

Chan. Ch.]

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land and invest the proceeds, my son William to receive the interest during his life, and after his death said proceeds to be equally divided among my family or their heirs I leave and bequeath to my son Thomas S. Ford the south-west part of lot No. 26, Front concession, in the said Township of Moore, containing 3 acres, with the buildings and appurtenances thereon, with all my personal property, in consideration of money advanced by him to me, said notes which he holds or may hold bearing interest at the rate of 10 per cent. per annum, with the following conditions, viz., he is to support his mother during her life, and if the executors think best, and if his mother agree to it, they may sell the said property, real and personal, and if the proceeds are more than satisfy just claims, the balance to be equally divided among my family or their heirs within one year after his mother's death, and I bequeath my son, the said Thomas S. Ford, in consequence of the responsibility devolved on him in supporting his mother, that in any division of property that may be, he is to have two shares, and be allowed what is reasonable for supporting his mother, the executors to take care of minor's shares until they are of age. And I hereby appoint and constitute my son, Thomas S. Ford, and my son-in-law, Richard Thomas, the sole executors to see this my will carried into effect."

Both executors proved the will in Jan., 1871. The widow died before the date of sale after-mentioned, and William Ford, the son named in the will, pre-deceased the testator.

In May, 1877, Thomas S. Ford sold the lands mentioned above to John Hyde and William Cathcart—an abstract of title has been furnished—the purchasers object to the title that, under the will of William Ford, Thomas S. Ford has no power to sell the first parcel—and that Thomas S. Ford has no power, either as executor or as devisee, to sell the second parcel.

The petitioner prays that these objections may be considered and adjudicated upon by the Court. It was conceded that these questions might properly be presented for

the consideration of the Court under the statute.

The first objection calls for a determination of the very much discussed question whether the survivor of two executors can exercise a power of sale given to the executors. The power is given "to the executors herein mentioned," and if a sale take place, the executors are to invest the proceeds. The direction that William is to receive the interest during his life, and after his death the proceeds to be equally divided among the family, appears to me to be a direction that the executors are to pay the interest to William during his life, and then to divide the proceeds. The investment is to be made by them, and it would presumably be made in their own names—there is no direction how it is to be made, but to enable the executors to preserve it for division, it would more properly be in their names than in others. And when so invested, the interest would require to be received by William through them, and the proceeds distributed to the family through them after his death. The clause added to the appointment of the executors, "to see this my will carried into effect," seems to point to the same conclusion. If this be the true construction of the will, then it is not a bare power in the executors, but a power coupled with an interest, vested in them in the character of executors, and, therefore, attached in this will to the office of executor. That it is given "to the executors herein named" is not equivalent to a power to them by name, involving the idea of a personal trust. In *Brassey v. Chambers*, 16 Beav. 231, 4 D. M. & G. 528, the power was given "to my executors hereinafter named," which Lord Romilly construed to mean that it was given to them *nominatim*, and not in their capacity of executors, but the Lords Justices dissented from this opinion. I cannot perceive an appreciable difference in effect between giving the power to "the executors herein named" and to "the executors hereinafter named." If in the one case it indicates that it is conferred upon them in their character of executors, it must have the same effect in the other.