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In Pederson the court reasoned "Now there is no lack of opportunity for a physician or surgeon to keep abreast of the advances in his profession . . . ."33 The standards required by state medical licensing boards, the comprehensive coverage of medical journals, the "detail men" of drug companies, and post graduate courses serve to keep physicians abreast of national standards.34 It is not contended that the facilities in smaller communities are now equal to those in larger towns and cities, nor that the ability and methods of treatment are everywhere the same. It is contended, however, that the older barriers no longer exist that would prevent any competent physician from knowing the extent of his ability and the capabilities of his facilities. There is nothing to prevent the doctor from knowing what skills and facilities are readily accessible for the proper treatment of the patient. "Increasingly realistic judges . . . will acknowledge that the legal rule ceases when the reasons for it cease."35

HAROLD N. BYNUM

Wills—Ademption by Trustee of Incompetent Testator in North Carolina—Adoption of the Intent Rule

In Grant v. Banks3 the North Carolina Supreme Court held that the sale by a trustee of property specifically devised by his ward prior to incapacitation did not adeem the devise and that proceeds from the sale still remaining in the estate were recoverable under

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22 In 1940, in Tevdt v. Haugen, 70 N.D. 338, 349, 294 N.W. 183, 188 (1940), the North Dakota Supreme Court stated:

"The duty of a doctor to his patient is measured by conditions as they exist, and not what they have been in the past or may be in the future. Today, with rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practiing. So far as medical treatment is concerned, the borders of the locality or community have, in effect, been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of his limited facilities or training is unable to give."


24 Id. at ——, 431 P.2d at 977.


26 270 N.C. 473, 155 S.E.2d 87 (1967).
the doctrine of equitable conversion. The issue of ademption by act of a trustee for an incompetent testator was one of first impression in North Carolina. Prior North Carolina ademption cases are based on the acts of testator or events happening during the life of testator while he retained testamentary capacity.

In this case the testatrix had executed a will in 1951 providing for the disposition of her personal property and for the sale of her homeplace, the proceeds of which were to be distributed to her nephews and nieces or their heirs. The will further provided that, subject to the right of the estate to control and possession for two years, a store and lot owned by testatrix was to go to the Methodist Orphanage. In 1957 testatrix was struck and seriously injured by an automobile and required constant medical and custodial care until her death in 1964. She was adjudged mentally incompetent and a trustee was appointed. With court approval the homeplace and lot were sold to provide funds to support the incompetent. Upon depletion of these and other cash reserves permission was obtained to sell the store and lot devised to the Methodist Orphanage. Of the 90,000 dollars received from the sale of the store and lot, between 40,000 dollars and 50,000 dollars remained in the estate at the time of testatrix's death. The issue raised in the suit was whether the specific devise of the store and lot was adeemed by the trustee's sale or if the remaining proceeds of the sale should go to the orphanage.

The ability of a trustee to adeem property specifically devised by his ward is the subject of sharp conflict among American courts.

This conflict is largely due to the fact that some courts have applied the rule that the intention of the testator must control, so that ordinarily there would be no ademption, while others take the view . . . that the true test is whether or not the thing spec-

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2 Id. at 485, 155 S.E.2d at 95. "Conversion is the fictional change of realty into personalty or of personalty into realty for equitable purposes." Scott v. Jordan, 235 N.C. 244, 250, 69 S.E.2d 557, 562 (1952). Thus the equitable conversion doctrine applied here is that the sale proceeds are impressed with the characteristics of the specific devise so that they might pass to the specific devisees under the will.

3 There are several types of ademption possible in the law of wills, i.e., ademption by gift during testator's life, ademption by extinction, etc. See 96 C.J.S. Wills § 1172 (1957); 57 Am. Jur. Wills §§ 1579, 1580 (1948). This note, however, is concerned only with ademption by extinction of the subject matter.


6 270 N.C. at 481, 155 S.E.2d at 93.
cifically bequeathed remains in specie at the time of testator’s death...\(^7\).

