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EQUITABLE CONVERSION IN WILLS IN SOUTH CAROLINA

I. GENERALLY

A venerable application of the maxim that equity regards as done that which ought to be done¹ is the doctrine of equitable conversion whereby realty is regarded as personalty or, less commonly, personalty as realty.² The doctrine is ordinarily important in South Carolina only to determine inheritance,³ but is also invoked where a deceased has contracted to purchase land before death without taking a conveyance.⁴ Here the contract right passes to the heirs as realty in intestacy or to the devisee in testacy.⁵

II. CONVERSION BY WILL AND ITS EFFECTS

Where a testator directs his lands to be sold and bequeaths the proceeds, the disposition is regarded in equity as one of personalty.⁶ An early reported fragment, *Postell v. Postell's Ex'rs*,⁷ indicates a clear following of the doctrine of equitable conversion in South Carolina. The later case of *Wilkins v. Taylor*⁸ sets out a clear exposition of the doctrine.

[T]he rule of Equity . . . is . . . that it is in the power of a testator, at his option, to give to his property the character of real or personal estate. If money is directed generally to be laid out in land, it will be regarded as land, and go to the heir at law, or otherwise as directed by the will.⁹

1. See generally 2 POMEROY, EQUITY JURISPRUDENCE §§ 364-71 (5th ed. 1941).

2. See generally 4 POMEROY, *op. cit. supra* note 1, §§ 1159-68.

3. *Jeffords v. Thornal*, 204 S.C. 257, 29 S.E.2d 116 (1944).

4. *Wilkins v. Taylor*, 8 Rich. Eq. 291 (S.C. 1847) (dictum).

5. In such a case the heir or devisee can compel the personal representative to pay the purchase price of the land contracted for before death. *Landrum v. Hatcher*, 11 Rich. 54 (S.C. 1857). Compare *Ford v. Gauthur*, 2 Rich. Eq. 270 (S.C. 1846) where land passed as intestate property subject to a mortgage given after the will was made; the court indicated that the heir could require reimbursement from the personal assets on foreclosure of the mortgage (dictum). Where land is contracted to be sold after having been devised by will, the contract converts the land into personalty and operates as a revocation of the devise. *Pinson v. Pinson*, 150 S.C. 368, 148 S.E. 211 (1929). In such a case the heir or devisee holds only a bare legal title; the right to the proceeds from the sale passes to the personal representative. 5 PAGE, WILLS § 46.1 (rev. ed. 1962).

6. 5 PAGE, *op. cit. supra* note 5, § 46.1.

7. 1 Desaus. Eq. 173 (S.C. 1790).

8. 8 Rich. Eq. 291 (S.C. 1847).

9. *Id.* at 295.

In the *Wilkins* case the testator had directed land sold and the proceeds disposed of. Under the then-prevailing rule that a will witnessed by the executor was void as to personalty but not as to realty,¹⁰ the court invoked the doctrine to invalidate the entire disposition. As a result complete intestacy occurred since the testator was considered to have made a will of personalty by virtue of the doctrine of equitable conversion. The widow and children therefore took the property under the rules of intestate succession.

In *Perry v. Logan*¹¹ the dissimilar consequences of a will of personalty as opposed to a will of realty were of critical importance also. Where the rule obtained that a limitation over on failure of issue was effective as to personal property but not as to real, the doctrine of conversion was applied to validate such a limitation over since the estate property became personalty in the view of equity.

[T]he distinction between personal and real estate in this respect . . . is not . . . applicable to the case. In this Court, according to the equitable doctrine of conversion, there was no real estate to pass under the limitations of the will, although there was real estate disposed of by it. *The will gave no land to the beneficiaries*, but directed that the real, as well as the personal estate should be sold by the executors: and it was the "proceeds" of the sale that the testatrix gave, to be equally divided among her seven grand children.¹² (Emphasis added.)

