

RECONVERSION IN MISSOURI

BY ALBERT CHANDLER*

Few provisions in wills are more common or troublesome than a direction to executors to "sell my real estate and divide the proceeds among my children."

Though the heirs and sometimes their creditors or assigns can prevent a sale under rules obtaining generally,¹ there is such diversity among details in different states that we shall confine our discussion to the numerous Missouri cases in hopes of presenting the matter in a practical way here. Under such wills our courts have been called on to decide questions involving insurance, partition, mortgages, attachments and execution sales, ejectionment, executors' commissions, as we shall see, and to sound the gamut of family controversy.

On the threshold it may be well to suggest that in the examination of all the cases there is one touchstone which is at least helpful in solving any of the problems here involved. That is to ask, "Where was the title to this land the day after the testator died?" A devise of land to the executor to sell passes title to him; but where he is only directed to sell, the land will descend to the heirs subject to a naked power.² The title must always be somewhere, and the heirs can only be disinherited by an express devise or necessary implication.³ These matters will be discussed further later on.

One other preliminary caution: it is always to be remembered that under such wills equitable conversion and reconversion are fictions, useful in their way as are other fictions of the law, but that land is always in fact land.⁴ Confusing the fiction with the fact has sometimes resulted in an "irreconcilability on principle," as suggested by Judge Ellison⁵ who went on to state that "the authorities bring us to this: that land

*St. Louis Bar.

¹ 13 CORPUS JURIS 885 *et seq.*; 2 WOERNER AM. LAW OF ADMINISTRATION (3 Ed.) sec. 342; 13 COL. LAW REV. 369; HARVARD LAW REV. Vol. 18, pp. 1 and 83; Vol. 19, p. 81; Vol. 21, pp. 288 and 630; Vol. 22, p. 451; 14 MICH. LAW REV. 252; LANGDELL, BRIEF SUMMARY OF EQ. JUR. 260.

² *Simpson v. Erisner*, 155 Mo. 165; *Barnard v. Keathley*, 230 Mo. 209; *Turner v. Hine*, 297 Mo. 153; *Wyatt v. Stillman Institute*, 303 Mo. 94; *Hobbs v. Yeager* (Mo.) 263 S. W. 225; *Compton v. McMahan*, 19 Mo. App. 1. c. 498; *Re Rickenbaugh*, 42 Mo. App. 328; *Coil v. Continental Insurance Co.*, 169 Mo. App. 636.

³ *Eneberg v. Carter* 98 Mo. 647; *DeLashmutt v. Teetor*, 261 Mo. 436; *Wyatt v. Stillman Institute*, 303 Mo. 94.

⁴ *Turner v. Hine*, 297 Mo. 153; *Nall v. Nall*, 243 Mo. 247; *Griffith v. Witten*, 252 Mo. 627; *Re O'Bannon's Estate*, 142 Mo. App. 268; *Coil v. Continental Insurance Co.*, 169 Mo. App. 636.

⁵ *Compton v. McMahan* (1885), 19 Mo. App. 1. c. 499.

directed to be sold merely, does not go to the executor, but to the heir subject to the naked power of sale; that the land directed to be sold is to be deemed money, and as such does go to the executor." We shall find this confusion of fact and fiction in several other opinions which do not seem to have been shot through with the incandescence of meditation.

I.

DEFINITIONS

Equitable conversion, under such wills as we are considering, is "a fictional or constructive alteration of the nature of the land by which it is to be considered as personalty and dealt with as such. This legal fiction was invented to protect the beneficiaries⁶ and sustain and carry out the intention of a testator The principle upon which it is founded is that a court of equity, which regards the substance and not the mere form of an instrument, will consider things agreed upon or directed to be done as having been done, *where nothing has intervened which ought to prevent a performance*," *Turner v. Hine, supra*. And the court goes on to explain that the doctrine is applied here only in its constructive sense, not in its fullness. It is therefore to be distinguished from the early cases where a house built on land of another either by mistake,⁷ or by agreement⁸ remains the personal property of the builder, and such recent examples as where a will devised land to a charity, the testatrix was thereafter declared insane, her guardian sold the land for reinvestment, and on her death the devise was held not to have lapsed or been revoked but the proceeds were awarded to the charity in lieu of the land.⁹

Reconversion is a doctrine that "has been evolved from and is of necessity incidental to that of conversion, and under it the legatees are authorized during the constructive status of the property to elect whether they will take the land rather than the proceeds arising from the sale."¹⁰

This doctrine is as "thoroughly grounded in the law as the doctrine of conversion. In other words, whilst the words of a will may in legal effect convert land into money, yet subsequent acts of the beneficiaries may reconvert the subject into land."¹¹ Their right to elect to take the land unsold is a reasonable exercise of the fundamental idea of prop-

⁶ "The executor does not belong to that class of persons to whom the right to invoke the doctrine of equitable conversion is available," *Re O'Bannon's Estate*, 142 Mo. App. 268.

