CASE NOTES

RE SPARROW[1]

Will—Request to wife for her maintenance—Subsequent deed of separation making provision for wife's maintenance—Ademption.

The doctrine of ademption means two things to the equity lawyer. He may think of it in the context of a specific testamentary disposition of property which fails because the subject matter of the disposition is no longer owned by the testator by the time he dies. On the other hand 'ademption' calls to mind the situation whereby a general legacy in a will is not payable because at some time after the execution of the will the intended bounty has been satisfied by an *inter vivos* disposition made by the testator.[2]

In the latter case there is in effect an implied revocation of the gift of the legacy. It is proposed to examine here, when such implied revocation takes place, in the light of the decision in the Victorian Supreme Court, of Little J. in the case of *Re Sparrow*.

At the outset it should be pointed out that the doctrine is not based upon a rule of law, but upon a rebuttable presumption as to the testator's intention in all the circumstances. Furthermore this discussion is limited to the 'second' aspect of the doctrine[3] i.e. when a general legacy ceases to become payable, and not the position in the case of a specific chattel or fund.

The texts often treat the doctrine of ademption as a synonym for the presumption against double portions, and sometimes use these notions interchangeably. It is submitted that some such generalisations are misleading and inaccurate.[4]

For the rule against double portions is of far more restricted scope than the doctrine of ademption. The former presumption applies only in the case of a beneficiary who under the will of someone who is his father, or is in *loco parentis* to himself, is left a legacy in the nature of a portion, but is prevented from taking his share if, after the execution of the will, the testator made him a gift *inter vivos* also in the nature of a portion.[5] The scope of the presumption against double portions must per force be limited by the definition of a portion.[6]

However the doctrine of ademption of a general legacy is not so limited. There is yet another instance (apart from the presumption against double portions) where the doctrine operates, irrespective of the relationship between the testator and his beneficiary.

It arises 'where the first disposition is expressed to be made for a *specific purpose* and [a] second disposition *effects* that purpose. In the

1 [1967] V.R. 739, Supreme Court of Victoria, Little, J.

2 *Jarman on Wills—Vol.* 2. (8th ed. 1951), 1136. 3 Supra.

4 e.g. Snell, *Principles of Equity* (26th Ed. 1966), 556. The presumptions of satisfaction and ademption apply *only* where the provisions are made by a father or a person in *locol parentis*.

5 Snell, vide infra, p. 552.

6 Jowitt, *Dictionary of English Law* (1959), 365. 'property settled or provided in favour of children or their issue'.

second case the presumption . . . is found on the intention of the testator or settlor as appearing from the instruments and from the circumstances of the later disposition.'[7] This is the aspect of the doctrine of ademption that arises in *Re Sparrow*—an aspect which suffers rather from too hasty treatment in the texts than from being totally omitted. *Williams*[8] and *Snell*[9] both dispose of it in a single brief paragraph (although *Jarman*[10] does give a more comprehensive analysis).

It is submitted that this undue emphasis on the testator-beneficiary relationship being that of father to child may be explained thus. It has been pointed out[11] that the doctrine of ademption, like its sister doctrine of satisfaction, is based on presumptions arising from inferences of the intention of the testator. Necessarily, the mere relationship of father and child must of itself give rise to strong inferences of intention. However it must be remembered that the intention can equally be inferred where no such relationship exists though it may be more difficult to prove the circumstances for the presumption to operate—i.e. a legacy expressly given for a particular purpose, or in pursuance of a specific moral obligation is prima facie adeemed by an advance . . . for the same purpose or in pursuance of the same moral obligation.[12]

We now come to the decision in *Re Sparrow*.[13] The testator had left to his wife during her life and widowhood half of the nett income of his residuary estate and stated reasons in his will as to why he would make no further provision for her. Some time after the execution of the will the testator's wife commenced divorce proceedings. These she discontinued on accepting a separation agreement by which the testator was to pay her a weekly fixed sum for life, his estate being expressly made liable under the covenant during her life. As must so often happen the husband neglected to alter his will after the agreement was made.

Little J. held that the bequest was intended for the maintenance of the widow, and was therefore adeemed by the subsequent provision in the separation agreement—by the operation of the doctrine of ademption as stated above. His Honour in no way considered himself to be stating any new principle.[14] Indeed he was confessedly adhering to the reasoning of a New Zealand court as applied to similar facts over twenty years previously,[15] and numerous English cases dating back to 1885.[16]

The importance of the decision then lies not in its novelty but in that it reminds us that the doctrine of ademption is not restricted to the case of dispositions to a beneficiary by a testator who stands in *loco parentis* to him, and that although the inference as to the testator's intention (to give once only) arises more readily in the latter case, it is by no means so limited.

