
Volume 47
Issue 4 *Dickinson Law Review* - Volume 47,
1942-1943

5-1-1943

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Recommended Citation

George B. Balmer, *An Executor's Authority to Sell Real Estate Under a Discretionary Power of Sale in Pennsylvania*, 47 DICK. L. REV. 193 (1943).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol47/iss4/1>

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Dickinson Law Review

VOL. XLVII

MAY, 1943

NUMBER 4

AN EXECUTOR'S AUTHORITY TO SELL REAL ESTATE UNDER A DISCRETIONARY POWER OF SALE IN PENNSYLVANIA

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Many lawyers and title insurance companies refuse to approve or insure a title which purports to pass by a deed given by an executor under a discretionary power of sale. The authority usually cited for such an attitude is *Eberly v. Koller*.¹ The purpose of this paper is to consider the effect of a discretionary power of sale given in a will to an executor and to determine whether there is any substantial reason why an executor to whom is given such a discretionary power to sell real estate should not be able to transfer good title to real estate of the testator covered by such a power.

We are not concerned in this paper with an equitable conversion of real estate by the will of a decedent. Our discussion is limited to discretionary powers of sale given to an executor where there is no equitable conversion either direct or implied.

As stated by Mr. Justice Paxson in *Hunt's Appeal*²:

"It ought to be settled by this time that, in order to work a conversion, there must be either —

- 1st. A positive direction to sell; or
- 2d. An absolute necessity to sell in order to execute the will; or
- 3rd. Such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money."

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¹209 Pa. 298 (1904) — See the following excellent articles which discuss part of the subject matter of this article: Heisler, Roland C.: "Duration of Testamentary Powers of Sale," Proceedings of Pennsylvania Title Association, 1938, page 33; Mecutchen, Pierce, Esq.: "Titles Under Wills", Legal Intelligencer, Feb. 18, 1939.

²105 Pa. 128, 141 (1884).

This statement of the test as to whether a will works an equitable conversion has been quoted repeatedly by the Courts in Pennsylvania.³ It will be noticed that the second and third of the above tests as to whether a will works an equitable conversion depend upon interpretation and upon a consideration of the situation at the time of the death of the testator or at the time of the execution of the will.⁴ There is no certainty in the application of these two tests and their application may and has differed from case to case with the result that it has been very difficult to apply them definitely. This difficulty, coupled with the oft repeated statement of Mr. Justice Mitchell in *Redding v. Rice*⁵:

"Precedents are of little value in the construction of wills, because when used under different circumstances and with different context, the same words may express different intentions."

leads to a lack of certainty and justifies attorneys and title insurance companies in viewing with hesitancy any determination short of a court decision of whether the provisions of a will come within the second and third tests of equitable conversion above set forth.

There is no doubt that the question of equitable conversion is of importance. Determination of the question of equitable conversion is necessary in order to determine whether debts of a decedent are entitled to payment after the expiration of the statutory period of their lien without the bringing and indexing of a suit in the Court of Common Pleas.⁶ This question is also important in determining whether an inheritance tax may be levied by the state upon the real estate of a resident which real estate is located outside of the state,⁷ or upon real estate of a non-resident when the real estate is located in Pennsylvania.⁸ There are other questions the decisions of which depend upon whether or not the will of the decedent works an equitable conversion.⁹

Our discussion, however, is limited to whether or not the right of an executor to sell real estate of his decedent under a discretionary power of sale in a will depends upon the question of conversion. *Eberly v. Koller*¹⁰ holds

³Vanuxem's Estate, 212 Pa. 315, 318 (1905); Chamberlain's Estate, 257 Pa. 113, 116 (1917); Loew's Estate, 291 Pa. 22, 27 (1927); Suppes's Estate, 322 Pa. 385, 387 (1936).

⁴Hunt's Appeal, 105 Pa. 128, 141 (1884); Chamberlain's Estate, 257 Pa. 113, 115, (1917); Reel's Estate, 272 Pa. 135, 138 (1922).

⁵171 Pa. 301, 306 (1895).

⁶Fiduciaries Act of June 7, 1917, P.L. 447. Sec. 15 (a) as amended by Act of June 7, 1919, P.L. 412, 20 P S 521; Casper's Estate, 206 Pa. 628 (1903); Reel's Estate, 272 Pa. 135 (1922).

