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

BY
BUSHROD WASHINGTON.

VOL. I.

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CASES ARGUED AND DETERMINED IN THE COURT OF APPEALS IN THE FALL TERM OF THE YEAR, 1794.

SHERMER *againſt* SHERMER'S Executors.

THIS was an appeal from a decree of the High Court of Chancery. The caſe was this: John Shermer, by his will, deviſed to his wife the uſe and profits of his whole eſtate, both real and perſonal, during her natural life, and after that was ended, then the whole of his eſtate, excluſive of that already given to his wife, to be equally divided between whoever his wife ſhould think proper to make her heir, or heirs, and his brother Richard Shermer. He further directed, that his executors, as ſoon as the crops were finiſhed after his wife's death, ſhould ſell and diſpoſe of his whole eſtate, real and perſonal, as they might think moſt conducive to the receiver's benefit.

The wife died in 1775, a few days after the teſtator, without making any diſpoſition, or appointment of her part of the eſtate. The executors ſold the eſtate, agreeably to the will, and diſtributed one moiety thereof, amongſt the relations of Mrs. Shermer; for the recovery of which, this ſuit was brought againſt the executors and diſtributees, by the preſent appellant, the ſon, heir and executor of Richard Shermer, the brother named in the will. It is proved that the teſtator frequently ſaid, he would leave his wife one half of his eſtate, to diſpoſe of as ſhe ſhould pleaſe, and that moſt of his eſtate was acquired by his intermarriage with her. Upon a hearing of the cauſe the bill was diſmiſſed, from which this appeal was prayed.

RONOLD for the appellant. The principle upon which the appellant's claim is founded, is ſo fully explained, and ſo concluſively

fively ſettled in the caſe of Tomlinſon and Dyghton, 1 *P. Wms.* 149. that it is unneceſſary to add any thing to it.

MARSHALL for the appellee. The deviſe to Mrs. Shermer, was intended to paſs to her, the whole intereſt and abſolute ownerſhip in the moiety, given to her appointed heir. In laſt wills, it is not neceſſary that the teſtator ſhould uſe technical words, in order to paſs a fee; for however inartificially he may expreſs himſelf, yet if his intention can be diſcovered to mean a diſpoſition of his whole intereſt in the thing deviſed, the court will ſupply ſuch words, as may be neceſſary to effectuate that intention. Thus, if the deviſe had been to the wife, to *diſpoſe of as ſhe pleaſed*, ſhe would moſt unqueſtionably have been entitled to the fee ſimple, becauſe ſuch a power is the eminent quality of ſuch an eſtate. But the caſe of Tomlinſon and Dyghton is relied upon, to eſtabliſh this principle, viz: that where an *expreſs* eſtate for life is given, it cannot be enlarged by words of implication, tho' if the eſtate had been given *generally*, it might be otherwiſe. I ſhall contend 1ſt, that the principle is not true, and 2dly, if it were, ſtill the caſe itſelf is not like the preſent.

1ſt, The principle is fully contradicted by the caſe of King and Melling, 1 *Ventr.* 214, and the great variety of caſes there cited. Langly and Baldwin 1 *Eq. Cas. Ab.* 185.—Blackbourn and Edgley 1 *P. Wms.* 605.—The Attorney General *vs* Sutton, 1 *P. Wms.* 754. Theſe caſes clearly prove, that an expreſs eſtate for life, may be enlarged by words of implication, if the teſtator's intention require it. The caſe Tomlinſon and Dyghton is conſequently founded upon a miſtaken principle, and ought not to be regarded.

