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Abstracts of Recent Cases

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The powers and duties of an incompetent's committee in West Virginia are set out in W. VA. CODE ch. 27, art. 11, § 4 (Michie 1961), which provides, "He shall preserve such estate and manage it to the best advantage; shall apply the personal estate . . . to the maintenance of such person, and his family, if any; . . ." The West Virginia court has stated that the powers conferred by this statute are broad, *McDonald v. Jarvis*, 64 W. Va. 62, 60 S.E. 990 (1908), and that the management of the estate is transferred for preservation and wise expenditure as may be most beneficial to the incompetent owner. *Gapp v. Gapp*, 126 W. Va. 874, 30 S.E.2d 530 (1944).

Apparently the question of making expenditures for other than support payments to the incompetent or his family has not arisen in West Virginia. However, in view of the statute's broad language, a West Virginia court might well sanction the substitution-of-judgement doctrine to the point of making distributions for tax avoidance purposes, if of course, it is something a reasonable person would do under the circumstances and it is clearly shown that the recovery of the incompetent is unlikely and that his comfort and well being will not be endangered.

David Gail Hanlon

Wills—Equitable Conversion

T, who owned two farms, entered into a specifically enforceable contract to sell farm number one. Later, he executed a will in which he devised his personal property to *A*, a life estate in the farms to *A*, and the "balance" in the farms to *B*. At *T*'s death the contract was unperformed but still specifically enforceable. *A* contends that *T*'s rights under the contract to sell the farm passed with *T*'s personal property. *B* contends that *T*'s rights under the contract to sell the farm passed under the specific devise of the farms. The issue presented was whether a devise of land in which the testator has naked legal title sufficient to pass his personal, equitable interest in that land. *Held*: yes, a general or specific devise passes the interest of the testator in the land which he had contracted to sell prior to the execution of the will. The fact that the testator was mistaken as to the legal nature of his interest in the land will not be allowed to defeat his intent to give the benefit

of his interest to a particular person. The devise to A for life, remainder to B will operate on T's rights under the contract. *Father Flanagan's Boy's Home v. Graybill*, 132 N.W.2d 304 (Neb. 1964).

Equitable conversion is a fiction of the courts of equity under which the owner of realty is deemed to own personal property if he has the right to receive personal property in place of the realty. Similarly, the owner of personalty may be deemed to own realty. It is a constructive alteration in the legal nature of the property and is based on the broad principle that equity considers done that which should be done. The very best estate plan can be ruined if just before the testator dies, his interest in Blackacre is converted into personalty by a contract, option, condemnation, fire, etc. Generally, the survivors are not so interested in who gets the property itself as they are in who gets the value it represents. Sager and Lutins, *Equitable Conversion and the Virginia Decedent*, 42 VA. L. REV. 409 (1956). The solution to this problem depends on whether there is a will. If there is, it is important to know whether the conversion took place before or after the execution of the will, and if it was after, whether there was an applicable anti-ademption statute.

If there is no will, the right to the purchase price of land contracted to be sold passes to the administrator of the intestate to be distributed along with the rest of the personal property. The intestate vendor's naked legal title descends to his heirs to be held for the benefit of the purchaser, but the equitable interest in the purchase money passes to his administrator. *Panushka v. Panushka*, 221 Ore. 145, 349 P.2d 450 (1960). This rule is well settled by case law; however, in an early New Jersey case in which the plaintiff proceeded at law rather than in equity the rights under the contract were held to pass to the heirs because the law court would not recognize the doctrine of equitable conversion. Apparently, had the plaintiff proceeded in equity the result would have been different. *Teneick v. Flagg*, 29 N.J.L. 25 (1860).

If the decedent dies leaving a will the effect wrought on the disposition of the estate by an equitable conversion depends on the order in which the events occurred.

At common law, where the will was executed and later there was an equitable conversion of property that had been specifically

devised or bequeathed, the gift failed. An equitable conversion of realty into personalty was sufficient to adeem a specific gift. Ademption is the failure of a specific devise or bequest because the subject matter was disposed of or destroyed between the execution of the will and the testator's death. *In re Coleman's Will*, 242 N.Y.S.2d 4 (Surr. Ct. 1963). The rule is generally applied regardless of the intention of the testator; most courts agree that while satisfaction depends on the intention of the testator, ademption depends merely on the extinction of the subject of the specific devise or bequest. The theory is not that a revocation was intended; rather, it is that nothing is left in the estate on which the specific devise or bequest can operate. *In re Atkinson*, 19 Wis.2d 272, 120 N.W.2d 109 (1963). In West Virginia there is authority that ademption depends on intention either expressed or inferred. *Swann v. Swann*, 131 W. Va. 555, 48 S.E.2d 425 (1948). The view that intention is unimportant gains support from the fact that even where property is taken against the wishes of the testator by condemnation there may be a fatal ademption. *Amestrano v. Downs*, 63 N.E. 340 (N.Y. App. 1902).