⁷Vanuxem's Estate, 212 Pa. 315 (1905).

⁸Chamberlain's Estate, 257 Pa. 113 (1917).

⁹E. g., whether partition may be brought: Severns's Estate No. 1, 211 Pa. 65 (1905); Suppes's Estate, 322 Pa. 385 (1936).

¹⁰209 Pa. 298 (1904).

that it does. This case arose on a case stated to determine whether an executor could make title to real estate. The will contained the following provision:

"I hereby authorize and empower my executors to sell all, or any of my estate, real or personal, not herein specifically bequeathed or devised, either at public or private sale, and to execute and deliver good and sufficient deeds for all real estate sold, for the purpose of executing this will."

President Judge Biddle of the Court of Common Pleas, in a very short opinion, states:

"The said object can be properly accomplished in a proceeding in partition, wherein differences in interest and claims for advancements may be readily adjusted. See *Reid v. Clendenning*, 193 Pa. 406. The will in this instance does not work a conversion."

The Supreme Court affirmed the decree upon the opinion of President Judge Biddle. The theory of the short opinion of the lower court is definitely that in order for an executor to sell real estate under a discretionary power there must exist an equitable conversion. In *Reid v. Clendenning*,¹¹ cited by the lower court, there was no power of sale either discretionary or otherwise. The Supreme Court held that the will and situation in that case did not work an equitable conversion. It is not authority for the effect of a discretionary power of sale.

Another case often cited for the principle that a discretionary power of sale does not enable an executor to convey good title unless there is a conversion is *Kreise v. Cartledge*.¹² This case arose on a petition for an accounting in equity. The real estate in question passed under the will of Thomas Cartledge. The will gave the one-half interest of the decedent in a partnership to his son, Alfred, and provided that the remainder of his estate, both real and personal, should be distributed one-third to the decedent's wife for life with remainder to his daughter and son in equal parts and the other two-thirds to the daughter and son. The will contained a provision giving the executors power "to sell any or all of my real estate at public or private sale upon such terms as they shall deem most advantageous." Among the real estate owned by the decedent was a one-half interest in premises 1514 Chestnut Street, Philadelphia, occupied by the partnership in question. After the death of the testator, the widow and the executors joined with the survivor of the old partnership in executing a lease for the premises to the son of the decedent and the surviving partner who had formed a new partnership. This lease was for a year and contained the provision that it should renew itself indefinitely unless notice of termination was given by either party. After ten years, the mother and daughter asked

¹¹193 Pa. 406 (1899).

¹²262 Pa. 55 (1918).

for an accounting and attempted to make the son who was one of the executors liable for additional rental on the theory that the rental value of the property in question increased greatly during that period and the son made no attempt to terminate the lease or compel the partnership to pay a higher rental. The theory of the mother and daughter was that the son violated his duty as executor. The Supreme Court held that the son was not acting as executor but was acting as agent for the owners of the property. In making this decision, the Court states:

“ consequently, for the present purposes, it must be considered realty. In absence of necessity, such as sale for payment of debts, and on default of express provision in the will, an executor or administrator as such is without authority or control over the realty belonging to the estate. Such property descends directly to the heirs or to the persons designated in the will of testator In this case the will contains a provision authorizing the executors to sell real property belonging to the estate; there is, however, no absolute direction to sell sufficient to amount to a conversion of the realty and no sale has been made, nor did necessity for sale arise. The estate was solvent and the personal property sufficient to satisfy all liabilities. Neither does the will contain a trust, or other provision, whereby it might be inferred the power of sale was intended to continue indefinitely and we find nothing in the case imposing upon defendant the duties or obligations of an executor with reference to the property in question. Under such circumstances, the power of sale must be limited to the ordinary purposes incident to the settlement of the estate and will not be construed as extending the power of the executors over the real estate for an indefinite period: *Penna. Co. for Ins., Etc., App., supra; Eberly v. Koller*, 209 Pa. 298.”

