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Decedents' Estates And Trusts—Specific Legatee Not Entitled to Insurance Proceeds of Adeemed Gift

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had been unfaithful to him, prior to the time of drawing the will. This she contended deprived him of the necessary testamentary capacity and affected the disposition of his estate under the will. The denial of probate of the will by the Surrogate Court was based on a jury finding that testator at the time of the drawing of the will was not of sound and disposing mind and memory. The Appellate Division reversed upon the law and on the facts.¹⁴ The Court of Appeals reversed the decision of the Appellate Division upon a finding that the issue of testamentary capacity had been properly submitted to the jury and to overturn their finding would be to deprive the jury of its traditional function of passing on the facts. (Note: During the trial on the issue the wife was allowed to testify concerning a personal communication between herself (an interested party) and the deceased. Under Section 347 of the New York Civil Practice Act this testimony should have been excluded and its admission in evidence constitutes reversible error. The Court of Appeals, therefore, reversed and ordered a new trial.) A dissent in the Court of Appeals was based on a belief that the evidence as presented was not sufficient to establish a question of fact as to testator's testamentary incapacity.

On the issue of testator's testamentary capacity, in the present case, there was substantial competent evidence which indeed raised an inference that he was under a delusion at the time of the drawing of the will. There is no doubt that this delusion, viz., that his wife was unfaithful, had affected the disposition of his estate under the will. The proponents sought to answer these contentions in two ways, first, that there was a reasonable basis for the testator's belief and secondly, even if the testator were acting under a delusion, there were other valid reasons for the disposition he chose which would support the validity of the will. The evidence presented by the proponent on his first point presented a question of conflicting theories for the jury's determination, viz., was there a reasonable basis for testator's belief or was there not. This conflict was resolved by the jury in favor of the wife. Proponent's second argument was also rejected, for where it appears that a disposition under a will has been or might have been affected by a delusion then the will must be invalidated.¹⁵

SPECIFIC LEGATEE NOT ENTITLED TO INSURANCE PROCEEDS OF ADEEMED GIFT

According to the law of ademption as it exists today, if an article specifically devised is lost, stolen, destroyed, or substantially changed before the will of the testator takes effect, the article is adeemed and cannot pass by the will.¹⁶ The fact that any of the above mentioned events take place with or without the consent or intent of the testator is immaterial.¹⁷

In the case of *In re Wright's Will*,¹⁸ a diamond ring was specifically devised

14. 8 A.D. 969, 190 N.Y.S.2d 845 (2d Dep't 1959).

15. *Supra* note 11.

16. Atkinson, *Wills* 742 (2d ed. 1953).

17. *In re Brann*, 219 N.Y. 263, 114 N.E. 404 (1916).

18. 7 N.Y.2d 365, 197 N.Y.S.2d 711 (1960).

but could not be found among the testatrix's effects at her death. The ring was insured and the proceeds of the insurance, \$4000, were paid into the estate. Both the specific legatee of the ring and the residuary legatee claimed the proceeds.

The Court of Appeals affirmed the Appellate Division,¹⁹ holding for the residuary legatee because the specific legatee was unable to carry the burden of proof that the ring disappeared after the death of the testatrix. Had the plaintiff proved this fact, she would have prevailed, as the ring would have passed by the will and the property being hers, she would have been entitled to the insurance proceeds.

In holding for the specific legatee the Surrogate was of the opinion that since testatrix's title to the ring would be superior to that of a finder or thief, if the ring disappeared before death, the specific legatee inherited this superior title and consequently was the only one who could sign a release of all right, title, and interest in the ring to the insurance company in return for the insurance proceeds.²⁰ Thus, it did not matter whether the ring disappeared before or after the death of testatrix.

The fallacy of this position, however, is that if the ring was lost prior to the death of the testatrix, the title to the ring cannot pass by the will because the insurance proceeds are substituted for it, and it is settled that the specific legatee is not entitled to insurance proceeds for a gift which is adeemed by change or disappearance before the death of the testator.²¹

ALLOCATION OF EXTRAORDINARY STOCK DIVIDENDS TO TRUSTS ESTABLISHED PRIOR TO 1926

At present in New York, Section 17(a) of the Personal Property Law provides, in substance, that unless a contrary intent appears in the will or deed, all stock dividends whether ordinary or extraordinary are payable to the principal of the trust.²² This statute, however, applies only to trusts created after 1926, the date of its enactment.²³ Stock dividends payable to a trust created before this date must be apportioned in accordance with the "Osborne rule."²⁴ Under this rule the value of the stock at the inception of the trust is described as the "intact value." This value is so described because it is to remain un-

19. 8 A.D.2d 158, 187 N.Y.S.2d 306 (1st Dep't 1959).

20. 15 Misc. 2d 225, 177 N.Y.S.2d 410 (Surr. Ct. 1958).

21. *Ametrano v. Downs*, 170 N.Y. 388, 63 N.E. 340 (1902).

22. N.Y. Per. Prop. Law § 17(a).

23. *Equitable Trust Co. v. Prentice*, 250 N.Y. 1, 164 N.E. 723 (1928).

24. "The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in trust. The value of the investment represented by the original share after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust." In *re Osborne*, 209 N.Y. 450, 485, 103 N.E. 823 (1913).