

TESTAMENTARY POWERS OF SALE.

Yet it is quite apparent, as we have said, from all the cases at this time, even those upholding the right of a single surviving executor to exercise a power not coupled with an interest, that the first distinction stated in this paper, namely, between bare powers and powers coupled with a trust, was hardly taken into consideration, and that whatever duty attached to the disposition of the proceeds of the sale, or whatever purpose the testator contemplated should be accomplished with them, no trust was considered to attach to compel or authorize the execution of the power, or enable it to survive, but it fell with the decease or incapacity of any one of those to whose exclusive discretion, by a strict literal construction, it was held to have been confided. *Qui hæret in litera hæret in cortice.*

It is true that, in the case above cited from Leonard's reports, * the court say that the sale, under the power, was good, "for the moneys coming of the sale are to be distributed by the executors as legacies, and it appertains to the executors to pay the legacies, and therefore they shall sell." But this language was used, not as a reason why the power survived, but as a reason why the executors should have the power at all, and it survived under the same principle as was enforced in *Houell v. Barnes*.

We have gone somewhat into detail in discussing the older authorities, because, apart from their intrinsic value from their age, they are generally referred to in support of the rules regulating powers, as enunciated by court and text writers since.

As a consequence of disregarding the substantial intention of the testator as to the disposition of the avails of the sale, in a blind literal adherence to the confidence supposed to be had in the persons named as donees of the power, the courts were driven to great nicety and inevitable conflict in determining when the power was general and when such confidence was expressed. It is, perhaps, unnecessary to recur to the cases in detail, for their number is so great as to make a complete examination of them altogether beyond our limits of space. † It may be sufficient to refer, as an illustration, to Mr. Sugden's fourth rule, above cited, ‡

where it is left quite doubtful whether a power given to executors, but by their proper names though as executors, would survive the death of one.

Thus, suppose the ordinary case that a testator appoints A., B., and C. his executors, bequeaths divers pecuniary legacies, and then says, I direct my said executors to sell whatever land may be necessary for the payment of said legacies; this, according to Mr. Sugden's rule, would be a case where a *nominatim* power was conferred, and the right to its exercise would be defeated by the death of A. For it is considered as much a *nominatim* appointment of the donees of the power to couple their names with the gift of the power by the word "said," as if they were named in the gift of the power. But if, on the other hand, after, or before a similar appointment of executors, the clause giving the power had run simply, to "my executors," here the power would survive, being given generally.

It is, moreover, apparent, from the tenor of the rules laid down by Mr. Sugden, and by the approval of them by the court in *Twinter v. Clark*, that a distinction is drawn between executors and other persons in a fiduciary position, and the capacity of a power given to the latter to survive to a single person seems to be denied. Stress is laid on the so-called "office" of the executor, as if those who occupied this position had something of a *quasi* corporate nature, which did not extend to trustees generally. And this view is confirmed by the language of the text-books. In a recent able treatise on real estate* it is said: "Where the power is to several persons having a trust capacity, or an office in its nature like that of the executors of a will, susceptible of survivorship, and any of them die, the power will survive, unless it is given to them *nominatim*, as to A. B. and C. D., naming them. In the latter case, the power would not survive unless it was coupled with an interest in the donees of the power." It will be observed here that the only distinction suggested in this passage is that already referred to, between powers coupled with an interest and bare powers, and that the latter cannot survive even if given to executors, if these are mentioned by name. But it

* *Ante*, p. 673.

† See *Perry, Trustees*, § 492 *et seq.*

‡ *Ante*, p. 670.

* 2 Washburn, R. P., § 22 (1st ed.).