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MORTON L. UNION

### Wills—Ademption—Insurance—Right to Proceeds

The specific legatee of an automobile sought to collect the proceeds of an insurance policy on the automobile after an accident in which it was damaged. The testatrix sustained injuries in the accident which resulted in her subsequent death. The insurance company paid to the executor the value of the automobile after the accident and took possession of it as salvage. The court held that the executor was entitled to the proceeds of the policy and that the legatee was entitled only to the value of the automobile as of the death of the testatrix. The insurance policy was held to be a personal contract between the testatrix and the insurer, hence the legatee had no interest therein.<sup>1</sup>

The case clearly illustrates how the relationship of the death of a testator and the damage or destruction of a specific legacy may produce varied results. That is, since the rights of the legatee are ordinarily determined as of the death of the testator,<sup>2</sup> it will be important whether the damage or destruction of the legacy or devise occurred prior to or subsequent to the testator's death.

In the first instance, *i.e.*, where the damage or destruction occurred prior to the death, the law of ademption controls.<sup>3</sup> Without elaborating on the intricacies of ademption, suffice it to say that ordinarily ademption is defined as the taking away of the subject matter of a specific legacy<sup>4</sup> or devise by its destruction, or its disposition by the testator in his lifetime.<sup>5</sup> Therefore, if the specific legacy or devise is damaged or

<sup>38</sup> This would certainly seem to be the conclusion to be drawn from *Branch v. Federal Trade Commission*, 141 F. 2d 31 (7th Cir. 1944); *Nestle Food Co., Inc.*, 2 F. T. C. 171 (1919); *Caravel Co., Inc.*, 6 F. T. C. 198 (1923); *Robert M. Lease Co., Inc., et al.*, 12 F. T. C. 85 (1928); *Export Petroleum Co. of Calif., Ltd.*, 17 F. T. C. 119 (1932); *Lake Erie Chemical Co., et al.*, 29 F. T. C. 67 (1939)

<sup>1</sup> *In re Barry's Estate*, 252 P. 2d 437 (Okla., 1952). *Accord*, *Ind. Mutual Cyclone Ins. Co. v. Rinard*, 102 Ind. App. 546, 200 N. E. 452 (1936); *Converse v. Boston Safe Deposit and Trust Co.*, 315 Mass. 544, 53 N. E. 2d 841 (1944); *In re Hilpert's Estate*, 165 Misc. 430, 300 N. Y. Supp. 886 (Sur. 1937); III AMERICAN LAW OF PROPERTY § 14.32 (1952).

<sup>2</sup> N. C. GEN. STAT. § 31-41 (1943 Recomp. 1950).

<sup>3</sup> *In re Hilpert's Estate*, 165 Misc. 430, 300 N. Y. Supp. 886 (Sur. 1937); III AMERICAN LAW OF PROPERTY § 14.32 (1952) where it is stated: "The right to recover on a fire insurance policy when the loss occurred in the lifetime of decedent passes to his personal representatives, as in case of any other chose in action; this recovery is for the general benefit of the estate and not for the devisee or others entitled to the land."

<sup>4</sup> 28 R. C. L. WILLS § 341 (1921).

<sup>5</sup> *Green v. Green*, 231 N. C. 707, 58 S. E. 2d 722 (1950); *Tyner v. Meadows*, 215 N. C. 733, 3 S. E. 2d 264 (1939); *King v. Sellars*, 194 N. C. 533, 140 S. E.

destroyed prior to the testator's death, the rules of ademption will operate to extinguish or limit what the legatee takes under the will. It logically follows also that in this instance the legatee will not be entitled to the proceeds of insurance on the specific legacy, since he has sustained no loss.

Where the damage or destruction to the specific legacy occurs after the death of the testator, there is, of course, no ademption, and the insurance collected by the executor will be held in trust for the legatee who has sustained the loss.<sup>6</sup> In this situation, the legacy existed in its normal condition at the time of the testator's death, hence the legatee is entitled to its fair value at that time.

