REBECCA JONES, PARNELLA NORTH, MARY E. PRITCHARD, VALENTINE BROWN, and JOHN W. PRITCHARD, Appellants, *v.* JAMES W. DENNIS, Executor of the last Will and Testament of MARIA L. DENNIS of Careysburg, Appellee.

OBJECTIONS TO PROBATION OF A WILL.

Argued January 18, 19, and 20, 1938. Decided February 4, 1938.

1. The cardinal rule in the construction and interpretation of wills or codicils is that the intention of the testator must be ascertained if possible, and if not in contravention of some rule of law or public policy, must be given effect.
2. Where effect cannot be given to the entire will, or to an entire provision therein, consistently with the rules of law, any part of it which is conformable to such rules will be sustained, if it can be separated from the rest of the will without violating the testator's general intention.
3. There are no arbitrary or unbending rules in the construction of the language of a will for in so doing the substance rather than the form must be regarded.
4. Should the language of a will or any part thereof be susceptible of two constructions, one of which will invalidate and the other sustain it, the rules of law permitting that construction will be given which will support the will as every testator is presumed to have intended to make a valid devise or bequest.
5. Where an intention appears to make certain gifts absolute in fee, other similar gifts in the will may be construed in the same way. Two devises of the same property will be harmonized if possible.
6. A construction should be avoided which converts a fee simple into a life estate or an estate tail by implication.
7. The common law of Liberia includes only such English statutes as were embraced in Blackstone's *Commentaries*.
8. Hence code pleadings adopted in the United States after said migration are no part of the common law of Liberia, but all pleadings must be in conformity with our own code.
9. Every answer may be once amended or withdrawn, and a new one filed, if this is done without producing delay in the trial.
10. Where there is no question of fact involved, there is no issue to be submitted to a jury.

Appellants filed objections in the court below to the probate of the will of Maria L. Dennis of which appellee is executor. The objections were overruled and appeal taken to this Court. *Judgment reversed.*

P. Gbe Wolo and *Anthony Barclay* for appellants. *S. David Coleman, W. E. Dennis* and *Benjamin G. Freeman* for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

On the 10th day of October, 1936, the appellants filed objections to the last will and testament of Maria L. Dennis, nee Maria L. Simon, then recently deceased. The essence of said objections is that lot No. 106 in the City of Monrovia, therein devised to James W. Dennis, her husband, testatrix had obtained from her late uncle E. F. Travis by devise, and that according to said devise, as contained in count one of the codicil to said will dated August 3, 1900, she held only an estate in fee-tail. The said section of said codicil reads:

> "I give and devise to my wife R. J. Travis instead of the land mentioned in the first clause of my said will, and my lands on Broad and Ashmun Streets in the City of Monrovia with the appurtenances to be used and enjoyed by her in lieu of dower during the time of her natural life. At her death, the property number 18 on the plot of the City of Monrovia, I give and devise in fee-simple to Trinity Memorial Church. The lot number 106 Monrovia, I give and devise in fee-simple to my niece Maria L. Simon, and the heirs of her body forever."

The estate granted, according to the provision of the codicil just read, is undoubtedly an estate in fee-simple, and it is our opinion that the words "and the heirs of her body forever" have to be rejected as surplusage because first, as a general rule according to the common law, "no estate could be limited to take effect after a fee-simple, as that in its nature is indeterminable."

Among the rules for construing wills the following summarized in 40 *Cyc.* may be quoted:

"The cardinal rule in the construction and interpreta-

tion of wills or codicils is that the intention of the testator must be ascertained if possible, and, if it is not in contravention of some established rule of law or public policy, must be given effect, and by this is meant the actual, personal, individual intention, and not a mere presumptive intention inferred from the use of a set phrase or a familiar form of words. For this purpose the will should be construed liberally; but it cannot be construed so as to effectuate an intention which is contrary to some rule of law or public policy.

". . . The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will, as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed, although technical words are not used; or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will." (pp. 1386–1389.)

"Where effect cannot be given to the entire will, or to an entire provision therein, consistently with the rules of law, any part of it which is conformable to such rules will be sustained, if it can be separated from the rest of the will without violating the testator's general intention. Thus where the testator's general intention, as expressed in the whole will, is in accordance with the rules of law, illegal or void provisions therein may be stricken out, where by so doing the general intention can be carried out; but such provisions cannot be stricken out so as to enable the court to put upon that which remains a construction which the whole will will not bear.

. . . . . .

