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on the other, had been annulled or rescinded between the parties, at any time prior to the execution of the deed by the plaintiff to Morris and Nicholson, in May 1796." If this instruction be considered as asking the court to determine on the effect of the evidence, it was properly refused. It is the province of the jury to weigh and decide on the sufficiency of the evidence; and from the words of the instruction, it would seem to be conceded, that there was some evidence of the rescission of the contract, as the court were asked to instruct the jury that the evidence was not sufficient to prove the fact. Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have. In this view, the circuit court did not err in refusing the above instruction.

As the instruction given on the prayer of the defendant, was founded on a part of the evidence only, the judgment of the circuit court must be reversed, and the cause remanded for further proceedings.

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 Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is *adjudged and ordered by this court, that the judgment of the said circuit court in this cause be and the same [*300 is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

*HENRY BEARD, WILLIAM A. BEARD, and LEWIS HAWKINS and [*301
MARY his wife, v. JOHN ROWAN.

Will.—Executory devise.

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 herein-before 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 herein-before 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 the 18th of 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

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requires a construction which give 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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*302] *ERROR to the Circuit Court of Kentucky. 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, situated 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 became a part of the state of Kentucky.

At the time of the making of his last will and testament, 25th of 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 the 13th of January 1800, John Campbell devised his estate, both real and personal, to James Milligan, William Elliot and Philip 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,

*303] *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 citizen 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

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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.

*" And whereas, I conceive it to be greatly to the interest of the several devisees herein before mentioned, to become citizens of [*304 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 any one 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

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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 25th of July 1786.

JOHN CAMPBELL." [SEAL.]

*305] "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 afore mentioned; 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 lifetime, 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.

"April 5th, 1791.

JOHN CAMPBELL."

In the circuit court of the district of Kentucky, the plaintiffs in error sued out a writ of right, on the 6th day of January 1830, and an *alias* writ of right, on the 3d day of 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: 1. 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 *306] to reside in the said *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 the 25th day of July 1786, he made and duly published his last will and testament, bearing that date, with an indorsement thereon, dated the 5th day of April 1791; that said will and indorsement were duly proved and recorded on the 13th day of January 1800, in the county court of the said county of Fayette; and that the said John Campbell was seised 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.

"2. That Robert Campbell was born in the kingdom of Ireland; that he migrated to the United States of America, before the revolutionary war

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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.

"3. 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 the 16th day of 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.

"4. That 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 ; that the said William Beard came to the United States in [*307 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, jun.

"5. 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.

"6. 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

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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.

*308] *"7. 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 the 21st day of 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 the 21st of 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 the 25th day of 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 *309] Campbell, during his lifetime. *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 directed in the said last will and testament of the 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,

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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 the 16th day of September 1773; the other two thousand patented to Charles D. Warnsdoff, the patent bearing the 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, 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 for ever. And the said Richard Taylor, for himself, his heirs, administrators and assigns, the said estate above conveyed, to the said parties of *the second part, will for ever defend against the claim or claims of all [*310 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 5th day of April 1826, between Joseph Beard, of the one part, and Henry Beard, Lawrence Daley and Ann his wife, Francis McLearn and Sarah his wife, Charles McLearn 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 the 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 the 7th of July 1806; and other mesne conveyances, the last of which was from William Lytle to the tenant and defendant, executed on the 17th of 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

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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 *311] *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 was for the demandants. That, unless they found from the evidence, that Allen Campbell was naturalized according to the laws of the United States, the law was with the demandants. That from the facts agreed, and the evidence offered, the law was 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 there 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.

*312] The case was argued by *Peters*, with whom was **Loughborough*, for the plaintiffs in error ; and by *Hardin* and *Sergeant*, for the defendant.

For the *plaintiffs* in error, it was contended :—1. That the title to the land in controversy passed by the will of John Campbell, in fee, to the trustees, and the survivors of them, named in said will, and so remained until the deed of R. Taylor, trustee to Beard, was made. 2. That at the making of the said deed, the title to so much of the said land devised by J. Campbell, as had not been disposed of by Allen Campbell, was in Taylor, the surviving trustee. 3. That the said deed of Taylor, trustee to Beard and others, was in due performance of the trust created by the will, and

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that the title of J. Campbell passed by it to the grantees. 4. That the circuit court erred in not giving the instructions moved by the demandants. 5. That it erred in giving those moved by the tenant.

For the *defendant*, it was contended:—1. That, taking the whole will of John Campbell together, it is evident and manifest, that all his landed estate, within five miles of Bear Grass, was intended for Allen Campbell; and to save it from forfeiture, as he was an alien when he made his will and codicil, he invested it in trustees. 2. That Allen Campbell became qualified, under the statutes of Kentucky, to take and hold real estate, accepted the devise, claimed the land in dispute, lived on it, used it, and sold part of it. 3. The consent of the executor was not necessary to perfect the title of Allen Campbell, and if it was, the executor did consent. 4. As soon as Allen Campbell became qualified to take and hold real estate in Kentucky, as he did on the 18th of December 1802, that instant he became vested with the title, in fee, as an executory devise, without a deed. 5. If Allen Campbell took the property as an executory devise, or by a release from the trustees; then, on his death, Robert Campbell and Sarah Beard inherited each a moiety, and when Robert Campbell died in 1805, Sarah Beard became *seised of the whole fee, and conveyed it to Fortunatus [313 Cosby, in 1806. 6. The title of the demandants is defective, because it is derived under a deed from Richard Taylor, who was not a trustee under the will of John Campbell, but was an executor. 7. When the conveyance was made by Taylor, the defendant was in adverse possession of the land. 8. The demandants cannot recover in a writ of right. Some of them have, on their own showing, no title at all: and if others have a title, it is not a joint title with some of the demandants; and other persons, if any of the demandants have title, who also have title, are omitted in the suit, although they are joint-tenants with the demandants in the writ; and a joint-tenant cannot recover his interest, unless all his co-joint-tenants are joined in the writ. 9. In a writ of right, the demandant may recover less than what he counts for, but it is less as to the quantity and not different in the nature of his title; for if he could, then the rule that the proof must agree with the statement, would be defeated; which would not be the case, when he recovered less in quantity: this is the distinction in almost every form of action.

THOMPSON, Justice, delivered the opinion of the court.—This cause comes up on a writ of error from the circuit court of the United States for the district of Kentucky. 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 the 21st of 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

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instruct the jury, that unless they find from the evidence, that the surviving trustee of Colonel Campbell's *will conveyed by deed the land in *314] 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 had 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 have 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 this 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 matter. This, however, is *rather matter of form ; and as the case is *315] 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 herein before 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

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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 absolute disposal of all the estate herein-before 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 the 21st of April 1826. But if Richard Taylor had no authority to convey this land, the demandants fail entirely to show any title whatever in the *land. His authority to convey the land, lies at the foundation of the right set up by them. [*316

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, nor 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 then 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, his 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. The 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

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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 18th of 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 in 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 his 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 *318] *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.