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Wills: Ademption by Extinction in California

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of those who were dependent on the testator in life. The charity would no longer be encumbered by its traditional restrictions on inheritance. Instead, the stress would be on general limitation of testamentary freedom; the charity would be on a par with non-charitable strangers in order to protect the testator's family.

However, retention of the present statute with certain modifications would seem to be the most likely alternative. The class of heirs allowed to challenge charitable bequests should be reduced to those to whom the testator owes a duty of support during his life. Attempts to evade the effect of the statute should be sharply curtailed by the courts in order to carry out its more realistic scope of protection and to prevent a pitfall for the unskilled. Unfortunately, under such a revised statute the charity is still restricted in its ability to inherit, but such modifications would limit these restrictions to fewer cases.

The modern goal of the mortmain statutes is to protect the family of the testator against disinheritance. However, it is readily apparent that even the most stringent of the proposed mortmain legislation does not adequately perform this function. The testator's family could still be left without means of support if the testator made his will prior to the prohibited period, or gave his property to non-charitable beneficiaries. Adequate family protection legislation should guard against all disinheritance—not just gifts to charity.

Nancy Franzen[*]

Flexible Restraints on Testation, 69 HARV. L. REV. 277 (1955). See also Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. R. 681 (1966) for a very complete discussion of the frequency of disinheritance, which, of course, has bearing on the most desirable remedy for it.

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WILLS: ADEMPTION BY EXTINCTION IN CALIFORNIA

The General Rule

A specific testamentary gift is a devise, bequest, or legacy of some certain realty, specified article, or particular fund that is distinguished from the remainder of testator's estate by the terms of his will.[1] Because of such testamentary specification, a specific gift will be held to have been adeemed if the specific subject matter devised or bequeathed is not part of the testator's estate at the time of his death and no provision is made in the will for its absence.[2] Ademption of such a specific testamentary gift, as it is generally understood, is "the loss of the [specific gift] by the loss, transfer or termination of the testator's

[1] ATKINSON, WILLS § 132, at 732, 737 (2d ed. 1953). Essentially the same definition is stated in CAL. PROB. CODE § 161(1): "(1) *Specific.* A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific "

[2] See ATKINSON, *op. cit. supra* note 1, at 732.

interest therein before his death."[3] If a specific gift is held to have been adeemed, the gift fails and the devisee or legatee takes nothing.[4]

The courts, in determining whether there was an ademption, utilize a two step process.[5] First, the nature of the gift—whether specific, general, demonstrative, or residuary—is determined. This requires a construction of the terms of the will to discover which kind of gift testator intended at the time the will was executed.[6] Once it is determined that the gift was specific,[7] the court will ascertain whether it was adeemed by some subsequent change in status of the subject matter of the gift. In determining whether an ademption has taken place, England and a majority of American jurisdictions[8] follow the general rule set down by Lord Chancellor Thurlow in *Humphreys v. Humphreys*:[9]

> [T]he 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 . 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.[10]

Under this majority rule, unless the subject matter of the specific gift is part of testator's estate at the time of his death, an ademption results.

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[3] 6 PAGE, WILLS § 54.1, at 242 (3d ed. 1962).

[4] *Id.* § 54.5, at 248. Ademption by extinction should not be confused with ademption by satisfaction, which means the act of the testator in satisfying the gift to a legatee or devisee during the lifetime of the testator by paying the legacy, turning over the subject of the bequest, or otherwise giving the legatee his share of the estate. On ademption by satisfaction, see generally 6 PAGE, *op. cit. supra* note 3, §§ 54.1-54.2, 54.21-54.37; ATKINSON, *op. cit. supra* note 1, § 133.

[5] The classic statement of the dual nature of ademption by extinction is found in Ashburner v. MacGuire, 2 Bro. C.C. 108, 109, 29 Eng. Rep. 62, 63 (1786), where Lord Chancellor Thurlow stated the fundamental rule that "the claim depended on two questions.

1. Whether the legacy was given as a specific legacy.
2. [W]hether the legacy . is adeemed. "

[6] ATKINSON, *op. cit. supra* note 1, § 132, at 731-32 states: "The question of whether a legacy is specific, demonstrative, general, or residuary depends upon the intention of the testator as disclosed by the language of his entire will, the circumstances surrounding him, and certain rules of construction applied by the courts." See also 6 PAGE, *op. cit. supra* note 3, § 48.1, at 2.

