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EQUITABLE CONVERSION IN PENNSYLVANIA.

Conversion is the turning of one thing into another, and the case which is the subject of this article is the turning of land into money and money into land by a fiction of equity.<sup>1</sup>

A large part of the jurisdiction of the courts of equity is exercised solely in aid of rights already existing, and this protection is extended to equitable as well as legal rights. The doctrine of equitable conversion, of which we propose to treat, is a fiction which the chancellors have employed to justify them mostly in aid of an equitable right in dealing with property, chiefly with respect to the devolution of that property after the death of the owner. Under this fiction, under certain circumstances and for certain purposes, land is considered and treated as if it were personal property, although actually land, and personal property is considered and treated as if it were land, although actually personal property. The doctrine, it will be observed, is a pure fiction, and does not appear in any case where the property is treated as being of the nature which it really is. The courts have, however, conceived that the doctrine

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<sup>1</sup>The word conversion is used in the law with several other meanings, as, for instance, in the case of an unlawful taking of personal property, with which, however, we have no concern.

is involved in a number of cases which can be properly explained on other grounds, and when so explained are relieved of no small amount of obscurity. A large part of this article, therefore, will be devoted to a discussion of what is not equitable conversion.

It is perfectly clear that when land is changed into money by a judicial sale, the owner of the land is entitled to the surplus proceeds, if any, because he was the owner at the time of the sale, and for no other reason whatever. This simple principle is of everyday application in the case of sheriffs' sales of property of a debtor, and is of like application in a number of other cases, such, for instance, as a sale in partition proceedings; the divesting of the interest of the heir by some sale in the course of settling the estate of a decedent; a sale of the interest of a minor by his guardian, in all of which, however strangely enough, it has been completely overlooked.

Suppose the owner of the real estate dies, and the property is subsequently sold in the manner we are now discussing. It is clear that upon the death of the owner, his interest descends to his heirs, who become the owners at the time of the sale, and the proceeds are, of course, payable to them accordingly. It is too plain for argument that the operation of the interstate laws or of a will devising an interest in real estate is not in either case suspended by any pending or possible sale of the decedent's real estate. The notion must be abandoned, as pointed out by Mr. Langdell,<sup>2</sup> that the heir as such cannot be entitled to money unless it is land in equity. The learned author says, "It is true that money cannot descend to an heir unless it is land in equity, but land which has descended to an heir is, of course, as liable to be converted into money as any other land, and the consequences of this conversion are the same as in other cases". The courts, however, could not conceive of the heir taking the property unless it were land, and as the nature of the property was actually changed through no

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<sup>2</sup> 19 Harv. Law Rev. 10.

fault of his, the court, in order to protect his right, invented the fiction of considering the money as land in order to justify the order directing the payment of the cash to him. But since the title was cast on the heir immediately at the death of the deceased, the sale was a sale of his property in so far as he was entitled to the proceeds, and the order directing the payment to him is really based on his legal right to the proceeds, and not on any theory of equitable conversion. It is not that the money descends to the heir as land after the sale, but that the land descends to him as land before the sale, and the proceeds, when the sale takes place, are payable to him as owner. If, therefore, there has been any death in the chain of title prior to the sale, the state of the title after such decease is to be attended to and distribution made accordingly.

On the other hand, where the person entitled to the proceeds dies after the sale, while the money is still under the control of the court, the proceeds are to be distributed to the personal representatives just as they would be if they had been paid over before the death of such owner and formed part of his estate. In this case also the doctrine of equitable conversion is not involved, although it is generally dragged in by the courts in the cases deciding this point. The law in Pennsylvania conforms to these principles with very few exceptions. Thus, where the interest of a minor is sold by his guardian, and the minor dies before the sale, his interest in the real estate descends to his heirs, and the proceeds of the sale when made are payable accordingly.<sup>3</sup> Where the minor dies after the sale, the proceeds will devolve on the personal representatives, unless the sale is made under the provisions of the Price Act hereafter referred to.<sup>4</sup>

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<sup>3</sup> No Pennsylvania case has been found supporting this statement, but the point is very clear on principle.

<sup>4</sup> Sale under Act March 29, 1832, Sec. 31, P. L. 190; *Dyer v. Cornell*, 4 Pa. 359 (1846); *Pennell's App.*, 20 Pa. 515 (1853); *Hough's Est.*, 3 D. R. 187 (1893). Sale under Act April 3, 1851, P. L. 505; *Large's App.*, 54 Pa. 383 (1867).

The Act of April 18, 1853,<sup>5</sup> commonly known as the Price Act, provides that the proceeds of the sale of real estate made under the provisions of the act shall be substituted for the land sold, and that no purchase or sale by authority of the act shall change the course of descent or transmission of any property changed in its nature by virtue thereof, as respects persons who are not of competent ability to dispose of it.<sup>6</sup> In like manner, where a guardian invests personal property of the ward in real estate under order of the Orphans' Court made in pursuance of the Act of April 13, 1854,<sup>7</sup> the investment is still considered as personal property, and when the minor dies it devolves as such.<sup>8</sup>

It appears, however, that where the committee of a lunatic sells the land of the lunatic for the payment of debts, the proceeds of the sale are, even when the lunatic dies after the sale considered as real estate and devolve accordingly, as was decided in the case of *Lloyd v. Hart*.<sup>9</sup> The decision is clearly contrary to principle and the other authorities, and the opinion of Gibson, C. J., in the Supreme Court, is not very conclusive. The case has given trouble<sup>10</sup> and may be confined as an authority to the exact facts.

So, also, where the real estate of a decedent is sold by the executor or administrator in proceedings in the Orphans' Court, or by a trustee under deed in proceedings in

<sup>5</sup> Secs. 6, 7, P. L. 503.

<sup>6</sup> Accordingly in these cases, where the minor died after the sale, the proceeds devolved as real estate: *Holmes's App.*, 53 Pa. 339 (1867); *Eckert's Est.*, 12 Phila. 93 (1878), s. c. 5 W. N. C. 431, 31 L. I. 193; *Hough's Est.*, 3 D. R. 187 (1893); *Owens' Pet.*, 3 D. R. 328 (1894), *semble*.

<sup>7</sup> Sec. 2, P. L. 368.

<sup>8</sup> *Davis's App.*, 60 Pa. 118 (1869); *Woodward's App.*, 38 Pa. 322 (1861).

<sup>9</sup> 2 Pa. 473 (1846).

<sup>10</sup> See remarks of Coulter, J., in *Dyer v. Cornell*, 4 Pa. 359 at 363 (1846). The suggestion of the learned judge, that the unfortunate condition of the lunatic was partly responsible for the rule in *Lloyd v. Hart*, 2 Pa. 473 (1846), is rather remote. The devolution of the estate under the intestate laws can hardly be said to be affected by the lunacy of the deceased intestate.

the Common Pleas, whether for the payment of debts or any other purpose, the proceeds represent the real estate sold, and are to be distributed to those entitled thereto at the time of the decedent's death.<sup>11</sup> So much of the Act of April 18, 1853,<sup>12</sup> as provides that in this case the proceeds of the sale shall be distributed as real estate, is merely declaratory of the existing law.<sup>13</sup> The creditors of a decedent are, of course, to receive payment out of the proceeds first,<sup>14</sup> which are properly payable to the administrator,<sup>15</sup> and where there are no debts, may be awarded directly to the heirs.<sup>16</sup>

In the case of a sheriff's sale of a decedent's real estate, the surplus proceeds are, under the Act of February 24, 1834,<sup>17</sup> payable to the personal representatives for distribution. In many cases, however, where it is clear that there are no creditors or the time for the lien of creditors has elapsed, the court will order the money paid directly to the heir or devisee.<sup>18</sup> In like manner, if the heir of a decedent dies before a sale, his interest in the land immediately descends as real estate to his heirs, and they, as owners, are entitled to the proceeds of the sale, which is not considered as being consummated, so far as their interest is concerned, until the deed is delivered.<sup>19</sup>

Where the heirs of a decedent die after a sale, since

<sup>11</sup> *Diller v. Young*, 2 Yeates, 261 (1797); *Grider v. McClay*, 11 S. & R. 223 (1824); *Hepburn's App.*, 65 Pa. 468 (1870); *Culbertson's App.*, 76 Pa. 145 (1874); *Wale's Est.*, 11 Phila. 156 (1876), s. c. 33, L. I. 409.

<sup>12</sup> Sec. 4, P. L. 505.

<sup>13</sup> Confer *Foster's App.*, 74 Pa. 391 at 399 (1873), which is a case of a sale of a decedent's interest in partnership real estate.

<sup>14</sup> *Yard's Est.*, 17 Phila. 436 (1885), s. c. 15, W. N. C. 422, 42 L. I. 17. But debts which have lost their lien cannot be paid out of the proceeds, *Commonwealth v. Pool*, 6 Watts, 32 (1837).

<sup>15</sup> *Commonwealth v. Rohm*, 3 S. & R. 375 (1816).

<sup>16</sup> *Green's Est.*, 5 Pa. C. C. 605 (1888), s. c. 19 Phila. 55, 45 L. I. 174, 5 Lanc. L. R. 217.

<sup>17</sup> Sec. 33, P. L. 70.

<sup>18</sup> *Trust Co. v. Sampson*, 209 Pa. 214 (1904).

<sup>19</sup> *Schmid's Est.*, *Dunlap's App.*, 182 P. 267 (1897); *Simpson's Est.*, 39 S. C. 382 (1909); *Erb v. Erb*, 9 W. & S. 147 (1845); *Williams, J.*, in *Overdeer v. Updegraff*, 69 Pa. 110 at 118 (1871).

they, as owners at the time of the sale, are entitled to money, the surplus accordingly devolves on their personal representatives,<sup>20</sup> except, however, where the sale takes place under the provisions of the Price Act,<sup>21</sup> which in this case changes the law as it existed before. So, also, in the case of a sale in partition proceedings, where a tenant in common dies at any time before the delivery of the deed, even after confirmation, his interest devolves as real estate, and the proceeds, when the sale is consummated, are to be distributed to his heirs as owners.<sup>22</sup> And when he dies after the sale, his share in the proceeds is to be distributed as personal property.<sup>23</sup>

It is perfectly true that the Supreme Court does say in these cases that there is an equitable conversion. It is said that the fiction ends with the first devolution, as equity will not impress the fund with the character of real estate from generation to generation.<sup>24</sup> It is found that this

<sup>20</sup> *Grider v. McClay*, 11 S. & R. 224 (1824).

<sup>21</sup> See n. 5, *ante*.