It will be noticed that in this case there was no sale or attempted sale by the executor. Likewise, the widow of the decedent joined in the execution of the lease, she being the person entitled to the income and therefore to that extent the lease was executed by the person having the present right to rents from the the property as real estate. It should also be noticed that the Court among the reasons assigned for holding that the son did not have any duty as executor stated that “no sale has been made.” Although the reasoning of the Court’s opinion seems to be that a discretionary power is limited to purposes incidental to the settlement of the estate, nevertheless the decision can be supported on the ground that pending the exercise of a discretionary power of sale, the real estate remained real estate and thus the devisees had the right to possession and also on the additional ground that the widow in joining in the lease exercised an election to continue to treat the real estate as real estate.

Another case often cited with *Eberly v. Koller* is *Swift's Appeal*.¹³ This case arose on an attempt by the surviving husband of the daughter of a decedent to compel the executors to sell certain real estate. Such daughter of the decedent had herself died subsequent to the decedent's death. The will had given the executors a discretionary power to sell which they did not exercise. The Court held that the petitioner had no right to compel the sale of the real estate. His asserted rights depended upon whether there was an equitable conversion at the time of the death of the decedent and the Court held that there was no such equitable conversion. Therefore, the case merely turns on the question of whether there was an equitable conversion or not and is no authority for the proposition that the executors if they had decided to exercise the discretionary power to sell could not have conveyed title to such real estate.

*Wilkinson v. Buist*¹⁴ holds that in view of the interpretation which the will placed upon the discretionary power of sale, it expired at the death of the wife. The discretionary power there given was in the widest terms but the Court considering the remainder of the will interpreted it to mean that the power of sale existed only until the death of the wife who was the life tenant. The Court, however, in its opinion states as follows:

" . . . but if, on the construction of the instrument, it appears otherwise, and that the testator intended it should be afterwards exercised, the power will of course be upheld, unless it is obnoxious to the rule against perpetuities, or the cestuis que trustent have elected to take the property as it stands: In re Cotton's Trustees, etc., L.R. 19 Ch. D. 624."

*Kolb, Executor, v. O'Hay*¹⁵ definitely holds that a discretionary power to sell in an executor does not give the executor the right to sell unless there is an equitable conversion worked by the will, and although a decision of a lower court, it definitely supports the test laid down in *Eberly v. Koller*.¹⁶

The above cases appear to be the leading ones cited for the principle that a mere discretionary power to sell alone is not sufficient to give the power to an executor to sell the real estate of a decedent.

No reference is made in any of those cases to *Livingood v. Heffner*.¹⁷ There the Supreme Court, through Mr. Justice Clark, states as follows:

"Except as already stated there was certainly no positive direction to sell; it may be that there was no technical conversion of the realty into personalty; this we are not called upon to decide; the question here is one of title, not of distribution;

¹³87 Pa. 502 (1878).

¹⁴124 Pa. 253 (1889).

¹⁵28 Dist. 194 (1918).

¹⁶209 Pa. 298 (1904).

¹⁷9 Sadler 526 (1888).

whether there was or was not a conversion, it is unnecessary to say—if upon a proper construction of the will, the executor was authorized to sell the land

Upon an examination of the whole case we are persuaded that although the testator did not intend to give any absolute direction to sell, he did intend, subject to the restriction stated, to confer a general power; the whole scheme of the will would seem to indicate this purpose of the testator's mind."

The Court there definitely held that a discretionary power to sell, although there was no equitable conversion of real estate, enabled the executor to sell and transfer good title.

In the recent case of *Kemerer v. Johnstone*,¹⁸ the will provided:

"Should I be possessed of any real estate at the time of my death, I authorize and empower my executor hereinafter named to sell all or any part of the same and to give good and sufficient deeds or deeds to the purchasers thereof, and to reinvest the proceeds thereof in approved securities for the use and benefit of the beneficiaries above named."

This case arose in assumpsit on a case stated to test the question as to whether an administrator d.b.n.c.t.a. could give good title under such a discretionary power of sale. The administrator d.b.n.c.t.a. had such a right only if the executor had such a right.¹⁹ No necessity for the sale for the payment of debts existed as all of the debts had been paid. There was a judgment against one of the daughters of the decedent who was given by the will a life estate in a third part of the estate. There was, however, absolutely nothing connected with the will or with the settlement of the estate that required the real estate to be sold but the Court held that the administrator d.b.n.c.t.a. could convey title.

