Equitable Conversion by Will—Right of Residuary Devisee to Rents

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the distinction between "residents" and "citizens" becomes important in some cases. It is submitted that the distinction between these words never becomes important, because, no matter which be used, the reasonableness of the ground for the diversity of treatment and the constitutionality of the enactment creating that diversity will stand in direct ratio to each other.

The result in Hinebaugh v. James is indubitably correct. It is too obvious to permit argument that beer, be it termed "intoxicating," or "nonintoxicating," is something that is inherently subject to regulation and control by the state, and it is equally apparent that such control can be more readily exercised over persons standing in some relationship to the state, either as residents or citizens thereof, than over persons between whom and the state there is no mutuality of obligations whatsoever. Hence there is in such a case a reasonable ground for diversity of treatment, and as a basis upon which to rest the principal case, this would be preferable to an attempted distinction between the words "resident" and "citizen."

H. A. W., Jr.

Equitable Conversion by Will — Right of Residuary Devisee to Rents. — T died possessed of personality valued at $265.16, represented by money in the bank, and realty appraised at $15,000. By will she bequeathed general legacies in the aggregate amount of $13,510. The tenth clause of the will read as follows: "All the rest, residue and remainder of my estate, both real and personal... I give, devise and bequeath to my daughter [D] absolutely and in fee simple. This bequest is made in addition to the love and affection which I bear to my said daughter also for the reason that my said daughter has expended a considerable amount


13 192 S. E. 177 (W. Va. 1937).

of money in the improvement and making repairs upon my real estate for which she has not been compensated." Aside from her funeral expenses of $703.28 at her death T owed approximately $2,000. The eleventh clause read: "In case my executors hereinafter named shall find it necessary or convenient in the settlement of my estate and payment of the legacies and devises hereinbefore set forth, I authorize and empower my said executors to sell and convey any or all my real estate and personal property.

The general legatees brought suit to compel the sale of T’s realty for the purpose of paying the debts of the estate and the legacies bequeathed to the plaintiffs. A question was raised as to whether D, as residuary devisee, was entitled to the rents derived from the real estate of T from the time of her death until actual sale. Held, that under the doctrine of equitable conversion T’s real estate was converted into personalty at the time of her death, thus giving the executors and not the residuary legatee the right to the rents. *Peters v. Kanawha Banking & Trust Co.*

The general principle is well established that in the construction of wills, where there is a mandatory direction to sell realty, equity will treat such property as personalty before the sale is made. It is equally well settled that where the direction to sell realty is discretionary no conversion occurs until the discretionary power is exercised. However, by the great weight of authority, where the general scheme of a will makes necessary a conversion, the power of sale though not in terms imperative operates as a conversion. A deficiency of personalty preventing the carrying out of the provisions of a will unless there is a conversion of real estate into money is such a necessity as invokes the doctrine of equitable conversion. It would appear from an examination of

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1 191 S. E. 581 (W. Va. 1937).
3 *In re Gracey’s Estate*, 200 Cal. 492, 253 Pac. 921 (1927); *In re Loew’s Estate*, 291 Pa. 22, 139 Atl. 582 (1927).
the facts, that such a deficiency existed in the principal case at the time of T's death.  

The basis of the doctrine of equitable conversion is to give effect to testator's intent. In view of the aggregate amount of the funeral expenses, debts and legacies and the extent of the personality T possessed at her death, it is fair to assume that she must have realized that it would be necessary to sell the realty in order that the legacies be paid.  

Where there is an imperative and absolute direction in a will that land be sold, the real estate will be considered as having been converted as of the date of testator's death. The same rule is generally applied when the doctrine of equitable conversion is invoked because of necessity in carrying out the provisions of a will. Thus, if conversion takes place at the time of testator's death, the executor and not the heir or residuary devisee is entitled to the rents of the land accruing between the time of testator's death and actual sale.  

A problem arises where at the time of testator's death the value of the personality is sufficient to take care of the debts and general legacies, but, in consequence of a change in values between the time of testator's death and the time the debts and legacies are actually paid, it later becomes necessary to sell the realty to give effect to the provisions of the will. To cope with such circumstances the Pennsylvania Supreme Court alone has apparently adopted a rule that "where there is a discretionary power of sale or there is a necessity to sell . . . to execute a will, conversion does not become effective in law until it is at least certain that conditions will arise calling for its use." The difficulty with such a rule is to determine exactly at what moment it became certain that conditions arose calling for its use. In the principal case the time

11 Stalder v. Stalder, 105 Neb. 367, 180 N. W. 566 (1920); Note (1915) 6 R. C. L. 1080; Wright v. Trustees, 1 Hoff. 202, 218 (N. Y. 1839) holds that the rents go to the party who takes the proceeds.  
element would be particularly important in view of the well established rule that rents belong to the owner of property on rent day.\footnote{ }

Therefore it is submitted that our court reached a result not only in accord with the weight of authority, but, what is more important, also in accord with the policy of maintaining practical and well settled rules concerning wills and their construction.

J. G. McC.

**ESTOPPEL BY DEED — CONVEYANCE OF INTEREST SUBSEQUENTLY ACQUIRED AS HEIR — WARRANTY IN QUITCLAIM DEED AS BASIS FOR ESTOPPEL. — T devised to W, his wife, a life estate in his property, with power of consumption of the corpus for her support, remainder to his children in fee, share and share alike. In 1929 A, one of the children, gave a deed of trust for his share, with covenants of general warranty, and in the same year two judgments were obtained against him. W died intestate in 1932. A lien creditors’ suit was thereafter brought to subject A’s interest in the property to sale in satisfaction of the judgments. Held, that since W had absolute power of disposition over the property, and therefore took the fee, the children took no interest under the will; that A had nothing to convey and conveyed nothing by his deed of trust; that the deed could not operate as an assignment of an expectancy in the property; that therefore, since the property descended to A by intestacy in 1932 and not before, it then became subject to the judgment liens, and the grantee and cestui under the trust deed took no interest. Swan v. Pople.\footnote{ }

Under a theory of estoppel by deed this property, an undivided one-seventh interest in the testator’s estate, would have passed under the trust deed, as soon as the son became entitled to it. The applicable rule is that if a grantor having no title or defective title, or an estate less than that which he assumes to grant, conveys with warranty or covenants of like import and subsequently acquires the title or estate which he purports to convey, or perfecteds his title, such after-acquired or after-perfected title will enure to the grantee or to his benefit by way of estoppel.\footnote{ }

\footnote{190 S. E. 902 (W. Va. 1937).}

\footnote{1} Rockingham v. Penrice. 1 P. Wms. 177 (1711).