<sup>22</sup> *Ferree v. Commonwealth*, 8 S. & R. 312 (1822); *Clepper v. Livergood*, 5 Watts 113 (1836); *Biggert's Est.*, 20 Pa. 17 (1852); *Spangler's App.*, 24 Pa. 424 (1855).

<sup>23</sup> *Yohe v. Barnett*, 1 Binney, 357 (1808); *Biggert v. Biggert*, 7 Watts, 563 (1838); *Hay's App.*, 52 Pa. 449 (1866); *McCune's App.*, 65 Pa. 450 (1870); *Kann's Est.*, 69 Pa. 219 (1871); *Wentz's App.*, 126 Pa. 541 (1889); *Scott's Est.*, 137 Pa. 454 (1890). Where a female tenant in common was married and died after the sale, there was some doubt as to the nature of her interest in the proceeds. It was, of course, personal property, *Yohe v. Barnett*, 1 Binney, 357 (1808); *Spangler's App.*, 24 Pa. 424 (1855); but as the courts in Pennsylvania had no equity jurisdiction to require the husband to make a settlement when applying for the personal property of his wife, *Yohe v. Barnett*, 1 Binney, 357 (1808), it was provided by Act of March 29, 1832, Sec. 48, P. L. 90, that the proceeds of the sale should be secured from the control of the husband. It was said that this Act was only necessary to keep her property away from the husband's control, *Hay's App.*, 52 Pa. 449 (1866), and it is probably now clear that the provisions are unnecessary in view of the larger right of the married woman to her separate property at law, *Kann's Est.*, 69 Pa. 219 (1871).

<sup>24</sup> A good example of this method of reasoning will be found in the opinion of Mitchell, J., in *Wentz's App.*, 126 Pa. 541 (1889). There is, it is apprehended, no reason why the share should not be considered as personal property from the time of the sale, see *Yohe v. Barnett*, 1 Binney, 357 (1808), and such is the principle in the subsequent case of *Scott's Est.*, 137 Pa. 454 (1894).

remark will generally be made in the case where the first owner dies before the sale, and there is a further devolution after the sale, in which case the heirs of the first owner being entitled to personal property at the time of the sale, the right devolves as such, or where the first or second owner dies after the sale, and the proceeds accordingly devolve as personal property. It is clear, however, from what has been said before, that the notion that there is an equitable conversion at the time of the sale, even where there is a death in the chain of title before that time, is a pure fiction and entirely unnecessary to the decision of the case, and still more is this true where any owner survives the sale, and becomes in his own right, whether under disability or not, entitled to the proceeds as personal property. To say in such case that the proceeds vest in him as real estate, and then when he dies, the fiction ceases and they devolve as personal property, still further obscures the real principle involved.

In like manner, in a case of a naked authority or discretion to sell in a will, the interest of the heir or devisee is real estate until the sale is made, and so far as he is entitled to the proceeds, he is entitled as owner at the time of the sale, irrespective of any doctrine of equitable conversion. The interest of the devisee is bound by a judgment entered before the sale, and the sale taking place, the judgment creditor is entitled to payment out of the proceeds because he had a lien on the land at the time of the sale, which lien was discharged by the sale.<sup>25</sup> The interest of a devisee dying before the sale being real estate, her husband becomes immediately entitled as tenant by the curtesy to the

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<sup>25</sup> *Solliday's Est.*, 175 Pa. 114 (1896); see *Peterson's App.*, 88 Pa. 397 (1879); *Shaner's Est.*, 31 C. C. R. 583 (1905), the remarks of Solly, P. J., in this case at p. 584, that the proceeds of the land sold were realty, is a statement of the operation of the doctrine of equitable conversion which, it is conceived, is unnecessary. The proceeds were personal property and distributed as such to the parties having liens in the land at the time of the sale, just as in the case of a sheriff's sale of real estate the proceeds are payable to the various judgment creditors, who do not require the assistance of any doctrine of equitable conversion to sustain their right to payment out of the proceeds.

proceeds when the sale is made.<sup>26</sup> In like manner, the interest of a devisee dying before the sale, when the gift is to his heirs, is considered as real estate, and his widow not being an heir, is not entitled to a share in the proceeds,<sup>27</sup> and the devisee is entitled to the rents as owner of the real estate until the power is exercised.<sup>28</sup> For the same reason, the parties interested may maintain partition,<sup>29</sup> and bring ejectment on the title as real estate.<sup>30</sup>

A widow who was given the share she would take under the intestate laws, shares in the proceeds of the sale of the real estate, she having that interest before the sale.<sup>31</sup> When the power is exercised, the property is converted from the time of the sale, and if the residuary devisee dies after a sale, the proceeds devolve as personal property.<sup>32</sup>

Where the executor, under power in the will, sells all the real estate, the proceeds become personalty, and a trust of the residue declared in the will is considered a trust of personal property, and the limitations of the interest of the *cestui que* trust are construed as limitations of personal property.<sup>33</sup> Where, however, the executor had an option to sell for cash or let a ground rent, it was held, the *cestui que* trust dying after the conveyance had been made on ground rent, that the option to the executors enabled them to change into another kind of real estate, and the ground rent, therefore, devolved as real estate.<sup>34</sup> In like manner, when the real estate of a decedent is sold under a discretionary power in his will, the proceeds belong to those who

<sup>26</sup> *Stoner v. Zimmerman*, 21 Pa. 394 (1853).

<sup>27</sup> *Raleigh's Est.*, 206 Pa. 451 (1903); report obscure as to whether devisee died before the sale or not.

<sup>28</sup> *Neumann's Est.*, 41 S. C. 279 (1909).

<sup>29</sup> *Sauerbier's Est.*, 202 Pa. 187 (1902); *Chew v. Nicklin*, 45 Pa. 84 (1863).

<sup>30</sup> *Darlington v. Darlington*, 160 Pa. 65 (1894).

<sup>31</sup> *Curry's Est.*, 5 C. C. R. 598 (1888), *s. c.* 19 Phila. 92, 45 L. I. 237.

<sup>32</sup> *Holmes' Est.*, 15 D. R. 774 (1906); *Macer's App.*, 3 Walker, 107 (1882).

<sup>33</sup> *Wharton v. Shaw*, 3 W. & S. 124 (1842).

<sup>34</sup> *Howard's App.*, 2 Penny. 347 (1882), *s. c.* 11 W. N. C. 410.



were owners under the terms of the will at the time of the sale. Thus, in *Perot's Appeal*,<sup>35</sup> the testator created a trust containing a discretionary power of sale in the trustees, and it was held that the proceeds of the sale of the real estate made by the trustees apparently before the death of the life tenant, were to be distributed as real estate of the testator. The court relied on the terms of the will, which provided that, in the events which happened, the residue should be divided among the testator's next of kin or heirs-at-law, the same as though he had died intestate and unmarried. The court below said that the will worked a conversion on the ground of an implied direction to sell. On appeal, the Supreme Court reversed, which, it is apprehended, was correct, as there was no such implied direction. The exercise of the power of sale changed the nature of the property, but the ownership of the proceeds was the same as that of the land sold.

For the same reason, where the land of the decedent is subject to the lien of decedent's debts, the exercise of the power within the time prescribed by the statute will not discharge the lien of the testator's unscheduled debts.<sup>36</sup> But where the time prescribed by the statute has expired, the creditor whose lien has been lost has no claim on the proceeds because he had no right to the land when it was sold.<sup>37</sup> It will thus appear that in the cases we have just discussed, the doctrine of equitable conversion, although generally so supposed, is not involved at all.

We now come to the case of an agreement for the sale of real estate, which is commonly said to produce an equitable conversion, and is the stock case used in the text books for illustrating the doctrine. It is very doubtful whether the doctrine is involved in the case at all.

An agreement for the sale of land does not of itself produce a conversion. It is the first step towards an ex-

<sup>35</sup> 102 Pa. 235 (1883).

<sup>36</sup> *Seeds v. Burk*, 181 Pa. 281 (1897).

<sup>37</sup> *Hunt and Lehmann's App.*, 105 Pa. 128 (1884); words of will in this case obscurely reported, see p. 140.

change of money for land. After the exchange has taken place, the vendor has the money and the vendee has the land, and the nature of each is unchanged, whereas, in the case of conversion, the thing converted is changed into something else. If an agreement of sale produce a conversion, the land in the hands of the vendor would become personal property, which it never does either actually or by way of fiction, and the money in the hands of the vendee would become land, which it never does either actually or by way of fiction. The doctrine of equitable conversion is a fiction and is not present in any case unless some property which is personal property is treated as real estate, or some property which is real estate is treated as personal property. Whenever the property is treated as being of the nature which it really is, there is no equitable conversion. It will be necessary, in order that the subject may be more clearly understood, to first point out the actual rights and remedies of the parties to an agreement of sale when one or both are deceased. The question is one of some difficulty, and its proper solution is essential to a correct understanding of the subject.

If the vendor dies after making a contract for the sale of land, and the title has descended to the heir-at-law or devisee, the executor cannot bring an action at law against the vendee for damages because he is unable to fulfill the contract, since he cannot make a conveyance, the title being in someone else. Equity, therefore, interposed and allowed him to file a bill making the heir or devisee co-defendant, and then, if a proper case was made out, the court would enter a decree directing the vendee to pay the purchase money to the executor and directing the heir or devisee to convey the title to the vendee. The heir or devisee had no equity to the purchase money because, being volunteers, they took the title subject to the outstanding contract. In like manner, since the contract was binding on the personal representatives, the vendee could sue the personal representatives of the vendor at law, in which suit the latter were helpless unless the heirs came to their relief.

as they could not avoid the breach, not having the legal title to convey. In England, the personal representative could obtain equitable relief. As there was no equity jurisdiction in Pennsylvania, the difficulty was provided for by several acts of the Legislature, which will next be discussed.

The Act of March 31, 1792,<sup>38</sup> gave a remedy in the Court of Common Pleas by providing that the vendee shall exhibit the contract in court and have it proved, and the executor or administrator may present a petition to the Court of Common Pleas asking for leave to execute a deed of conveyance. It was further provided<sup>39</sup> that the executors could prove the contract, and the same proceedings could be had as where the purchaser or his representatives procured the contract to be proved; and<sup>40</sup> that the contract must be proved before the purchaser should have a right to sue upon the contract. This act, however, did not fully cover the case.<sup>41</sup>

It was subsequently provided by the Act of February 24, 1834,<sup>42</sup> that the Orphans' Court should have jurisdiction to make a decree of a specific performance in the case of a written or oral contract which had been entered into by decedent, upon petition of the executor or administrator, or the purchaser of the real estate or other person interested in such contract.<sup>43</sup> The petition is to be presented to the

<sup>38</sup> 3 Smith's Laws, 66, Sec. 1.