[7] For interesting examples of how far the California courts have gone in finding a bequest to be general or demonstrative, not specific, in order to avoid an ademption, see Estate of Blackmun, 98 Cal. App. 2d 314, 220 P.2d 30 (1950); Estate of Cline, 67 Cal. App. 2d 800, 155 P.2d 390 (1945); Estate of Jones, 60 Cal. App. 2d 795, 141 P.2d 764 (1943).

[8] *E.g.*, Alexander v. House, 133 Conn. 725, 54 A.2d 510 (1947); Moffatt v. Heon, 242 Mass. 201, 136 N.E. 123 (1922); Welch v. Welch, 147 Miss. 728, 113 So. 197 (1927); Wyckoff v. Perrine, 37 N.J. Eq. 118 (1883); Ametrano v. Downs, 170 N.Y. 388, 63 N.E. 340 (1902); Hoke v. Herman, 21 Pa. 301 (1853); In re Barrows, 103 Vt. 501, 156 Atl. 408 (1931); Estate of Kamba, 230 Wis. 246, 282 N.W 570 (1938). See generally 6 PAGE, *op. cit. supra* note 3, § 54.15, at 266; ATKINSON, *op. cit. supra* note 1, § 134, at 742.

[9] 2 Cox. Ch. 184, 30 Eng. Rep. 85 (Ch. 1789).

[10] *Ibid.*

The California View

California has defined a specific legacy by statute;[11] and, although the statute does not mention intent, the California courts are in accord with the general rule that testator's intent governs whether a legacy is specific, demonstrative, or general.[12] The California rule determining an ademption by extinction, however, is not so clearly defined. The Probate Code merely says that "if such specific legacy fails, resort can not be had to the other property of the testator."[13] As to what causes failure of the gift such that an ademption results, the leading California case of *Estate of Goodfellow*[14] adopted a federal circuit court's[15] definition of ademption saying:

> Ademption of a specific legacy is 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.* The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will, *from which an intention that the legacy should fail is presumed.*[16]

The California definition, then, involves an act of the testator which indicates his intention to cancel the gift. This act must be an act of such extinctive or dispositive character that it raises a presumption that testator intended the gift to fail. Therefore, it appears that the *Goodfellow* court felt the intent of the testator was to be sought, and that the court should not merely ask whether the subject matter of the gift remained in specie as part of testator's estate at the time of his death.

This conclusion is supported by *Estate of Mason,* decided by the California Supreme Court in 1965.[17] There testatrix executed a will specifically devising her home and furnishings to her son. She was subsequently declared incompetent, and the appointed guardian sold the home, applying the proceeds to her maintenance. The devisee sought to abate the residuary legatee's share of the estate to make up for his loss, while the residuary legatee claimed the specific devise had been adeemed. The court held that no ademption had been effected, saying, *inter alia*: "A change in the form of property subject to a specific testamentary gift will not effect an ademption *in the absence of proof that testator intended that the gift fail.*"[18] This reasoning was also applied in *Estate of Holmes,*[19] decided the same year by the district court of appeal. There testator was found to have sold his specifically devised realty while acting under the undue influence of

[11] CAL. PROB. CODE § 161(1).

[12] Estate of Buck, 32 Cal. 2d 372, 196 P.2d 769 (1948); Estate of Jepson, 181 Cal. 745, 186 Pac. 352 (1919); Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955); Estate of Loescher, 133 Cal. App. 2d 589, 284 P.2d 902 (1955); Estate of Blackmun, 98 Cal. App. 2d 314, 220 P.2d 30 (1950); Estate of Jones, 60 Cal. App. 2d 795, 141 P.2d 764 (1943).

[13] CAL. PROB. CODE § 161(1).

[14] 166 Cal. 409, 137 Pac. 12 (1913). The court held that a specific legacy of $5,000, to be obtained from her father's estate, was adeemed when testatrix subsequently collected and mingled the proceeds with her general estate.

[15] Kramer v. Kramer, 201 Fed. 248, 253 (5th Cir. 1912) (dictum).

