and which have marked the development of the legal science in the United States. This

species of real property was first brought forward under the constitution and statutory enactments of Texas, when it existed as a separate and distinct Republic. A doctrine founded upon such a sound and judicious basis, instituted not for the purpose of encouraging and stimulating a tendency to fraud, but, on the contrary, with a view to protecting the honest and upright landholder against failures in the ordinary affairs of life,— failures which may at any moment dispossess the honest but unfortunate landholder and his family of a home,— could not fail to commend itself, and hence we find that in the United States of America the doctrine was readily taken up and state after state passed statutes adopting it, with such modifications as were deemed suitable to their respective conditions.

In 1889, the Legislature of Liberia passed an act entitled, "The Homestead and Household Exemption Act." Section 1 of said act reads as follows : "That from and after the passage of this act all householders and heads of families, owning real estate, shall have so much of that real estate exempt from the writs of their creditors, that is to say, one town lot or one acre of farm land upon which the house is situated, with all the appurtenances and out-dwellings of same, which exemption shall mean the homestead of the family, and this exemption shall last as long as any of the heirs of the family so occupying it shall live." (Act Leg. Lib. 1889.) This is practically the law controlling this case. The language of the above cited act conveys to the mind of the court the idea that property set aside by the head of a family as a homestead for himself and family creates an estate in which all parties connected with and forming a part of said family, within the meaning and purview of said act, acquire an interest and a share therein.

The object of the lawmakers in passing this statute, which enables a householder to take out of market a limited portion of his real and personal property, and to have the same secured against the claims of his creditors, appears to be not only for the purpose that the head of the family shall have secured unto him an unassailable estate, but also that the wife and children, forming a part of said family, shall likewise take an estate therein, which cannot be set aside or destroyed, either by their own acts or by the acts of him who first held an absolute fee therein, or by the claims of third parties against any of the tenants thereto. And this view is upheld by the terms of a subsequent statute, which makes it a misdemeanor for either the clerk of

court to issue, or the sheriff to serve, any writ upon a homestead estate. (Act Leg. Lib. 1897.) Undoubtedly this statute was not passed to screen property held in fee by debtors against the writs of their creditors. But it is because the putting an estate under the Homestead and Household Exemption Act creates an estate in coparcenary among all the parties constituting and forming the family, within the meaning of the original act, that this statute forbids all interference with it by the officers of the law. To hold to the contrary, we think, would be to declare this statute fraudulent and pernicious.

It was insisted upon by the learned counsel for the appellant, that James T. Wiles placed the property under review under the Homestead Act after Florence J. and Richard J. Wiles had attained their majority, and that therefore they could not be looked upon as constituting a part of the family at the time said property was homesteaded. The court would remark here, that there was no evidence submitted to support this statement, but supposing there had been, we could not have upheld the proposition. The unequivocal intention of the lawmakers, so far as we can draw from the language of the act, was, as we have said, to create an estate in perpetuity for the family. The last paragraph of the Act of 1889 reads : "This exemption shall last as long as any of the heirs of the family so occupying it shall live." Let us suppose that Florence J. and Richard J. Wiles were not living in the family at the time the property was homesteaded, yet would they not acquire a title therein by virtue of being heirs of the original head of the family and occupant? And if there survives any of the heirs of the original head of the family, would not the homestead remain in full force and virtue? The statute contemplates a lapse of a homestead estate only after the heirs of the original "head" and occupant have become extinct.

We are aware that the statutes of some of the American states enunciate a somewhat different principle, but in this case it is the lex scripta of the country and not the statutes of foreign states which is the controlling law.

We have already shown that a homestead under the laws of Liberia is an estate in which the wife and children constituting the family, hold an undivided interest therein. Such an estate could not be regarded as an estate in joint tenancy, as was suggested by one of the counsel, for an estate in joint tenancy is one acquired by purchase and is not subjected in all respects to

the rule of descent. This species of tenancy is governed by the subtle principle of survivorship, which does not apply to homestead estates. Equally so, nor would the law regard it an estate in common, because the title thereto is not distinct and several; nor an estate in fee tail, because in homestead estates the wife acquires and holds an equal interest therein with the heirs of the original householder, whereas in fee tail the title is reserved to the "heirs of the body" only of him last seized. By analogy of the law of real property we find that a homestead under the laws of Liberia answers to an estate in coparcenary. The three units which the law demands to establish such estate, namely, time, title, and possession, are to be found in this species of property.

Let us now consider whether James T. Wiles, the original householder, had a legal right to devise the homestead created by himself or not,—and we may here observe that it is upon this point chiefly that appellant rested his case.

We have already endeavored to show what kind of an estate a homestead estate is, and who the parties are that acquire interest therein, by force of the law of the country. If our conclusions are supported by the law of real property and the Homestead and Household Exemption Act of Liberia, and we do not hesitate to say that we feel that they are, then it follows as a legal consequence, that the property in question cannot be disposed of by will. If James T. Wiles and his family held the property in question as a homestead, it could not afterwards be devised, as long as the heirs existed, without setting aside an inflexible rule of the law of real property. "A man cannot dispose of the rights of other parties." "He who would be generous must first be just."

Having traversed the grounds of the whole case, we conclude by saying that the will of James T. Wiles, devising lots 96 and 97, cannot take the property from under the exemption where it had been legally placed. Nor can the will destroy or in any wise annul the force of the homestead, or create a new and distinct estate while there are living heirs of James T. Wiles, the original householder and occupant.

The judgment of the court below is therefore affirmed and the clerk is hereby authorized to issue a mandate to the judge of the court below, informing him of this decision.