

---

Volume 53  
Issue 3 *Dickinson Law Review* - Volume 53,  
1948-1949

---

3-1-1949

## Conveyance of an Executor Under a Discretionary Power to Sell

Robert Rollman

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

Robert Rollman, *Conveyance of an Executor Under a Discretionary Power to Sell*, 53 DICK. L. REV. 210 (1949).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol53/iss3/9>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

## CONVEYANCE BY AN EXECUTOR UNDER A DISCRETIONARY POWER TO SELL

The doubt and subsequent disagreement concerning the interpretation to be given the decision in *Eberly v. Koller*, 209 Pa. 298, 58 A 558 (1904), has been resolved by the Pennsylvania Supreme Court in the recent case of *In re Shaffer's Estate*, 61 A. 2d 872, Dec. 4, 1948, At. Rep. Ad. Sheets. The *Eberly* case arose on a case stated to determine whether an executor could make title to real estate. The facts were, concisely, these: L. F. Eberly died testate in 1895 and in his will directed, inter alia, as follows: "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." Plaintiff, as surviving executor, advertised and sold the property to the defendant, but the defendant refused to accept the deed, alleging that the plaintiff had no power to make title. The trial court held adversely to the plaintiff, saying, in effect, since the proposed sale was for the purpose of distribution only and not for the payment of debts the object could be properly accomplished in a proceeding in partition. The court concluded by saying, "The will in this instance does not work a conversion." The Supreme Court affirmed on the opinion of the court below. The necessary implication of the decision is that an executor may not convey real estate under a testamentary discretionary power where the will does not also work a conversion. Many lawyers and title insurance companies refused to approve or insure a title which purported to pass by a deed given by an executor under a discretionary power of sale, relying on the *Eberly* case as authority. The cases of *Kreise v. Cortledge*, 262 Pa. 55, 104 A 885 (1918) and *Swift's Appeal*, 87 Pa. 502, were often cited for the same principle. It has been suggested however, 47 DICK. L. REV. 193 at 195 and 197, that the latter two decisions could be sustained on other grounds or otherwise distinguished. Nevertheless the decision in the *Eberly* case created a great deal of discussion in legal circles. One jurist argued that the proposition for which the case was cited was not justified by the facts; while others were firm in their belief that if it was not justified by the facts; while others were firm in their belief that if it was the rule at one time it no longer prevailed as such. Mr. George Balmer, Esq., in 47 DICK. L. REV. 193, at 201 (May 3, 1943) submitted that, "*Eberly v. Koller* 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 the Act of June 7, 1917, P. L. 447, Sec. 30, 20 P. S. 716; *Kemerer v. Johnstone*, 318 Pa. 526, 179 A 67 (1935); *Davidson v. Bright*, 267 Pa. 580, 110 A 301 (1920), and the line of cases following it; and *Burkerhoff v. Martin*, 28 D & C 227 (1937)."

The Supreme Court in *In re Shaffer's Estate*, decided Nov. 8, 1948, states that, "The Supreme Court reviewing the *Eberly* case (in 1904) merely affirmed the lower court's arbitrary choice of a supposedly more expeditious means (*i. e.*, partition) of carrying out the provisions of the particular will." The court points out that in the *Eberly* case, the lower court was concerned with the efficacy of partition in the circumstances and not with any power of sale as its one citation (*Reid v. Clendenning*, 193 Pa. 406) plainly indicates. Following this interpretation, the rule for which *Eberly v. Koller* was so often cited never had Supreme Court affirmation. The court continues by saying, "Other and more recent decisions confirm the correct rule to be that, *even though a will does not effect an equitable conversion, a discretionary power of sale thereunder is sufficient to authorize the executor to convey the decedent's real estate* [Italics supplied]. See, *Kemerer v. Johnstone*, 318 Pa. 526, 179 A 67 (1935), quoting with approval from *Lentz v. Boyer*, 81 Pa. 325, 327, 328; *Davidson v. Bright*, 267 Pa. 580, 110 A 301 (1920); *In re Cooper's Estate*, 206 Pa. 628, 56 A 67 (1904); and *Livingood v. Heffner*, 11 A. 187, 9 Sadler 526, 530, 531 (Pa., 1888). See also Act of June 7, 1917, P. L. 447, Sec. 30, 20 P. S. 716." Thus, the Supreme Court of the Commonwealth affirmed what many jurists had consistently contended was the rule and what Mr. George Balmer, Esq., predicted in his 1943 paper published in 47 DICK. L. REV. 193.

ROBERT ROLLMAN