equally naive to suppose that a prisoner's fears are confined to the possible retributive motives of a sentencing judge. More particularly, the prisoner must consider the possibility of receiving a harsher penalty not only because a particular judge could act with improper motives, but also the very fact that a second conviction may produce a longer sentence than the one he is presently serving. The Shear court recognizes that, "The threat of harsher sentences on successful habeas corpus applicants certainly can become a tool by which to prevent state or federal prisoners from seeking redress of Constitutional deprivations previously suffered."15 But, the Shear decision does not preclude relief for an individual ostensibly aggrieved by a harsher punishment after the second trial. That is, the particular defendant may still have judicial review of his case in order to determine the propriety of the sentencing judge's actions.

Since the circuit courts of appeals are evenly split over the constitutionally of imposing a harsher penalty on a successful habeas corpus applicant,16 the United States Supreme Court may move to resolve the issue. Until that decision is rendered, Shear v. Boles stands as an attempt to reconcile the exigencies of federalism with the demands for individual rights.

Thomas Ryan Goodwin

Wills—Ademption of Specific Legacies

T executed a will devising a lot and store building to an orphanage. Subsequently T became incompetent and a trustee under court order sold the specific realty to acquire funds for the maintenance of T. A portion of the funds were still held by the trustee at T's death. The executor of T's estate petitioned the court for construction of T's will and instructions in the administration of T's estate. The trial court held that the sale of the lot and store

15 Id. at 864.
16 United States v. White, 36 U.S.L.W. 2082 (U.S. 1967); Starner v. Russell, 376 F.2d 808 (3rd Cir. 1967), both uphold the imposition of a harsher penalty. Contra, Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); Marano v. United States, 374 F.2d 583 (1st Cir. 1967). It is to be noted that the court in Marano v. United States, supra, would allow the exceptional step of increasing the sentence of the successful habeas corpus applicant if there were sufficient grounds contained in a new pre-sentence report and these grounds had been affirmatively revealed.
building did not adeem the legacy and that the orphanage was entitled to the residue of the proceeds of the sale. Held, affirmed. The sale of the property by the trustee under court order did not by operation of law cause an ademption of the specific devise of the lot and store building. To the extent that the proceeds remained in and were traceable into the estate of T, they retained the character of the realty so that the specific devise was not adeemed. Grant v. Banks, 155 S.E.2d 87 (N.C. 1967).

The principal case raises an interesting question concerning the ademption of specific legacies. The holding appears to be in conflict with the general rule that ademption operates as a matter of law and does not depend on the intention of the testator. The purpose of this comment is to investigate the extent to which and the circumstances under which this general rule has been abandoned.

There is a conflict of authority concerning the doctrine of ademption. Most jurisdictions adopt the in specie or identity test while others follow the intention test. Courts applying the in specie test follow the rule that the specific legacy is adeemed if the subject of the gift is not in existence as a part of the testator’s estate at the time of his death or has been substantially changed in form. Courts applying the intention test hold that the question of ademption does not depend on the existence or non-existence of the particular subject matter devised or bequeathed but rather on the intention of the testator, i.e., whether by certain acts he evidences an intention that the specific legacy be adeemed.

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1 A specific legacy is a gift of a particular thing or a specified part of a testator’s property (either personal or real) so as to be distinguished from all others of the same kind. A general legacy is a gift, normally of money from the testator’s estate, which is not dependent on the existence of a particular thing or fund for its satisfaction. It can be satisfied out of the general assets of the estate. A demonstrative legacy is a gift of money charged against a particular fund. It is in its nature a specific legacy because it is charged against a particular fund and also in the nature of a general legacy because if the fund against which it is charged should fail, it can be paid out of the general assets of the estate as a general legacy. Annot., 64 A.L.R.2d 778 (1959).