A. Clear Intent To Convert Required

Since equitable conversion is important in wills to give effect to the testator's desires to treat one species of property as the other, a clear intent to convert must be found.¹³ In the case of *Farmer v. Spell*¹⁴ the testator directed that his just debts be paid and devised certain property to his son to be given at a valuation, the daughter to have an equivalent value in personalty out of the remaining property. The court held that land so given was not to be regarded as converted into personalty since the

10. The executor is now a competent witnessing party although he forfeits his commission by so doing. S.C. CODE ANN. §19-260 (1962).

11. 5 Rich. Eq. 202 (S.C. 1853).

12. *Id.* at 215.

13. 18 C.J.S. *Conversion* §16 (1938).

14. 11 Rich. Eq. 541 (S.C. 1860).

valuation was taken only for the purposes of equality among beneficiaries. The commonly found direction to pay debts gave rise to no implication of conversion since that provision only expressed what the law required. The estate's debts were considerable, but under the rule that personalty is the primary fund for the payment thereof, the lands devised were not affected: no conversion was worked of them.

The more recent case of *Cagle v. Shaefer*¹⁵ reaffirmed the *Farmer* result: where land was given at a valuation, no inference arose that it was to be treated as money. Although a sale of the property was authorized, the will required that the proceeds be reinvested in like property—a manifest purpose to make a gift of land.

In a related case, *Ex parte Johnson*,¹⁶ it was again stated that equitable conversion does not arise absent a clear intent that the land given is to be treated as money. Thus, directions in a will that a tract of land be divided equally among named beneficiaries worked no conversion.¹⁷

Although a clear intent to treat land as money, or vice versa, must be found before the doctrine of conversion comes into play, property may be converted not only by specific directions but by implication,¹⁸ as in the case of *Clarke v. Clarke*.¹⁹ In this case the testatrix directed payment of debts which combined with the assorted legacies amounted to some sixty-five thousand dollars. The fact that the decedent possessed personalty of value less than one thousand dollars in South Carolina did not of itself give rise to an implied conversion of the considerable real property for the satisfaction of the gifts and debts. However, the court did find an implied conversion since the will blended personalty and realty in the residuary clause²⁰ and provided that certain minors' shares held by another be *paid* over, speaking in terms of *whole sum, pay*, etc. The use of the term *devise*—a term of realty—was negated by the overriding tenor of the will in terms of personalty. The *Clarke* court followed a dictum from *Farmer v. Spell* suggesting conversion by implication.

15. 115 S.C. 35, 104 S.E. 321 (1920).

16. 147 S.C. 259, 145 S.E. 113 (1928).

17. *Accord*, *McNamara v. Ayers*, 191 S.C. 228, 196 S.E. 545 (1938).

18. 18 C.J.S. *Conversion* § 16 (1938).

19. 46 S.C. 230, 24 S.E. 202 (1896).

20. *Accord*, general rule. 18 C.J.S. *Conversion* § 16 (1938).

[I]f the intention to dispose . . . as personalty can be ascertained from the face of the will it may not be indispensable that a sale should be explicitly directed as a means of conversion.²¹

B. Limited Conversion Where Purpose Fails

In *North v. Valk*²² the extent of the conversion effected where the testator's purpose fails or succeeds with an intestate residue was considered. The rule announced was that a so-called out and out conversion, that is, a general direction to sell the realty, impressed the property as personalty; however, if the land is to be sold for a specific purpose which fails, as for example the payment of debts of which there are none at death, no conversion is worked. If the purpose of the sale is met and a surplus remains undisposed of, the property passes as realty. If the residue of the converted property is disposed of by the terms of the will, it does not go as realty but is treated as personalty. And if such a residue is to go to legatees who take as tenants in common with no survivorship between them and one of the residuary legatees dies during the testator's lifetime, his share devolves to the distributee for the evident reason that the gift has lapsed.²³

