

TESTAMENTARY POWERS OF SALE.

is further inferrible from the author's language that, if there is no interest to which the power is annexed, it is necessary to survivorship that the donees should hold an office like that of executors; and the case of *Tainter v. Clark*, and Sugden's rule, before cited, are expressly referred to and relied upon.

It is, however, difficult to see any force in this distinction between executors and other trustees or persons in a fiduciary capacity. It is true that executors are commonly said to have an office; but the source from which they derive their official capacity, namely, the Probate Court, is precisely that which can give them no capacity to take by survivorship discretionary powers conferred by will. Exactly in so far as they have an office they are the creatures of the Probate Court. But it is from the testator only that they receive the power or discretion; and in this respect they do in no whit differ from any other trustees. All are equally grantees from the testator, and grantees only. Their relation to the land upon which the power is to be exercised is like that of grantees *inter vivos*, excepting only that the death of the donor does not revoke their power, but is the point at which it is established. This is clear from the earliest authorities, which distinguished between the testamentary functions of an executor and his duties as a grantee; holding the former capable of passing to an administrator *de bonis non*, but the latter not even divested by the executor's renunciation of his office, as this was intended by the court to apply only to his testamentary duties strictly. Thus, in the case already referred to,* it was laid down "that if a man makes a will that his executors shall alien his lands, there, if the executors renounce administration of his goods, yet they may alien the land, for the will of the land is not a testamentary matter." Nor can it be said that this case applies only to absolute devises of the land, for here there was no devise of land, but only of a power. We shall, indeed, urge later that in this case such a power should pass to the administrator, wherever, at least, and to the extent that there was a trust imposed in regard to the disposition of the proceeds of a testamentary nature; as we have already suggested

that the failure to enforce such a trust at this early period arose from the then undeveloped state of the powers of a court of equity; but the point we make is still clear, that no distinction was here drawn between executors and any other trustees, as to the status of a power to sell conferred upon them, or, consequently, its capacity to survive. The same principle appears also in the cases heretofore cited, of the survivorship of powers given to sons-in-law, † feoffees, ‡ and the like. § Indeed, in the modern and very exhaustive case of *Conklin v. Egerton*, || the point was carried so far that such an administrator was held incapable to succeed to any powers involving a discretion conferred on the executor, although such succession had been conferred by statute; and this decision is cited and followed in *Tainter v. Clark*, ¶ *Greenough v. Welles*, ** and other recent cases. But the ground, and the only one, upon which these cases can proceed, is, that a broad line is to be drawn between the office of executor or administrator, which is conferred by the court, and the position of the executor as trustee, grantee, or donee under the will.

We regard, then, any reliance upon the "office" of executors to enable a power to survive to a single one as placed upon an unsound basis. On the contrary, we urge that there is no discrimination between executors and trustees in regard to powers, if these relate to testamentary duties; and that they will survive to a single trustee as well as to a single executor.

(To be continued.)

IRISH JURIES.

A blue book has just been issued which illustrates in a very striking and painful manner one of the great difficulties of Irish administration. There are some things which a Government can do for a country, and there are other things which the people alone can do for themselves. In the latter category must be placed trial by jury. A Government can supply judges, but the working of the jury system demands the loyal and intelligent co-operation of the people. If that is

† *Ante*, p. 674.

‡ *Ibid.*

§ *Ante*, p. *ibid.*

|| 21 Wend. 430; 25 id. 224, 232.

¶ 10 Cush. 571.

** 13 Metc. 220.

* 15 Henry 7, 11.