

consideration of all circumstances. (k) 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 these infants, elect that they shall take entirely under the will of their father, the late *William Bowie*.

But the one-third of the negroes given by the testator *Baruck*, upon his death, immediately vested in the rest of the children of his daughter *Kitty*, to be distributed when they should arrive at age, that is, in these parties, *Eliza*, *Walter*, and *Kitty*. This specific legacy to them was the immediate gift of a fund, with all its produce. The testator *William*, as their father and natural guardian, might well take and hold these negroes for them; but in doing so he made himself accountable to them for their profits. Consequently, the amount of those profits which had accumulated in his hands, during his life-time, was a debt due from him to them, it was a part of their property in his hands. But it has been in no way disposed of by him; he has not described, or even alluded to it as a part of that mass of property, by the special disposition of which he has expressly or impliedly driven them to elect to take under or against his will. On the contrary, considering it as a debt due from him, he has, together with all others of his debts, expressly provided for its payment.

The principles of election arise out of the fact, that a party who has a right to one parcel of property, has another given to him, with an express declaration, or under circumstances which leave no room to doubt that the donor, who has disposed of both, intended he should have choice of either; but that he should not be permitted to take both of them. It is no where spoken of as arising out of the circumstance of the testator's being a debtor to his devisee or legatee. In this case the testator *William* shews that he perfectly understood the extent of his power to put some of his children to an election, by the manner in which he has dis-

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(k) *Gretton v. Haward*, 1 Swan. 413.