ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

RENDLESHAM and others—*Appellants.*
WOODFORD and others—*Respondents.*

June 9, 1813.

CASE OF ELECTION.

TESTATOR by his will leaves various legacies to heir at law (among others.) Contracts for the purchase of certain freehold estates, subsequent to the date of his will, which (as is apparent on the face of the will) he intended should go to trustees and executors, and not to heir at law. The heir at law, who is legally entitled to these estates, is obliged to elect between them and the benefits which he derives under the will.

THIS was a question of election, arising out of the remarkable will of Peter Thellusson, which gave occasion to the passing of the Act 39 and 40 Geo. 3. cap. 98, by which the power of settling and devising property for the purpose of accumulation is restrained in general to twenty-one years after the death of the grantor or testator.

Will of P. Thellusson, merchant; dated April 2, 1795.

By this will, dated April 2d, 1796, the testator, after bequeathing various pecuniary legacies to his sons and daughters, &c. devised and bequeathed the whole of the rest of his immense property, consisting of lands of the annual value of 4,500*l.* and of personal property to the amount of 600,000*l.* to trustees, for the purpose of accumulating, during the lives of his three sons, and the lives of all their sons who should be living at the time of his death, or born in due time afterwards, and the lives and life of the survivors and survivor of them; then the

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estates directed to be purchased from time to time, with the produce of the accumulating fund, to be divided into three shares; one to be conveyed to the eldest male lineal descendant of each of his three sons, with benefit of survivorship; and in case of failure of all such descendents, the whole to be applied to the use of the Sinking Fund. It was calculated that this property might possibly amount to thirty-two millions before any part of it could be alienated.

Death of testator, July 27, 1797. Will established in Chancery, Feb. 19, 1801. Decree affirmed by Lords, June 25, 1805.

The testator died July 27th, 1797. The will was established in Chancery by decree, February 19th, 1801; affirmed by the House of Lords, June 25th, 1805. After devising and bequeathing as aforesaid, it contained the following clause, on which the question of election arose:—

Clause on which question of election arose.

"In case I shall in my life-time enter into any "contracts for the purchase of any lands, tenements, "or hereditaments, and I should happen to die be- "fore the necessary conveyances thereof are exe- "cuted, I order and direct, that all and every such "contract or contracts so entered into by me as "aforesaid, shall be completed and carried into "execution by my said trustees after my death, and "that the purchase-monies for such respective es- "tates and premises, shall be paid by them, by, "with, and out of my personal estate and effects, "and that the deeds and conveyances thereto "respectively shall be made to them, their heirs, "and assigns; and that they, and every of them, "shall stand, remain, and be seised, and possessed "of all and singular the premises so to be conveyed "upon, under, and subject to such and the same

" uses, trusts, limitations, provisoes, and conditions, June 9, 1813.
" as are in and by this my will created, expressed,
" and declared of and concerning the estates hereby CASE OF ELECTION.
" directed to be purchased by and with the aforesaid
" residuum of my estate and effects, in the manner
" hereinbefore mentioned."

The Chancellor, by the decree of the 19th February, 1801, had reserved the question of election till the Master, to whom the usual reference in such cases was ordered, should have made his report. Master S. C. Cox, by his report dated 20th May, 1806, certified, that the testator had, by articles of agreement of 10th November, 1795, *contracted* (prior to the date of the will) for an estate at Thorpe, in Balne, in Yorkshire, which was *conveyed* to the testator by indentures, dated 18th and 19th of July, 1796 (subsequent to the date of the will); and that the testator, *subsequent to the date of his will, contracted* to purchase three several estates, of which the purchase had since been completed, and the purchase-money paid by the trustees; viz. one at Motherby, in Yorkshire, for 21,000*l.*; another at Newton Hanzard, in the County of Durham, for 9,600*l.*; and a third in the parish of Wadsworth, in Yorkshire, for 1,050*l.*; which three last mentioned estates, contracted for subsequent to the date of the testator's will, descended to Peter Lord Rendlesham, heir at law to the testator, as declared by the decree.

May 20, 1806. Master's report as to the estates which gave rise to the question of election.

