Swann, on the same side.—The judgment is for costs; all the costs which have accrued or shall accrue. It is admitted, that we have a right to recover the costs of the first execution; and even if the clerk has mistaken the law, in adding the costs of the second, yet, that error is cured by the plaintiff's release. In the case of *Scott* v. *Hornsby*, 1 Call 41, the court of appeals of Virginia decided, that if a forthcoming bond be taken for more than the sum due by the execution, and the plaintiff release the excess, the bond will support a judgment.

*96] **Jones*, in reply.—The awarding of execution on a forthcoming bond, upon motion, is a summary remedy given by statute, in derogation of the common law, and therefore, the provisions of the statute must be strictly pursued. The release cannot aid an error in the exercise of this summary jurisdiction. I admit, the practice to be, that if the bond be for more than the judgment, and the plaintiff releases the excess, it will support a judgment. So, if the bond be for too small a sum, it is still good as a bond at common law. But in neither case, will it support the summary proceeding, by motion.

The taking a forthcoming bond is one mode of executing the writ. If the defendant be arrested, the quashing of the execution releases his body. So, if goods be taken on a *fi. fa.*, and the *fi. fa.* be quashed, the goods are discharged. So, in this case, the bond (being taken in lieu of the goods or of the body) would be discharged, by the quashing of the execution.

It is true, the judgment is for costs; but it cannot be in the alternative; that is, if one execution, then for 22 pounds of tobacco; and if two executions, then for 44 pounds of tobacco.

Marshall, Ch. J.—The court is of opinion, that the act of assembly contemplates the case where the first execution is not returned nor executed; that is, where it is out and may be served. The clerk is right in adding the costs of the *alias ca. sa.* The judgment is for costs, generally; which includes all the costs belonging to the suit, whether prior, or subsequent to the rendition of judgment. If new costs accrue, the judgment opens to receive them.

Judgment affirmed, with costs.

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*97] *Lambert's Lessee *v.* Paine.

Devise in fee.

A devise of "all the estate called Marrowbone, in the county of Henry, containing by estimation 2585 acres of land," carries the fee.[1]

Quære? Whether a British subject, born in England, in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia, by descent or by devise?

This was an ejectment brought in the Circuit Court of the United States, for the middle circuit in the Virginia district; in which John Doe, a subject of the King of Great Britain, residing without the state of Virginia, lessee of John Lambert, another subject of the King of Great Britain, complains of Richard Roe, a citizen of Virginia, residing within the said state, and

[1] Abbott *v.* Essex Co., 18 How. 262; s. c. 2 Curt. 126.

claims possession of a messuage and tenement, containing 156 acres of land, in the county of Henry, being part of a tract of land called Marrowbone.

The jury found the following special verdict, viz: "That George Harmer, being seised in fee of the lands in the declaration mentioned, on the 25th of June 1782, made a paper writing, purporting to be his last will and testament, all written with his proper hand, and signed by him; which will we find in these words:

"'In the name of God, Amen. I, George Harmer, of the commonwealth of Virginia, being perfectly well and of sound mind and memory, do make and ordain my last will and testament, in manner and form following, that is to say, all the estate, both real and personal, that I possess or am entitled to, in the commonwealth of Virginia, I hereby give and devise unto my friend, Thomas Mann Randolph, of Tuckabo, and Henry Tazewell, of the city of Williamsburgh, in trust, upon these conditions, that when John Harmer, my brother, now a subject of the King of Great Britain, shall be capable of acquiring property in this country, that they, or the survivor of them, do convey, or caused to be conveyed, to him, in fee-simple, a good and indefeasible title in the said estate; and in case the said John Harmer should not be capable of acquiring such right, before his death, then that my said trustees, or the survivor of them, do convey the said estate in manner aforesaid, to John Lambert, son of my sister, Hannah Lambert, when he shall be capable of acquiring property in this country; and in case John Lambert should not, before his death, be capable of acquiring a title to the said estate, then I direct the same to be conveyed *to my sister, Hannah Lambert, if she, [*98
in her lifetime, can acquire property in this country. But if the said John Harmer, John Lambert and Hannah Lambert should all die before they can acquire property legally in this country, then I desire that my trustees aforesaid may cause the said estate of every kind to be sold, and the money arising from such sale, together with the intermediate profits of the said estate shall be by them remitted to the mayor and corporation of the city of Bristol, in England, to be by them distributed, according to the laws of England, to the right heirs of my said sister, Hannah Lambert, to whom I hereby give all such money, excepting the sum of 100*l.* lawful money to each of the afore-mentioned trustees, which shall be paid out of the first money arising from the sales afore mentioned, or from the profits arising to my heirs. In witness whereof, I have hereunto set my hand and affixed my seal this 25th of June, 1782.'

"We find, that on the 12th day of September 1786, the said George Harmer, being seised as aforesaid, duly executed another writing testamentary, which we find, in these words:

"'In the name of God, Amen. I, George Harmer, being sick and weak in body, but in perfect mind and memory, do give and bequeath unto Doctor George Gilmer, of Albemarle county, all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2585 acres of land; likewise, one other tract of land in said county, called Horse-pasture, containing, by estimation, 2500 acres; also, one other tract, in the county aforesaid, containing, by estimation, 667½ acres of land, called the Poison-field. It is my desire that all my negroes, horses and other property be sold, and after paying my debts, the balance, if any, be remitted to my nephew, John Lambert, out of which he shall pay his mother five hundred pounds,' &c.

"Afterwards, on the 12th or 13th day of September 1786, he departed this life, without revoking the will or writing testamentary last mentioned; and without any other revocation of the will first mentioned, than the said writing testamentary of the 12th of September 1786. We find, that John Harmer, mentioned in the paper writing of June 1782, departed this life about the year 1793. We find, that John Lambert, named in the paper
*99] writings *aforesaid, the lessor of the plaintiff, was, if capable of inheriting lands in Virginia, heir-at-law to the said George Harmer; that he was born in England, on or before the year 1750; that he has never resided in any of the United States of America, and is, and ever has been, from the time of his birth, a subject of the King of Great Britain. We find, that George Gilmer aforesaid, under whose heir and devisees the defendant holds, died in the month of November 1793. We find, that in the December session 1798, the general assembly of Virginia passed an act, which we find at large in these words:

"'An act vesting in the children of George Gilmer, deceased, certain lands therein mentioned (passed January 12th, 1799). § 1. Be it enacted by the general assembly, that all the right, title and interest, which the commonwealth hath, or may have, in or to the following lands, lying in the county of Henry, which George Harmer, by his last will and testament, devised to a certain George Gilmer, and which, since the death of the said George Gilmer, it is supposed have become escheatable to the commonwealth, to wit, one tract called Marrowbone, containing, by estimation, 2585 acres; one other tract called Horse-pasture, containing, by estimation, 2500 acres; and one other tract called the Poison-field, containing, by estimation, 667½ acres, shall be, and the same are hereby released to, and vested in, the children, whether heirs or devisees, of the said George Gilmer, deceased; to be by them held and enjoyed, according to their respective rights of inheritance, or devise under his will, as the case may be, in the same manner as if the said George Gilmer had died seised of the lands in fee-simple, and an office had actually been found thereof; saving, however, to a certain John Lambert, who, as heir-at-law to the said George Harmer, claims the said lands, and to all and every other person or persons, bodies politic and corporate (other than the commonwealth), any right, title or interest, which he or they might or would have had in or to the said lands, or any part thereof, against the said children and devisees, if this act had never been made. § 2. This act shall commence in force from the passing thereof.'

"We find, that George Harmer was, at the time of his death, seised in fee
*100] of the lands in the *declaration mentioned, which are of the value of $3000, and that George Gilmer, at the time of his death, was seised of the same, under the devise to him from the said George Harmer. We find the lease, entry and ouster in the declaration mentioned. On the whole matter, if the court shall be of opinion, that the law is for the plaintiff, we find for the plaintiff the lands and tenements in the declaration mentioned, and 20 cents damages; and if the court shall be of opinion, that the law is for the defendant, we find for the defendant."

Upon this verdict, the judgment of the court below was for the defendant. The transcript of the record contained a bill of exceptions by the defendant, to the refusal of the court to the admission of testimony to prove that George Harmer, at the time he made the will in favor of Gilmer, de-

clared to the person who wrote it, that it was his intention to give Gilmer the fee-simple. There was also an agreement of counsel, that if the court should be of opinion, that the first will ought not to have been admitted in evidence, because not proved before a court of probate, then so much of the verdict as related to that will should not be considered as forming any part of this case.

The writ of error was sued out by the plaintiff, and general errors assigned. The case was argued at February term 1803, by *Minor* and *Mason*, for the plaintiff in error, and by *Key*, for the defendant.

Minor, for the plaintiff, insisted on the following points, viz: 1st. That the devise from George Harmer to George Gilmer, dated 12th of September, 1786 ,of all the estate called Marrowbone, is only a devise for life. 2d. That John Lambert, heir-at-law of George Harmer, is not an alien as to the citizens of this country, and is capable of taking the reversion by descent. *3d. That the will of 12th September 1786, is only a partial, and not a total revocation of the will of 25th June 1782; and that this will passes [*101 and disposes of the reversionary interest of the testator's estate, according to the legal import of that will. 4th. That by virtue of the Virginia statute transferring trusts into possession, the devise of 1782 transferred the legal estate to John Lambert. 5th. That John Lambert, if an alien, is capable of taking by devise, and is protected by the treaty of 1794 between the United States and Great Britain. 6th. Or that, if not, the property remains in him until office found for the commonwealth.