<sup>39</sup> In Sec. 2.

<sup>40</sup> By Sec. 3.

<sup>41</sup> For cases under this act, see *Park v. Marshall*, 4 Watts, 383 (1835); *Hagerty's Case*, 4 Watts, 307 (1835); *Young v. Pleasants*, 3 Yeates, 317 (1801).

<sup>42</sup> Secs. 15, 16, 17, 18, P. L. 75.

<sup>43</sup> Proceeding by personal representative of vendor upon written contract; *Sutter's Heirs v. Ling*, 25 Pa. 466 (1854); *West Hickory Mining Assn. v. Reed*, 80 Pa. 38 (1875). in this case the vendor had assigned his right to the purchase money before he died, and the vendee having paid the money to the assignee, the administrator of the vendor proceeded for leave to convey. See also *Huggins's Est.*, 204 Pa. 167 (1902), where there were similar facts, and the decree directed the executor of the vendor to make the deed and to deliver it to the assignee, to be delivered by her when the consideration was paid. Written contract proceeding by personal representatives of vendee: *Chess's*

Orphans' Court having jurisdiction of the account of the decedent's executor or administrator, even though the lands are situate in another county.<sup>44</sup> The act provided that the deed of the executor or administrator should be of the same force and effect to pass and vest the estate intended as if the same had been executed by the decedent in his lifetime. It is undoubtedly competent for the Legislature to provide that the deed of the executor should divest the title of the heirs, just as it would have been competent for the Legislature to have provided that the decree of the Orphans' Court should of itself, upon being entered, transfer the title to the purchaser. It is perhaps better to rest the point on this theory than on the questionable doctrine adverted to by Lewis, J.,<sup>45</sup> that the legal title descended to the heir subject to an equitable estate in the vendee, which was at once clothed with the legal title under the peculiar Pennsylvania principle. As the relation does not produce that effect in the lifetime of the vendor, a deed then being necessary, why then should it have that effect after his death? Furthermore, the operation of this principle would leave the estate of the decedent without any security for the unpaid purchase money. If the vendee is a co-executor of the deceased vendor, the deed is to be made by the other executor, and if there is only one executor, in such case the sheriff shall execute the deed under the supervision of the court.<sup>46</sup> It may be further observed that an actual seizin in the vendor is not necessary. Legal or constructive seizin is sufficient.<sup>47</sup> The Act of 1834 was probably in-

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*App.*, 4 Pa. 52 (1846), see this case for comments on the form of the petition and the practice; *M'Farson's App.*, 11 Pa. 503 (1849). Administrator of vendor against administrator and heirs of vendee: *Anshutz's App.*, 34 Pa. 375 (1859). Oral contract, vendor against administrator of vendee: *McKee v. McKee*, 14 Pa. 231 (1850), see this case as to form of decree. Executor of vendor against widow and heirs of vendee: *Simmons's Est.*, 140 Pa. 567 (1891).

<sup>44</sup> *M'Farson's App.*, 11 Pa. 503 (1849).

<sup>45</sup> In *Sutter's Heirs v. Ling*, 25 Pa. 466 at 467 (1854).

<sup>46</sup> Act of April 9, 1849, P. L. 511.

<sup>47</sup> *M'Farson's App.*, 11 Pa. 503 at 512 (1849).

tended to introduce the English equity practice,<sup>48</sup> and was passed in aid of the defective remedies afforded by the Acts of March, 1792, and of 1818<sup>49</sup> and there is some doubt whether it repeals the Act of 1792.<sup>50</sup> The Act of 1834 only requires or permits the same performance of the agreement that the vendor would have made under its terms in his lifetime. "Is a completion of the sale on the vendor's terms".<sup>51</sup>

The wording of the Act of 1834, as to what parties are to be notified, is somewhat obscure. In a proceeding by the personal representative of the deceased vendor, it is not necessary to join the heirs of the vendor.<sup>52</sup> Where, however, the proceeding is by the vendee against the personal representative of the deceased vendor, the heirs must be joined, otherwise the proceedings are a nullity as to them.<sup>53</sup> Although the heir has no real interest, the

<sup>48</sup> Bell, J., in *McKee v. McKee*, 14 Pa. 231 (1850); Rogers, J., in *Chess's App.*, 4 Pa. 52 at 53, 54 (1846).

<sup>49</sup> See remarks of Bell, J., in *M'Farson's App.*, 11 Pa. 503 at 508 (1849).

<sup>50</sup> The two acts were at first regarded as concurrent. *Wetherill v. Seitzinger*, 9 W. & S. 117 (1844); see, however, *Musselman's App.*, 65 Pa. 480, Agnew, J., at 487 (1850); Black, C. J., in *Myers v. Black*, 17 Pa. 193 at 198, 199 (1851); *Holliday v. Ward*, 19 Pa. 485, Black, C. J., at 492 (1852), and remarks of Bell, J., in *McKee v. McKee*, 14 Pa. 231 at 235 (1850), in which case the proceeding was condemned as a confusion of the remedies contemplated by the two acts. See also remarks of Yerkes, P. J. in *Sorver v. Scholl*, 1 D. R. 575 (1892), in which case the plaintiff was not allowed to proceed with the common law action.

<sup>51</sup> Gibson, C. J., in *Riddlesberger v. Mentzer*, 7 *Watts*, 141 at 142 (1838); consequently held in this case that the wife not having joined in the agreement, the conveyance by the administrator did not bar her dower.

<sup>52</sup> *Sutter's Heirs v. Ling*, 25 Pa. 466 (1854); *West Hickory Mining Asso. v. Reed*, 80 Pa. 38 (1875), which may be considered as overruling as to this point; *McKee v. McKee*, 14 Pa. 231 (1850), this case is very involved and of doubtful authority, as it is difficult to tell who made the petition. See also *Simmons's Est.*, 140 Pa. 467 (1891), where the point was raised and the Court below, affirmed, on appeal said that notice to the heirs was not necessary, but the record was amended by joining the widow and heirs.

<sup>53</sup> *Hoffner v. Wyncoop*, 97 Pa. 130 (1881); see *Chess's App.*, 4 Pa. 52 (1846); Lewis, J., in *Sutter's Heirs v. Ling*, 25 Pa. 466 (1854), seemed to think that the same doctrine applies to the case of a proceeding by a vendor.

practice of joining him in the decree was necessary to get the title out of him at common law. Since the deed of the executor has this effect under the statute, there seems to be no necessity of joining him in either proceeding. It may be argued that the holder of the legal title has an interest in being heard as to the existence or non-existence of the alleged agreement of sale, and should not, therefore, be deprived of the land without notice and opportunity to be heard on this point. If this argument is sound, however, the heirs should be joined also in a proceeding by the vendee, which, however, is not the law. If the heirs are not notified, there is an opportunity for collusion between the personal representatives of the vendor and the vendee. The only safe proceeding, therefore, in practice is to refuse to pass a title in either case unless the notice has been given.

The Act of 1834 was substantially re-enacted by the Act of April 28, 1899.<sup>54</sup> There is a slight difference in the wording of the two acts as to the notice which is to be given.<sup>55</sup>

The Act of April 9, 1849,<sup>56</sup> provides that in all actions of ejectment brought to enforce the payment of purchase money, the personal representatives of the deceased creditor may sustain the same in their own names to the same extent as the decedent could if living. It is to be observed that this act only permits the executor to sue, but says nothing about the heir or devisee of the vendor.<sup>57</sup> Since,

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<sup>54</sup> P. L. 157. For cases under the Act of 1899, see *Fay's Est.*, 213 Pa. 428 (1906), which was a proceeding by the vendor against the executor of deceased vendee under an oral contract; *Holt v. McWilliams*, 21 S. C. 137 (1902), which was a proceeding by vendee against the executor of vendor on an oral contract. The Act of 1899 was overlooked in *Huggins's Est.*, 204 Pa. 167 (1902).

<sup>55</sup> The words of the 15th Sec. of the Act of 1834 were, after due notice "to the purchaser, or to the executors or administrators and heirs of the decedent or devisees of the estate." The Act of 1899 provides that due notice shall be given to the persons interested, according to the nature of the petition, and does not specify who the persons interested are. No case turning on this point has been discovered.

<sup>56</sup> P. L. 526.

<sup>57</sup> See *Thompson v. Adams*, 55 Pa. 479 (1867), where Agnew, J., at p. 93, pointed out that the ejectment could not be brought against the personal representatives of the vendee, but only against his heirs and

however, the latter has no interest in the purchase money. it is difficult to see how he can proceed to enforce the payment thereof. No authority has been found on this point, and the law, therefore, is in doubt.<sup>58</sup> When the vendee dies the conveyance should be made to his devisees or heirs.<sup>59</sup>

The Act of April 28, 1899,<sup>60</sup> provides that where the purchaser of the real estate is deceased, his executor or administrator or other persons interested in the contract may proceed in the Orphans' Court. The introduction in this act of the executor and administrator of the deceased vendee is an anomaly, as the right under the contract, whatever its nature, descends to the heir or the devisee in all cases.<sup>61</sup>

It is clear that during the lifetime of the vendor the fact

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only by the personal representatives of the deceased vendor; *Bender v. Luckenbach*, 162 Pa. 18 (1894). The remarks of Lewis, J., on this statute, in *Sutter's Heirs v. Ling*, 25 Pa. 466 at 467 (1854), are not clear. The learned judge seems to have overlooked the circumstance that the statute applies to the case only when the vendee is in possession.

<sup>58</sup> In *Webster v. Webster*, 55 Pa. 161 (1866), the heirs of the vendor were allowed to succeed, the Court expressly declining to decide who was entitled to the purchase money or who was to make title. As the vendor died intestate in that case, and had been dead many years, the whole balance of the purchase money was probably payable to the plaintiffs. The Court below, Derrickson, J., affirmed on appeal, said that the legal title descended to the heirs, and that they would have the same right under it as the vendor himself in his lifetime, and that if they could not bring ejectment, the defendant could hold the land without paying for it. He could not, however, because he was liable to the administrator, and the heirs could compel the administrator to sue, and, as pointed out by the learned judge, the omission of the administrator to sue would not affect the right of the heir. The case may be considered as overruled by *Bender v. Luckenbach*, 162 Pa. 18 (1894), although Dean, J., at p. 23, endeavored, it must be confessed, without much success, to distinguish the cases.

<sup>59</sup> In *Simmons's Est.*, 140 Pa. 567 (1891), where the vendee was deceased intestate, the conveyance was apparently made to the guardian of the minor children of the deceased with the consent of the widow. The better practice would be to make it direct to the minor. At common law a minor was perfectly capable of receiving a title to real estate.

