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Wills - Ademption - Sale of Property by Guardian of Physically Incompetent Testator

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WILLS—ADEMPTION—SALE OF PROPERTY BY GUARDIAN OF PHYSICALLY INCOMPETENT TESTATOR—By a will executed in 1950, testator devised his undivided one-half interest in his home to his wife in fee simple. A year later and with his consent, the probate court appointed a guardian for him on the ground of physical incompetency. In 1952 the guardian sold the devised property under court order, at which proceeding the testator was properly before the court, was consulted, and agreed to the sale. A small portion of the proceeds was used for the support of the testator but $7271 remained at his death five months later and was turned over to his executors. The probate court found that the sale of the testator's interest in the property did not operate as an ademption. On appeal, *held,* reversed. Authority to the effect that the sale by a guardian of a mentally incompetent testator does not adeem a specific devise does not apply to the case of a physically incompetent testator. The testator consented to the sale and at all times possessed full testamentary capacity. *Roderick v. Fisher,* 97 Ohio App. 95, 122 N.E. (2d) 475 (1954).

Although the principal case does not present a difficult problem, it adds another chapter to the very interesting history of the doctrine of ademption.[1] Several cases involving conversion of a specific legacy or devise by the guardian of a mentally incompetent testator have come before the courts,[2] but this appears to be the first case involving conversion by the guardian of a physically incompetent testator.[3] It was held at early common law that ademption by extinction could result only when the non-existence of the specific gift was due to the intent of the testator.[4] However, Lord Thurlow's decision in *Stanley v. Potter*[5] soon initiated the modern rule that, regardless of the testator's intention, ademption takes place if the property is not in his estate at the time of his death.[6] This rule was soon extended to involuntary as well as voluntary extin-

[1] See generally, Warren, "The History of Ademption," 25 IOWA L. REV. 290 (1940); Page, "Ademption by Extinction: Its Practical Effects," 1943 WIS. L. REV. 11; 43 HARV. L. REV. 1311 (1930).

[2] E.g., Wilmerton v. Wilmerton, (7th Cir. 1910) 176 F. 896, cert. den. 217 U.S. 606, 30 S.Ct. 696 (1910); In re Cooper's Estate, 95 N.J. Eq. 210, 123 A. 45 (1923); Lamkin v. Kaiser, (Mo. App. 1923) 256 S.W. 558; 30 A.L.R. 676 (1924).

[3] Morse v. Converse, 80 N.H. 24, 113 A. 214 (1921), involved a conversion by a conservator where testator had not been declared insane, but the decision was based on the fact that the testator did not know of the action and therefore it did not evidence a change of his intention.

[4] Pawlet's Case, Raym. T. 335, 83 Eng. Rep. 174 (1679); Orm v. Smith, 2 Vern. 681, 23 Eng. Rep. 1042 (1711); Partridge v. Partridge, Cas. T. Talbot 226, 25 Eng. Rep. 749 (1736). Cf. Stout v. Hart, 7 N.J.L. 414 (1801).

[5] 2 Cox 180, 30 Eng. Rep. 83 (1789). See also Asburner v. MacQuire, 2 Bro. C.C. 108, 29 Eng. Rep. 62 (1786).

[6] Matter of Brann, 219 N.Y. 263, 114 N.E. 404 (1916); In re Estate of Keeler, 225 Iowa 1349, 282 N.W. 362 (1938); 4 PAGE, WILLS, 3d ed., §1527 (1941). That the question of intent is irrelevant because of the absence of anything upon which a devise can operate, see 24 COL. L. REV. 405 (1924); 45 HARV. L. REV. 710 (1932). Sometimes it is said that intent to adeem is conclusively presumed. Kramer v. Kramer, (5th Cir. 1912) 201 F. 248; In re Sorensen's Estate, 46 Cal. App. (2d) 35, 115 P. (2d) 241 (1941).

guishments.[7] When confronted with the conversion of a specific gift by the guardian of a mentally incompetent testator, the English courts[8] and a minority of the American courts[9] continued to apply the same objective rule. But a majority of the courts revolted at the hardship occasioned by a strict application of this rule and established an exception in this instance.[10] Purporting to rely on the testator's intention, these courts hold that there is no ademption in such a case[11] except in so far as the proceeds are used for the benefit of the testator.[12] The policy rationale seems to be that to allow the guardian to adeem in this instance would be to give him the opportunity to favor one legatee over another.[13] In addition, such a testator lacks the testamentary capacity to change his will so as to insure that the legatee or devisee will still share in his estate.[14] Neither of these reasons for varying the general rule applies to the principal case. The artificiality of extending the rule of the insanity cases is further emphasized by the fact that ademption would occur in the principal case by either the subjective test of the testator's intention or the objective general rule.

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[7] See note 4 supra. For cases dealing with condemnation, see Ametrano v. Downs, 170 N.Y. 388, 63 N.E. 340 (1902); Lafontaine's Heirs v. Lafontaine's Heirs, (Md. 1954) 107 A. (2d) 653. Cf. McCoy v. Ferguson, 249 Ky. 334, 60 S.W. (2d) 931 (1933), for an exception where the landowner was an infant, and 4 POMEROY, EQUITY JURISPRUDENCE, 5th ed., §1167 (1941), to the effect that the same rule applies where a lunatic is involved. See also In re Jepson's Estate, 181 Cal. 745, 186 P. 352 (1919); Ross, Executor, v. Carpenter, 48 Ky. 367 (1849).

[8] Jones v. Green, L.R. 5 Eq. 555 (1868); In re Freer, 22 Ch. D. 622 (1882). However the Lunacy Act of 1890 gave to the lunatic's legatee an interest in the proceeds of disposition under the court order equivalent to that which would have passed had there been no change in the property. 53 and 54 Vict., c. 5, §123 (1) (1890).

[9] Hoke v. Herman, 21 Pa. 301 (1853); In re Ireland's Estate, 257 N.Y. 155, 177 N.E. 405 (1931); In re Barrow's Estate, 103 Vt. 501, 156 A. 408 (1931).

[10] See cases cited in note 2 supra and National Board v. Fry, 293 Mo. 399, 239 S.W. 519 (1922); Lewis v. Hill, 387 Ill. 542, 56 N.E. (2d) 619 (1944); Buder v. Stocke, 343 Mo. 506, 121 S.W. (2d) 852 (1938); Duncan v. Bigelow, 96 N.H. 216, 72 A. (2d) 497 (1949). It should be noted that in a few states statutes produce the same result. See In re Barnes' Estate, 162 Mich. 79, 127 N.W. 37 (1910); In re Hubbard's Estate, 196 Misc. 224, 92 N.Y.S. (2d) 73 (1949). The Scottish courts hold that conversion by the curator does not work ademption unless it was a necessary and unavoidable act in order to support the ward. Macfarlane v. Macfarlane, [1910] Sess. Cas. 325, 47 Scot. L. R. 266.

[11] See Wilmerton v. Wilmerton, note 2 supra.

[12] Buder v. Stocke, note 10 supra; Lewis v. Hill, note 10 supra.

[13] Wilmerton v. Wilmerton, note 2 supra; In re Cooper's Estate, note 2 supra; 4 PAGE, WILLS, 3d ed., §1530 (1941); 45 HARV. L. REV. 710 (1932); 20 ST. JOHN'S L. REV. 85 (1946).

[14] 45 HARV. L. REV. 710 (1932).