1. That the devise to Gilmer is only for life. In the first will of 1782, which is wholly written with the testator's own hand, he evinces not only a knowledge of the import, but of the necessity of technical words of limitation or perpetuity; yet, in the will of 1786, he uses expressions which convey a life-estate only, and uses no words which can be construed into an intention wholly to revoke the will of 1782. The first will disposes of the fee to his near relations; and hence results a strong presumption, that he meant to give only a life-estate by the will of 1786. The will of 1782 makes use of strong terms of limitation or perpetuity, and clearly shows his intention of securing the fee-simple to his brother and heir, John Harmer, who had, in fact, given him this very land. In the last will, he does not notice his former will, nor mention his brother and heir, but devises "all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2585 acres of land," &c., to Doctor George Gilmer.

It is generally true, that a devise of real property without words of limitation, conveys only an estate for life. This is the general rule, and must prevail, unless such circumstances appear, as are sufficient to satisfy the conscience of the court, that the testator *intended to convey a fee. [*102 *Bowes* v. *Blackett*, Cowp. 235. So, in the case of *Hogan* v. *Jackson*, Ibid. 306, Lord MANSFIELD said, "if the words of the testator denote only a description of the specific estate, or lands devised; in that case, if no words of limitation are added, the devisee has only an estate for life. But if the words denote the quantum of interest or property that the testator has in the lands devised, there, the whole extent of his interest passes, by the gift, to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator. It is now clearly

settled, that the words 'all his estate,' will pass everything a man has; but, if the word 'all' is coupled with the word 'personal,' or a local description, there the gift will pass only personalty, or the specific estate particularly described."

And in the case of *Loveacres* v. *Blight*, Cowp. 355, Lord MANSFIELD said, "in general, wherever there are words and expressions, either general or particular, or clauses, in a will, which the court can lay hold of, to enlarge the estate of a devisee, they will do so, to effectuate the intention. But if the intention of the testator is doubtful, the rule of law must take place; so, if the court cannot find words in the will, sufficient to carry a fee, though they themselves should be satisfied, beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law. Now, though the introduction of a will, declaring that a man means to make a disposition of all his worldly estate, is a strong circumstance, connected with other words, to explain the testator's intention of enlarging a particular estate, or of passing a fee, where he has used no words of limitation, it will not do alone. And all the cases cited in the argument, to show that the introductory words in this case would alone be sufficient, fall short of the mark; because they contained other words, clearly manifesting the intention of the testator to pass a fee."

The case of *Right* v. *Sidebotham*, Doug. 759, is also very strong. There, the introductory clause testified the intention of the testator to dispose of all his worldly goods and estates, and also a disinheriting legacy to the heir. The devise, then in question, was coupled by the word "and" with another devise to *the same devisee, her heirs and assigns, yet it was held not sufficient to carry the fee. Lord MANSFIELD says, "the rule of law is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. All my estate, or all my interest, will do; but 'all my lands lying in such' a place, is not sufficient. Such words are considered as merely descriptive of the local situation, and only carry an estate for life." The same principle is laid down in Gilbert on Devises 24.

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Thus, we find that the intention of the testator must be sought by fixed rules, and when found, it must not only be sufficiently proved, to satisfy the conscience of the court, but must be coupled with apt and sufficient words to pass a fee. See the case of *Frogmorton* v. *Wright*, 3 Wils. 418, which is a strong case for the plaintiff. So is also the case of *Chester* v. *Painter*, 2 P. Wms. 335. In the case of *Fletcher* v. *Smiton*, 2 T. R. 656, the words were, "all my estates," and the decision was upon the ground of an intention clearly appearing to dispose of his whole interest.

There is nothing in the present case, to show an intention of conveying a fee, unless it be the words "all the estate called Marrowbone, in the county of Henry, containing 2585 acres of land." The testator does not, in the beginning of his will, as in most of the cases cited, declare an intention of disposing of all his estate and interest. There is a difference between the terms "all *the* estate" and "all *my* estate." The latter is certainly a more evident allusion to the degree of interest than the former. The expressions "all the estate called Marrowbone," are clearly words of locality, and not of interest. What idea would a lawyer have of an estate called Marrowbone, containing 2585 acres? Could he ascertain whether it was an estate for

years, for life, or in fee? Besides, the expression is coupled with two others which are most clearly descriptive of the thing, and not of the degree of interest. "Likewise one other tract of land, called Horse-pasture; also one other tract, called the Poison-field." Here, by the word "likewise," is implied that the testator meant to devise the same degree of interest in each of the tracts; and by the word "other," it is evident, that he intended the former description as a description of a tract of land *as to locality only, and not of his degree of interest in it. Having, in the first part of the sentence, used [*104 an equivocal word, and having, in the subsequent clause of the sentence, used synonymously a word which is certain in its meaning, and clearly descriptive of the thing, and not of the interest, it is fair to conclude, that the equivocal meaning of the former is explained and rendered certain by the latter; and that he meant no more by the word "estate," than by the expression "tract of land."

It is a rule, that where words are used synonymously, the word most frequently used shall govern the sense. Here, the term "tract of land" is twice used as synonymous to "estate;" the former, therefore, ought to control the sense of the latter. It is true, that "all my estate" has sometimes carried the fee; but to induce a departure from the general rule, the intention must be clear to pass a fee. The word "all" is coupled with a local description; it relates to the number of acres, and not to the degree of the testator's interest in the land. The word "estate," as used in Virginia, is generally understood to mean a description of the property or thing, and not of the interest; and this court will respect the provincial meaning, to come at the true intention of the testator. It is not probable, and therefore, is not to be presumed, that he would give his estate to a stranger, and disinherit his heir, who had given him this very estate; and it is to be observed, too, that he does not, in his last will, even mention his brother John, to whom, by the first will, he had given all his estate.

2. The second point is, that John Lambert, heir-at-law of George Harmer, is not an alien as to the citizens of this country, and is capable of taking the reversion by descent. If he is incapable of holding lands in this country, it must be, because he is an alien born. Is he such, under the legal acceptance of the word alien? A definition of an alien is thus given in *Calvin's Case*, 7 Co. 16 *a*: "An alien is a subject that is born out of the ligeance of the king, and under the ligeance of another." Wood's Inst. 23; 1 Inst. 198 *b*; 1 Woodd. 386. John Lambert, the lessor of the plaintiff, was born in England, in *the year 1750, under the allegiance of the king of Great [*105 Britain. At his birth, he had inheritable qualities, of which he can be deprived by one mode only, and that is the commission of a crime sufficient to work corruption of blood. 1 Bl. Com. 371. This is not pretended. Lambert was born within the ligeance of the king, the then common sovereign of this country and England; and therefore, is not an alien born.

Those born under common allegiance may acquire and hold lands; and in time of war, they may join the one, but must render service to the other, for the land. Bracton, lib. 5, c. 24, fol. 427 *b*; 1 Hale's P. C. 68; *Calvin's Case*, 7 Co. 27 *b*. The words of Bracton are: "*Est etiam et alia exceptio quæ tenenti competit ex persona petentis propter defectionem nationis, qæ ditatoria est, et non perimit actionem, ut si quis alienigena qui* [*non*] *fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec terræ fuerint communes, nec*

etiam sive rex ei concesserit placitari, quia sicut Anglicus non auditur in placitando aliquem de terris et tenementis in Francia, ita nec debet Francigena, et alienigena, qui fuerit ad fidem regis Franciæ, audiri placitando in Anglia. Sed tamen sunt aliqui Francigenæ in Franciæ, qui sunt ad fidem utriusque, et semper fuerunt ante Normanniam deperditam, et post, et qui placitant hic et ibi, ea ratione qua sunt ad fidem utriusque, sicut fuit W. comes Marreschallus et manens in Anglia, et M. de Feynes manens in Francia, et alii plures; et ita tamen si contingat guerram moveri inter reges, remaneat personaliter quilibet eorum cum eo cui fecerit ligeantiam, et faciat servitium debitum ei cum quo non steterit in persond. See also *Calvin's Case*, 7 Co. 25 *a*, *b*.

A man born in the English plantations, is a subject. Wood's Inst. 23. He that is born in the mother country must, *à fortiori*, be a subject, and capable of all the rights of a subject in the colonies. One of these rights is that of acquiring property. "All persons may convey, as well as purchase, except men attainted of treason," &c., "aliens born," &c. Wood's Inst. 233; 1 Inst. 42 *b*. But it has been proved, that the lessor of the plaintiff is not an alien born; he, therefore, may purchase or take. If he once had an inheritable quality, or a capacity to take, and has not forfeited it by any crime, it follows, that he has it yet. The separation of the colonies from England, could
*106] not, in law or *reason, deprive him of this right. *Calvin's Case*, 7 Co. 27 *a*, *b*.

Calvin's Case was shortly this: Calvin was born in Scotland, after the crowns of England and Scotland were united on the head of James I. The question was, whether he could maintain an assise of *novel disseisin* of lands in England. The plea was, "that he was an alien, born at Edinburgh, within the kingdom of Scotland, and within the ligeance of the king of Scotland, and out of the ligeance of the king of England." One of the objections on the part of the defendants was, that if *post-nati* were, by law, legitimated in England, great inconvenience and confusion would follow, if the king's issue should fail, whereby those kingdoms might again be divided. But to this, it was answered by the judges, that "it is less than a dream of a shadow, or a shadow of a dream: for it hath been often said, natural legitimation respecteth actual obedience to the sovereign at the time of the birth: For as the *ante-nati* remain aliens as to the crown of England, because they were born when there were several kings of the several kingdoms, and the uniting of the kingdoms, by descent subsequent, cannot make him a subject to that crown to which he was an alien at the time of his birth, so albeit the kingdoms (which Almighty God of his infinite goodness and mercy divert!) should, by descent, be divided, and governed by several kings; yet it was resolved, that all those that were born under one natural obedience, while the realms were united nnder one sovereign, should remain natural-born subjects, and no aliens; for that naturalization, due and vested by birthright, cannot, by any separation of the crowns afterwards, be taken away; nor he that was, by judgment of law, a natural subject, at the time of his birth, become an alien, by such a matter *ex post facto*. And in that case, upon such an accident, our *post-natus* may be *ad fidem utriusque regis*, as Bracton saith, in the afore-mentioned place, fol. 427."

