

the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the Court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury, and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution."

The sentence to which Mr. McMurtrie refers, in the previous article, is found in the next to the last clause of the opinion of the Court, and is as follows :

"If the objection to the statute," says Mr. Justice MILLER, "is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors, which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, *so far as at present advised, it appears to us that all the powers of a court, whether at common law or at chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the Court in which this remedy shall be had. Certainly, it seems to us to be quite as wise to use the processes of the law and the powers of the Court to prevent the evil as to punish the offence as a crime after it had been committed.*"

It remains but to note that the case opens but leaves unanswered two interesting questions of constitutional law : First, whether a State can deprive her citizens of the right of a trial by jury according to common law forms ; second, whether a State, granting that she can abolish the jury system *in toto*, can abolish it in regard to a certain class of crimes, while retaining it in trial of other crimes.

Besides these constitutional questions, the Court, in the sentence above quoted, refused to decide the question raised by the counsel, and of which the foregoing article is so clear an exposition, viz. : whether the proceeding instituted by the statute is essentially a criminal proceeding.

W. D. I.

## MORTGAGES EXECUTED UNDER POWERS TO SELL LAND TO PAY DEBTS.

BY DANIEL WAIT HOWE, ESQ.

### WHEN POWER TO SELL INCLUDES POWER TO MORTGAGE.

It may be said to be moderately well settled that a mere power to sell does not include a power to mortgage.<sup>1</sup>

<sup>1</sup> 1 Sugden Vendors (8th Am. ed.),\* 396 ; 2 Washburn Real Prop. (4th ed.), 655, pl. 5 ; 3 Redfield Wills (3d ed.), 549.

Thus a mere power in a power of attorney to sell real estate confers no power to mortgage.<sup>1</sup> But the chief difficulty in determining whether a power to sell includes a power to mortgage arises when, as is often the case in wills, the power to sell is coupled with a trust to raise money out of the estate to pay debts or other charges. Where there is a direction to pay debts or charges, nothing being said as to how the money shall be raised, it has been held that this implies not only a power to sell,<sup>2</sup> but also a power to mortgage, if that method of raising money be more advantageous to the estate than a sale.<sup>3</sup> If, however, the will or other instrument expressly authorizes a sale, the question arises whether the power to sell includes, or is to be considered as negating, the power to mortgage. Most of the authorities agree in holding that if it clearly appears from the will or other instrument that the intention of the donor of the power in directing a sale was that his real estate should be absolutely converted into money, or, to use the common expression, that there should be an "out-and-out" sale, then no power to mortgage will be implied.<sup>4</sup> The rule is very clearly expressed by Mr. SPENCE, as follows: "Generally speaking, a power to sell implies a power to mortgage; but a mortgage is not a proper execution of the trust where the clear, manifest intention of the testator is that the estate should be sold out and out, and that there should be a complete conversion of his real estate, and that the produce of his real and personal estate should be disposed of as money."<sup>5</sup>

In several of the cases which are often cited in support of the broad proposition that a power to sell does not imply a power to mortgage, the intention of the testator that his real estate should be sold "out and out" was clearly

<sup>1</sup> Jones' Mortgages (3d ed.), Sec. 129; Wood v. Goodridge, 6 Cush., 117; Morris v. Watson, 15 Minn., 212.

<sup>2</sup> Hill Trustees (4th Am. ed.), \*345; 2 Perry Trusts (4th ed.), Sec. 766.

<sup>3</sup> Hill Trustees (4th Am. ed.), \*355; 1 Jones' Mortgages (3th ed.), Sec. 129.

<sup>4</sup> Hill Trustees (4th Am. ed.), \*355.

<sup>5</sup> 2 Spence Eq. Jur., \*369. See also 1 Lewin Trusts (1st Am. from 8th Eng. ed.), \*425; 2 Perry Trusts (4th ed.), Sec. 768.

manifest upon the face of the will.<sup>1</sup> And it was upon a similar construction of the will that the decision was based in the leading case of *Stronghill v. Anstey*.<sup>2</sup> On the other hand, where it is apparent that the primary purpose of the testator is not to convert the estate into money, but is to pay the debts or other charges with which it is charged, and this purpose may be equally as well or better accomplished by a mortgage, the power to sell will imply a power to mortgage.<sup>3</sup>

