legacies: and here, as it was contended, the appointee of the Court of Probate—under the statute of 1817, c. 190—could not succeed to such a discretion, so clearly limited to particular individuals; that to hold this would be to abridge the authority which every owner of property has, to select individuals to manage it, and would transfer it to persons unknown to him; that the power of sale was a naked authority, and rested on personal confidence; and that the testatrix reposed full confidence in her brother, not only in his management of the estate, but in his selection of a successor; that beyond this she extended no confidence, inasmuch as by distinct and precise words she limited the power of sale to her brother and his nominee. But the court held that as there was a trust of the proceeds, and the power was to effectuate this trust, its exercise was compulsory and not discretional, and that it could well pass to the probate appointee.

The case of *Whitney* v. *Whitney* * may be referred to, merely to show that an executor is the necessary trustee of testamentary trusts, and that a probate appointee succeeds thereto. There was there no power of sale to be exercised.

But in *Alley* v. *Lawrence*,† where a power of sale was given to executors, to whom the property had already been devised in trust to support the testatrix's children during their minority and that of the youngest of them, and then to divide it among them equally, it was held that the will gave the power of sale to them as executors, and that a deed executed by them simply as such was good. This case is therefore express to the point that such a power would survive; for as attached to the office of executor, or, in more intelligible language, because coupled with the trusts to which the executor succeeded, it could be well executed by any one on whom those trusts might fall, even an administrator *de bonis non*. The case of *Warden* v. *Richards* ‡ is even more strongly in point. The testator there appointed his brothers, by name, his executors, and authorized them "to take upon themselves the trust thereby created, &c., and, if necessary for the execution thereof, to sell any part or all my real estate." One brother declined the executorship. The case presented all the points of objection to the survivorship of the power which were deemed fatal in *Tainter* v. *Clark*. The power was given to two *nominatim*, as the testator's brothers, and by their judgment of the necessity of the sale, a clear discretion was vested in both. But the court held that, as the object of the sale was to pay debts and legacies, it was a power coupled with a trust, and could well be exercised by one executor. In view, therefore, of what trusts have been uniformly held to be legacies by the same court, this decision goes the full length for which we contend.

Nor do the latter decisions present any conflict with this case. In *Carson* v. *Carson*,* which might, in a hasty perusal, be thought to have an opposite tendency, the facts were, that executors, who were charged with payment of the income for life to the widow, and then the principal to her residuary legatee, and vested with a power of sale and investment, were sought to be held in trustee process for a debt due by the latter. The court, embarrassed by the language of the statute, by which all "debts, legacies, &c., due from or in the hands of the executor or administrator as such may be attached" by trustee process, while admitting that this trust attached to the executor, and unable to deny the long course of decisions uniformly holding such a gift a legacy, and the executor, as such, vested with its possession, nevertheless use language hardly warranted by the cases, saying, "This clearly contemplates a trust in the executors beyond the duty of paying the debts and distributing the assets in the ordinary way;" and again, "They [the executors] do not hold the property merely in their capacity as executors. If they did, their trust would be discharged, and their duty performed, when they had collected the personal estate, paid the debts, legacies and charges," &c. They then proceed to point out the inconvenience, or rather impossibility, both of the executors performing their trust, if a remote distributee's creditor could compel them to account to him immediately, and the equal impossibility of keeping the judgment of such a creditor alive and operative until the estate accrued to the

* 4 Gray, 236.
† 12 Gray, 373.
‡ 11 Gray, 277.

* 6 Allan, 397.