in keeping with the growing sentiment that infants within the age of discretion should be held amenable for fraudulent conduct, but analytically, such relief should be granted in an action in deceit, and not in an action on the contract. The difference may be not only in the burden of proof, but also in the measure of damages.[26]

IMPLIED REVOCATION OR ADEMPTION OF DEVISE BY SUBSEQUENT CONTRACT TO CONVEY—While the New Jersey Statute of Wills[1] expressly provides the manner and circumstances under which a devise may be revoked by some positive act[2] or by operation of law,[3] it remains silent as to the common law of implied revocation by alienation or alteration of the lands devised.[4] If a testator devises property and thereafter makes an absolute conveyance, such alienation operates as a revocation,[5] for the devisor does not die seized, and his sale after making

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[26] See Rice v. Boyer, *supra* note 18; Burley v. Russell, *supra* note 18.

[1] 4 Comp. Stat. (1910) p. 5860.

[2] "No devise * * * shall be revocable otherwise than by some other will in writing * * * or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence * * * " 4 Comp. Stat. p. 5861, Sec. 2.

[3] "That every last will * * * made when the testator had no issue living * * * if at the time of his death, he leaves a child, * * * such will shall be void, and such testator be deemed to die intestate." 4 Comp. Stat. p. 5865, Sec. 20. Section 21 provides that if the testator has issue born at the time of the making of the will, he shall die intestate as to subsequent born children.

[4] It was assumed, soon after the Statute of Frauds was enacted that revocation by alienation remained in force. Dister v. Dister, 3 Lev. 108. The courts have adhered to this view with great uniformity. Kreig v. McComas, 126 Md. 377, 95 Atl. 68 (1915); 1 PAGE, WILLS, p. 741, Sec. 455. Phillippe v. Clevenger, 239 Ill. 117, 87 N.E. 858 (1909).

[5] It was the settled rule at common law and under the original statutes of wills (32 Hen. VIII. Chap. 1; 34 Hen. VIII. Chap. 5) that a will as far as it operates on real estate speaks as of the time of its execution, and real estate acquired after the execution cannot pass thereby without a re-execution or republication after such re-acquisition. 75 A.L.R. 484. It followed therefore that an alienation of the testator's interest in realty which he had devised operated as a revocation of such devise. Bruen v. Bragaw, 4 N.J. Eq. 261 (Ch. 1842); Lanning v. Cole, 6 N.J. Eq. 102 (Ch. 1847). The rule that alienation of realty operated as a revocation was a special application of the general principle that after-acquired realty could not be devised. Since the general principle has been abolished by statute in New Jersey (4 Comp. Stat. (1910) p. 5870, Sec. 26) and other states expressly stating that after-acquired property may be devised, it would seem inevitable that the rule itself should disappear, and that a subsequent conveyance of realty devised by will and not re-acquired is more like an ademption of a legacy than like a technical revocation of a devise at common law. To avoid confusion, it would seem advisable to use the word "ademption" as is done by some courts. 1 PAGE, WILLS p. 744, Sec. 456.

the devise is "conclusive evidence of a change of intention".[6] It would seem, however, that the question is one of identity rather than of intention.[7] Since a will speaks from the time of the death of the testator,[8] and the property devised is not owned by him at that time, there is nothing on which the devise can operate. This deduction justifies an implied revocation of a devise where a testator has been deprived of his lands by eminent domain[9] or by a tax sale[10] or other compulsory proceedings.[11] Intent is, therefore, inconsequential. The test should be, has the devisor at the time of his death the identical property which he purported to have devised under his will? It would then follow that where the estate devised, has been subsequently altered by a contract to convey, even though the agreement remains executory at death of the testator, the rule of implied revocation[12] or ademption[13] should be invoked.

The maxim that equity regards and treats that as done which in good conscience *ought* to be done is illustrated by the doctrine of equitable conversion.[14] The full significance of this principle is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land. Once the agreement becomes

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[6] Heinen v. Stubenrauch, 106 N.J. Eq. 300, 150 Atl. 687 (Ch. 1930) (devise); Hattersley v. Bissett, 51 N.J. Eq. 597, 29 Atl. 187 (E.&A. 1893) (devise); Kenaday v. Sinnott, 109 U.S. 606, 45 L. ed. 339 (1900) "the word, 'ademption,' it may be said to be the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke".