But suppose that there is a power to sell, coupled with a trust to pay debts or other charges, but there is nothing else upon the face of the will by which to determine whether or not it was the testator's intention that there should be an "out-and-out" sale,—what is the presumption in such case? Upon this question the authorities are not harmonious. Some hold that in the case supposed the power to sell will not be construed as a power to sell out and out; and that such a power, coupled with such a trust, without more, implies a power to mortgage. In other words, that this is the presumed intent of the testator, unless a contrary intent is clearly manifest from other parts of the will. "It seems," says Mr. HILL, "that a trust to sell lands for the payment of debts will authorize a mortgage for that purpose, which is a conditional sale, unless, indeed, it be the clear intention of the testator in directing the sale, that his real estate should be absolutely converted."<sup>4</sup> This was expressly decided in the leading case of *Ball v. Harris*.<sup>5</sup> In that case a testator charged his lands with the payment of his debts, and then authorized the trustees to whom the lands were devised to sell them and invest the proceeds in other lands, with further power to sell these also in execution of the trusts specified in the

<sup>1</sup> *Haldenby v. Spofforth*, 1 Beav., 390; *Page v. Cooper*, 16 Id., 396; *Devaynes v. Robinson*, 24 Id., 86.

<sup>2</sup> 1 De G. M. & G., 635. See the comments on this case in *Hill Trustees* (4th Am. ed.), 536, note 1.

<sup>3</sup> 1 *Lewin Trusts* (1st Am. from 3th Eng. ed.), \*425; 2 *Perry Trusts* (4th ed.), Sec. 768; 3 *Redfield Wills* (3d ed.), 549. See also *Sugden Vendors* (8th Am. ed.), \*396; 4 *Kent Com.*, \*147.

<sup>4</sup> *Hill Trustees* (4th Am. ed.), 355. See also 2 *Spence Eq. Jur.*, \*369.

<sup>5</sup> 4 *Myl. & Cr.*, 264.

will. Beyond this there was nothing upon the face of the will to indicate whether the testator did or did not intend an out-and-out sale. The trustees made an equitable mortgage of the lands devised by a deposit of the title-deeds, and it was contended that they had no power to do so. But the Court held that the primary object of the testator was to raise money to pay debts, and that the power to sell for that purpose did not negative a power to mortgage, if that was the best method of effecting the primary object of the testator. COTTENHAM, L. C., said: "So long ago as the case of *Mills v. Banks*,<sup>1</sup> in 1724, it seems to have been assumed that 'a power to sell implies a power to mortgage, which is a conditional sale,' and no case has been quoted as throwing any doubt upon that proposition. But this is not a mere power to sell; it is a trust to raise money out of the estate to pay debts. It would indeed be most injurious to the owners of estates charged if the trustee could effect the object of his trust only by selling the estate."

The reasoning of this case, it will be observed, applies to all cases where the primary object of the testator is to raise money, whether the purpose of raising the money is to pay debts or is to execute some other trust imposed upon the trustee. And this reasoning accords with the general rule for the construction of powers. "The intention of the donor of the power is the great principle that governs in the construction of powers; and in furtherance of the object in view, the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut down a general power to a particular purpose."<sup>2</sup> It accords also with the familiar rule in the construction of wills, that a will should be construed in such a way as will most effectually carry out the manifest primary intent of the testator, even if, in order to do so, it may be necessary to reject some particular or special intent.<sup>3</sup>

<sup>1</sup> 3 Peere Will, 1.      <sup>2</sup> 4 Kent's Com., \* 345.

<sup>3</sup> 1 Redfield Wills (4th ed.), 433; 2 Jarman Wills (Randolph & Talcott's ed.), 53, \* 480.

The case of *Ball v. Harris* was cited, and not disapproved, in *Stronghill v. Anstey*, *supra*, and has ever since continued to be the law in England.<sup>1</sup> In the case last cited the rule, as above stated, was applied to uphold a mortgage made by one trustee to his co-trustees.

Recent well-considered American cases are to the same effect. In *Loebenthaler v. Raleigh*,<sup>2</sup> there was a will containing this clause: "If it should seem necessary at any time to dispose of a portion of my real estate for the payment of my debts, I hereby give my executors power to do so, either at public or private sale." The estate included a large tract of land which it was difficult to sell to advantage. It was held that the will conferred a power to mortgage. "It is to be observed," says the Chancellor, RUNYON, "that the testator did not by this provision contemplate a conversion for any other purpose than the payment of debts, nor to any greater extent than might be deemed necessary for that object. His design was to give his executors power to convert his real estate, to the extent that they might deem necessary, for the payment of his debts.

"Mr. FISHER lays it down that a power for trustees to mortgage is sometimes implied in a power to sell, viz.: where to satisfy the terms of the proposed object of the power—as, for instance, to raise a particular charge, subject to which the estate is devised—it is not necessary to make an absolute conversion.<sup>3</sup> Where power of sale is given to raise a particular charge only, and the purpose can be answered better by mortgage than by sale, and that method is not violative of the intention of the grantor of the power, the former mode of raising money should be preferred to the latter, for the obvious and sufficient reason that it is for the advantage of the estate that it should be

<sup>1</sup> See also *Earl of Oxford v. Earl of Albemarle* (Shadwell, V.C., 1848), 17 Law Journ. H.S.Ch., 396; *In re Dimmock* (Kay, J., 1885), 52 Law Times H.S., 494.

