

personalty by the agreement which is enforceable against him. A devise by will, prior to and in no way referring to a subsequent contract to convey, the effect of which changes the estate devised into a mere lien, cannot be arbitrarily regarded as a presumed intention by the testator that the proceeds of the sale should replace the estate devised. Moreover, an intention to make a specific devise necessarily includes an intent to render it subject to ademption in the event of the specific devise being converted into cash. If this be true as to specific legacies⁴⁰ there is no reason why it should not apply to specific devises. Assuming that by oral declarations it could be shown that the testator did not intend an ademption by a later sale, this would undoubtedly violate the letter and the spirit of the Wills Act⁴¹ which insist on the formalities of writing and execution in order to avoid opportunities for perjury. For this reason New Jersey⁴² and other states⁴³ have held that the sale, destruction, or collection, of a bequest or devise, adeems it without regard to the actual intention of the testator. Discussion of the motives and intentions of the testator in destroying the subject of the devise would be productive of endless uncertainty and confusion. Upon these considerations, the *Riddle Case*⁴⁴ appears to have been erroneously decided. The effect of an executory contract upon a prior devise should be determined not upon the uncertain grounds of presumed intention, but rather upon the identity of the testator's estate in accordance with the language of his will at the time of his death.

LIABILITY OF INSURER ON POLICY VOID FOR NEGLIGENCE OR MISTAKE OF AGENT—It is a good defense to an action on an insurance policy that the assured breached a warranty¹ or made false representations concerning facts material to the risk.² A doubt arises, however, when the assured offers evidence that the warranty was

⁴⁰ *Mecum v. Stoughton*, 81 N.J. Eq. 319 (Ch. 1913); *in re Kirkpatrick*, 94 N.J. Eq. 380, 119 Atl. 634 (Prer. Ct. 1922).

⁴¹ *Supra*, note 1.

⁴² *Wyckoff v. Perrine's Executors*, 37 N.J. Eq. 118, 122 (Ch. 1883) (specific legacy).

⁴³ *Lang v. Vaugh*, 137 Ga. 671, 74 S.E. 270, 40 L.R.A. (N.S.) 542 (devise); *Hoke v. Herman*, 21 Pa. 301; *Grogan v. Ashe*, 156 N. Car. 286, 72 S.E. 372.

⁴⁴ *Supra*, note 38.

¹ *Silcox v. Grand Fraternity* 79 N.J.L. 502 (E.&A. 1910); *McManus v. Casualty Co.* 114 Me. 98, 15 Atl. 510 (1915); *Colaneri v. Ins. Co.* 10 N.Y. Supp. 678 (1908).

² *Brunjes v. Ins. Co.* 91 N.J.L. 296 (E.&A. 1917); *Johnson v. Ins. Co.* 123 Minn. 453, 144 N.W. 218 (1913).

never asserted by him or that the facts complained of were truly stated to the agent when application for insurance was made. Does this reply vitiate the defense? May the company rely on the breach when the warranty appeared in the policy thru the neglect or mistake of its own agent, who was in full possession of all the essential facts?

The answer in New Jersey is "yes". Proof of statements made to the agent is inadmissible under the parol evidence rule, which has long been applied, in its strictest form, to suits on insurance policies.³ In the early case of *Franklin Insurance Company v. Martin*,⁴ it was said, "Evidence is not competent in an action on the policy to show that the matter complained of as a breach of warranty was mentioned to the agent at the time of application and that he said it was of so little consequence that it need not be mentioned in the policy—nor will it be received to show that the insured informed the agent of the exact condition of his title and that the agent filled out the application in his own language." This would seem to be a harsh position and might appear to open rather than close the door to fraud. Indeed most other jurisdictions have relaxed the rule to permit such proof to show waiver or estoppel.⁵ But the New Jersey courts consider that the reasons behind the parol evidence rule apply with equal cogency to the insurance contract as to any other and condemn such evasion of it.⁶ The sup-

³ *Deweese v. Ins. Co.* 35 N.J.L. 367 (Sup. Ct. 1872); *Bennett v. Ins. Co.* 55 N.J.L. 377 (Sup. Ct. 1893); *Kupferschmidt v. Ins. Co.* 80 N.J.L. 441 (E.&A. 1910).

⁴ 40 N.J.L. 568 (E.&A. 1878).

⁵ *Ins. Co. v. Wilkinson*, 13 Wall. 222 (U.S. Sup. Ct., 1871); *Kansel v. Ins. Co.* 31 Minn. 17, 16 N.W. 430 (1883); *Ins. Co. v. Goyne*, 79 Ark. 315, 96 S.W. 365 (1906); *Johnson v. Ins. Co.* 1 N.D. 167, 45 N.W. 799 (1890); *Staats v. Ins. Co.* 55 Wash. 51, 104 Pac. 185 (1909); *Ins. Co. v. Almon*, 206 Ala. 45, 89 So. 76 (1921); *Graham v. Ins. Co.* 48 S.C. 195, 26 S.E. 323 (1897); *Hough v. Ins. Co.* 29 Conn. 10, 76 Am. Dec. 581 (1860); *Ins. Co. v. Stocks*, 149 Ill. 319, 36 N.E. 400 (1893); *Gordon v. Ins. Co.* 197 Mich. 226, 163 N.W. 956 (1917).

