remarks from so high a source were well calculated to mislead them as to the proper grounds and consideration upon which they should found their verdict, and settle the rights of the parties. The danger that such would be the effect, whether it was so or not, would be sufficient to vitiate the verdict. . . . Jurors should be left to the free and fair exercise of their judgments, and not subjected to threat or coercion to induce them to surrender their honest judgments."

The reader is referred to "Misconduct of the jury as ground for a new trial," in the July number of this REVIEW.

WILLIAM SANDERSON FURST.

DEPARTMENT OF WILLS, EXECUTORS, ADMINISTRATORS.

EDITOR-IN-CHIEF,
HON. WILLIAM N. ASHMAN,
Assisted by
HOWARD W. PAGE, WM. HENRY LOYD, JR., MAURICE G. BELKNAP,
CHAS. WILFRED CONRAD, EDWARD BROOKS, JR., JOSEPH HOWARD RHOADS.

HITE *v.* HITE.[1] COURT OF APPEALS OF KENTUCKY.

Words, Creating a Conversion of Real Property into Personalty, in a Will.

A will authorizing the trustees thereunder to sell any of the property and directing them to invest the proceeds "so as to be safe and produce income," and pay the income to the testator's wife and children for their lives, remainder over, does not mean that the unproductive real estate of the testator shall be treated as converted as of the day of his death, so that only such portion of the purchase money would be principal as with interest from the testator's death to the day of sale, would equal the entire amount realized, and that the balance should be distributed as income, but the entire amount must be treated as principal.

EQUITABLE CONVERSION.

By equitable conversion is meant a change in the nature of property from real into personal, or from personal into real, for certain purposes of devolution, not actually taking place but presumed to exist only by construction or intendment of equity: Bispham's Equity, 5th ed., § 307.

The whole doctrine of equitable conversion depends upon the well-established and familiar principle that a court of equity looks upon that as done which a testator by his will has directed to be done, so far as the will of the decedent could have been carried into effect without violating any rule of law or equitable principle: Lorillard *v.* Coster, 5 Paige, 173; Emerson *v.* Cutler, 14 Pick., 120.

Conversion may be effected in two ways: First, by a trust under a will; and second, by a contract between parties both living.

As a general rule, in the first

[1] 20 S. W., 778.

case, the trust must be couched in imperative language, and in the second the contract must be binding.

The conversion in the first instance takes place from the death of the testator, as that is the time when the will takes effect, and in the second instance, from the delivery of the papers forming the settlement or contract: Van Vechten *v.* Van Vechten, 8 Paige, 106; McClure's App., 72 Pa., 414; Loftis *v.* Glass, 15 Ark., 680: McWilliam's App., 9 Cent. Rep., 773; Arnold *v.* Gilbert, 5 Barbours S. Ct., 192.

It is only the first of these two methods of working a conversion with which we have to deal at present—that is conversion arising under a trust in a will.

By the use of certain words of direction a testator makes it imperative upon his executors or trustees to convert his estate into that species of property in which he wishes to give it to his beneficiaries. It is this duty, imposed upon the executors or trustees, which a court of equity considers as performed, even before actual conversion has been made, and in order that the rights of parties in interest may not be prejudiced by delay on the part of the executors or trustees. In carrying out the direction of the testator, the conversion directed to be made is considered as effected as of the date of the testator's death: Craig *v.* Leslie, 3 Wheat., 563; Holland *v.* Cruft, 3 Gray, 180; Kane *v.* Gott, 24 Wend., 641; Greenland *v.* Waddell, 116 N. Y., 234; Allison *v.* Wilson, 13 S. & R., 330; Collins *v.* Champ's Heirs, 15 B. Mon. (Ky.), 118; Green *v.* Johnson, 4 Bush., 167.

As a delay on the part of the executors will not prevent a conversion from taking place, so a direction in the will postponing the time of sale will not have that effect: Hocker *v.* Gentry, 3 Metc. (Ky.), 463; High *v.* Worley, 33 Ala., 196.

There are several well-recognized ways in which conversion may be worked by a testator: First, by an express, imperative direction to executors or trustees to sell land and distribute the proceeds, or to lay out a fund in land for a devisee; second, by applying to one kind of property limitations applicable to it only in its changed form; and, third, by a blending of real and personal property in such a way that distribution can only be effected by a sale of one kind of property or the other.