⁷ *Lowenberg v. Bernd*, 47 Mo. 297.

⁸ *Brown v. Turner*, 113 Mo. 27.

⁹ *National Board v. Fry*, 293 Mo. 399.

¹⁰ *Turner v. Hine*, 297 Mo. 153, 248 S. W. 933.

¹¹ *Nall v. Nall*, 243 Mo. 247.

erty, to make any lawful use of one's own; and a reconversion will result also where the purpose of the conversion fails, whether because impossible, unlawful, or, sometimes, inexpedient the fiction failing with the failure of its reason.¹² An election to reconvert may be made by the court acting for beneficiaries who are not *sui juris*,¹³ or by persons who have succeeded to the rights of beneficiaries either by voluntary conveyance¹⁴ or by judicial process.¹⁵ But here we enter upon debatable ground,¹⁶ as we shall see.

II.

THE WILLS CONSTRUED

In the following cases it was held that, under the wills there involved, conveyances by one or more of the heirs or devisees passed title to their grantees without any deed from the executor or trustee as such.

VOLUNTARY CONVEYANCES BY BENEFICIARY

"My executors shall sell, at private or public sale, all my property, both real and personal, as soon after my decease as they shall deem most expedient and for the best interest of my estate"—proceeds to widow for life, remainder to children. *Held*, a deed after final settlement by the widow alone, of two executors, with no express reference to the power, conveyed her life interest, but that only.¹⁷

Where a will devised property to the widow during life or widow-

¹² De Lashmuth v. Teetor, 261 Mo. 436.

¹³ Griffith v. Witten, 252 Mo. 627.

¹⁴ Turner v. Hinc, *supra*; Simpson v. Erisner, 155 Mo. 165; Williams v. Lobban, 206 Mo. 399; Hobbs v. Yeager (Mo.) 263 S. W. 225.

¹⁵ Eneberg v. Carter, 98 Mo. 647; Williams v. Lobban, *supra*.

¹⁶ Compton v. McMahan, 19 Mo. App. 494; Llewellyn v. Llewellyn, 122 Mo. App. 467; Morris v. Stephenson, 128 Mo. App. 338.

¹⁷ Little v. Addington (1875) 59 Mo. 275. This was in accordance with the rule laid down by Judge Bliss in Pease v. Pilot Knob Iron Company, 49 Mo. 124, that in arriving at the intention of the grantor, "if the instrument would be wholly inoperative unless taken as an execution of the power, the maker will be considered as having intended to execute it, although no reference to the power is made; but if there be any legal interest [i. e. of the grantor] on which the deed can attach, it will not execute the power." Compare two cases arising under the same will, where one deed was held to convey only a life estate, and the other was an exercise of the power; Owen v. Switzer, 51 Mo. 322 and Owen v. Ellis, 64 Mo. 77, both discussed in Campbell v. Johnson, 65 Mo. 439, where the presumption is introduced that a substantial consideration is a circumstance from which to infer an intention to convey the whole title.

Where the trustee has active duties, possession and control of real estate, so that the use will not be executed, a deed by the beneficiaries—who had no present right to possession—conferred none on their grantee, but did transfer such rights to distribution as they had; Simpson v. Erisner (1899), 155 Mo., l. c. 165.

hood, then to be sold and the proceeds divided among the children, a purchaser from the widow and children was held to have acquired the property free from the power and was granted an injunction against a sale under the power. *Williams v. Lobban*.¹⁸

Under substantially the same testamentary provision, mortgages by the several heirs were upheld, as an election to take the land instead of the proceeds. *Nall v. Nall*.¹⁹

Again under a substantially identical provision, quit claim deeds were held to convey the interests of those heirs who executed them. The court said that the doctrine of conversion and reconversion "being for the sole benefit of the persons to whom the proceeds of the sale of the land are to be paid, they are in fact the owners of the property, and may, being *sui juris*, contract concerning it as they may deem proper." *Turner v. Hine*.²⁰

Where a will directed the executor to rent certain lands until debts, etc., could be paid, then sell them and divide the proceeds, simple quitclaim deeds by certain residuary legatees, and other quitclaims expressed to release the interest of certain others as heirs, were alike held to convey their respective interests. *Hobbs v. Yeager*.²¹

INVOLUNTARY CONVEYANCE OF BENEFICIARY'S INTEREST

Under the following testamentary provisions the interests of beneficiaries were transferred, wholly or in part, to creditors or others by judicial proceedings, without a deed from the executor.