[16] Estate of Goodfellow, 166 Cal. 409, 415, 137 Pac. 12, 15. (Emphasis added.)

[17] 62 Cal. 2d 213, 42 Cal. Rptr. 13, 397 P.2d 1005.

[18] *Id.* at 215, 42 Cal. Rptr. at 15, 397 P.2d at 1007. (Emphasis added.)

[19] 233 Cal. App. 2d 464, 43 Cal. Rptr. 693 (1965).

his housekeeper, the residuary legatee. The court held that the undue influence made his dispositive act involuntary and awarded the proceeds from the sale to the specific devisee. This case also recognized a trend in California to let the issue of ademption turn upon the intent of the testator where possible[20] and stated that *Mason* "confirms that trend and adopts the rule that intent controls."[21] As to when this intent is to be sought, the court said: "Some earlier cases left doubt whether the intent sought was that expressed in the will or that existing at time of disposition of the devised property. In any event, *Mason* looks to intent at the time of alienation, the view indicated in *Stevens, Cooper* and *McLaughlin.*"[22]

From *Mason,* then, it is apparent that some proof is necessary—not to show that testator intended the gift to continue—but to show that he intended the gift to fail. From *Holmes* it appears that the California courts feel obligated to go outside the terms of the will and determine this intent at the time of the dispositive or extinctive act. But neither case, nor any other California case, has stated what, if any, criteria are to be used in this determination of intent. However, they all appear to consider the circumstances affecting the dispositive or extinctive act.[23] These circumstances should be categorized generally to provide an objective standard which the courts can apply to the problem of determining testator's intent at the time the status of the subject matter of the specific gift changes.

Suggested Criteria

The following categories are submitted as guidelines to be used in this determination: (1) testator's role in the change—whether active or passive; (2) the character of the change—whether substantial or merely formal; (3) disposition of the proceeds, if any—whether traceable or not; (4) opportunity of testator to change his will—whether a long or short time has elapsed between the change and testator's death; and (5) miscellaneous circumstances peculiar to the facts of the particular case.

Testator's Role in the Change of Status of the Specific Property

When testator plays an active role in the disposition or extinction of the subject matter of the gift, as where he sells real estate,[24] transfers stocks or bonds,[25]

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[20] *Id.* at 468, 43 Cal. Rptr. at 695.

[21] *Ibid.*

[22] *Ibid.* The cases cited by the court are Estate of Mason, 62 Cal. 2d 213, 42 Cal. Rptr. 13, 397 P.2d 1005 (1965); Estate of Stevens, 27 Cal. 2d 108, 162 P.2d 918 (1945); Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951); and Estate of McLaughlin, 97 Cal. App. 485, 275 Pac. 875 (1929).

[23] In Estate of McLaughlin, 97 Cal. App. 485, 488, 275 Pac. 875, 877 (1929), the court said: "[O]rdinarily the purpose [of the testator] will appear by a construction of the terms of the will in the light of the subsequent acts and conduct of the testator." *Accord,* Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955). See also Estate of Stevens, 27 Cal. 2d 108, 162 P.2d 918 (1945).

[24] *E.g.,* Estate of Benner, 155 Cal. 153, 99 Pac. 715 (1909); Estate of Sorensen, 46 Cal. App. 2d 35, 115 P.2d 24 (1941), Estate of McLaughlin, 97 Cal. App. 481, 275 Pac. 874 (1929) (not to be confused with Estate of McLaughlin, note 23, *supra*).

[25] *E.g.,* Estate of Buck, 32 Cal. 2d 372, 196 P.2d 769 (1948).

sells his automobile,[26] or sues to collect a debt;[27] it follows that he probably has full knowledge of the legal effect of his act relative to the particular property. However, where testator merely plays a passive role in the change in status of the particular property, as where a bequest of an undistributed interest in X's estate is subsequently distributed to testator,[28] a mortgage or other debt is paid,[29] or bonds are redeemed by the obligor;[30] it does not follow as readily that testator considered the legal effect such a transaction might have upon the specific gift. The former situation—where testator is the primary cause of the change in status—implies conscious and intentional choice on his part that the consequent change in status should take place.[31] The latter—where the testator plays no active role in the change—allows no such implication of choice. No conclusion as to what testator intended with reference to the specific gift can be clearly deduced.[32]

Character of the Change in the Status of the Specific Property

If the change in status amounts to a substantial change in the character of the property, as where real estate is sold,[33] or a car is disposed of,[34] or stocks and bonds are transferred;[35] and nothing more is shown; an inference that testator was intentionally eliminating the specific property from his estate seems reasonable.[36] Where, however, testator applies the proceeds to purchase similar

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[26] *E.g.*, Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951).

