

## Ademption by a Committee of an Insane Testator

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The New York State Tax Law, in its efforts to achieve as much uniformity as possible with the federal laws in matters of estate taxes, has followed the federal courts on this question.<sup>13</sup> Prior to September 1, 1930, however, this type of transfer was not subject to tax under New York law.<sup>14</sup>

How remote must the possibility of reversion be in order to constitute the transfer an absolute and complete gift during the lifetime of the transferor and hence not subject to the Estate Tax? Attempts have been made to draw a fine line between what constitutes a possibility so remote as to be equivalent to no possibility at all, and what constitutes a reasonable possibility.<sup>15</sup> Even if a hard and fast line were set by statute or by the courts, it would still be exceedingly difficult to place many such trusts or other transfers on one side of the line or the other. The facts will differ in each case as they have in the past. The laws applicable to trusts will still, as they do now, vary from state to state. The Federal Government, in interpreting any trust agreement is bound, in most instances, to take into account the laws of the state in which the agreement was drawn.<sup>16</sup>

More than three quarters of an estate may be eaten up by estate taxes alone where the estate is big enough<sup>17</sup> and it is in the larger estates that *inter vivos* transfers are most common. The stakes being high, litigation ensues only too frequently.

The question as yet unresolved is certain to appear in the courts again and again.

NEWCOMB B. PINES.

#### ADEMPMENT BY A COMMITTEE OF AN INSANE TESTATOR

The conflict in the United States concerning the correct rule in ademption by a committee of an insane testator was manifested by the Illinois case of *Lewis v. Hill*, decided in 1944.<sup>1</sup> This case affirmed what is considered to be the majority ruling in such actions.<sup>2</sup>

<sup>13</sup> *Matter of Cregan*, 275 N. Y. 337, 9 N. E. (2d) 953 (1937).

<sup>14</sup> *Estate of Isabelle C. Kirby v. State Tax Commission*, 228 App. Div. 171, 239 N. Y. Supp. 390 (1930); *Matter of Schweinert*, 133 Misc. 762, 234 N. Y. Supp. 307 (1929).

<sup>15</sup> *Becker v. St. Louis Trust Co.*, 296 U. S. 48, 56 Sup. Ct. 78 (1935); *Commissioner v. Kellogg*, 119 F. (2d) 54 (C. C. A. 3d, 1941).

<sup>16</sup> *Sharpe's Estate v. Commissioner*, 148 F. (2d) 179 (C. C. A. 3d, 1945); *Vaccaro v. United States*, 149 F. (2d) 1014 (C. C. A. 5th, 1945); *Commissioner v. Porter*, 148 F. (2d) 566 (C. C. A. 5th, 1945).

<sup>17</sup> Federal Estate Tax rates range as high as 20% *basic tax* and 77% *additional tax*. The New York Estate Tax ranges as high as 20%. (See INT. REV. CODE §§ 810 and 935; N. Y. TAX LAW § 249n.)

<sup>1</sup> *Lewis v. Hill*, 387 Ill. 542, 56 N. E. (2d) 619 (1944).

<sup>2</sup> *Wilmerton v. Wilmerton*, 176 Fed. 896, 28 L. R. A. (N. S.) 401 (1910);

Ademption has been defined as the extinction or satisfaction of a legacy by some act of the testator which is equivalent to a revocation of the bequest, or which indicates an intention to revoke.<sup>3</sup> Of necessity, it takes place only when the legacy is specific.<sup>4</sup> However, intention is no longer the criterion and there are many instances where ademption has been completed without the intention of the testator, as for example, in destruction of the property,<sup>5</sup> material alteration in its substance,<sup>6</sup> or appropriation of the property by operation of the law.<sup>7</sup>