The latter view, known as the English or specie test, is the minority rule.\(^8\) The minority jurisdictions reason that if the specific devise is not in the testator’s estate at the time of death, the courts have no power absent specific statutory direction to change the residuary estate into the specific devise.\(^9\) The majority follow the view that no ademption occurs when the trustee of an incompetent testator sells the property devised because of the inability of the testator to express his testamentary intent other than as expressed in the will.\(^10\) Even the majority, however, generally agree that there is an ademption pro tanto of the proceeds used in the ward’s maintenance.\(^11\)

In adopting the majority rule the supreme court relied on *Brown v. Cowper*.\(^12\) The court there, in construing N.C. GEN. STAT. § 33-32, stated: “The general rule is that, where the real estate of a lunatic is sold under a statute, or by order of court, the proceeds of sale remain realty for the purpose of devolution on his death intestate while still a lunatic.”\(^13\) Despite the fact that the above case applied to an intestate lunatic, the court could “see no reason why . . . this rule should not apply to an incompetent testator.”\(^14\) Reasoning further the court stated:

Trustee and ward is a trust relation in which the trustee acts for the ward, whom the law regards as incapable of managing his own affairs. The legal title to the property is in the ward, the trustee being merely the custodian, manager, or conservator of the ward’s estate. In his limited capacity . . . the trustee has no power to change the will of his ward by merely commingling assets in his hands. To so hold would reach the preposterous

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\(^7\) 57 AM. JUR. Wills § 1590 (1948).
\(^9\) In Re Ireland’s Estate, 257 N.Y. 155, 177 N.E. 405 (1931), changed by statute, New York Civil Practice Act, § 1399 (1933); accord, Jones v. Green, (1868) L.R. 5 Ch. 555.
\(^12\) 247 N.C. 1, 100 S.E.2d 305 (1957). In this case the guardian of a lunatic had sold his ward’s interest in land with court approval. Upon his death the heirs at law sought to take the personal property as if it were realty.
\(^13\) Id. at 9, 100 S.E.2d at 311.
\(^14\) 270 N.C. at 484, 155 S.E.2d at 95.
result of allowing a guardian or trustee to rewrite and alter the provisions of a will so as to destroy the testamentary intent of testator.15

Although this reasoning is in line with many recent decisions on this point16 it does not necessarily follow that this is the most just or equitable rule.

In adopting the intent test the court stated that a failure to do so “would reach the preposterous result of allowing a guardian or trustee . . . to destroy the testamentary intent of testator by merely commingling funds.”17 In appellant’s brief, however, it was noted that

it is well to remember in this case that the trustee . . . elected to sell and dispose of the homeplace prior to his sale and disposal of the downtown property. Had he first sold the downtown property, the homeplace, which brought $17,500 (an amount much less than that which is now on hand), would have remained intact.18

Thus by choosing the order in which the various pieces of property were sold the trustee did in fact decide who would take under the will. It is difficult to understand how this result is any less “preposterous” as regards testatrix’s actual intent.

The court in following the majority rule apparently adopted the major exception to it,19 i.e., that proceeds of the sale used in the support and maintenance of the ward are adeemed pro tanto. It should be noted, however, that such pro tanto ademption was unavoidable in that no other funds were available to support the testatrix. Should a case arise in which the trustee sells property subject to a specific devise for support of the ward while “generally devised” property remains intact at death, will the court require the latter property be given to the specific devisees up to the value of the specific devise because of the inability of the trustee to change testator’s intent?20 It would seem logical so to hold under the present rule.

15 Id. at 485, 155 S.E.2d at 95, 96.
17 270 N.C. at 485, 155 S.E.2d at 95, 96.
19 270 N.C. at 485, 155 S.E.2d at 95. The court allowed only the recovery of those funds which were not used in the support of the ward or in costs of administration.
20 At least one court has so done. In In Re Mason’s Estate, 62 Cal. 2d
since the court, by denying the trustee the power "to destroy the testamentary intent of testator" implies a fortiori that the testamentary intent will thus be preserved.

