

Memorandum 82-95

Subject: Study L-625 - Probate Law and Procedure (Ademption)

If a will makes a gift of specific property and the property no longer exists at the testator's death or is no longer a part of the estate, the gift is said to be "adeemed" (revoked). If the subject of the gift is not completely extinguished but is merely changed in form, the courts look to the inferred or probable intent of the testator to determine whether the beneficiary will get the property in its new form.

At the last meeting, the staff reported that Professor Susan French was concerned that one of the ademption sections in the proposed law (Section 204.420) might be construed to set out exclusive rules for the situations it governs, and thereby to preclude the courts from applying "tracing" principles and awarding to a specific devisee proceeds from property sold, taken by eminent domain, or destroyed. The Commission asked the staff to consider the problem and to report back. The staff's conclusions are as follows:

(1) Proposed sections not exclusive. Neither existing California law nor the UPC purport to deal comprehensively with the rules of ademption/nonademption, but merely set forth some specific rules of nonademption. The Commission's decision was to continue this scheme, adding the UPC nonademption rules to California's and making clear in the Comment that these rules of nonademption are not exclusive and nothing in the proposed law is intended to increase the incidence of ademption in California. This has been done. See the Comment to Section 204.420.

(2) Tracing. The doctrine that a testamentary gift is not adeemed when the property is merely changed in form has been somewhat inaccurately characterized as "tracing." See, e.g., Estate of Creed, 255 Cal. App.2d 80, 83-84, 63 Cal. Rptr. 80 (1967). Ordinarily, when applying equitable tracing principles it is immaterial what form the property is converted into so long as the chain of tracing can be maintained. In the ademption context, however, the paramount question is what the testator intended. Thus, when the testator's will gives "[t]hat certain Hudson Automobile, now owned by me," and it is shown that the testator owned a 1941 Hudson when the will was made, but owned a 1948 Hudson at death, the question is what the testator probably intended; the source

of funds used to purchase the new automobile is irrelevant. See Estate of Cooper, 107 Cal. App.2d 592, 237 P.2d 699 (1951). When the new property is acquired by an exchange of the specifically devised property, the gift is not adeemed if the new property is similar to the old (id. at 596); it may be adeemed if the new property is sufficiently dissimilar to the old. See 7 B. Witkin, Summary of California Law Wills and Probate § 220, at 5731 (8th ed. 1974). In short, it is inappropriate to transplant equitable tracing principles into the ademption context where the inquiry is, and should be, what did the testator probably intend?

Respectfully submitted,

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