

Notes

Ademption By Extinction in Indiana

I. INTRODUCTION

Ademption by extinction¹ presents a potential problem when property designated by a specific bequest² cannot be identified in the testator's estate at death. The problem is to determine whether the specific legatee should receive other assets from the decedent's estate as a substitute for the missing or changed bequest, or whether the bequest is lost.³ There are two fundamental common law approaches to this problem: the ancient rule, or intent theory; and the identity doctrine.⁴ Under the intent theory action by third parties will not adeem the bequest or devise, and the only relevant inquiry is to ascertain the testator's intent.⁵ While the earliest American and English cases used this subjective approach,⁶ it was later abandoned in favor of the identity doctrine.⁷ Under the identity rule a testator's intent is irrelevant and the inquiry is confined to objective determination of two questions. Is the bequest specific? Is the subject matter to be found in the decedent's estate? If the bequest is specific and the exact subject matter is missing from the estate, the bequest is adeemed⁸ regardless of the testator's intent.⁹ By 1850, this approach had been adopted in a majority of American jurisdictions.¹⁰

¹T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 134, at 743-45 (2d ed. 1953); 6 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 54.1, at 241-44 (1962) [hereinafter cited as PAGE]. Ademption by extinction should not be confused with ademption by satisfaction wherein the testator by an inter vivos transfer of the subject matter, or substitute for a general gift, satisfies the general bequest or devise. See generally T. ATKINSON, § 133; PAGE, §§ 54.1-54.2, 54.21-54.37.

²Only specific bequests and devises may be adeemed by extinction. T. ATKINSON, *supra* note 1, § 132; PAGE, *supra* note 1, § 54.5.

³If the specific bequest or devise is adeemed, it will usually pass under the residuary clause or by intestacy if there is no residuary clause. T. ATKINSON, *supra* note 1, § 132, at 736.

⁴Warren, *The History of Ademption*, 25 IOWA L. REV. 290, 304-10 (1940).

⁵Page, *Ademption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11, 15-16.

⁶See, e.g., *Beall v. Blake*, 16 Ga. 119, 122 (1854); *Stout v. Hart*, 7 N.J.L. 414, 426 (1801); *Orme v. Smith*, 1 Eq. Abr. 302 (1711); Warren, *supra* note 4, at 299-301.

⁷English attempts to inquire into the testator's intent produced a mass of irreconcilable decisions and much confusion as to the circumstances under which a bequest is adeemed. Page, *supra* note 5, at 18-19.

⁸*Ashburner v. Macguire*, 29 Eng. Rep. 62 (1786).

⁹*Richards v. Humphreys*, 32 Mass. (15 Pick.) 133, 135-37 (1833); *King v. Sheffey*, 35 Va. (8 Leigh) 614, 617 (1837); *Stanley v. Potter*, 30 Eng. Rep. 83 (1789); *Humphreys v. Humphreys*, 30 Eng. Rep. 85 (1789).

¹⁰T. ATKINSON, *supra* note 1, § 134, at 743; Warren, *supra* note 4, at 307-10.

Although the identity doctrine is easier to apply, it has been widely criticized.¹¹ American courts have developed numerous techniques to avoid its harsh results¹² and a tendency to return to the intent rule is apparent in several states.¹³

Indiana's position on ademption, like that in many other states, is unsettled. Several early cases show that the principles of ademption by extinction have been confused with the principles of ademption by satisfaction¹⁴ and those of the revocation of wills.¹⁵ This confusion is compounded by recent appellate court decisions which are in direct conflict on whether the intent¹⁶ or identity doctrines¹⁷ should be applied. This Note will examine the present status and background of ademption by extinction in Indiana and give an overview of the basic methods, problems, and advantages of both the intent and identity doctrines. Finally, the possibility of clarification through legislation will be evaluated.

II. INDIANA'S ADEPTION RULES

Indiana has only a few ademption cases, and they apply the ademption principles in a conflicting manner.¹⁸ The Indiana Supreme Court has never spoken directly on the question which creates even greater confusion.

In *New Albany Trust Co. v. Powell*,¹⁹ the testator had bequeathed

¹¹Mechem, *Specific Legacies of Unspecific Things—Ashburner v. Macguire Reconsidered*, 87 U. PA. L. REV. 546, 546-53 (1939); Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195, 227-33 (1971); Warren, *supra* note 4, at 301, 326-27; Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741, 750-51 (1961) [hereinafter cited as *Ademption*]; Note, *Ademption in New York: The Identity Doctrine and the Need for Complete Abrogation by Legislation*, 25 SYRACUSE L. REV. 978, 990-93 (1974) [hereinafter cited as *Ademption in New York*].

¹²Mechem, *supra* note 11, at 553-76; Paulus, *supra* note 11, at 197-207; Smith, *Ademption by Extinction*, 6 WIS. L. REV. 229, 233-38 (1931); Warren, *supra* note 4, at 319-25; *Ademption*, *supra* note 11, at 743-45; Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085, 1093-96 (1953); *Ademption in New York*, *supra* note 11, at 993-97.

¹³See generally Warren, *supra* note 4, at 316-17; Note, *Wills: Ademption By Extinction In California*, 18 HASTINGS L.J. 461, 463-64 (1967) [hereinafter cited as *Ademption by Extinction in California*]; Note, *Ademption in Iowa—A Closer Look at the Testator's Intent*, 57 IOWA L. REV. 1211, 1218 (1972).

¹⁴*Roquet v. Eldridge*, 118 Ind. 147, 20 N.E. 733 (1888); *Stokesberry v. Reynolds*, 57 Ind. 425 (1877); *Weston v. Johnson*, 48 Ind. 1 (1874); *Robbins v. Swain*, 7 Ind. App. 486, 34 N.E. 670 (1893).

¹⁵*Simmons v. Beazel*, 125 Ind. 362, 25 N.E. 344 (1890); *Sturgis v. Work*, 122 Ind. 134, 22 N.E. 996 (1889); *Swails v. Swails*, 98 Ind. 511 (1884).

¹⁶*Brown v. Schaffer*, 145 Ind. App. 591, 252 N.E.2d 142 (1969).

¹⁷*Pepka v. Branch*, 155 Ind. App. 637, 294 N.E.2d 141 (1973).

¹⁸*Id.*; *Brown v. Schaffer*, 145 Ind. App. 591, 252 N.E.2d 142 (1969); *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 64 N.E. 640 (1902).

¹⁹29 Ind. App. 494, 64 N.E. 640 (1902).

"200 shares of the capital stock of the Madison Gaslight Company,"²⁰ to his granddaughter and the residue of the stock to his wife. The testator owned 259 shares of this stock when the will was executed, but subsequently sold all but 100 shares. The court, without first identifying the appropriate rule, classified the granddaughter's bequest as specific.²¹ Because the remaining stock was insufficient to fully satisfy the specific bequest, the court held that it was adeemed pro tanto.²² The court's explanation of the initial classification indicated a search for the testator's intent as expressed in his will.²³ This procedure creates uncertainty regarding which principle the court applied to the ademption problem. Although the court looked to the testator's intent in classifying the bequest,²⁴ such an approach is not necessarily inconsistent with the identity rule. The court stated: "The law is settled that a legacy is adeemed if the specific thing does not exist at the testator's death,"²⁵ citing *Ashburner v. Macguire*.²⁶

Arguably, the court's inquiry into the testator's intent was the crucial point of the decision and may be interpreted as an application of the intent doctrine. If the intent rule was applied, however, *Ashburner* was inappropriately cited. A more reasonable explanation is that the testator's intent was only relevant in determining the nature of the bequest and not in determining whether the stock was adeemed.²⁷ The court cited other cases for the general proposition that the primary rule of construction is to determine the testator's intent,²⁸ but none of the cited cases dealt with ademption

²⁰*Id.* at 496, 64 N.E. at 640.