[7] Kean's Will, 9 Dana, 25; Beck v. McGillis, 9 Barb. 35; Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456; Hoke v. Herman, 21 Pa. 301; Humphreys v. Humphreys, 2 Cox, Ch. Cas. 184; Harrison v. Jackson, L.R. 7 Ch. Div. 339, 47 L.J. Ch. N.S. 142; Re Bridle, L.R. 4 C.P. Div. 336; see 40 L.R.A. (n. s.) 542.

[8] At common law a will speaks as of the time of the death of the testator as to personalty, and after acquired personalty passes under the will. 75 A.L.R. 477. But this was not true as to realty, (see *supra* note 5) until changed by statute. 4 Comp. Stat. (1910) p. 5870, Sec. 26; Gardner v. Gardner, 37 N.J. Eq. 487 (Ch. 1883); Goetter v. Berth, 99 N.J. Eq. 625, 133 Atl. 872 (Ch. 1926).

[9] Ametrano v. Downs, 170 N.Y. 338, 58 L.R.A. 719. The court drew no distinction between a voluntary and involuntary conveyance of devised lands. In Wetherill v. Hough, 52 N.J. Eq. 683 (Ch. 1894) it was held that where there was a compulsory conversion by eminent domain of real estate belonging to an infant, the proceeds should be treated as real estate.

[10] Borden v. Borden, 2 R.I. 94.

[11] The earliest case on this question is that Yelverton v. Mark, Year Book 39 Hen. VI 18, B, where it was held that if a testator is disseized by a stranger, and dies before re-entry, the devise is void. In Pleasants' Appeal, 77 Pa. 356, a devise of slaves (which were by law real estate) was revoked by an act of Parliament abolishing slavery, and the devisees were not entitled to compensation.

[12] *Supra,* note 5.

[13] *Supra,* note 5.

[14] "Equity does not regard and treat as done what *might* be done, or what *could* be done, but only what *ought to be done.*" 1 POM. EQ. JUR. p. 679.

binding,[15] equity regards the vendor as holding the estate in trust for the vendee, and the vendee as under an equitable as well as legal obligation to pay the purchase money.[16] In other words, the relationship is substantially that of mortgagor and mortgagee.[17] By the terms of the executory contract the land *ought* to be conveyed to the vendee and the purchase price *ought* to be transferred to the vendor. Equity therefore regards this as done, that is to say, the vendor's interest is converted into personalty, and the vendee's into realty.[18] So unflinchingly is the doctrine applied that in almost every respect the parties are treated as though the contract were already performed and the rights of all parties interested are crystallized at the making of the contract.[19] Such a constructive alteration of the estate is effected that the vendee, the equitable owner, is subject to any loss and will enjoy any benefit accruing after the contract.[20] The vendee can assign, mortgage, devise his interest.[21] He can call for a conveyance of the property from a donee or purchaser with notice.[22] In the event of his death intestate, it passes to his heirs and not to his administrators.[23] The vendee's widow is entitled to dower in his equitable estate.[24] Moreover, the vendee is chargeable with taxes paid by the vendor beyond the value of the usufruct[25] and also with the costs of improvements made by the vendor under compulsion of the law.[26] Conversely,

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[15] "In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will enforce against an unwilling purchaser." 3 POM. EQ. JUR. p. 2753. Wittingham v. Lighthipe, 46 N.J.Eq. 429 (Ch. 1890).

[16] Maddock v. Astbury, 32 N.J. Eq. 181 (Ch. 1880); Hoagland v. Latourette, 2 N.J. Eq. 254 (Ch. 1839); Force v. Dutcher, 17 N.J. Eq. 165 (Ch. 1864); Huffman v. Hummer, 17 N.J. Eq. 263 (Ch. 1865).

[17] WILLISTON, CONTRACTS par. 927, p. 1765.

[18] 1 STORY EQ. JUR. (12th ed.) par. 790.

