

**Beard Vs. Rowan**

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**Court :** US Supreme Court

**Decided On :** 1835

**Appeal No. :** 34 U.S. 301

**Appellant :** Beard

**Respondent :** Rowan

**Judgement :**

Beard v. Rowan - 34 U.S. 301 (1835)

U.S. Supreme Court Beard v. Rowan, 34 U.S. 9 Pet. 301 301 (1835)

**Beard v. Rowan**

**34 U.S. (9 Pet.) 301**

*ERROR TO THE CIRCUIT COURT OF THE*

*UNITED STATES FOR THE KENTUCKY DISTRICT*

## **SYLLABUS**

Kentucky. The clauses in the will of John Campbell under which the land in controversy was claimed were as follows:

"And if within that time my said half-brother, Allen Campbell, shall become a citizen of the United States or be otherwise qualified by law to take and hold real estate within the same, I then direct that my said trustees, or the survivor or survivors of them, shall convey to my said half-brother, Allen Campbell, his heirs or assigns, in fee simple all the land hereinbefore described in this devise. But if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct that my said trustees, or the survivor or survivors of them, shall sell and dispose of the said land hereby directed to be conveyed to him on two years' credit, with interest from the date to be paid annually, and the money and interest arising from such sale to be transmitted to my said half-brother, to whom I give and bequeath the same. But should my said half-brother become a citizen of the United States or be otherwise qualified to hold real estate within the same before his death, it is then my will and desire that he shall have the sole and absolute disposal of all the estate hereinbefore devised or bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees."

The testator died in October, 1799.

Allen Campbell a native of Ireland, came to the State of Kentucky in December, 1799, and continued to reside therein until September, 1804, when he died.

On 18 December, 1800, the Legislature of Kentucky passed a law reciting that by the laws then in force, aliens could not hold lands therein, and it is considered the interest of the state that such prohibition should be done away. It then provides that any alien, other than alien enemies, who *shall have actually resided* within the commonwealth two years shall, during the continuance of his residence therein after that period, be enabled to hold, receive, and pass any right, title, or interest to any lands or other estate in the same manner and under the same regulations as the citizens of the state. It was held that the full effect and benefit of this act and the clear intention of the legislature requires a construction which gives to it a *prospective*, as well as *retrospective*, application, and under this construction, Allen Campbell became qualified to, take and hold the title to the land in question as if he had been a citizen of the state. The devise to Allen Campbell was a good executory devise, depending on the contingency of his becoming a citizen of the

United States or being otherwise qualified to hold real estate. This contingency was not too remote. It must necessarily not only from the nature of the contingency, but by express limitation in the devise, happen in the lifetime of the devisee, if ever, and upon the happening of this contingency, there can be no doubt but the devisee took an estate in fee.

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John Campbell a native of Ireland who emigrated to the State of Virginia before the Revolutionary War and continued to reside in Kentucky until his decease, which took place in October, 1799, was the owner of a tract of land situate above and below the mouth of Bear Grass Creek, on the Ohio, comprising the land on which, by an act of the Legislature of Virginia, the City of Louisville was laid out. Upon the erection of a part of Virginia into a separate state, these premises become a part of the State of Kentucky.

At the time of the making of his last will and testament, 25 July, 1786, John Campbell who was never married, had a brother of the whole blood, Robert Campbell, also a citizen of the State of Virginia, a father, a half-brother, named Allen Campbell, and a sister of the whole blood named Sarah Beard, who was a widow and had children. His father, half-brother, and sister were natives of Ireland and subjects of the King of Great Britain and Ireland in 1786. The father of John Campbell died before him. By his will, which was duly proved and recorded on 13 January, 1800, John Campbell devised his estate, both real and personal, to James Milligan, William Elliot, and Phillip Ross, and the survivor and survivors of them, in trust for the uses and purposes stated in the will.