²¹Arguably, the bequest could have been classified as general. Prior to the holding in *Waters v. Selleck*, 201 Ind. 593, 170 N.E. 20 (1930), the controlling statement was found in *Roquet v. Eldridge*, 118 Ind. 147, 20 N.E. 733 (1889), wherein the court stated: "A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of, or article belonging to, the estate, which the testator intended should be transferred to the legatee in specie." *Id.* at 149, 20 N.E. at 734. In *Powell*, the testator's language did not indicate that the bequest could be satisfied only by the transfer of specific assets owned at death and was not confined to *my* 200 shares but operated only as a general gift of 200 shares of the specific stock. There were sufficient assets in the estate to purchase the additional stock and the residuary clause stated that the wife was to have the balance of the assets only "after paying the above legacy mentioned" 29 Ind. App. at 496, 64 N.E. at 640. The court held, however, the testator had intended to make a specific bequest because there was no authority in the will to purchase securities.

²²29 Ind. App. at 502, 64 N.E. at 642.

²³*Id.* at 499, 64 N.E. at 641.

²⁴*Id.* at 500, 64 N.E. at 642.

²⁵*Id.* at 502, 64 N.E. at 642 (citing *Ashburner v. Macguire*, 29 Eng. Rep. 62 (1786)).

²⁶29 Eng. Rep. 62 (1786).

²⁷Ind. App. at 499, 64 N.E. at 641.

²⁸*Id.* (citing *Hartwig v. Schiefer*, 147 Ind. 64, 46 N.E. 75 (1897); *Corey v. Springer*, 138 Ind. 506, 37 N.E. 322 (1894); *Lutz v. Lutz*, 2 Blackf. 72 (Ind. 1827)); *Bray v. Miles*, 23 Ind. App. 432, 54 N.E. 446 (1899)).

questions. While *Powell* does not provide a clear holding for either the identity or intent theories, the process employed by the court is most similar to the identity rule.

In *Brown v. Schaffer*,²⁹ the testator had devised "all of my right, title and interest in and to the estate of Harold C. Brown, my deceased brother,"³⁰ to his deceased brother's wife. After the brother's will was executed, the testator's entire interest was deposited in bank certificates that remained intact from date of deposit until testator's death. The executor brought an action to construe the will claiming that full payment of the interest extinguished the specific bequest and that the certificates of deposit should pass to the residuary legatee. The testator's sister-in-law argued that the testator's receipt during his lifetime of his interest in the estate of his deceased brother did not constitute an ademption. She claimed that the specific bequest had not been destroyed, alienated, or extinguished, but merely changed in form and was a part of the estate at death.

The court, citing *Powell* as the only relevant Indiana ademption case,³¹ indicated that the appropriate inquiry is to determine the testator's intent, and stated:

The intention of the testator is to be determined from a full and complete consideration of the will as a whole . . . and from all of the facts and circumstances surrounding the testator at the time the will was executed

Once the intention of the testator has been determined, all other rules of law must bend to such intent . . . so long as it does not violate some positive rule of law.³²

The Indiana cases³³ and statute³⁴ cited for this rule of construction, however, would not apply to an ademption case unless the intent doctrine had been accepted. The language in *Brown* also presents the broader question of how far a search for the testator's intent may reach. The authorities relied upon indicate that such a search would be limited to the instrument itself and to the situation

²⁹145 Ind. App. 591, 252 N.E.2d 142 (1969).

³⁰*Id.* at 595, 252 N.E.2d at 145.

³¹*Id.* at 615, 252 N.E.2d at 156 (citing *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 64 N.E. 640 (1902)).

³²145 Ind. App. at 602, 252 N.E.2d at 149.

³³*Pierce v. Farmers State Bank*, 222 Ind. 116, 51 N.E.2d 480 (1943); *St. Mary's Hosp. v. Long*, 215 Ind. 1, 17 N.E.2d 833 (1938); *Ridgeway v. Lanphear*, 99 Ind. 251 (1884); *Osburn v. Murphy*, 135 Ind. App. 291, 193 N.E.2d 669 (1963); *In re Will of Duvall*, 125 Ind. App. 646, 129 N.E.2d 377 (1955).

³⁴IND. CODE § 29-1-6-1(i) (1976).

and circumstances surrounding the testator at the time of its execution.³⁵

In adopting the intent doctrine in *Brown*, the First District Court of Appeals indicated that it had followed the majority rule.³⁶ In this respect the court was undoubtedly confused. The cases analyzed by the court do not clearly support the intent doctrine³⁷ and several of the cases cited are contradictory.³⁸ Also, although there has been some wavering in recent years, commentators indicate that the identity doctrine has continued to be the majority rule.³⁹

The court also indicated that the sole Indiana ademption statute⁴⁰ supported their conclusion.⁴¹ Because the statute, derived

³⁵See notes 33-34 *supra*.

³⁶145 Ind. App. at 605, 252 N.E.2d at 151.

³⁷*Id.* at 606-10, 252 N.E.2d at 152-53 (construing *Creed v. Knoll*, 255 Cal. App. 2d 80, 63 Cal. Rptr. 80 (1967); *King v. Sellers*, 194 N.E. 533, 140 S.E. 91 (1927); *Gist v. Craig*, 142 S.C. 407, 141 S.E. 26 (1927); *In re Bradley's Will*, 73 Vt. 253, 50 A. 1072 (1901)). The *Brown* court's examination of *Gist v. Craig*, 142 S.C. 407, 141 S.E. 26 (1927), did not mention the testator's intent and was an application of the substance/form exception to the identity rule. In *King v. Sellers*, 194 N.C. 533, 140 S.E. 91 (1927), the court was dealing with a case of ademption by satisfaction in which the common law rule is that the testator's intent is the controlling factor, Paulus, *supra* note 11, at 214 n.74. *In re Bradley's Will*, 73 Vt. 253, 50 A. 1072 (1901), does apply an intent approach, but the bequests were held not to be specific and evidence of intent was, therefore, irrelevant. Vermont, however, has since abandoned the intent approach in *In re Barrow's Estate*, 103 Vt. 501, 156 A. 408 (1931). *Creed v. Knoll*, 255 Cal. App. 2d 80, 63 Cal. Rptr. 80 (1967), is representative of recent cases in that jurisdiction taking a liberal approach toward the identity doctrine. California, however, has not completely abandoned the identity approach; see, e.g., *Ademption by Extinction in California*, *supra* note 13.

³⁸*Speyers v. Manchester*, 131 Conn. 598, 41 A.2d 783 (1945); *Pridemore's Exec. v. Bailey*, 300 S.W.2d 559 (Ky. 1957) (decided under a relevant statute); *Goode v. Reynolds*, 208 Ky. 441, 271 S.W. 600 (1925); *Gray v. McCausland*, 314 Mass. 743, 51 N.E.2d 441 (1943); *Day v. Brooks*, 10 Ohio Misc. 273, 224 N.E.2d 557 (1967); *Warrent v. Shoemaker*, 4 Ohio Misc. 15, 207 N.E.2d 419 (1965); *In re Estate of Biss*, 232 Or. 26, 374 P.2d 382 (1962); *In re Gerlach's Estate*, 364 Pa. 207, 72 A.2d 271 (1950), cited in *Brown v. Schaffer*, 145 Ind. App. at 606, 252 N.E.2d at 151-52.

³⁹Warren, *supra* note 4, at 307-10.

⁴⁰IND. CODE § 29-1-18-44 (1976) provides:

In case of the guardian's sale or other transfer of any real or personal property specifically devised by the ward, who was competent at the time when he made the will but was incompetent at the time of the sale or transfer and never regained competency, so that the devised property is not contained in the estate at the time of the ward's death, the devisee may at his option take the value of the property at the time of the ward's death with incidents of a general devise, or the proceeds thereof with the incidents of a specific devise.

