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# Ademption in Pennsylvania: Neal Estate

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# ADEMPTION IN PENNSYLVANIA: *NEAL ESTATE*

The Orphans' Court of Warren County, Pennsylvania, has recently held in *Neal Estate*[1] that the action of a guardian in exchanging shares of stock in a corporation held by an incompetent for shares in a different corporation did not effect an ademption of the specific legacy of the original stock. This Note will inquire into the effect of this holding on the law of ademption in Pennsylvania.

Ademption, in modern law, has two distinct meanings. The term is sometimes used with reference to the act of the testator in paying to the legatee, in the lifetime of the testator, a legacy which the testator has given to the legatee by will, or in satisfying such legacy by giving in place thereof something of value.[2] The term used to describe such actions on the part of the testator is *ademption by satisfaction.* Ademption is also used to indicate the extinction of the legacy by the loss or destruction of the subject matter in the lifetime of the testator, or by the loss, transfer or termination of the testator's interest in the subject matter prior to his death. This extinction of a legacy is denoted by the term *ademption by extinction.*[3] The court in *Neal* dealt with the latter use of the term "ademption."

It is a well-settled general rule that the principle of ademption by extinction applies only to specific legacies,[4] as distinguished from general legacies.[5] Also, the doctrine does not apply to demonstrative testamentary gifts, *i.e.*, gifts which are payable out of the estate generally, but which are charged (as against other legatees or devisees of general gifts) on certain specific

1. 32 Pa. D. & C.2d 322 (Orphans' Ct. 1963).
2. *In re* Keeler, 225 Iowa 1349, 282 N.W. 362 (1938); Dillender v. Wilson, 228 Ky. 758, 16 S.W.2d 173 (1929); See Warren, *The History of Ademption*, 25 Iowa L. Rev. 290 (1940).
3. Welch v. Welch, 147 Miss. 728, 113 So. 197 (1927); "An Ademption of a legacy is effected when by some act of the testator its subject matter has ceased to exist in the form in which it is described in the will so that on his death there is nothing answering the description to be given to the beneficiary." Ford v. Cottrell, 141 Tenn. 169, 176, 207 S.W. 734, 736 (1918), quoted in Wiggins v. Cheatham, 143 Tenn. 406, 410, 225 S.W. 1040, 1041 (1920).
4. "An ademption occurs when a legacy is specific and the thing bequeathed is disposed of by testator in his lifetime. There is no ademption, however, where the legacy is general . . . ." McFerren Estate, 365 Pa. 490, 492, 76 A.2d 759, 761 (1950).
5. Since a general legacy is to be paid out of the testator's estate generally, the destruction, sale or transfer of specific things cannot prevent the satisfaction of the general gift as long as enough remains in the estate, after payment of debts and the like, to satisfy the legacy in order of its priority. Thus, for example, a beneficiary under a general legacy of securities will not lose the cash value of his legacy merely because the testator did not own such securities at his death, and the executor is unable to purchase similar securities at the date of testator's death. In such cases, the difficulty in determining the value of the gift or non-existence of the subject matter does not, in itself, cause an ademption. Hollenbaugh's Estate, 402 Pa. 256, 167 A.2d 270 (1961); McFerren Estate, 365 Pa. 490, 76 A.2d 759 (1950).

property.[6] As applied to a specific gift or legacy, the effect of the doctrine of ademption is to destroy such a gift or legacy when there has been a sale, destruction and the like of the specific thing which has been specifically bequeathed,[7] unless, either by the provisions of the will or by some special statute,[8] the proceeds of the gift are given to the legatee in place of the property itself.

In *Neal Estate* testatrix owned one hundred and thirty six (136) shares of stock in the Floridin Company. Testatrix became incompetent and a guardian was appointed who, with court approval, entered into an agreement exchanging the Floridin stock for stock in the Pennsylvania Glass Sand Corporation. The agreement made by the guardian was a part of a general agreement whereby all Floridin Company stock was to be acquired by the Pennsylvania Glass Sand Corporation. After finding that testatrix had made a specific bequest of the Floridin stock by a will executed four years prior to the stock exchange the court was faced with the question of whether the exchange of the stock by the guardian effected an ademption of this specific bequest. In refusing to find that there had been an ademption, the court laid great stress on the possible favoritism toward one legatee over another which *could* be exercised by the guardian if his actions were to be deemed to effect an ademption.[9]