Ins. Co. v. Wilkinson, *supra*, has long been the leading case on admissibility of parol evidence. The explanation of the departure from the usual rule is summed up by Mr. Justice Miller thus: (p. 236) "This principle does not admit oral testimony to vary or contradict that which is in writing but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name was signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it." The case was a suit on a life policy. The application had been filled in by the agent from information given him by the applicant. The latter made no answer to one question and the false statement relied on as the defense was obtained by the agent from another source.

⁶ Chief Justice Beasley in *Deweese v. Ins. Co.* *supra*, stated, "I have not found that it is anywhere supposed that this general rule which illegalizes

porting authorities are remarkable for their prestige rather than their number.⁷

It is also established in New Jersey that the assured is under a duty to read his policy,⁸ and his acceptance without objection is an assent to the entire contract, even though it contain warranties of which he is unaware.⁹ This, in reality, is but another way of framing the parol evidence rule. The view that an assured is entitled to assume that his statements will be accurately incorporated in the application and policy has been advanced by some courts,¹⁰ but an opinion of similar tenor in the case of an illiterate assured was unanimously overruled by the Court of Errors and Appeals.¹¹ The overwhelming weight of authority on this point supports the New Jersey rule.¹²

parol evidence under the conditions in question has been relaxed with respect to contracts of insurance. * * * In my apprehension the doctrine, (of parol evidence to set up an estoppel in pais) can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written contract, evidence by parol. * * * It is idle to say that the estoppel if permitted to operate will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected, not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties."

⁷ *Ins. Co. v. Grand View B. & L.*, 183 U.S. 308, 22 Sup. Ct. Rep. 133 (1902); *Ins. Co. v. Lyman* 15 Wall. 664 (U.S. Sup. Ct. 1872); *Ins. Co. v. Penman* 151 Fed. 961, (C.C.A. 1907); *Jenkins v. Ins. Co.* 7 Gray 370 (Mass. 1856); *Barrett v. Ins. Co.* 7 Cush. 175 (Mass. 1851); *Jennings v. Ins. Co.* 2 Den. 75 (N.Y. 1846). *Ins. Co. v. Grand View B. & L.* and *Ins. Co. v. Lyman* are United States Supreme Court cases following in point of time *Insurance Company v. Wilkinson* and clearly indicate that the latter case is not to be taken as authority for the admissibility of parol evidence in the circumstances under discussion. The *Wilkinson* case may perhaps be distinguished on the facts, otherwise, it must be considered overruled.

⁸ *Crescent Ring Co. v. Travelers Indemnity Co.*, 102 N.J.L. 85 (E.&A. 1925).

⁹ *Hudson Casualty Co. v. Garfinkel*, 111 N.J. Eq. 70 (E.&A. 1932) *Hetfield, J.*: "The policy itself was notice to the assured of the warranty contained therein and his silent acceptance closed the contract and bound him to the agreement thereby tendered."

¹⁰ *Ins. Co. v. Leon*, 138 Ind. 636, 37 N.E. 584 (1894); *Dryer v. Ins. Co.*, 82 N.W. 494 (Iowa 1900); *Kister v. Ins. Co.*, 128 Pa. 553, 18 Atl. 447 (1889); *Dowling v. Ins. Co.*, 168 Pa. 234, 31 Atl. 1087 (1895); *Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L.R.A. 217 (1889); *Ins. Co. v. National Bank*, 60 Kan. 630, 57 Pac. 524 (1899); *Rake v. Ins. Co.*, 125 N.W. 207 (Iowa 1910).

¹¹ *Giammares v. Ins. Co.*, 89 N.J. Eq. 460 (Ch. 1918), *rev.* 91 N.J. Eq. 114 (E.&A. 1918). *V. C. Lane* said, "The assured in a fire case may safely assume that the policy was issued by the company in accord with the oral request; he may safely assume that the policy is not to the knowledge of the insurer void *ab initio*." This point was not specifically covered in the opinion of the Court of Errors but it most certainly does not represent the law in New Jersey.