The provisions of the will of John Campbell out of which the controversy between the parties to this case arose were the following:

"I do further direct that after the decease of my said father, all the profits of my lands within five miles of the mouth of Bear Grass shall be annually paid to the guardian of my said half-brother, Allen Campbell during his minority, to be applied to his education and maintenance, if so much be required therefor; if not, then the

overplus to be laid out on interest by my said trustees till my said half-brother shall arrive at the age of twenty-one years or marry; but upon either of the said contingencies' happening, the aforesaid profits shall then and thenceforth be paid to my said half-brother, for and during the term of five \_\_\_\_\_, and if within that time my said half-brother shall become a citizen of the United States or be otherwise qualified by law to take and hold real estate within the same,

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I then direct that my said trustees, or the survivors or survivor of them, shall convey to him, my said half-brother Allen Campbell his heirs or assigns, in fee simple, all the lands hereinbefore described in this devise; but if my said half-brother shall not within the time aforesaid become a citizens as aforesaid, I then direct that my said trustees, or the survivors or survivor of them, shall sell and dispose of the aforesaid lands hereby directed to be conveyed to him on two years' credit, with interest from the date, to be paid annually, and the money and interest arising from such sale to be transmitted to my said half-brother, to whom I give and bequeath the same. It is my further will and desire that in case my said half-brother shall die before the expiration of the aforesaid term of five years after his arrival at the age of twenty-one years, the land intended by the next preceding clause to be devised to him shall be sold by my said trustees on two years' credit, and the money arising from such sale, when received, shall be transmitted to the guardians of the children which my said half-brother may leave, to be by the said guardians lent out on interest, and an equal division shall be made thereof amongst them; but should my said half-brother become a citizen of the United States of America or be otherwise qualified to hold real estate within the same before his death, it is then my will and desire that he shall have the sole and absolute disposal of all the estate hereinbefore devised and bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees. It is my further will and desire that in case my said half-brother shall die before he shall become qualified to hold real estate as aforesaid and without children or a child, my said trustees shall make sale of the lands hereby directed to be conveyed to him, as is before directed, on two years' credit, and that the money

arising by sale be appropriated to the use of my said sister, Sarah Beard, and all the children which she hath or may hereafter have, to be lent out on interest, as is directed in the several devises, bequests and limitations hereinbefore made to them, the interest and principal to be transmitted, and their proportions thereof respectively to be the same, and subject to the same rules, limitations, and conditions as are directed and prescribed in the cases of the other before mentioned devises and bequests to my said sister and her children. "

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"And whereas I conceive it to be greatly to the interest of the several devisees hereinbefore mentioned to become citizens of America and take possession of such parts of my estate as are hereby intended for them respectively, instead of selling the same and receiving the consideration thereof, I do therefore direct that all and every such devisee shall have a right to receive their respective proportions of whatever lands may be undisposed of at the time of their becoming qualified to take and hold the same, and that my said trustees, or the survivors or survivor of them, shall make fair and equitable divisions accordingly and convey to them their respective proportions as aforesaid, and should my said sister come over to America before that part of my lands hereby intended for her and her children shall be disposed of by my trustees, I then direct that the same shall not be sold, but that the profits thereof shall be annually appropriated to the use of her and her children as aforesaid until her children shall come of age or marry, but that whenever anyone of them shall arrive at the age of twenty-one, or marry, his or her proportion of such land shall be conveyed by my said trustees, or the survivors or survivor of them, in fee simple, provided such child shall be capable of holding the same. I hereby direct that upon all sales which shall be made of any part of the property herein directed to be sold, good landed security shall be taken for the payment of the purchase money in specie. I do declare that it is my will and desire that no part of my estate of any kind shall go to my brother R. C. in any manner whatever, and as unforeseen events may happen which may make it prudent to delay making the sales herein directed to be made, I do therefore authorize my said trustees, or the survivors or survivor, to use their or his discretion therein so

as to guard against such inconveniences and losses, as there may be danger of the estate suffering by precipitating the sales. I also authorize them or him to alter the times of credit upon such sales, should it be found to the interest of the estate so to do."

"I do hereby revoke all former and other wills by me made."

"In witness whereof, I have hereunto set my hand, and affixed my seal this 25 July, 1786."

"JOHN CAMPBELL [SEAL]"

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"Signed, sealed, published, and declared by the testator as and for his last will and testament in presence of us, who subscribed our names as witnesses in his presence and by his desire."