<sup>60</sup> P. L. 157.

<sup>61</sup> In *Fay's Est.*, 213 Pa. 428 (1906), the proceeding appears to have been against the executrix of the deceased vendee upon a parol agreement, the Court proceeding under the Act of 1899. This case is badly reported.

that he has a chose in action in his right against the vendee on the agreement of sale does not alter the nature of the land which he has obligated himself to convey; that remains as it was before—land. He now has two things, a chose in action and the title to the land. After his death, the circumstances remain the same, only the chose in action devolves on his personal representatives, and the land on the heir or devisee. The vendor simply agrees to make an exchange of money for land, and there is no occasion for the application of the doctrine of equitable conversion.

As to the vendor, therefore, there is no equitable conversion. His right to receive the purchase money is personalty at law and devolves as such,<sup>62</sup> and the title to the land devolves as real estate, but, of course, subject to the agreement of sale. The devisee or heir is a volunteer against whom the right of specific performance existing on the part of the vendee may be exercised.

In a number of cases<sup>63</sup> the court has said that the agreement of sale worked a conversion into personal property. Although this is the frequent statement, no case has been found in which the real estate has been actually considered as personal property, and no such cases are cited in Pepper & Lewis's Digest of Decisions.<sup>64</sup> On the contrary, the decisions are to the effect that the land in the hands of the vendor which he has agreed to convey is considered as of its actual nature, real estate, and the vendor's right under the agreement of sale is considered what it really is, personal property. Thus, a married woman vendor could assign her interest with the joiner of her husband without an acknowledgement, under the Act of 1848.<sup>65</sup> The executor is entitled to the balance of the unpaid purchase money, even though the contract provides for the payment to the

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<sup>62</sup> Langdell, 18 Harv. Law Rev. 255; confer 18 Harv. Law Rev. 249.

<sup>63</sup> Agnew, J., in *Thompson v. Adams*, 55 Pa. 479 at 483 (1867); *per curiam* in *Drenkle's Est.*, 3 Pa. 377 (1846); Dean, J., in *Bender v. Luckenbach*, 162 Pa. 18 at 22 (1894), and many others might be cited.

<sup>64</sup> Vol. 19, Col. 32590.

<sup>65</sup> *Fryer v. Rishell*, 84 Pa. 521 (1877).



heirs and legal representatives. The residuary legatee cannot sue.<sup>66</sup> The widow of the deceased vendor is entitled to her share of the proceeds of the sale received by the personal representatives absolutely as personal property, and is, at the same time, entitled to her dower in the land agreed to be conveyed.<sup>67</sup> A conveyance under a decree of specific performance by the Orphans' Court does not bar the widow's dower.<sup>68</sup> She could never be entitled to dower unless the property was real estate. In like manner, she could never be entitled to her share of the proceeds of the sale absolutely unless it was personal property. This shows that the vendor has two things, the land and the chose in action, and there is no case of an equitable conversion at all. The title to the land remains in the vendor until he has made a conveyance. It descends to the heir subject to the trust in favor of the vendee.<sup>69</sup> A conveyance of all the decedent vendor's real estate by his heirs passes the title to the lands agreed to be sold.<sup>70</sup> The land agreed to be conveyed is subject to the claim of the creditors of the deceased vendor, just as any other real estate, and the proceeds of the sale received by the executors are to be distributed as real estate to the creditors.<sup>71</sup>

There is, however, a sense in which it may be said that an agreement of sale produces an equitable conversion; it is this,—since the doctrine is applicable on the death of the vendor, it may be said that as his heirs, devisees or

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<sup>66</sup> *Bender v. Luckenbach*, 162 Pa. 18 (1894), for practice in amending the record when the wrong party sues, see this case; *Sutter's Heirs v. Ling*, 25 Pa. 466 (1854).

<sup>67</sup> Dictum, Gibson, C. J., in *Leinaweaver v. Stoever*, 1 W. & S. 160 at 165 (1841); *Drenkle's Est.*, 3 Pa. 377 (1846); *Ross v. Jessup*, 19 Pa. 280 (1852).

<sup>68</sup> *Riddlesberger v. Mentzer*, 7 Watts, 141 (1838).

<sup>69</sup> Coulter, J., in *Fisher v. Harris*, 10 Pa. 457 at 459 (1849).

<sup>70</sup> *Vincent v. Huff*, 8 S. & R. 380 (1822). In the case of *Foster v. Harris*, 10 Pa. 457 (1849), apparently to the contrary, the heirs made the conveyance after a deed had been made to the vendee under a decree of specific performance in the Orphans' Court. The heirs consequently had no title at the time they made the conveyance.

<sup>71</sup> Dictum. Lewis, C. J., in *Leiper's Exrs. v. Irvine*, 26 Pa. 54 at 57 (1856).

other persons interested in his estate have an interest in that estate as a *res*, which is fixed immediately at his death, therefore the change of part of the estate from personal property to real estate is, as respects the identity of the *res*, a conversion,<sup>72</sup> just as an exchange by the trustee of land for money produces a conversion of the trust *res* with respect to the right of the *cestui que* trust. On this point, it may be observed that what is an exchange, viewed with relation to the thing itself, may result in equitable conversion when considered with reference to the right of a third party in the thing.

If the agreement of sale is not carried out, and the land remains in the estate of the decedent, there is some doubt about how it should be treated.<sup>73</sup> In *Ross v. Jessup*,<sup>74</sup> the vendor had, at the time of his death, a number of outstanding agreements of sale. It was held that the interest in the agreements was personal property, and the widow was entitled to her interest in the same as such. Lowrie, J., in the Supreme Court, said: "It is equally plain that where the testator has sold real estate by valid agreements, the sums due thereon were part of his personal estate, and that on his death his widow's interest therein became immediately vested. It follows that the trustees were bound so to administer this portion of the estate that her interest should not be affected by any act or omission of theirs. It was their duty to proceed on the agreements and collect the money for those having a right to claim it. If such pursuit should result in recovering back the land, then they were bound to account for that as a substitute for the money and subject to the same trusts.

<sup>72</sup> See language of Mr. Langdell in 18 Harv. Law Rev. 250 (1905).

<sup>73</sup> See dictum, Lewis, C. J., in *Leiper's Exrs. v. Irvine*, 26 Pa. 54 at 57 (1856), that where the contract was rescinded by the consent of the vendee, there was a reconversion, and the land was to be considered as real estate as to distributees and legatees. This case and *Leiper's App.*, 35 Pa. 420 (1860), arising on the same will, although sometimes cited in this connection, do not raise the point, as they present the case of a sale by a trustee and the effect of the sale on the right of the *cestui que* trust, a somewhat different question.

<sup>74</sup> 10 Pa. 280 (1852).

If they cancelled any of the sales, they are bound to account to the widow for her share of what could have been made out of them by a reasonable pursuit of the appropriate remedies." It does not clearly appear, however, from the decree entered in the case, just how the land was accounted for as substitute for the money,—whether as realty or personalty. Since the agreement is not carried out, the estate loses a chose in action which it had, and as the equitable claim of the vendee on the real estate disappears, it seems that the heir or devisee should hold the title free of the trust on behalf of the vendee, and there being no other provision under the will, should take absolutely.

It is doubtful if there is any occasion to apply the doctrine of equitable conversion to the interest of the vendee under the articles. It is true that the interest is treated as real estate. Thus, the right descends, on the death of the vendee, to his heirs and not to his personal representatives.<sup>75</sup> The interest of the vendee is subject to dower and curtesy and all the incidents of real estate.<sup>76</sup> The vendee has an equitable estate in the land which is sufficient to support partition.<sup>77</sup> His interest may be mortgaged<sup>78</sup> and taken in execution by the sheriff,<sup>79</sup> and all loss occasioned by damage to the property falls on the vendee.<sup>80</sup> If suit is brought under the Act of April 9, 1849,<sup>81</sup> it must be brought by the personal representative of the deceased vendor against the heirs of the deceased vendee, and not against the personal representatives of the latter.<sup>82</sup> The interest

<sup>75</sup> Tilghman, C. J., in *Vincent v. Huff*, 8 S. & R. 381 at 388 (1822); dictum, Lewis, J., in *Longwell v. Bentley*, 23 Pa. 99 at 103 (1854); *Aldrich v. Bailey*, 71 Pa. 246 (1872).

<sup>76</sup> Dictum, Lewis, J., in *Longwell v. Bentley*, 23 Pa. 99 at 103 (1854).

<sup>77</sup> *Longwell v. Bentley*, 23 Pa. 99 (1854).

<sup>78</sup> *Gratz v. Ewalt*, 2 Binney, 95 (1809).

<sup>79</sup> *Baird v. Lent*, 8 Watts, 442 (1839). If sold by the sheriff, is converted into personal property; *Barnes's App.*, 46 Pa. 350 (1863).

<sup>80</sup> *Morgan v. Scott*, 26 Pa. 51 (1856).

<sup>81</sup> P. L. 526.

<sup>82</sup> Agnew, J., in *Thompson v. Adams*, 55 Pa. 479 at 483 (1867). Consider, however, provisions of the Act of April 28, 1899, pointed out in n. 54, *ante*.

of the vendee may be assigned by contract or deed or disposed of by will.<sup>83</sup>

It is frequently said that the vendor is trustee of the title for the vendee who has an equitable estate in the land.<sup>84</sup> There are, however, grave objections to the position of the vendor as the trustee of the land,<sup>85</sup> and still greater objections to the position that the vendee is a trustee of the purchase money.<sup>86</sup> It is not necessary for the purpose of our discussion to go into this point. It is important, however, to observe that if the theory, that the vendor is trustee for the vendee, is sound, then the vendee has as *cestui que* trust an equitable estate in the land which is, in point of fact, real property and is dealt with as such, and consequently the decisions above referred to and the law on the subject do not proceed upon the theory of equitable conversion, as that doctrine is never found in the case where property is considered as of the nature which it really is. If, on the other hand, the vendor is not a trustee for the vendee, but the latter has only a chose in action, a right to proceed upon the contract and enforce specific performance or recover damages for its non-performance by the vendor, then those cases which decide that this right of the vendee is real estate must proceed upon the doctrine of equitable conversion because the right to proceed upon the contract is clearly personal property, and if it is treated as real estate must be so treated under the doctrine which we have under discussion. Whatever the theory is, the law is clear that the right of the vendee under articles for the sale of land descends to his heir instead of to the personal representative, and for many purposes is considered as if it were a right in real estate.<sup>87</sup>

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<sup>83</sup> Coulter, J., in *Foster v. Harris*, 10 Pa. 457 at 459 (1849).