Another recent case directly on the question is *Brinkerhoff v. Martin*.²⁰ In this opinion President Judge Reese of the Court of Common Pleas of Cumberland County goes into the subject in detail and finds that an executor under a discretionary power to sell contained in a will has the right to sell the property. He states, in reference to *Eberly v. Koller*, as follows:

"We fail to see why it was necessary for the Supreme Court to hold in *Eberly v. Koller*, supra, that an executor has no power to sell real estate unless there has been a conversion. It is true that, if there was no conversion (prior to section 30), an executor could not, because of the lien of general debts, convey a 'good' title or a 'clear' title. But this hardly justifies the conclusion that where there was no conversion the executor could convey no title whatsoever."

¹⁸318 Pa. 526 (1935).

¹⁹Fiduciaries Act of June 7, 1917, P. L. 447, Sec. 3 (d), 20 P S 352.

²⁰28 D. & C. 227 (1936).

Section 30 of the Fiduciaries Act of June 7, 1917, P.L. 447,²¹ provides as follows:

"Whenever any person seised of real estate situated in this Commonwealth has died or shall die, having first made and published his last will and testament, wherein said real estate is devised to executors or trustees named therein, in trust, to make sale thereof; or wherein the sale of real estate is authorized or directed, but no person is designated to make such sale, and the executors have complied with the provisions of section twenty-eight, clause (c) of this act; or wherein said executors or trustees are authorized to make sale of said real estate, convert the same into money, and distribute the proceeds of such sale or sales, or any part thereof, or hold the same in trust for any particular purpose, or for the use of any particular person or persons named in said last will and testament, the person or persons purchasing the real estate so sold, from the executors or trustees named in said last will and testament, under the power of sale or direction to sell contained therein, shall take title thereto free and discharged of any obligation to see to the application of the purchase-money."

Certainly this Section of the Fiduciaries Act provides that an executor with a discretionary power of sale has the right to sell the real estate of the decedent covered by the power. However, the previous law was not changed by this enactment²² and, therefore, the law previous to the Fiduciaries Act must have reached the same result. This Section likewise does not cause an equitable conversion of real estate subject to a discretionary power of sale.²³

The usual way in which the question of the power of an executor to sell real estate is tested is in a case stated for the purpose of trying the ability of the executor to vest good title. This is the manner in which the problem arose in *Eberly v. Koller*, *Kemerer v. Johnstone* and *Brinkerhoff v. Martin*, *supra*. The only other method by which the question would likely arise would be in an ejectment proceeding brought by a devisee in a will against the purchaser from the executor under a power of sale or *vice versa*.

There is, however, a line of cases in which the decision reached must be based on the theory that the executor had the ability to transfer title even though there was no conversion. *Cooper's Estate*²⁴ arose on distribution of the estate of a decedent. The proceeds of the sale of real estate were part of the amount for distribution. Certain creditors claimed to share in this fund. The Supreme Court held that there was no equitable conversion and the creditors having lost their liens on the real estate could not participate in the proceeds of the

²¹20 P S 716.

²²*Davidson v. Bright*, 267 Pa. 580 (1920).

²³*Davidson v. Bright*, 267 Pa. 580 (1920); *Copeland v. Hurwitz*, 93 Pa. Super. Ct. 355 (1928).

²⁴206 Pa. 628 (1903).

sale of the real estate. The sale by the executors occurred after the expiration of the two year period which was at that time the statutory period in which suits to preserve liens of debts had to be brought. There was no suggestion in the case that the executor had no right to sell even though the lien of debts had expired. The Court stated that the conversion did not occur until the property was sold. Although in this case, the result would have been the same if the devisees of the real estate had sold it rather than the executor, nevertheless, the Court distributes the proceeds of a sale by the executor and by such distribution at least inferentially approves the sale.