¹² *Ins. Co. v. Fletcher*, 117 U.S. 519 (C.C.A. 1886); *Bostwick v. Ins. Co.* 116 Wis. 392, 89 N.W. 538 (1902); *Metzger v. Ins. Co.*, 227 N.Y. 411, 125 N.E. 814

If the parol evidence hurdle be removed there is no doubt that knowledge by the agent will estop the company from setting up the defense.¹³ But the agent must be authorized to bind the company in the transaction.¹⁴ A general agent¹⁵ or a State agent¹⁶ or an officer of the company¹⁷ clearly has the requisite power. Most of the problems arise in connection with the so-called "soliciting" agent. A clause in the application or policy disclaiming any responsibility for statements made to him during preparation thereof, is effective to limit his authority in New Jersey.¹⁸ Statutes are to be found in many states providing that the soliciting agent shall have the power to bind the company despite such a limitation.¹⁹

With the realization of the difficulty of recovering on the policy, an attempt was made in the recent case of *Weatherby v. Aetna Insurance Company*²⁰ to hold the company in tort for issuing a void policy. The complaint recited that a fire policy had been written containing a provision against incumbrances; that at the time of issuance defendant's agent knew that a chattel mortgage had been placed on the subject of insurance; that there was a duty on defendant to use due care in issuing a valid policy; that defendant

(1920); *Richardson v. Ins. Co.*, 46 Me. 394 (1859); *Cleaver v. Ins. Co.*, 65 Mich. 572, 32 N.W. 706 (1887); *Ins. Co. v. Knabe*, 171 Mass. 265, 50 N.E. 516, (1898); *Ins. Co. v. Fresno F.&I. Co.*, 161 Cal. 468, 119 Pac. 646 (1911); *Gugue v. Ins. Co.*, 78 N.H. 439, 101 Atl. 612 (1917); *Ins. Co. v. Fansler*, 143 Va. 884, 129 S.E. 727 (1925); *Tiffany v. Ins. Co.*, 199 Mo. App. 36, 200 S.W. 728 (1918); *Capps v. Ins. Co.*, 318 Ill. 350, 149 N.E. 247 (1925).

¹³ *Beebe v. Ins. Co.*, 93 Mich. 514, 53 N.W. 818 (1892); *Taylor v. Ins. Co.*, 116 Iowa 625, 88 N.W. 807 (1902); *McElroy v. Ins. Co.*, 94 Fed. 990 (C.C.A. 1899); *Loring v. Ins. Co.*, 1 Cal. App. 186, 81 Pac. 1025 (1905); *Michelson v. Ins. Co.*, 53 N.D. 391, 206 N.W. 807 (1925); *Bemis v. Ins. Co.*, 125 Minn. 54, 145 N.W. 622 (1914); *Ins. Co. v. Wingfield*, 22 Ky. 1564, 57 S.W. 456 (1900); *Ins. Co. v. Globe Loan Co.*, 44 Neb. 380, 62 N.W. 895 (1895); *Singleton v. Insurance Co.*, 42 N.Y. Supp. 446 (1896).

¹⁴ *Martin v. Ins. Co.*, 44 N.J.L. 274 (Sup. Ct. 1882); *Gambino v. Ins. Co.*, 232 Mich. 561, 205 N.W. 480 (1925).

¹⁵ *Schaeffer v. Ins. Co.*, 80 Md. 563, 150 N.W. 147 (1914); *Holden v. Ins. Co.*, 188 App. Div. 734, 177 N.Y. Supp. 286 (1919).

¹⁶ *Ice Co. v. United Surety Co.*, 159 Mich. 102, 123 N.W. 619 (1909).

¹⁷ *Martin v. Ins. Co.*, *supra*, note 14.

¹⁸ *Dimick v. Ins. Co.*, 69 N.J.L. 384, (E.&A. 1903); *Ins. Co. v. McGrath*, 52 N.J.L. 487 (Sup. Ct. 1899); *McClave v. Ins. Co.*, 55 N.J.L. 187 (Sup. Ct. 1893); *Ins. Co. v. Snyder*, 59 N.J.L. 18 (Sup. Ct. 1896).

¹⁹ The Colorado Statute P. L. 1921, Sec. 2491 is typical—"Any person who shall solicit and procure an application for insurance shall in any controversy between the parties to the contract * * * be held to be the company's agent, whatever stipulations or conditions may be contained in the policy or contract." Similar statutes obtain in Florida, Georgia, Indiana, Iowa, Kentucky, Michigan, Mississippi, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, Texas and Wisconsin.

²⁰ 11 N.J. Misc. 435 (Sup. Ct. 1933).

disregarded such duty by issuing a policy which it knew to be void and therein was negligent. A previous action on the policy had been defeated.²¹ The Court could find no duty resting on defendant as broad as that contended for by plaintiff and struck the complaint. Liability for negligence in writing insurance policy had been sustained in a few cases.²² These are disapproved in the *Weatherby* opinion. The relationship between company and assured is a contractual one, and it is difficult to see where any basis for a tort action can be found.