<sup>84</sup> Coulter, J., in *Foster v. Harris*, 10 Pa. 457 at 459 (1849).

<sup>85</sup> *Rayner v. Preston*, 18 Ch. D. 1, 6; language of Cotton, L. J., quoted in 8 Harv. Law Rev. 117, 118, n. 6; Art. 36, Solic. Journal 775, 784; Langdell, 19 Harv. Law Rev. 236.

<sup>86</sup> 9 Harv. Law Rev. 118, n. 6.

<sup>87</sup> Langdell, 19 Harv. Law Rev. 234.

In the recent case of Brennan's Estate,<sup>88</sup> the purchaser, who had bought at the Orphans' Court sale, died after confirmation and before the delivery of the deed, leaving no real estate and insufficient personal property to complete the sale. His personal representatives secured a rescission of the contract and a substitution of someone else in his place. Upon distribution of his estate it was contended, on behalf of his heirs, that the personal property on hand had been converted into real estate by the agreement to purchase and descended to them. The court held that there was no conversion, and that the personal representatives were entitled to the assets. The decision was correct. Even giving the doctrine of equitable conversion its greatest force in any case of a vendee under articles, it can only apply to his right on the contract, and could, in no event, seize upon or single out the money which he is going to use to complete the purchase and turn that into real estate. Those funds are part of the general corpus of the estate, and the doctrine of equitable conversion cannot in any case apply unless there is a specific *res*. It was not necessary, therefore, to rest the case on the ground that orphans' court sales are made under the control of the court, and do not, therefore, have the same effect as to vendees as do private contracts. The line of cases cited by Mr. Justice Stewart in delivering the opinion of the Supreme Court as to this point, were cases deciding that there was no conversion of the interest of the heirs of the vendor until the sale was actually consummated.

We shall now discuss those cases where the doctrine of equitable conversion is properly applied, and even here we shall find that it is of a much more limited application than is commonly supposed.

The *cestui que* trust is entitled to the trust *res* as it was at the time of the creation of the trust. In most cases of modern trusts there are two interests only to be considered, the interest of the life tenant and the interest of the re-

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<sup>88</sup> 220 Pa. 232 (1908).

mainderman, and this principle holds true as to each one. Where the life tenant dies, a question frequently arises as to the devolution of the income due him at the time of his death,<sup>89</sup> and such income is of the same nature as the property from which it was derived. When the remainderman dies, the question frequently arises as to the devolution of his interest in the principal of the trust.

It is a principle of equity that the trustee can do no act which will change the nature of the trust *res* as against the *cestui que* trust. What this means is, that although the trustee is the *dominus* of the legal title, and can, in point of fact, dispose of the *res*, and, if it is real estate, exchange it for money, or if it is money, exchange it for real estate, his act, which at law is perfectly valid, will not avail in equity against the *cestui que* trust.<sup>90</sup> If the circumstances are such that the *cestui que* trust cannot follow the trust property into the hands of the purchaser, or if he can, he elects to hold the proceeds of the sale in the hands of the trustee, the chancellor will apply the doctrine of equitable conversion and declare that as the sale ought not to have been made in equity, the property will, if the necessity arises, be considered as of the nature that it was before the sale.<sup>91</sup> Thus, if the *cestui que* trust dies either before or after the sale, his interest will devolve as of its original nature.<sup>92</sup> The law on this point is perfectly clear. The difficulty is that there are some cases which countenance an application of the doctrine which, it is apprehended, is unsound on principle.

Where a trustee sues out a mortgage and buys in the

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<sup>89</sup> E. g., see *Bergdoll's Est.*, No. 1, 27 C. C. R. 354 (1903).

<sup>90</sup> The case of conversion of which we are speaking is to be distinguished from the use of the word as implying a wrongful disposition of personal trust property not amounting to an investment of land, for an instance of which see *App. of Franklin's Admr.*, 115 Pa. 534 (1886).

<sup>91</sup> Confer remarks of McMichael, J., in the court below in *Reed v. Mellor*, 122 Pa. 635 at 642 (1888).

<sup>92</sup> *Leiper's Exrs. v. Irvine*, 26 Pa. 54 (1856). If the *cestui que* trust does not die, it makes no difference what the nature of the property is; *Slifer v. Beates*, 9 S. & R. 166 at 184 (1822).

mortgaged premises at sheriff's sale, the land so purchased will, if the *cestui que* trust dies, be treated as personal property for the purposes of devolution under the doctrine of equitable conversion, and it is clear that by no process of reasoning can this equitable conversion of the interest of the *cestui que* trust have any effect on the property in the hands of the trustee or as to third parties. It is the law, however, in Pennsylvania, although objectionable on principle, that the trustee in such case can dispose of the property to third parties, just as if it were personalty.<sup>94</sup> These decisions appear to proceed on the theory that the circumstance that there is an equitable conversion enables the trustee to convey the property clear of the claim of the *cestui que* trust, and yet it is just because the claim of the *cestui que* trust does attach to the property that the doctrine of equitable conversion is applied. There is an earlier decision to the contrary which has been overlooked<sup>95</sup> and which may probably be considered as overruled. To be sure, the case cited in the note was that of a purchase of land, which, however, should make no distinction in principle.

Where, however, the trustee is given power to make a sale or to invest in land, there is no occasion to apply the doctrine of equitable conversion because the settlor has made

<sup>94</sup> *Fell's Est.*, 9 W. N. C. 382 (1880); *Johnson v. Bliss*, 11 W. N. C. 293 (1882); *Yerkes v. Richards*, 170 Pa. 346 at 353 (1895), *semble*. There was probably, however, a direction to reinvest in this case; Dictum, Hawkins, P. J., in *Park's Est.*, 173 Pa. 190 at 194 (1896); the case of *Oeslager v. Fisher*, 2 Pa. 467 (1846), frequently cited in this connection seems to depend on the circumstance that the purchaser was a *bona fide* purchaser for value without notice; see also *Hunter v. Anderson*, 152 Pa. 386 (1893), discussed *post*. Thus, where a donee of the proceeds of land directed to be sold is also a trustee of the proceeds, an election by him to take the land instead of the proceeds does not change the nature of the trust property from personalty to realty, and in accordance with the other cases, it was held that such trustee could sell and dispose of the title to the land just as if it were personal property. *Reed v. Mellor*, 122 Pa. 635 (1888).

<sup>95</sup> *Kaufman v. Crawford*, 9 W. & S. 131 (1845). Where the guardian invested the ward's money in land and the minor was held to have such an estate in the land that the guardian could not subsequently convey the title without the consent and joinder of the *cestui que trust*.

the gift to the *cestui que* trust subject to this right in the trustee to make the exchange, and the *cestui que* trust must be content with the change in the nature of the property, and it therefore devolves at his death as of the nature that it was at that time.

Mr. Langdell<sup>96</sup> calls attention to the case of an authority in a trustee to sell land and invest the proceeds in land, and comes to the conclusion, when the sale is made and before the new investment is made, the proceeds are to be considered as personal property, although the English authorities are to the effect that the proceeds are converted in equity into land from the time the land is sold. Mr. Langdell's reason apparently being that there is no change in the ownership of the property, it remaining in the same *cestui que* trust as it was before. It is believed, however, that the real reason is that the direction to buy or sell is impliedly and necessarily an authority to convert. Where there is a conversion by the trustees under the power, and the *cestui que* trust dies before the sale, his interest devolves as of the nature of the property before the conversion by the trustee.<sup>97</sup> So also where the power has not been exercised at all, the property devolves on the death of the *cestui que* trust as of its former nature.<sup>98</sup> Where, however, there is a power of sale in the trustee and a conversion under the power, and the *cestui que* trust dies after the sale, the proceeds devolve as of the nature of the property after the con-

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<sup>96</sup> 19 Harv. Law Rev. 91, 92, 93.

<sup>97</sup> *Henscy's Est.*, 220 Pa. 212 at 216 (1908). The remarks of Potter, J., that "a sale made by trustees for the convenient management of the trust and not under positive directions in the will, does not alter the course of distribution," may be disregarded as opposed to reason and the weight of authority. What the learned Judge probably meant, having in view the facts of the case before him, was that a sale under discretionary power does not work a conversion as to an interest vested before the sale, the owner of which has died. That such a sale does work a conversion as to the interest of a person dying after the sale is beyond question under authority and principle. *Page's Est.*, 75 Pa. 87 (1874); *Bergdoll's Est.* (No. 2), 27 C. C. R. 354 (1902); *Wood's Est.*, 9 C. C. R. 429 (1891); s. c. 20 Phila. 107; County Court report is much better.

<sup>98</sup> *Bergdoll's Est.* (No. 1), 27 C. C. R. 354 (1902).



version; generally personal property.<sup>99</sup> A different conclusion, however, was reached in the case of a purchase of land by a trustee under a power.<sup>100</sup> Why there should be this distinction between the case of a purchase of land and a sale of land, is difficult to understand. No reason is given in the cases.

Where a ground rent was paid off, the trustees having power to convert, the court held that as the payment was due to an act of a stranger and did not depend on the intention of the trustees or the testator, it was of no effect as to the *cestui que* trust, and as he probably, although not so stated in the report, died after the ground rent was paid off, it was held that the proceeds devolved as real estate,<sup>101</sup> but that the proceeds passed as personalty from the *cestui que* trust, the temporary quality of real estate having ended with the first devolution.<sup>102</sup> But if the sale is made with the consent of the *cestui que* trust, the case will be the same as a sale under the power.<sup>103</sup>

<sup>99</sup> *Ingersoll's Est., Maury's App.*, 167 Pa. 549 (1895). The remarks, however, of Mitchell, J., at p. 550, that the conversions under the power were actual and legal, does not altogether touch the point. The conversions, if made, whether made under the power or not, would be actual, and, in the sense that they were conversions of the legal title, would be legal. The presence of the power did not add to their actuality; that power alone prevented the application of the fiction that there had been no conversion. The learned judge probably meant that the conversions were considered as to have taken place as to the *cestui que* trust, and were legal in the sense that they were lawful. *Lackey's Est.*, 149 Pa. 7 (1892), the sale here was made with the consent of the *cestui que* trust as provided in the deed of trust. *Page's Est.*, 75 Pa. 87 (1874), is obscure on this point. *Rose's Est.*, 6 C. C. R. 109 (1888), s. c. 45 L. I. 266, 19 Phila. 98. In *Leiper's App.*, 35 Pa. 420 (1860), it appeared that the trustees of the deceased *cestui que* trust had, under authority of the legislature, conveyed the land to a corporation and received in return stock which they were to hold on the same trusts as they did the land. The executor of the deceased *cestui que* trust received the stock, and it was held that the proceeds of the sale of a portion thereof were to be distributed as personalty. This decision is correct because the land was lawfully converted under the act of the legislature.