"Dispose of all my real estate as soon as it can be done without loss to my estate . . . to be equally divided between my children." *Eneberg v. Carter*.²² A creditor properly sold out the interest of one heir on execution, the land descending to the heirs only subject to the power. The court says, "Did the clause of the will in controversy operate of its own force and, without action on the part of the executor, to convert the land into money, and thus place it beyond the lien of the judgment and the execution issued to enforce it? I am not of the opinion it did, and for these reasons: (1). It is a well known maxim, that an heir at law can only be disinherited by express devise or necessary implication, and that implication is defined to be such a strong probability that an intention to the contrary cannot be presumed. (2). And his title cannot be defeated unless there was a disposition of the subject to some other person capable of taking."

¹⁸ (1907) 206 Mo. 399.

²⁰ *Supra*, footnote 10.

²² (1889) 98 Mo. 647.

¹⁹ *Supra*, footnote 11.

²¹ (1924), (Mo.) 263 S. W. 225.

Unsold lands given "to my executors in trust to be by them held, improved, leased, sold or otherwise disposed of as to them may seem best for the use and benefit of my children in equal shares," were partitioned, after final settlement, at the suit of some of the heirs. *Donaldson v. Allen*.²³

Under similar provisions, the Courts of Appeals appear to depart somewhat from the course of the Supreme Court. "My executor shall as soon as it would be profitable and convenient, sell my real estate at such times and on such terms as he may deem best and proper, and divide the moneys among my children"; *Compton v. McMahan*.²⁴ It was held that a sheriff's deed passed a title to the land "extinguishable by an execution of the power" by the executor, when the money received by the executor was held to go to the child "as legatee under the will and not as heir" so that the execution purchaser of the land of the heir "was not entitled to the personal interest of the legatee."²⁵

Lands were to "be sold at private sale by my executor for the best price obtainable and the proceeds . . . divided equally between my children," *Morris v. Stephenson*.²⁶ Purchasers of the interest of one child on execution sale were held not entitled to rents between the date of their purchase and a sale by the executor, and to have "got no interest in the estate by virtue of their sheriff's deed," on the theory that the land was converted by the will into personal property belonging to the executor and not to the heirs.²⁷

TIME FOR EXECUTING POWER OF SALE

BEFORE LETTERS TESTAMENTARY. It was early held that before probate of the will the executor's deed would be effective where the will, which speaks from the testator's death, gave the executor a power of sale. *Wilson v. Wilson*.²⁸

In a recent fraud case a married woman, then unable to serve under the statute, was named as executrix but never qualified. She induced a foreclosure and the court "hold her as having sold it and treat her as

²³ 182 Mo. 626. Partition was held appropriate in setting aside a fraudulent sale by the executor, *Barnard v. Keathley* (1910), 230 Mo. 209; also in *Nall v. Nall* (1912), 243 Mo. 247. See *Llewellyn v. Llewellyn*, (1906), 122 Mo. App. 467, where it was held the proceeds of a partition sale would go to the testamentary trustee.

²⁴ (1885), 19 Mo. App. 494.

²⁵ The distinction between the interest descending to an heir and that coming by purchase to one as legatee is observed also in *Dwyer's Estate* (1921) (Mo. App.), 231 S. W. 672.

²⁶ (1907), 128 Mo. App. 338.

²⁷ A similar decision with respect to intermediate rents is *Williams v. Williams* (1910), 145 Mo. App. 382.