The leading English authority on the subject of equitable conversion is Fletcher *v.* Ashburner, 1 Bro. C. C., 497. The testator devised real estate to trustees in trust (after his widow's death) to sell the same and divide the proceeds between his son and daughter. Nothing could be more clear and imperative than such a direction. The testator's intention, which is the touchstone by which the question of conversion or no conversion, and indeed most other questions relating to the interpretation of wills are decided, is here apparent, to wit: that the land should be sold and the proceeds divided.

The question before the court arose in this way: The son and daughter, the legatees under their father's will, both died in the lifetime of their mother, until whose death conversion in fact could not take place, and so at the time of her death the land was still in fact land, and as such it was claimed by the son's heir-at-law. The personal representatives of the widow

claimed it as personalty, and Sir THOMAS SEWELL, M. R., decided in their favor, saying: "Nothing is better established than the principle that money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted. The cases establish this rule universally."

In the old case of Doughty *v.* Bull, 2 P. Wm., 320, Lord Chancellor KING held that a direction to trustees to sell land and distribute the proceeds, the time of sale being left to the discretion of the trustees, would work a conversion. The Lord Chancellor says: "The rule being that lands devised to be sold are thereby made personal estate, this case is within such rule, the lands are here devised to be sold and only the time of sale left discretionary."

If the direction to sell be imperative a long delay in the sale will not prevent a conversion: Yates *v.* Compton, 3 P. Wm., 308, was a case of a devise of land to executors to sell and pay an annuity. There was a long delay in the sale and, the annuitant dying before it was made, the heir claimed the land. The Lord Chancellor decided that the clearly expressed intention of the will was to give away all from the heir, to turn the land in question into personal estate, and this must be taken as if it was at the time of the death of the testator, and ought not te be altered by any subsequent accident.

In 1838 Lord LANGDALE, M. R., held the following will to have worked a conversion out and out: "I do empower my wife to sell all my real estate whatsoever and the money arising from such sale, together with my personal estate, she, my said wife, shall and may divide and proportion among my said children as she shall by will direct." The widow died without having sold or apportioned the estate. The power to sell was construed as in the nature of a trust for the children, and subject to such apportionment as the widow might make, the children were entitled in equal shares to the converted real estate: Grieveson *v.* Kirsopp, 2 Keen, 653.

The provisions in the wills considered in the cases of *in re* Ibbitson, L. R. 7 Eq., 226, De Beauvoir *v.* De Beauvoir, 3 H. L. Cas., 548, were held not to be couched in sufficiently imperative language to effect a conversion, though in the latter case the intention of the testator was to make his real and personal property blend and to give the combined fund the character of real property: See Atwell *v.* Atwell, L. R. 13 Eq., 23.

In the case of Curling *v.* May, cited 3 Atk., 255, A gave £500 to B in trust, that B should lay out the same upon a purchase of lands or put the same out on good securities, for the separate use of his daughter, H (the plaintiff's then wife), her heirs, etc., and died 1729. In 1731 H, the daughter, died without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H, and the money was decreed to the administrator; for the wife, not having signified any intention of a preference, the court would take it as it was found. If the wife had signified any intention it should have been observed, but it was not reasonable at that time to give either her heir or the administrator or the trustee liberty to elect.

Lord TALBOT said: "It was originally personal estate, and yet remained so, and by reason of the alternative language of the will nothing could be gathered from it as to what was the testator's principal intention."

Where the direction was to purchase land *or* other securities, and this was followed by the limitation to trustees in trust for the wife for life, and after her decease to such uses and under such provisions, conditions and limitations as his lands before devised were limited, Lord HARDWICKE decided that conversion of the above fund was not at the election of the trustees. It was the evident intention of the testator that the money should be laid out in land, and the discretion must be taken to mean only that, till lands are purchased, the trustees might invest the money in personal securities: Earlom *v.* Saunders, Amb., 241.

Had there been no clause showing conclusively the testator's intention to convert, the alternative character of this direction would have prevented a conversion from being effected.

In Bleight *v.* the Bank, 10 Pa., 131, a conveyance to trustees to pay an annuity out of the rents of certain real estate *or* to sell was held not to make a conversion because it was not imperative on the trustees to exercise the power. Where a discretion whether to sell or not is vested in any executor or devisee conversion does not take place.