At early common-law, an ademption by extinction of the subject matter of the specific gift or legacy was based on the intention of the testator.[10] The rationale of this rule was that the facts which worked such extinction indicated that the testator had changed his mind and did not intend to bequeath the property to the legatee.[11] Strict adherence to the rule that the

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6. The sale, destruction and the like of the property upon which it is charged terminates the charge and causes the legacy to cease to be a demonstrative legacy. As far as it is a legacy which is payable out of testator's estate generally such sale, destruction and the like does not affect the legacy. To the extent that the legacy can be paid from the general funds of the estate, in order of its priority, such legacy is not affected by the sale or destruction of the property. If the legacy is not paid it is because the testator's estate is not large enough to pay it. This is a question of abatement, not of ademption. Shearer's Estate, 346 Pa. 97, 29 A.2d 535 (1943); Pennsylvania Co. v. Riley, 89 N.J. Eq. 252, 104 Atl. 225 (1918); Smith Appeal, 103 Pa. 559 (1883).

7. Horn's Estate, 317 Pa. 49, 175 Atl. 414 (1934); Harshaw v. Harshaw, 184 Pa. 401, 39 Atl. 89 (1898).

8. The legislatures, in a few states, have changed the common law of ademption by statute in effect providing that the devisee or legatee to whom the adeemed legacy or devise was given may follow the proceeds of such legacy or devise unless it appears from the will, or in some other way, that testator did not intend that such heir should receive the proceeds. See Reynolds v. Reynolds, 187 Ky. 324, 218 S.W. 1001 (1920); Haselwood v. Webster, 82 Ky. 409 (1884). Such a statute is usually interpreted as applying only to gifts to those persons who are heirs. Newby v. Union Bank and Trust Co., 195 Ky. 481, 243 S.W. 11 (1922); Dillender v. Wilson, 228 Ky. 758, 16 S.W.2d 173 (1929).

9. 32 D. & C.2d at 338.

10. Coke v. Bullock, Cro. Jac. 49, 79 Eng. Rep. 41 (K.B. 1791); *In re* Partridge, Cas. Temp. Talb. 226, 25 Eng. Rep. 749 (Ch. 1736). See Warren, *op. cit. supra* note 2.

11. *Ibid.*

testator's intention determines the existence or non-existence of an ademption creates a problem in cases where it is difficult or impossible to ascertain the testator's intention.

If extinguishment of the subject matter of the specific bequest operates as an ademption or not, depending on the testator's intention, and *if* such intention may be shown by testator's oral declarations, then the controlling evidence in the case will consist of the written will, executed in accordance with the statute, together with testator's oral declarations.[12] This violates both the letter and the spirit of wills acts, which insist on the formalities of a writing and execution in order to avoid opportunities for perjury.[13] For this reason, it is now the majority rule in the United States that the sale, destruction or collection of the bequest or devise adeems such bequest or devise without regard to the actual intention of the testator.[14] Ademption, under the majority rule, depends rather on a rule of law, arising from the extinction of the property or fund granted. This modern rule is justified in part, because of the confusion which would arise in attempting to determine the intention of the testator; and in part, because upon the sale, collection, and the like of the subject of the bequest or devise, there is nothing in existence which conforms to the gift in the will.[15]

In no state has the modern rule disregarding the testator's intent been more rigorously applied than in Pennsylvania. As early as 1834 in *Blackstone v. Blackstone*,[16] Chief Justice Gibson said "that the annihilation of a specific legacy or such change in its state as to make it another thing, annuls the bequest for reasons paramount to consideration of intention, is now too firmly

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12. See White v. Winchester, 23 Mass. (6 Pick.) 48 (1827); Thomond v. Suffolk, 1 P. Wms. 461, 24 Eng. Rep. 474 (Ch. 1718).

13. I PAGE, WILLS § 236 (3d ed. 1941).

14. *In re* Keeler, 225 Iowa 1349, 282 N.W. 362 (1938); Hoke v. Herman, 21 Pa. 301 (1853). See also Humphreys v. Humphreys, 2 Cox 184, 30 Eng. Rep. 85 (Ch. 1789), wherein it was said:

> The only rule to be adhered to was to see whether the subject of the specific bequest remained in specie at the time of the testator's death; for if it did not, then, there must be an end of the bequest; and that the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest, would be productive of endless uncertainty and confusion.