²⁸ (1873), 54 Mo. 213.

having the purchase money in her hands as a trust fund for the purpose of executing the trust." *Carr v. Burr*.²⁹

And the Court of Appeals also said, perhaps obiter, that the executors "may sell the land although they refuse the administration." *Compton v. McMahan*.³⁰

TO BE EXERCISED BEFORE ADMINISTRATION PERIOD EXPIRES

Where the executors were directed to "sell at private or public sale as soon after my decease as they shall deem most expedient and for the best interest of my estate, and the proceeds to be used or applied in such manner as my executors shall think best," a deed made after final settlement in the probate court was held to convey only the individual interest of the grantor and not to exercise the power, distinguishing *Hazel v. Hagan*.³¹ The court says, "The selling is to be done by the executors and the proceeds used and applied by them in such manner as they, the executors, should deem best. This entirely rebuts any presumption of a personal trust to be executed after they or either of them had ceased to act officially." *Littleton v. Addington*.³²

The rule is stated in *Donaldson v. Allen*.³³ "If the will expressly or absolutely directs the executor to sell the real estate without vesting any discretion in the executor, and to apply the proceeds to the payment of debts or to distribute them, then the power adheres to the office of executor and is not personal, and must be exercised during the continuance of the executorship, for in such cases the proceeds of the real estate become personal assets of the estate and are a proper subject of administration and distribution by the Probate Court."

Recently the Supreme Court dealt with a will giving the residue to the widow for life; at her death, or earlier at her direction, the executor was directed to sell on such terms as he deemed best and give the proceeds to a certain charity. The executor made final settlement without having sold the land; the widow died; the circuit court appointed a successor-trustee to sell the land for the charity. The court held, "In investing the executor with a power of sale, the will in this case did not create a personal trust. The power conferred is one that adheres to the office of executor and must be exercised during the continuance of the executorship . . . consequently, the administration is still pending in the probate court. And that court, and that court alone, is vested with jurisdiction to fill the vacancy." *Wyatt v. Stillman Institute*.³⁴

²⁹ (1922), 294 Mo. 673, 243 S. W. 98. ³⁰ (1885) 19 Mo. App., 1. c. 509.

³¹ 47 Mo. 277.

³² (1875), 59 Mo., 1. c. 279. See also note 17, *supra*.

³³ (1904), 182 Mo., 1. c. 647.

³⁴ (1924), 303 Mo. 94, 26 S. W. 73.

In a still more recent case, a trust company, with power of sale as executor, had failed to sell the land for some nineteen years. The Supreme Court held, that "the executor ought to have sold the real estate within the time of administration, two years, as then fixed by law, unless the time of closing the estate was extended for good reasons by the probate court This estate should be fully and finally closed, as contemplated by the will of testator, and respondent should be held for all remiss conduct during the unnecessary years of its futile administration." *Re McElevay's Estate, Mississippi Valley Trust Co. v. Burke*.³⁵

POWER CONTINUING AFTER FINAL SETTLEMENT

Where the power of the executor is coupled with a discretion, it is personal and not official, and survives the final settlement; but it is not perpetual, and the donee is subject to the control of a court of equity. *Donaldson v. Allen*.³⁶ As this article is a discussion of reconversion, it may seem beside the mark to examine cases where the power of sale was exercised and no reconversion took place. But it will be found that a principle controlling many of these cases is the same principle that distinguishes between cases where reconversion is admissible and those where it is not open to the heirs. The beneficiaries cannot defeat the purposes of an active discretionary trust by electing to reconvert or otherwise, as we shall see. In deciding whether the sale can be made by a substitute, appointed either by the Circuit or the Probate Court, light has been thrown upon the right of beneficiaries to wind up a trust themselves.

WHETHER SALE BY APPOINTEE OR A SUBSTITUTE

The distinction sometimes involved above, between a personal trust and a power attached to the office of executor, reappears in some of the cases below, dealing with execution of the power of sale by the appointee or by a substitute, and will involve a discussion of the jurisdictional boundary line between the Circuit and Probate Courts under these wills.

Section 132 R. S. 1919 provides that "the sale and conveyance of real estate under a will shall be made by the acting executor or administrator

³⁵ (1924), 305 Mo. 224, 266 S. W. 123.

³⁶ (1904), 182 Mo. 626. Compare *De Lashmutt v. Teetor* (1914), 261 Mo. 436, where a trust created in another state evidently because of inability of foreign executors as such to act here, was held to die with the power of the foreign executors to receive the proceeds of a sale. Upon final settlement, therefore, the land vested in the heirs no longer subject to a power.

with the will annexed, if no other person be appointed by the will for that purpose, or if such person fail or refuse to perform the trust." With only slight verbal differences, this has been the law for over a hundred years. See sec. 25 of an act approved January 12, 1822, Territorial Laws.³⁷

An early case deals with both a vicarious exercise of the power, and a conflict in jurisdiction between the two courts, more clearly than these matters have been discussed in some of the later opinions.