Various events are sufficient to take property out of the testator's estate so as to cause an ademption. Certainly, where there is a complete alienation of the testator's interest in the subject of a specific devise or bequest there is an ademption. Therefore, where the testator executed a will in which there was a specific devise of real estate but later conveyed the real estate the devise failed. The court could not substitute the proceeds from the sale in place of the land. *Mastics v. Kiraly*, 196 N.E.2d 172 (Ohio Prob. 1964). Similarly, where the testator took a purchase money mortgage in exchange for the subject of a specific devise, the devisees were not entitled to the mortgage; the devise was adeemed. *In re Bernier's Will*, 181 N.Y.S.2d 385 (Surr. Ct. 1958). The granting of an option is sufficient to cause an ademption if the option is later exercised, and it is of no consequence that the exercise was after the testator died. The exercise relates to the time the option was granted. Therefore, where the testator devised all his real estate and later granted an option to purchase to a third party, upon the exercise of the option the gift was adeemed, and the proceeds from the sale become a part of the testator's residuary estate. *Schneck Estate*, 30 Pa. D. & C.2d 417 (Orph. Ct. 1962). Where property is taken by eminent domain the courts are in agreement that the doctrine

of ademption applies; however, due to the differences in the various condemnation statutes the results in similar cases are often not the same. *LaFontaine's Heirs v. LaFontaine's Heirs*, 205 Md. 311, 107 A.2d 653 (1954). For example, in New Jersey there is no equitable conversion of the property until the condemnation proceedings are fully terminated. *In the Matter of Burnett*, 50 N.J.Super. 482, 140 A.2d 242 (1958). Certainly, where the title passed under the condemnation proceedings between the execution of the will and the testator's death, there was an ademption of any specific devise. *In re Celentano's Estate*, 213 N.Y.S.2d 1019 (Surr. Ct. 1961). If the testator conveys less than his entire interest in a property previously devised, there is an ademption as to the part conveyed, but the will is operative as to any portion left undisposed. Therefore, where the testator devised Blackacre and later conveyed it by a severance deed reserving the mineral rights, the ademption operated only as to the surface. *Knicket's Will*, 185 N.E.2d 93 (Ohio 1961). In order to avoid the harsh rule of ademption the courts have occasionally refused to recognize that a certain property was no longer in the testator's estate at his death. Where the change is so slight as to amount to a mere change in form and not substance, there is no ademption. *Biss v. Parrish*, 232 Ore. 26, 374 P.2d 382 (1962). In West Virginia the courts have recognized this exception; where the testator invested the "coal money" in municipal bonds there was not such a change in the substance of the property as to cause an ademption. The legatees of the "coal money" took the bonds. *Cornwell v. Mt. Morris Methodist Episcopal Church*, 73 W. Va. 96, 80 S.E. 148 (1913).

At common law it was well settled that entering into a specifically enforceable contract to convey property was a sufficient disposition of that property to cause an ademption. Even though there was no conveyance of the title before the testator died, any specific testamentary provision concerning the subject of the contract failed by ademption, and the rights on the contract passed as personalty. *In re Sprague*, 244 Iowa 540, 57 N.W.2d 212 (1953). In many states this rule has been modified by statute so that a mere contract to convey property may effect an equitable conversion but will not cause an ademption. Generally, the anti-ademption statutes provide that no agreement by a testator to convey property previously devised or bequeathed shall be deemed a revocation of the devise or bequest; rather, the property shall pass by the terms

of the devise or bequest subject to the agreement. The apparent purpose of legislatures in enacting such statutes is to avoid the strict application of the doctrine to the formation of executory contracts and to avoid disappointment merely because the nature of the testator's interest in the property changed. The courts have generally recognized this purpose, and the effect of such statutes has been to pass to the devisee or legatee whatever interest the testator had in the property at his death regardless of its legal nature. *Shure v. Dahl*, 80 N.W.2d 825 (N.D. 1957). No anti-ademption statute has been enacted in West Virginia.

There is no ademption where there was first an equitable conversion and later the will was executed. In the principal case, the testator contracted to sell his property before executing his will, and there was held to be no ademption. The acts or events which amount to the disposition of the property must occur between the time the will is executed and the testator's death. *Buder v. Slacke*, 343 Mo. App. 506, 121 S.W.2d 852 (1938). Ademption is based on the failure of a thing to continue to exist. *Seifert v. Kepner*, 227 Md. 517, 177 A.2d 859 (1962). Even though there is no ademption where the disposition preceded the execution of the will, if the disposition was complete, the gift still fails because there is no subject on which it can operate. However, where the testator had some interest in the property devised, even if only a security interest, the courts hold that he merely made a mistake in describing his property. For example, where *T* entered into a specifically enforceable contract to sell Blackacre and later executed a will in which he devised Blackacre to *X*, the devise was effective to give *X* whatever rights *T* still had under the contract at his death. *Robinson v. Lee*, 136 S.E.2d 860 (Va. 1964). Similarly, a devise of property on which the testator merely held a purchase money mortgage is presumed to refer to the testator's rights on the mortgage. *Bathey v. Bathey*, 94 Neb. 729, 144 N.W. 786 (1913). In a New York case similar reasoning was used where the testatrix owned no real estate but did own all the stock in a real estate holding company. Her specific devise of all her real property was intended as a bequest of the stock and it was given that effect. *Wyle's Estate*, 118 N.Y.S.2d 182 (Surr. Ct. 1952). The law will not allow a devise or bequest to fail simply because the testator made a mistake in describing the subject of the gift if there is enough correspondence with some property in the estate to afford

the means of determining the testator's intent. This rule is based on the broad principle that in interpreting and construing a will the intention of the testator must prevail if it can be ascertained from the will and admissible extrinsic evidence. More specifically, each section of a will must be interpreted in the light of the entire will and the circumstances surrounding the testator when he executed it. *Wooddell v. Frye*, 144 W. Va. 755, 110 S.E.2d 916 (1959). Apparently no West Virginia case is directly in point, but there is little doubt that the rule in West Virginia is similar to that applied in the principal case.

Where there is a specific devise of property, and later the testator contracts to sell the property, according to the common law there has been such a disposition as to cause the gift to fail. However, where a testator executes a will which purports to devise or bequeath property already under contract to be sold, the will is interpreted in the light of those circumstances and the misdescription of the testator's interest is not fatal to the devise or bequest. As in the principal case, the testator's interest in the property passes to the named object of his bounty regardless of its legal nature.

Robert Willis Walker