[27] *E.g.*, Morgan v. Wolpert, 164 Ga. 462, 139 S.E. 15 (1927).

[28] *E.g.*, Estate of Babb, 200 Cal. 252, 252 Pac. 1039 (1927); Estate of Goodfellow, 166 Cal. 409, 137 Pac. 12 (1913); Estate of Cline, 67 Cal. App. 2d 800, 155 P.2d 390 (1945).

[29] *E.g.*, Estate of Jepson, 181 Cal. 745, 186 Pac. 352 (1919); Estate of McLaughlin, 97 Cal. App. 485; 275 Pac. 875 (1929).

[30] *E.g.*, Estate of Jones, 60 Cal. App. 2d 795, 141 P.2d 764 (1943).

[31] In Estate of Sullivan, 128 Cal. App. 2d 144, 147, 274 P.2d 946, 948 (1954), it was said: "[Testator] disposed of the property from the sale of which the legacies were to be paid. From this act arises the presumption that he intended the legacies should fail." In Estate of Sorensen, 46 Cal. App. 2d 35, 37, 115 P.2d 241, 242 (1941), the court stated: "[T]he ademption was effected by the disposal of the property [sale by testatrix], by an act which prevented its passing by the will."

[32] In Estate of McLaughlin, 97 Cal. App. 485, 489-90, 275 Pac. 875, 877 (1929), the court held: "The accepting of a deed of conveyance in consideration of the exact indebtedness secured by a mortgage [the bequest] furnishes no evidence of the intent of a testatrix to accomplish an ademption where the testatrix retains the property to the time of her death, and subsequently makes no change in the terms of her will." Also, the court in Estate of Cline, 67 Cal. App. 2d 800, 806, 155 P.2d 390, 394 (1945), said: "[T]here is no showing that by any act or conduct of his after he made his will and up to the time of his death [testator] . intended to abolish the gift to appellant." The latter case was almost entirely dictum, but it was approved in Estate of Mason, 62 Cal. 2d 213, 215, 42 Cal. Rptr. 13, 15, 397 P.2d 1005, 1007 (1965).

[33] *E.g.*, Estate of Benner, 155 Cal. 153, 99 Pac. 715 (1909); Estate of Sullivan, 128 Cal. App. 2d 144, 274 P.2d 946 (1954); Estate of Sorensen, 46 Cal. App. 2d 35, 115 P.2d 241 (1941); Estate of McLaughlin, 97 Cal. App. 481, 275 Pac. 874 (1929).

[34] *E.g.*, Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951).

[35] *E.g.*, Estate of Buck, 32 Cal. 2d 372, 196 P.2d 769 (1948).

[36] In Estate of Resler, 43 Cal. 2d 726, 736, 278 P.2d 1, 7 (1954), the court held:

property,[37] or merely alters his interest in existing property,[38] or otherwise effects a change merely in the form of the property,[39] not amounting to a change in substance—it seems reasonable that he did not intend the gift to be extinguished; and that by replacing or only altering the character of the specific property, that he intended such gift would remain in force.[40]

Disposition of the Proceeds Derived from the Specific Property

Where a substantial change in the status of the property takes place, and the proceeds from the transaction are not traceable to a readily identifiable source;[41] it is reasonable to infer that testator must have felt that extinguishing the gift was more important than maintaining it or acquiring substitute property.[42] Where, however, the proceeds of the transaction changing the status of the property—although the character of the specific property is entirely changed—are readily traceable and have been maintained intact, it cannot be as easily said that abrogation of the gift was more important to testator than maintaining it in its new form. The fact that testator kept the value of the gift intact,[43] even though he

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"[A]fter the will was made, testator transferred his interest in the business [the specific bequest] . in exchange for [a promissory] note. That sale divested the testator of his interest in the business, and, in absence . of a contrary intent, it may not be assumed that he intended to bequeath the proceeds of it in lieu of his interest." See CAL. PROB. CODE § 73; Estate of Sorensen, 46 Cal. App. 2d 35, 37, 115 P.2d 241, 242 (1941).