A will directed the executor to sell land after the widow's death and then divide the proceeds among the children; the executor having refused to qualify, the Public Administrator took charge c.t.a.; after the widow's death he advertised and sold the land and accepted part purchase price and then refused to complete the sale. It was sought in the County Court—then having probate jurisdiction—to compel him to proceed. But the Supreme Court held that although the court having probate jurisdiction has control over sales under the statute, here the sale was under the will, executing a testamentary power, and relief must be sought in equity. *Coil v. Pitman's Administrator*.³⁸ Judge Wagner wrote the opinion, holding that "the administrator with the will annexed was the proper person to make the sale and execute the trust," under the statute above noticed (then Wagn. Stat. 93 No. 1). But to what court he is amenable in so acting is not settled by this statute, but by other legislation and general principles. In ordinary course, acting under the court having probate jurisdiction, the representative selling land must have it "appraised; he must advertise in a certain way before the sale takes place; the sale must be had at a certain time; the property must bring a certain amount, and there must be a report and approval to render it valid. . . . But in the case we are considering the specific power to sell is conferred by the will, and does not exist in consequence of any statutory law. The administrator acted independently of the County Court. He was not amenable to it for the performance of any duty respecting the sale; and the manner, time, price, place, etc., were all matters resting in his sound discretion. He was not required to make any report or settlement with the County Court in reference to his action; in fact, the sale had nothing to do with anything relating to the administration. The will gave the power of attorney to sell for a specified object not connected with anything touching the administration; and because the statute, in this instance, designated the administrator as the proper person to execute the power, it does not follow therefore that the County Court shall assume jurisdiction over the subject matter."

³⁷ Vol. 1, p. 925.

³⁸ (1870), 46 Mo. 51.

We have noticed above, in discussing another matter, the case of *Simpson v. Erisner*.³⁹ Here the will imposed active duties of management upon trustees, who were also executors. Both trustees resigned. The Probate Court appointed an administrator *c. t. a.* It was held that the legal title was in trustees, who must yet be appointed, to carry out the trust. The will differed from the stereotyped form we have found in most of the other cases.

The question of vicarious exercise of the power, as well as that of jurisdiction, is crucial in cases dealing with liability on the administrator's bond. A will directed land to be sold by executors, the proceeds loaned, the interest used to educate children, and at the widow's death the principal to be divided among the children. Letters testamentary having been revoked, a public administrator took charge, received the proceeds of lands already sold, and sold other lands. His authority having been revoked, his successor sued on his bond for the balance on hand, as assets for which his sureties were liable. It was held that "the power of sale given by the will here being absolute and peremptory, is annexed to and follows the office of executor, and survives by virtue of our statute to the acting administrator with the will annexed"; the land was converted "if not from the death of testator, at least from the date of sale"; he must therefore account as administrator and not as trustee. *Francisco v. Wingfield*.⁴⁰

Where the real estate was given "to my executors in trust," but with such active duties that it was a personal trust, *i. e.*, not attached to the office of executor, it survived the final settlement. The Circuit Court appointed a receiver to sell and to wind up the trust. The Supreme Court said, "There was no apparent necessity for the removal of the trustees and appointment of a receiver, but as this involved only a question of which should earn the commission and there has arisen bitterness among the beneficiaries, it cannot be said the trial court abused its discretion." *Donaldson v. Allen*.⁴¹

The Kansas City Court of Appeals held void a sale of land made by an administrator *c. t. a.* under such a will as we are considering, arguing that though the executor named had refused to act, the power did not pass, because "his duties as executor and trustee are wholly distinct. As executor he would have nothing to do with the land. Land is not a testamentary matter," and therefore a successor should have been sought in the circuit Court. *Compton v. McMahan*.⁴² This case has been cited often in the briefs of counsel, appearing in our reports; it

³⁹ 155 Mo. 165.

⁴¹ 182 Mo., *l. c.* 649.

⁴⁰ 161 Mo., *l. c.* 560, 561.

⁴² 19 Mo. App., *l. c.* 509.

has not been often referred to by the Supreme Court, and never on this point.