The next step in the line of cases was *Davidson v. Bright*²⁵ in which there was a discretionary power of sale in the executor, acting under which the executor contracted to sell certain real estate of the decedent "free from all encumbrances". The purchaser refused to take title claiming such a sale by the executor did not have the effect of divesting the lien of general or unscheduled debts of the testator of which there were many. The Court held that the executor had the power to convey title under his discretionary power of sale and by such sale to divest the lien of general debts of the testator even though suits had been brought for some of the debts and properly indexed in order to preserve such lien. The decision is not based on the theory of equitable conversion. In fact, the Court specifically negatives equitable conversion. The Supreme Court affirmed the judgment of the court below in favor of the executor for the purchase price. He had the ability to transfer title under the discretionary power of sale and when he did so a conversion occurred then and not as of the death of the testator.

*Brennan's Estate*²⁶ was another case where an executor sold under a discretionary power of sale after the time for filing a suit in the Prothonotary's Office in order to preserve the lien of debts had expired. This case arose upon the disallowance of a claim by a creditor upon the adjudication of the account of the executor in which the proceeds of the real estate so sold were included. The Supreme Court specifically holds that there was not a conversion and states in reference to the power of sale as follows:

"Testator merely divided his estate between his wife and children and gave to the wife, as executrix, a power of sale. She was free to exercise the power or not as she saw fit."

Powers of sale given by a will to persons other than the executors are exercisable by the persons to whom they are given even though there is no equitable conversion by the will.²⁷

²⁵267 Pa. 580 (1920).

²⁶277 Pa. 509 (1923).

²⁷*Watson's Estate*, 241 Pa. 271 (1913); *Gelb v. Weisberger*, 247 Pa. 416 (1915); *Stiffler v. Penna. Coal & Coke Co.*, 298 Pa. 152 (1929).

It is submitted that *Eberly v. Koller*²⁸ is no longer the law in Pennsylvania and that in order for an executor to exercise a power of sale given to him in a will there need not be an equitable conversion. This is shown by Section 30 of the Fiduciaries Act,²⁹ *Kemerer v. Johnstone*,³⁰ *Davidson v. Bright*³¹ and the line of cases following it, and *Brinkerhoff v. Martin*.³² If attorneys and title insurance companies accepted this principle as being the law most of the difficulties raised by them in reference to the transfer of title by an executor under a discretionary power of sale would disappear. There would be no need to determine whether there was or was not an equitable conversion. A deed of the executor under such a power would be good whether or not there was an equitable conversion.

There seems to have grown up some idea that a discretionary power of sale is only good if there is some necessity for its exercise. It is believed that this is merely another method of expressing the second and third tests for determining whether there has been an equitable conversion.³³ The existence of debts of the decedent which would be paid out of the proceeds of the sale of the real estate is not a requirement for the exercise of the discretionary power of sale.³⁴

In the case where there is no equitable conversion under the will, an actual conversion occurs when the executor exercises his discretionary power of sale. Until he exercises it, the land remains land.³⁵ It follows that in order for debts of a decedent to remain a lien on the real estate, suit must be brought within the statutory period.³⁶ It also follows that the devisees can prevent an actual conversion by the executor by electing to have the land remain land which could be accomplished by a deed by the devisees to some other person and most likely by a declaration to that effect filed in the Recorder's Office. Although, in the case of a discretionary power, the devisees' election to have the land remain as land is not exactly the same as an election by devisees to reconvert where the will effects an equitable conversion, the same effect is accomplished and the same principles should govern as govern reconversion.³⁷

Pending the exercise by the executor of a discretionary power to sell, any devisee can institute partition proceedings³⁸ which would be an election to have

²⁸209 Pa. 298 (1904).

²⁹Fiduciaries Act of June 7, 1917, P.L. 447, Sec. 30, 20 P S 716.

³⁰318 Pa. 526 (1935).

³¹267 Pa. 580 (1920).

³²28 D. & C. 227 (1936).

³³Hunt's Appeal, 105 Pa. 128, 141 (1884).

³⁴Cooper's Estate, 206 Pa. 628 (1903); Brennan's Estate, 277 Pa. 509 (1923); Kemerer v. Johnstone, 318 Pa. 526 (1935).

³⁵Davidson v. Bright, 267 Pa. 580 (1920).

³⁶Cooper's Estate, 206 Pa. 628 (1903); Brennan's Estate, 277 Pa. 509 (1923).

