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Decedent's Estate--Ademption--Effect of Change in Nature of Bequeathed Property (In re Ireland's Estate, 257 N.Y. 155 (1931))

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no part of the stock having been paid for, he lost his right thereto. Plaintiff claims that a contractual obligation to declare dividends rested on the defendants. *Held,* the defendant corporation was under no legal obligation to declare dividends. Such obligation cannot be inferred from the provisions of the contract to sell stock to the employee. *Lindgrove* v. *Schluter & Co.,* 256 N. Y. 439, 176 N. E. 832 (1931).

The plaintiff employee alleges that the defendant corporation earned large profits and that the proportion of such profits which accrued to the shares owned by the plaintiff amounted to upwards of $118,000 or more than the full amount of the purchase price thereof, yet the defendant corporation made no declaration of dividends. The mere fact that a corporation has a large amount of surplus or net profits does not entitle the stockholders to the payment of dividends.[1] The directors of a corporation owe a duty to their stockholders to exercise an impartial judgment in reference to the declaration of dividends, and to declare them only when, under the existing circumstances, a declaration will seem best to serve the corporate interests; and no contract, engaging them unrestrictively to declare dividends can have any legal force.[2] What is true of contracts by directors is true of contracts by corporations, which may act only through its directors.[3] Consequently, the plaintiff has no contractual right to have dividends declared.

H. F. S.

DECEDENT'S ESTATE—ADEMPTION—EFFECT OF CHANGE IN NATURE OF BEQUEATHED PROPERTY.—The testator had bequeathed fifty-six chares of stock to the legatee in a will made in 1926. Subsequently the testator became mentally incompetent and a committee was appointed of his person and estate. The committee, needing money to support the incompetent, sold the stock and used the proceeds for his maintenance until his death. The account of the committee was judicially settled and the balance of the amount received from the sale of the stock was paid over to the executor of the estate by order of the court. The legatee under the will brought an action to recover the proceeds of the sale in lieu of the specific property

[1] Williams v. Western Union, 93 N. Y. 162 (1883); Beveridge v. N. Y. El. R. R. Co., 112 N. Y. 1, 19 N. E. 489 (1889); Burden v. Burden, 159 N. Y. 287, 54 N. E. 17 (1899); Greeff v. Equitable Life Insurance Co., 160 N. Y. 19, 54 N. E. 712 (1899).

[2] West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838 (1889); Flaherty v. Cary, 62 App. Div. 116, 70 N. Y. Supp. 951 (1st Dept. 1901), *aff'd,* 174 N. Y. 550, 67 N. E. 1082 (1903).

[3] 6 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (1919) §3659.

bequeathed. The Appellate Division, affirming the decision of the trial court, was of the opinion that the intention of the testator governed, and, as he had become incompetent to change his will, his committee had no power to dispose of this stock so as to work an ademption of the legacy.[1] On appeal, *held,* reversed. Sale of the testator's stock by the committee after the testator became incompetent worked ademption of the specific legacy. *In re Ireland's Estate,* 257 N. Y. 155, 177 N. E. 405 (1931).

Unless there is a statute to that effect the courts cannot change a specific into a general legacy. The specific property to be given by will does not exist unless it can be physically turned over to the legatee. One claiming the benefit of a specific legacy must establish the existence and identity of the subject matter of the legacy as stated in the will.[2] Specific legacies do not usually abate unless the residuum and the amount available for the payment of general legacies have been exhausted in the payment of debts.[3] In this event they abate *pro rata.*[4]

In the principal case the legatee could not establish the existence and identity of the subject-matter as the committee had converted the subject-matter of the legacy into money, thereby working an ademption of the specific bequest.

It would seem that the Appellate Division leans too far toward one side of the question, while the Court of Appeals leans too far towards the other. The incompetent would not desire that the shares of stock, bequeathed under a will made by him while he was sane, be held for the benefit of a stranger while he was spending the remainder of his estate for medical attention; especially where the remainder would naturally go to his children. Nor yet does it seem reasonable that the incompetent would wish that the entire bequest be adeemed, if there remained a residue from a sale of the specific property bequeathed. A committee in lunacy is a mere conservator of his ward's estate, and his possession of that estate vests him with no power to change his ward's duly expressed purposes respecting distribution of his estate after his death.[5]

England has met the above situation by the Lunacy Act of 1890.[6] In cases governed by this act, sales and other disposition of the property of the testator under the powers of the act, do not affect the interest of the legatees except so far as the money thereby produced is actually expended under the act, and the court will as far as possible administer the estate of the lunatic testator so as to preserve the rights of the legatee.[7] In a recent English case consols belonging to

[1] *In re* Ireland's Estate, 231 App. Div. 288, 247 N. Y. Supp. 267 (3d Dept. 1931).
[2] Barber v. Davidson, 73 Ill. App. 441 (1897).
[3] Stevens v. Fisher, 144 Mass. 114, 10 N. E. 803 (1887).
[4] Tomlinson v. Bary, 145 Mass. 346, 14 N. E. 137 (1887).
[5] 28 R. C. L. 345, 346, 4 R. C. L. Supp. 1819.
[6] §123, subd. 1.
[7] 2 JARMAN, WILLS (1930) 1056.

the patient and specifically bequeathed by will were sold and the proceeds paid into her bank account. After the patient's death the specific legatees were held to be entitled to the money remaining in the bank after the sum applied by the receiver on behalf of the incompetent had been deducted.[8] New York has no statute like the Lunacy Act, and until there is one to that effect it is supposed that the courts here must be bound by the common-law rule.[9]

It is interesting to note that recently the Missouri courts had a case where real estate was specifically devised and was sold by order of the probate court while the testator was insane and under guardianship. It was there held that the sale worked no ademption or revocation of the devise and that at the death of the testator the devisee was entitled to the remainder of the proceeds.[10] The Missouri and English courts look at this particular question logically, while New York insists on adhering to mechanistic legal reasoning.

R. C. W.

EQUITY—ADEQUACY OF TENDER ON RESCISSION OF CONTRACT. —Plaintiff, president and chief stockholder, in the Marr Oil Corporation, brought an action to rescind a contract, whereby he, through the fraud and bribery of his agents, had been induced to sell his shares of stock in exchange for others in the Southern Oil Corporation. The exchanged stocks had been disposed of in the open market. However, upon learning of the fraudulent character of the transaction, the plaintiff rebought an equivalent number. These he tendered back, together with the shares purchased by his innocent co-directors, but failed to do the same as to the shares owned by the guilty directors, the agents in the negotiation. Question: Was such tender adequate? *Held,* it was, and thus plaintiff was entitled to the relief sought. The refusal of the conspirators to join in the undoing of a wrong may not be used as a ground for refusing equity. However, the court may exact the return of the profits made through the purchase of the equivalent number of shares. *Marr* v. *Tumulty,* 256 N. Y. 15, 175 N. E. 356 (1931).

A court of equity will go far to procure the declaration of a rescission on terms that are just. Fraud and misrepresentation as to the stocks of a corporation are adequate grounds for rescinding a

[8] Matter of Hodgson's Trusts 2 Ch. Div. 189 (1919).

[9] The nearest approach to such a statute is §1402 N. Y. CIVIL PRACTICE ACT, which relates to real property.

[10] Lamkin v. Kaiser, 256 S. W. 558 (Mo. App. 1923).