In the early English decisions, the courts looked to the intention of the testator to discover whether the ademption had taken place, that is, whether the testator intended to revoke his gift by disposing of the property before his death.<sup>8</sup> This rule was soon discarded in favor of what was considered a better test, that is, whether the thing was still in existence in the estate.<sup>9</sup> The American courts<sup>10</sup> have followed the English decisions<sup>11</sup> in observing this rule, the reasoning behind it being that after the property has been destroyed, changed or taken, the testator still has an opportunity to change his will, and if he fails

see *National Board v. Fry*, 293 Mo. 399, 239 S. W. 519 (1922); *Matter of Cooper's Estate*, 95 N. J. Eq. 210, 123 Atl. 45 (1923); *Morse v. Converse*, 80 N. H. 24, 113 Atl. 214 (1921); *Lamkin v. Kaiser*, 256 S. W. 558 (Mo. App. 1923); *World's Gospel Union v. Barnes' Estate*, 162 Mich. 79, 127 N. W. 37 (1910); also see annotation in 30 A. L. R. 676 (1924).

<sup>3</sup> *Kenaday v. Sinnott*, 179 U. S. 606, 45 L. ed. 339, 21 S. Ct. 233 (1900); *Burnham v. Comfort*, 108 N. Y. 535, 15 N. E. 710 (1888). For an interesting history and criticism of the rule of ademption see Page, *Ademption by Extinction* (1943) 1943 Wis. L. Rev. 11.

<sup>4</sup> *Thayer v. Paulding*, 200 Mass. 98, 85 N. E. 868 (1908); *In re Blomdahl's Will*, 216 Wis. 590, 257 N. W. 152 (1934).

<sup>5</sup> *Brady v. Brady*, 78 Md. 461, 28 Atl. 515 (1894); see *Elwyn v. De Garmendia*, 148 Md. 109, 128 Atl. 913 (1925); *Donath v. Shaw*, 132 N. J. Eq. 545, 29 Atl. (2d) 555 (1942).

<sup>6</sup> *Matter of Brann*, 219 N. Y. 263, 114 N. E. 404 (1916); *Welch v. Welch*, 147 Miss. 728, 113 So. 197 (1927); *First National Bank of Boston v. Perkins Institute for the Blind*, 275 Mass. 498, 176 N. E. 532 (1931).

<sup>7</sup> *Ametrano v. Downs*, 62 App. Div. 405, 70 N. Y. Supp. 833 (2d Dep't 1901).

<sup>8</sup> *Chapman v. Hart*, 1 Ves. Sr. 27 (1749); *Patridge v. Patridge*, Cas. t. Tab. 226 (1736); *Drinkwater v. Falconer*, 2 Ves. 623, 28 Eng. Rep. 397 (1755).

<sup>9</sup> *Ashburner v. Macguire*, 2 Bro. C. C. 108 (1786). The rule however was best stated in *Stanley v. Potter*, 2 Cox 180 (1789), by Lord Thurlow who said, "I believe it will be a safer and clearer way to adhere to the plain rule which I before mentioned which is to inquire whether the specific thing remains or not."

<sup>10</sup> *First National Bank of Boston v. Perkins Institute for the Blind*, 275 Mass. 498, 176 N. E. 532 (1931); *Ametrano v. Downs*, 62 App. Div. 405, 70 N. Y. Supp. 833 (2d Dep't 1901); *Owen v. Busiel*, 83 N. H. 345, 142 Atl. 692 (1928); *Hoke v. Herman*, 21 Pa. 301 (1853); *Rogers v. Rogers*, 67 So. Car. 168, 45 S. E. 176, 100 Am. St. Rep. 721 (1903).

<sup>11</sup> *Harrison v. Jackson*, 7 Ch. D. 399 (1877); *In re Brandle*, 4 C. P. D. 336 (1879); *In re Bick*, 1 Ch. 488 (1921).

to do so the presumption is raised that the testator wished nothing to go to the legatee.

Difficulty with the foregoing rule is found in those cases where the testator after having made a valid will is precluded by insanity from making another. Property, which he had devised in the valid will, is sold to support him by his guardians while he is in the insane state. The testator thereafter dies, precluded from having revised his testamentary disposition by his mental derangement. Under a strict interpretation of the rules of ademption, the beneficiary receives nothing, the property being adeemed by the act of the testator's guardians.