But 2dly, If that caſe be law, it is unlike the preſent. In that, the power of diſpoſing is limited to particular children; in this, it is to the heirs general. The diſtinguiſhing feature of a fee ſimple eſtate, is conſequently diſcernible in this caſe, and not in that. Again—in that caſe, as well as in that cited from 3 *Leon.* 71, the wife having made an appointment, the intention of the teſtator could not be fruſtrated, and conſequently, the queſtion, turning merely upon the validity of the appointment, the nature, or extent of the wife's eſtate, was a point only incidentally decided, and therefore, the opinion as to that point, ought not to be conſidered as a binding authority. Again; it will not be denied but that if an expreſs eſtate for life had not been given to the wife, the latter words, would have enlarged the eſtate into a fee ſimple. In this caſe, the court, to effectu-

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ate the intention of the teſtator, will conſider the life eſtate given to the wife, as applying, not to her moiety, but to the moiety, which after her death is deviſed to the brother, and this will materially diſtinguiſh the preſent caſe, from that of Tomlinſon and Dyghton, & will bring it preciſely within that part of the rule laid down by the court, which makes the eſtate to the wife a fee ſimple.

WASHINGTON in reply. The caſe of Tomlinſon and Dyghton, and the caſes there cited, from 3 *Leon.* 71 & 1 *Mod.* 189, are ſo concluſive upon the point now under conſideration, that it can only be neceſſary for me, to ſhew that the objections made to them are not well founded. Thoſe caſes are built upon this well eſtabliſhed principle of the common law, viz: that an heir ſhall never be diſinherited by implication, nor by words of uncertain and doubtful meaning. In laſt wills, an eſtate of inheritance is permitted to paſs, by other words than thoſe artificially appropriated to that purpoſe; but it is intention only, which governs in ſuch a caſe; and where that intention can be clearly diſcovered, the court will give ſuch a conſtruction to the words, however inapt they may be, as will fulfill that intention. Thus in the caſe of Langly and Baldwin, the teſtator declared an intention, in one part of his will, to give an eſtate for life only; but it was equally clear, that he meant all the ſons of the tenant for life to take eſtates tail in ſucceſſion, before the limitations over were to take effect. But the 7th and other ſons would not by the rules of law, come into the ſucceſſion, if the anceſtor took only an eſtate for life; becauſe, where the anceſtor takes an eſtate for life, the heirs, or iſſue, by ſuch names, cannot take as purchaſers. So is Shelleys caſe—here then, are two contending intentions, both of them equally clear, tho' depending upon different claims for fulfillment. A proviſion for all the children, was more likely to be the favorite intention of the teſtator, than the nature, or quantity of the eſtate to be enjoyed by the anceſtor. How then, aſk the court, is this prevailing intention to be effectuated? The anſwer is, by uniting the eſtate for life with that ariſing by implication, and thus enlarging that eſtate into an inheritance; by which means only, the whole iſſue could be provided for. By ſuch refinements, do the judges govern themſelves in caſes of that ſort, and thus ingenious are they in inventing ſome ſubtle mode or other for carrying into effect the *will* of dead men. They metamorphoſe an eſtate for life, into an eſtate of inheritance, to promote this primary object, but not otherwiſe. It is neceſſity only, which could juſtify it, ſince if this neceſſity did not require it, ſuch