[19] Miller v. Miller, 25 N.J. Eq. 354 (Ch. 1874); Williams v. Haddock, 145 N.Y. 144, 39 N.E. 825 (1895); Atcherley v. Veron, 10 Mod. 518, where it is held that the conversion is not affected by the fact that the contract prescribes a later date for the execution of the conveyance.

[20] Marion v. Wolcott, 68 N.J. Eq. 20, 59 Atl. 242 (Ch. 1904) (insurance proceeds). Cropper v. Brown, 76 N.J. Eq. 406, 74 Atl. 987 (Ch. 1909), held that the successful bidder at a sheriff's sale sustains the loss before the confirmation of the sale. This is the rule in the great majority of jurisdictions. For authorities outside New Jersey, including minority view *contra*. See note 22 A.L.R. 595.

[21] Buck v. Buck (N.Y.) 11 Paige 170; Townsend v. Champernowne, 9 Price 130; 1 STORY, EQ. JUR. par. 789; 2 *Ibid* par. 1213.

[22] Hoagland v. Latourette, 2 N.J. Eq. 254 (Ch. 1839); Downing v. Risley, 15 N.J. Eq. 92 (Ch. 1862); Moyer v. Hinman, 13 N.Y. 180; Lovejoy v. Potter, 60 Mich. 95, 26 N.W. 844.

[23] Haughwout v. Murphy, 22 N.J. Eq. 351 (E.&A. 1871); Young v. Young, 45 N.J. Eq. 27, 34, 16 Atl. 27 (Ch. 1889).

[24] Cushing v. Blake, 30 N.J. Eq. 689 (E.&A. 1879); Young v. Young, supra, note 23.

[25] King v. Ruckman, 24 N.J. Eq. 556 (E.&A. 1873).

[26] *Supra*, note 25.

the vendor's interest, a mere lien,[27] constitutes personalty and on his death is distributable as such.[28] The property is no longer liable for the debts of the vendor even though the vendor dies before title passes.[29] Furthermore, he cannot give a valid deed or mortgage to one having knowledge of the vendee's equities.[30]

However, the legal title, being unaffected by the executory contract devolves to the vendor's heirs upon his death. Still when the vendee afterwards completes the contract, takes the conveyance of the legal title from the heirs and pays the price, the money, being all the time a part of the vendor's personal and not his real property, goes to his administrators or executors with the rest of his personal assets, and does not go to the vendor's heirs.[31]

It would therefore follow that where a testator enters into a contract to sell a devised estate, the effect of which converts the realty into personalty, the devise in equity is deemed to be revoked or adeemed[32] and when the money is paid after the testator's death, his personal representatives are entitled to the proceeds as against his devisees.[33] And this was true at common law even if the sale

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[27] "This lien, like every other equitable lien is not an interest in the land, is neither a *jus ad rem,* nor a *jus in re,* but merely an encumbrance." 1 POM. EQ. JUR. par. 368.

[28] Keep v. Miller, 42 N.J. Eq. 100 (Ch. 1886).

[29] Stockfleth v. Britten, 105 N.J. Eq. 3, 146 Atl. 583 (Ch. 1929).

[30] Ellis v. Jeans, 9 Cal. 415.

[31] 1 POM. EQ. JUR. par. 368.

[32] In this case, it is more like an ademption than a technical revocation of a devise at common law. See, *supra,* note 5; "At modern law, such conveyance should be classed as an ademption, rather than as a revocation since such realty will pass under such devise, without a republication and re-execution of the will, if the testator reacquires title to such realty and owns it at his death." 2 PAGE, WILLS, par. 1329.