C. Conversion As To Debts And Abatement

In *McFadden v. Hefley*²⁴ it was held that the doctrine of conversion would not be given effect for all purposes, as for example, to defeat the payments of debts out of the personalty or assent by the executor to the beneficiaries' taking.²⁵ The will in the case provided that "To my daughter . . . I give and bequeath \$400.00 to be invested by my executors in a homestead. . . ."²⁶ Clearly an intention to make a gift of land rather than money, the provision was not allowed to override the liabilities of personalty under the guise of equitable real estate. Thus the fund which the testator had elected to treat as land was treated as no different from the other personal assets of the

21. *Supra* note 14, at 548.

22. 1 Dud. Eq. 212 (S.C. 1838).

23. *Accord*, general rule. 18 C.J.S. *Conversion* § 24 (1938).

24. 28 S.C. 317, 5 S.E. 812 (1887).

25. *Accord*, general rule. 18 C.J.S. *Conversion* § 26 (1938).

26. 28 S.C. 317, 318, 5 S.E. 812, 813 (1887).

estate and was subjected to the payment of debts as other personalty under the order of abatement.

[W]here . . . a pecuniary legacy is given, and the same is directed to be laid out in land . . ., for some purposes . . ., such a testamentary provision may be regarded as a devise of real estate, yet it cannot be so regarded for all purposes, and . . . the assent of the executor is necessary to perfect title of the legatee; and . . . until such assent, the legacy constitutes a part of the personal assets of the testator, and as such must be applied, as the other personal estate, to the payment of debts.²⁷

D. Conversion As Regards The Nature Of The Estate Or Gift

As has been seen in *Perry v. Logan*,²⁸ where a gift over was effective as to personalty but not as to real estate, the limitation was good under the rule of conversion of the land into money by directions in the will. Another varying consequence between gifts of realty and personalty appeared in the cases of *Renwick v. Smith*,²⁹ *Dunlap v. Garlington*,³⁰ and *Andrews v. Loeb*,³¹ where a fee conditional attached to gifts of the proceeds of land directed to be sold operated to give absolute ownership to the several legatees. Although in the *Andrews* case the legatee elected to take the land rather than the proceeds, thus effecting equitable reconversion,³² the result was the same, viz., the condition attached to the gift was inoperative under the rule that a fee conditional gift of personal property vests an absolute estate.

What she took under the will, therefore, was personalty, and the words added to the will which would have given only a fee conditional in the land, gave her an absolute estate in personalty, i.e., in the proceeds of the land. The subsequent election to take the land instead of the money, operates to give her a good title in fee to the land.³³

27. *Id.* at 322, 5 S.E. at 815.

28. *Supra* note 11.

29. 11 S.C. 294 (1877).

30. 17 S.C. 567 (1882).

31. 22 S.C. 274 (1884).

32. See discussion *infra*.

33. 22 S.C. 274, 275 (1884).

E. Reconversion

As the term implies, equitable reconversion occurs where those beneficiaries who for the purposes of the will are regarded as taking realty as personalty or vice versa elect to take the property in its original species rather than in its converted form.³⁴ In *Mattison v. Stone*³⁵ it was said that reconversion is effected where the beneficiaries of proceeds of sale unequivocally elect instead to take the land.³⁶

F. Power As Opposed To Direction To Sell

It is generally held that a mere power to sell devised or intestate property effects no conversion at the testator's death. However, when such an optional power is in fact exercised the property is regarded as converted from that time.³⁷ South Carolina appears to have no decision on the point but certainly would follow the general rule. It was held in *Ware v. Murph*,³⁸ citing and following *Ferguson v. King*,³⁹ where land was left under an unexercised power of sale in the executor that title to the fee vested in the heirs. By implication of the *Ware* decision that title to land under a power of sale was in the heirs rather than the personal representative, no conversion is worked in such a case in South Carolina.