On the 15th December, 1806, *Lord Erskine* (then Chancellor) ordered that this report should be confirmed, and that the Appellant, Peter Lord Rendlesham, should convey and assure unto and

Dec. 15, 1806. Heir at law ordered to elect between the estates descending to

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him at law, and legacies under will.

to the use of the said Matthew Woodford and Emperor John Alexander Woodford, their heirs and assigns, upon the trusts of the will of the said testator, Peter Thellusson, the messuage and lands, situate at Thorpe, in Balne aforesaid, contracted to be purchased by the said testator, prior to the date of his will, with their appurtenances; and it was ordered that the Appellant, Peter Lord Rendlesham, should make his election between the estates to which he was entitled, as the heir at law of the said testator, and the legacies and other benefits bequeathed to him by the said testator's will.

Against this order, as far as it related to the question of election, Lord Rendlesham the heir at law, appealed; and having died on 15th September, 1808, the appeal was revived by order of the Lords of 26th February, 1810.

It was contended on the part of the Appellant, that this order of the Court below ought to be reversed, for these reasons:—

1st, That the doctrine of election is said to be founded on an implied condition; but an heir at law, who is particularly favoured by the law of England, ought not to be disinherited by such implication, which is not that necessary implication, which is in other cases required to disinherit an heir at law, who takes by descent, either because there is no intention to disinherit him and give the property to another expressed or necessarily implied, or because the apparent intent to disinherit is such as the policy of the law directs shall not be attended to.

2d, That the common law did not invest a person

with the power of devising an estate by will, but such power only originates in Acts of Parliament, which authorise him to devise by will such estates only as he had at the time of making the will. A will therefore containing a clause, devising an estate intended to be purchased, must be read as if it contained no such clause, and consequently a court cannot call on the heir to elect. (*Shedden v. Goodrick*, 8 Ves. Jun. 481, and *Carey v. Askew*, there cited, p. 492.)

3d, The heir is always particularly favoured by the law of England; and it seems therefore only to have authorised the testator to dispose of those lands which he had, and not to have entrusted him with a power to dispose prospectively of whatever he might have, that the heir at law might not be disinherited without the testator having a full knowledge of the property he was parting with, and if that is the reason of the law, to apply the doctrine of election to such a case as this is to raise an implication to defeat the policy of the law.

4th, Lord Holt, in *Brunker v. Cooke*, 11 Mod. 123, compares the disability the testator is under, of disposing of real estate he had not when he made his will, to the disability in cases of infancy and coverture; and *Herle v. Greenbank*, 1 Ves. 298, 3 Atk. 695, is an express authority in point, that the will of an infant or feme covert, shall not put the heir taking a legacy under it to his election. In this case (as is observed in that case) the will is void as to the estate attempted to be disposed of, and it therefore differs from the common cases of election, where the testator gives land which belongs

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to another; for there the testator, supposing himself to have an interest in the land, gives what he supposes he has, and the will is therefore good as far as he has any title, but the title of the testator to that land failing, the devisee is obliged to make it good; but here the testator having no shadow of present interest, and knowing that to be the fact, wishes to dispose generally of all after acquired property, which the rule of law does not allow him to do.

It was on the other hand contended in behalf of the Respondents, that the order in question ought to be affirmed on these grounds:—

1st, It is a rule of a Court of Equity, that a person taking benefits under a will, shall not disturb the disposition made by it.

2d, It distinctly appears upon the will to have been the intention of the testator, that the interest, that the heir insists descended to him, should pass by the will.

Sir S. Romilly and *Mr. Bell* for Appellants; *Mr. Martin* and *Mr. A. Buller* for Respondents.

The appeal was dismissed, and the order complained of affirmed without any observations. (For report of the proceedings under this will, from the beginning, vid. 4 Ves. 227—11 Ves. 313; and upon this particular question, 13 Ves. 209, and cases there referred to.)

Agents for the Appellants, ODDIE, ODDIE, and FORSTER.
Agents for the Respondents, BUDD and HAYES.
Agent for the Treasury, LITCHFIELD.