⁴¹145 Ind. App. at 611, 252 N.E.2d at 154. The court stated: "Thus, the only ex-

from section 231 of the Model Probate Code, was designed as a specific exception to the identity doctrine,⁴² it is doubtful that its adoption provides any support for the intent theory. Indeed, if the intent rule were the law in Indiana, the statute would be unnecessary because a guardian's acts would already be subject to a determination of the testator's intent.

Possibly the *Brown* court confused the substance-form exception to the identity rule with the intent doctrine. Under the exception some courts admit evidence of the testator's intent to determine whether the testator intended to make a substantial change in the property.⁴³ Although this approach has been criticized as a means of avoiding the identity doctrine,⁴⁴ it is distinguishable from the intent doctrine. Under this exception, if the change is held to be substantial, the bequest will be adeemed.⁴⁵ Under the intent rules, however, if the testator intended a specific bequest, the substitute property will pass even if the change is substantial.⁴⁶ Authority offered in *Brown* to support the intent doctrine actually upheld the substance-form exception and did not support the intent theory.⁴⁷ Arguably,

pression of our legislature upon the subject of ademption supports the rule against arbitrary ademptions and supports the intent theory" *Id.*

⁴²The compiler's comments following IND. CODE § 29-1-18-44 (Burns 1973) are taken from the MODEL PROBATE CODE COMMENTS § 231 and state in part:

The Kentucky statute purports to give the value of any adeemed devise to the devisee if he is an heir of the testator. The Model Probate Code does not deal with this more general proposition but proceeds upon the theory that the remedy for the usual ademption situation lies in greater liberality by the courts in holding that devises are general or demonstrative rather than specific When the testator becomes incompetent, however, it seems unfair that acts of his guardian should work an ademption when the incompetent has no opportunity to remedy the situation by making a fresh will.

See also notes 140-41 *infra* and accompanying text.

⁴³See generally T. ATKINSON, *supra* note 1, § 134, at 747-48; Paulus, *supra* note 11, at 199; Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085 (1953). Although evidence may be admitted to show whether the testator intended a substantial or merely a formal change in the property, a complete disappearance of the subject matter will cause an ademption without regard to intent. Such an inquiry was disapproved by the Second District Court of Appeals in *Pepka v. Branch*, 155 Ind. App. 637, 294 N.E.2d 141 (1973), in which it was held that the trial court erred in admitting evidence of the testator's intent regarding the nature of the change. See notes 63-64 *infra* and accompanying text.

⁴⁴Evans, *Effect of Corporate Transformation Upon Ademption, Lapse, and Fiduciary Appointments*, 88 U. PA. L. REV. 671, 676-81 (1940).

⁴⁵T. ATKINSON, *supra* note 1, § 134; Note, *supra* note 43.

⁴⁶See Page, *supra* note 5, at 14-16.

⁴⁷96 C.J.S. *Wills* § 1177, at 998-99 (1957), quoted in *Brown v. Schaffer*, 145 Ind. App. at 612-13, 252 N.E.2d at 155.

the court could have reached the same result and created less confusion by applying the identity doctrine and holding that the specific bequest had only changed in form and, therefore, was not adeemed.

In *Pepka v. Branch*,⁴⁸ the testator had bequeathed "sixty-five percent of the Pepka Spring Company"⁴⁹ to his son and the residue of his estate to his wife. The Pepka Spring Company had been incorporated after the will was executed. The testator's wife claimed that the transformation had adeemed her son's share and that the entire interest in the company passed under the residuary clause. The executor of the estate argued that "the incorporation . . . was merely a change in form and not substance as the new corporation was in almost all respects owned, operated and controlled by the same person in the same manner as before."⁵⁰

The Second District Court of Appeals held that such a change did not constitute an ademption and that the change was merely formal.⁵¹ The court rejected the intent theory applied by the First District Court of Appeals in *Brown*⁵² and stated that, although the identity rule has long been the majority rule, "[a]t this point in history, our beloved Indiana is one of the jurisdictions still adhering to the Ancient Rule [intent theory]."⁵³ The only Indiana case cited for this conclusion, however, is *Brown*.⁵⁴ In adopting the mechanistic identity rule, the court surveyed the history and the reasons for its application⁵⁵ and concluded: "Notwithstanding Indiana's adoption of the Ancient Rule in *Brown*, . . . it is our opinion that the Modern Rule is more logical, less cumbersome, and easier to apply."⁵⁶ The court argued that the use of a subjective method to determine ademption questions would result in the same confusion and inconsistency which originally caused the English and American courts to abandon the intent approach.⁵⁷ It emphasized that the search for in-

⁴⁸155 Ind. App. 637, 294 N.E.2d 141 (1973).

⁴⁹*Id.* at 641, 294 N.E.2d at 143.

⁵⁰*Id.* at 650, 294 N.E.2d at 148.

⁵¹*Id.* at 664, 294 N.E.2d at 156.

⁵²*Id.* at 661, 294 N.E.2d at 155.

⁵³*Id.* at 655, 294 N.E.2d at 151.

⁵⁴*Id.* (citing *Brown v. Schaffer*, 145 Ind. App. 591, 252 N.E.2d 142 (1969)). By stating that the *Brown* court was "reaffirming" the intent doctrine, the court may have created an opportunity for continued confusion in the Indiana law of ademption. If this is an accurate statement, then the intent doctrine is still law in the First and perhaps the Third Districts, while the identity doctrine applies in the Second District.

⁵⁵155 Ind. App. at 652-58, 294 N.E.2d at 149-53.

⁵⁶*Id.* at 659, 294 N.E.2d at 153.

⁵⁷*Id.*, 294 N.E.2d at 154. The court stated:

The final, and most important, reason to reject the Ancient Rule is that its utilization effectively emasculates the parol evidence rule and wills statutes which insist on certain formalities in the writing and execution of wills to prevent fraud and perjury. The apparent unlimited scope of the

tent, particularly if allowed to wander from the four corners of the will, would create uncertainty and increase the potential for fraud.⁵⁸

The court also questioned the statement in *Brown* that the intent doctrine is the majority approach⁵⁹ and stated: "A careful reading of the *Brown* case indicates a confusion of ademption with the general rules construing wills"⁶⁰ The court purported to overrule *Brown*⁶¹ and the adoption of either the intent doctrine or modified rule by the Indiana courts.⁶² The court indicated that any question regarding the testator's intent in an ademption case is to be strictly limited to a determination of the exact property subject to the specific bequest at the time the will was executed.⁶³ The court next held that the trial court had erred in admitting extrinsic evidence of the testator's intent in changing the form of the business.⁶⁴ To avoid the sting of a mechanical application of the identity doctrine, they held that, regardless of the testator's intent, the incorporation had not materially altered the nature of the property in the estate and that it could be identified in substantially the same form as was devised.⁶⁵

Ancient Rule in seeking the testator's intent relative to ademption permits admission of extrinsic evidence contrary to well accepted rules

Id. at 659-60, 294 N.E.2d at 154. See also Page, *supra* note 5, at 18.

⁵⁸155 Ind. App. at 659-60, 294 N.E.2d at 154.

⁵⁹*Id.* at 661, 294 N.E.2d at 155 (construing *Brown v. Schaffer*, 145 Ind. App. 59, 252 N.E.2d 142 (1969)).

⁶⁰155 Ind. App. at 661, 294 N.E.2d at 155.

⁶¹*Id.* "Therefore, to the extent that *In re Brown's Estate* and any other Indiana case are inconsistent with the Modern Rule as here applied, they are expressly overruled." *Id.*

⁶²In rejecting the *modified rule* the court was referring to the confusion in *Brown* between the substance-form exception and the intent doctrine. See note 43 *supra* and accompanying text.

⁶³155 Ind. App. at 658, 294 N.E.2d at 153. The court applied a two-step process:

The first step consists of establishing the identity of the specific bequest which the testator purports to make under the terms of the will.

The second step is the application of the Modern Rule or the form and substance test.

Once these two steps have been completed, the ademption inquiry ends. Extrinsic evidence is not admissible and any question of the testator's intention becomes irrelevant.

