the third clause charged "the said executrix and executor" with trusts during ten years to discharge such mortgages as they should deem expedient, to reserve such an amount as they might deem necessary for the support of the executrix, and during the same period, to reserve also such sums as in their judgment were necessary for the support of the testator's daughter and sons. In the fourth clause he directs that, "If it shall be deemed necessary or expedient to dispose of any of my real property for the benefit of the estate in the judgment of my executrix and executor, I hereby give them full power to do so, and invest the sums so received for the benefit" of the *cestuis que trust*.

Here, in the first place, the power was given *nominatim*. The word "said" does not, it is true, occur before executrix and executor; but to infer thence that this meant to refer to the office and not to the individuals already named, would be to assert that the testator meant there should be a succession of one male and one female in that office. It is clear the word "said" is omitted by inadvertence. In the second place, the power was given expressly in confidence and relying on the judgment of these two. In the third place, the duties which the power was to facilitate the execution of were trust duties, and only testamentary in the sense that they were contained in the will.

Both the executor and executrix qualified; the former subsequently resigned, and the latter alone executed the power of sale. It was objected that the power was a bare power, was discretionary, and could only be executed by both. But the court sustained the sale, and held that the trust underlying the power, and connected with duties charged on the executor by the will, attached to the office, were coupled with a trust, and would have survived to one executor on the decease of the other. "The power of sale in question," says Ames, J., "it is true, may not be, in the strict sense of the word indispensable to the final distribution of the estate; but it is manifestly subservient and auxiliary to the execution of the trusts which he has seen fit to connect with the administration of the will. It is certainly appropriate to and in entire harmony with the mode of administration which he has pointed out, and the functions which he has thought proper to connect with the office of executor. It is part of the executorship," &c. The learned judge then remarks upon the distinction between resignation and non-acceptance. "The rule [of survivorship] seems to be the same also if one of the executors had refused to accept the trust. . . . It is difficult to see why a vacancy occasioned by the resignation of one of two, which is simply a refusal to be concerned with the trust thereafter, can stand on any different ground. The power seems not to be a mere naked authority, but is coupled with the trust of administration as one of its incidents, and its exercise is a matter of duty, and not of mere arbitrary discretion, whenever the necessity for its exercise shall arise."

A similar decision had been reached in the recent and almost parallel case of *Chandler* v. *Rider*,* the only point of difference between the two being that the distinction last considered was not in issue in this case, as the power was exercised by a surviving, and not a continuing, executor. But the power was as discretional, and the right to the proceeds seemed to be wholly dependent on the exercise of that discretion. Nevertheless, the court held that the power survived.

We consider, then, that it is well settled—in this Commonwealth at least—that all powers attached to testamentary trusts, which are not by express terms restricted to the donees, will attach to whoever occupies the position of executor, though he is but the single accepting, surviving, or continuing executor of several, even though expressly named; in a word, that the *nominatim* rule is entirely abrogated. And we think it follows, as a necessary consequence, that the same powers can be exercised by an administrator *cum testamento annexo*, and that the authority of *Tainter* v. *Clark* is seriously weakened, if not overruled. We are aware that in *Greenough* v. *Welles*† a different conclusion was reached; but we do not think that the doctrine, or rather *dictum*, put forward in that case can be maintained against later authorities already considered. The power in that case which was held to be personal, so as not to pass, was given to the executor to

* 102 Mass. 268.
† 10 Cush. 571.