Mr. Justice THOMPSON says in Anewalt's App., 42 Pa., 414: "To establish a conversion the will must direct it out and out, irrespective of *all* contingencies. The direction to convert must be positive and explicit and the will must decisively fix upon the land the quality of money. The sale directed in this case depended upon several contingencies. It was made dependent upon the acceptance or non-acceptance of the land on certain terms by his sons. See also Nagle's App., 13 Pa., 260, and Stoner *v.* Zimmerman, 22 Pa., 394.

In Foster's App., 74 Pa., 391, a question as to the conversion of partnership land arose, and Judge SHARSWOOD said, delivering the opinion of the court: "Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit equitas* has redoubled force in application to it. It follows, of necessity, that it is limited to its end. When the purpose of conversion is attained conversion ends, or, more accurately, reconversion takes place."

Where the conversion directed to be made is only for certain purposes, those purposes failing the conversion does not take place, but it is sometimes a difficult question whether the intention of the testator is to convert only for the purposes of the will or out and out for all purposes. This can only be determined by a consideration of the entire will.

In Page's Estate, 75 Pa., 87, the entire estate was vested in trustees, the personalty to be held upon certain trusts, and the executors, in the fourth item of the will were clothed with a discretionary power to sell any part of the real estate, the proceeds of such sales to be held upon the same trust. It was held that although conversion may arise without express terms, where it is clear that the testator meant to

create a fund out of both real and personal estate, and bequeathed it as money, yet as the whole frame of the will in this case indicated no more than a mere discretionary power to sell any part of the real estate, no conversion was worked.

These words, "Lastly, it is my will, that, after the death of my beloved wife, all my estate be appraised and sold as soon as it can be done with advantage; and if any of my sons think proper to take the farm on which I now live, at the appraisement, he shall have the privilege of doing so on paying the other heirs their respective shares; and it is my will that all the money arising from the sale of my real estate be equally divided among all my children share and share alike," were held an express direction to sell, and the fact that the will further permitted one of the sons at his option to take the farm at the valuation to be made, did not change the effect of the direction to sell. Whether or not a son acquired the farm, it was nevertheless a sale, and the one taking it became a purchaser: Laird's App., 85 Pa., 339.

The probable Pennsylvania rule on this doctrine is found in Jones *v.* Caldwell, 97 Pa., 42, where Mr. Justice PAXSON delivering the opinion of the court, says: "An absolute direction to sell lands after the death of the testator's widow, and to divide the proceeds among his children, effects an equitable conversion thereof into personalty." The testator in this case left the income of his real estate to his wife, so long as she remained his widow, and after her death he directed his executors to dispose of all his property real, personal and mixed, and he goes on to say that if his heirs agree to a division of the estate amongst themselves, the executors are not to be bound to make the sale. This subsequent provision does not prevent a conversion, because it is surplusage and may be stricken from the will without altering its legal effect. The law gives the heirs the right to elect to take the property as real estate. The testator must have intended a conversion even in the event of a division of the estate among the heirs by agreement. There were eight heirs, and but five separate properties of unequal values. Be that as it may, to have divided them would have required either a sale between themselves or partition according to law. The latter would have necessarily involved an appraisement and sale, and hence a conversion.

The fact that one of several beneficiaries may be given an option to take the property in its unconverted state does not prevent a conversion from taking place: Laird's App., 85 Pa., 339; Pyle's App., 102 Pa., 317; Miller *v.* Commonwealth, 111 Pa., 321.

In number one hundred of the Pennsylvania State Reports are found two cases which treat the subject of conversion rather fully. The first is Roland *v.* Miller, at page 47, in which a testatrix directed that all her personal estate should be equally divided among her children and heirs at law. Further on in the will she made the same disposition of the proceeds from any sale of her real estate. The executors were not to be compelled by her heirs to sell any real estate until the expiration of the term for which such real estate might be leased. She prohibited the sale of any real estate

for ten years after her decease, unless her executors should deem it advantageous or advisable to sell the whole or any part, in which case they were authorized and empowered to do so within the term of ten years. TRUNKEY, J., says: "It never is presumed that a testator intended to die intestate as to any part of his estate if a contrary intent can be fairly deduced from the language of his will. The natural and reasonable intendment of this will is, that the realty shall be sold and the proceeds divided among the legatees. Within a limited time the executors have unlimited discretionary power to sell, after that time they are bound to sell. A provision that the executors shall not be compelled to sell, by the heirs, until the expiration of a stipulated term, implies that *then* they may be compelled. The power vested in the executors, discretionary for a certain time, thereafter is unconditional, not dependent on discretion or contingency, nor upon the consent or agreement of any person, and if they neglect or refuse to exercise it, they may be compelled to perform their duty by legal process at the instance of any legatee."