*Id.* at 186, 30 Eng. Rep. 86.

15. Hoke v. Herman, *supra* note 14, at 305, wherein the court said:

> . . . [I]f a thing bequeathed in a will by such description so as to distinguish it from all other things be disposed of, so that it does not remain at the death of the testator, or if it be changed that it cannot be called the same thing, the bequest is gone. If such a legacy be a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed if it be possible for the executor to give it to him; but if not, he can not have money in place of it. This results from an inflexible rule of law applied to the mere fact that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator.

16. 3 Watts 335 (Pa. 1834).

settled to be questioned."[17] *Blackstone* teaches that the courts will not speculate concerning the intention of the testator with respect to his testamentary scheme when the subject matter of a specific legacy or devise is sold or disposed of by him prior to his death.[18]

While in the normal case involving a sale, transfer or destruction of the subject matter by the testator himself, there is little problem in applying the "immateriality of intention" doctrine of ademption, a great deal of confusion and controversy has arisen in the so-called "guardian sale" cases. In the "guardian sale" cases the subject matter of the specific bequest or devise is not in existence at the testator's death because it has been disposed of in his lifetime by a guardian or committee appointed for his estate when he has become incompetent.

In this type of case there is a direct conflict among the authorities on the question of whether the legatee can pursue the proceeds.[19] *Neal* attempts to resolve the question in Pennsylvania.

The decisions in the guardian sale case may be classified into two distinct categories: (1) a sale by a guardian or committee fully adeems the legacy or devise,[20] and (2) the sale by the guardian or committee adeems only *pro tanto, i.e.*, only to the extent that the proceeds of the sale are consumed for the testator's benefit before his death.[21]

Before entering into a discussion of the *Neal* holding, it is necessary to examine the cases in Pennsylvania prior to *Neal*. It is submitted that this examination will show that the Pennsylvania courts have been dissatisfied with the application of the immateriality of intention doctrine of ademption to guardian sale cases. The court in *Neal* noted this dissatisfaction of the Pennsylvania courts in the following manner:

> The decisions have been hard to reconcile but the rigors of the

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17. *Id.* at 338.

18. See Derby Estate, 14 Fiduc. Rep. 66 (Philadelphia County Orphans' Ct., 1963), wherein the court stated:

> Since the decision in Blackstone v. Blackstone . . . it has been the law of this Commonwealth, without equivocation, that an asset once owned by testator, and specifically bequeathed in his will, but not in existence at the time of his death, is adeemed, irrespective of his intention.

*Id.* at 68.

19. *Compare* Wilmerton v. Wilmerton, 176 Fed. 896, *cert. denied,* 217 U.S. 606 (7th Cir. 1910), in which testator's intention was considered necessary to effect an ademption so that a guardian's dealings with testator's property will not cause an ademption, *with In re* Ireland, 257 N.Y. 155, 177 N.E. 405, *reversing* 231 App. Div. 228, 247 N.Y. Supp. 267 (1930) wherein the "identity" or "in specie" test controls without regard to testator's intention so that a guardian is capable of adeeming a specific legacy from the incompetent testator.

20. Graf's Estate, 34 Pa. D. & C. 20 (Orphans' Ct. 1946); Woodward's Estate, 3 Pa. D. & C. 433 (Orphans' Ct. 1922); Hoke v. Herman, 21 Pa. 301 (1853).

21. See Lloyd v. Hart, 2 Pa. 473 (1846); Irwin Estate, 23 Pa. D. & C.2d 37 (Orphans' Ct. 1960).

> ademption rule have been avoided and equitable results obtained by a liberal interpretation of testator's intent in defining what is the subject matter of the gift. If the subject matter is the proceeds of designated property and not the property itself, the legacy is not specific and the gift is not adeemed. . . .[22]

From the "guardian sale" cases a different rule of ademption has evolved to be applied when the sale, destruction and the like of the subject matter of a specific legacy is the result of the action of a guardian. The basic source of this rule is *Lloyd v. Hart.*[23] In *Lloyd* the incompetent left no will. A lunacy committee appointed to administer his estate sold real estate with court approval; the proceeds of the sale to be used for the maintenance of the incompetent. Upon the incompetent's death over one-half of the proceeds from such sale remained unexpended. The court held that the sale of the real estate by the committee did not work an ademption of the surplus but only an *ademption pro tanto, i.e.*, only to the extent of the amount actually expended for the maintenance of the incompetent. Furthermore, the court held that the Act of 1836,[24] through which the committee derived its sole authority to sell the real estate, did not give the committee

