

BEXs Knowledge Sharing Initiative



WHAT IS
ADEMPTION?

Ademption of a legacy

The ademption of a legacy may be described as the tacit or implied revocation of a legacy by the conduct of the testator. Where the testator voluntarily sells, donates or otherwise alienates the subject-matter of the legacy, the legacy is said to be adeemed. Whether or not the legacy is adeemed by the alienation of the subject of the bequest is primarily a question of intention, and evidence of the surrounding circumstances together with statements made by the testator are admissible to prove or disapprove the intention to revoke.

The Roman-Dutch writers were not in agreement on the question whether a voluntary alienation by the testator of the subject-matter of the legacy prior to the testator's death gave rise to the presumption that the alienation was made by the testator with the intention of revoking the legacy. Van Leeuwen and Lybrechts held the view that in case of doubt the alienation was not presumed to have been accompanied by this intention, as the intention of the testator is presumed to have remained unchanged. Other writers, however, took the view that a voluntary alienation raised the presumption that the testator intended to revoke the bequest. In *Lunn v Lunn's Estate* Bale CJ approved Van Leeuwen's view and expressed the opinion that the intention to revoke was not to be presumed from the mere fact of a voluntary alienation. On the other hand, in *Oelrich v Beck* NO McGregor J expressed doubts as to the correctness of the view taken by Van Leeuwen and Lybrecht. Other decisions appear to have accepted that a voluntary alienation does raise the inference or presumption that the legacy has been adeemed and it is submitted that this view will prevail.

It is clear, however, that where the alienation is not voluntary but the testator is forced to dispose of the subject-matter of the legacy as a matter of necessity (as, for example where the testator has been forced to dispose of the property in question to satisfy debts) the inference of ademption will not arise. Nor will the inference arise where the testator merely pledges or mortgages the subject-matter of the legacy.

Ademption may also take place where the testator after executing a will donates the subject-matter of a legacy to the legatee, although the legatee would have a claim for any balance not so donated. A debt due to the testator and bequeathed to a legatee may be adeemed where the testator either enforces payment of the debt or releases the debtor.

An ademption holds good even although the alienation is null and void as a matter of law.

Ademption may be partial where the testator disposes of only part of the subject-matter of the legacy.

Ademption will operate only where the legacy was intended to be specific. Thus where the legatee is bequeathed a sum of money out of a particular fund or the income on a particular investment, the testator may well have intended the legatee to receive the sum or income in question notwithstanding that the particular fund has been disposed of or the nature of the investment changed, and such disposal or change will not in these circumstances adeem the legacy.

It may well be that where a specific thing has been bequeathed by the testator and cannot be found amongst the testator's possessions after the testator's death, ademption by alienation will be presumed.

Once the legacy has been adeemed it is not revived if the testator thereafter reacquires the subject-matter of the legacy, unless the testator evinces an intention to revive the legacy.

Where the subject-matter of the legacy is alienated, but the testator did not intend to revoke the bequest, the legatee is entitled to the value of the legacy or, if the executor can reacquire it, the bequest itself.