G. Effect Of Discretion In Executor

In *Bell v. Bell*⁴⁰ it was argued that no conversion was worked of realty directed to be sold since the executor was given discretion as to the manner and time of sale, the net proceeds to be divided among certain named beneficiaries. However the court held that since the direction to sell was absolute—the discretion going only to the manner of making the sale—the testator palpably intended to treat the property disposed of as personalty.⁴¹

34. 18 C.J.S. *Conversion* § 52 (1938).

35. 90 S.C. 146, 72 S.E. 991 (1911).

36. The conditions under which takers of proceeds may reconvert the fund and take the land itself are considered *infra*.

37. 5 PAGE, *op. cit. supra* note 5, § 46.3.

38. 1 Rice 54 (S.C. 1838).

39. 2 Nott & McCord 588 (S.C. 1820).

40. 25 S.C. 149 (1886).

41. *Accord*, general rule. 18 C.J.S. *Conversion* § 20 (1938). Note in the *Bell* case the implicit following of the rule as to power to sell as opposed to direction. See discussion *supra*. Had the executor's discretion concerned whether or not to sell, presumably no conversion would have arisen.

Conversion is also worked where the time of sale is postponed or is remote,⁴² as was stated in *Farr v. Gilreath*.⁴³ "The general rule is, that where the conversion is imperatively directed, it is regarded as taking place at the testator's death, although the time fixed by him for the sale for that purpose be distant."⁴⁴ In *Byrne's Ad'mrs v. Stewart's Ad'mrs*⁴⁵ lands directed to be sold on an infant's coming of age were held equitably converted. "The sale is suspended but the ultimate destination is to make the bequest pecuniary."⁴⁶ Likewise in *Colton v. Galbraith*,⁴⁷ where lands were directed to be sold at a widow's death and the proceeds distributed, etc., the disposition was regarded as one of personalty.

H. Rights And Powers Of Affected Parties

In *Walker v. Killian*⁴⁸ it was held that the beneficiaries of property converted to personalty by directions to sell in the will do not get title to the fee but rather a simple personal estate.⁴⁹ Thus an attempted mortgage of the land by the beneficiaries was ineffective as such, operating only as an assignment of the proceeds enforceable in equity. It was also noted that the right to the proceeds was not a lien superior to the expenses of the administration of the estate.

Similarly, the beneficiaries of converted realty could not maintain an action for partition of the land in the case of *Burton v. Burton*.⁵⁰ The court pointed out however that the beneficiaries of the proceeds could require the executors to sell the realty and divide the proceeds, including payment for past rents and profits.

In *Bell v. Bell*⁵¹ it was held that since the takers of the proceeds of a directed sale have only an interest in personalty, such legatees could not assail a judgment against the land to be sold. *Mattison v. Stone*⁵² held that one who had a remainder interest

42. 18 C.J.S. *Conversion*. § 23 (1938).

43. 23 S.C. 502 (1885).

44. *Id.* at 513.

45. 3 Desaus. Eq. 135 (S.C. 1810).

46. *Id.* at 143.

47. 35 S.C. 531, 14 S.E. 957 (1891).

48. 62 S.C. 482, 40 S.E. 887 (1902).

49. 18 C.J.S. *Conversion* § 39 (1938).

50. 113 S.C. 227, 102 S.E. 282 (1920).

51. *Supra* note 40.

52. *Supra* note 35.

in the proceeds of a directed sale could not cause a partition of the lands affected unless the proceeds of the sale had been foregone and the land itself taken by reconversion. But in the second *Mattison v. Stone*⁵³ holding it was stated that the holders of a life estate interest in proceeds could not elect to reconvert where the will provided for a remainder interest in the proceeds. Nevertheless, one who sought partition of the land wrongfully reconverted and conveyed to a third party could not prove the necessary title to the land for the purpose of partition since under the will he had an interest only in proceeds, not the fee. The court intimated that the contingent remainderman should pursue an interest in the proceeds before the instant action.