<sup>100</sup> See *Ingersoll's Est.*, 3 D. R. 399 (1894), s. c. 15 C. C. R. 19, 36 W. N. C. 249, 251.

<sup>101</sup> *Ingersoll's Est., Lindenberger's App.*, 167 Pa. 550 (1895).

<sup>102</sup> *Ingersoll's Est., Lindenberger's App.*, 167 Pa. 550 (1895).

<sup>103</sup> Confer *Leiper's Exrs. v. Irvine*, 26 Pa. 54 (1856), in which, however, the point was not raised.

In some cases the doctrine is not involved although so supposed by the court. Thus, in *Hunter v. Anderson*,<sup>104</sup> the creditors of A agreed among themselves that two of them should purchase A's real estate at sheriff's sale and hold same in trust for the benefit of A's creditors. The purchase was made at the sale. The agreement of trust directed the trustees to make a sale as early as practicable for the purpose of converting the same into money, and authorizing them to convey the title without liability on the part of the purchaser to see to the application of the purchase money. One of the trustees died, and the purchaser from the surviving trustee refused to take title on the ground that, *inter alia*, the conveyance would not divest judgments against the *cestuis que* trustent or the dower of their wives. The Supreme Court, in an opinion by Paxson, C. J., held that the title offered was good and marketable, on the ground that the directions to make a sale in the deed of trust worked a conversion, and that since the subject matter offered for sale was personal property, the contentions of the purchaser were not well founded. It was entirely unnecessary to drag in the doctrine of conversion because the trustee had full power to dispose of the legal title, discharged of the claim of the *cestuis que* trustent, and even if the subject matter were considered as real estate, the title would be good because, under that power, he could obviously divest the dower right of the wives of the *cestius que* trustent and the lien of the judgments, as the rights in such case could rise no higher than the right of the *cestui que* trust, and the claim would be solely upon the proceeds of the sale in the hands of the trustees. Furthermore, the doctrine of equitable conversion was misapplied because even if there is a conversion in equity, the fact remained that the property in question was real estate. As the fiction is to be carried no further than necessary, it cannot properly operate as to third parties. In a number of cases where there was a sale under a power, the court said that the

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<sup>104</sup> 152 Pa. 386 (1893).

nature of the property was changed, but the remarks were *dicta* and unnecessary to the decision of the case, because no question as to the nature of the property was before the court.<sup>105</sup> In like manner, the doctrine of equitable conversion was not involved in a number of other cases because the property was actually sold before the question arose.<sup>106</sup>

Where there is a trust created to buy or sell land, the *cestui que* trust has an equitable interest in the performance of the trust, and the court will, in aid of the interest, apply the doctrine of equitable conversion. This case is to be distinguished from that of the *cestui que* trust of a continuing trust, the distinction being that here the whole trust is embraced in the direction to buy or sell, and that being accomplished, the trust is at an end, whereas, in the first case, the trust continues in existence for a period of time fixed by the terms of the gift and independently of any power to buy or sell that may be inserted.

Where there is a trust to sell land, the *cestuis que* trustent are entitled to the proceeds and their interest before the sale takes place, is under the doctrine of equitable conversion to be considered and treated as personal property. Where there is a trust to buy land, the interest of the donees or *cestuis que* trustent will, between the time of the gift and purchase of the land, be considered as real estate, even though the funds in the hands of the trustee are, in point of fact, personal property.<sup>107</sup> The principle with respect

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<sup>105</sup> E. g., *Marshall's Est.*, 147 Pa. 77 at 81 (1892).

<sup>106</sup> E. g., *App. of the City of Phila.*, 112 Pa. 470 (1886).

<sup>107</sup> The case of a direction to lay out money in land is very rare in Pennsylvania. For examples, see *Becker's Est.*, 150 Pa. (1892); *Ross v. Drake*, 37 Pa. 373 (1860), and confer *McCullough v. Johnetta Coal Co.*, 210 Pa. 222 (1904), where, however, no question as to equitable conversion was raised. It may not be without interest in this connection to call attention to the language of Sir Thomas Sewell in the case of *Fletcher v. Ashburner*, 1 Bro. C. C. 497 (1779), where he said that "The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land." The different practice in Pennsylvania is the result of the changed attitude of the community towards the desirability of investments in land.

to each of these two cases is the same,<sup>108</sup> with this difference, however, that where there is a direction to lay out money in land for the benefit of two or more persons, either one of the two can take his share of the money without disturbing the right of the other to have his share laid out in land; that is, either one can elect to take the money as money against the will of the other. Where, however, there is a direction to sell land and divide the proceeds or lay out the proceeds in investments, the case is different. Here, owing to the impartible nature of the land itself, neither of the donees can, in the case of two or more prevent a sale or elect to take the land in lieu of money, without the consent of the others. The trust may be created by deed *inter vivos* or by last will and testament. Few Pennsylvania cases have been found of such a trust created by deed involving the application of the doctrine of equitable conversion.<sup>109</sup> In most cases of a trust by deed a continuing trust is created, the application of the doctrine of equitable conversion to which has already been discussed.<sup>110</sup> The trust is created by a direction to sell, and as there can be no trust unless there is someone to enforce it, or, in other words, there is a definite *cestui que* trust, it follows that there must be some persons who are entitled to the proceeds of the sale or a part thereof under the terms of the gift. The donee is not entitled unless the

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<sup>108</sup> See, however, *Ingersoll's Est.*, 167 Pa. 550 (1895). Note 100 *ante*; *Kaufman v. Crawford*, 9 W. & S. 131 (1845), note 95 *ante*.

<sup>109</sup> E. g., *Dodson's Est.*, 11 Phila. 81, s. c. 32 L. I. 218, 1 W. N. C. 484. In *Bleight v. Bank*, 10 Pa. 131 (1848), there was a conveyance of certain real estate in trust with power in the trustee to sell, the income to be paid to A for life, at her death to be distributed among the grantors. Before the death of the life tenant, one of the grantors mortgaged her share in the premises, and the life tenant then dying, the purchaser at sheriff's sale under proceedings on the mortgage filed a bill in partition which was allowed. The trust was at an end, and the purchaser at the sale could maintain partition on either his equitable or his legal title, whichever it was considered as having, and there was no question of equitable conversion involved in the case. As this case is very frequently cited under the doctrine of equitable conversion, it is important to point out its utter irrelevancy to the subject.

<sup>110</sup> Confer, *Hunter v. Anderson*, 152 Pa. 386 (1893), which has been discussed, n. 104 *ante*.

terms of the gift are mandatory. It is not therefore, that there is a direction to sell but that there is a gift of the property on such terms that there is some one or more persons who are entitled in equity to the proceeds of the sale and who can consequently compel a sale.

The owner of real estate may authorize or direct the sale of his land after his death only for the purpose of (1) making some disposition of the proceeds of the sale or some part thereof; (2) satisfying some charge or encumbrance which may be already existing, created by law or created by the will, or (3) as ancillary to a trust of the property.<sup>111</sup> Unless, therefore, there is a direction to sell for one of these purposes, there can on principle be no equitable conversion.<sup>112</sup>

There is, however, an important distinction between the case of a naked direction to sell and a gift in trust with direction to sell. A naked direction or power to sell is where there is no devise of the legal title to the donee of the power, in which case the legal title is either in the heir under the intestate laws or in a devisee under the will. The ownership of the property, therefore, is in the heir or devisee subject to the power, whereas, in the case of a devise upon trust to sell, the legal title is in the donee of the power who holds it upon the trust declared in the direction to sell. As to the donees of the proceeds of the sale, there is no distinction between the two cases. There is, however, a slight difference in the principle involved in the disposition of so much of the proceeds as are not disposed of by the power.

Whenever, therefore, there is a gift of the legal title with a trust to sell, and a failure to dispose of the proceeds in part or in full, there is a resulting trust to the heir of the undisposed of proceeds<sup>113</sup> according to the principle of

<sup>111</sup> See Langdell, 18 Harv. Law Rev. 20.

<sup>112</sup> Where the direction is nugatory, there is no equitable conversion. See *Luffberry's App.*, 125 Pa. 513 (1889), *semble*, discussed n. 118 *post*.

<sup>113</sup> *Wilson v. Hamilton*, 9 S. & R. 424 (1825); *Tinney's Est.*, 6 D.

a resulting trust,<sup>115</sup> and the doctrine of equitable conversion is not involved at all.

In the case of a naked direction to sell, the title is in the heir, subject to the exercise of the power, and the direction is to sell property which belongs to him. The interest of the heir, therefore, in the undisposed part of the proceeds is that of owner, and the share is payable to him as such<sup>116</sup> without the necessity of resorting to the doctrine of equitable conversion. If the heir dies before the sale, his heir then becomes the owner and entitled to the proceeds. In such case, the land as we have already noticed, descends before the sale. There are several cases which require some attention in this connection.

In Evans's Appeal,<sup>117</sup> there was a naked direction to sell real estate and a gift of the proceeds to a charity, which gift was void because the testator died within one calendar month of the date of his will. As there was no devise of the real estate, the title descended to the heirs. This, therefore, was a clear case of a naked direction to sell, and no effective gift of the proceeds. The Supreme Court, however, in an opinion by Read, J., said that the naked direction to sell absolutely converted the real estate of the decedent into personal property, although the remarks were unnecessary to the decision of the case which arose on an application by some of the heirs-at-law to prevent the ex-

R. 765 (1897, case obscure, badly reported. Although Duncan, J., in *Wilson v. Hamilton*, 9 S. & R. 424 (1825), said the question was of some difficulty, and Rogers, J., in *Burr v. Sim*, 1 Whart. 252 at 263 (1835), said that the interest results as personalty.

<sup>115</sup> See Foulke, Rule against Perpetuities in Penna., Sec. 151.

<sup>116</sup> *Worsley's Est.*, 4 D. R. 177 (1895), s. c. 16 C. C. R. 323. In *Shedden's Est.*, 210 Pa. 92 (1904), the testatrix directed her real estate to be sold, and disposed of one-half of the proceeds and made no disposition of the other half. The property was sold under the power, and it was held that the *cestui que* trust of one-half was, of course, clearly entitled to her one-half of the proceeds, and that there was an intestacy as to the other half, which was to be distributed to the testatrix's heir. The heir, of course, was the owner of one-half of the property directed to be sold, and as such owner, was entitled to one-half of the proceeds, irrespective of any doctrine of equitable conversion.