4 E.g., Lang v. Vaughn, 137 Ga. 671, 74 S.E. 270 (1912); Elwyn v. DeCarmendia, 148 Md. 109, 128 A. 913 (1925); In re Brann, 219 N.Y. 263, 114 N.E. 404 (1916); May v. Sherrard’s Legatees, 115 Va. 817, 79 S.E. 1026 (1913); In re Estate of Atkinson, 19 Wis. 2d 727, 120 N.W.2d 100 (1963).

5 E.g., Wilmorton v. Wilmorton (C.C.S.D. Ill. 1910), 176 F. 896, cert.
There is no doubt that where the subject of the specific legacy is disposed of by the testator in his lifetime it is adeemed.  

A majority of American jurisdictions have adopted this view holding that if the subject of the specific legacy does not remain in specie at the testator's death the legacy is adeemed as a matter of law. Ademption also occurs as a matter of law when the specific legacy is totally lost or destroyed through some unexpected circumstances. These views had their origin in an early English case which ruled that ademption resulted from destruction or loss of the subject of the specific legacy and not from a change of intention by the testator. However, a mere change in name and form will not adeem the legacy when the subject of the specific legacy remains in existence in substantially the same form. Where the change is only a formal one it has been said that the question of ademption may depend on the testator's intention. Apparently, the testator's intention would be material in such cases only when it was not obvious whether there had been a substantial change in the subject of the specific legacy.

One interesting exception to the in specie rule is found in the case of Miller's Executor v. Malone. Here, the testator executed a will devising certain land in trust to an executor who was to sell the land and distribute the proceeds among certain specific devisees. The court recognized and accepted the in specie rule, concluding, however, that this case was an exception to the rule since the will devised the proceeds of the sale of the land. Thus the sale of the land by the testator in his lifetime did not adeem the legacy.
However, the case in which the specific legacy is disposed of by the testator during his lifetime is not the factual situation with which the principal case deals. In cases such as the principal case there is a conflict of authority concerning whether an ademption results when the subject of a specific legacy is disposed of by the guardian, committee, or conservator of an incompetent testator. The existence of the in specie and intention theories gives rise to this conflict of authority. In this situation some courts have rejected the in specie or identity rule. Thus where a testator has become incompetent and a guardian, committee, or conservator is conducting his affairs, the majority of American courts have adopted the view that a sale by the guardian of the subject of the specific legacy does not work an ademption of the legacy, so far as the proceeds are traceable into the estate and have not been expended to support the testator. The principal case is in accord with the majority rule. This rule has often been applied in cases of specific devises of real estate. However, the same rule has been applied in the following cases concerning personal property: where a conservator collected part of a trust fund specifically bequeathed; where a guardian sold corporate stock specifically bequeathed; where a conservator withdrew savings bank deposits specifically bequeathed and purchased a Liberty Bond with them; where a conservator commingled funds of the estate with other funds realized from the conversion of the testator's specifically bequeathed distributive shares in another's estate.

In cases involving the sale of the corpus of a specific legacy by the guardian of an incompetent testator the weight of authority

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17 Morse v. Converse, 80 N.H. 2d, 113 A. 214 (1921).

18 In re Cooper's Estate, 95 N.J. Eq. 210, 123 A. 45 (1923). The court held that neither the conversion nor commingling of the funds adeemed the legacy. The principal case also held that the commingling of the proceeds of the sale with other assets of the estate would not adeem the legacy. Grant v. Banks, 155 S.E.2d 87, 95 (N. C. 1967).
is to the effect that there is an ademption pro tanto of the specific legacy to the extent that the proceeds are expended in support of the incompetent testator.\textsuperscript{19} The principal case adopts this rule.\textsuperscript{20} The principle of pro tanto ademption will not be prevented from operating simply because property other than the subject of a specific legacy might have been sold to obtain funds to support the incompetent.\textsuperscript{21}

