legatee in possession. It is really upon this ground that the case was decided, and the remarks of the court already quoted cannot be considered literally correct.

Indeed, the class of decisions in Massachusetts upon which we have been commenting are well founded upon English authorities, and on the principle there laid down that such a direction to distribute personalty, coupled with a power of sale of realty, makes an equitable conversion of such realty, out and out; giving the character of personalty thereto from the date of the will, and to the extent to which such distribution is to take place among the legatees; and that these become thereby *cestuis que trust*, with a right to insist on the exercise of the power.

Thus, in *Foone* v. *Blount*,* by the terms of the will, the executors were to pay certain specified legacies, and to this end were "appointed, constituted and empowered" to sell certain real estate. It was objected that this was a devise of lands, not a legacy, and that therefore the devisees, who were papists, could not take; but the court declared this to be a power not coupled with a trust in real estate, but in personalty, and operative from the testator's decease to convert the land out and out. Similar decisions had been made in equity in *Yates* v. *Compton*,† and *Att'y-Gen.* v. *Gleg*,‡ and a power to sell to pay an annuity was held a conversion out and out from the testator's decease; and the same principle has been fully recognized in other courts in this country;§ and that as the land became personalty, *e converso*, the power to deal with it attached to whoever should become charged with the executorial duty; to a single surviving or accepting executor, or even an administrator *cum testamento annexo*.

In *Treadwell* v. *Cordis*,‖ above referred to, the distinction is taken that, while under the Statute 21 Henry 8, c. 4, if one or more executors die, or do not accept the office, the survivor or remaining executors may well execute a power attached thereto, yet it is otherwise where they all accept and one thereafter resigns or renounces, because the power has vested in him, and his renunciation cannot divest him thereof; and ancient decisions to this effect are referred to,* and the same view has been adopted, in more than one modern case.† Indeed, in the case of *Conklin* v. *Egerton*, a very elaborate examination is made of the ancient law upon this point, and the testamentary duties of an executor are limited to dealing with personal property merely, while as to realty the executor acts not *qua* executor, but as trustee, whether he is a devisee of the land itself or only the donee of a power to sell it, because the will in this respect is a conveyance, not a testament. But, however well ascertained this distinction may have been at the early period of the common law, it is submitted that the course of decision in this state, already fully examined, by which the executor, as executor, stands charged with trust duties and powers properly attached thereto, has substantially overruled it. It would, indeed, be an anomaly for the same court to hold that the sureties on the executor's bond should be held responsible for the disposition of the proceeds of a power of sale conferred upon him even by the name of trustee, and yet that his approved resignation of the office of executor should not divest him of all title to deal with the land, when he had surrendered his power to act under the will from which alone it had proceeded. And as this distinction went on the ground that the resignation of his office by the executor did not relieve him of his character of grantee, it is hard to see how his refusal to accept that office from the Probate Court could have any other or greater effect. Indeed, under such a doctrine, nothing but a re-conveyance by him would be effectual to free him.

But if this distinction could be considered as having any foot-hold in this state, it has been definitely overruled by the late case of *Gould* v. *Mather*,‡ and the law placed on the ground for which we have been contending. The testator in this case, in the first clause of his will, appointed his wife and one Marshall respectively his executrix and executor; in

* Cowp. 464.
† 2 P. W. 308, 310-311.
‡ 1 Atk. 356.
§ *Meakings* v. *Cromwell*, 1 Seld. 136; *Rogert* v. *Hertell*, 4 Hill, 492; *Stagg* v. *Jackson*, 2 Barb. Ch. 86; *Boyd's Lessee* v. *Taylor*, 2 Dall. 223.
‖ 5 Gray, 341.

* 15 Hen. 7, 11.
† *Conklin* v. *Egerton*, 21 Wend. 430, and cases there cited; *Tainter* v. *Clark*, 13 Metc. 220.
‡ 104 Mass. 283.