Aspects of the operation of the doctrine, as explained by Little J. deserve examination. First, it should be noted that ademption will occur, irrespective of differences in the terms of the two dispositions, so long as the

7 *Williams on Wills* (14th ed.), 227.
8 Ibid.
9 Snell op. cit. 557.
10 Jarman op. cit. 1135.
11 Supra n. 7.
12 Snell op. cit. 557.
13 [1967] V.R. 739.
14 [1967] V.R. 739, 748.
15 *Re Horrocks* [1944] N.Z.L.R. 314.
16 *Re Pollock* (1885) 18 Ch.D. 552.

court considers that the same purpose underlay both, or that they were made in fulfilment of the same moral obligation. Thus in *Re Sparrow* ademption occurred notwithstanding that the maintenance provision in the deed was not a gift but a bargain for consideration, whereas the will was the testator's unilateral and voluntary act.[17] Similarly it was immaterial that the settlement provided Mrs Sparrow with a weekly income at a fixed sum, while the will allowed for half of the nett income of the testator's residuary estate with a lower limit of £5.0.0 per week. This aspect of the doctrine of ademption may be contrasted with the parallel doctrine of satisfaction where even slight differences in the terms of the two dispositions generally suffice to rebut the presumption. For the purposes of ademption the only prerequisite is that the same purpose or moral obligation underlies both dispositions. In *Re Sparrow* the essence of the case is summed up in the proposition: 'The benefits given to the wife by the two documents are *sui generis*.[18]

Little J. explained what is meant by saying that the testamentary disposition and the one which follows it must be made *'for the same purpose'* for ademption to take place. 'To constitute a particular purpose . . . it is not in my opinion necessary that some special use or application of the money by or on behalf of the legatee, such as purchasing . . . a house . . . should be in the testator's view. [It is] enough if the request is expressed to be in fulfilment of some *moral* obligation . . . originating in a definite external cause, though not of a kind which the law would have recognized. *Indeed the same basis underlies the presumption of ademption inferred from a parental obligation.*'[19]

In effect the stipulation that the dispositions must both be made for the same 'particular purpose' signifies that they must not have been made 'merely for bounty'.

It is submitted that the courts will be very ready, when testator and beneficiary are husband and wife, to hold that dispositions were made for 'the same particular purpose' viz a moral obligation. Indeed where such a relationship exists it is difficult to conceive of a situation where the moral obligation would be absent. In *Re Sparrow* itself Mr Sparrow was considered to be under a moral obligation to provide for his spouse's maintenance notwithstanding a clause written into the will that the testator declined to make further provision for his wife: first, because she had sufficient means of her own; and, second, they had agreed on their marriage not to be financially obligated to each other.

A foreseeable danger arising from the courts' probable willingness to imply moral obligations from the mere existence of the husband-wife relationship is that by the time the Reports list any sizeable number of these cases new misconceptions will arise. The day may not be far away when a presumption of ademption will be categorically said to arise (in a similar way to the presumption against double portions) whenever a bequest to a spouse is followed by a disposition *inter vivos* to that spouse. But *Re Sparrow* must serve as a reminder that the basis of the ademption principle

17 [1967] V.R. 739/744.
18 Ibid.
19 The italics are mine.

is a far more general one, lest we once again lose sight of the true scope of the doctrine.

As often as not, the donor's purpose in making a testamentary disposition will not be expressly set out in the instrument. In order to ascertain this parol evidence is admissible not to add to or to vary the instrument 'but when . . . in conjunction with the surrounding circumstances the court raises a presumption . . . then parol evidence is admissible to rebut the presumption and therefore also to support it.[20] In *Re Sparrow* the court found that the two dispositions were made in pursuance of the same purpose of providing maintenance for the donor's wife. This purpose was evident enough in the deed of separation, but with respect to the will the 'purpose' was ascertainable not from its express terms but by inference from its language. Implicitly the bequest was also made for the purpose of the maintenance of the testator's widow, and His Honour so held despite the testator's express reference to his wife's adequate and independent means. Indeed Little J. considered this circumstance was 'nothing to the point'.[21] It is respectfully submitted however that this factor could be very much in point in so far as if a man makes a provision for his wife whom he knows to be amply endowed this might well indicate that the provision was not made with an eye to the wife's maintenance at all, but for some other purpose.