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refinements would amount to the *making*, not to the *conſtruing* of wills. So too, in the caſe of the Attorney General *vs* Sutton, founded upon the ſame principle with that juſt ſpoken of; except that in this, if all the iſſue had been provided for, yet the court muſt have decided as they did; becauſe, from two clauſes in the will, (mentioned in a note in the laſt edition of *P. Wms.*) the teſtator expreſſes his intention to give an eſtate tail, in words too plain to be miſunderſtood. But the court never will convert an *expreſs* eſtate for life, into an eſtate of inheritance, by words of *implication*, unleſs compelled to do ſo by abſolute neceſſity; that is, where the intention is in the firſt place clear, and not merely a doubtful, or poſſible intention; and ſecondly where that intention *cannot otherwiſe be effectuated*. This is the principle, upon which I rely; it is laid down in all the caſes, and controverted in none. Thoſe cited upon the other ſide prove it, and it is the very principle, upon which they are decided. Tomlinſon and Dyghton does not oppoſe; but on the contrary ſupports it, and yet it ſeems to have been ſuppoſed by Mr. Marſhall, that the judge declared, "that an expreſs eſtate for life could not be enlarged by implication." Taking it as a thing granted, that this poſition was there aſſerted, he proceeds to prove its fallacy, by citing Langly and Baldwin, and the other caſes relied upon for this purpoſe. But theſe caſes, tho' they contradict the *ſuppoſed caſe* of Tomlinſon and Dyghton, are entirely conſiſtent with that caſe, as it *really* is. The Chancellor there ſays, "that where an expreſs eſtate for life is given, with a *power to diſpoſe*, the latter words, ſhall not by implication enlarge the former, into an eſtate of inheritance, but they ſhall be conſidered as a diſtinct gift, and as coming in by way of addition." Now the difference between that, which the judge is *ſuppoſed* to ſay, and that which he actually ſays, is obvious. An expreſs eſtate for life may be enlarged by words of implication, *if by no other means* the teſtator's intention can be complied with, and therefore, in Langly and Baldwin, it was done, becauſe there was no other way to effectuate the intention; becauſe, if the 7th and other ſons could not take by deſcent, it was ſuppoſed they could not take at all: but they were clearly *intended to take*; therefore *from neceſſity*, the anceſtor took an eſtate of inheritance. But in the caſe of Tomlinſon and Dyghton, the children of the teſtator might take by purchaſe, without doing this violence to the plain words of the will. Therefore no neceſſity exiſted, for enlarging the eſtate for life, by words of implication, for in that caſe, the wife

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might, by exercising the power of appointment given to her, make the children take as purchasers. So upon this principle, the case before the court, and all others, where a power of appointment is annexed to the express estate for life, will be found to differ, from cases, where the issue are let in under words of implication, enlarging the estate for life into an estate of inheritance.

The next question is, does the case of Tomlinson and Dyghton differ from the present? The restriction of the power to dispose in that case, is noticed in the argument, and differs from this thus far only, that if that passed a greater estate than for life, it was a *conditional* fee, this an *absolute* one: if that only gave a power to dispose, it was a limited one, this is unlimited. But as to intention, there is no difference. The testator might as well intend the one, as the other, and both are equally distinguished by the marks of ownership, if there exist any in either. But it is contended, that in that case, the wife had made an appointment, and therefore, as to the other point, it was merely an obiter decision. But it is evident, that this was a material point in the cause, for if the wife took an estate in fee, it was unnecessary to decide the validity of the appointment, and therefore, this was a previous and important subject of consideration.

The last argument relied upon is, that the court to effectuate the testator's intention, will construe the express estate for life in this case, as applying only to the moiety, which after the wife's death, is given to the brother, and not to the other moiety devised to her appointed heir; and upon this difference, it is supposed, that the case of Thomlinson and Dyghton, does not apply. This argument tho' specious, has no solidity when examined; for, I ask, where is that intention, which, without resorting to the construction contended for, will be defeated? What is the intention? To give an estate *for life*, for so are the express words of the will; in the next place, to limit the inheritance to the person, whom the wife should appoint. No person can doubt, but that this was the intention, because the words are too plain to be misunderstood. There is no room left for construction, where there is no ambiguity in the expression. But, can this intention, so expressed, be no otherwise effectuated, than by converting the life estate into a fee? If it cannot, then I admit it must be done, and greater concessions ought not to be required, since all the cases, cited against us, shew, that this bold attack upon the plain words of the testator, can only be warranted, where otherwise, the intention would be entirely defeated.

defeated. To the queſtion, I anſwer, let the wife take an eſtate for life; let her exerciſe the power of appointing her heir or heirs; let ſuch heir or heirs take the inheritance, and then the teſtator's intention is fulfilled. Is not this what we contend for? and cannot all this be done, conſiſtently with the rules of law? where then, is the *neceſſity* of giving the wife a fee? The heirs could have taken if ſhe had *choſen* to name them, and if ſhe did not chuſe, but preferred leaving the eſtate to deſcend, where the law would caſt it, it cannot alter the caſe, or make the intention of the teſtator mean, what was not meant when that intention was expreſſed. That intention, was either to give a *power*, or a *beneficial intereſt* to the wife in the inheritance, and this court, will decide at this day, as they would have done, had the queſtion come on the moment after the teſtator's death. One would ſuppoſe, from the argument on the other ſide, that the heirs of the wife could not poſſibly take, unleſs the wife was conſtrued to take a fee, and that the court were ſtruggling to invent ſome mode, or other, to prevent this violence from being done to the teſtator's intention. Whereas, there is nothing more in the caſe, than that the wife has either neglected, or not choſen to exerciſe the power ſhe had, and therefore, this attempt is made, in order to repair the conſequences of this omiſſion, by ſacrificing to that end, the eſtabliſhed principles of law.