The other case in this same volume of reports is Bright's App., 100 Pa., 602. Here the testator directed all his real estate to be sold for the payment of debts and legacies; some of it he directed should be sold immediately. So much of it as was not necessary for the payment of debts he directed should not be sold till the first day of April, 1866. Mr. Justice PAXSON says: "That the real estate was converted by the will is too plain for argument. Here was an express direction to sell, and divide the proceeds among nieces and nephews. It depended upon no contingencies except time, than which there is nothing more certain."

Where land is devised to executors with a direction to sell, the legal title thereto vests in them, but by some decisive act on the part of the heirs or beneficiaries it is possible for them to divest the legal title, and take the land in lieu of money: Anderson *v.* Anderson, 133 Pa., 408.

A will containing this clause, "I give to my executors power to sell and dispose of the whole or any portion of my real estate or personal property, if they find it necessary to do so in order to make a fair and equitable division of my estate," was held not to work an equitable conversion: Sheridan *v.* Sheridan, 136 Pa., 14.

Mr. Justice WILLIAMS in the above case said: "The will gives a power of sale, but leaves the question whether it shall be exercised or not to the discretion of the executors. The reason why a power of sale works a constructive conversion is only that it makes an actual conversion certain, which is not the case where discretion to use the power or not is left to the executors. The estate is treated at once as having the qualities it must necessarily have where the power is exercised."

A testator bequeathed all his estate to his wife, for her use, as long as she remained his widow. If she desired the land to be sold, the executor was to sell it, the proceeds to be invested for her use for life, or as long as she remained his widow. Held not to work a conversion, as the direction was not positive and explicit, and the will

did not decisively fix upon the land the quality of money: Machemer's Estate, 140 Pa., 544.

In Hunter *v.* Anderson, 152 Pa., 386, an agreement that a trustee shall sell certain land and distribute the proceeds was considered as having worked a conversion, and the purchaser from the trustee took the land free from liens against the *cestuis que* trust and unaffected by the dower of their wives.

The case of Fahnestock *v.* Fahnestock, 152 Pa., 56, is a good illustration of an equitable conversion effected, not by an express direction to sell, but by a power of sale given to executors, and the impossibility of otherwise carrying out the clearly expressed intention of the testator in his will. Mr. Justice McCULLOM said: "It is not contended that the words, 'I hereby empower and authorize my executors to sell all my real and personal property, at private or public sale, and make and execute deeds in fee simple for my real estate,' standing alone, operate as a conversion, but it was thought by the learned judge below, and it is insisted upon by the appellees here, that these words taken in connection with the other provisions of the will, exhibit a clear intention and purpose on the part of the testator that his real and personal property shall be converted into money for investment, and the collection and disbursement of interest or income in accordance with his directions therein, and further, that it is not possible to execute the will according to its terms without such a conversion of his real estate.

A mere naked power to sell real estate does not operate as a conversion of it into personalty, but such power coupled with a direction or command to sell will have that effect. If a testator authorizes his executors to sell his real estate, and to execute and deliver to the purchasers deeds in fee simple of the same, as in this case, and it is clear from the face of his will that it was his intention the power so conferred by him should be exercised, it will be construed as a direction to sell, and will operate as an equitable conversion. If in addition to the clear intention of the testator, it plainly appears that effect cannot be given to material provisions of the will without the exercise of the power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executor under it are the same, as if it contained a positive direction to sell.

There can be no final settlement of the estate, in accordance with the will, until the power conferred upon the executor for the sale of the real and personal property is exercised, therefore, conversion in fact must take place, and in point of equity the estate is considered as converted from the time of the death of the testator.

In the Supreme Court of the United States Craig *v.* Leslie is the leading case, decided in 1818 and reported in 3 Wheaton, 564. The direction in the will was as follows: "I give my real and personal estate to five executors, upon special trust, that my executors will sell both my personal and real estate. I give and bequeath to my brother all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted unto him." The brother of the testator was an alien, and as such could not take land. The in-

tention of the testator was clearly to convert his real estate into personalty, in order that the brother might take the bequest of the proceeds, and this intention was carried out.