It is useful to consider at this point the limits to the doctrine of ademption. Although the texts are generally unsatisfactory as to this aspect of the doctrine the following emerges from *Jarman on Wills*[22]:

(a) The purpose underlying both dispositions must be specific.

(b) Parol evidence is not admissible to show that a gift was intended to be in satisfaction of a legacy when the intention is not communicated to the legatee in the testator's lifetime;[23] and

(c) where the will and the subsequent deed of gift expressed a different motive and object it was held that parol evidence was not admissible to vary their construction.[24]

Perhaps the American law of ademption of general legacies offers a *modus vivendi* which deals with the problem in a way which is somewhat more realistic than our own. The English and Australian courts proceed by setting up a *prima facie* presumption of ademption, be it a case of double portions, or of two dispositions made for the same purpose. More or less arbitrary factors serve to rebut this presumption; for example, if there is a substantial difference in the nature of the two dispositions such as a fund of money left by the will whereas the subject of the settlement *inter vivos* is land. Alas our courts have more than once been embarrassed by the presence of these arbitrary factors and have even ignored them when the commonsense of the situation seems to demand it.[25] The Americans

20 Williams, *op. cit.* 233.

21 [1967] V.R. 739, 743.

22 Jarman *op. cit.* 1145.

23 The learned author cites *Re Shields* [1912] 1 Ch. 172.

24 *Re Aynsley* [1915] 1 Ch. 172.

25 An example is the approach of our High Court in the case of *Royal North Shore Hospital v. Crichton Smith* (1938) 60 C.L.R. 798. Although this is a case on satisfaction, it illustrates well the difficulties a court may experience when applying artificial rules as to what gives rise to a presumption, then what suffices to rebut it.

seem to have devised what seems to be a workable solution to this artificiality by causing a presumption of ademption to arise in the case where the testator stands *in loco parentis* to the beneficiary; there is otherwise no ademption unless the testator *intends* that a gift made after the will should adeem the bequest.[26] Thus an American court's enquiry centres on ascertaining, quite apart from any presumptions in favor of ademption, what was the intention of the testator at the time of the subsequent gift. It is submitted that to adopt a similar approach in our own jurisdiction would do away with our unduly prolix and difficult enquiry into the following:

First, were both dispositions made for the same purpose? This prerequisite for the presumption to arise may be virtually unascertainable when the purpose for either or both dispositions is not apparent; and, second, Are there any factors serving to rebut the presumption of ademption once raised?

It is noteworthy that the desirable result reached by the Victorian Supreme Coure in *Re Sparrow* would similarly be obtained by the more realistic and logical enquiry as to the testator's intention at the time of the disposition *inter vivos*. The difference would be rather in the means than the end, but the American method is likely to produce greater consistency of decisions and is more flexible and readily comprehensible than our own.

For the present a lesson in drafting might be learned. The solicitor who draws up his client's will, and who later drafts an *inter vivos* settlement upon the same beneficiary should state expressly in the latter document whether the disposition is intended to adeem that contained in the will.

The problem of the man who writes his will and then neglects to alter it when circumstances change is not simply academic. The facts of *Re Sparrow* have arisen before,[27] and unless mankind becomes wiser, will no doubt arise in the future. It is for this reason that the true scope of the doctrine of ademption should be kept in mind.

DOROTHY KOVACS

LYONS v. LYONS[1]

Real property—Torrens system—Joint tenancy—Severance—Mortgage of interest by co-owner joint tenant.

The recent case of *Lyons v. Lyons* well illustrates the anomalous situation that may arise as a consequence of the acceptance of certain fundamental concepts in the law of property. More specifically, a mortgagee may find his security has vanished should a joint tenant mortgagor of land under the Transfer of Land Act predecease his co-owners.

In the case before the Supreme Court of Victoria the applicant's husband, holding as joint tenant with his wife, mortgaged his interest in the land. Prior to redemption of this mortgage he died and was survived by

26 Atkinson—Handbook of the Law of Wills (2nd Ed. 1953), 737-8.
27 E.g. *Re Horrocks* [1944] N.Z.L.R. 314.
1 (1967) V.R. 169, Supreme Court of Victoria; McInerney, A. J.

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