In England these cases were considered as ademption when done by authorized persons.<sup>12</sup> However, where the person acted without authority, it was maintained that no ademption had taken place and the beneficiary could recover.<sup>13</sup> The situation was remedied by the enactment of a statute which revised the common law and specifically excepted acts of an insane testator's committee from adeeming property which he had previously bequeathed, so that the beneficiary could recover a like amount representing the property, or the residue if some had been used in the testator's support.<sup>14</sup>

The legislatures of American states have not followed this English enactment, and therefore courts have been pressed for a suitable rule which would allow the beneficiary to recover. They have sustained the beneficiary's right for a variety of reasons. The following are representative of the *ratio decidendi*, used to sustain the beneficiary's right to take: 1) At the last moment when the testator could make a valid disposition of the property, the legacy was still in existence.<sup>15</sup> 2) The committee, in adeeming the property, would be acting contrary to the last express wish of the person whose interests and desires they were appointed to safeguard and carry out. By this act they would be permitted to swell the residuary estate at the expense of one whom the testator specifically wished to benefit. 3) The possibility of fraud would be enhanced where the conservator, or persons on the committee close to the testator, knowing of the provisions

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<sup>12</sup> Jones v. Green, L. R. 5 Eq. 555 (1868); *In re Freer*, Ch. D. 622 (1882).

<sup>13</sup> Jenkins v. Jones, L. R. 2 Eq. 323 (1866); \*Taylor v. Taylor, 10 Hare 475, 68 Eng. Rep. 1014 (1853).

<sup>14</sup> LUNACY ACT OF 1890, 53 & 54 Vict. c. 5, § 120(1): A lunatic, his heirs, executors, administrators, next of kin, devisees, legatees and assigns, shall have the same interest in any moneys arising from any sale, mortgage or other disposition under the powers of this act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage or disposition, if no sale, mortgage or disposition, had been made and the surplus moneys shall be of the same nature as the property sold, mortgaged or disposed of.

<sup>15</sup> Wilmerton v. Wilmerton, 176 Fed. 896 (1910); *cert. denied*, Wilmerton v. Wilmerton, 217 U. S. 606, 30 Sup. Ct. 696, 54 L. ed. 900 (1910).

of his will, could favor one legatee over another by choosing the property to be sold.<sup>16</sup>

The Illinois court upheld the beneficiary's right in the case of *Lewis v. Hill*,<sup>17</sup> mentioned previously. In this action, the testatrix, Sarah Collins, devised certain real estate to Edith Lewis, the plaintiff. Subsequently, the testatrix was adjudged incompetent, and the defendant, T. C. Hill, was appointed her conservator. The devised property was included by the defendant in an inventory of the assets of the testatrix and the former applied to the court for an order to sell the property in order to pay the expense of maintaining the testatrix in a home. The property was sold, but before any of the proceeds of the sale were used in her support the testatrix died and the defendant was appointed executor of the estate. Plaintiff brought suit against both the defendant and the residuary legatee, to secure an order to turn over to the plaintiff the proceeds of the sale. The court sustained the plaintiff by saying that the fund remained impressed with the nature of the realty, and that the committee could not adeem the property.

The jurisdictions of Pennsylvania,<sup>18</sup> Vermont,<sup>19</sup> and New York<sup>20</sup> have followed a contrary doctrine; the case of *In re Ireland* being the outstanding New York decision.<sup>21</sup> The court held that the legatee of a specific devise of stock was not allowed to recover the cash balance representing the stock which had been sold by a committee of the insane testator, and which went instead to the residuary legatee. The basis of this holding was that the stock had been adeemed, since the change in the nature of the property had been material.

The court went on to say that intent of the testator is no longer a guide but rather that the primary consideration is whether the property is an actual asset of the estate at the demise of the testator. Here the shares of stock having been converted into cash, the legacy was considered adeemed. The court felt obliged to follow this rule in the absence of a statutory enactment, since they could not change a specific legacy into a general one by judicial fiat. They also pointed out that England had remedied the situation by the statute<sup>22</sup> and in cases of the sale of real property of infants and incompetents a statute has already been enacted<sup>23</sup> which keeps the money from changing from realty until the infancy or incompetency is removed. It has been

<sup>16</sup> *Id.* at 900.