³⁷Cases gathered in BUSHONG'S PENNSYLVANIA LAND LAW, page 95, Note 72.

³⁸Sheridan v. Sheridan, 136 Pa. 14 (1890); Carter's Estate 225 Pa. 355 (1909); Dunshee v. Dunshee, 234 Pa. 550 (1912).

the land remain as land. These holdings are consistent with the theory that under a discretionary power to sell the land remains land and the proceeds of such sale are treated as if they were land with the rights to said proceeds determined as of the time of the actual conversion by sale. Another application of the principle that real estate passing under a will which contains a discretionary power of sale remains real estate until the power of sale is exercised is that the rents from such real estate belong to the devisees.³⁹

The question naturally arises as to how long a discretionary power of sale in an executor continues to be exercisable. It is beyond the scope of this paper to discuss the effect of the Rule Against Perpetuities upon discretionary powers of sale⁴⁰ but it will be noticed that in the cases discussed in this article, the discretionary powers of sale by their terms were unlimited as to time and the fact that under their terms they might be exercised after the period fixed by the Rule Against Perpetuities did not invalidate their exercise, at least before the period fixed by the Rule had expired. In *Schenck v. Clyde*,⁴¹ the Supreme Court held that an administrator d.b.n.c.t.a. could not exercise a discretionary power to sell the real estate eleven years after the death of the decedent. On the other hand, *Livingood v. Heffner*⁴² is a case where the Supreme Court approved a sale by an administrator d.b.n.c.t.a. twenty-seven years after the death of the decedent. In other cases, sales have occurred at varying times after the deaths of the decedents.⁴³ Certainly the discharge of the lien of debts by expiration of time does not cause a discretionary power to terminate.⁴⁴ A partition proceeding or an election to treat the land as land terminates the discretionary power of sale but this is a termination by the act of the devisees and not by passage of time. The great majority of sales by executors under discretionary powers of sale occur within a few years after the death of the decedent and usually occur before a final account is filed by the executor. As the devisees have possession of the real estate pending the exercise of the discretionary power to sell and can terminate this discretionary power at any time by either a partition proceeding or an election to have the real estate remain as real estate, there appears to be no reason why the power should not continue exercisable at least during the period fixed by the Rule Against Perpetuities. Any doubt as to the duration of the discretionary power, however, does not affect the exercise of that power within a reasonable time after the death of the decedent.

³⁹Appeal of Penna. Co. etc., *Watts Estate*, 168 Pa. 431 (1895).

⁴⁰See Heisler, Roland C., "Duration of Testamentary Powers of Sale", Proceedings of Pennsylvania Title Association, 1938, page 33.

⁴¹53 Pa. Super. Ct. 652 (1913).

⁴²9 Sadler 526 (1888).

⁴³3 years—*Brennan's Estate*, 277 Pa. 509 (1923); 2 years 3 months—*Cooper's Estate*, 206 Pa. 628 (1903).

⁴⁴*Cooper's Estate*, 206 Pa. 628 (1903); *Brennan's Estate*, 277 Pa. 509 (1923); *Kemerer v. Johnstone*, 318 Pa. 526 (1935).

In many sections of the state, title insurance companies which hesitate in insuring a title purporting to pass by a deed given by an executor under a discretionary power will insure such title upon being guaranteed that the executor will file an account in the Orphans' Court in which he charges himself with the proceeds of this real estate. The theory of this position is that after the distributees receive their shares of the proceeds of this real estate, they are estopped to question the exercise of the power of sale. This principle is set forth in *Brinkerhoff v. Martin*.⁴⁵ Even though undoubtedly the legatees and devisees are estopped by such a final adjudication, nevertheless, it is submitted that the title which an executor gives by a deed executed under a discretionary power does not depend upon estoppel but is a good title immediately upon the execution and delivery of the deed.

It is submitted that there is no explanation for *Kemerer v. Johnstone*⁴⁶ and the principle on which *Cooper's Estate*⁴⁷ is based except that a mere discretionary power of sale in an executor is valid and may be exercised by him.

Reading, Pa.
May 13, 1943

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⁴⁵28 D. & C. 227, 231 (1936).

⁴⁶318 Pa. 526 (1935).

⁴⁷206 Pa. 628 (1903).