> . . . power to convert beyond the exigencies of the occasion . . . since, had it not been for those exigencies, the legislature would have conferred no power at all. The power was to be exercised, not for the sake of conversion merely but for a purpose beyond it, and beyond the accomplishment of such a purpose, it is not to be supported. . . .[25]

The next case dealing with this problem, *Hoke v. Herman*,[26] arose seven years after *Lloyd*. Taking the position that an ademption does not depend on the intention of the testator, the court in *Hoke* ruled that a specific bequest of a promissory note to the maker of the note was adeemed to the extent of the amount paid thereon by the maker to the guardian of the testator after the latter had become insane. The court reached this conclusion even though the legatee and the guardian did not know of the existence of the bequest at the time the payment was made and indorsed on the note. Consequently, the specific legatee, having received from the executor the note bequeathed to him, could not recover from the executor the amount which he had paid to the guardian for application on such note, because the specific bequest was adeemed *pro tanto* by such payment.

The conclusion of *Hoke* that intention plays no role in ademption was followed in *Woodward Estate.*[27] There testator's will made a specific devise

22. 32 Pa. D. & C.2d at 333.
23. 2 Pa. 473 (1846).
24. Pa. Laws 1836, at 589, repealed, Pa. Laws 1951, at 612.
25. 2 Pa. at 478.
26. 21 Pa. 301 (1853).
27. Woodward's Estate, 3 Pa. D. & C. 433 (Orphans' Ct. 1922).

of his farm to his son. Thereafter, the testator became incompetent, and his estate was placed in the hands of a guardian who sold the farm, pursuant to a court order. The balance in the guardian's hands at testator's death was turned over to testator's executors; the court holding that by the sale of the farm by the guardian the specific devise was adeemed and thus, the specific devisee had no right to the fund representing the proceeds of the farm.

Presented with the conflict of whether the actions of the guardian fully adeem the specific legacy or adeem it only to the extent that the funds are expended for the maintenance of the incompetent, a lower court in *Irwin Estate*[28] attempted a reconciliation. In *Irwin,* the decedent executed a will in 1950, devising her real estate to her son. In 1956, the decedent's guardian executed an agreement to sell the real estate, pursuant to a court order. Before the sale was completed the decedent died. Thereafter, her executor completed the sale and held the proceeds. While the sale was intended and approved by the court to create a fund for the decedent's maintenance, her death precluded any necessity for expending the proceeds for such purpose. The court adopted the rationale of *Lloyd* in holding that the sale did not operate as an ademption beyond the amount needed for the incompetent's support (in this case none of the funds were so expended).

Thus, while the above case law in Pennsylvania exhibits divergent views on major aspects of the problem, as does the case law in the majority of the jurisdictions of the United States, it is plain that generally speaking, the guardian of an incompetent testator is not wholly without power to accomplish an ademption of a specific devise. For example, where the guardian has acted within his lawful authority (and particularly, where he has been authorized to do so by court order) and has sold property belonging to the ward for the latter's maintenance, the devise or legacy from the ward is adeemed at least *pro tanto, i.e.,* to the extent that the proceeds have been applied and consumed for the benefit of the ward.[29]

The more serious problem, however, arises when the sale by the guardian is not necessary for the incompetent's maintenance. Perhaps the sale is necessary to preserve the value of the estate, such as when property held appears to be losing its value.

Is the act of the guardian in this type of situation to be an ademption? The courts are in conflict on this question. The reason for the conflict is the different views taken as to the effect of the testator's intention. Is the incompetent testator's intention to be considered in resolving the ademption

28. 23 Pa. D. & C.2d 37 (Orphans' Ct. 1960).

29. See Lewis v. Hill, 387 Ill. 542, 56 N.E.2d 619 (1944); Kamkin v. Kaiser, 256 S.W. 558 (Mo. App. 1923); Morse v. Converse, 80 N.H. 24, 113 Atl. 214 (1921) (in which testator was not mentally incompetent).

issue, or is intention immaterial and is the issue to be decided on whether the legacy in specie remains in the estate at the time of death?