Id. at 658-59, 294 N.E.2d at 153.

⁶⁴*Id.* at 658, 294 N.E.2d at 153. The court stated: "Consequently, a will speaks from the date of its execution in order to ascertain the intention of the testator with respect to the identity of the gift he intended to bequeath. Beyond that point, an inquiry into the intention of the testator is not proper." *Id.*

⁶⁵The court stated: "In the polarity of form and substance, if form is 12:00 o'clock and substance is 1:00 o'clock, the minute hand did not reach quarter after the hour." *Id.* at 664, 294 N.E.2d at 156.

III. FOUNDATIONS OF THE IDENTITY DOCTRINE IN INDIANA

Although the weight of the authority favors the identity rule,⁶⁶ Indiana's law on the question remains in confusion. Significantly, in all three of the cases discussed previously, the courts did not employ other Indiana cases for possible guidance on the question.⁶⁷ The above cases also demonstrate the confusion which has developed in distinguishing ademption by extinction from other doctrines of will construction such as ademption by satisfaction, revocation, and the avoidance of intestacy. In all three of these other doctrines the testator's intent is controlling.⁶⁸ The confusion of ademption by extinction with these doctrines, plus the absence of a controlling precedent on the question, has left the law in Indiana completely unsettled.

Confusion between the doctrines of ademption by satisfaction and ademption by extinction⁶⁹ often results when ademption is discussed generally without the designation of which doctrine is being applied. In *Weston v. Johnson*,⁷⁰ this confusion was particularly important because dictum in the case indicated that the identity rule applies in Indiana. In discussing the application of the doctrine of ademption by satisfaction to specific legacies the court stated:

The word 'ademption,' when applied to specific legacies of stock or of money, or securities for money, must be considered as synonymous with the word 'extinction.' . . . The intention of the testator is immaterial in the ademption of specific legacies, because the subject being extinct at the death of the testator, there is nothing upon which the will can operate⁷¹

⁶⁶See note 10 *supra*.

⁶⁷The court stated in *Brown*: "No Indiana case has come to our attention involving the doctrine of ademption where there has been a change in the subject matter of the specific legacy, but not a complete alienation or destruction thereof." 145 Ind. App. at 615, 252 N.E.2d at 156.

⁶⁸See T. ATKINSON, *supra* note 1, §§ 133-34; Page, *supra* note 5, at 29-30.

⁶⁹See note 1 *supra*.

⁷⁰48 Ind. 1 (1874). The testator had made a specific devise of a quarter section of land to each of his two grandchildren. After the will had been executed, but before his death, the testator gave to his grandson the quarter section specifically devised to his granddaughter. The grandson brought the action to quiet title to the quarter section which he had taken under the will. His sister opposed on the theory that the devise to her brother had been adeemed by satisfaction. The court held that the presumption of ademption by satisfaction was not applicable to specific bequests or in cases in which the testator and the legatee did not stand in loco parentis.

⁷¹*Id.* at 8-9 (quoting ROPER, A TREATISE ON THE LAW OF LEGACIES, at 329 (1848)).

While the court was dealing with only the satisfaction question, it is apparent that the granddaughter's specific devise had been extinguished by the conveyance to the grandson. The dictum shows the court's approval of the identity doctrine.⁷²

Several commentators have indicated that the major problem with the identity doctrine is not in its mechanical application, but rather in the approach taken by courts in classifying certain types of bequests as specific.⁷³ Indiana's approach to the classification of bequests problem is set out in *Waters v. Selleck*.⁷⁴ In discussing whether the bequest was specific or demonstrative, the court stated that the testator's intent was relevant.⁷⁵ While such language may be interpreted as an application of the intent approach, the court allowed evidence of intent only for the purpose of classifying the bequest. The court did not discuss the appropriate rule for deciding the ademption question. After finding the bequest specific, they upheld the lower court's finding that the unpaid portion of the bequest failed.⁷⁶

There are Indiana cases in which specifically devised property has been completely adeemed, and the question presented was whether the remaining assets would pass under the residuary clause or by descent. In *Scher v. Stoffel*,⁷⁷ the testator's will had included a specific devise of real estate and had further provided that this real property was not to pass under the residuary clause. Subsequently, the testator sold part of the realty and retained the proceeds in the

⁷²See also *Kemp v. Kemp*, 92 Ind. App. 268, 154 N.E. 505 (1926) (conveyance of a portion of specifically devised real estate adeemed or revoked the devise and evidence of intent was held to be inadmissible).

⁷³Mechem, *supra* note 11, at 576; Warren, *supra* note 4, at 326; *Ademption*, *supra* note 11, at 750.

⁷⁴201 Ind. 593, 170 N.E. 20 (1930). The testator had bequeathed "five thousand dollars, (\$5,000.00) in cash out of the Burbank Estate," but the estate had only \$2,500. *Id.* at 594, 170 N.E. at 20. The question presented was whether the \$5,000 bequest was specific, and, therefore, adeemed pro tanto, or whether it was demonstrative and entitled the legatee to participate in the estate's general assets.

⁷⁵*Id.* at 599, 170 N.E. at 22. The court stated:

But whether a legacy is general, specific or demonstrative is not governed by any arbitrary rules, Rood, Wills § 707, it depends entirely upon the intention of the testator, and the rules of construction contended for by appellant do not control as against the intent of the testator when that intent is ascertained.

Id. (citation omitted). See also *Garrison v. Day*, 36 Ind. App. 543, 76 N.E. 188 (1905).

⁷⁶201 Ind. at 597, 170 N.E. at 21. "That if the estate of Andrew J. Burbank, deceased, shall fail to yield Five Thousand Dollars (\$5,000.00) the legacy will fail to the extent of the deficit."

⁷⁷115 Ind. App. 195, 58 N.E.2d 118 (1944).

form of traceable bank deposits. The question was whether the cash passed under the residuary clause or by intestacy. The court assumed, without discussion, that the specific bequest was adeemed, but admitted intra-will evidence of the testator's intent to determine whether the property passed under the will or by law. In so holding the court stated: "'A residuary clause will pass proceeds from the ademption of specific legacies, in whatever form such proceeds exist, unless such a disposition is contrary to the manifest intention of the testator.'"⁷⁸ The testator's intent was not relevant in determining whether the property had been adeemed, but only in determining whether it was to pass under the will. If the intent doctrine had been the law in Indiana, the specific devisee might have avoided the intestacy question altogether because the proceeds of the sale were traceable and the will contained an expression of intent that the realty not pass under the residuary clause.

*Coon v. Coon*⁷⁹ also stands for the proposition that a residuary clause will dispose of the proceeds resulting from the ademption of a specific bequest unless there is a manifestation of contrary intent. Does such a statement indicate that Indiana follows an intent approach? It is not clear since *Coon* did not address ademption by extinction.⁸⁰ The court in *Coon* looked to the will to determine only whether the testator intended for the property in question to pass under the will or by intestacy and did not hold that the testator's intent was relevant in an ademption case.⁸¹ Had ademption by extinction been the issue before the court and the intent rule applied, the property probably would not have passed under the residuary clause. Under the identity doctrine, however, the result would have been the same. Neither *Scher* nor *Coon* clearly adopted the intent

⁷⁸*Id.* at 199, 58 N.E.2d at 120 (quoting 69 C.J. *Wills* § 1484 (1934)).

⁷⁹187 Ind. 478, 118 N.E. 820 (1918).

⁸⁰The testator had devised "all my real estate" followed by a specific description of the real property he owned at the time the will was executed. His wife was the only residuary legatee. He subsequently sold part of the specifically devised realty and purchased another plot. The wife claimed that the after-acquired property passed to her under the specific devise and, therefore, was not subject to sale and contribution to satisfy other general legacies. She argued that such general legacies were to be paid only from the personalty existing at the testator's death, and that the testator had not intended for the realty to pass by the residuary clause or by law. The general legatee claimed, alternatively, that the after-acquired property should either pass by the residuary clause and, thereby, be subject to contribution, or pass outside the will. *Id.* at 480, 118 N.E. at 821.

