

the testator Baruck, to all or any of those children, could be questioned by any one of them, in opposition to the others, or in derogation of the will of their father; and therefore, the testator William, by no exercise of his power, which went no further than to dispose of the land to which it applied, among those children, could leave them any right of election.

But it will be seen by the comparative view of the actual operation of these two testamentary acts, as exhibited by the report of the auditor, that the testator William, has devised to his son and daughter, Walter and Kitty, other lands, in addition to portions of that derived from their grandfather, and has also bequeathed to each of them, a large amount of personal property; that the testator William speaks of the land derived from the testator Baruck, as his, the testator William's, dwelling plantation, and then gives to his wife and daughters, and her son, a home at his mansion house, until his son Walter should attain his full age; and directed that all the property be kept together, and worked with the family slaves; and that the profits, after the payment of his debts, be divided, &c. Here, so far as the donations of other property, not derived from the testator Baruck, and also of a home, and the charge for payment of debts, affects the lands and slaves held under the testator Baruck, by incumbering them and their profits with a habitation right, and the payment of the debts of the testator William, or by withholding them temporarily from his children by his wife Kitty, are directly at variance with, and go beyond a mere execution of the power given by the will of the testator Baruck, they do most manifestly put the testator William's children, by his wife Kitty, to an election, to take under, or in opposition to his will. And those of the testator William's children, by his wife Kitty, who are now of full age, have all of them elected to take under their father's will accordingly.

With regard to the infants who have been also put to their election, I am of opinion, that in the situation of this case, the Court may and ought to elect for them; and that in doing so, it must be guided altogether with a view to the benefit of the infants, on a *consideration of all circumstances. *Gretton v. Haward*, 1 **624** *Swan*. 413. A reference has been made to the auditor, for the purpose of collecting information upon this subject; and the facts and statements reported by him, have not been questioned. From those statements, there can be no doubt, that it will be greatly for the benefit of the infants to take under the will of their father, in so far as the property given to them by their grandfather, has been embraced within the terms of the election, offered to them by the will of their father, which particularly describes the real estate, and also sufficiently specifies the negroes as being then a part of the "family slaves." I shall, therefore, in behalf of