Without noticing the case above, the Kansas City Court of Appeals said later that "Nothing is better established than this 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. And it may be stated as a fixed rule that under a direction of this character the executor does not become a mere trustee of the moneys received by him from the sale of the lands, but takes them in his capacity of executor." *Re Branch Estate*.⁴³

Later on, however, the author of the opinion in *Compton v. McMahan* referred to it in another opinion which adds no light; under such a will he holds that on a policy of fire insurance issued to the deceased, his executors and assigns, the executor is the proper party to sue; then the opinion runs on *obiter* to say he would sue as trustee, and that a judgment collected would *not be assets of the estate* though "of course" *subject to the decedent's debts*. *Coil v. Continental Insurance Co.*⁴⁴

ELECTION TO RECONVERT

We come now to the meat of the matter: under what testamentary provisions it is possible for the beneficiaries to reconvert so as to take the land and defeat the power of sale, and how that right is to be exercised.

We have referred above to the provisions of the will in *Simpson v. Erisner*,⁴⁵ and the construction thereof as creating an active discretionary trust which would not be executed by vesting title in the heirs. The land was devised to the executors, to rent, repair and control, to support his widow and educate his children, and finally to divide. There it was held that the beneficiaries could not prevent a sale, nor could their assignee to whom all had conveyed their interests.

The same result was reached in *Wyatt v. Stillman Institute*,⁴⁶ but by a somewhat different line of reasoning. The proceeds of a sale of the residuary estate were to be given to the Institute for educational purposes; if the executor could not act, the Institute was to choose a successor. The Institute elected to take the land unsold. The court held that there was no devise of the property, the Institute was given money, and "land was merely the source from which the money was to be obtained"; only those having the exclusive beneficial interest can elect to

⁴³ (1907), 123 Mo. App., 1. c. 579.

⁴⁴ (1913), 169 Mo. App. 636, 155 S. W. 872.

⁴⁶ 303 Mo. 94, 260 S. W. 73.

⁴⁵ 155 Mo. 165.

reconvert; the Institute had no such interest; the gift was to a charitable use, and of all the proceeds, not merely the rents and profits. To take the land was held to be inconsistent with the gift, and for both the foregoing reasons the election was ineffectual.

It will have been observed that the wills discussed in both these cases were quite different from the testamentary clause with which we begin this article. It is only in such exceptional cases that reconversion is not open to the beneficiaries.⁴⁷

The courts have discussed the question whether an election to reconvert must be unanimous, or whether less than all the beneficiaries may defeat the power of sale. It is agreed that in all ordinary cases the election must be by all the beneficiaries, and only where one is given a stated sum which the others will pay, or under other such circumstances he cannot possibly be injured by reconversion by the others, will less than unanimous consent suffice.⁴⁸ But a court may elect for those not *sui juris*, *Griffith v. Witten*,⁴⁹ acting for their best interest, as it may also terminate the trust on a proper showing. *Donaldson v. Allen*.⁵⁰

"The election need not be simultaneous, *Williams v. Lobban*,^{50a} and may take place at any time before the actual conversion of the land into money by a sale.⁵¹

The election may be shown by executing deeds⁵² to the land, or mortgages,⁵³ or by pleadings filed;⁵⁴ and the execution of the use will be tantamount to the same thing.⁵⁵

In one case the difficulty of valuing the interest of one heir was deemed an insuperable obstacle to reconversion by the others; *Turner v. Hine*.^{55a} But the Kansas City Court of Appeals saw no such difficulty in valuing the land as a basis for compensating the trustee. *Gilbreath v. Cosgrove*.⁵⁶

EFFECT OF RECONVERSION

EXECUTOR'S COMMISSIONS. The question of jurisdiction controlled

⁴⁷ See discussion of *Williams v. Lobban* in the recent case of *McElevey's Estate*, 305 Mo. 244; 266 S. W., l. c. 124, 125.

⁴⁸ *Turner v. Hine* (1923), 297 Mo. 153; 248 S. W. 933; *Williams v. Lobban*, 206 Mo., 399; *Galbreath v. Cosgrove*, 193 Mo. App. 419; *Wyatt v. Stillman Institute*, *supra*.

⁴⁹ (1913), 252 Mo. 627.

⁵⁰ 1904. 182 Mo. 626.

^{50a} 206 Mo., l. c. 414. See also *Nall v. Nall*, 243 Mo. 247, separate mortgages given at different times.