⁸¹Once the court determined that the property would pass under the will the issue of ademption was no longer relevant because the testator's wife was the specific and residuary legatee. *Id.* at 483-84, 118 N.E. at 821-22.

rule in Indiana and both held only that the testator's intent is relevant in determining whether the property passes by will or by intestacy.

Some of the confusion in Indiana concerning ademption can be traced to cases which discuss the revocation of a specific bequest of real estate due to a subsequent devise.⁸² Under the common law, a devise of real estate was revoked if the testator was not in possession of the realty from the time of execution of the will until death.⁸³ Indiana, like most jurisdictions, has altered the common law rule by statute.⁸⁴ In *Swails v. Swails*,⁸⁵ the court determined that the testator's intent was relevant in determining whether the specific devise had been revoked.⁸⁶ Similarly, in *Simmons v. Beazel*,⁸⁷ a revocation case, the court held intent was relevant.⁸⁸ In *Simmons*, the specific devise had been transformed into another traceable asset. Because the decedent's wife was both the specific and

⁸²See generally T. ATKINSON, *supra* note 1, § 134, at 743; Page, *supra* note 5, at 29-30; Smith, *supra* note 12, at 229.

⁸³*Bowen v. Johnson*, 6 Ind. 110 (1854); *Wolf v. Wolf*, 73 Ind. App. 221, 127 N.E. 152 (1920).

⁸⁴IND. CODE § 29-1-6-1 (1976) provides in pertinent part:

In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

(a) Any estate, right or interest in land or other things acquired by the testator after the making of his will shall pass thereby and in like manner as if title thereto was vested in him at the time of making the will.

Id. § 29-1-5-6 provides in pertinent part:

No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed subscribed and attested as required in section 503 [29-1-5-3].

⁸⁵98 Ind. 511 (1884) (holding that a partial alienation of a specific devise did not revoke the entire devise and that the remaining portion passed under the will). The discussion of revocation necessarily avoids the question of ademption by extinction, although such a question was relevant to the portion of the specific devise absent from the testator's estate at his death. See also *Wolf v. Wolf*, 73 Ind. App. 221, 127 N.E. 152 (1920).

⁸⁶98 Ind. at 515.

⁸⁷125 Ind. 362, 25 N.E. 344 (1890).

⁸⁸The testator had specifically devised a life estate in certain realty to his wife with a remainder to his children and bequeathed "all the personal property which I may have at my death" to his wife. After the will was executed he sold the realty, but held a promissory note for the unpaid balance. His heirs claimed the conveyance had revoked the devise and, therefore, the proceeds should pass by descent. Without reference to statute, the court stated that, although the testator's intent was relevant, there was no evidence in the will of an intent to revoke. *Id.* at 366, 25 N.E. at 345.

residuary legatee, however, the ademption question was not raised.⁸⁹ In *Sturgis v. Work*,⁹⁰ the testator devised by specific description land he did not own. The remainder of his estate was to pass under the residuary clause. The specific devisee attempted to present evidence that the description was a mistake. Although the case was determined on an evidentiary basis, the result was that a specific devise was adeemed without regard to the testator's intent.⁹¹ If Indiana had followed the intent rule, the specific devisee could have argued that such evidence was admissible to show the testator's intent at the time the will was executed.⁹² Possibly these cases have been misinterpreted as standing for the proposition that intent is admissible in determining whether a bequest has been adeemed by extinction.

While the rule governing ademption by extinction is still an open question, the preceding cases provide some guidance. One of the difficulties with the opinions in *Brown* and *Pepka* is the lack of reference to other relevant Indiana cases⁹³ and the assumption that Indiana follows the intent rule. These cases, while not directly addressing the question of ademption, show a pattern. Indiana courts have searched for intra-will indications of a testator's intent when presented with classification of bequests, ademption by satisfaction, revocation, or possible intestacy. Aside from *Brown*, none of the relevant Indiana cases have held that intra-or extra-will evidence of intent is admissible to show an ademption by extinction. The dictum in *Weston*⁹⁴ also offers substantial support for the identity rule. While the Indiana Courts of Appeal are currently divided on the appropriate rule, these antecedent cases, at least impliedly, accept the identity rule.

IV. POSSIBLE APPROACHES TO ADEPTION QUESTIONS

Whichever doctrine is followed in Indiana, the courts will undoubtedly experience problems similar to those in other states. A brief look at cases in other jurisdictions indicates that neither rule

⁸⁹It is also clear that if the specific provision had been revoked under the common law rule any question of ademption by extinction would have been eliminated because there would not have been a valid specific bequest under which the property could pass even if the testator had not intended that the property be adeemed.

⁹⁰122 Ind. 134, 22 N.E. 996 (1889).

⁹¹*Id.* at 135, 22 N.E. at 996. The court held there was no error in refusing to admit such evidence and that the property passed under the residuary clause. *Id.*

⁹²See note 64 *supra*.

⁹³See note 67 *supra* and accompanying text.

⁹⁴See note 71 *supra* and accompanying text.

has produced completely satisfactory results.⁹⁵ A brief analysis of the advantages, disadvantages, and methods of the two rules may clarify some of the problems.

The intent doctrine may fulfill the testator's intent, but it also raises important evidentiary questions which may lead to continued uncertainty and confusion. What does a search for the testator's intent mean in an ademption case? Will evidence of the deceased's intent be limited to the generally accepted rules for the construction of wills, or will extrinsic evidence be allowed? *Brown* does not give a clear answer,⁹⁶ but the authorities cited therein consistently confine the search to the four corners of the instrument and the situation and circumstances at the time of execution.⁹⁷ These rules of construction have been applied conservatively in Indiana⁹⁸ and the courts have continued to protect against infringements on the Statute of Wills and Statute of Frauds.⁹⁹ It is also important to note that in cases of ademption by satisfaction, where the testator's intent is controlling, Indiana courts have confined extra-will evidence to situation and circumstances at execution.¹⁰⁰ If Indiana decides to follow the intent rule in an extinction case, the inquiry should be similarly limited.

Under the intent doctrine, even if the resulting property is traceable, an ademption may still occur.¹⁰¹ Where a testator has voluntarily removed property from the estate and evidence of intent is limited to an examination of the will, it is possible that the property will not be adeemed and, thus, may be contrary to the testator's actual intent.¹⁰² Where the transfer is the result of an involuntary act, an intra-will search is more likely to correspond with a testator's true intent. Unless extrinsic evidence is admitted to determine the testator's actual intent at the time of transfer, however, the intent doctrine may produce results equally arbitrary as those of the identity rule.¹⁰³ The intent doctrine may also raise a

⁹⁵Page, *supra* note 5; Warren, *supra* note 4.

⁹⁶145 Ind. App. at 617, 252 N.E.2d at 149-50.

⁹⁷See notes 33-35 *supra* and accompanying text.

⁹⁸See, e.g., Hauck v. Second Nat'l Bank, 153 Ind. App. 245, 286 N.E.2d 852 (1972).

⁹⁹See, e.g., Pierce v. Farmers State Bank, 222 Ind. 116, 51 N.E.2d 480 (1943); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934).

¹⁰⁰See Roquet v. Eldridge, 118 Ind. 147, 20 N.E. 733 (1889); Brown v. Crossley, 69 Ind. 203 (1879); Weston v. Johnson, 48 Ind. 1 (1874); Clendening v. Clymer, 17 Ind. 155 (1861); Scher v. Stoffel, 115 Ind. App. 195, 58 N.E.2d 118 (1944); Kemp v. Kemp, 92 Ind. App. 268, 154 N.E. 505 (1926).