*Neal* attempts to answer the above question by adjusting the heretofore rigid rules of ademption to the equities of the particular case. The conversion of the subject matter by the guardian in *Neal* was in no way necessary for the maintenance of the incompetent. The conversion was part of a program of one corporation to absorb the assets of another. To the court in *Neal* the "in specie" doctrine of ademption, *i.e.*, the subject matter of the gift has to be in existence at testator's death or the gift is adeemed, ignores the equities involved: "Justice is blind in that it is never swayed by rank or power, but justice is never blind to the facts."[30] The court recognizes that there is a distinction to be drawn where the testator is competent and where he becomes incompetent. In the former case the testator after the sale or destruction of the subject of the legacy is able to execute or revise his will to provide for the loss of the subject matter, but in the latter the testator's incompetency prevents him from so doing, and thus, the strict rule of ademption destroys his testamentary scheme. Thus, the *Neal* rule provides a degree of protection to the testator who is incapable of adjusting his gifts to provide for those persons previously the recipients of his bounty.

Perhaps the most significant aspect of the *Neal* decision is its recognition of the favoritism which a guardian would be able to exercise among the named legatees of the incompetent. This recognition is verbalized in the following manner in a passage drawn from a respected authority[31] on the subject of wills:

> The results of the rule that sale, collection, and the like by the guardian of an incompetent person operates as an ademption have been very unsatisfactory. A guardian who is hostile to one of the beneficiaries may adeem the gift to him by a sale of the property or by collection of a debt. If he is friendly to one to whom a general gift is made or to whom a general residuary gift is given, he may increase the amount of such gift by converting the property into the form which is given to such beneficiary.[32]

*Lloyd* and *Irwin* refused to follow the immateriality of intention doctrine in guardian sale cases. These decisions refused to find an ademption beyond the amount expended for the incompetent's maintenance. *Neal* extends their rationale to a case where the conversion of the subject matter of the legacy was in no way connected with the maintenance of the incompetent. The three cases taken together demonstrate that at the least a different standard of ademption is necessary in the guardian sale cases.

30. 32 Pa. D. & C.2d at 340.
31. IV PAGE, *op. cit. supra* note 13, § 530.
32. 32 Pa. D. & C.2d at 338.

Furthermore, *Neal* seems to throw new light on the entire doctrine of ademption, suggesting that an examination of the rules should be undertaken. The rigidity and severity of the ademption rules are clearly shown in the recent case of *Smith Estate.*[33] It is a nonguardian sale case but worthy of note because it shows the inequities which can arise from the present ademption doctrine. In *Smith* testatrix bequeathed all her stock in a specific corporation to the trustees of an inter vivos trust created by her son. At the age of 90, testatrix was advised by her attorney to accept an offer to purchase the above-mentioned stock. Her attorney testified that at this time testatrix was, in his opinion, incompetent to make a will. Nevertheless, the court found that she possessed testamentary capacity and agreed with the auditing judge that an ademption had occured, *i.e.*, that decedent's sale of the stock was a voluntary act made at a time when she understood the nature of the transaction. No one advised her of the possibility of there being an ademption at the time she sold the stock. There was also testimony that she (decedent) could not remember the names of her close relatives, and that she did not know the exact number of the shares of stock that she owned. Furthermore, her attorney was of the opinion that she was incompetent to execute a codicil to her will.

*Smith* is just one case in a line of cases which shows most acutely the inequities of the application of the strict rule of ademption.[34] It has been suggested that the time has come for legislative action to secure relief from the severity of this rule.[35] However, it is submitted, that decisions such as *Neal* show very clearly that our courts are able to recognize the equities involved in these ademption cases, and can adjust the rules accordingly. The courts have fashioned the rules of ademption and they are capable of supplying relief from their rigidity without the assistance of any legislative body.

MORGAN R. JONES

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33. 415 Pa. 569, 202 A.2d 40 (1964).
34. See Dublin Estate, 2 Fiduc. Rep. 309 (Allegheny County Orphans' Ct. 1952), wherein the intention of the testator was given primary consideration to avoid the severity of rule of ademption. *See also* Frost Estate, 354 Pa. 223, 47 A.2d, 219 (1946); Woodward's Estate, 3 Pa. D. & C. 433 (Orphans' Ct. 1922).
35. See FIDUC. REV. 1-2 (Sept. 1964); Note, 74 HARV. L. REV. 741 (1961).