The present case is stronger than Calvin's. There, the question was, whether he had gained a right; but here, it is, whether he has lost one. The

same rule prevailed when the Saxon heptarchy became united under the King of the West Saxons. *Calvin's Case*, 7 Co. 23 *b*. And also with regard to the possessions held by the kings of England in France, at various times, such as the Dukedom of Acquitain, and the Earldoms of Poitiers, Normandy and Anjou. So, with regard to the islands of Jersey, Guernsey, *Man, [*107
Ireland, &c. *Calvin's Case*, 7 Co. 19, &c.; 1 Hale's P. C. 68, 69. Suppose, a division of these states, it would follow, from the doctrine contended for by the opposite counsel, that people born in the same country, and under one common allegiance, would be aliens to each other.

The Kings of England themselves did homage to the Kings of France for provinces which they held, such as Normandy, Guienne, Brittany, &c. This was also the case with many of their subjects; as in the case of the Duke of Richmond, Duke D'Aubigny, &c. Hale's P. C. 68; *Calvin's Case*, 7 Co. 27 *b*. In this country, the personal services are dispensed with, but the land pays the common tax or duty. Alienage is incident to birth only. *Doe ex dem. Duroure* v. *Jones*, 4 T. R. 308.

It is not just or reasonable, that a man should be punished, without committing a crime, or for an act committed by a superior power which he could not control. Suppose, a secession of one of these states; would it be just, that the citizens of the other states, holding property in that state, should forfeit it, or lose their rights?

The reasons of policy for prohibiting aliens from holding lands are stated in *Calvin's Case*, 7 Co. 18 *b*, to be three: 1. The secrets of the realm might thereby be discovered; 2. The revenues of the realm should be taken and enjoyed by strangers born; 3. It should tend to the destruction of the realm. But none of these apply to the present case. Lambert lives out of the realm, and therefore, cannot betray its secrets. The land will continue to pay the taxes, which, being the sinews of war, will preserve the realm. Besides, the case applying only to the *ante-nati*, is limited in extent, and its operation will be constantly diminishing by failure of heirs, by alienations, by naturalization, &c. The English, who understand the principles of the common law at least as well as we do, have allowed our citizens to inherit in similar cases. The cases of the Chichester estate, and an estate recovered by Mr. Boyd, and the Earl of Cassel's estate, are examples. A liberal policy should dictate a reciprocation of the same principle.

*3. The third point, viz., that the will of 12th September 1786, is [*108
only a partial, and not a total, revocation of the will of 25th June 1782; and that this will passes and disposes of the reversionary interest of the testator's estate, according to the legal import of that will, was admitted by the opposite counsel, in case the second will devised a life-estate only.

4. The fourth point, that by virtue of the Virginia statute transferring trusts into possession, the devise of 1782 transferred the legal estate to John Lambert, was also admitted, if he is not to be considered as an alien.

5. The fifth point is, that John Lambert, if an alien, is yet capable of taking by devise, and is protected by the treaty of 1794, between the United States and Great Britain. By the 9th article of the treaty, "it is agreed, that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the

same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens."

The only doubt which can be raised upon this article arises from the word "hold." But treaties ought to be liberally expounded, so as to meet the full intention of the contracting parties. There can be no doubt, but the intention was to secure, not only actual possession, but rights which would have vested but for the alienage of the parties. This is apparent, from the provision made for legal remedies, which would be wholly useless, if the former expressions were meant to comprehend only lands in actual possession. If, therefore, Lambert is to be considered as an alien, yet the treaty destroys that bar to his recovery.

*109] *6. The sixth point is, that although Lambert should be considered as an alien, and is not protected by the treaty, yet he is capable of taking by devise, and of holding the land, until office found for the commonwealth. He certainly has a good right against all the world, except the sovereign. In England, land purchased by an alien does not vest in the king, until office found. Co. Litt. 2 *b*, Hargrave's note 3 ; *Page's Case*, 5 Co. 52 *b ;* 1 Jones 78, 79 ; *Englefield's Case*, Moore 325 ; 2 Bl. Com. 293. If he had been tenant-in-tail, he might have barred the remainder. Goldsb. 102 ; 4 Leon. 84. An alien may take by devise, Powell on Devises 316, 317, 318 ; *Knight* v. *Duplessis*, 2 Ves. 362, and may hold until office found. "For," says Powell, "when an alien takes by will, the estate, on the will's being consummate, vests in him, and he is in, to all intents and purposes, as any other devisee would have been, until something further be done to take the estate devised out of him again ; for as long as the alien lives, the inheritance is not vested in the king, nor shall he have the land, until office found ; but if he die before office, the law casts the freehold and inheritance upon the king, for want of heirs, an alien having none. So that the title of the crown is collateral to the title by the devise, has no retrospect to the time of its being consummate, nor does it affect the land in the hands of the devisee, until another thing is done to entitle the king, not under the devise, but by right of his prerogative, viz., office found ; the tenant being an alien, and consequently, though of capacity to take lands in his own right, yet not of capacity to hold them."

Key, contrà, contended, 1st. That George Harmer, by the will of 1786, devised a fee to Gilmer. 2d. That if he did not, yet the lessor of the plaintiff cannot recover.

1. The word "estate," in the devising clause of a will, where it refers to land, denotes and carries the testator's interest in the land. And there is no *110] difference in construction *of law, whether the words are "all *my* estate," or "all *the* estate." Both carry the whole interest of the testator. In the present case, there are no words of locality that operate as description, and prevent the fee from passing. It is admitted, that the word estate, where it is coupled with personalty, shall be restrained, and will not carry the fee of lands ; upon the principle *noscitur a sociis*. This case is not within this distinction, because the word estate refers wholly to the land, and the whole personal estate is disposed of by a subsequent, independent clause. Consequently, no cases can apply but where the expressions

are similar to those of the present will, and refer to lands. In the case of *Wilson* v. *Robinson*, 2 Lev. 91 ; 1 Mod. 100 (25 *Car. II.*, *Anno* 1672), the words were, "all my tenant-right estate at Brigisend, in Underbarrow," and it was held, that they passed the fee. This is the general rule of law, and is uniformly supported by the authorities from the year 1672 to the present time ; except the case cited by the plaintiff's counsel, from 2 P. Wms. The case in 2 Lev. 91, is exactly like the present ; the word lands is used in the same sentence, and in the same manner as in the present case.

The word "estate," in wills, always means the interest, unless controlled by words of restriction. Words of locality will not restrain the force of the word estate. In the case of *The Countess of Bridgewater* v. *Duke of Bolton*, 1 Salk. 236; s. c., 6 Mod. 106, the words were, "all other my estate, real and personal, not otherwise disposed of by this my will, for to be given by him to his children as he shall think convenient, I solely trusting to his honor and discretion that he will give them such provision as will be necessary." "*Et per* HOLT, Ch. J., who delivered the resolution of the court, the rents pass by these words 'all my real and personal estate,' for the word estate is *genus generalissimum*, and includes all things real and personal, and the fee of the rents passes, at least, the whole estate of the devisor; for all his estate is a description of his fee. In pleading a fee-simple, you say no more than *seisitus in dominico suo ut de feodo;* and in *formedon*, or other action, if a fee-simple be alleged, you say *cujus statum* the demandant now has." And he held, "that devising all his estate, and *all his [*111
estate in such a house, was the same, and that all his estate in the thing passed in either case."

The next case is that of *Barry* v. *Edgeworth*, 2 P. Wms. 323 (*Anno* 1729), which overrules the case of *Chester* v. *Painter*, cited by the plaintiff's counsel from 2 P. Wms. 235 (*Anno* 1725). In this case of *Chester* v. *Painter*, the court probably took the whole will together, and from the testator's having used the word heirs, in some of the devises, and omitted it in the devise in question, concluded, that it was not his intention to pass the fee. In the case of *Barry* v. *Edgeworth*, the words were, "all her land and estate in Upper Catesby, with all their appurtenances," and the Master of the Rolls held it to be decided by the case of *The Countess of Bridgewater* v. *Duke of Bolton*, 1 Salk. 236, and said, "the word estate naturally signifies the interest rather than the subject, and its primary signification refers thereto; and although the devise be of all her land and estate in Upper Catesby, this is not restrictive with respect to the estate intended to pass by the will, but only as to the land." "And as the word estate has been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it; for then none could give any opinion thereupon." This case refers to that of *Murry* v. *Wyse*, 2 Vern. 564 (*Anno* 1706), where the words "all the rest and residue of his real and personal estate whatsoever," were held to pass a fee. s. c., Precedents in Chan. 264.

In the case of *Ibbetson* v. *Beckwith*, Cas. temp. Talbot 157, the words were, "as touching my worldly estate, wherewith it hath pleased God to bless me, I give, devise and dispose of the same in the manner following." Then follow two devises of "estates," burdened with the payment of debts and legacies, which were admitted to carry a fee; after which came the devise in question: "Item, I give unto my loving mother all my estate at

Northwith close, North closes, and my farm held at Roomer, with all my goods and chattels as they now stand, for her natural life, and to my nephew Thomas Dodson, after her death, if he will but change his name to Beckwith; if he does not, I give him only 20*l.*, to be paid him for his life out of Northwith close, North close, and the farm held at Roomer; which I give
*112] her, upon my nephew's refusing to change *his name, to her and her heirs for ever." The question was, whether Thomas Dodson took an estate for life or in fee. The Lord Chancellor decreed that he took the fee; and said, that the word estate carries the fee, and that no case had been cited "to warrant the altering the known legal signification of it." See also Gilb. Devises 25. So, in the case of *Bailis* v. *Gale*, 2 Ves. 48 (*Anno* 1750), testator devised to his wife all that estate he bought of Mead, for so long as she shall live; and in another clause said, "I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." The Lord Chancellor said, that the word estate is admitted to be sufficient to make a description not only of the land, but the interest in the land; and he held that the fee passed to Charles.