[33] Hall v. Bray, 1 N.J.L. 212 (Sup. Ct. 1794) (obiter); Walton v. Walton, 7 Johns. Ch. (N.Y.) 258, 11 Am. Dec. 456; Donohoo v. Lea, 31 Tenn. (1 Swan), 199, 55 Am. Dec. 725; Blair v. Snodgrass, 1 Sneed 24; Farrar v. Winterton, 5 Beav. 1, 6 Jur. 204; Mayer v. Gowland (Eng.) 2 Dick 253; Watts v. Watts (Eng.) L.R. 17 Eq. 217, 22 Weeks Rep. 105; *Re* Estate of Bernhard, 134 Ia. 603, 12 L.R.A. (N. S.) 1029, 112 N.W. 86; see note, 42 N.J. Eq 100; 57 L.R.A. 643; 58 L.R.A. 719; 40 L.R.A. (N.S.) 545. In Farrar v. Winterton, *supra,* a testatrix made a will devising certain real estate. After making the will she entered into a contract to sell the same land. The contract remained executory at her death, and the only question presented by the case was, whether the purchase money paid by the vendee after her death belonged to the executors as a part of the general assets of her estate, or whether it belonged to the devisees. Lord Langdale said (p. 8): "The question whether the devisees can have any interest in that part of the purchase-money which was unpaid depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest. In equity, she had *alienated the land,* and instead of her beneficial interest in the land, she had acquired a title to the purchase-money. What was really hers in right and equity was not the land, but the money, of which alone she had the right to dispose; and though she had a lien upon the land, and might have refused to convey until the

was rescinded by mutual consent of the parties, so that the testator was restored to his former title, and died seized of the same estate.[34]

It is of interest to note that several states[35] in which the common law is in force have provided by statute that a contract for the conveyance of any property specifically devised does not revoke the devise where any part of the purchase money remains unpaid, unless an intention to revoke plainly appears. In other words, all the testator's interest which is the right to enforce payment of the unpaid purchase price, passes to the devisee, if the testator still has legal title.[36]

In the case of *Feeney v. Coles*[37] the testatrix in the first clause of her will directed that specific lands remain unsold. Thereafter, she agreed to convey the land, but died before the time fixed for execution of the deed. The Vice Chancellor held that the executory contract took the land out of the operation of the first clause and gave the proceeds to her residuary estate as part of her personalty. In other words, the first clause was impliedly revoked.

However, in the recent case of *Riddle v. Brooks*[38] a contrary result was reached. The testator made a specific devise upon trust. Later, he entered into a valid contract to convey, but at his death the agreement remained executory. Wholly ignoring the doctrine of equitable conversion, the Vice Chancellor ruled that the devisees were entitled to the purchase money as against the residuary legatees; that the proceeds replaced the property devised, and so long as the contract remained executory, there could be no intentional revocation of the devise. It is firmly established that since the fiction of equitable conversion rests upon a duty, there must be a clear or imperative direction in the will, deed, or trust, *or a clear imperative agreement in the contract* to sell the land for money.[39] Where a testator dies before the execution of his contract to convey, his intent is manifest to convert his realty into

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money was *paid, yet that lien was a mere security, in or to which she had no right or interest except for the purpose of enabling her to obtain the payment of the money.* The beneficial interest in the land which she had devised was not at her disposition, but was by her act wholly vested in another at the time of her death."

[34] Walton v. Walton, 7 Johns. Ch. (N.Y.) 258, 11 Am. Dec. 456; Herrington v. Budd, 5 Denio (N.Y.) 321; Morey v. Sohier, 63 N.H. 507, 3 Atl. 636, stating this to be the common law rule, but holding to the contrary under the N.H. statute.

[35] Alabama, Wisconsin, Kentucky, Indiana.

[36] 40 L.R.A. (N.S.) 550; 1 PAGE, WILLS, par. 470; Scarbrough v. Scarbrough, 176 Ala. 141, 57 So. 820; Lefebvre's Estate, 100 Wisc. 192, 75 N.W. 971.

[37] 52 N.J. Eq. 493 (Ch. 1894).

[38] 115 N.J. Eq. 1 (Ch. 1933).

[39] 3 POM. EQ. JUR., par. 1160.

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 legacies[40] 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 Act[41] which insist on the formalities of writing and execution in order to avoid opportunities for perjury. For this reason New Jersey[42] and other states[43] 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 NEGLECT OR MISTAKE OF AGENT—It is a good defense to an action on an insurance policy that the assured breached a warranty[1] or made false representations concerning facts material to the risk.[2] A doubt arises, however, when the assured offers evidence that the warranty was

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[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).