a tract of land *The facts are stated in the opinion of the Court.* [They would *properly* appear here.]

Green for the plaintiff in error. We agree, that executors, vested *nominatim*, with power to sell, may renounce the executorship, and yet execute the trust of *selling the estate.* But the case is different where the power is given to them *as executors*, which is the case in this will. Here, it will be observed, that not only had the executors renounced, but by their instance and act, three other persons had been appointed administrators with the will annexed. Their renunciation had thus been accepted in the most complete and effective way; they had renounced: their renunciation had been accepted: the place had been vacated, and being vacant, was now filled by new occupants. Admitting that a single renunciation filled in the office or delivered to the register, would be insufficient to destroy the validity of a deed made by the original executors, *no one having as yet displaced them*, the case is widely different when other persons are *in* the place. Then surely *they* must be out of it. Bacon, in his Abridgment,* says: "If an executor refuse before the ordinary, the ordinary may grant administration *cum testamento* to another person, and he can never be permitted to prove the will." In *Yates* v. *Crompton*,† an administrator *d. b. n.* filled a bill against the heir to sell, the executor having renounced. It was objected that the executor ought to have been made a party. But the sale *was decreed.*

Brown, contra: By well settled principles of common law, the executors had just as full power to exercise their power of sale after their renunciation as before it. The renunciation to the register or ordinary relates simply to personality; the only sort of estate over which either have any power whatever. The power to sell is given by the *will*, and might be exercised without any probate of it at all; *Yates* v *Crompton*, cited on the other side, is in our favor. The objection was that "the executors ought to have been made parties, for notwithstanding they had renounced, yet the power of sale continued in them." The objection was overruled, "there being *only* a power and no ESTATE divided." So too what Bacon says is true only by the civil law, but *whether or not, it* has no application here, for the executor don't ask to resume. Swinburne on Wills ‡ says, "If a man devises that A. B. and C. D., whom he makes his executors, shall sell his lands, and they refuse to be his executors, yet nevertheless they may sell because they are *named* by their proper names." For this he cites Fulbecke, an old but good writer. Here the power was to his executors hereafter to be *named*, and three particular persons afterwards are "named." Indeed the authorities go much further. Viner§ says, one wills that his executors may alien his land *without* naming them. The executors named refused to be executors; yet they may alien. This law is not only well settled now, but it has been settled from a very ancient date. It was expressly so decided by all the judges of England in Trinity Term, in the 16th year of Henry the VI., and is reported in the Year Book of that reign. The judges who gave opinions were Fineux, Chief Justice, and Reid, Tremaille, and Frowick, Justices.

This case is thus translated by Mr. Sugden in his work on Powers, *Appendix.*

"It was lately adjudged in the Exchequer Chamber, by all the Justices of England, that if a man makes a will of lands, that his executors shall sell the land and alien, &c., if the executor renounce administration and to be executors, there neither the *administrators nor the ordinary* can sell or alien, (*quod nota*); which was allowed by Rede and Tremaille for good law.

"And if a man makes his will that his executors shall alien his land without naming their proper names, if they refuse the administration and to be executors, yet they may alien the land, which was admitted by Fineux, C. J., and Tremaille, J., for *clear* law; Rede, J., not denying it.

"And if a man makes his will that his land which his *feoffees* have, shall be sold and aliened, and does not say by whom, there his executors shall alien that, and not the feoffees, per Rede, Tremaille and Frowick, J. J., Fineux, C. J., said nothing to this this day, but the day before he in a manner affirmed this. Conisby, J., said that the feoffees shall alien; but this [fact] was denied, for executors have much greater confidence in them than feoffees have."

Here is our point, fully, clearly and precisely stated, between three and four hundred years ago, as being "clear law" in that day. It was reported at once; printed soon after with the invention of printing, and has stood and been cited from that time to this, as an authoritative decision. Sugden, for example, says:‖ "It remains only to be observed that where the power is given to executors they may exercise it, although they may renounce probate of the will." And Preston:¶ "Athough executors renounce the probate of the will as to personal estate; they are not by such renounciation disqualified to execute an authority of sale over real estate." The American author, Mr. Hood,* says: "At common law, executors who have formally renounced the administration of a will, may nevertheless execute a power given by will to sell lands."

The opinion of the court was delivered by TOMPKINS, C. J.

Courtney, who had originally owned the land, made his last will and testament on the 11th August, 1835, by which he directed and empowered his executors thereinafter to be named, to sell, convey and make over any part of his real estate, and he appointed two friends of his, Campbell and Roberts, his executors. He died in 1840. The executors, by instrument of renunciation filled with the surrogate and in his office, declined the executorship, and at their suggestion and desire two other persons, White and Green, were appointed administrators, with the will annexed. In 1850, however, the original

* Vol. 2, p. 405, Tit. Executors and Administrators, 9.

† 2 Peere Williams, 308.

‡ Vol. 2 p. 731, ed. of 1803.

§ Vol. 8 p. 466, pl. 9.

‖ Powers, vol. 1, p. 139. (15 and 16 Law Library.)

¶ Abstracts of Title, vol. 2. p. 262.

* Trest. on Executors, p 243.