

then, as there could have been no choice, the power would have been thus virtually extinguished. Such only child could not have been put to an election under such a testamentary provision, and the right to put to an election, must have rested upon general principles, independently of that power. There being in fact, however, a plurality of such children, no exercise of the power which merely gave the whole of the lands derived from 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