<sup>117</sup> 63 Pa. 183 (1869).

ecutors from selling the land. As it appeared the sale was necessary for the payment of debts and legacies, the court was clearly right in saying that the heirs had no standing to interfere with the discretion of the executors in the matter, although in reaching that result it is difficult to see how the doctrine of equitable conversion was involved at all.

In *Lufberry's Appeal*,<sup>118</sup> there was a naked direction to sell real estate and divide the proceeds among certain charities, which latter gifts failed because the will was not executed within one calendar month of the decedent's death. It was held that the title descended to the heirs-at-law, and that the personal representatives had no standing to compel the executors to sell. The opinion of Hanna, P. J., in the court below, is not altogether clear. It seems that the learned judge thought that the title descended to the heirs because there was no necessity for the conversion, whereas, it is apprehended the true principle is that the title descended to the heirs at once, and no one being entitled to the proceeds of the sale, the power became nugatory and the title remained just where it was before, in the heirs. In no event is it conceived that the doctrine of conversion figured in the question. Whether a certain person can compel a sale by an executor can never depend on whether the interest is realty or personalty.

In *Adams's Estate*,<sup>119</sup> the testatrix provided as follows: "Eighth. In order to pay any of my debts or any of the aforesaid legacies, I authorize, empower and direct my executors hereinafter named to sell, either at public or private sale, my house and lot of ground, No. 1739 Latona Street, to make, execute and deliver unto the purchaser or purchasers thereof all necessary deeds of conveyance, and without any liability on the part of the purchaser to see to the application of the purchase money." The executor undertook to sell this property, and the heirs-at-law objected to the sale, and applied for an injunction to restrain the same.

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<sup>118</sup> 125 Pa. 513 (1889).

<sup>119</sup> 148 Pa. 394 (1892).

While the proceedings on that were pending, the executor's account was filed, and it appeared that there was not enough personal property to pay all the debts and legacies, but one of the heirs, who presented a claim for a certain sum, offered to abate his claim to such an extent that the personal property would be sufficient to pay the debts and legacies, thereby obviating the necessity of selling the premises for that purpose.<sup>120</sup> The court *in banc* enjoined the executor from selling the land, holding that the same remained the property of the heirs and that there was no equitable conversion. This decree was reversed by the Supreme Court on appeal, and although there was a motion for reargument, the court adhered to their opinion which was clearly erroneous. The case of *Ackroyd v. Smithson*,<sup>121</sup> was not in point because that was a gift of the entire legal title upon trusts, some of which failed; whereas, in this case, the title descended to the heir subject only to the naked power of sale. The Supreme Court overlooked the circumstance that the residuary gift applied only to the personal property, and that there was no disposition of the real estate except under the power, and as the proceeds must have gone to the heir less the debts and legacies, it seems too plain for argument that the heirs could by paying the debts and legacies prevent the sale.

It is clear from the cases which we have just discussed that the Act of February 24, 1834,<sup>122</sup> has no effect on the legal title as between the executor and heir or devisee, what-

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<sup>120</sup> That the heir can do this see remarks of Rogers, J., in *Burr v. Sim*, 1 Whart. 252 at 262 (1835), and Duncan, J., in *Wilson v. Hamilton*, 9 S. & R. 424 at 431 (1825).

<sup>121</sup> 1 Bro. Ch. Cases, 503.

<sup>122</sup> Sec. 13, P. L. 70. The provisions of the act are as follows: "The executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interest therein, and have the same powers and authorities over such estate, for all purposes of sale and conveyance, and also of remedy by entry, by action, or otherwise, as if the same had been thereby devised to them to be sold, saving always to every testator his right to direct otherwise."



ever effect it may have between the executor and third persons.<sup>123</sup>

The next point is as to the application of the doctrine of equitable conversion to the right of the donees in the proceeds of the sale. The doctrine is applicable, if it is applicable at all, only between the time of making the gift and the time of the sale of the property, and as we have already observed, there is no distinction in this connection between the case of a naked power of sale and a gift in trust to sell. Therefore, from the time of the taking effect of the will until completion of the sale, the interest of the donees is a right to the proceeds of the sale, and is therefore considered personal property by the doctrine of equitable conversion, although, in point of fact, the property itself is real estate.<sup>124</sup> Consequently, the interest of the donee is subject to attachment under the Acts of July 27, 1842,<sup>125</sup> and April 13, 1843,<sup>126</sup> and the proceeds of the sale, when made, are to be paid to the attaching creditors in the order of their priority, whether served before the sale or not.<sup>127</sup> After the sale, the proceeds are to be distributed to the assignee and not to the judgment creditor.<sup>128</sup> So, also, a judgment creditor of the donee on a judgment entered before the sale has no lien on the proceeds of the sale.<sup>129</sup> In like manner, when

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<sup>123</sup> Confer *Cobb v. Biddle*, 14 Pa. 444 (1850); *Cobel v. Cobel*, 8 Pa. 342 (1848); *Blight v. Wright*, 1 Phila. 549 (1853); s. c. 12 L. I. 62; *Est. of John Myers*, 9 Phila. 310 (1872).

<sup>124</sup> It is true that it is sometimes said in these cases that there is a partial conversion or a conversion only in so far as the will requires. As to the interest of the heir there is no conversion until the sale, and then his entire interest is changed into money by an actual conversion. As to the donees of the proceeds of the sale there is an equitable conversion of their entire interest until the sale takes place, and after the sale the proceeds are actually personal property, and there is therefore no occasion to apply the doctrine of equitable conversion.

<sup>125</sup> P. L. 436.

<sup>126</sup> P. L. 235.

<sup>127</sup> *Weeter's Est.*, 21 S. C. 241 (1902); see *Fenton v. Fisher*, 106 Pa. 418 (1884), the law was formerly otherwise; see *Hess v. Shore*, 7 Pa. 231 (1847).

<sup>128</sup> *Stallman's Est.*, 13 C. C. R. 111 (1893).

<sup>129</sup> *Allison v. Wilson*, 13 S. & R. 330 (1925); this case obscurely reported.

the donee dies before the sale, the proceeds, when the sale is made, are to be distributed as personal property.<sup>130</sup> For the same reason, the donee may transfer his interest by parol, as the Statute of Frauds does not apply.<sup>131</sup> After the sale has taken place, the proceeds are in fact personal property and treated as such.<sup>132</sup> In like manner, where there is a direction to sell which will cause an equitable conversion, the words of limitation disposing of the proceeds are to be construed as limitations of personal property.<sup>133</sup>

It is clear, however, that there is a trust, and the donees as *cestui que* trust, whether their interest is realty or personal property, have no power whatever to deal with the legal title to the land or encumber it in any way,<sup>134</sup> and in reach-

<sup>130</sup> *Parkinson's App.*, 32 Pa. 455 (1859).

<sup>131</sup> *Mellon v. Reed*, 123 Pa. 1 (1888); Parol Partition, *Howell v. Mellon*, 189 Pa. 169, Dean, J., at 177 (1899).

<sup>132</sup> *Laird's App.*, 85 Pa. 339 (1877); *Bright's App.*, 100 Pa. 602 (1882); *Schrack's Est.*, 9 D. R. 149 (1900); *Krause's Est.*, 14 D. R. 765 (1905); *McClure's App.*, 72 Pa. 414 (1872).

<sup>133</sup> *Eby's App.*, 84 Pa. 241 (1877); *Pyle's App.*, 102 Pa. 317 (1883), *semble*; remarks of Gordon, J., in *Muhlenberg's App.*, 103 Pa. 587 at 591 (1883); *Dull's Est.*, 222 Pa. 208 (1908). Even though the words do not amount to an equitable conversion in the testator's disposition of the property in its converted shape, the proceeds are, when the sale is made, to be distributed, considering the limitations as personal property; Penrose, J., in *Heiss's Est.*, 18 Pa. 22 at 25 (1886). If, however, the testator disposes of the proceeds in a converted shape, there is probably room to infer an implied direction to sell, and the case is, therefore, one of an equitable conversion. *Klotz's Est.*, 190 Pa. 152 (1899).

<sup>134</sup> Mortgage void as to legal title, *Gray v. Smith*, 3 Watts, 289 (1834). Conveyance of grantor's real estate does not include the land directed to be sold, *Willing v. Peters*, 7 Pa. 287 (1847). Land is not bound by the lien of a judgment against one of the donees, *Allison v. Wilson*, 13 S. & R. 330 (1825); *Roland v. Miller*, 100 Pa. 47 (1882), *semble*; *Jones v. Caldwell*, 97 Pa. 42 (1881); *Brolasky v. Galley's Exrs.*, 51 Pa. 509 (1866); purchaser at sheriff's sale takes no title. A judgment creditor who buys the interest of the legatee in the land at sheriff's sale under his judgment cannot succeed in an action of *assumpsit* against the executor for the amount of the legacy, *Morrow v. Brenizer*, 2 Rawle. 185 (1828). A donee cannot bring ejectment against a purchaser from the executor, *Silverthorn v. McKinster*, 12 Pa. 72 (1849). The property is not subject to dower of the wife of a donee, *Willing v. Peters*, 7 Pa. 287 (1847), and the interest of the donee is not liable to a sale by the sheriff on a *fi. fa.*, *McClellan's Est.*, 158 Pa. 639 (1893). For the same reason the donees cannot maintain partition of the unsold land, *Severn's Est.*, 211 Pa. 65 (1905); *Keim's Est.*, 201 Pa. 609 (1902); *Rankin's Est.*, 13 C. C. R. 617 (1893); *Fahnestock*

ing the conclusions indicated in the cases cited in the note the doctrine of equitable conversion is not involved in the slightest way, these cases all being well decided upon the principle of the law of trusts. Any attempt on the part of the donees, therefore, to deal with their interest as interest in the land must be valid, if valid at all, as equitable assignment of their interest as *cestui qui* trust in the proceeds.<sup>135</sup>

It is also perfectly clear that no occasion arises in any case to resort to the doctrine of equitable conversion unless a question is before the court involving the question whether the property is realty or personalty. In many cases there was a direction to sell,<sup>136</sup> since, however, in none of these cases did any circumstances arise calling for the application of the doctrine, the remarks of the judges as to the same were mere *dicta*.

There are, however, several cases in which it is apprehended that the doctrine of equitable conversion has been given an effect which is inconsistent with principle. These cases will now be discussed.

In *Leiper v. Thomson*,<sup>137</sup> a judgment creditor of the decedent in a sale of the decedent's real estate, failed to notify

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*v. Fahnestock*, 152 Pa. 56 (1892). Where, however, the equitable conversion is only as to a part interest in the land, the other tenant in common is not, therefore, deprived of the right in partition, *dictum* Thompson, J., in *Sill v. Blaney*, 159 Pa. 264 at 271 (1893); *Reid v. Clendenning*, 193 Pa. 406 at 417 (1899) *semble*. The executors or trustees are the ones to maintain partition with the other tenants, *Ramsey v. Ramsey* (No. 2), 226 Pa. 252 (1910).

