# REPORTS
OF
# CASES
ARGUED AND DETERMINED
IN THE
# COURT OF APPEALS
OF
# VIRGINIA.

BY
*BUSHROD WASHINGTON.*

VOL. I.

*RICHMOND:*
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and man. Why did not Beverley avail himself at law, of the ſuppoſed advantage, which he now relies upon in this court? But ſuppoſe he had pleaded it, and the plaintiff had replied the ſpecial matter, "that he had been induced by the defendant to receive the bond;" upon a demurrer, the law would have been decided in his favor. 2 *Mod.* 279. If he had pleaded infancy, he might have avoided *the bond*, but certainly in another action, the plaintiff upon proving his aſſumpſit after his attaining full age would have ſucceeded. If then, this would have been his fate at law, upon no principle can he expect, that a Court of Equity will aſſiſt him in impoſing upon innocent third perſons a loſs produced by his own fraud.

Upon the whole the court affirm the decree.

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## MINNIS, Ex'r. of AYLETT and others, *againſt* PHILIP AYLETT.

THIS was an appeal from a decree of the High Court of Chancery, and the queſtion depended upon a clauſe in the will of William Aylett the father of the appellee, wherein he deviſed to the appellee and his heirs, "the plantation on which "he then lived, and all his lands in the county of King Wil-"liam, alſo his land in Drummond's neck in James City coun-"ty." The teſtator at the time of making his will, and at his deceaſe, was ſeiſed of an eſtate of inheritance, in a tract of land in the county of King William, upon a part of which he lived, the reſidue being in the poſſeſſion of others, under leaſes. He was alſo entitled to a leaſehold intereſt for the term of 999 years in another tract of land lying in the ſame county, but of this laſt he was not poſſeſſed. He commenced a ſuit for the recovery of it, which abated by his death. His executors revived the ſuit after his death, and recovered the land. The appellee filed his bill in the High Court of Chancery, againſt the executors and reſiduary deviſees of the teſtator, claiming the leaſehold as well as the freehold lands. The only queſtion was, whether the leaſehold land paſſed under the above clauſe to the appellee, or was comprehended in the reſiduary clauſe in the will. The Chancellor decreed in favor of the appellee, upon his giving bond

bond with condition to pay the proportion of the debts due from the teſtator, for which this land is liable; and alſo, an account of the rents and profits thereof, received by the executors. From this decree the executors appealed.

WARDEN for the appellants. The deciſions, from the caſe of Roſe *vs.* Bartlett, *Cro. Car.* 292, down to the preſent day, have been uniform upon the ſubject; and they all eſtabliſh this difference, that if the teſtator be entitled to both freehold and leaſehold lands, and deviſe *all his lands*, the former only will paſs; but if he have leaſehold lands only, then they will paſs; for in the firſt caſe, the freeholds lands will ſatisfy the words of the will. He cited *Swinb.* on wills 139, 318, deviſe of all his lands and tenements—only the freehold lands paſs. 1 *P. Wms.* 286—3 *P. Wms.* 26—2 *Atk.* 450—1 *Vern* 271.

MARSHALL for the appellee. If the weight of authorities were out of the way, there could be no queſtion, in caſes of this ſort, about the intention, which certainly is, to paſs all the teſtator's land, whether freehold or leaſehold. The caſes cited, do not apply. They have all of them been decided upon ſome expreſſion in the will, ſhewing an intention to paſs only the freehold lands. In thoſe caſes, the teſtator either gives all his lands and *tenements*, or all his *freehold lands*. As for inſtance, in the quotation from Swinburne, the author explains thoſe caſes, and ſhews, that by the word *tenement*, the teſtator is conſidered as meaning *frank tenement* or *freehold*, and thereby limiting the general meaning of the word *lands*. In this caſe the teſtator had but one tract of land in King William, except the leaſehold, and the deviſe being of *all his lands*, in the plural; it cannot be ſatisfied unleſs the leaſehold land ſhall be conſidered as paſſing.

WARDEN in reply. The caſe of Roſe and Bartlett is a deviſe of all his lands; and the word *tenements* is not mentioned. It is true, that the court, in giving the opinion, put the caſe of a deviſe of all a man's lands and *tenements*, and this is concluſive to ſhew, that the inſertion of that word makes no difference, ſince they would not have decided the caſe under conſideration, and the caſe ſtated in argument, in the ſame manner, if there were any thing in the word *tenement*. But this caſe, upon intention, is ſtronger than any of thoſe cited, becauſe here, the teſtator not being in *poſſeſſion* of the leaſehold land, it is not preſumable that he meant to deviſe it.

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The PRESIDENT delivered the opinion of the Court.

In the case of Shermer and Shermer's executors, the court declared their opinion to be, that where the intention of a testator is apparent, cases to over-rule that intention must be strong, uniform, and apply directly to the case before the court, or else they would be disregarded. If in this case, the intention appeared clear, that the leasehold land should pass, the court would give a decision according to this principle, in support of the intention; but we can discover no such intention. The rule is laid down in Rose and Bartlett, by all the judges, that where a testator having both freehold and leasehold lands in a particular place, devises all his lands in that place, only the freehold lands shall pass. Subsequent Judges and Chancellors have stated the rule, and uniformly decided accordingly, altho' in one case, the Chancellor acknowledged, that the testator intended the leasehold land should pass.

Thus settled, it has become a rule of property, which the court cannot depart from, without disturbing perhaps many titles, enjoyed under this long established principle. In this will, there are no words or circumstances, to shew an intention, which do not appear in the case of Rose and Bartlett.

The court are therefore of opinion, that the leasehold land did not pass under the clause in question to the appellee, but is comprehended within the residuary clause to the wife and children of the testator, and they reverse the decree, and remit the cause for further proceedings.

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## BROWN'S Executors, *against* PUTNEY.

THIS was an action of assumpsit brought by Putney against the appellants in the District Court of Williamsburg. The defendant pleaded the act of limitations, upon which, issue was taken. The jury, by consent, found a verdict for the plaintiff, subject to the opinion of the court upon the following case, viz: that no assumpsit was proved after the 27th of March 1786, and that the writ in this suit issued the 23d of August 1791: that to avoid the act of limitations the plaintiff produced a writ which issued for the same cause of action from the Court of Hustings of Williamsburg, dated the 24th of October 1786, and which was not served upon Brown; but in November following

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