

the interest which the creditor takes by the will, is not *ejusdem generis*, not being co-extensive with, or of the same nature of that to which he is entitled from the testator, as his debtor, the legatee will be entitled to both interests.

But although, in my opinion, the interest which this complainant takes under the will of his grandfather cannot be regarded as a satisfaction of his claim founded upon the alleged contract, I yet think the will puts him to his election, and that he cannot claim under the will and under the contract also.

There can be no doubt that the degree of intention, necessary to raising a case of election, must plainly appear upon the face of the will, but then the court is not to disregard what amounts to a moral certainty of the intention of the testator. *McElfresh vs. Schley and Barr*, 2 Gill, 181.

And though evidence *dehors* the will, will not be admitted to prove, or disprove, such intention, there seems to be no valid objection to such evidence to show the state and circumstances of the property. *Judd vs. Pratt*, 13 ves., 174; 2 *Roper on Legacies*, 390.

Now, can there be a doubt that the testator did intend to dispose of this property as his own. He took the deed to himself on the 17th of February, 1846, and on the 2d of April following, he made his will, by which he devised to the trustee, his whole estate of every kind and description. I throw out of view his declaration to Mr. Poe, which has been excepted to, but I suppose the *fact* of his taking the deed to himself is evidence, to show the state and circumstances of property.

Now, is it not morally certain, that the testator intended to dispose of his will of this property, and is not that intention apparent upon the face of the will itself, especially when taken in connection with the state and circumstances of the property. He unquestionably had the legal title, and his intention, as it appears to me, might be as well disputed to dispose of any other part of his estate as this.

There is another intention manifested upon the face of this will, which would be frustrated by the success of this attempt on the part of the complainant; and that is to place the grand-