<sup>135</sup> Mortgage valid as an equitable assignment, see *dictum*, Williams, J., in *McClellan's Est.*, 158 Pa. 639 at 644 (1893); *Bailey v. Allegheny Nat'l. Bank*, 104 Pa. 425 (1883). Sale of deceased donee's interest under order of court; *Horner's App.*, 56 Pa. 405 (1867). So also a conveyance as land of the shares in the proceeds of lands directed to be sold passes the interest in the proceeds, *Costen's App.*, 13 Pa. 292 (1850).

<sup>136</sup> E. g., *Davis's App.*, 63 Pa. 348 (1869); *Evans's App.*, 63 Pa. 183 (1869), where the question was as to whether the executor had power to sell; *Dundas's App.*, 64 Pa. 325 (1870), question involved in this case as to conduct of trustee in making sale, see language of Agnew, J., at p. 331, as to question involved; *Marshall's Est.*, 147 Pa. 77 (1892); *Fuller's Est.*, 225 Pa. 626 (1909); *Espenship's Est.*, 13 C. C. R. 294 (1893), see language of Ashman, J., in *Arrotti's Est.*, 20 Phila. 118 (1891), s. c. 48 L. I. 136, 9 C. C. R. 535.

<sup>137</sup> 60 Pa. 177 (1869).

the widow and heirs as required by the Act of February 24, 1834.<sup>138</sup> The court held that the omission did not invalidate the sale because there was a direction to sell which caused an equitable conversion, and the real estate being thus converted into personal property, the act did not apply. It is apparent, however, that this is giving the doctrine an effect between the trustee and third parties, whereas it is only properly applicable as to the interests of the donee in the proceeds of the sale.

Where a decedent owns real estate situate in another state, it is clear that the property is not subject to the collateral inheritance tax laid by the Commonwealth of Pennsylvania on estates or interests within the state passing from the decedent.<sup>139</sup> Suppose, however, the testator has directed the sale for a lawful purpose.<sup>140</sup> The interest of the donees in the proceeds of the sale of the land is personal property in equity from the time of the testator's death until the time of the sale and personal property in fact after the sale. Therefore, it is said that the property situate in the other state, if unsold, or its proceeds, if it has been sold, will be subject to the Pennsylvania collateral inheritance tax.<sup>141</sup> In such case, expenditures on account of the real estate by the executors are proper charges against the personal estate.<sup>142</sup> Strictly speaking, however, it is not the real estate which is subject to the tax, but the interest of the donees, and if the donees reside in another state, it is difficult to see how the collateral inheritance tax can be col-

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<sup>138</sup> Sec. 34, P. L. 79.

<sup>139</sup> *Commonwealth v. Coleman*, 52 Pa. 468 (1866); *Drayton's App.*, 61 Pa. 172 (1869); *Dalrymple's Est.*, 215 Pa. 267 (1906).

<sup>140</sup> The question whether the direction is such as to produce an equitable conversion should be determined by the law of the foreign state, *Hough's Est.*, 3 D. R. 187 (1894), although this point has never been noticed in the other cases. Perhaps in those cases the law of the foreign state was the same as that of Pennsylvania.

<sup>141</sup> *Miller v. Commonwealth*, 111 Pa. 321 (1885); *Vanuxem's Est.*, 212 Pa. 315 (1905); *Dalrymple's Est.*, 215 Pa. 367 (1906); *Williamson's Est.*, 153 Pa. 508 (1893); *Lewis's Est.*, 203 Pa. 211 (1902); see note 19 *Harv Law Rev.* 201.

<sup>142</sup> *Tasker's Est.*, 215 Pa. 267 (1906).

lected, as the interest then passes from one foreign state to another.<sup>143</sup>

Conversely, where the decedent lives outside the state, owning real estate in Pennsylvania, and there is an equitable conversion under his will, the real estate in Pennsylvania is not subject to the collateral inheritance tax, as it is considered as personal property and its *situs* is at the domicile of the decedent.<sup>144</sup> This, however, is open to objection, for the doctrine of equitable conversion applies only to the interest of the donees, and as to the State of Pennsylvania the case is that of an active trust superimposed on the legal title to Pennsylvania lands, and there is no reason why the trustee should not bear the burden of the tax just as in other cases of trusts, irrespective of the *situs* of the equitable interest.

Where, however, the direction is to sell at a future time, as at the death of the life tenant or at the expiration of a term, say, of twenty years, it has been decided that there is no equitable conversion at the testator's death for the purpose of assessing the collateral inheritance tax on property outside the state.<sup>145</sup> Since, however, in this case, just as in any other case of a direction to sell, the interest of the donees is personal property in equity until the time of the sale, it is difficult to see how any such distinction can be drawn. It is true that the actual conversion is not to take place until the time fixed in the future, but that circumstance has no effect on the application of the doctrine of equitable conversion, and it is on the application of that doctrine that the liability to the tax is sustained.

If an actual conversion of the decedent's property takes place within the two years, the debts are payable out of the proceeds, and the personal representative is liable until he has accounted therefor, even though the two years have

<sup>143</sup> Confer *Hale's Est.*, 161 Pa. 181 (1894).

<sup>144</sup> *Coleman's Est.*, 159 Pa. 231 (1893); *Schoenberger's Est.*, 221 Pa. 112 (1908); *Lamberton's Est.*, 40 S. C. 548 (1909).

<sup>145</sup> *Hale's Est.*, 161 Pa. 181 (1894); *Handley's Est.*, 181 Pa. 339 (1897).

expired.<sup>146</sup> Since personal property of the decedent is liable for the payment of all debts until they are barred by the Statute of Limitations, it has been supposed that where there is a direction to sell, the doctrine of equitable conversion turns all the real estate directed to be sold into personal property as to the decedent's creditors, who lose their lien and can resort to the fund until it has been accounted for by the executor, whether sold within the two years' period or not.<sup>147</sup> There is an objectionable extension of the doctrine to third parties as to whom, no matter what the relations are between the trustee or executor and beneficiaries, the property should be considered as of its real nature.

The notion is frequently advanced that the question whether there is an equitable conversion depends on whether the descent is broken,<sup>148</sup> and the provisions of the Act of 1834, giving the executor the title in case of a naked power of sale, are sometimes adverted to as affecting the question. We have already shown that there is an equitable conversion only as to the interest of the donees until the sale has taken place, and then only when there is a direction to sell for a lawful purpose. It is clear that it is immaterial whether the title is in the heir or devisee or in the executor, as the right of the donee to compel a sale upon which the equitable conversion depends arises from the direction to sell and not from the disposition or failure to dispose of the legal title. The provisions of the Act of 1834, therefore, are clearly immaterial.<sup>149</sup>

Where the legal title vests in the donees of the proceeds of the sale, as will happen where there is a gift of the proceeds under a naked direction to the heirs, or where the land

<sup>146</sup> *Arndt's App.*, 117 Pa. 120 (1887).

<sup>147</sup> *McWilliam's App.*, 117 Pa. 111 (1887), *semble*; no discussion; *Mustin's Est.*, 194 Pa. 437 (1900).

<sup>148</sup> See language of Bell, J., in *Silverthorn v. McKinster*, 12 Pa. 72 (1849); Agnew, J., in *Dundas's App.*, 64 Pa. 325 at 330 (1870); Ludlow, J., in *Smith's Est.*, 4 Phila. 181 (1860); Thompson, J., in *Brolasky v. Galley*, 51 Pa. 509 (1866); Read, J., in *Parkinson's App.*, 32 Pa. 455 at 458 (1859).

<sup>149</sup> See language of Woodward, J., in *Chew v. Nicklin*, 45 Pa. 84 at 87, 88 (1863).

is devised to the donees with a naked direction to sell and pay over the proceeds, there is no room for the application of the doctrine of equitable conversion.<sup>150</sup> The parties have an equitable right against themselves, as the chancellor will not interfere except where there is a duty owing from one person to another. A direction to sell superimposed on a devise in fee is nugatory. This principle was, however, overlooked by the Supreme Court in a number of earlier<sup>151</sup> and one later<sup>152</sup> case so that no statement can be ventured as to the law. We shall conclude this discussion by briefly calling attention to the distinction between an equitable charge and a direction to sell causing an equitable conversion. Since the proceeds of the sale of land cannot be ascertained until the sale is actually made, it follows that a gift of the proceeds of any part or any interest thereon cannot be carried into effect until the sale is made. Such a gift, therefore, necessarily requires a sale. A charge upon land, however, must always be for a sum certain and a sale of the land is never necessary to its discharge. Furthermore, the owner can always get rid of the charge by the payment of the money. He is the absolute owner of the land, subject only to the encumbrance, whereas, in the case of the gift of the proceeds, the party holding the legal title only owns such part of the proceeds which are not disposed of. Since, therefore, the right of the owner of the charge is only to a sum of money, it can be discharged by the payment of money. A sale of the land is not, therefore, necessary, and the doctrine of equitable conversion is not applicable, and when the land is sold, the owner of the charge has no ownership in the proceeds; he is entitled to the amount of the charge and nothing more. It is true the owner

<sup>150</sup> *Yerkes v. Yerkes*, 200 Pa. 419, Mitchell, J., at 425 (1901); Houston, J., in *Morrow v. Brenzier*, 2 Rawle, 185 at 193 (1828); confer, *Glentworth's Est.*, 221 Pa. 329 (1908).

<sup>151</sup> *Allison v. Wilson*, 3 S. & R. 330 (1825); Laird's App., 85 Pa. 339 (1877), *Jones v. Caldwell*, 97 Pa. 42 (1881); *Bright's App.*, 100 Pa. 602 (1882); *Roland v. Miller*, 100 Pa. 47 (1882); *Thomman's Est.*, 161 Pa. 444 (1894).

<sup>152</sup> *Severn's Est.*, 211 Pa. 65 (1905).

of the charge can require the sale of the land in order to satisfy the charge, not, however, because of the direction to sell, but because of the lien of the charge. Consequently, as the debts have an independent legal existence at law and equity, a devise to sell for the payment of debts authorizes a sale only of so much of the land as is necessary to pay the debts, and cannot, therefore, cause an equitable conversion of the surplus over and above the amount of the debts.<sup>153</sup>

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PHILADELPHIA, April 19, 1910.

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<sup>153</sup> Langdell, 19 Harv. Law Rev. 87, 88.