"HARRY INNIS, T. PERKINS, CHRIST. GREENUP"

"The executors named in my last will and testament are James Milligan, as aforementioned; Charles Simms, of the Town of Alexandria, in the County of Fairfax, attorney at law; Richard Taylor, and \_\_\_\_\_ of Jefferson County; William Elliot, of Westmoreland County, and State of Pennsylvania; and Philip Ross, of the County of Washington, in the same state."

"JOHN CAMPBELL"

"I, John Campbell have this day erased the name of James Sullivan from the number of my executors, as he has destroyed in my life time the confidence which I would wish to repose in a man that would, in my opinion, be worthy to act for me after my death."

"JOHN CAMPBELL"

"April 5, 1791"

In the Circuit Court of the district of Kentucky, the plaintiffs in error sued out a writ of right on 6 January, 1830, and an alias writ of right on the 3 June, 1830, against John Rowan, the defendant in error, and claimed one hundred acres of the land near the mouth of Bear Grass; Henry A. Beard as a citizen of the State of Ohio, and the other plaintiffs as citizens of Missouri. The defendant in his plea claimed ninety-five acres of the premises in question, and disclaimed as to the residue, put himself on the assize, and prayed recognition to be made whether he or the plaintiffs had the greater right to hold the premises so claimed by him.

The cause came on for trial at the November term, 1831, of the circuit court, and the following facts were agreed upon to be used on the trial.

"The parties in this cause agree to the following facts, to-wit:"

"First. That John Campbell was born in the Kingdom of Ireland; that he came to the United States of America prior to the Revolutionary War; that he continued to reside in the said

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United States from the time of his migration thereto until he departed this life in the month of October, 1799, in the County of Fayette in the State of Kentucky, where he then resided; that on 25 July, 1786, he made and duly published his last will and testament bearing that date, with an endorsement thereon dated 5 April, 1791; that said will and endorsement were duly proved and recorded on 13 January, 1800, in the County Court of the said County of Fayette, and that the said John Campbell was seized in fee simple at the time of his death of the premises in question in this action, and that he died without ever having been married."

"Second. That Robert Campbell was born in the Kingdom of Ireland; that he migrated to the United States of America before the Revolutionary War between the United States of America and Great Britain; that he continued to reside therein until his death, which happened in August, 1805, near Louisville, in the County of

Jefferson in the State of Kentucky; that he had resided in Kentucky many years before his death; that he was a brother of the whole blood of the said John Campbell and died intestate, and was never married."

"Third. That Allen Campbell was born in the Kingdom of Ireland, and was about twenty-five or twenty-six years of age when he died; that he migrated to the United States in the year 1796 and resided in the City of Philadelphia until he came to the State of Kentucky, which was in the month of December, 1799; that he resided in Kentucky from that time until 16 September, 1804, when he departed this life intestate, and was never married. That he was a half-brother on the father's side to the said John and Robert Campbell and Sarah Beard."

"Fourth. That said Sarah Beard was born in the Kingdom of Ireland, and migrated to the State of Kentucky in the year 1800, where she continued to reside until October, 1806, when she departed this life; that she was a sister of the whole blood to the said John and Robert Campbell and sister of the half blood to the said Allen Campbell on the side of the father; that she was a widow when she came to Kentucky, and continued to be a widow until her death; that at her death, she had three surviving children, to-wit, William Beard, Joseph Beard and Elizabeth Megowan, all of whom were born in Ireland;

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that the said William Beard came to the United States in the \_\_\_\_ 1790, and was never naturalized, and departed this life in the year 1813; that he was married and had two children, issue of said marriage, at the death of said John Campbell to-wit, Nancy C. Beard and Sarah Beard, who were his only children at that time; that said Nancy C. Beard intermarried with Robert Bywaters, and is still living; and Sarah Beard intermarried with Hankerson Bywaters, and is still living; that the mother of the said Nancy and Sarah departed this life, and the said William Beard married a second time, and had the following issue of said marriage, to-wit, William A. Beard, Catharine Beard, Mary Beard, John Beard, Charles Beard and Joseph Beard, all of whom were born since the death of the said John Campbell; that the said Catharine Beard has intermarried with, and is now the wife of Henry

H. Shepard; that the said Mary Beard has intermarried with and is now the wife of Lewis Hawkins; that the said Charles Beard departed this life in March, 1831, an infant and childless; that the said John, Charles and Joseph Beard were born since the death of the said Sarah Beard; that the said Joseph Beard and Elizabeth Megowan, children of the said Sarah Beard, came with her to Kentucky, and are still living; that the following are the children of the said last named Joseph Beard, to-wit, Henry Beard, Ann Daley, wife of Lawrence Daley, Isabella McLearn, wife of Charles McLearn, Sarah McLearn wife of Francis McLearn, and Joseph Beard, Jr."