What then are the assured's remedies? The situation is palpably unjust to him. He has been honest in his representations, and beyond the slight neglect in failing to check over his policy, is without blame; yet he cannot obtain redress either in contract or tort. The first expedient that suggests itself is the filing of a bill in equity to reform the policy on the grounds of mutual mistake.²³ Upon a state of facts like that in the *Weatherby* case reformation is not possible.²⁴ The company does not have in contemplation the same facts as the assured; hence each party has a different contract in mind and there was no mutual mistake. It is not a case where both parties intend one contract and execute another. A further possible remedy is an action of fraud against the agent.²⁵ This, if capable of proof, is too often valueless because of his financial irresponsibility.

Some aid to the assured in his unfortunate predicament is indicated, but that given him in other states appears undesirable and impracticable in view of the posture of the law in New Jersey. The passing of a statute defining agency, for instance, would not over-

²¹ *Weatherby v. Ins. Co.*, 9 N.J. Misc. 1256 (Sup. Ct. 1931). The complaint set up the policy and the loss. The answer alleged breach of warranty. The reply recited that the agent knew of the facts constituting the breach at the time the policy was issued. On motion the complaint and reply were stricken since the parol evidence rule would not permit proof of the facts relied upon in the reply.

²² *Boyer v. Ins. Co.*, 86 Kan. 442, 121 Pac. 329 (1912); *Duffie v. Ins. Co.*, 160 Iowa, 19, 139 N.W. 1087 (1913). In the *Boyer* case application for hail insurance was made. The agent delayed in transmitting it to the home office for such a length of time that a loss occurred before the policy was issued. The *Duffie* case was identical except that a life insurance policy was involved.

²³ *Seymour v. Ins. Co.*, 83 N.J. Eq. 37 (Ch. 1914); *Koch v. Ins. Co.*, 87 N.J. Eq. 90, (Ch. 1910); *Sardo v. Ins. Co.*, 100 N.J. Eq. 332 (E.&A. 1926); *Berkowitz v. Ins. Co.*, 106 N.J. Eq. 238 (E.&A. 1930). In *Steel Company v. Ins. Co.*, 74 N.J. Eq. 635 (Ch. 1908) at pages 645, 646, we find this language, "Contracts inter partes may be reformed by the Court whenever by reason of mutual mistake the written instrument fails to express the agreement on which the minds of the parties met or where there is a mistake by one of the parties and fraud or other inequity attempted on the part of the other."

²⁴ *Ordway v. Chace*, 57 N.J. Eq. 478 (Ch. 1898).

²⁵ *Crescent Ring Co. v. Travelers Indemnity*, *supra*, note 8.

come the parol evidence bar. What form should the assistance take? A practical suggestion is to be found in *Giammares v. Insurance Company*,²⁶ where Vice Chancellor Lane granted an injunction against the defendant's pleading a breach of warranty where the true facts had been revealed to the agent on the ground of an estoppel *in pais*. He was reversed by the Court of Errors and Appeals on another question and the injunction was not mentioned in the appellate opinion.²⁷ But equity undoubtedly may enjoin the pleading of defenses at law. It has done so recently in the case of the Statute of Limitations.²⁸ No other instance is found, but the equities of the situation presented here should be sufficient to move the most exacting conscience to extend the remedy.

THE CHANCERY INVESTIGATION—The recent investigation into certain alleged practices on the part of officers of the Court of Chancery concerning the administration of trust and receivership estates, ordered by the late Chancellor Walker¹ and conducted, among others, into the judicial acts and private business affairs of two vice-chancellors of the court,² came to an abrupt halt with the recent decision by the Court of Errors and Appeals in *In re New Jersey State Bar Association*³ reversing the Court of Chancery in the same cause.⁴

The petitioner appellant, one of the vice-chancellors of the court, filed his petition to have suppressed that part of the master's report relating to his findings of fact in connection with the investigation of the vice-chancellor's judicial acts and private business affairs. The chancellor denied the prayer of the petition except that he directed the report contain no conclusions, comments or recommendations by the master. The appellate court held the chancellor had no power to investigate the judicial acts or private business affairs of a vice-chancellor and that the order of reference in that respect was improvidently made.

The action on the part of the late Chancellor Walker in directing the order of reference was unique in the judicial system of this state. One of the purposes in making the order was to enable the

²⁶ *Supra*, note 11.

²⁷ *Supra*, note 11.

²⁸ *Howard v. R.R. Co.*, 102 N.J. Eq. 517, (Ch. 1928) *aff.* 104 N.J. Eq. 201 (E.&A. 1928).

¹ Chancery Docket 89-639. For preliminary discussion of this matter see *The Current Chancery Investigation*, 1 MERCER BEASLEY L. REV. 51, 2, p. 30 (1932).

² *Supra*, note 1.

³ 114 N.J.Eq. 261 (E.&A. 1933).

⁴ 112 N.J.Eq. 606 (Ch. 1933).