<sup>2</sup> 36 N. J. Eq., 169.

<sup>3</sup> Citing *Fisher on Mortgages*, Sec. 435. The cases of *Stronghill v. Anstey*, 1 De G. M. & G., 635; *Page v. Cooper*, 16 Beav., 396; and *Ball v. Harris*, 4 Myl. & Cr., 264, are authorities on this point.

adopted, and it is within the limits of the power intended to be conferred.”

It would be absurd, to say the least of it, to adhere so closely to the literal terms of the grant of power as to necessitate a sacrifice of the property, when by a reasonable construction that result could be avoided. Lord LANGDALE, in *Haldenby v. Spofforth*,<sup>1</sup> in commenting on Lord MACCLESFIELD'S remarks in *Mills v. Banks*,<sup>2</sup> that “a power to sell implies a power to mortgage, which is a conditional sale,” says he conceives this to mean that where it is intended to preserve the estate, there, under a direction of sale, a mortgage will sufficiently answer the purpose. And Lord ST. LEONARDS, in *Stronghill v. Anstey*, *ubi sup.*, says: “It ought, I think, to be considered that in a case where the trustees have a legal estate, and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorize a mortgage, yet where the circumstances justify the raising of the particular charge by a mortgage, it must be, in some manner, in the discretion of the Court whether it will sanction that particular mode or not. It may be the saving of an estate and the most discreet thing that can be done; and as the legal estate would go, and as the purposes of the trust would be satisfied, I think it impossible for the Court to lay down that in every case of a trust for sale to raise particular sums, a mortgage might not, under the circumstances, be justified.” The rule is truly expressed by Mr. HILL as follows: “A power for trustees to sell will authorize a mortgage by them, which is a conditional sale, whenever the objects of the trust will be answered by a mortgage; as, for instance, where the trust is to pay debts or raise portions. But where the trusts declared of the purchase money show that the settlor contemplated an absolute conversion of the estate, a mortgage will be an improper execution of the power.”<sup>3</sup> This case must be considered as emphatically overruling anything to the contrary in the previous case of *Ferry v. Laible*,<sup>4</sup> which is

<sup>1</sup> 1 Beav., 390.

<sup>2</sup> 3 Peere Will., 1.

<sup>3</sup> Citing *Hill Trustees*, 475.

<sup>4</sup> 31 N. J. Eq., 566.

not even cited, and is apparently utterly ignored, in the opinion of the Chancellor.

The case of *Loebenthaler v. Raleigh*, *supra*, was approved by the Supreme Court of Massachusetts in the recent case of *Kent v. Morrison*.<sup>1</sup> In the case last cited real estate was devised to the wife, "with full power to sell and convey the same by deed (part or all of it); the proceeds thereof are to be used for her comfort and otherwise as she may think proper." Notwithstanding the specific direction that the power should be executed by *deed*, the Court held that the power included a power to mortgage, and that it might be executed by a guardian for the wife, she having become insane, under a license from the Probate Court. The Court distinguishes the prior case of *Hoyt v. Jacques*,<sup>2</sup> as belonging to that class of cases where the intention of the donor of the power is that the real estate shall be converted out and out into money. The case of *Loebenthaler v. Raleigh*, *supra*, was also followed in the well-considered case of *Waterman v. Baldwin*,<sup>3</sup> which must be regarded as overruling anything to the contrary in the previous case of *Hubbard v. German Catholic Cong.*<sup>4</sup> To the same effect is the recent and well-reasoned case of *Faulk v. Dashiell*.<sup>5</sup> Other authorities, particularly those in Pennsylvania, go much further, and hold that a power to sell, even though not coupled with a trust to pay debts or raise charges, implies a power, unless it is clearly negatived, to mortgage: *Zane v. Kennedy*;<sup>6</sup> *Steifel v. Clark*.<sup>7</sup> The case of *Steifel v. Clark* distinguishes and controls the prior case of *Head v. Temple*,<sup>8</sup> in Tennessee.

But there are also authorities of great weight, holding that a power to mortgage cannot be implied from a power to sell, though coupled with a trust to pay debts or other charges out of the proceeds; that a power to raise money by a sale negatives a power to raise money by a mortgage, and *prima facie* is to be construed as a power to sell "out

<sup>1</sup> 26 N. E. Rep., 427.

<sup>2</sup> 129 Mass., 286.

<sup>3</sup> 68 Iowa, 255.

<sup>4</sup> 34 Iowa, 31.

<sup>5</sup> 62 Texas, 642.

<sup>6</sup> 73 Pa. St., 182.

<sup>7</sup> 9 Baxter (Tenn.), 466.