"Fifth. That the said John Campbell Robert Campbell Allen Campbell and Sarah Beard were the only surviving children of Allen Campbell the elder, who departed this life in Ireland before the said John Campbell."

"Sixth. That Charles Simms and Richard Taylor survived the other trustees and executors of John Campbell; that said Simms departed this life in the District of Columbia about the year 1825 or 1826, never having been in the State of Kentucky; that neither of the other trustees, except Taylor and Sullivan, were ever in the State of Kentucky after the death of said John Campbell; that said Taylor resided therein at the death of Campbell and so continued until his death, which happened in the year 1828 or 1829; and that said Taylor alone qualified as executor of said John Campbell in Kentucky. "

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"Seventh. That the said defendants were possessed of the premises in contest in this action at the time of the service of the process on them in this case, and are now in possession thereof, and also were in possession of said premises before and on 21 April, 1826. The parties aforesaid do further agree that it shall be competent for either of them to introduce evidence, either written or parol, to establish any facts not herein and hereby agreed to and admitted, which they or either of them may deem necessary and within the issue."

The demandants made title under the will of John Campbell and under a deed executed on 21 April, 1826, by Richard Taylor, as executor of the last will and

testament, and trustee of the estate of John Campbell to Joseph Beard, Elizabeth Megowan, and the heirs of William Beard, the material parts of which instrument were the following:

"The said John Campbell did, by his last will and testament, duly made and published on 25 July, 1786, devise to James Milligan, Charles Simms, Richard Taylor, William Elliot, and Philip Ross, and the survivors and survivor of them, whom he did thereby appoint executors of his last will and testament, all his estate, both real and personal, in trust for certain uses and intents therein mentioned, and whereas all the said executors and trustees have renounced the execution of said will, except Richard Taylor, the first party to these presents, and whereas the said John Campbell deceased did, by his last will and testament, provide that all his real estate in the County of Jefferson aforesaid, within five miles of the mouth of Bear Grass Creek, should be conveyed to his half-brother, Allen Campbell, so soon as he became a citizen of the United States or should be otherwise qualified to hold real estate, or that in either event happening, the said Allen Campbell should, without a deed from the trustees or trustee of said John Campbell's will, have the disposal of said real estate, within the limits aforesaid, and whereas the said Allen Campbell died in 1804 without having disposed of certain parts of said real estate in any way and without having ever received a title to said real estate, by which it again reverted to the estate of said Campbell and became subject to the devises in his will as to so much thereof as was undisposed of by said Campbell during his lifetime. "

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"And whereas the said Richard Taylor, sole executor and trustee as aforesaid, in consideration of the premises, is willing to convey the property aforesaid, except so much thereof as he hath this day conveyed in a separate deed to same parties, to the heirs of Sarah Beard, deceased, as is directed in the said last will and testament of said John Campbell as will more fully appear, reference being had thereto. Now therefore, in consideration of the premises and for the further consideration of one dollar to him in hand paid, the receipt whereof he doth hereby acknowledge, the said Richard Taylor, as executor and trustee as aforesaid, hath