In preserving the testamentary intent the court reasoned that the doctrine of equitable conversion should apply to the incompetent testate situation as well as the incompetent intestate situation. This reasoning seemingly overlooks one important factor—the will as an expression of testator's intent as to the ultimate disposition of his entire estate. In the intestate situation the legislature provides a will for the decedent. The principle underlying the various classifications delineated by descent and distribution statutes is that those who generally would be the natural objects of a decedent's bounty take over those who would not. Had the instant case been an intestate situation the Methodist Orphanage would have had no claim. Since it is testate, however, the court holds that the orphanage takes the money remaining in the estate to the exclusion of the next of kin. In so doing the court places great emphasis on the fact that the orphanage was to get a specific devise while the next of kin were intended to take only the residuary estate. Was this in fact the intention of the testatrix?

Although this is a problem of ademption rather than construction of wills, it is helpful to refer to the will to determine whether the result attained under the majority rule is in accord with testatrix's intentions—the implied purpose of adopting the rule. Generally the will must be construed as a whole to ascertain the intent of the testator. In the present case testatrix bequeathed the store and

213, 397 P.2d 1005, 42 Cal. Repr. 13 (1965), there was a specific devise of testator's home to the son of a friend. After incompetency, the guardian bank sold the home for testator's support, keeping the 21,000 dollars sale proceeds in a separate account. At death only $56.66 dollars of this money remained. Other property in the estate valued at $6,808.08 dollars was to go to the residuary legatees. In holding that there was no ademption pro tanto of the specific devise, the court stated that "when specifically devised property has been sold and the proceeds used to pay debts and expenses, the devisee may have his gift redeemed from the remainder of the estate." 62 Cal. 2d at 217, 397 P.2d at 1008, 42 Cal. Rptr. at 16.

21270 N.C. at 484, 155 S.E.2d at 95.


lot to the orphanage subject to the control and possession of her estate for two years, the bequest being "made at the request of my [deceased] husband." The will further provided that "the rest and residue which remains in the hands of my said Executor...shall...be equally divided between [the children of my brothers or their heirs]." Obviously testatrix did not contemplate her future incompetency at the time she executed the will. Construing the will as a whole it is extremely doubtful that she intended her nephews and nieces to be excluded under any circumstances. Even as to the specific devise she provided that it was to be subject to the right of the residuary estate to possession for two years. Indeed, by her very words the testatrix provided for the orphanage at the request of her deceased husband. Under the intent rule adopted by the court, however, an entity outside of the family relationship took the whole of the residuary estate to the exclusion of her family. It was just such a result which led the New York court to adopt the English view, saying "an intention to hold...shares of the preferred stock for the benefit of a stranger, while spending the remainder of his estate which would naturally go to his children, for doctors, nurses, and maintenance can hardly be imagined."

Perhaps a more equitable rule in situations like the present is the Scottish rule cited by our court but not followed. This rule states that "no act of a curator bonis can avail to affect the order of his ward's succession...unless it can be shown not only that it was a proper and necessary act of administration on the part of the curator, but that it would have been a necessary and unavoidable act on the part of the ward if sui juris." Comparing this test with the majority and minority American doctrines it seems a safe middle ground in that (1) it does not require ademption every time the character of the specific devise is changed (minority rule), while (2) it does not deny ademption every time the change in the devise is

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25 Record at 13, Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967).
26 Id. at 14.
27 Thus, should not the court have allowed as a minimum the right of the residuary legatees to possession and control of the remaining money for two years?
29 270 N.C. at 482, 155 S.E.2d at 93.
caused by act of a trustee (majority rule). This rule would not give the trustee the power "to destroy the testamentary intent of testator" because it requires not only that the change be a necessary act on the part of the trustee but that it be an act which the testator would have made himself if *compos mentis*. Applying this rule to the instant case there would be an ademption of the specific devise and the heirs would take the residuary estate. Since the store and lot was the only estate asset left at the time of the sale, the testatrix would have had to sell the property for support had she been *sui juris*.

Although the North Carolina Supreme Court followed the great weight of American authority in adopting the intent test it seems that the rule adopted did not give effect to the intention of testatrix. The basic fault in both the majority and minority rules in this country is their failure to give effect to the will as a whole in determining the intent of testator. In light of this failing the Scottish rule of necessity would ostensibly bring about a more equitable solution.

*James R. Carpenter, Jr.*