[37] *E.g.*, Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951).

[38] *E.g.*, Estate of Hale, 170 Cal. App. 2d 351, 338 P.2d 997 (1959); Estate of Tramer, 161 Cal. App. 2d 353, 326 P.2d 520 (1958); Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955); Estate of McLaughlin, 97 Cal. App. 485, 275 Pac. 875 (1929).

[39] *E.g.*, Estate of Stevens, 27 Cal. 2d 108, 162 P.2d 918 (1945).

[40] Estate of Cooper, 107 Cal. App. 2d 592, 596, 237 P.2d 699, 702 (1951), held that "[T]he exchange of a certain property which has been specifically devised, for other similar property, will not constitute an ademption." See CAL. PROB. CODE § 78; Estate of Tramer, 161 Cal. App. 2d 353, 326 P.2d 520 (1958); Estate of Hale, 170 Cal. App. 2d 351, 338 P.2d 997 (1959) (trust deed taken back in conveyance of specific devise—no ademption).

[41] *E.g.*, Estate of Goodfellow, 166 Cal. 409, 137 Pac. 12 (1913); Estate of Babb, 200 Cal. 252, 252 Pac. 1039 (1927); Estate of Sullivan, 128 Cal. App. 2d 144, 274 P.2d 946 (1954); Estate of McLaughlin, 97 Cal. App. 481, 275 Pac. 874 (1929).

[42] Estate of McLaughlin, 97 Cal. App. 481, 483, 275 Pac. 874, 874-75 (1929), held: "[T]he entire interest having been sold by her and conveyed to strangers, subsequent to the execution of her will, and the proceeds thereof having been mingled with the general assets of the estate, the bequest must be deemed to have been abrogated." Later, in Estate of Resler, 43 Cal. 2d 726, 736, 278 P.2d 1, 7 (1954), the court said: "[I]n [the] absence of a showing of a contrary intent, it may not be assumed that [testator] . intended to bequeath the proceeds of [the sale] in lieu of his interest [previously bequeathed]."

[43] *E.g.*, Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955); Estate of McDonald, 133 Cal. App. 2d 43, 283 P.2d 271 (1955); Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951); Estate of Stevens, 27 Cal. 2d 108, 162 P.2d 918 (1945); Estate of McLaughlin, 97 Cal. App. 485, 275 Pac. 875 (1929). *But see* Estate of Peyton, 143 Cal. App. 2d 379, 299 P.2d 897 (1956) (check deposited a few days

abolished its physical substance, should be persuasive that he did not intend to abolish the benefit conferred on the legatee by the will.[44]

Testator's Opportunity To Change His Will

If testator has had a clear opportunity to change his will, as where a period of many years has elapsed from the change in status,[45] or where he has revised his will by codicil as to other parts of his estate,[46] it cannot easily be said that he consciously intended to retain a benefit for the specific legatee. Where such a clear opportunity for testator to change his will exists, and he does not, this fact is persuasive that the change in status was done deliberately, or at least accomplished with the knowledge of the testator.[47] When, however, a very short time elapses between the change in status and testator's death,[48] or where no change in his will is possible,[49] or where a codicil is attached which republishes a will purporting to leave property which has only been altered in form,[50] no inference can be drawn from the fact that the will is not changed. Where no such clear opportunity exists to change the will, and he does something indicating his intent

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before death); Estate of Sorensen, 46 Cal. App. 2d 35, 115 P.2d 24 (1941) (check uncashed at time of death).

[44] Estate of Mason, 62 Cal. 2d 213, 216, 42 Cal. Rptr. 13, 15, 397 P.2d 1005, 1007 (1965), held: "[A] specific testamentary gift is adeemed when the specific property has been disposed of by the testator and cannot be traced to other property in the estate or when the testator has placed the proceeds of such property in a fund bequeathed to another " *Accord,* Estate of Packam, 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965). In Estate of Holmes, 233 Cal. App. 2d 464, 469, 43 Cal. Rptr. 693, 696 (1965), the court said: "Although ademption would result if the proceeds of the property sold could not be traced that problem does not arise here. The proceeds are readily traceable to the bank account " *But see* Estate of Benner, 155 Cal. 153, 99 Pac. 715 (1909) (sale of devised realty, proceeds comprised practically whole estate, held adeemed); Estate of Sorensen, 46 Cal. App. 2d 35, 115 P.2d 24 (1941) (sale of devised realty, check uncashed at testator's death, held adeemed).