WASHINGTON, J., delivering the opinion of the court, after reviewing the English authorities, says: "Were this a new question it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine that a devise of money, the proceeds of lands directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator directs by his will to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

"The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made."

In Peter *v.* Beverly, 10 Peters, 532, the testator directed certain land to be sold for the payment of debts, and did not say who was to sell. It was held, that the necessary implication was that the executors were to carry out the direction. Craig *v.* Leslie (*supra*) is quoted, and the doctrine therein stated adopted.

Taylor *v.* Benham, 5 How., 233, was a case in which the following clause was construed to have worked a conversion: "I do hereby order, will and direct, that, on the first day of January next, after my decease, or as near that day a can conveniently be, the whole of the property that I may die seized or possessed of, or may be in anywise belonging to me, be sold." WOODBERRY, J., says: "Courts in carrying out the wishes of testators, the pole star in wills, are much inclined, especially in equity, to vest all the powers or interest in executors which are necessary to effectuate those wishes, if the language can fairly admit it. They are inclined, also, when considering it a trust, or a power coupled with an interest, to have its duration and quantity commensurate with the object to be accomplished: Bradstreet *v.* Clarke, 12 Wend., 663; Coster *v.* Lorillard, 14 Wend., 299. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted for the purposes of the will, so much of his estate, or the money arising from it, as it not effectually disposed of by the will (whether it arises from some omission or defect in the will itself, or from any subsequent accident which may prevent the devise from taking effect) results to the heir-at-law: Burr *v.* Sim, 1 Wharton, 252. See Cropley *v.* Cooper, 19 Wall., 167.

In New York the doctrine of equitable conversion has been adopted in toto, and the rules for determining whether or not conversion in a specified case is to be considered as having taken place are much the same as those applicable in the same case in an English court.

The intention of the testator, if sufficiently clearly expressed, governs in this matter; when once that intention is determined, as

well as in all other questions concerning the construction and interpretation of wills. There must be either an express, imperative direction to the executor or trustee to sell, or a power of sale given, in connection with a limitation applicable to the property only in a changed form from that in which it is at the time of the testator's death, or by a blending by the testator of his real and personal estate, making it distributable as personalty.

In the case of, In the Matter of Gansert, 136 N. Y., 106, there was a direction to executors to pay debts of decedent and certain legacies. This was followed by a clause in the following words: "Giving and granting unto my said executors and trustees full power and authority to sell and convey any and all my real estate, either at private sale or public auction, and to make, execute and deliver good and sufficient conveyances therefore."

MAYNARD, J., says: "The testator well knew that his debts could not be paid, as directed, without sale of real estate, and he intended to clothe his executors with a power commensurate with the duties and obligations laid upon them.

Whenever a power or authority to sell is given without limitation, and is not in terms made discretionary, and its exercise is rendered necessary by the scope o the will and its declared purposes, the authority is to be deemed imperative, and a direction to sell will be implied, provided the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt, and his intention cannot otherwise be carried out: Scholle *v.* Scholle, 113 N. Y., 261; Chamberlain *v.* Taylor, 105 N. Y., 194; Hobson *v.* Hale, 95 N. Y., 593. The real and personal estate if blended in one gift to the executors for a common trust, in which all the beneficiaries share equally. In such cases the exercise of a general and unlimited power of sale is imperative, and may be compelled in favor of any party who is lawfully entitled under the provisions of the will to the real property when sold.

In the case of Clift *v.* Moses, 116 N. Y., 144, the following power given to an executor was held not to work a conversion as a sale was not absolutely necessary for the purposes of the will: "I give and devise to my executor and executrix all my real and property of every kind in trust for the purpose of paying my debts and legacies named in this, my last will, giving them power to sell, mortgage and convey any and all real estate for the purposes above named."