"There are no arbitrary or unbending rules in the construction of the language of a will, as no two wills

are in all respects alike; and in construing such language, substance rather than form must be regarded, and if the testator's intention can be ascertained to a reasonable certainty from the whole will, it must be given effect however informal or artificial the terms or language employed. The court is not bound to give a strict and literal interpretation to the words used; and if the testator has put a particular interpretation upon a phrase or clause in his will the court in construing that phrase or clause should follow his interpretation; but it should not read into the will language which the testator did not intend to use." *Id.* at 1395, 1396.

"Where the language of a will or a part thereof is reasonably susceptible of two constructions, one of which will invalidate it and the other sustain it, the latter construction, if consistent with the testator's intention and the rules of law, must be adopted, as where one construction is consistent and another construction inconsistent with the law, the former must prevail if possible, and the will be declared valid, as it will be presumed that the testator intended to make a valid devise or bequest, and it is only when the language actually used by the testator will admit of no other reasonable construction than that the will or a part thereof is invalid or illegal that the court will declare such to be its effect. A will should also be construed so as to give effect if possible, without violating well-settled rules of law, to every part or provision of it, provided such an effect can be given consistently with the general intention of the testator as ascertained from the whole will. Every word or phrase should be given its effect and harmonized with the rest of the will, if it is possible to do so without defeating the general intention." *Id.* at 1407.

If there was any doubt as to the intention of the late

Hilary W. Travis, as expressed in the said first section of the said codicil, in our opinion all such doubts are effectively resolved by reference to the second and seventh sections of said codicil which follow:

> "*Section 2:* My property on the waterside in Monrovia, I hereby direct my Executors to rent and apply the proceeds to the payment of my debts. As soon as they are paid the income therefrom shall be applied as follows: One half shall be paid to my wife until her death and the other half shall be handed over to my niece Maria Simon. Upon the death of my wife, the property is hereby devised and bequeathed to my niece Maria Simon, her heirs and assigns in fee simple forever. . . .
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> "*Section 7:* The rest, residue, and remainder of my estate real and personal except one half of my income arising from my interest and shares in the Mining Companies, which I hereby give to my niece Maria Simon, absolutely and to her heirs and assigns forever."

In construing a will the intention of the testator towards a devisee or legatee, as has been seen, must be gathered from the whole instrument. According to the above quotations it is clear that Maria Simon was intended by the testator to be both residuary devisee and residuary legatee. In other words there is abundant evidence that the intention of the testator was that she should be the principal beneficiary of both his real and personal estate.

Quoting again from 40 *Cyc.* 1577:

> "Any expression in separate parts of the will may show that a fee was meant, as where the introduction or other part of the will shows that the will was intended to cover all testator's property. Where an intention appears to make certain gifts absolute in fee, other similar gifts in the will may be construed in the same way, and where certain gifts are qualified,

a failure to qualify other gifts may show that they were intended to be absolute or to be mere life-estates. Two devises of the same property will be harmonized if possible. A complete gift by a codicil cannot be controlled by words in the will, but may well modify the estate given by the will.

"A construction should be avoided which converts a fee simple into a life-estate or an estate tail by implication. Fulton v. Fulton, 2 Grant (Pa.) 28." *Id.,* note 41.

Hence, it is our unanimous opinion that the late Hilary W. Travis, by the terms of the sections of the codicil hereinbefore quoted, intended to convey to Maria L. Dennis, formerly Maria L. Simon, lot No. 106 in Monrovia in fee simple, and not in fee tail as contended by objectors, now appellants.

After the pleadings had reached the sur-rebutter, appellants, on the 18th day of December, 1936, filed a set of "Supplemental Objections," thus commencing a set of supplemental pleadings, and claimed that they were justified in so doing by the rules of code pleading in sundry parts of the United States of America.

This Court, in the year 1878, in interpreting the statute found on pages 72–3 of the Acts of 1857–60, declaring what should be the common law of this Republic, said as follows:

"Here is an adoption not only of the common law as set forth in Blackstone's Commentaries as in the previous act amended by this, but of the whole of those Commentaries as revised and modified by the writers named in the act. The statutes embraced in those Commentaries, where they remain unchanged by laws now in force, have thus been adopted as laws of this Republic. . . .

"Kent in his Commentaries, Vol. 1, in giving an account of the sources of the common law to the American people, makes this statement: 'It is also

the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.' " *Roberts* v. *Roberts,* 1 L.L.R. 107, 112.