¹⁰¹*In re Estate of Resler*, 43 Cal. 2d 726, 278 P.2d 1 (1955); *In re Estate of Hagberg*, 276 Cal. App. 2d 622, 81 Cal. Rptr. 107 (1969); See generally *Ademption by Extinction in California*, *supra* note 13.

¹⁰²*Ademption*, *supra* note 11, at 748; See also, PAGE, *supra* note 1, § 54.15.

¹⁰³Paulus, *supra* note 11, at 227-33.

question whether a grant of the traceable or equivalent assets will conflict with the testator's intent to provide for general or residuary legatees.¹⁰⁴ The conflict is inevitable; if the court is willing to allow a subjective search for intent, results will lack consistency, but, if intent is irrelevant, results may be unjust.

Some courts, applying a *fund theory*, have attempted to determine from an examination of the will whether the testator intended to confer an economic benefit or a unique item upon the legatee.¹⁰⁵ Under this approach unique items would be adeemed to the extent they were not present in the testator's estate at his death, while an "economic benefit" would pass to the specific legatee if it was traceable. This procedure is similar to Mechem's proposal that only specific bequests of unique items be subject to ademption and that specific legacies of assets be construed as general and therefore not subject to ademption.¹⁰⁶

A return to, or an adoption of, the intent approach might be undesirable and could result in troublesome uncertainty.¹⁰⁷ Logically extended, such a doctrine would require tracing of the proceeds of a transferred bequest or devise whenever the testator's "intent," as constructed by the court, so indicated.¹⁰⁸ The admission of extrinsic evidence in this examination could produce results that would violate the formally expressed intent of the testator and encourage litigation.

Although the identity doctrine is an easier and, potentially, a more consistent rule to apply, it can also produce harsh results.¹⁰⁹ Applied mechanically, it can result in a distribution completely contrary to the *expressed* intent of the testator.¹¹⁰ However, the ap-

¹⁰⁴See *Ademption*, *supra* note 11, at 749.

¹⁰⁵*Willis v. Barrow*, 218 Ala. 549, 119 So. 678 (1929); *Gray v. McCausland*, 314 Mass. 743, 51 N.E.2d 441 (1943). See generally *Ademption*, *supra* note 11, at 750; Note, *supra* note 43, at 1089.

¹⁰⁶Mechem, *supra* note 11, at 576.

¹⁰⁷"Inevitably, the intent criterion proved unworkable." Mechem, *supra* note 11, at 562.

¹⁰⁸See 18 CAL. L. REV. 711 (1930). But see Note, *Wills: Ademption of Specific Legacies and Devises*, 43 CAL. L. REV. 151, 154 (1955).

¹⁰⁹*E.g.*, *Wyckoff v. Perrine's Ex'r*, 37 N.J. Eq. 118 (Ch. 1883); *Ametrano v. Downs*, 170 N.Y. 388, 63 N.E. 340 (1902); *In re Barrow's Estate*, 103 Vt. 501, 156 A. 408 (1931); *In re Kamba's Estate*, 230 Wis. 246, 282 N.W. 570 (1938). T. ATKINSON, *supra* note 1, § 134, at 742; See generally PAGE, *supra* note 1, § 54.15, at 266.

¹¹⁰*Connecticut Trust & Safe Deposit Co. v. Chase*, 75 Conn. 683, 55 A. 171 (1903); *In re Dungan's Estate*, 30 Del. Ch. 628, 62 A.2d 509 (Orphans Ct. 1948); *Beck v. McGillis*, 9 Barb. Ch. 35 (N.Y. Sup. Ct. 1850); *In re Barry's Estate*, 208 Okla. 18, 252 P.2d 437 (1952).

proach of courts in adopting this rule and then endeavoring to find exceptions for harsh cases has also been criticized.¹¹¹

Under the identity doctrine a substantial change in the bequeathed property will operate as an ademption, but, if the change is merely one of form or location, or is minor in character, the bequest may still pass to the specific legatee.¹¹² If the testator is more specific in the description and gives the particular characteristics, location, or quality of the object, the bequest will be adeemed.¹¹³ This substance-form test is particularly applicable where the property involved is a security, an interest in a business, or another intangible asset.¹¹⁴

A second method of avoiding the doctrine is by the classification of bequests. Since ademption by extinction applies only to specific bequests,¹¹⁵ the character of the bequest must be determined before the doctrine is applicable. Perhaps, as a result of the identity rule, Indiana courts have expressed a preference for finding general, rather than specific, legacies.¹¹⁶ The rules for classification provide that the determination should be made in accordance with the testator's intra-will manifestation of intent.¹¹⁷ This provides an opportunity for the court to examine the testator's intent before the ademption argument is raised. This exception is particularly appropriate where the bequest is not unique and is traceable.¹¹⁸

Another exception to the identity doctrine is the time-of-death construction.¹¹⁹ Although a will normally speaks only at the death of the testator,¹²⁰ its language may be determined in light of the cir-

¹¹¹"It is of course to be regretted that courts make rules and principles with the operation of which they are so dissatisfied from the outset that they feel compelled to make other equally unsatisfactory rules as a means of evading the first set of rules."

Page, *supra* note 5, at 28. See also Paulus, *supra* note 11, at 197-207.

¹¹²T. ATKINSON, *supra* note 1, § 134, at 747-48; Note, *supra* note 43, at 1085.

¹¹³Succession of Canton, 144 La. 113, 80 So. 218 (1918); *Hastings v. Bridge*, 86 N.H. 247, 166 A. 273 (1933).

¹¹⁴See generally Evans, *Effect of Corporate Transformation Upon Ademption, Lapse, and Fiduciary Appointments*, 88 U. PA. L. REV. 671 (1940); Mechem, *supra* note 11, at 566-76; Note, *supra* note 43, at 1089.

¹¹⁵See note 2 *supra*.

¹¹⁶*Waters v. Selleck*, 201 Ind. 593, 170 N.E. 20 (1930); *American Fletcher Nat'l Bank & Trust Co. v. American Fletcher Nat'l Bank & Trust Co.*, 161 Ind. App. 166, 314 N.E.2d 810 (1974). See also T. ATKINSON, *supra* note 1, at 746.

¹¹⁷See notes 74-76 *supra* and accompanying text. See, e.g., W. BORLAND, *WILLS & ADMINISTRATION* § 119 (1915); Evans, *supra* note 119, at 671; Paulus, *Special and General Legacies of Securities; Whither Testator's Intent*, 43 IOWA L. REV. 467 (1958).

¹¹⁸Paulus, *supra* note 11, at 206.

¹¹⁹T. ATKINSON, *supra* note 1, at 746.

¹²⁰*Id.* at 433-35, 470-73, 746, 815.

cumstances surrounding the testator when the will was executed.¹²¹ Under the identity rule a testator's intent is relevant only at the time the will was executed.¹²² Therefore, where it could be shown that the testator intended to make a specific bequest of property he owned at the time of the will's execution and the specific item was not present in his estate at death, the bequest would be adeemed. The time-of-death exception, however, allows a generic gift such as "my stock" or "my interest" to include all items which fall within the general description and are in the testator's possession at his death. This interpretation will save a devise which would have been adeemed if the decedent's intent, when the will was executed, was relevant.¹²³

This exception might be available in Indiana because some courts have held that the will speaks only at the date of death¹²⁴ and operates only on those assets in the estate at death.¹²⁵ Indiana statutes which allow a will to pass after-acquired property¹²⁶ also support this interpretation. The *Brown* court, however, argued that the time-of-death construction applied only to after-acquired property, and not to ademption cases.¹²⁷ This approach was also rejected by the *Pepka* court's statement that although "[t]he will becomes

¹²¹*Id.* at 810. *See, e.g.,* Peirce v. Farmers State Bank, 222 Ind. 116, 51 N.E.2d 480 (1943); Conover v. Cade, 184 Ind. 604, 112 N.E. 7 (1916); Corey v. Springer, 138 Ind. 506, 37 N.E. 322 (1894); Stevenson v. Druley, 4 Ind. 519 (1853).

