

But then the intention of the testator, that such devisee should be put to an election, must be either distinctly expressed, or very strongly manifested by facts and circumstances; for, no one can be stripped of his rights by guessing or conjecture. It must distinctly appear, that the claim is irreconcilable and incompatible with the devise; or that to sustain the claim, would throw the testator's estate into a channel entirely different from that in which he had placed it by his will. To prevent such a perversion, or disappointment of the express, or clearly manifested intention of the testator, a court of equity will, by a strong operation of its powers, put the devisee to an election.(f) But there is no instance of a devisee being made to elect upon slight presumptions or inferences; or where the will might have its full effect without impairing the obligation of the claim; or where the testator has property, which is absolutely his own, answering fully to the description of that spoken of in his will, and by which all its expressions may be satisfied.(g)

In this case, it appears that the testator had a considerable real estate, in fee simple, by which his expressions, "all my estate, real and personal," may be amply gratified without embracing the entailed estate. There is nothing upon the face of the will itself, nor any thing in the circumstances under which it was made, which necessarily or very clearly shews an intention to comprehend the entailed as well as the fee simple estate. Although the testator might, during his lifetime, have aliened the lands which he held as tenant in tail, by a mere deed of bargain and sale, legally executed and recorded; and thus have barred the right of the heir in tail; yet, it is very certain, that he could not *devise* those lands by his last will and testament.(h) Upon the whole, then, it is my opinion, that the plaintiffs are entitled to recover; and the amount in such case having been agreed upon; it is thereupon,

Decreed, that *Edward Hall*, the surviving executor of the late *Thomas Hall*, forthwith pay unto the claimants, *John B. Bayliss* and *Elizabeth* his wife, as administrators of *William W. Hall* deceased, the sum of \$2666 66, or that the said defendant bring the same into this court to be paid to the said complainants; the

(f) *Noys v. Mordaunt*, 2 Vern. 581; 2 Mad. Chan. 51; *Blake v. Bunbury*, 4 Bro. C. C. 21; *Sheddon v. Goodrich*, 8 Ves. 492; *Dillon v. Parker*, 1 Swan, 359. (g) *Pow. Devi.* 465.—(h) *Paca v. Forwood*, 2 H. & McH. 175; *Laidler v. Young's Lessee*, 2 H. & J. 69.