<sup>8</sup> 4 Heisk. (Tenn.), 34.

and out." The leading case in support of this doctrine is *Bloomer v. Waldron*,<sup>1</sup> and represents the opposite extreme from the Pennsylvania cases. The opinion of COWEN, J., is based upon a very narrow and rigid common law construction of powers, and discloses a marked hostility to the more liberal rules of equity. The authority chiefly relied on in support of the opinion is *Holdenby v. Spofforth*,<sup>2</sup> before cited, in which, as already stated, the intent of the testator that there should be an "out-and-out" sale was clearly manifest. COWEN, J., even intimates a strong doubt as to the rule, now perfectly well settled, that a general power to raise money out of rents and profits implies a power to sell or mortgage. And finally, in respect to curing a defective mortgage by a subsequent exercise of the power of sale, the opinion is materially modified, if not overruled, by the later case of *Mutual Life Ins. Co. v. Woods*.<sup>3</sup>

In *Hoyt v. Jaques*,<sup>4</sup> it was held "that under a will a trust with a power to sell *prima facie* imports a power to sell 'out and out,' and will not authorize a mortgage unless there is something in the will to show that a mortgage was within the intention of the testator." But this statement is qualified by what follows: "It has been held that where the sole object and purpose of the testator, in conferring the power, was to pay debts or a particular specific charge upon the estate, and the estate itself is devised subject to that charge, such power to sell may authorize a mortgage; but, where it appears from the will that the intention of the testator was to sell the estate and convert it absolutely, a mortgage by the donee of the power to sell is void."<sup>5</sup> If the case of *Hoyt v. Jaques* can be construed as deciding anything more than that a power to sell does not include a power to mortgage, when the manifest intent of the donor is that the real estate shall be sold out and out and con-

<sup>1</sup> 3 Hill (N. Y.), 361.      <sup>2</sup> 1 Beav., 390.

<sup>3</sup> 121 N. Y., 302; see also *U. S. Trust Co. v. Roche*, 116 N. Y., 120.

<sup>4</sup> 129 Mass., 286.

<sup>5</sup> Citing, amongst other authorities, *Ball v. Harris*, 4 Myl. & Cr., 264.

verted into money, it must be deemed to be limited by the subsequent case of *Kent v. Morrison*, above cited.<sup>1</sup>

Some of the cases which are cited in the text-books as in accord with those last referred to are not so in fact. Thus in *Green v. Claiborne*,<sup>2</sup> it was expressly provided in the deed of settlement that there should be a sale of the trust property *and a reinvestment of the proceeds in other property upon the same trusts*, which the Court held to indicate that the grantor intended an absolute sale. Even upon this theory, however, the decision cannot well be reconciled with that in *Ball v. Harris*, *supra*.

In *Butler v. Gazzam*,<sup>3</sup> the conveyance to the trustee, besides authorizing a sale and reinvestment of the proceeds, expressly provided that the land should *be kept free from incumbrance*.<sup>4</sup>

Of *Ferry v. Laible*, *supra*, which is cited in the previous note, it is to be observed that it was a decision of the Vice-Chancellor, and that it is virtually overruled by the decision of the Chancellor in the later case of *Loebenthaler v. Raleigh*, above referred to. The cases of *Hubbard v. German Catholic Cong.*, and *Temple v. Head*, must also be deemed to be qualified and limited by the later cases in the same courts, of *Waterman v. Baldwin*, and *Steifle v. Clark*, *supra*.

The authorities which hold that a power to sell, though coupled with a trust to pay debts or charges, *prima facie* implies an "out-and-out" sale and negatives a power to mortgage, seem not to attach sufficient importance to the distinction between a discretionary power to

<sup>1</sup>The following, though not going to the full extent of the two cases, last cited, may be regarded as more nearly in harmony with them than they are with the case of *Ball v. Harris*, *supra*, and the cases in accord with it: *Tyson v. Latrobe*, 42 *Maryl.*, 325 . . . (in this case BARTOL, Ch. J., dissented in an elaborate opinion); *Wilson v. Maryland Life Ins. Co.*, 60 *Id.*, 150; *Price v. Courtney*, 87 *Mo.*, 387; *Stokes v. Payne*, 58 *Miss.*, 614. See also 1 *Lewin Trusts* (1st Am. from 8th Eng. ed.),\* 425.

<sup>2</sup>83 *Va.*, 386.

<sup>3</sup>81 *Ala.*, 491.

<sup>4</sup>The following cases are also cited in some of the text-books in support of the proposition that a power to sell *prima facie* implies an "out-and-out" sale and negatives a power to mortgage: *Ferry v. Laible*, 31 *N. J. Eq.*, 566; *Hubbard v. German Catholic Cong.*, 34 *Iowa*, 31; *Temple v. Head*, 4 *Heisk.* (*Tenn.*), 34.