⁵¹ *Griffith v. Witten* and *Williams v. Lobban*, *supra*.

⁵² *Williams v. Lobban*, 206 Mo. 399. ⁵³ *Nall v. Nall*, 243 Mo. 247.

⁵⁴ *Donaldson v. Allen*, 182 Mo. 626; *Nall v. Nall*, *supra*; *Galbreath v. Cosgrove*, 193 Mo. App. 419.

⁵⁵ *De Lashmutt v. Teetor*, 261 Mo. 436. ^{55a} Note 10 *supra*.

⁵⁶ (1916), 193 Mo. App. 119.

in disposing of the first case involving a claim to commissions on the proceeds of such a testamentary sale of real estate. "The power given the executor to sell the land was not a power conferred upon him in his capacity as executor The subject matter of the controversy between the trustee and the devisees in respect to the commissions claimed by the former for services rendered in the execution of the trust is clearly within the jurisdiction of the circuit court and without that of the Probate Court." The latter had disallowed commissions charged in the final settlement, and this was affirmed. *Re Rickenbaugh*.⁵⁷

In *O'Bannon's Estate*,⁵⁸ though the will directed the executor to sell land and pay off the distributees "in money," the heirs voluntarily partitioned lands of the agreed value of \$25,000, and the executor claimed a commission on their valuation. The Kansas City Court of Appeals held that, however it might have been converted by the will, the land was reconverted by election of the heirs and "the court was right in disallowing the claim for a commission."

Without citing its decision in this case, the same court reached the opposite result in *Gilbreath v. Cosgrove*.⁵⁹ Here the will directed the executor to sell, pay the widow \$8000, and divide the balance. The court enjoined a sale on condition that the heirs pay off the widow and a commission to the executor.

The St. Louis Court of Appeals followed the *O'Bannon Case* in *Re Dwyer's Estate*,⁶⁰ where the heirs had voluntarily partitioned, holding the executor was not entitled to a commission, setting out the statute R. S. 1919, sec. 220, which allows "as full compensation for their services and trouble a commission of five per cent on personal property and on money arising from the sale of real estate."

The latter court makes an effort to reconcile the *O'Bannon* and *Gilbreath* cases, on the theory that where there is a conversion, a commission may be due; where there is no conversion, no commission is due. But this rather begs the question as to what will be considered a conversion, whether it be actual or constructive. It is submitted that the *Gilbreath* case cannot be reconciled with the decision of the Supreme Court in *Williams v. Lobban*,⁶¹ holding that a purchaser from the heirs "is entitled to the land, and is not bound to submit to a sale of the property and attendant expenses and costs thereof, and the court below was right in granting him a perpetual injunction to prevent the sale," without any such onerous condition requiring commissions to be first paid as in the *Gilbreath* case.

⁵⁷ (1890), 42 Mo. App. 328.

⁵⁸ (1916), 193 Mo. App. 419.

⁶¹ (1907), 206 Mo. 399.

⁵⁹ (1910), 142 Mo. App. 268.

⁶⁰ (1921), 231 S. W. 672.

The Supreme Court had theretofore upheld an exclusion of executors from such commissions, where they did not make the sale, in *Donaldson v. Allen*:⁶² "Appointment of a receiver involved only a question of which should earn the commission and . . . it cannot be said the trial court abused its discretion."

MANAGEMENT OF LAND. Under a will devising land to trustees, with power to sell for the best interests of the estate and pay over the proceeds to foreign executors, to be by them divided among beneficiaries, the Supreme Court held the trustees had only a naked power; "they have under the provisions of the will no right to the possession, direction or management of the land in any respect whatever," *De Lashmutt v. Tector*.⁶³

Under a similar power the Supreme Court recently held that the executor takes "exactly that quantity of interest which the purposes of the trust require . . . The will did not impose on the executor any duty involving possession, control or management of the testator's land; it merely directed him to sell it. This naked power he could as effectively exercise without the fee as with it. It follows that he did not take the fee by implication." *Wyatt v. Stillman Institute*.⁶⁴

It is the business of the heirs or distributees, not of the executor, to keep the property insured.⁶⁵

Questions involving rents are far from settled. Thus in the *Stillman Institute* case, where there was no devise of the land to anybody, and where we have just seen that the executor had a naked power of sale without control or management of the property, it was held that the title vested in the heirs in trust for the sole beneficiary, which would be entitled to the proceeds of a sale *together with the rents and profits*. Who should collect the rents is not stated; doubtless a receiver might be appointed as in *Donaldson v. Allen*.⁶⁶

Of course there is no trouble about this where the heirs and the distributees are the same persons, and title vests in them subject to a naked power of sale. Our examination of the wills construed, *supra*, has shown that most of them fall into this class. The right to the rents seems dependent upon the date and duration of the supposititious conversion of the land into personalty. While there was some hesitation about fixing the date, it is perhaps settled that the conversion will be deemed to take place with the testator's death, in cases where there is a peremptory

⁶² (1902), 182 Mo., 1. c. 649.