Applying the principle of said decision to the case at bar, it is clear that code pleading, enacted by any of the several States of the United States of America and hence long after the emigration of the Pilgrim Fathers above referred to, is not a part of our common law. Indeed we have our own code pleading prescribed in chapters IV, V and VI of the Statutes of Liberia, *Old Blue Book.* Common law pleading, therefore, except as modified by our civil code of pleading above referred to, constitutes the only mode of pleading recognized in this jurisdiction, and not any manner of code pleading in vogue in any other jurisdiction not a part of the "common law" nor of our own civil code. According to said code of ours, a party is not precluded from raising new facts that may come to his knowledge after an original pleading shall have been filed. On the contrary the necessity therefor is recognized, and provided for under certain restrictions, as follows:

"Every answer may be once amended or withdrawn, and *a new one filed, or an additional answer filed,* but this must be done so as to produce no delay in the trial of the cause, and the defendant must pay all costs of the motion incurred by both parties, previous to such amendment." Ch. V, p. 45, § 6. (Italics added by the Court.)

"Amendments may be made in replies and answers, subsequent to the first, upon the terms on which they may in the first answers and replies, and subsequent answers may be withdrawn, and others substituted upon similar terms." Ch. VI, p. 46, § 7; *Thomas* v. *Dennis,* 5 L.L.R. 92, 3 New Ann. Ser. 66.

According to the common law, if a party desired to plead some point of law or fact which came to his notice after his pleading or pleadings had been filed, he did so by a plea *puis darrein continuance* (see Board's Civil Pleading 3–4; Shipman's Common Law Pleading 171); and had objections followed such a course in this case it is probable that no objection to that course would have been made. But the filing of supplemental pleadings was a complete innovation, unwarranted by our code, which, in our opinion, was correctly challenged by appellees, and correctly disallowed by the judge of the court below.

In spite of arguments made by appellants to the contrary, this Court adheres to, and reaffirms the principle settled in the case *Roberts* v. *Howard,* 2 L.L.R. 226, 6 Lib. Semi-Ann. Ser. 17 (1916), where Mr. Justice Johnson, afterwards His Honor Chief Justice Johnson, speaking for this Court said:

> "As to the first point raised in the bill of exceptions, we are of the opinion that the court below did not err in hearing and determining the case without the intervention of a jury, as the only questions for the court to determine were issues of law, all the material facts raised in the pleadings having been admitted by both parties. . . .
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> "The rule laid down in the case *Harris* v. *Locket* that actions of ejectment must be tried by a jury, under the direction of the court is based upon the fact that in such cases, mixed questions of law and fact are usually involved. It is obvious however that where, as in this case, the facts are admitted, leaving only issues of law to be determined, the rule will not apply. See law maxim: *'Cessante ratione legis cessat et ipsa lex.* When the reason of the law ceaseth, so does the law itself cease.'"

The majority of my colleagues are, however, of opinion that there is so far one incurable error in this case.

For, inasmuch as when the witnesses to the will having testified in support thereof they were respectively cross-examined by objectors who maintained that said will had not been proven, that raised an issue of fact which the judge was incompetent under the law to decide without a jury because of the statute in force which provides that:

> "Contested Wills shall be sent to the Court of Quarter Sessions to be tried by jury upon its merits, and by them either rejected, set aside, or quashed, or approved; and if rejected, the same may be removed by appeal to the Supreme Court. . . ." Art. II of the original Judiciary Act, Old Blue Book, p. 117, § 1 etc.; 2 Rev. Stat. § 1272.

Hence they say, not only would said statute appear to be mandatory so soon as an issue of fact is raised, but the court should have recognized that here was an issue which, in accordance with the statute just cited, it was bound to submit to a jury for its verdict.

But, in every such case, or in a case of this sort where the supplemental pleadings attacking the authenticity of the signature were ruled out, the objectors would find themselves in the position of a party who, having failed or neglected to file any affirmative pleadings, would be confined to a bare denial of the facts, in this case the fact of the due execution by testatrix of the will. *Massaquoi* v. *Lowndes,* 4 L.L.R. 260, 2 New Ann. Ser. 96 *et seq.,* esp. p. 97, and cases therein cited.

It follows then that the judgment of the court below should be reversed and the case remanded for the issues of fact to be tried by a jury in strict accordance with the principles hereinbefore cited. And inasmuch as appellants attempted to amend their pleadings without the payment of costs as provided by statute, they should pay all costs so far incurred; and it is hereby so ordered.

Reversed.