The case of *Hogan* v. *Jackson*, Cowp. 306, shows that the word estate is sufficient to pass all the interest of the testator in the thing devised. So, in the case of *Loveacres* v. *Blight*, cited from Cowp. 355, Lord Mansfield says, "the word estate comprehends not only the land or property a man has, but also the interest he has in it." And in *Denn* v. *Gaskin*, Cowp. 659, he puts the words, "all my estate," as an example of an expression tantamount to words of limitation. See also the case of *Hodges* v. *Middleton*, Doug. 434, where the argument of counsel is strong to the same effect. All the subsequent cases refer to that of *Barry* v. *Edgeworth*, 2 P. Wms. 523, and none of them refer to that of *Chester* v. *Painter*, in 2 Ibid. 335. The case of *Right* v. *Sidebotham*, cited from Doug. 763, does not apply to the present case, as the words of that devise were, "all my lands, tenements and houses," and not all the estate, as in our case. The authority from Gilb. on Devises, p. 24, is answered by p. 25, and a reason why a fee did not pass in the case in p. 24, is, because the word estate was coupled with personalty. The case of *Frogmorton* v. *Wright*, cited from 3 Wilson 418, had no words descriptive of the testator's interest, and the case of *Fletcher* v. *Smiton*, cited from 2 T. R. 660, is a strong case to show that the word estates will carry the fee, unless restrained by other words, clearly showing a contrary intention. A description of the place cannot, in reason, restrict the
*113] operation of the word *estate, because, unless the place be named, you cannot tell either what land, or what estate the testator meant to pass.

But it is said, there is a difference between the expressions, "all *my* estate," and "all *the* estate," and that the former more clearly indicates the interest than the latter. Nothing but the refinement of ingenious men could find a diversity in these expressions. When a testator is disposing of his worldly affairs, it is his own property that he means to dispose of, and not that of another person. When, therefore, he uses the expression, *the* estate, it means the same as *his* estate. But this subtlety of construction was soon exploded in express terms. It was suggested by the counsel, in the case of *Bailis* v. *Gale*, 2 Ves. 48, but Lord Hardwicke held, that it makes no difference which mode of expression is used. So, there was once an attempt made to distinguish between the words "at" and "in," such a place; but

this was overruled by Lord TALBOT, in the case of *Ibbetson* v. *Beckwith*, Cas. temp. Talbot 157. The word "at" was used in the case in 2 Lev. 91, and in the case before Lord TALBOT. But the word "in" was used in the case of *Barry* v. *Edgeworth*, 2 P. Wms. 523, yet the decisions in those cases were all the same way.

From this chronological view of cases, it seems clear, that the word estate, in a will, carries the whole interest of the testator, unless there are other words clearly indicating an intention to give a less estate. No such words appear in the present will; hence it follows, that the whole interest of the testator was devised to the defendant.

2. But if Doctor Gilmer took only a life-estate, yet the lessor of the plaintiff is not entitled to recover. 1st. Because John Harmer stands before him in the first will; and if the doctrine of *ante-nati* is correct, it applies to him as much as to Lambert, and therefore, upon the death of Doctor Gilmer, the estate vested in John Harmer, who was the person last seised. But *the special verdict does not find Lambert to be the heir of John Harmer, but of George Harmer, which is wholly immaterial. If Lambert is not the heir of the person last seised, he cannot recover. For if the first devise to John Harmer took effect, the contingent devise to Lambert could not; and therefore, if the latter is entitled at all, it must be as heir of John Harmer, and not as devisee of George Harmer. [*114

Equitable estates are governed by the same rules as estates at law. George Harmer died in 1786; John Harmer died in 1793. Either John Harmer was an alien, or he was not. If he was not an alien, then he took under the devise, and it is not stated who was his heir. If he was an alien, then he was, or was not, competent to take as devisee. If competent to take, then the record does not state Lambert to be his heir. If he was was not competent to take under the devise, neither is Lambert, for the same reason. But if Lambert can take as devisee, so could John Harmer, and the lessor of the plaintiff must then show a title under him. The will states John Harmer to be the testator's brother, and Lambert to be his sister's son; but it does not thence, follow, that he was heir-at-law of John Harmer; for the sister might be of the half-blood. Everything must appear in the special verdict to complete the plaintiff's title; and upon the strength of his own title only can he recover.

But the doctrine of *ante-nati* is not correct. The king, under whose allegiance the two were born, is the common bond which connects the inheritable blood. The English doctrine is, that a man can never expatriate himself, and hence, they have allowed our citizens, born before the revolution, to inherit to British subjects. But, by the revolution of 1776, and the declaration of independence, new relations took place. A new sovereignty was created, to which British subjects, not in this country at that time, never owed allegiance, and therefore, they can have no inheritable blood as to lands in this country.

But it is said, that Lambert, if an alien, could take and hold, until office found. *If Lambert, as an alien, could take, so could John Harmer, and therefore, upon his death the inheritance devolved upon the commonwealth, without office. Co. Litt. 2 *b*; 1 Bac. Abr. 81. An alien can never take by operation of law, and therefore, a *feme* alien cannot be endowed, nor can an an alien be tenant by the curtesy. 1 Bac. Abr. 83. An [*115

alien purchaser may take and hold, until office found; and may protect himself against an ejectment, because no one who has not a better title, can recover against the possessor. But he cannot maintain an ejectment. If John Harmer took anything, it was the reversion in fee, subject to the life-estate of Gilmer. If John Harmer died before Gilmer, then, upon the death of John Harmer, this reversion vested in the commonwealth. If Gilmer died before John Harmer, then, upon the death of the latter, the whole estate vested in the commonwealth.

Then, as to the treaty of 1794. John Harmer having died in 1793, and the inheritance being, by his death, cast upon the commonwealth, it was not a subject within the meaning of the treaty. John Lambert did not, at that time hold the land, for it had gone to the commonwealth of Virginia. The treaty did not intend to divest a right actually vested in the commonwealth.

Mason, in reply.—The word estate may mean the interest as well as the thing; but whether it is to have that sense annexed to it or not, depends upon the intention of the testator, collected from the whole circumstances of the case. All the facts found by the verdict are to be taken into consideration, to form a correct idea of the testator's intention. By the first, he clearly meant to give the fee to his brother and his heirs. The second will does not expressly revoke the first, and contains nothing which can be construed into an implied total revocation, unless the word estate conveys a fee to Doctor Gilmer. All the cases which have been cited, are governed entirely by the intention of the testator. Where the intention was to pass a fee, there the word estate has been adjudged sufficient to carry the intention into effect. The words "the estate called Marrowbone," in common acceptation, mean the tract of land called Marrowbone. They cannot neces-
*116] sarily *mean the fee-simple, because the estate would still be called Marrowbone, whether the interest was for life or for years.

The case of *Chester* v. *Painter*, 2 P. Wms. 336, has not been overruled. It is consistent with all the other cases. It did not appear to be the intention of the testator to give the fee, and therefore, although the word estate was used, it was held, that the fee did not pass. This shows that the word estate is not alone sufficient. Where words may be used in a large or in a contracted sense, the true construction is to be sought only by the intention of the person using them.

In the present will of 1786, there is no preamble stating it to be the intention of the testator to dispose of all his estate by that will; nor is there any residuary devise. As the first will is not expressly revoked, the two wills are to be considered as forming but one will. In such a case, the rule of construction is, that every clause shall be carried into effect, if possible. No repugnance shall be presumed, if the whole can stand together; and if one construction will reconcile the various parts, and another will make them repugnant, the former is to be adopted. To suppose, that the word estate, in the last will, conveyed the fee, would be to create a repugnance to the first will, and therefore, that construction is not to be given to the word, if it will bear another. It must be admitted, that it uay be used in two senses. In one, it means the thing and the interest; in the other, it means the thing only. The one may be termed the technical, and the other the

common sense of the word. By giving it the latter construction, the two parts of the will can be reconciled, and therefore, that construction ought to be adopted.

It is conceded, that the legal estate in the trustees cannot be set up against the *cestui que trust.* It ought also to be admitted, that this doctrine holds between those parties only ; but as to everbody else, the trust and the legal estate remain separate, to support the trust. In such a case, the commonwealth cannot take by office found, but must sue in chancery to have the trust executed for its benefit.

It will not be contended, that the trustees were not competent to take and hold the property in trust. The *devises to John Harmer and John Lambert were contingent. If the contingency has not happened, [*117 the trustees still hold, for the purpose of executing the trust, when the contingency shall happen. John Harmer died in 1793, before the contingency happened upon which his devise depended. Upon his death, John Lambert's right under the will accrued. He had a title under the trust ; and the treaty of 1794 protects it. The treaty is a nullity, unless it protects such rights as this. If it protects only good and indefeasible titles, it is wholly useless, for such titles can protect themselves.

But if any right vested in John Harmer, then the title of Lambert is good as his heir-at-law. For the jury have found him to be heir-at-law of George Harmer ; but he could not be the heir of George, if John left any children ; and if John left no children, then is Lambert heir to John. The conclusion is irresistible ; as much so, as if the jury had found it. As to the objection that Lambert's mother might be sister of the half-blood, it would prevent him from being heir to George as well as to John.

February 18th, 1805. This cause was again argued at this term by the same counsel, before Cushing, Paterson, Washington and Johnson, Justices. Marshall, Ch. J., having formerly been of counsel for one of the parties, did not sit, and Chase, J., was absent. The argument took nearly the same course as before.