In *Farr v. Gilreath*⁵⁴ a will left property in trust⁵⁵ and provided that if the cestui que should die without issue, the property was to be sold by the trustee and the proceeds distributed. At the cestui que's request part of the property was sold for support. The contingent remainderman brought an action to recover the land from the purchaser. The court recognized the propriety of the accelerated sale as consonant with the testator's intent and held that since the remainder interest was a legacy rather than a devise, the beneficiaries were remitted to the proceeds of the sale.

The case of *Hamer v. Bethea*⁵⁶ involved joint owners of land, one of whom had died intestate. The lower court had decreed the lands sold and the proceeds distributed to the deceased's heirs upon application for partition by the surviving owner. In another action by the heirs against the administrator to whom the funds had been paid instead, the court held that there was no conversion of the realty as to the administrator's powers. The extent of his capacity depended upon the character impressed on the property at death. Although the partition order extinguished the heirs' title to the land and gave them an interest

53. 99 S.C. 151, 82 S.E. 1046 (1914).

54. *Supra* note 43.

55. Real property is converted where left in trust to be sold, the trustee being under a duty to hold or distribute the proceeds; similarly, personal property left in trust to be expended for land is regarded as giving the cestui que an interest in realty. RESTATEMENT (SECOND), TRUSTS § 131 (1) (2). In addition to *Farr v. Gilreath*, 23 S.C. 502 (1885), the cases of *Clarke v. Clarke*, 46 S.C. 230, 24 S.E. 202 (1896), *Land Title & Trust Co. v. South Carolina Tax Comm'n*, 131 S.C. 192, 126 S.E. 189 (1924), and *Newberry v. Walker*, 162 S.C. 478, 161 S.E. 100 (1931) (discussed under topics *infra*) applied the doctrine of equitable conversion where property was left to a trustee to be sold and the proceeds distributed.

56. 11 S.C. 416 (1878).

in the proceeds, the administrator had no power to receive or dispose of the fund since the duties of the office are confined to what is personalty at death.

In *O'Neale v. Dunlap*⁵⁷ certain devised property of wards was sold by the guardian who invested the proceeds plus other funds in other land. Where the wards elected to take the purchased property, the court held that it passed as realty to their heirs and not as so much real estate plus so much personalty as representing the origin of the invested funds.

In *Newberry v. Walker*⁵⁸ it was held that certain unborn children who were to take an interest in the proceeds of land directed to be sold could never acquire legal title to the realty but only an equitable interest in the fund upon birth.

In *American Bible Society v. Noble*,⁵⁹ where lands were directed to be sold and the proceeds distributed, the doctrine was invoked to validate a gift of the fund to a religious corporation although a direct devise of the land itself was forbidden by statute.⁶⁰

In *Dickson v. Davis*⁶¹ it was held that no right of dower attached where a wife's spouse was the beneficiary of a gift of proceeds from the sale of land, the bequest being one of personalty in the view of Equity.

I. Equitable Retainer Out Of Converted Funds

The cases of *Smith v. Huger*⁶² and *In re Covin's Estate*,⁶³ where lands directed to be sold were regarded as personalty, allowed the equitable retention of debts due the estate by certain legatees. Had the doctrine of conversion not been invoked to make the gift one of personalty, no set off would have been permitted under the rule that land specifically devised or such is exempt—as was held in *McNamara v. Ayers*⁶⁴ where no conversion of the land was worked by mere directions to divide it.

57. 11 Rich. Eq. 405 (S.C. 1860).

58. 162 S.C. 478, 161 S.E. 100 (1931).

59. 11 Rich. Eq. 156 (S.C. 1859).

60. *Accord*, general rule. 18 C.J.S. *Conversion* § 40 (1938).

61. 31 F. Supp. 912 (W.D.S.C. 1940).

62. 1 Desaus. Eq. 247 (S.C. 1791).

63. 20 S.C. 471 (1883).