[45] *E.g.,* Estate of Goodfellow, 166 Cal. 409, 137 Pac. 12 (1913); Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955).

[46] *E.g.,* Dean v. Tusculum College, 195 F.2d 796 (D.C. Cir. 1952).

[47] *E.g.,* Estate of Sullivan, 128 Cal. App. 2d 144, 147, 274 P.2d 946, 948 (1954), where it was said: "The will was drawn July 2, 1949. Testator died January 31, 1952. In the meanwhile, he disposed of the property from the sale of which the legacies were to be paid. From this act arises the presumption that he intended the legacies should fail." *But see* Estate of McLaughlin, 97 Cal. App. 485, 489-90, 275 Pac. 875, 877 (1929); the court held: "The accepting of a deed of conveyance in consideration of the exact indebtedness secured by a mortgage on the same premises, furnishes no evidence of the intent of a testatrix to accomplish an ademption of a devise of the interest in the property represented by the mortgage, where the testatrix retains the property to the time of her death, and subsequently makes no change in the terms of her will."

[48] *E.g.,* Estate of Holmes, 233 Cal. App. 2d 464, 43 Cal. Rptr. 693 (1965); Estate of MacDonald, 133 Cal. App. 2d 43, 283 P.2d 271 (1955). *But see* Estate of Peyton, 143 Cal. App. 2d 379, 299 P.2d 897 (1956); Estate of Sorensen, 46 Cal. App. 2d 35, 115 P.2d 24 (1941).

[49] *E.g.,* Estate of Mason, 62 Cal. 2d 213, 42 Cal. Rptr. 13, 397 P.2d 1005 (1965); Estate of Ehrenfels, 241 A.C.A. 294, 50 Cal. Rptr. 358 (1966).

[50] *E.g.,* Gilmer v. Aldridge, 154 Md. 632, 141 Atl. 377 (1928).

that the change in status have no effect, it cannot be clearly said that testator, by his subsequent act has shown an intent to adeem.[51]

Miscellaneous Circumstances and Circumstances Peculiar to the Facts of the Particular Case

In many cases courts either stress or include as part of an argument for or against finding an ademption, minor circumstances which do not fit into the above categories. Each circumstance apparently affects the court's determination whether the specific gift has been adeemed; and together they indicate that the above categories are the major circumstances, but are not all-inclusive. Among the minor circumstances are: whether the proceeds become incorporated into another legatee's specific gift or merely become part of the residuary estate;[52] whether testator has attempted to dispose of all his property, or has left part by a general residuary clause;[53] whether the will is holographic, indicating no legal advice or awareness of the effect of the subsequent extinctive act, or whether drawn by an attorney;[54] whether the specific legatee will take rather than the intestate heirs;[55] whether the gift is made more valuable by the change,[56] or less;[57] whether testator had actual knowledge of the change in status;[58] and whether the taker by force of the ademption is named in the will.[59]

Application of Criteria

Because of *Mason* and *Holmes*, the California rule appears to be that no ademption will be found without proof that testator intended to destroy the specific devise, bequest, or legacy; and this requires an examination of testator's purpose at the time the status of the property changes. To determine this intent correctly, assuming that the will does not provide for an alternative distribution in the case of an ademption, the court must look to the circumstances of the dispositive or extinctive act. This in turn requires an evaluation of these circumstances, and a determination of their effect should be controlling. It is during this evaluation that the above-mentioned categories should prove helpful. For example, the two easiest cases would be:

(1) Testator's voluntary act causes an extinction of the subject of the specific gift; the proceeds from such transaction are mingled with the general assets of

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[51] *E.g.*, Estate of Mason, 62 Cal. 2d 213, 216, 42 Cal. Rptr. 13, 15, 397 P.2d 1005, 1007 (1965), where the court held that "the reasons for refusing to find an ademption upon the guardian's sale are the incompetent testator lacks intent to adeem . . and the opportunity to avoid the effect of an ademption by making a new will See also Estate of Ehrenfels, 241 A.C.A. 294, 50 Cal. Rptr. 358 (1966).

