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Real Property-Tenancy in Common-Life Interest-Judicial Sale-Partition

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REAL PROPERTY—TENANCY IN COMMON—LIFE INTEREST—JUDICIAL SALE
—PARTITION.—The appellants, tenants in common with appellees' decedent, holder of a life interest, in a partition proceeding, prayed for a sale of realty, alleging its indivisibility. Appellees' decedent, prior to her death, admitted its indivisibility and asked that the present value of her life estate be determined upon the sale of the realty. On June 24, 1925 the court ordered the realty to be sold. One piece of property was sold in November 1925; the other, a farm, was not sold until September 1928. Appellees' decedent filed a petition December 6, 1928, asking the court to determine the present value of her life estate in one-third of the net proceeds of the sale of the realty and for an order directing the commissioners to pay her the amount determined. Appellees' decedent died December 7, 1928. Appellees then filed a similar petition. Appellants filed an answer setting out the death of the appellees' decedent and asserting that her interest, even after the confirmation of the sale, was still realty and terminated at her death. The principal question is—When realty, held by tenants in common, is petitioned to be sold on a partition proceeding does the conversion of the realty into personalty take place on the confirmation of the sale or when the proceeds of such sale are actually distributed? *Held*, that the conversion of the realty into personalty is effected on the confirmation of the sale.¹

Although it seems that the question as to the time of conversion of realty into personalty in a partition proceeding has never been decided in this jurisdiction before the instant case,² yet it has been held that a surviving second wife, without issue, is entitled, on a sale of land in such proceeding, to one-third of the proceeds of such sale, reduced to a sum equal to the present value of her life estate.³

An examination of the authorities reveals conflicting views, as to just when the conversion of realty into personalty is effected on a sale in a partition proceeding. It has been held in England and in some of our jurisdictions that an absolute order of sale within the jurisdiction of the

¹ Watson's Revision of Works Practice and Forms, Watson, B. F., vol. 1, Sec. 543.

² *Buschbaum v. Hale*, Appellate Court of Indiana, July 27, 1932, 182 N. E. 93.

³ *Supra*, note 1.

⁴ *Swain v. Hardin* (1878), 64 Ind. 85; *Russell v. Russell* (1874), 48 Ind. 456; *Coquillard v. Coquillard* (1916), 62 Ind. App. 426, 113 N. E. 481.

court operates as a conversion from the date of the order and before any sale has taken place.⁴ This view represents the extreme view and the one most favorable to the one with a life interest and fixes the earliest possible time of such conversion. In *Foster v. Hilliard*,⁵ it was held that each party is to participate in the proceeds of the sale in proportion to the beneficial interest, which he had in the land at the time of the sale. This view is submitted as the prevailing rule in this country, although most of the decisions are more explicit in their statement of the rule in holding that the conversion from realty to personalty on a sale in a partition proceeding is not effected until the ratification or confirmation of the sale by the court and the compliance by the purchaser with the terms thereof.⁶ There is still another view, which holds that the conversion does not take effect until such proceeds belonging to a co-tenant, are accepted by him as such.⁷ This is the extreme view most favorable to the holder of the remainder in fee and seems to be the most impractical.

What is the law in cases bearing a close analogy? When land is taken under the power of eminent domain, the purchase money is generally considered personalty and belongs to the same person to whom the land belonged when the power of eminent domain was exercised.⁸ The rule of equitable conversion also supports the view that the conversion of realty into personalty is effected on confirmation of the sale. When a vendor contracts to sell land the interests of the parties become fixed. The purchaser becomes the equitable owner at once and the vendor holds the legal title as security for the purchase price.⁹ In *Moore v. Burrows*,¹⁰ this interest of the vendor was described as personal property like a bond, or a mortgage, and that the interest went to his personal representative.

There are some decisions, which state that the proceeds derived from the partition sale, should be treated as land and disposed of in accordance with the respective interests, which the parties held in the land.¹¹ Tiffany,¹² however, interprets these statements to mean that in the distribution of the proceeds of a partition sale, it is to be considered in the light of the parties' interest in the land for the sake of succession and distribution.

⁴ *Hyett v. Mekin* (1875), 25 Ch. 735; *Greenough v. Small* (1890), 137 Pa. 128, 20 Atl. 396; *City of Owensboro v. Hardwick* (Ky.) (1930), 24 S. W. (2nd) 555.

⁵ Federal Cases, No. 4, 972 (1840), 1 Story 77.

⁶ *Newcomer v. Orem* (1852), 2 Md. 297, 56 Am. Dec. 717; *Early v. Dossett* (1876), 45 Md. 462; *McLean v. Leitch* (1910), 152 N. C. 266, 67 S. E. 490; *Joyner v. Futrell* (1904), 136 N. C. 301, 48 S. E. 649; *Albright v. Moeckley* (1930) (Iowa), 230 N. W. 351; *Scott's Estate* (1890), 137 Pa. 454, 20 Atl. 623.

⁷ *Smith v. Bayright* (1881), 34 N. J. Eq. 424; *Turner v. Dawson* (1885), 80 Va. 401; *Weltherill v. Hough* (1894), 52 N.J. Eq. 683, 29 Atl. 592.

⁸ *United States v. Baker* (1910), 183 Fed. 280; *Ametrano v. Downs* (1902) (N. Y.), 62 App. Div. 405, 63 N.E. 340; *Stay v. Stay* (1910), 59 Wash. 651, 110 Pac. 549.

⁹ *House v. Dexter* (1861), 9 Mich. 246; *Downing v. Risley* (1862), 15 N. J. Eq. 93; *Williams v. Haddock* (1895), 145 N. Y. 144, 39 N.E. 825; *Riegelman's Estate* (1896), 184 Pa. 476, 34 Atl. 120; *Coles v. Feeney* (1899), 52 N. J. Eq. 493, 29 Atl. 172.

¹⁰ (N. Y.) (1861), 34 Barb. 173.

¹¹ *Garner v. Wood* (1889), 71 Md. 37, 17 Atl. 1031; *Meeker v. Forbes* (1915), 84 N. J. Eq. 271, 93 Atl. 887; *Riley v. Riley* (1921), 92 N. J. Eq. 465, 113 Atl. 777; *Connole v. Connole* (1923), 49 R. I. 1, 119 Atl. 321.

¹² Tiffany, Real Property, Vol. 1, No. 124, pp. 455-56.

There is left one question. Suppose the commissioner had effected the sale as directed, and the purchaser had complied with the terms thereof, all of which had been approved by the court, and then defaulted, would the commissioner have the power to foreclose and resell the land and treat it as personalty or would there be a reconversion back to realty? Equity has answered this question by holding that if the purchaser defaults, the executor or administrator may foreclose the contract and thereafter sell the land, and administer the proceeds as a part of the vendor's personal estate.¹³

J. H. H.

¹³ *Williams v. Haddock* (1895), 145 N. Y. 144, 39 N.E. 325; *Clapp v. Tower* (1903), 11 N. D. 556, 93 N. W. 862.