HAIGHT, J., delivering the opinion of the court, said: "Conversion arises only from an express, clear, and imperative direction, or from a necessary implication of such: 6 Am. and Eng. Encyclopedia of Law, 665. The question of conversion is one of intention, and the question is did the testator intend to have his real estate converted into personalty immediately upon his death? The whole will, and the circumstances of each case must be considered in deciding this question. If he did so intend, the court must give this intention effect, and treat the realty as personalty from the time of his death. If, however, he intended to give the executor, or trustee under his will,

a power to convert, leaving it discretionary with them to convert or not, the conversion will depend upon the will or discretion of the executor or trustee, and will not be regarded as consummated in law, until it is consummated in fact. In the will under consideration a power to sell, mortgage or convey any or all of the real estate is given. It is left entirely discretionary with the executor or trustee whether the sale shall be made or not, and as to whether the whole, or a portion only, shall be sold. It follows that there was no conversion until the executor exercised the power and consummated the sale:" Henderson *v.* Henderson, 21 N. Y., 800; Parker *v.* Linden, 22 N. Y., 614.

Evidently the distinction between Clift *v.* Moses, and *In re* Gansert, is to be found in the circumstances of each estate—in Clift *v.* Moses there was sufficient personal estate to pay all debts and legacies—without a sale and, therefore, the intention to convert could not be imputed to the testator, while in *In re* Gansert there was not sufficient personal estate for the purposes of the will, and the testator, with knowledge of such fact, having directed the accomplishment of those purposes, must be considered as having at the same time directed a sale of his real estate to make up the deficiency, and thereby worked a conversion out and out.

A mere power of sale in the executor does not work a constructive change of the property. The duty to sell must be imperative: In the Matter of the Will of Fox, 52 N.Y., 530. But where a power of sale is given, and it is apparent from the general provisions of the will that the testator intended his real estate to be sold, the doctrine of equitable conversion applies: Phelps *v.* Bond, 23 N. Y., 69.

In the case of Fisher *v.* Banta, 66 N. Y., 438, the will directed the executors to divide the *real estate* equally between the testator's two sons, and a codicil directed his executors to sell his real estate. It was held that the direction to sell was indicative of an intention on the part of the testator that his land should be divided between his two sons *as personalty*. By this construction both clauses of the will were effectively carried out. Had the first direction been obeyed, and the land distributed, the second direction could not have been of any effect, for there would have been no land left to sell, and the direction would have been nugatory.

If the direction to sell is imperative, requiring a sale at all events, and leaving it discretionary with the executors only as to the time and manner of selling, the conversion will be considered as taking place at the death of the testator, and the sale when made has the same effect, in respect to the rights of the parties in interest, as though made immediately: Arnold *v.* Gilbert, 5 Barb., S. Ct., 192.

"Upon the principles of equitable conversion," said the chancellor, in Lorillard *v.* Coster, 5 Paige, 173, "money directed by the testator to be employed in the purchase of land, or land directed to be sold and turned into money is, in this court, for all the purposes of the will, considered as that species of property into which it is directed to be converted; so far as the purposes for which such conversion is directed to be made are legal, and can be carried into effect."

The same principle is also appli-

cable to the case of a direction in a will to sell one piece of land, and to convert it into another for the purposes of the will, by investing the proceeds of the sale in the purchase of such other lands, under a valid power of trust, to make such sale and reinvestment.

The general doctrine as adopted in New York is vindicated at some length in Kane *v.* Gott, 24 Wend., 641, in which a trust in the executors was created, with imperative directions to sell, as soon as may be, the testator's whole real estate, and appropriate the avails to the purposes of the will, in connection with his other personal property. By his own act the testator had the power to throw the land into this shape, either by sale before his death or by his will: Gott *v.* Cook, 7 Paige Ch., 521; Van Vetchen *v.* Van Vetchen, 8 Paige, 106; Stagg *v.* Jackson, 1 Comstock, 206.

In White and Tudor's Leading Cases in Equity, Vol. 1, Part 11, page 1159, it is said, "The courts of Kentucky, though they do not reject the principle, obviously regard it with disfavor," and in support of this the following cases are cited: Clay *v.* Hart, 7 Dana, 1; and Samuel *v.* Samuel's Administrators, etc., 4 B. Mon., 245.

Clay *v.* Hart does not support this statement, as the only point decided in that case, touching in any manner upon equitable conversion, was that where a mere direction was given to executors to exercise discretion whether to sell or not, the power could not be exercised by the survivor of the executors. As there was no devise to them of the legal title, nor of any personal interest, nor any direction to sell, no equitable conversion was considered to have been worked.