There are ſome expreſſions in this will, not unworthy of notice, as tending to furniſh additional proof of the intention.—He gives to the wife, the *uſe* and *profits* of his eſtate for life, and ſays, "*and after this is ended*" &c. Now theſe words ſtrike me to be as ſtrong as the words *and no longer*, in Target and Gant, 10 *Mod.* 402. Again, the deviſe is not of the *eſtate itſelf*, but of the *uſe* and *profits* for life, which is another ſtrong evidence of intention.

The PRESIDENT delivered the opinion of the court.

It is contended by the appellant's counſel, that Mrs. Shermer was by the will, only tenant for life of a moiety, with a power to diſpoſe of the fee; and that not having executed that power, the eſtate deſcends to the heir of the teſtator.

In ſupport of this poſition, ſeveral caſes have been cited; but they ſeem to verify the ſaying of a judge, "that in diſputes upon wills, caſes ſeldom illucidate the ſubject, which depending on the intention of the teſtator, to be collected from the will, and from the relative ſituation of the parties, ought to be decided upon the ſtate and circumſtances of each caſe."—To which

I will add, that I have generally obſerved, that adjudged caſes have more frequently been produced to diſappoint, than to illuſtrate the intention; and I am free to own, that where a teſtator's intention is apparent to me, caſes muſt be ſtrong, uniform, and apply pointedly, before they will prevail to fruſtrate that intention.

The caſes produced tend to prove, that an expreſs eſtate for life to the wife, with a power to diſpoſe of the fee, ſhall not turn her eſtate for life into a fee.

In the caſe of Target and Gant, the ſubject in diſpute was a chattel, and the objection to the remainder was, that it was void, being limited on too remote a contingency, being after an eſtate tail, which, it was ſaid, the wife took, tho' deviſed to her for life, being limited over on her dying without iſſue. The lord Chancellor ſaid, that the eſtate tail in ſuch a caſe, as to lands, was raiſed by implication, to favor the teſtator's intention, and he would not make the implication, in the caſe of chattels, to deſtroy that intention. So that if this caſe apply at all, it proves, that the teſtator's intention ſhall make ſuch words either an eſtate for life, or an inheritance, as ſhall beſt promote that intention.

In both the caſes from 1 *P. Wms.* and 3 *Leon.* where it was adjudged the wife took an eſtate for life, with power to diſpoſe of the fee, the deciſion of the point was unimportant, ſince in both, the wife had executed her power, properly and effectually.

In thoſe and all the caſes, the queſtion turns upon a fee eſtate in lands, here there is no doubt about the fee. It is in the purchaſer from the executor, and the only queſtion is how the money ſhall go according to the will? whether this will make a difference, need not be decided, ſince upon a view of the will, the intention is apparent, that the wife ſhould have the whole eſtate for life, and that at her death, one half (except his ſpecific bounty to her) ſhould go to *her family*, and the other to *his own*. Their relative ſituation, and his prior declarations, only ſhew ſuch intention to be liberal and juſt.

His words have been critically ſcanned; he does not give her a power to *diſpoſe*, but to name the *perſon or perſons* ſhe might chuſe to ſucceed to her part, to whom the teſtator gives the money; and it is doing ſmall violence to the words, even in their critical meaning, to ſay that by *ſuffering* her legal repreſentatives to ſucceed her, ſhe has *actually made them her heir or heirs*, as much ſo as if ſhe had pointed them out by an expreſs deviſe.

The decree affirmed.