granted, bargained, sold, aliened, and confirmed and by these presents doth grant, bargain, sell, alien, and confirm to the said parties of the said second part, excepting from the heirs of William Beard, Nancy C. and Sally Bywaters, who have already sold and disposed of all their right, title and interest in and to the same, a certain tract or parcel of land lying and being in the County of Jefferson, on the Ohio River, adjoining the Town of Louisville, containing, by estimation, three thousand acres, be the same more or less, one thousand acres of which being the one-half of two thousand acres, patented by the King of Great Britain to John Connolly by patent bearing date 16 September, 1773, the other two thousand patented to Charles D. Warnsdoff, the patent bearing date the day and year last mentioned, and bounded as described in the said patents, as will more fully appear on reference being had thereto. Also all the unsold lots in the Town of Louisville, consisting of twenty-acre lots, ten-acre lots, five-acre lots, half-acre lots, and other lots and parcels of ground, deeded to Colonel John Campbell; also all the island in the said River Ohio near the said Town of Louisville lately in the possession of Allen Campbell; also all the ground and ferry at the lower landing in Shippingport, together with all and singular the premises and appurtenances thereunto belonging, or in any wise appertaining, and all the estate, right, title, interest, or claim of him, the said Richard Taylor, of, in or to the same -- to have and to hold the said land, lots, island, ferry, and all and singular the appurtenances to the said party of the second part, their heirs and assigns, forever, and the said Richard Taylor, for himself, his heirs, administrators, and assigns, the said estate above conveyed to the said parties of

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the second part, will forever defend against the claim or claims of all and every person claiming by or through him."

And also under a deed, executed by Joseph Beard and others, of which the following is a copy.

"This indenture, entered into this 5 April, 1826, between Joseph Beard, of the one part, and Henry Beard, Lawrence Daley and Ann his wife, Francis McLear and

Sarah his wife, Charles McLear and Isabella his wife, and Joseph M. Beard, witnesseth, that for and in consideration of the natural love and affection which the said party of the first part bears towards his children, the parties of the second part, and for the further consideration of one dollar in hand paid to him by the said parties of the second, he doth hereby give, alien, sell, convey, and assign to the said parties of the second part all his right, title, claim, and interest in and to the estate of Colonel John Campbell, deceased, in the Counties of Jefferson and Shelby in state aforesaid, for which suits are about to be commenced by the heirs of said Campbell of which said Joseph is one, for and in consideration of which the parties of the second part hereby bind themselves to pay that part of the expenses of said suits which will fall on said Joseph in the prosecution thereof."

The title of the tenant, the defendant in error, was derived under the will of John Campbell and under the following conveyances: a deed from Sarah Beard, the sister of John Campbell the testator, to Fortunatus Cosby, executed on 7 July, 1806, and other mesne conveyances, the last of which was from William Lytle to the tenant and defendant, executed on 17 February, 1822.

In January or February, 1800, Allen Campbell was put into possession of the whole landed estate of John Campbell devised to him, and which was within five miles of the mouth of Bear Grass, by Richard Taylor, one of the executors of John Campbell's will. When the lands were surrendered to him and he was put into possession of the same, it was as the owner and proprietor thereof in fee, as devisee under the will of his half-brother, John Campbell. He continued to occupy the same until his death, claiming it as his own and occasionally selling various parts thereof. After the death of Robert Campbell, Sarah Beard, as the heir of Allen Campbell as to

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one moiety and heir of Robert Campbell of another moiety, claimed the whole estate.

On the trial in the circuit court, the demandants prayed the court to instruct the jury that unless they find from the evidence that the surviving trustees of Colonel Campbell's will conveyed by deed the land in contest to Allen Campbell that the law is for the demandants.

That unless they find from the evidence that Allen Campbell was naturalized according to the laws of the United States, that the law is with the demandants.

That from the facts agreed and the evidence offered, the law is for the demandants, and they ought to find accordingly.

The court refused to give the instructions as prayed, and the defendant moved the following instructions to the jury, which were given. That the premises in question passed in fee to Allen Campbell the half-brother of John Campbell under his will, and at the death of said Allen passed, by descent, from him to Robert Campbell and Sarah Beard, and then from him to her, provided the jury believed from the evidence 1st, that said John Campbell was a citizen of the United States, and died in October 1789, and had never been married; 2d, that said Allen Campbell came to the State of Kentucky in December, 1799, and continued to reside therein until September, 1804, and then died intestate, and had never been married; 3d, that said Robert Campbell was a citizen of the United States and half-brother of the said Allen; that said Sarah Beard was half-sister of said Allen and came to Kentucky in October, 1800, and continued to reside therein until the death of said Allen; that said Robert Campbell died in August, 1805, intestate, and had never been married, and that said Sarah Beard was the sister of the said Robert Campbell.

The jury found the following verdict, on which the court gave a judgment for the defendant.