Minor, for the plaintiff in error, in addition to his argument as already reported, contended, that the rule of the common law, which requires words of limitation to create a fee-simple, was never departed from, until after the statute of wills ; and even then, the courts did not depart from, but only softened, the rule ; and that only in cases where the intention was clear to pass the fee. *Timewell* v. *Perkins*, 2 Atk. 103.

He then went into a minute examination of the following cases, viz : *Beawes* v. *Blackett*, Cowp. 240; *Bailis* v. *Gale*, 2 Ves. 48; *Wilson* v. *Robertson*, 2 Lev. 91; s. c., 1 Mod. 100 ; *Countess of Bridgewater* v. *Duke *of Bolton*, 1 Salk, 236; *Goodwin* v. *Goodwin*, 1 Ves. 228; [*118 *Tanner* v. *Morse*, Cas. temp. Talb. 284; *Tanner* v. *Wyse*, 3 P. Wms. 295; *Beachcroft* v. *Beachcroft*, 2 Vern. 690; and *Ibbetson* v. *Beckwith*, Cas. temp. Talb. 157; and from the whole, deduced this principle, that the intention of the testator must be so clear as not to admit of a doubt; for if there is the smallest ground of doubt, the court will not disinherit the heir.

He also cited the case of *Markant* v. *Twisden*, from Eq. Cas. Abr. 211, pl. 22, where it was held, that the words "all the rest and residue of my estate, chattels, real and personal," carried only a life-estate; and the case of

Bowman v. *Milbanke*, 1 Lev. 130, in which the words were, "I give all to my mother, all to my mother." Yet there, although every feeling of the heart is engaged in support of that filial piety which could so fervently speak its intention of giving his whole estate to his mother, it was held, that the land did not pass. In our case, the feelings are all thrown into the opposite scale: the devise is to a stranger, in exclusion of the heir; and that heir the very brother to whose bounty the testator was indebted for this very estate.

"Uncertain words in a will must never be carried so far as to disinherit the heir-at-law. And though there be words which of themselves would disinherit him, yet, if they come in company with other words which render their import less forcible, they ought to be construed favorably for the heir;" *Shaw* v. *Bull*, 12 Mod. 594; in which case, the words of the devise were, "and all the overplus of my estate to be at my wife's disposal, and make her my executrix."

In the case of *Moore* v. *Denn*, 2 Bos. & Pul. 247, the words of the will were, "First, I give and devise unto my kinsman, Nicholas Lister, all that my customary or copyhold messuage or tenement, with the appurtenances, situate and being in Ecclesfield aforesaid, as the same is now in the tenure or occupation of Valentine Sykes; all the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever or wheresoever, and also all my goods, chattels and personal estate, of what nature or kind soever, *119] after payment *of my just debts and funeral expenses, I give, devise and bequeath the same unto my loving wife, Sissily Carr, and I do hereby nominate and appoint her sole executrix of this my last will and testament." Upon this devise, it was decided, by the house of lords, on a writ of error, that the wife took only an estate for life. In the present case, it is sufficient for us, if the words of the will are doubtful; for if the intention to devise the fee is not clear, beyond all doubt, the presumption is in favor of the heir-at-law.

2. Upon the question of alienage, in addition to the authorities produced on the former argument, he cited Vaughan 279, pl. 5, and 286, pl. 3, that a person born in the plantations may inherit lands in England; and 2 Tuck. edit. of Bl. Com., App. p. 53, 54, 61, 62, that the *ante-nati* of England, who remained British subjects, after the declaration of independence, were still capable of inheriting lands in America, or holding those which they already possessed.(*a*)

Key, for the defendant in error, upon the question of the devise, took the same ground as in his former argument.(*b*) There is a difference in the

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(*a*) JOHNSON, J.—Does not the last clause of the will of 1786 show that the testator meant, by that will, to dispose of his whole estate?

Mason.—That clause relates only to personal estate. The word property is coupled with negroes and horses, which shows in what sense he meant to use it. But if it comprehends the reversion of the real estate, yet, as he appointed no person to make the sale, the reversion would descend to the heir-at-law, until some person should be appointed by proper authority, to carry that clause of the will into effect.

(*b*) WASHINGTON, J.—Is the will of 1782 so executed and recorded as to pass lands?

Key.—The jury have found that he executed it, and it is not necessary that a will

effect of the word "estate" when used in the preamble of a will, or in the residuary *clause, and when used in a specific devise. When used in the devising clause, it always carries the whole interest of the testator in the thing devised. [*120

An argument has been drawn from the manner in which the two other estates are described; and it is said, that because they are not called estates, but tracts of land, the devise clearly gives only a life-estate in those two tracts, and therefore, it is to be presumed, that the testator only meant to give a life-estate in the Marrowbone tract; because he has coupled them all together by the words "likewise" and "also." But we say, that he meant to give the fee of all the tracts to George Gilmer, and that the words are sufficiently large to carry that intention into effect.

In the case of *Cole* v. *Rawlinson*, 1 Salk. 234, the words of the devise were, "I give, ratify and confirm, all my estate, right, title and interest, which I now have, and all the term and terms of years which I now have, or may have, in my power to dispose of, after my death, in whatever I hold by lease from Sir John Freeman, and also the house called the Bell Tavern, to John Billingsley;" and it was adjudged, that the fee of the Bell Tavern passed, by force of the words "and also," which caused the preposition "in" to be understood, so as to read "and also in the Bell Tavern." So, in the present case, the three specific objects of the devise are connected by the words "likewise" and "also," and you must apply the first part of the devising clause to each subject, and read it thus: "likewise, I give and bequeath unto Doctor George Gilmer, of Albemarle county, all the estate in one other tract of land called Horse-pasture." The word "likewise" shows that he meant to give the same interest in the two other tracts, which he had given in Marrowbone.

Upon the question of alienage, he contended, that by the common law, every man is an alien to that government under whose allegiance he was not born. The capacity to inherit results from the fact that the heir and ancestor both owe allegiance to the sovereign of the country where the lands lie. The right of inheritance is *derived only through one common sovereign. The allegiance due to that sovereign is the *commune vinculum* which connects the heir with his ancestor, as to the tenure of lands. This common allegiance must exist at the time of the birth of the heir, and continue unbroken until the time of the descent. If this allegiance is not to be confined to the sovereign of the country where the lands lie, it would follow, that where the ancestor and heir were both natural-born subjects of a foreign state (for instance, subjects of France), and the ancestor should be naturalized in this country, and become a purchaser of lands here, the heir, although not naturalized, would still have a right to inherit those lands, because they both owed allegiance to France, their common and natural sovereign. [*121

The American *ante-nati* may inherit lands in England, because the ancestor and heir both owed a common allegiance to the sovereign of that country where the lands lie. But the British *ante-nati* never owed allegi-

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of lands should be recorded, under the laws of England, and the law is considered the same in Maryland. I do not object to the will on that account.

ance to the government of this country, and therefore, the British heir cannot inherit the American lands of his American ancestor.

If, then, the capacity to inherit depends upon a common allegiance to the sovereign of that country where the lands are, it will follow, that when that common allegiance ceases to exist, the capacity to inherit must cease also. The common allegiance to the sovereign of this country ceased by the declaration of independence, or, at least, when that independence was acknowledged by the King of Great Britain, at the treaty of peace, whereby he assented to the withdrawing our allegiance; and the principle of the common law, that natural allegiance must be perpetual, is not so rigid, but that it may be shaken off with the assent of the sovereign to whom it was due. For in 1 Hale H. P. C. 68, Lord HALE says, "that though there may be due from the same person, subordinate allegiances," "yet there cannot, or, at least, should not, be two or more co-ordinate absolute allegiances, by one person to several independent or absolute princes; for that lawful prince that hath the prior obligation of allegiance from his subject, cannot *122] lose that interest, without his own consent, *by his subject's resigning himself to the subjection of another; and hence it is, that the natural born subject of one prince cannot, by swearing allegiance to another prince, put off or discharge him from that natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested, without the concurrent act of that prince to whom it was first due. Indeed, the subject of a prince, to whom he owes allegiance, may entangle himself, by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot, by such a subjection, divest the right of subjection and allegiance that he first owed to his lawful prince."

Hence, it is clearly the opinion of Lord HALE, that natural allegiance may be divested and dissolved, with the concurrent act of that prince to whom it was due; and by a note of the editor, in the same page, it seems, that the doctrine of perpetual allegiance refers only to a private subject's swearing allegiance to a foreign prince, and has no relation to a national withdrawing of allegiance. If the American revolution is to be considered as such a national withdrawing of allegiance, then that withdrawing was complete and perfect, even before the assent of the King of England was obtained, and the American *ante-nati* are as totally absolved from all allegiance to the British king, as if they had been natural-born aliens.

There being, then, no common allegiance between the British and the American *ante-nati*, at the time of the descent cast, there can be no capacity to inherit the one to the other, even were it not necessary that the common allegiance should be to the sovereign of the country where the lands lie.

Lord HOLT, also, in the same page, shows in what sense Lord COKE, in *Calvin's Case*, and Bracton, before him, have used the expression, "*ad fidem utriusque regis.*" He says, "it appears by Bracton, that there were very *123] many that had been anciently *ad fidem regis *Angliæ et Franciæ*, especially, before the loss of Normandy; such were the *comes mareschallus* that usually lived in England, and M. de Faynes, *manens in Francia*, who were *ad fidem utriusque regis*, but they ever ordered their homages and fealties, so that they swore or professed ligeance, or lige homage, only to one; and the homage they performed to the other, was not purely lige

homage, but rather feudal, as shall be shown more hereafter; and therefore, when war happened between the two crowns, *remaneat personaliter quilibet eorum cum ei, cui fecerat ligeantiam, et faciat servitium debitum ei cum quo non steterat in persona*, namely, the service due from the feud or fee he holds."