<sup>17</sup> *Lewis v. Hill*, 387 Ill. 542, 56 N. E. (2d) 619 (1944).

<sup>18</sup> *Hoke v. Herman*, 21 Pa. 301 (1853).

<sup>19</sup> *In re Barrow's Estate*, 103 Vt. 501, 156 Atl. 408 (1931).

<sup>20</sup> *In re Ireland*, 257 N. Y. 155, 177 N. E. 405 (1931).

<sup>21</sup> *Notes* (1931) 6 ST. JOHN'S L. REV. 147, (1931) 16 CORN. L. Q. 623, (1931) 65 N. Y. U. L. Q. 506. See the excellent note in (1932) 45 HARV. L. REV. 710.

<sup>22</sup> LUNACY ACT OF 1890, *supra* note 15.

<sup>23</sup> N. Y. CIV. PRAC. ACT § 1042 which provides that the proceeds of a sale of real property of an infant or insane person remain property of the same

held under this statute that the character of a fund realized from the sale of real estate remained realty so that the devisee of such property could recover the proceeds less expenses.<sup>24</sup> It would seem, therefore, that under the influence of this statute the real property of an incompetent could not be adeemed by his committee if he died in his insane state.

The decision in the *Ireland* case reversed a well considered previous New York Supreme Court holding.<sup>25</sup> The rule is indeed harsh and follows the idea of ademption to the extreme. It was worked out by the courts to give effect to the probable intention of the testator, and has ended up by defeating the intention more than it has given effect to it.<sup>26</sup>

However much we may disagree with the *Ireland* case, it must be considered as the present law in New York.<sup>27</sup> We should be interested, therefore, in ways in which the situation may be remedied and in avoiding the creation of similar ones. Statutory enactment is probably the only method which is a satisfactory remedy, although the statutes passed in sister states have not been as satisfactory as the English statutes.<sup>28</sup>

Until such time as the legislature enacts such a statute or statutes covering the situation, the burden falls on the draftsman of the will. As with so many instances in the law the power to remedy the situation lies with the person making the instrument. If we keep in mind, in drafting the will, the possibility of insanity, we will clear the first hurdle in eliminating situations like the *Ireland* case. Normally demonstrative legacies carry out the testator's wishes as well as specific legacies.<sup>29</sup> If the testator wishes to make the bequest only in specie then an alternate should be added. We have left, then, only those few instances wherein the testator desires that nothing should pass to the legatee if the specific property he devised is not in existence at the time of his death. A person making a will, either failing to comprehend the problem or neglecting to provide for it, may undergo great expense and infinite thought and yet not give effect to the omnipresent human motive to provide for the natural objects of his bounty.

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nature until infant reaches full age or incompetency is removed. Act is construed in *Matter of Garlick's Estate*, 96 Misc. 653, 151 N. Y. Supp. 113 (1916).

<sup>24</sup> *Snedeker v. Ellis*, 136 Misc. 607, 241 N. Y. Supp. 563 (1930).

<sup>25</sup> *Matter of Carter*, 71 Misc. 406, 130 N. Y. Supp. 201 (1911).

<sup>26</sup> See Page's article, *Ademption by Extinction* (1943) 1943 WIS. L. REV. 11, 38. See Professor Warren's article, *The History of Ademption* (1940) 25 IOWA L. REV. 270, 324. He believes the rule of ademption is outmoded and should be revised.

<sup>27</sup> In the recent case of *In re Anslinger's Estate*, 185 Misc. 827, 831, 57 N. Y. S. (2d) 466, 470 (1945), the *Ireland* case was cited with approval.

<sup>28</sup> Collected statutes and difficulties surrounding such enactments are discussed in Page, *Ademption by Extinction* (1943) 1943 WIS. L. REV. 11, 33.

<sup>29</sup> See *When Legacy Is Demonstrative* (1920) 6 A. L. R. 1353.