"We, the jury, find that the tenant has more right to hold the tenement as he now holds it in the written count mentioned, than the demandants to have it as they now demand it."

The plaintiffs took a bill of exceptions and sued out this writ of error.

MR. JUSTICE THOMPSON delivered the opinion of the Court.

It is a writ of right for the recovery of a piece or tract of land, the title to which is admitted to have been duly and legally vested in John Campbell. Both parties claim under the will of John Campbell as the source of title.

The demandants claim under a deed from Richard Taylor, the surviving executor of John Campbell bearing date 21 April, 1826, to Joseph Beard, Elizabeth Megowan, and the heirs of William Beard. The tenant claims under a devise in the will of John Campbell, and the decision of the case depends mainly upon the construction to be given to this devise.

The evidence in the cause being closed, each of the parties moved the court for instructions to the jury. The demandants prayed the court to instruct the jury that unless they find from the evidence that the surviving trustee of Colonel Campbell's

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will conveyed by deed the land in contest to Allen Campbell the law is for the demandants.

That unless they find from the evidence that Allen Campbell was naturalized according to the laws of the United States, that the law is with the demandants.

That from the facts agreed, and the evidence offered, the law is for the demandants, and that they ought to find accordingly.

These instructions the court refused to give, but, on the prayer of the tenant, gave the following instructions.

That the premises in question passed in fee to Allen Campbell the half-brother of John Campbell under the will, and at the death of the said Allen passed by descent from him to Robert Campbell and Sarah Beard, and from him, Robert Campbell to her, Sarah Beard, provided the jury believed 1, that John Campbell

was a citizen of the United States, and died in October 1799, and had never been married; 2, that the said Allen Campbell came to the State of Kentucky in December 1799, and continued to reside therein until September 1804, and then died intestate, and had never been married; 3, that the said Robert Campbell was a citizen of the United States and half-brother of the said Allen; that Sarah Beard was half-sister of the said Allen and came to Kentucky in October, 1800, and continued to reside therein until the death of the said Allen; that the said Robert Campbell died in August, 1805, intestate, and has never been married; and that the said Sarah Beard was the sister of the said Robert Campbell.

The material facts in this case are not at all drawn in question. They are agreed upon by a stipulation contained in the record. And we must at all events assume for the purpose of the present decision that the jury has found all the facts hypothetically put by the court in the instruction given to them, and upon the assumption of which the court instructed the jury that in point of law the demandants were not entitled to recover, and whether this instruction was correct is the question now before the Court.

Upon the argument here, several objections have been made to the right of the demandants to recover in this action, claiming, as they do, different titles which cannot, as is alleged, be set up under a joint action in this manner. This, however, is

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rather matter of form, and as the case is before us on the merits and has been fully argued, we pass by this objection without stopping to inquire whether it was well founded or not.

The clause in the will of John Campbell upon which the right to the land in question depends is as follows.

"And if within that time my said half-brother, Allen Campbell, shall become a citizen of the United States or be otherwise qualified by law to take and hold real estate within the same, I then direct that my said trustees, or the survivor or

survivors of them, shall convey to him, my said half-brother, Allen Campbell his heirs or assigns, in fee simple, all the lands hereinbefore described in this devise. But if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct that my said trustees, or the survivor or survivors of them, shall sell and dispose of the said lands hereby directed to be conveyed to him on two years' credit, with interest from the date, to be paid annually. And the money and interest arising from such sale to be transmitted to my said half-brother, to whom I give and bequeath the same."

The testator then provides for the disposition of these lands and the proceeds thereof in case his said half-brother shall die before the expiration of the aforesaid term of five years after his arrival at the age of twenty-one years, and then adds the following clause:

"But should my said half-brother become a citizen of the United States of America or be otherwise qualified to hold real estate within the same before his death, it is then my will and desire that he shall have the sole and absolute disposal of all the estate hereinbefore devised and bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees."

It is contended on the part of the demandants that under this will, the legal estate of the land in question is vested in the executors and trustees, and that Allen Campbell did not take any legal estate under the will and could not acquire it except by deed from the trustees or the survivor of them. And they contend that Richard Taylor was such survivor, and they claim under the deed from him of 21 April, 1826. But if Richard Taylor had no authority to convey this land, the demandants fail entirely to show any title whatever in the

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land. His authority to convey the land lies at the foundation of the right set up by them.