The opinion of the court in *Calvin's Case*, 7 Co. 27, that if the kingdoms of England and Scotland "should be, by descent, again divided and governed by several kings," "those born under one natural obedience, while the realms were united under one sovereign, would remain natural-born subjects and not aliens," was at least an extra-judicial opinion; and it is not very clear, what is the meaning of it. Does it mean, that they would be natural-born subjects of both kingdoms, or only of that which should remain governed by the same king? If the former, yet the case is not parallel to ours. Ours is a case where a new sovereignty has sprung up, and no person could be born under its allegiance, before its existence. According to *Calvin's Case*, allegiance does not depend upon the country in which the person is born, but upon the obedience and subjection of that country at the time of the birth. A person, therefore, born before the independence of the United States, cannot be called a natural-born subject of the United States; and if he was not here, at the time of the revolution, he cannot maintain a suit, as to lands in this country, but by virtue of some express stipulation in a treaty.

Mason, in reply.—If the declaration of independence, and the treaty, totally divested all allegiance, so that the British *ante-nati* are aliens to us, it would equally make American *ante-nati* aliens to the British. But we all know, that cases have happened, in which American *ante-nati* have been adjudged capable of inheriting *lands in Great Britain; and if those [*124
British decisions were correct, they must have been grounded upon the principle that our *ante-nati* were not aliens to the King of Great Britain; and if the declaration of independence did not make us aliens to them, it could not make them aliens to us. The American revolution only discharged the political relation which subsisted between us and the crown of England. It did not destroy individual rights or capacities. The revolution was to accomplish a great national object. No one individual can be charged with it. It was a national act, to maintain national rights, and only such rights were affected by it. It only absolved our allegiance, but did not, *ex necessitate*, take away the capacity to inherit.

Cushing, J.—Are not allegiance, and the capacity to inherit, connected together?

Mason.—Yes; and therefore, the common law will not consider the allegiance so totally absolved, as to make him an alien who was born a subject, and thereby deprive him of the right of inheritance. Although, by the act of Virginia, in 1779, Lambert was to be considered as an alien, and incapable to sue, &c., yet that act was repealed by the treaties, and therefore, he stands just where he did before the revolution.

The private rights of individuals were not affected by the revolution, except by the laws of the several states. The object of the treaties was to put individuals as nearly as possible on the same footing as before the revolution; and the words of the treaties are sufficiently large to accomplish

that purpose. They are, "and that no person shall, on that account, suffer any future loss or damage." If Lambert is, on that account, to be deprived of his right of inheritance, it will be such a loss and damage as will be a violation of the treaty of 1783.

*125] *What is common law in England is common law in Virginia; what is law and justice there, is law and justice here. Policy, justice and magnanimity require that we should apply the same beneficial rule to them which they have extended to us.

PATERSON, J.—Would not the decisions have been the same in England, if there had been no such article in the treaty?

Mason.—Yes, if there are no British statutes to prevent it; and the decisions would have been similar in Virginia, if there were no act of assembly on the subject.

In this position, I am supported by a very learned judge in Virginia (Judge TUCKER), who is not suspected of any improper partiality to Great Britain, or her subjects. In his notes to Blackstone's Commentaries, vol. 2, Appendix, p. 53, 54, he says, "all persons born within the United States, whilst colonies of Great Britain, were natural-born subjects of the crown of Great Britain." "The natives of the colonies, and the natives of the parent state, were, in consequence thereof, of equal capacity to inherit or hold lands in the different parts of the British empire, as if they had been born, and their lands situated in the same country. And, in fact, many native Americans did hold estates in England, and on the other hand, great numbers of natives of Great Britain, who had never been in America, possessed estates in lands in the colonies. By the declaration of independence, the colonies became a separate nation from Great Britain; yet, according to the principles of the laws of England, which are still retained, the natives of both countries, born before the separation, retained all the rights of birth; or, in other words, American natives were still capable of inheriting lands in England, and the natives of England, who remained subjects of the crown of Great Britain, were still capable of inheriting lands in America,

*126] *or of holding those which they already possessed." And again, in p. 61, he says, "by the common law, upon the separation between America and Great Britain taking place, the natives of Great Britain were constructively natural-born in America, and notwithstanding that separation, might hold lands here, as if they had been residents in America." After mentioning the act of assembly of Virginia of May 1779, c. 55, by which they were declared aliens, he says, "by the treaty of peace, the common-law principle that the *ante-nati* of both countries were natural-born to both, and as such, capable of holding or inheriting in both, seems to have been revived; in consequence of which, they are now capable of holding, purchasing or inheriting, in the same manner as if they were citizens."

As to the question of the devise, it is not denied, that the word estate is sufficiently large to carry the fee; nor, that the intention of the testator is to govern the construction of the will. But we contend, that the word estate is not alone sufficient to carry the fee. It is only a word which courts will lay hold of, to effectuate the intention of the testator: but then the intention to pass a fee must be clear, beyond all manner of doubt, before the court will disinherit the heir-at-law.

Lambert v. Paine.

March 1st, 1805. The judges now delivered their opinions *seriatim.*

JOHNSON, J.—This is a writ of error from the circuit court of Virginia to reverse a judgment in ejectment given for the defendant.

The circumstances of the case come out on a special verdict, from which it appears, that George Harmer, under whom both parties claim, was a citizen of the state of Virginia. That on the 25th June 1782, he made a will, by which he devised "all the estate, both real and personal, which (he) possessed, or was entitled to, in the commonwealth of Virginia," to certain trustees *" in trust and upon these conditions: that when John Harmer, (his) [*127 brother, (then) a subject of Great Britain, shall be capable of acquiring property in this country, then they, or the survivor of them, do convey, or cause to be conveyed, to him, in fee-simple, a good and indefeasible title in the said estate;" and in case John Harmer should not be capable of acquiring such right, before his death, he then directs the conveyance to be executed to his nephew, the plaintiff; and in case of his not being capable of acquiring lands, before his death, he directs the estate to be sold and the proceeds paid over to other relations.

In the year 1786, George Harmer executes another will, which, as every part of it is material to the case before us, I will peruse at length. (Here he read the will of 1786.) The testator died soon after executing the last mentioned will. His brother, John Harmer, died in 1793, having never become a citizen. The jury further find, that John Lambert, the plaintiff, is a British subject, was born before the revolution, viz., in the year 1752, and is heir-at-law to the testator. The treaties with Great Britain, and an act of Virginia, vesting in George Gilmer any interest that may have escheated, are also found in the verdict. The land sued for is a part of the Marrowbone tract.

The questions suggested are, 1. What estate is conveyed to George Gilmer by the will of 1786? 2. If but an estate for life, does the will of 1782 remain unrevoked as to the remainder, so as to convey it to the plaintiff? 3. And last. Is John Lambert disqualified to inherit as an alien; or, if incapable, generally as such, is he not protected by the treaties existing between this government and Great Britain, particularly the 4th article of the treaty of London?

To form a judgment on the first point, it is necessary to consider, *1. The general import and effect of the word estate, as applied to a [*128 devise of realty. 2. Whether its general import is controlled or altered by the subsequent words, used in a similar sense, in the will of 1786.

I consider the doctrine as well established, that the word estate, made use of in a devise of realty, will carry a fee, or whatever other interest the devisor possesses. And I feel no disposition to vary the legal effect of the word, whether preceded by *my* or *the*, or followed by *at* or *in*, or in the singular or plural number. The intent with which it is used is the decisive consideration; and I should not feel myself sanctioned in refining away the operation of that intent, by discriminations so minute as those which have been attempted at different stages of English jurisprudence.

The word estate, in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. It is unquestionably true, that its meaning may be restricted, by circumstances or expressions indicative of its

being used in a limited or particular sense, so as to confine it to the subject alone; but certainly, in its general use, it is understood to apply more pertinently to the interest in the subject. To one not accustomed to the discriminations of technical refinement, it would seem, that no doubt could be entertained as to the interest devised to Gilmer. The plain, ordinary import of the words would convey the idea of an absolute disposition of every article of property disposed of by the will. That words of inheritance are necessary to convey a fee, is certainly a good general rule of the common law; but, in the case of wills, it is entirely subordinate to expressions of the testator's intention.

In the case before us, there is no necessity for extending the decision of the court beyond the words made use of in disposing of the Marrowbone tract. But it is contended, that the words adopted by the testator, in devising the two other tracts, are used in the same sense as those in the first devising clause, and being of a *more restricted signification, ought *129] to limit the word estate to a description of the mere locality. I think otherwise. When a word is made use of, to which a clear legal signification has been attached, by successive adjudications, it ought rather, in my estimation, to control the meaning of those of a more equivocal purport. But the construction of a will ought to depend much more upon the evident intent of the testator, than upon the strict import of any term that he may make use of. Too critical an examination of the diction of a will, is rather calculated to mislead the court, than to conduct it to a just conclusion.

I infer the intent of the testator, in the case before us, from the following circumstances, extracted from the special verdict.

1. In the first clause of the will of 1782, the testator makes use of the expression "all the estate, both real and personal, which I possess, or am entitled to, in the commonwealth of Virginia," evidently under an impression that the word estate is sufficient to convey a fee; because, out of the estate, thus devised to his trustees, he instructs them to convey to his brother, or nephew, in the alternative stated, a good and indefeasible title in fee-simple.

