real estate to be sold, and the executor or executors named in the will shall refuse to act, or die without executing the powers vested in him or them, the Orphans Court may, on petition of any one interested, appoint an administrator *de bonis non* with the will annexed, or empower the administrator with the will annexed previously appointed, to execute the trusts of the will in the same manner as the executor or executors appointed in the will might do. As to when one of joint trustees under a will, with power to the survivors, on the death of any of them, to execute the trusts thereof, &c., renounces or refuses to act, see Code, Art. 93, sec. 281-283.[2]

Scope of statute.—The Statute of course does not apply to a case of death, nor to any case but that of *refusal* on the part of an executor to join in the administration. Lord Coke observes, Co. Litt. 113 a., that although its letter extends only to cases where executors have a power to sell, yet being a beneficial law it is by construction extended to cases where lands are devised to executors to be sold, see Bonifaut v. Greenfield, Cro. Eliz. 80, and Hawkins v. Kemp, 3 East. 410. The devise must be to the persons as Executors, for where one devises to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors, they do not take the *land as executors, but **282** as devisees in trust and joint-tenants; and the case is not helped by this Statute so as to pass the whole estate, upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved; but taking it to be a conveyance by the three only, it would sever the joint-tenancy, and convey three-fifths of the estate to

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to avoid the expense and delay of a chancery proceeding but not to divest the jurisdiction of a court of equity under Code 1911, Art. 16, sec. 94. So when a will directs land to be sold by an executor and he refuses to act, or dies without acting, both courts have concurrent jurisdiction over the matter and that court which first exercises its jurisdiction is entitled to retain it. The executor himself can proceed to exercise his power under the supervision of either court. Wright v. Williams, 93 Md. 66; Noble v. Birnie, 105 Md. 80; Snook v. Munday, 90 Md. 701; Keplinger v. Maccubbin, 58 Md. 203; Eichelberger v. Hawthorne, 33 Md. 588. See also Mish v. Lechlider, 89 Md. 278.

But where the testator devises real estate to his wife for life and after her death to be sold by his executor and the proceeds divided, and the executor dies in the lifetime of the testator, the Orphans Court has no jurisdiction over the matter of the sale, the only jurisdiction competent to supply a trustee being in a court of equity under Code 1911, Art. 16, sec. 94; *contra* if the executor survives the testator. Wilcoxon v. Reese, 63 Md. 542. Cf. Myers v. Forbes, 74 Md. 362.

Where testator devises his estate to his executors and trustees, who are different persons, giving them power to sell, the trustees should unite with the executors in exercising the power. Poole v. Anderson, 80 Md. 454. As to the same person being both executor and trustee, see Long v. Long, 62 Md. 33; Keplinger v. Maccubbin, 58 Md. 203.

[2] Code 1911, Art. 93, secs. 297-299; Druid Co. v. Oettinger, 53 Md. 61; Long v. Long, 62 Md. 57.