⁶³ (1914), 261 Mo. 436, 169 S. W. 34.

⁶⁴ (1923), 303 Mo. 94, 260 S. W. 73.

⁶⁵ *Coil v. Continental Insurance Co.* (1913), 169 Mo. App. 636.

⁶⁶ 182 Mo. 626.

direction to sell,⁶⁷ but where the power to sell is dependent on a condition subsequent,⁶⁸ or the exercise of a discretion,⁶⁹ there will be no fictional conversion but the land will be deemed land until the sale and actual conversion into money.⁷⁰ Even in the first group of peremptory directions to sell, will be found cases holding title to remain in the heirs awaiting the actual conversion.⁷¹ An examination of the cases in the notes below will disclose considerable speculation upon the date of conversion, not always necessary to the decisions, with resulting confusion. Where it is held that the land had been converted into personalty, it has followed that rents belonged to the executor to be accounted for in his settlements, *Williams v. Williams*.⁷²

The same principles should determine whether a creditor of an heir, levying on his interest in the land, can acquire the same on an execution sale. Where land is only the source from which money is to come, to be distributed by the executor, it is an asset of the estate rather than of the heir or distributee.⁷³ But where the land vests in the heir subject to a naked power of sale⁷⁴ or where there has been a reconversion by which the heirs or distributees have elected to take the land as land, a levy on the interest of the heir will pass to the execution purchaser such real property as the heir has therein.⁷⁵ We have seen above that the same principles determine what passes by a voluntary conveyance.⁷⁶

Relief against fraud or misconduct of the trustee has been afforded even though it was necessary to bend the doctrines of conversion and reconversion to the peculiar circumstances of the cases.⁷⁷

⁶⁷ *Re McElevy's Estate, Mississippi Valley Trust Co. v. Burke* (1924), 305 Mo. 244; *Wyatt v. Stillman Institute* (1923), 303 Mo. 94; 260 S. W. 73. But even here, where the will intends to convert land into personalty, it has been held that there may be no intention to vest the title to the land in the executor, and that partition will lie, *Barnard v. Keathley* (1910), 230 Mo. 209; and that it is for the heirs to insure, *Coil v. Continental Insurance Co.* (1913), 169 Mo. App. 636.

⁶⁸ *Re Rickenbaugh* (1890), 42 Mo. App. 328.

⁶⁹ *Simpson v. Erisner* (1899), 155 Mo. 165; *De Lashmutt v. Teetor* (1914), 261 Mo. 436.

⁷⁰ *Hobbs v. Yeager* (1924) (Mo.) 263 S. W. 225; *Turner v. Hine* (1923), 297 Mo. 153; 248 S. W. 933; *Griffith v. Witten* (1913), 252 Mo. 627.

⁷¹ *Williams v. Lobban* (1907), 206 Mo. 399.

⁷² 145 Mo. App. 382. See also *Morris v. Stephenson* (1907), 128 Mo. App. 338.

⁷³ *Wyatt v. Stillman Institute* (1923), 303 Mo. 94; *Morris v. Stephenson* (1907), 128 Mo. App. 338.

⁷⁴ *Eneberg v. Carter* (1889), 98 Mo. 647.

⁷⁵ *Compton v. McMahan* (1885), 19 Mo. App. 494. See discussion of involuntary conveyances above.

⁷⁶ Compare *Simpson v. Erisner* (1899), 155 Mo. 157 with *Hobbs v. Yeager* (1924) (Mo.), 263 S. W. 225.

⁷⁷ *Barnard v. Keathley* (1910), 230 Mo. 209; *Carr v. Barr* (1922), 294 Mo. 673; *Re McElevy's Estate, Mississippi Valley Trust Co. v. Burke* (1924), 305 Mo. 244.