¹²²*See* note 63 *supra* and accompanying text.

¹²³Under this approach if the testator makes a specific bequest of "my stock" and owns X stock on the date of execution but Y stock at death, the bequest is not adeemed—not as a result of intention, but because the will operates only upon the property held at death and the Y stock falls within the specific description. Arguably, when the specific bequest is of a more personal nature, such as "my diamond" or "my gold watch," the exception is less appropriate. *See* Milton v. Milton, 193 Miss. 563, 10 So. 2d 175 (1942); *In re Charles' Estate*, 3 App. Div. 2d 119, 158 N.Y.S.2d 469 (Sup. Ct. 1957); *In re Lusk's Estate*, 336 Pa. 465, 9 A.2d 363 (1939). *Contra*, Schildt v. Schildt, 201 Md. 10, 92 A.2d 367 (1952); *In re Morris' Estate*, 11 Misc. 2d 457, 169 N.Y.S.2d 881 (1957).

¹²⁴*Shriver v. Montgomery*, 181 Ind. 108, 103 N.E. 945 (1914); *Heaston v. Kreig*, 167 Ind. 101, 77 N.E. 805 (1906); *Brown v. Critchell*, 110 Ind. 31, 11 N.E. 486 (1887).

¹²⁵*Haxton v. McClaren*, 132 Ind. 235, 31 N.E. 48 (1892).

¹²⁶IND. CODE § 29-1-6-1(a) & (b) (1976).

¹²⁷145 Ind. App. at 616, 252 N.E.2d at 157. The court stated:

When we say a will speaks from the date of the death of the testator, we simply mean that a will operates upon all the property in the testator's estate at the time of his death, and is not restricted solely to that property he may have owned at the time he made his will. Vol. 29, I.L.E., Wills, Sec. 192, p. 350. It has no connection with the doctrine of ademption. It was formulated as a rule of law to cover property acquired by the testator after he made his will, and which was a part of his estate at the time of his death.

Id.

operative or effective after it is probated and speaks from that date as an affective instrument, . . . for purposes of ademption it is construed as of the date of execution to identify the subject matter of the gift."¹²⁸

A similar escape device is the use of "special language" in a will which does not alter the nature of the bequest, but makes its quantity or quality uncertain.¹²⁹ Where the will provides that the legatee is to have an inclusive gift such as "the proceeds,"¹³⁰ "my interest,"¹³¹ or "my business,"¹³² the courts have circumvented the identity rule by allowing the introduction of evidence to trace the bequest and to clarify any ambiguity regarding the amount in question. Such an inclusive description was used in *Brown*,¹³³ but, because the court applied the intent rule, the exception was not necessary.¹³⁴

Some states deviate from the identity doctrine when the results would be grossly unfair, yet refuse to adopt an intent approach.¹³⁵ Although California has not completely abandoned the identity rule, its current position is exceptionally flexible and indicates a preference for the intent approach.¹³⁶ Iowa has moderated the identity rule by employing a two-pronged test in harsh cases.¹³⁷ However,

¹²⁸155 Ind. App. at 658, 294 N.E.2d at 153.

¹²⁹T. ATKINSON, *supra* note 1, at 746; G. THOMPSON, THE LAW OF WILLS § 519 (3d ed. 1947); Paulus, *supra* note 11, at 203-05.

¹³⁰*In re Manshaem's Estate*, 207 Mich. 1, 173 N.W. 483 (1919); *In re Estate of Caldwell*, 6 Misc. 2d 110, 160 N.Y.S.2d 375 (Sup. Ct. 1957). See also *In re Dublin's Estate*, 375 Pa. 599, 101 A.2d 731 (1954).

¹³¹*Mee v. Cusineaus*, 213 Ark. 61, 209 S.W.2d 445 (1948); *Mitchell v. Mitchell*, 208 Ark. 478, 187 S.W.2d 163 (1945); *Weed v. Hoge*, 85 Conn. 490, 83 A. 636 (1912).

¹³²*In re Gerlach's Estate*, 364 Pa. 207, 72 A.2d 271 (1950) (partnership to corporation); *Wiggins v. Cheatham*, 143 Tenn. 406, 225 S.W. 1040 (1920) (business received).

¹³³"[A]ll of my right, title and interest," 145 Ind. App. at 596, 252 N.E.2d at 145.

¹³⁴It is possible that the *Brown* court confused this exception to the identity rule with a complete adoption of the intent approach. See notes 43-47 *supra* and accompanying text.

¹³⁵This approach has been followed when a testator had no chance to amend his will or make his intention known after the specific property ceased to be a part of his estate. See, e.g., *Wolfe v. Eckhoff*, 208 N.W.2d 923 (Iowa 1973) (insurance proceeds from "common disaster"); *Walsh v. Gillespie*, 338 Mass. 278, 154 N.E.2d 906 (1959) (sale of stock by conservator). *Contra*, *In re Barry's Estate*, 208 Okla. 8, 252 P.2d 437 (1952). For a discussion of whether insurance proceeds should pass to a specific legatee, see 4 U. KAN. L. REV. 465 (1956); 29 S. CAL. L. REV. 249 (1956).

¹³⁶The present rule in California is that there will be no ademption without proof that the testator intended to destroy the specific bequest or devise. *In re Mason's Estate*, 62 Cal. 2d 213, 42 Cal. Rptr. 13, 397 P.2d 1005 (1965); *In re Estate of Holmes*, 233 Cal. App. 2d 464, 43 Cal. Rptr. 693 (1965), noted in *Ademption by Extinction in California*, *supra* note 13, at 468. *Contra*, *In re Babb's Estate*, 200 Cal. 252, 252 P. 1039 (1927) (following identity rule strictly).

¹³⁷This approach applies only where the specified asset has changed substantially in form, but has not been extinguished. An initial determination of the testator's intent

such a "no rule" approach has been criticized as the worst possible method because it does not proceed upon general principles and produces inconsistent results.¹³⁸ While a general trend toward the intent doctrine has been noted, the identity doctrine continues to be the majority rule¹³⁹ and its numerous exceptions will undoubtedly continue to be used in order to avoid harsh results.

VI. STATUTORY ALTERNATIVES

The confusion and occasionally unreasonable results experienced under the identity doctrine have been modified by legislation in several states.¹⁴⁰ Generally, these statutes deal with only one particular problem and raise a presumption that in such an instance the testator did not intend an ademption. Some statutes operate only where the alienation occurs as a result of the following: A sale by guardian;¹⁴¹ a condemnation proceeding;¹⁴² accident or theft;¹⁴³ exchanges of property of like character;¹⁴⁴ subsequent contract of sale;¹⁴⁵ or any act by the testator that alters, but does not "wholly divest" his estate or interest in the devised asset.¹⁴⁶

The most comprehensive statutes are found in Oregon¹⁴⁷ and Wisconsin.¹⁴⁸ These lengthy and complex statutes attempt to cover all of the special situations in which the identity rule may produce undesirable results, but they may actually provide an equally inflexible approach to the problem. Similar to the Wisconsin and Oregon approaches, sections 2-607 and 2-608 of the Uniform Probate Code list certain situations in which specific bequests will be presumed not to adeem.¹⁴⁹ Under all three of these methods only intra-will evidence of intent is admissible.

is made from both intrinsic and-extrinsic evidence. If the intent is clear, it is followed; if it is ambiguous, the identity rule applies. See 57 IOWA L. REV. 1211, 1214 (1972).

¹³⁸Page, *supra* note 5, at 36-37.

¹³⁹Warren, *supra* note 4, at 324-25.

¹⁴⁰See Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856 (1960).

¹⁴¹IND. CODE § 29-1-18-44 (1976); OHIO REV. CODE ANN. § 2127.38. (Page 1968) (real property only).

¹⁴²OR. REV. STAT. § 112.385 (1975); WIS. STAT. ANN. § 853.35(4) (West 1971).