[52] Estate of Babb, 200 Cal. 252, 252 Pac. 1039 (1927).

[53] Estate of McLaughlin, 97 Cal. App. 485, 275 Pac. 875 (1929); Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955).

[54] Estate of McLaughlin, *supra* note 53; Estate of Moore, *supra* note 53.

[55] Estate of McLaughlin, *supra* note 53; Estate of Moore, *supra* note 53.

[56] Estate of McLaughlin, *supra* note 53.

[57] Estate of MacDonald, 133 Cal. App. 2d 43, 283 P.2d 271 (1955).

[58] *Ibid.*

[59] Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955).

his estate; and a long period of time elapses between the time testator disposes of the property and the time of his death. With this set of circumstances it would be relatively easy to infer that testator intended to adeem the specific gift.[60]

(2) But, if testator plays only a passive role in the act that causes the status of the property to be changed; and if this change is only one of form, the proceeds of the transaction being readily traceable; and testator has no opportunity to change his will; it would be difficult to say that testator intended to adeem the specific gift.[61]

Although less clear, the same method of evaluation may be applied in those cases where a combination of these circumstances are inconsistent. For example, testatrix sells realty previously devised. She receives the proceeds in the form of a check, which remains uncashed at the time of her death three weeks later, and her will is holographic, indicating she was without legal advice. If the specific devise is held adeemed, the proceeds will pass as intestate property[62] in the absence of a valid residuary clause. This case involves a voluntary act of the testatrix and a change in substance; but there are readily traceable proceeds and no clear opportunity to change her will. It also includes a lack of legal advice and a possible resulting partial intestacy. None of these factors alone indicate clearly whether testatrix intended to adeem the specific devise. Taken together, however, it can be argued that she was probably not aware of the legal effect of her act and did not desire that the proceeds should pass to possible strangers rather than to her previously chosen beneficiary. Also, the fact that the proceeds were unspent at death indicates no pressing need for money or desire to apply it to some other purpose. Finally, from the fact that testatrix died soon after the sale, it can reasonably be inferred that she had given no thought to an alternative testamentary scheme. These factors taken together are persuasive that the circumstances tending to show an intent to adeem: voluntary disposition of the devise and extinction of its subject matter, should not be controlling. The circumstances taken as a whole are in favor of an intent not to adeem; and under *Mason's* requirement of proof that testator intended the gift to fail, no ademption should be found because of insufficiency of proof.[63]

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[60] For such a fact situation see Estate of Buck, 32 Cal. 2d 372, 196 P.2d 769 (1948). Testator owned 40,000 shares of stock in a tightly held corporation. He bequeathed a total of 30,000 shares to his six children and 5,000 shares to claimant. Subsequently he made a gift of 10,000 shares to his wife, transferring these to her in his lifetime. The court, after holding the bequests specific, held the claimant's bequest of 5,000 shares had been adeemed.

[61] For such a fact situation see Estate of MacDonald, 133 Cal. App. 2d 43, 283 P.2d 271 (1955). Testatrix bequeathed any car she might own at her death to her mother; subsequently she wrecked the car, dying a few hours later. The court held the insurance proceeds from the car went to the mother in lieu of the specific bequest.

[62] These are the facts of Estate of Sorensen, 46 Cal. App. 2d 35, 115 P.2d 241 (1941).

[63] The court held, however, that the specific gift had been adeemed. It is doubtful that this result would be reached today. Compare Estate of Holmes, 233 Cal. App. 2d 464, 43 Cal. Rptr. 693 (1965), where the court held the unspent proceeds from the sale passed to the specific devisee because the circumstances of the sale showed no intent to adeem.

Conclusion

Most California ademption cases can be approached in this way. The form of analysis is not difficult of application and provides an objective approach to the California courts' obligation to determine whether testator intended an ademption to be effected. It also allows the courts the opportunity to avoid both strict rules of law and guesswork in their determination, thus providing flexibility when needed to avoid a harsh result, as well as a basis for more uniform holdings.

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