2. There is no reason to infer, from anything in this case, that the testator intended only to make a partial disposition of his property; that he intended to die intestate as to any part of it. The fair presumption generally is, that he who enters upon making a will, intends to make a full distribution of everything that he possesses. That such was the particular intention of this testator, I think fairly inferrible from the general nature of the residuary bequest. The word other, in my opinion, is referrible to the whole preceding part of the will, and excludes, as well the lands devised to Gilmer, as the negroes and horses which he directs to be sold. We must give it this construction, or else suppose, either that the word property, here used, is confined to personalty, or, that it includes everything that he possessed, both real and personal; in which latter case, it would comprise even the lands previously disposed *of. It follows, therefore, that in the *130] clause in which he proposes to dispose of the whole residue of his property, he omits making any disposition of any interest in the lands in question; evidently, as it impresses me, upon the supposition, that he had already disposed of his whole interest in them. What object could the testator propose to himself, by dying intestate as to the remainder in fee, in

the lands in question? He knew that his heir-at-law was an alien, and, as, such, incapable of holding lands under a government to which he did not owe allegiance. This circumstance is evident, from the will of 1782; and it is equally evident, from the same will, that he felt that repugnance, which is common to all men, at the idea of suffering his lands to escheat, and knew the means of preventing it.

I am, therefore, of opinion, upon the first point, that George Gilmer took a fee in the land which is the subject of this suit, and this opinion disposes also of the second point, and renders it unnecessary for me to consider the third.

WASHINGTON, J.—The only question in this cause which I mean to consider is, whether the will of George Harmer, made in 1786, passes to George Gilmer an estate in fee, or for life, in the Marrowbone land. The words of the clause containing the bequest are "I give to Doctor George Gilmer, of Albemarle county, all the estate called Marrowbone, lying in Henry county, containing, by estimation, 2585 acres, and likewise, one other tract called Horse-pasture, containing, by estimation, 2500 acres; also one other tract containing, by estimation, 667½ acres, called the Poison-field."

The rule of law most certainly is, that where, in a devise of real estate, there are no words of limitation superadded to the general words of the bequest, nothing passes but an estate for life; but since, in most cases, this rule goes to defeat the probable intention of the testator, who, in general, is unacquainted with technical phrases, and is presumed to mean a disposition of his whole interest, unless he uses words of limitation, courts, to effectuate this intention, will lay hold of general expressions in the will, which, from their legal import, comprehend the whole interest *of the testator in the thing devised. But if other words be used, re- [*131
straining the meaning of the general expressions, so as to render it doubtful, whether the testator intended to pass his whole interest or not, the rule of law which favors the right of the heir must prevail. Thus, it has been determined, that the words "all my estate at or in such a place," unless limited and restrained by other words, may be resorted to, as evidence of an intention to pass, not only the land itself, but also the interest which the testator had in it. But words which import nothing more than a specification of the thing devised, as "all my lands," "all my farms," and the like, have never been construed to pass more than an estate for life, even when aided by an introductory clause, declaring an intention to dispose of all his estate. Except for the establishment of general principles, very little aid can be procured from adjudged cases, in the construction of wills. It seldom happens, that two cases can be found precisely alike, and in the present instance, I do not recollect that a single one was read at the bar which bears an analogy to it. The case of *Wilson* v. *Robinson*, which comes the nearest to it, is of doubtful authority. No reasons are given by the court for their opinion, and consequently, it is impossible to know, whether it was or was not influenced by other parts of the will. *Ibbetson* v. *Beckwith* was decided upon a manifest intent to pass the inheritance, arising out of the different parts of the will taken together, amongst which is to be found an introductory clause which, the chancellor says, affords evidence that the testator had in view his whole estate. The cases of *The Countess of Bridge-*

water v. *The Duke of Bolton*, and *Bailis* v. *Gale*, only lay down the general principle, which is not denied, that the word "estate" in a will, standing alone, and unqualified by other words, is sufficient to pass the whole of the testator's interest. The words "all my land and estate," in the case of *Barry* v. *Edgeworth*, express so plainly an intention to give a fee, that I only wonder a question could have been made of it. They are quite as strong as if the testator had given the land, and all his interest in the land, where the word estate or interest, unless construed as was done in that case, would have been perfectly nugatory. In *Goodwin* v. *Goodwin*, the Chancellor doubted whether the word estate was not so limited and restrained by strong words of locality and description as to deprive it of the interpretation generally given to it.

*132] *In the case now under consideration, there is no introductory clause, declaratory of an intention in the testator to dispose of the whole of his estate; yet, I admit, that if he had devised all his estate called Marrowbone, without using other words calculated to limit the technical meaning of the word estate, the cases cited by the defendant's counsel would establish, beyond a doubt, that a fee passed. But I cannot read this clause of the will, without feeling satisfied, that the testator did not mean to use the word estate in its technical sense. For he not only varies the description of the tracts of land called Horse-pasture and the Poison-field, so as to show that, with respect to them, he only meant to describe their situation and quantity; but by using the word "other," it is plain, that with respect to the Marrowbone estate, his design was the same. Unless, in the disposition of this latter estate, he had described or intended to describe it, as so much land, he could not, with any propriety, speak of the Horse-pasture estate as another tract of land. It will hardly be said, that the devise of the last tracts passes more than an estate for life, unless the word estate, before used, can be transferred to those tracts, so as to impart to the expressions there used, the technical meaning given to the word estate, where it stands alone. But I cannot perceive how this is to be done, without supplying words not used by the testator, and which there is no necessity for doing, in order to make sense of the clause as it stands. It would, I think, be going too far, to supply more than is necessary to make each devise a complete sentence, and then to introduce the preposition "in" for the purpose of making sense of the whole. Yet, if this be not done, the word estate cannot, in respect to the Horse-pasture and the Poison field tracts, be pressed into the service, and made in any manner to fit the sentence.

If only an estate for life in the Horse-pasture and the Poison-field tracts passed to George Gilmer, it will, I think, be very difficult to maintain that the word estate, in the same sentence, governed by the same verb, and coupled with the words which describe those tracts of land, can be construed to pass a fee.

The testator certainly uses the words estate and tract of land as synonymous expressions; and then the question will be, whether the generality of

*133] the first shall enlarge *the plain and usual import of the latter words, or, the latter restrain the technical meaning of the former? I know of no case, where the word estate is used at all, in which its general import is limited and restrained by so many and such strong expressions descriptive of the land, and totally inapplicable to the interest of the testator, as

in the present. The words, the estate called Marrowbone, lying in Henry county, containing, by estimation, so many acres, excite, at first, no other ideas than such as respect the name and situation of the land, with the number of acres contained in it. The description would be equally accurate, whether the interest of the testator were a fee, or a term for years.

If, then, we are to search after and to effectuate the intentions of men, supposed to be unacquainted with legal phrases, and are, on that account, to construe the words they use, with indulgence, I think, we shall be more likely to fulfil this duty, by limiting the general import of a technical word, which, in its common use, is entirely equivocal, and is rendered particularly ambiguous in this case, by the words which immediately attend it, than by giving to the words "tract of land," a meaning which they do not, in themselves, import, and are seldom, if ever, used to express more than a local description of the thing itself.

As the opinion of a majority of the court is in favor of the defendant, upon the construction of the will, I do not think it necessary to say anything upon the doctrine of alienage, as that question may possibly come on, in some other case, in which it must be decided.

Paterson, J.—The devise in the will of George Harmer was intended to convey some interest in the Marrowbone farm to George Gilmer; and the quantity of interest, whether for life or in fee, is the question now to be considered. It is a fundamental maxim, upon which the construction of every will must depend, that the intention of the testator, as disclosed by the will, shall be fully and punctually carried into effect, if it be not in contradiction to some established rule of law. In such case, the intention must yield to the rule. This intention is to be collected from the instrument itself, and not from extrinsic circumstances; and therefore, the *will of [*134
A. can afford little or no aid in discovering the intention and expounding the will of B. Indeed, the number of cases which are usually cited in arguments on devises, tend to obscure rather than to illuminate. When, however, a particular expression in a will has received a definite meaning, by express adjudications, such definite meaning must be adhered to, for the sake of uniformity of decision, and of security in the disposal of landed property. It cannot be questioned, that the word "estate" will carry everything, both the land and the interest in it, unless it be restrained by particular expressions; for estate is *genus generalissimum*, and comprehends both the land and the inheritance. 1 Salk. 236; 6 Mod. 106; Pr. Ch. 264; 2 P. Wms. 524; Cas. temp. Talbot 157; 1 Ves. 226; 2 Ibid. 179; 3 Atk. 486; 5 Burr. 2638; 1 T. R. 411. The word "estate" is the most general, significant and operative that can be used in a will, and according to all the cases, may embrace every degree and species of interest. If the word "estate" stand by itself, as if a man devise "all his estate to A.," it carries a fee, from its established and legal import and operation. Standing thus *per se*, it marks the intention of the testator, passes the inheritance to the devisee, and controls the rule in favor of the heir-at-law. It is true, that this word, when coupled with things that are personal only, shall be restrained to the personalty. *Noscitur à sociis.* The word "estate" may also, from the particular phraseology, connected with the apparent intent of the testator, assume a local form and habitation, so as to limit its sense to the land itself. Here, uncommon par-

ticularity of description is requisite, so as to leave the mind perfectly satisfied, that the thing only was in contemplation, and nothing more. A description merely local cannot be extended beyond locality, without departing from the obvious import of the words ; and thus making, instead of construing, the will of the testator. But when no words are made use of, to manifest the intention of the testator, that the term "estate" should be taken, not in a general, but in a limited signification, then it will pass a fee; because the law declares, that it designates and comprehends both the subject and the interest. Nay, such is the legal import and operation of the word "estate," that it carries a fee, even when expressions of locality are annexed.