¹⁴³N.Y. EST., POWERS & TRUSTS LAW § 3-4.5 (McKinney 1967) (passing insurance proceeds).

¹⁴⁴GA. CODE ANN. § 113-818 (1975).

¹⁴⁵OR. REV. STAT. § 112.385(4) (1975).

¹⁴⁶CAL. PROB. CODE § 78 (West 1956); OHIO REV. CODE ANN. § 2107.36 (Page 1976); N.Y. EST., POWERS & TRUSTS LAW § 3-4.3 (McKinney 1967).

¹⁴⁷OR. REV. STAT. § 112.385 (1975).

¹⁴⁸WIS. STAT. ANN. § 853.35 (West 1971).

¹⁴⁹UNIFORM PROBATE CODE § 2-607:

(a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

Kentucky has taken an exceptionally broad approach to the problem and has created a general presumption against the ademption of specific legacies.¹⁵⁰ This statutory presumption only arises when a specific bequest is in favor of an "heir." Extrinsic evidence is allowed to rebut the presumption. Virginia has taken the opposite approach and presumes, absent a contrary expression in the will,

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- (1) as much of the devised securities as is a part of the estate at the time of the testator's death;
 - (2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;
 - (3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and
 - (4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.
- (b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise.

Id. § 2-608:

- (a) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if subsequent to the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (b).
- (b) A specific devisee has the right to the remaining specifically devised property and:
 - (1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;
 - (2) any amount of a condemnation award for the taking of the property unpaid at death;
 - (3) any proceeds unpaid at death on fire or casualty insurance on the property; and
 - (4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

¹⁵⁰KY. REV. STAT. § 394.360 (1970), provides in pertinent part:

- (1) The conversion of money or property or the proceeds of property, devised to one (1) of the testator's heirs, into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise unless the testator so intended; but the devisee shall have and receive the value of such devise, unless a contrary intention on the part of the testator appears from the will, or by *parol or other evidence*.
- (2) The removal of property devised shall not operate as an ademption, unless a contrary intention on the part of the testator is manifested in a like manner.

(Emphasis added.)

that such devises will fail.¹⁵¹ While Kentucky allows extrinsic evidence to rebut the presumption, even this approach may produce results as arbitrary as the identity rule. One proposal has been to allow extrinsic evidence to determine the burden of proof.¹⁵² This procedure has not been adopted in any of the existing statutes and would undoubtedly be met by the same objections that are raised regarding the intent doctrine.¹⁵³ Absent some uniform statutory reform, the law of ademption by extinction is likely to remain confused.¹⁵⁴

VII. CONCLUSION

The Indiana Supreme Court would follow the majority rule if presented with an ademption case. Despite the somewhat confusing and conflicting approaches taken by the Indiana Courts of Appeal, the rationales and dicta from related cases show, at least impliedly, an acceptance of the identity rule. Only the First District Court of Appeals has applied the intent approach, and it is suggested that such application is erroneous.¹⁵⁵ The First District was clearly wrong in assuming that the intent theory was the majority rule. The categorical statement that Indiana had followed this approach is also misleading. The only Indiana case cited for this proposition was *Powell* which, arguably, is an application of the identity rule.¹⁵⁶ However, if Indiana has now "adopted" a mechanical rule, as in-

¹⁵¹VA. CODE § 64.1-65 (1973), provides in pertinent part:

Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in any devise in such will, which shall fail or be void or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will.

¹⁵²Certain categories which could be used in the determination of whether such an act is sufficiently extinctive or dispositive to place the burden of proof on the specific legatee are:

(1) testator's role in the change—whether active or passive; (2) the character of the change—whether substantial or merely formal; (3) disposition of the proceeds, if any—whether traceable or not; (4) opportunity of testator to change his will—whether a long or short time has elapsed between the change and the testator's death; and (5) miscellaneous circumstances peculiar to the facts of the particular case.

Ademption by Extinction in California, *supra* note 13, at 464.

¹⁵³Such inquiries are "productive of endless uncertainty and confusion . . ." *Humphreys v. Humphreys*, 30 Eng. Rep. 85, 85 (1789).

¹⁵⁴Statutory reform has long been advocated. Page, *supra* note 5, at 36-38. Others argue that the courts should reform the law by construing legacies as general whenever possible, Mechem, *supra* note 11, at 576. A third approach favors judicial or statutory admission of extrinsic evidence of the testator's intent. Paulus, *supra* note 11, at 227-33.

¹⁵⁵See notes 31-42 *supra*.

¹⁵⁶See notes 19-28 *supra*.

dictated in *Pepka*, and overruled the intent theory "adopted" in *Brown*, the courts may be heading in the opposite direction of other jurisdictions. Several states appear to be establishing wider exceptions to the identity rule, while others have abandoned the doctrine judicially or by statute.¹⁵⁷ Such a trend may result from a less restrictive judicial attitude toward the admission of extrinsic evidence of intent¹⁵⁸ or from a desire to avoid harsh results. While some commentators favor continued judicial supervision,¹⁵⁹ others argue that the approach will only lead to continued confusion, uncertainty, and increased litigation.¹⁶⁰ It remains to be seen how the California and Iowa approaches work and whether the greater willingness to admit extrinsic evidence will produce consistent results.¹⁶¹

Because there are so few ademption by extinction cases in Indiana, the need for statutory reform may not be urgent, but would be helpful. The absence of case law did not prevent the legislature from expressing its preference in the guardianship situation.¹⁶² A statute would remove some of the confusion surrounding the problem. Although any statutory alternative could create an approach as mechanical as the identity rule, the Uniform Probate Code approach presents a reasonable solution.¹⁶³ This method raises a presumption similar to that found in Indiana's abatement,¹⁶⁴ exoneration,¹⁶⁵ and contribution statutes.¹⁶⁶ Raising a statutory presumption against the ademption of specific legacies in particular circumstances would significantly reduce the potential for harsh results under the identity rule. The presumption should be rebuttable by intra-will evidence of intent and by the testator's situation at the will's execution. The statute would not displace the common law exceptions to the identity doctrine so that where the statute did not cover the situation a specific bequest might still be saved judicially.

This type of statute has the same weaknesses as any approach which does not allow extrinsic evidence, other than intra-will evidence, in order to determine actual intent. However, there is no

¹⁵⁷See notes 136-37, 140-50 *supra*, see also Paulus, *supra* note 11, at 195.

¹⁵⁸See generally Note, *Ascertaining the Testator's Intent: Liberal Admission of Extrinsic Evidence*, 22 HASTINGS L.J. 1349 (1971).

¹⁵⁹Warren, *supra* note 4, at 327.

¹⁶⁰Mechem, *Why Not A Modern Wills Act?*, 33 IOWA L. REV. 501, 515 (1948); Page, *supra* note 5, at 37-38; Paulus, *supra* note 11, at 233.

¹⁶¹See notes 136-37 *supra*.

¹⁶²See note 40 *supra*.

¹⁶³See note 149 *supra*.

¹⁶⁴IND. CODE § 29-1-17-3 (1976).

¹⁶⁵*Id.* § 29-1-17-9.

¹⁶⁶*Id.* § 29-1-17-4.

reason why the search for intent in an ademption case should be any broader than for any other situation involving the interpretation of a will. The same constraints and policies should apply. It would also seem advisable to create a general statutory presumption against the ademption of specific legacies and then only allow intra-will evidence of intent. There are undoubtedly many instances in which the will indicates a clear intent to make a specific bequest and, yet, the testator has intentionally disposed of the property in order to defeat this bequest. Under these circumstances only the introduction of extrinsic evidence would achieve a result consistent with the testator's intent. Where the transfer is involuntary, however, a statute would present less risk of inconsistent results. In any event, it is reasonably certain that, absent some type of statutory reform, the law of ademption by extinction in Indiana will remain a contradictory, confusing and shifting area.

J. BRADLEY SCHOOLEY