Richard Taylor is not named as one of the trustees. The trustees named are James Milligan, Charles Simms, William Elliot, and Philip Ross, who are also

appointed executors, and to whom the testator devises his estate, both real and personal, in trust for the uses and purposes provided and declared in his will. It is true that he afterwards, in a codicil, names Richard Taylor as one of his executors. But the estate was vested in the other executors named, as trustees, and Taylor, in his capacity merely as executor, acquired no title to the land or any authority to sell it.

But it is unnecessary to rest the case upon this point, as it is very clear that under the will of John Campbell, his half-brother, Allen Campbell, took an estate in fee simple as an executory devise, without any deed from the trustees.

The intention of the testator in this respect cannot be mistaken. Allen Campbell was an alien, and was not or might not be qualified to take and hold real estate. The title was accordingly vested in trustees, with directions to convey the same to him when he should become qualified by law to take and hold the same. And if he should not within a specified time become qualified to take and hold real estate, the trustees are directed to sell the land and transmit the avails thereof to the said Allen Campbell, thus providing for all supposed contingencies with respect to the situation of the devisee and to enable him to receive the benefit of the devise. But that his right and title to this estate might not at all depend upon the trustees, he devises the land directly to the said Allen Campbell if he should at any time before his death become a citizen of the United States or be otherwise qualified to hold real estate, notwithstanding he may not have obtained deeds therefor from his said trustees.

This was a good executory devise depending on the contingency of his becoming a citizen of the United States or otherwise qualified to hold real estate. This contingency was not too remote. It must necessarily, not only from the nature of the contingency but by express limitation in the devise, happen in the lifetime of the devisee, if ever. And upon the happening of this contingency there can be no

doubt but the devisee took an estate in fee. The words in the will are amply sufficient to pass an estate in fee. And the only remaining inquiry is whether Allen Campbell, before his death, became qualified to take and hold real estate in the State of Kentucky. And this will depend upon the act of the legislature of that state passed on 18 December, 1800, which is as follows:

"Whereas, by the laws now in force in this commonwealth, aliens cannot hold lands therein, and whereas it is considered the true interest of this state that such prohibitions be done away, be it therefore enacted, &c.;, that any alien, other than alien enemies, who shall have actually resided within this commonwealth two years shall, during the continuance of his residence herein after the said period, be enabled to hold, receive and pass any right, title, or interest to any lands or other estate known within this commonwealth in the same manner and under the same regulations as the citizens of this state may lawfully do."

2 Littell's Laws 400.

The evidence in the record shows, and it is so found by the jury, that Allen Campbell came to the State of Kentucky in December, 1799, and continued to reside therein until September, 1804, when he died intestate, never having been married. It is argued on the part of the demandants that this law only embraces aliens who shall have resided within the state two years before the passing of the act, and does not, therefore, reach the case of Allen Campbell.

This is certainly too narrow an interpretation of this law to meet the obvious intention of the legislature, even admitting that such is the strict grammatical construction.

The preamble in the act may be resorted to to aid in the construction of the enacting clause when any ambiguity exists. That preamble evidently shows that the intention of the legislature was to make a general provision for removing the disability of aliens to hold real estate, and this founded upon state policy doubtless for the purpose of encouraging the settlement of the country, and this object would be in a great measure defeated by restricting the act to aliens who shall have

resided two years in the state before the passing of the act. The condition upon which aliens are placed on the same footing with citizens with respect to the right of holding and

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disposing of land is a two-years' residence within the state, and the full effect and benefit of the act, and the clear intention of the legislature, require a construction which gives to it a prospective as well as retrospective application. And under this construction, Allen Campbell became qualified to take and hold the title to the land in question and pass the same in the same manner as if he had been a citizen of the state. No constitutional objection can be made to this act. It does not profess to naturalize aliens. It is not necessary that they should be made citizens in order to hold and pass real estate, and the condition upon which this may be done is a matter resting entirely with the state legislature. We are accordingly unanimously of opinion that the judgment of the circuit court is correct, and it is accordingly

*Affirmed.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky and was argued by counsel, on consideration whereof it is adjudged and ordered that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs.

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