*135] To illustrate this position by apposite and adjudged *cases : If a man, in his will, says, "I give all my estate in A.," it has been held, that the whole of the testator's interest in such particular lands passed to the devisee, though no words of limitation are added. 2 P. Wms. 524. So, the word "estate" was held to carry a fee, though it denoted locality, "as my estate at Kirby-Hall." *Tuffnel* v. *Page*, 2 Atk. 37; s. c. Barnard. Ch. 9. On which, Lord HARDWICKE observed, that though this is a locality, yet the question is, whether it is such a locality as is sufficient to show the testator's intention merely to be to convey the lands themselves, and not the interest in them. He was of opinion, that the words were descriptive both of the local situation, and the quantity of interest. And in *Ibbetson* v. *Beckwith*, Lord TALBOT observed, that the word "estate," in its proper, legal sense, means the inheritance, and carries a fee. Why, indeed, may not locality and interest be connected, and the same words express and convey both. To exclude interest in the subject, the expressions coupled with the word "estate" must be so restrictive and local in their nature, as to convey solely the idea of locality, and not to comprehend the *quantum* of interest, without doing violence to the words and intention of the testator. Besides, it is a just remark, repeatedly made by Lord HARDWICKE and Lord MANSFIELD, that where a general devise of land is narrowed down to an estate for life, the intention of the testator is commonly defeated, because people do not distinguish between real and personal property; and, indeed, "common sense would never teach a man the difference ;" and therefore, judges have endeavored to make the word "estate," in a will, amount to a devise of the whole interest, unless unequivocal and strong expressions are added, to restrict its general signification. It would be a laborious and useless task, to enter into a minute and critical investigation of the great variety of cases which bear on this subject. They are collected in a note by the editor of Willes' Rep. 296.

From the whole scope and complexion of the will of George Harmer, it is evident to my mind, that the testator intended to dispose of all his property, both with regard to the quantity and quality thereof. He did not mean to die intestate, as to any part of his estate; but on the contrary, it was his manifest intention, to leave nothing undisposed by his will. He

*136] directs that all his negroes, *horses and other property be sold, &c., which plainly indicates what his intention was in regard to the lands which he had previously devised. This last clause evinces and illustrates the meaning of the testator, and removes every particle of doubt from my mind, as to the true construction which ought to be put on the word "estate."

To effectuate this intention, the term "estate" is to be taken in its largest signification, as comprehending both the subject and the interest, the land and the inheritance.

Amidst the great mass of cases arising on wills, it is impossible to select any two that are exactly similar. The variety of expressions is infinite; and it is from the language, that we are to discover the intent. The same word, indeed, may be taken in a different sense in different wills, and even in different parts of the same will, owing to its juxtaposition, its associations, and the manner in which it is placed and used. The case of *Bailis* v. *Gale*, in 2 Ves. 48, may serve to elucidate the devise under review, in more points than one. "I give to my son, Charles Gale, all that estate I bought of Mead, after the death of my wife." These expressions seem strongly to mark locality in contradistinction to interest. But, what says my Lord HARDWICKE? "I am of opinion, that both the thing itself, and the estate, property and interest the testator had, pass by the devise. Several questions have arisen in courts of law and equity, on devises of this kind; but all the latter determinations have extended and leaned as much as possible to make words of this kind comprehend, not only the thing given, but the estate and interest the testator had therein. But it is objected, the pronoun "my" is not added; there was no occasion for it. It was necessary, he should use such words as point out the whole interest in the land, which is sufficiently done by the other words; for he bought of Mead, the land and the fee-simple in the land; which is agreeable to the construction of the word estate, being sufficient to describe the thing, and the interest, as it is in the case of all *my* estate."

So, in the present will, the words, "I give all the estate called Marrowbone," contain a description of the land, and the interest in it. The case in Vesey is particularly *applicable, and worthy of attention, in another respect, as it affords a complete answer to the distinction which was [*137 ingeniously raised, and attempted to be sustained between the import of the word "my" and "the" in devises like the present. The counsel for Lambert contended, that the word *the*, "all the estate," was descriptive of the thing; whereas, the word *my*, "all my estate," was descriptive of the interest as well as of the thing. But, in the case of *Bailis* v. *Gale*, Lord HARDWICKE held, with great clearness, that there was no difference between a device of all *my* estate at N., and a device of all *the* estate at N.; and that a fee passed, in either case. Nor ought this opinion to be considered as extrajudicial; for the counsel in *Bailis* v. *Gale* insisted, that the pronoun *my* was necessary to make the devise carry a fee; and therefore, it claimed, very properly, the notice and decision of the court. According to this opinion, a devise of the estate called Marrowbone, in the county of Henry, must have precisely the same construction and effect, as a devise of all my estate called Marrowbone, in the county of Henry; which, it appears to me, would unquestionably give a fee.

Some expressions in a will, as, "I give my farm, my plantation, my house, my land," do, of themselves, contain no more than a description of the thing, and carry only an estate for life, because unconnected with words of inheritance, or other words of a similar import. For we are not permitted to enlarge the estate of a devise, unless the words of the devise itself be sufficient for that purpose. In the present devise, the words, "all the estate

called Marrowbone," are competent to carry the degree of interest contended for on the part of the defendant; and this construction accords with the intention of the testator, as disclosed by his will. Whether it would not have been more beneficial to society, to have observed, from the first, the same technical phraseology and strictness of legal terms in devises, as in conveyances of landed property, is a question which may amuse the theoretical jurist; but which, as judges, we cannot seriously discuss; for it is a leading axiom in our system of jurisprudence, not to be shaken by judicial authority,
*138] *that the intent of the testator, so far as it is consistent with the principles of law, must be attended to, and control the decision. I am, therefore, of opinion, that the words, "I give to George Gilmer all the estate called Marrowbone, in the county of Henry," give a fee, being descriptive equally of the quantity of interest, and locality of the thing devised.

Cushing, J.—The first question in this case is, whether the devise to George Gilmer, in the will of George Harmer, made in 1786, carries a fee, by the words "all the estate called Marrowbone, in the county of Henry, containing, by estimation, 2585 acres of land," &c.

Wills are expounded more favorably, to carry the intent of the testator into effect, than conveyances at common law, which take effect in the lifetime of the parties; wills being frequently made by people enfeebled by age or indisposition, and without the aid of counsel learned in the law. Therefore, words not so technical for the purpose, have, in a great variety of cases, for above a hundred years, been construed by the judges, to carry a fee, which would not do so in a deed.

In a number of cases, the word "estate" has been determined to comprehend the whole interest in the land. Among those adduced, there are several which appear to me essentially in point to the present case. In the case, 2 Lev. 91 (a case which has since been held, by good judges, to be good law), a devise of "all my tenant-right estate, at B., in Underbarrow," was determined to import a fee. I see no essential difference between that case and this; except the particle "the" instead of the pronoun "my," which, in common sense, and in the opinion of Lord Hardwicke, makes no difference. "All *the* estate" is, at least, as extensive and comprehensive as "all *my* estate." In 2 P. Wms. 523, the words "all my lands and estate in Upper
*139] Catesby, in Northamptonshire," were adjudged *to carry a fee. That agrees with the case at bar, except that the word "lands," precedes "estate," which I think immaterial. "Estate" is the most operative word. In the case of *Bailis* v. *Gale*, 2 Ves. 48, a devise of "all that estate that I bought of Mead," was determined by Lord Hardwicke to be of a fee. This, I think, is substantially like the case at bar; and by him, that, *the* or *my*, makes no material difference. Add to this, what seems to make the point conclusive, the testator appears to have a design to dispose of his whole estate.

The other cases cited do not appear to contradict these; but, varying in some circumstances, seem not so directly applicable; yet, by the spirit and reasonings attending them, they tend to confirm the rectitude of the other decisions which are more directly in point.

The latter part of the devise in question, of several tracts of land immediately succeeding the devise of "all the estate called Marrowbone, in the county of Henry," &c., if considered as not carrying a fee, I conceive, would

not, however, control or restrict the prior part of the devise of "all the estate called Marrowbone," &c. Rather than that, I should suppose the former part would carry spirit and meaning to the latter. But that is not necessary now to be determined. This first point being determined in favor of the defendant, the former judgment must be affirmed.

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*Hodgson *v.* Butts.[1] [*140

Chattel-mortgage.

A mortgage of chattels, in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged or proved, and recorded.[2]

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action for money had and received, to recover from the defendant, who was master of the schooner Mississippi, the amount of freight received by him, subsequent to the mortgage of the said schooner, by R. & J. Hamilton (the former owners) to the plaintiff.

On the trial of the general issue, the plaintiff took two bills of exception, and the verdict was for the defendant.

The first bill of exceptions stated the following facts: That the plaintiff, to support his claim, produced a deed from R. & J. Hamilton, by which they bargained and sold to the plaintiff, the schooner Mississippi, then in the port of Alexandria, and the cargo of the ship Hannah, then at sea, as security to indemnify and save harmless the plaintiff, as indorser of their notes, to the amount of $10,000. If they should indemnify him within —— days after the arrival of the cargo on the ship Hannah, if it should arrive before the return of the schooner Mississippi from her then intended voyage to New Orleans; or, if the cargo of the Hannah should not arrive, before the return of the schooner, then within —— days after her return, the deed should be void: but, if they should fail to indemnify the plaintiff, within the periods mentioned, then he was to sell the cargo of the Hannah, and the schooner and cargo.

The deed also contained the following covenant: "And we do moreover bind ourselves, our executors and administrators, and also the freight and inward cargo of the said schooner Mississippi, to exonerate the said William Hodgson from," &c. "It being the true intent and meaning of these presents, to bind ourselves, our schooner called the Mississippi, her tackle, *apparel and furniture, her freight and inward cargo, and the cargo of the ship Hannah, to exonerate," &c. [*141

The execution of the deed was in the following form: "In witness whereof, the said Robert and James Hamilton have hereunto set their hands and affixed their seals, this fourth day of May 1800.

Signed, sealed and delivered, in the presence of } Robt. & Jas. Hamilton. (Seal.)

Ch. Simms, James D. Lowry.

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[1] See s. c., in the court below, 1 Cr. C. C. 447, 488.

[2] United States Bank *v.* Lee, 13 Pet. 107; Lee *v.* Huntoon, Hoffm. Ch. 447; Sturtevant's Appeal, 34 Penn. St. 149.