

This suit has been instituted to recover a legacy given by the late Thomas Hall to his son William W. Hall, the late plaintiff. This Thomas Hall, in the life-time of his wife, had, besides the late complainant, William W. Hall, seven other children; and was then in possession of personal property to a considerable amount in * value; and was seized of two tracts of land, as tenant **134** in tail male; and of other parcels of land, in fee simple. Under which circumstances he made his will, wherein he says: "I request my executors, hereafter named, to dispose of all my estate, both real and personal, except some legacies, hereafter mentioned, to the best advantage, and after having first paid all my just debts, out of the sales of my personal property, to pay unto my wife Isabella, one-third part of the remaining balance, which the law gives her." And he then goes on to dispose of his estate among his children; giving to his son William W. Hall, the late complainant, one thousand pounds.

Soon after making this will, Thomas Hall died. Whereupon the late plaintiff, William W. Hall, as heir in tail, entered upon, held and disposed of the entailed estate to his own use. In consequence of which, Edward Hall and William Hall, the executors of Thomas Hall, deceased, refused to pay William W. Hall the legacy given him by his late father; alleging, that he could not be thus permitted to disappoint the will of their testator, by taking both the estate tail and the legacy; since the estate tail constituted a material part of the fund, out of which the legacy was given. And, to shew that such was the intention of their testator, they exhibited, as a part of their answer, a paper purporting to be a schedule, made by him, of all his estate, and upon which, as they allege, he predicated his will. But this schedule has neither been admitted nor established by proof; and therefore cannot be permitted to have any bearing whatever upon this case. From the pleadings, proofs, and agreements of the parties, it appears, that the whole controversy has been reduced to a single question; that is, whether William W. Hall can be put to his election to take either the entailed estate or the legacy; or be allowed to have both?

Wherever a testator devises a part of his estate to one, who has a claim upon it independently of him; it is a settled principle of equity, that the devisee shall not be allowed to disappoint the express, or obvious intention of the testator by taking both; to insist upon his claim, to its full extent, and also to take all the benefit bestowed upon him by the will. The devise, in such cases, is considered, in equity, as having been made upon an implied condition, that the claim shall be waived; and therefore the devisee will be bound to make his election to abide by the will, and take under it entirely, relinquishing his claim; or to abandon the will altogether.