The most perplexing problems arise when the available facts indicate that the death of the testator and the damage or destruction of the legacy were apparently simultaneous. In one New York case,<sup>7</sup> the testatrix died in the sinking of a ship and the specific legacy was lost in the same sinking. The court, in awarding to the legatee certain proceeds to cover the value of the chattel, briefly held that "there was no destruction, selling or disposition of the articles in question during the lifetime of the testatrix." An English case,<sup>8</sup> decided on somewhat the same facts, reached a result contrary to the New York case. The testator and the specific legacy were lost at sea and the court held that there was an ademption of the legacy, hence the insurance proceeds belonged to the estate. The reasons given for the decisions in both cases were brief and no basis for the contrary results can be determined from either case. It is possible that the New York court could have considered the fact that the property was insoluble and still in existence at the time of the testatrix' death, thus preventing ademption. If such was the case, the court would probably have reached a contrary decision if the specific legacy and the testator had perished in a conflagration resulting in the complete destruction of the legacy. It is submitted that the New York court arrived at the more equitable decision in the matter. However, due to the varied circumstances that may surround an apparently simultaneous death of the testator and destruction of the legacy, the court would probably refuse to indulge in any presumptions and the burden would fall on the legatee, in claiming the proceeds from the legacy, to prove that there has been no ademption.<sup>9</sup> On the other

91 (1927); *Starbuck v. Starbuck*, 93 N. C. 183 (1885); *Taylor v. Bond*, 45 N. C. 5 (1851); 4 PAGE, WILLS § 1513 *et seq.* (1941).

<sup>6</sup> *Culbertson v. Cox*, 29 Minn. 309, 13 N. W. 177 (1882); *Millard v. Beaumont*, 194 Mo. App. 69, 185 S. W. 547 (1916); *Wyman v. Wyman*, 26 N. Y. 253 (1863); *Graham v. Roberts*, 43 N. C. 99 (1851); VANCE, INSURANCE § 133 (3d. ed. 1951).

<sup>7</sup> *In re Shymer's Estate*, 136 Misc. 334, 242 N. Y. Supp. 234 (Sur. 1930).

<sup>8</sup> *Durant v. Friend*, 5 De G & S 343, 64 Eng. Rep. 1145 (1852).

<sup>9</sup> Note, 43 HARV. L. REV. 1311 (1930).

hand, the courts seem to favor the construction of a will which prevents the failure of a bequest or legacy.<sup>10</sup> Certainly that construction should have some weight when there has been no intent or voluntary act on the part of the testator to cause an ademption, as where the testator and specific legacy perish simultaneously.

The testator by making a specific legacy intends a real benefit to the legatee, and if the legacy is defeated through operation of law rather than by his own act, his intent may be said to have been defeated. Even if the legacy is defeated by his own act, there is no conclusive intent on his part that the legacy be adeemed. Of course, this undesirable result has been alleviated somewhat by the courts in construing the legacy as a general or demonstrative legacy if at all possible.<sup>11</sup> Even though the legacy is clearly a specific one which has been destroyed, it would seem that in some instances the legatee would be entitled to the proceeds therefrom on the basis of the testator's implied intention. That is, if it can be implied from the "four corners" of the will that the testator intended some fixed pattern of distribution among the natural subjects of his bounty, there would appear to be no objection to allowing the proceeds of adeemed property to be paid to a legatee or devisee.<sup>12</sup> Hence, by construction, the apparent intent of the testator may be served and ademption prevented.

Further, attempts have been made in some jurisdictions to remedy the situation by statute.<sup>13</sup> Kentucky's statute<sup>14</sup> seems to be the most liberal of the statutes on the subject, but it operates to prevent ademption only where the heirs of the testator are concerned. In one case decided under the statute,<sup>15</sup> it was held that a specific devise of a farm to the testator's heirs was not adeemed by a sale of it during the testator's lifetime and the devisee-heirs were entitled to the proceeds. It

<sup>10</sup> *Willis v. Barrow*, 218 Ala. 549, 119 So. 678 (1929); *Palmer v. French*, 326 Mo. 710, 32 S. W. 2d 591 (1930); *In re Strassenburgh's Will*, 136 Misc. 91, 242 N. Y. Supp. 453 (Sur. 1930); *In re Levas Estate*, 33 Wash. 2d 530, 206 P. 2d 482 (1949).

