

## TESTAMENTARY POWERS OF SALE.

tain was not properly kept in view in these authorities, was that between a bare power and a power coupled with a trust. A bare power is necessarily a discretionary one, and precisely to the extent to which it is a power merely, must be limited to the donee or donees, and cannot in any way be transferred or pass to any other person. It may be either a legal or an equitable power. But the distinction between these two classes is foreign to the point under consideration; for an equitable power may be one that equity will interfere to compel the exercise of, and so take it from the domain of the donee's discretion, and replace that by the discretion of the court of equity. But equity will do this only on the ground that, and to the extent to which, there is an interest vested in some person in the execution of the power, and which equity is bound to enforce; in other words, that the power is coupled with a trust.

This is the first distinction which is to be maintained in order to a correct view of the position of the authorities on this subject; and it will be seen, therefore, that our whole inquiry to ascertain the survivorship or not of any power resolves itself into the question whether the power is wholly discretionary throughout, or whether any part of it is compulsory, because a third person has an interest in its exercise, not dependent for its existence on the discretion of the donee of the power.

A second distinction, quite diverse in its nature from the one just commented on, is between bare powers and powers coupled with an interest. The latter phrase is often broadly employed to include every case where an interest is to vest by the exercise of the power. It is conceived that this is incorrect, and that the true meaning is, that an interest vests in the donees of the power, which is to be enlarged by the exercise of the power, or out of which the power is to take effect, as in case of a power of sale attached to a mortgage.\*

The cases which turn on this latter distinction rest on a very different principle from those of the first class. The limitation of an interest, whether legal or equitable in its nature with a power appended, enables the grantee to deal with the power as he does with the estate;

and if the latter is capable of being as signed, the power will also pass to the assignees, even without words of limitation to them in the original grant of the power. If such words are inserted, then the power can be exercised without the intervention of a court of equity; and if not, then at least with such intervention.

It is, however, evident, from an examination of the early cases, especially those of or anterior to the time of Lord Coke, that the full conception of the distinction first stated did not then exist in any proper sense, and that the only distinction established or even recognized was the second one, *i. e.*, between bare powers and powers coupled with an interest. With the then partially developed jurisdiction of the court of equity, the existence of a duty in the nature of a trust underlying a power was not recognized as a ground for equitable interference.† The settled distinction was, that if an estate was devised to several executors or trustees in trust to sell, here the power would survive as coupled with an interest; but if devised in trust that the executors, &c., should sell, then it would not survive. Thus in *Atwaters v. Birt*,‡ on a feoffment to four to uses, there was a proviso that the uses should cease on (*inter alia*) the assent of the feoffees. One of the feoffees dying, the donor, with the assent of the other three feoffees, revoked the uses; but it was held void, Popham, C. J., saying that "before the statute of 21 Hen. 8, c. 4, the common law was, that if one devised his land to four to sell, and one of them dies, the survivors, because they have an interest, may sell; but if he had devised that three should sell the land, and one of them dies, the survivors, because they have but a mere authority, cannot sell." As authority, an anonymous case, some forty years earlier,§ is referred to. Here, after a devise by a *cestui que use* that A, B and C, the feoffees to uses, should sell to pay legacies, &c., A, one of the feoffees, died. It was questioned whether B and C could sell; "and it seemed not, and so it was ruled; but *quere*, if they had not been named A, B, and C, but feoffees only." So in the case of *Butler v. May*,|| on a devise to

† Lewin, Trusts, 430 *et seq.*

‡ Cro. Eliz. 856.

§ 4 Dyer, 177.

|| Dyer, 189, 190.

\* *Hind v. Poole*, 1 K. & J. 383.