64. 191 S.C. 228, 196 S.E. 545 (1938) (discussed *supra*).

III. CONVERSION OF OUT OF STATE REALTY

In *Clarke v. Clarke*⁶⁵ the United States Supreme Court held that the decision of the South Carolina court in *Clarke v. Clarke*⁶⁶ as regards equitable conversion of realty into personalty did not bind other jurisdictions under the full faith and credit clause of the federal constitution. The Court held that the decision of the domiciliary tribunal that the will converted out of state realty did not foreclose the foreign court's consideration but that the state where the land was located had exclusive province in the matter.

In *Land Title & Trust Co. v. South Carolina Tax Comm'n*⁶⁷ the question of the domiciliary state's power to tax out of state realty was considered. The testatrix, domiciled in South Carolina, directed that certain real and personal property located in Philadelphia be sold and the proceeds distributed, thus converting the whole into personalty. The South Carolina tax was assessed on the theory that the conversion of the land into personalty made it includible as a portion of a legacy left by a resident and thus subject to the state inheritance tax. The South Carolina court reasoned that if beneficiaries under a will could invoke the doctrine of equitable conversion, the tax commission could likewise rely on the rule. Citing the United States *Clarke*⁶⁸ case for the proposition that the state tax commission must abide by the rules of equitable conversion as set forth by the law of the jurisdiction where the land is located, the South Carolina court concluded that the situs state, Pennsylvania, followed the doctrine of equitable conversion for the purpose of allowing a tax on the converted realty regarded as part of the general legacy. Therefore the court held that the domiciliary state could likewise assess a legacy tax on the property. The general basis of the taxing power was the rule that personalty was deemed to be located in the domiciliary state and thus subject to its laws, while the laws of the situs governed the passage of realty.

A decision of the Supreme Court a year later undermined the basis of the *Land Title & Trust Co.* case. It was held in *Frick v. Pennsylvania*⁶⁹ that the domiciliary state may not assess an

65. 178 U.S. 186 (1900).

66. 46 S.C. 230, 24 S.E. 202 (1896).

67. 131 S.C. 192, 126 S.E. 189 (1924).

68. *Supra* note 65.

69. 268 U.S. 473 (1925).

inheritance tax on out of state personalty owned by a resident at death.

The Frick case having denied the power of the domicile to exact the tax in respect of tangible personal property definitely located in another state, it is difficult to see how the principle of equitable conversion can any longer be applied for the purpose of exacting the tax at the domicile, in respect of real property located in another state equitably converted by the will.⁷⁰

Although the interstate arm of the tax commission to reach out of state bequests of foreign personalty may no longer be employed, the commission's power to assess tax on the passage of state realty considered as equitably converted remains unaffected under the *Land Title & Trust Co.* reasoning.

IV. CONCLUSION

The doctrine of equitable conversion has maintained its vitality throughout the history of the South Carolina courts. If it is conjectured that the doctrine's less frequent appearance in the recent past bespeaks its demise, one only need remember that rules of law eventually become so well settled that to reaffirm them is needless. For this reason the applicable provision of the proposed probate code⁷¹ seems almost like an intruder in the house of case law. Although the occasions for the employment of the doctrine of equitable conversion arise less often where the distinctions between the passage of intestate real and personal property are abolished,⁷² there remains a broad area for its use wherever the distinctions between realty and personalty are material in giving effect to the provisions of wills.

PAUL R. HIBBARD

70. Annot., 42 A.L.R. 347 (1926).

71. "A testamentary direction to sell real property, and the exercise of a testamentary power of sale of real property, shall constitute an equitable conversion of real estate into personal property but shall not affect distribution of the estate under the provisions of the will."

Proposed Probate Code § 89(c). Note that the language fails to provide for reconversion and applies the doctrine where property is sold under a power (see discussion *supra*).

72. STATUTE OF DESCENT AND DISTRIBUTION, S.C. CODE ANN. § 19-51 (1962).