

TESTAMENTARY POWERS OF SALE.

mentioned. And it seems to make no difference whether he is called executor or trustee in connection with the particular trust imposed.* Thus, in *Prior v. Talbot*,† Isaac N. Prior was appointed executor and trustee by the will, which required "the said trustee" to sell and "to divide and set apart one-third of the proceeds arising from such sale, . . . and having safely and prudently invested the same in his own name, to hold the same in trust to pay the income to said Roxana [the testator's widow] during her life, and after her death to hold the same upon the trusts to be thus distributed," &c. It was held that, notwithstanding this language and the duty charged, he held the fund as executor, and was chargeable as such until he qualified as trustee. In *Dascomb v. Davis*‡ the court would seem to imply that executors charged with the payment of similar legacies of personal property, and with the power and duty of managing the estate and effects "of the testator, and disposing of all his lands, &c., for the purposes before mentioned, at such time and in such manner as shall be most likely, in their judgment, to do exact justice to all my creditors, and to be for the greatest advantage of all concerned," had not merely a power, but an estate in possession; so that they could maintain an action of trespass *quare clausum* against an intruder, and which would, as an estate, of course, have passed to a single surviving executor. Whereas the same language in *Tainter v. Clark* was held to confer a mere discretionary power, to which this case stands therefore in direct opposition.

It seems, accordingly, to be clear, as we have already intimated, that if these trust duties attach to the executor as such, the powers coupled with them must equally attach so far as they are necessary to the discharge of these executorial duties, even if terms of special confidence or reliance in the trustee's discretion are found, and that this discretion is therefore exercisable by a single executor. It is true that in *Treadwell v. Cordis*,§ *Tainter v. Clark* is referred to with apparent approval; and it is said that the exercise of the power of sale in that case "was not necessary to the execution of

the will, or to the complete settlement of the estate in accordance with it." But it is submitted that such was not the fact, and that we have shown that the exercise of the power in that case was indispensable to such a settlement, and that, at most, the trustee's discretion extended to the selection of the parcel which he should sell.

It is, however, admitted in *Treadwell v. Cordis* that testamentary trusts are binding on the executor as such; and if it were not clear from the cases already considered that powers of sale attach of necessity to the executorial office where the proceeds are to satisfy such a trust, we think it will be apparent from the cases that follow. In the very elaborately considered case of *Shelton v. Homer*,* the testator had given to his executors, "or those who should take upon themselves probate of the will," a power of sale. It was held that after two executors had qualified, and one subsequently resigned, the other could not execute the power. We shall have occasion to notice this case further on, in connection with the distinction taken between a resigning and a non-accepting executor; but it is sufficient here to remark that the power in this case was a bare power, and so declared by the court, there being no purpose directed for the disposition of the proceeds; and that it was therefore not coupled with a trust.†

In the case of *Gibbs v. Marsh*,‡ a power of sale was given by name to the testatrix's brother Walter, who had previously been appointed trustee of certain real estate, under several special trusts; and it was further provided that he, or any successor of his nominated by him to the trusts, might sell and re-invest as the *cestuis que trust* should direct and advise, or, in default of such advice and direction, as the trustee or trustees should think most for their interest. The trustee died without nominating a successor; and the Probate Court appointed a new trustee, whose conveyance of the premises was here in issue. The state of facts certainly disclose as distinct a confidence reposed in the trustee's discretion as in the case of *Tainter v. Clark*; in addition to which the trustee there was an executor, and a sale imperative for payment of debts and

* *Newcomb v. Williams*, *sup. cit.*

† *Ut sup.*

‡ 5 Metc. 535.

§ 5 Gray, 341, 359.

* 5 Metc. 462.

† *Denne v. Judge*, 9 East, 288.

‡ 2 Metc. 243.