Indeed the same rule is applied in Kentucky as in England and Pennsylvania. The question is, does the testator direct a sale, and show an intention that the beneficiaries shall take as legatees and not as devisee, if so the land is converted as of the death of the testator. The Court says in this case: "Had the testator peremptorily directed the sale of the land (and not for a special purpose, that might fail, or not require the sale of the whole of it) so that none of it could in any event go to the heirs, or devisees, it would have been treated, in equity, at the instant of his death, as a portion of his personal estate, and a direct and unconditional gift. A testamentary gift to his wife and children of the produce of the sale, might have been considered as a legacy for the payment of which the executor was bound by law. The words of the will in this case formed no direction of sale, the title to the land passed, by the will, to the beneficiaries, with a discretionary power in the executor to sell the land.

Samuel *v.* Samuel's Administrators, etc., 4 B. Mon., 245, is the other case cited to show disapproval of the doctrine of equitable conversion, by the courts of Kentucky. True it is here said to be extremely artificial, and that it will not be applied, by the Chancellor, to change the quality of property, as the testator has left it, without a clear indication manifested to give it character as money or land.

But this is no more than is said in many other States; indeed, everywhere the direction must be imperative to sell, at all events, thereby imposing a duty on the trustee or executor in order to effect

an equitable conversion. For it is the duty to convert, and the certainty that the actual conversion will take place sooner or later, which a court of equity construes, as a conversion from the death of the testator. Here the testator devised all his estate, real, personal and mixed to three trustees, with full power and authority, in their discretion, to sell and convey any of his estate, and he directs the trustees, in finally settling up and adjusting and paying over the amount of the proceeds of his estate, to distribute among three children all such sums of money as shall belong to said estate. The direction is made discretionary in terms. Though the last clause might be construed as expressing an expectation on the part of the testator that his estate would be all converted, yet it was not sufficiently clear to infer from it a direction to the trustees to sell at all events, and thereby to work a constructive conversion.

In the opinion it is said: "It may have been described as money, in the residuary clause, not for the purpose of controlling the discretion of the trustees, nor of indicating an intention that the legatees should have nothing but money, but only because the testator may have expected, that under the discretionary power of the trustees, the estate would be converted into money. The Court goes on to say: "And will such an implied expectation, when there is no command and the distribution of the estate in kind, to those to whom it is given would not violate any express provision of the will, furnish such evidence of an intention to convert the whole estate into money, as to authorize a court of equity to regard it as money, before it is actually converted? The doctrine of equitable conversion is at best extremely artificial. Its basis is that things agreed to be done are treated, in equity, as if actually done, but as the principle is stated in Story's Equity, Vol. II, §§ 212 and 214, they are so treated for "many purposes," and, therefore, impliedly, not for all purposes; and the court does not interfere to change the quality of the property as the testator has left it, unless there be some clear act or intention by which he has fixed upon it throughout a definite character, as money or as land. Nor will equity consider things as done in this light in favor of everybody, but only of those who have a right to pray that it might be done."

It is said in Powell on "Devises," at page 63: "The new character must be decisively and absolutely fixed upon the property." If trustees may convert it or not as they see fit, there is no constructive conversion.

I do not see that such statements show any obvious disfavor to the doctrine itself, nor can I find any expressions in Hite *v.* Hite, the case taken for annotation, which is a decision of a Kentucky court, showing that equitable conversion is any more unfavorably received in Kentucky than in the other States. Judge HOLT says, in Hite *v.* Hite: "The intention of the testator must govern." He undoubtedly intended that the trustees should so change and invest the estate to make all of it productive of income. This is evident from the eighth clause of the will which directs them to invest and dispose of it, "so as to be safe and produce income." He must have known that this could not be done at once,

without sacrifice. This doubtless led to his giving them a broad discretion in the matter. The estate was large, much of it, at his death, was already productive, and it cannot well be supposed that he expected a part of the principal would be given to the life tenants to compensate for a delay which he knew must occur before the remainder could be made so. Then follows the only clause in the opinion that could possibly be considered as throwing disfavor upon the doctrine of equitable conversion, which he had already adopted. The doctrine of equitable conversion is at best, an artificial, arbitrary one. It will not be applied unless it be made the duty of the trustees to sell. The Chief Justice concedes that the duty to sell is imposed upon the trustees in this case and holds that the discretion given, relates only to the time when it shall be done.

In Christler *v.* Medis, 6 B. Mon., 37, and in Hocker *v.* Gentry, 3 Meb. (Ky.), 473, the doctrine is stated, that if the direction to sell is imperative, the right of the legatee will, in equity, be regarded as a right to money, from the time of the testator's death, though the period of sale is remote, and conversion cannot be made until the time arives.