<sup>11</sup> *Vogel v. Saunders*, 92 F. 2d 984 (D. C. 1938); *Conway v. Shea*, 282 Mass. 25, 183 N. E. 771 (1933); *Methodist Church v. Thomas*, 235 Mo. App. 671, 145 S. W. 2d 157 (1941); *In re Liell's Will*, 139 Misc. 513, 247 N. Y. Supp. 386 (Sur. 1931); *Smith v. Smith*, 192 N. C. 687, 690, 135 S. E. 855, 857 (1927) ("If the words will be satisfied by anything of the same kind, not owned by the testator, the legacy is general.").

<sup>12</sup> *See Trust Co. v. Miller*, 223 N. C. 1, 4, 25 S. E. 2d 177, 178 (1943); *Nooe v. Vannoy*, 59 N. C. 185, 189 (1860).

<sup>13</sup> ALA. CODE ANN. § 61-15 (1940) (if the testator conveys his interest in the devised property and later acquires a new interest, the new interest passes unless it appears from the will or other instruments that the testator intended a revocation of the will); GA. CODE ANN. § 113-818 (1937) (no ademption if the testator exchanges property devised for other of like character); KY. REV. STAT. § 394.360 (1948) (when property devised to an heir is thereafter converted, the devisee shall receive the value of the devise unless a contrary intent appear from the will or other evidence).

<sup>14</sup> KY. REV. STAT. § 394.360 (1948).

<sup>15</sup> *Westover's Ex'rx v. Westover*, 313 Ky. 545, 233 S. W. 2d 105 (1950).

has been suggested that "anti-ademption statutes" could be passed, as we now have "anti-lapse statutes," to prevent the legacy's failing;<sup>10</sup> but apparently no state has been willing to go so far to remedy the situation. Even if it were found under the above remedies that the legatee or devisee were entitled to the proceeds of the legacy, query as to whether insurance proceeds would be considered proceeds of the legacy or of a separate contract.

It would seem that the most practical remedy is to be found in the will itself. Thus, if the testator were to provide in his will that if the specific legacy is not a part of his estate at his death, the legatee is to take other rights, such as the proceeds of the property, the property purchased with the proceeds of the property, or the insurance derived from its damage or destruction in lieu of the property specifically bequeathed, the problem would be practically extinct except for the matter of tracing proceeds. The intent of the testator can best be served when drafting his will by informing him of the possibility of ademption and the remedies available.

ELTON C. PRIDGEN

#### Witnesses—Competency of Husband and Wife—Effect of Validity and Purpose of Marriage

Defendant was on trial for violation of the immigration laws. He had entered into a marriage in France with an honorably discharged veteran for the purpose of bringing himself within the language of the War Brides Act<sup>1</sup> so as to gain entrance to the United States. At the time of the marriage both parties understood its limited purpose; it was agreed that a divorce would be obtained after the marriage had served this purpose; and the wife received a sum of money for participating in the plan. At the trial the government offered the wife as a witness against the defendant. He objected on the ground that she was his wife pursuant to a French marriage and therefore incompetent to testify against him. *Held*: The validity or invalidity of the French marriage is immaterial. The relationship was entered into with no intention of the parties to live together as husband and wife, but only for the purpose of using the ceremony in a scheme to defraud. The marriage was a sham, empty, phony affair, and the ostensible spouse was competent to testify against the defendant.<sup>2</sup>

<sup>10</sup> Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 514 (1948); III AMERICAN LAW OF PROPERTY § 14.13 (1952).

<sup>1</sup> See 59 STAT. 659 (1945), 8 U. S. C. § 232 (1947) which provides in effect that alien spouses of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War, shall be admitted to the United States.

<sup>2</sup> *Lutwak v. U. S.*, 73 Sup. Ct. 481 (1953).