The Court, in the first of the above cases, said: "Real estate is converted into personalty, immediately upon the death of the testator, only where the direction to sell is positive, without limitation and without discretion as to time, on the part of those to whom the power is delegated."

The statement that the direction of sale must be without limitation as to time cannot stand, because it is clearly the rule in Kentucky that, though the time of sale is left to the discretion of the trustees, yet if the duty to sell *sometime* is placed upon them constructive conversion will take place.

In Green *v.* Johnson, 4 Bush., 164, decided in 1868, the Court construed the words "authorize and request" as working a conversion. Judge ROBERTSON says: "If, instead of devising the title to his three daughters, and merely requesting a sale of the land, the testator had devised it to the executors, and peremptorily ordered them to sell; it is admitted that, as to that interest, it was money bequeathed, and not land devised. Nevertheless, if thewill concerning the sale must be construed as mandatory, the testator must be presumed to have intended a conversion of the land into money, as best for the testamentary beneficiaries; and his intention if clearly manifest for such conversion, made the land money to the legatees. A mere authority to sell could not have been a constructive conversion; but the super-added "request to sell was constructively mandatory, because the unqualified request" was the testator's will, and left no discretion not to sell. Authority, analogy and reason allow no escape from this conclusion. Whatever a testator expresses as his will is mandatory; and if the will is unqualified the executors have no right to refuse its fulfillment. Such "request" is synonymous with "require," or "direct," or "order." The testator seemed to think that his provident end, of the best interest and security of his daughters, would be most advantageously attained by converting certain lands into money, and for

that purpose he requested his executors to make the conversion. This, in equity, was conversion itself, and, therefore, the daughters took money instead of land.

A court that will construe "request" as synonymous with "direct," in order to hold that an equitable conversion has been effected, can hardly be said to look upon the doctrine with disfavor. See also Collins *v.* Champ's Heirs, 15 B. Mon., 118.

When land directed to be sold is devised to certain persons, they take a gift of money; but if they elect to take the land as land, the sale need not actually take place, though the beneficiaries are regarded as purchasers. So, if the testator inserts in his will a clause giving a legatee the right to elect to take the land instead of money, yet as this is giving him no greater right than the law had already given him, such a will is considered as working a conversion of the land: Rawlings *v.* Landis, 2 Bush., 158; Perkins *v.* Coghlan, 148 Mass., 30; McFadden *v.* Hefley, 28 S. C., 317.

King *v.* King, 13 Rhode Island, 501 (1882), shows that the courts of Rhode Island have adopted the doctrine in its entirety. The clause of the will construed in this case was one by which the testator gave his executors a general authority and power of sale of his real estate. He says: "They may from time to time, and as often as they deem to be for the interest of said trust, sell and convey any of my real estate, and invest the proceeds. DURFEE, C. J., asks: "What was the the testator's intention? The rule being that, in equity, the property will be treated as being already what it was intended that it should become. Did the testator intend simply to give the executor or trustee under his will a power to convert, leaving it discretionary with them to convert or not? If so, the conversion will depend upon the will or discretion of the executors or trustees, and will not be considered as consummated in law until it is consummated in fact." In support of this statement, the Chief Justice cites several English cases and Cook *v.* Cook, 20 N. J. Eq., 375; Anewalt's App., 42 Pa., 414; Chew *v.* Nicklin, 45 Pa., 84. The question of the testator's intention is decided by the rule given in Story's Equity, Vol. II, § 214, already quoted, or as the rule is elsewhere laid down: "For the will to operate as a conversion, it must show in terms, or by necessary implication, that the testator intended the property to be converted absolutely, and at all events." The reason for this rigor of construction is, that there is not a spark of equity between the next of kin and the heir, and that therefore neither ought to lose the right which the existing character of the property gives him until it is clearly demonstrated that the testator intended to have it changed.

In New Jersey, the case of Cook *v.* Cook, 20 N. J. Eq., 375, contains the rule applicable there. Chancellor ABRAHAM I. ZABRISKIE, in construing the following words in a will: "I do authorize and empower my executors to sell and dispose of all my real estate," says: "When land is directed to be sold, absolutely and positively, without any time fixed for sale, it is considered as converted into money, from the death of the testator; but for this, the direction must be imperative. If it is optional with the executor whether to sell or not to