Underlying the majority holding that a sale of the subject of a specific legacy by the guardian of an incompetent testator does not work an ademption of the legacy are two important considerations: (1) the incompetent testator lacks the intent to adeem and the opportunity to avoid the effect of ademption by executing a new will; and (2) a contrary holding would allow the guardian, by simply changing the form of the property in his custody, to determine the distribution of the estate and thus to disrupt the testator's dispositive scheme.\textsuperscript{22} In this regard a decision in an Ohio case is significant.\textsuperscript{23} The court pointed out that if the testator, at the time of the disposition of the subject of the specific legacy, or at any time subsequent to the sale, was competent, then the sale by the guardian would adeem the legacy.\textsuperscript{24} Once the testator regained testamentary capacity a failure on his part to make new provisions for his specific devisees was apparently considered to evidence his intention that the legacy be adeemed. Thus, it seems clear that in cases such as the principal case the courts focus on the element of testamentary intent and attempt to give effect to this intent as expressed at a time when the incompetent retained testamentary capacity.

At least two separate legal concepts are employed by the courts in their efforts to give effect to the testamentary intention in cases such as the principal case. The appointment of a conservator is

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\item \textsuperscript{20} The North Carolina court also held that the proceeds of the sale could be applied to pay debts and costs of administration without selling other personal property for this purpose. The specific legacy was held to be adeemed to the extent that the proceeds were expended to meet these debts and costs. This holding applies the doctrine of pro tanto ademption more extensively than any other case found.
\item \textsuperscript{21} Stake v. Cole, 257 Iowa 594, 133 N.W.2d 714, 717 (1965).
\item \textsuperscript{22} Estate of Mason, 62 Cal. 2d 213, 216, 42 Cal. Rptr. 13, 16, 397 P.2d 1005, 1007 (1965).
\item \textsuperscript{23} Bishop v. Fullmer, 112 Ohio App. 140, 175 N.E.2d 209 (1960).
\item \textsuperscript{24} Id. at 144, 175 N.E.2d at 212.
\end{itemize}
held to give rise to the relation of trustee and cestui que trust between the conservator and the ward. Thus a sale by the conservator is not considered as a sale by the incompetent, but rather as a sale made by law. Any rights which the specific legatee had in the subject of the sale will attach to the proceeds of that sale.\textsuperscript{26} The problem has also been approached as one of equitable conversion.\textsuperscript{26} Under this theory the proceeds from the sale of the specific legacy are impressed with the character of and stand in the place of the land sold.\textsuperscript{27} The principal case gives consideration to both of these theories. And there is language in the opinion that suggests the court based its decision on both.\textsuperscript{28} The application of either theory leads to the same conclusion. Certainly the same result must follow no matter whether it is said that the specific legatee has the same rights in the proceeds of the sale as he had in the specific legacy itself or whether the proceeds of the sale are considered to stand in the place of and to be impressed with the character of the land sold. Thus, both of these approaches are in application and effect methods through which the court can give effect to the testamentary intent of an incompetent testator.

There are a minority of courts which adhere strictly to the \textit{in specie} or \textit{identity} theory and apply it to the sale by a guardian, committee, or conservator of the subject of a specific legacy. They hold that disposal of or a substantial change in the identity of the subject of the legacy adeems the legacy entirely.\textsuperscript{29} The leading case following the minority rule states that when the specific thing given fails to exist, the legacy fails.\textsuperscript{30} Certainly one advantage of the minority view is that it is easy to apply and avoids the elusive and troublesome questions of intent.\textsuperscript{31}

No West Virginia cases were found which were in point with the principal case.\textsuperscript{32} There is indication in one case that ademption may

\textsuperscript{25} Lewis v. Hill, 387 Ill. 542, 546, 56 N.E.2d 619 (1953).
\textsuperscript{26} Bryson v. Turnbull, 194 Va. 528, 74 S.E.2d 180 (1953).
\textsuperscript{27} Id. at 536, 74 S.E.2d at 187.
\textsuperscript{28} Grant v. Banks, 155 S.E.2d 87, 95 (N.C. 1967).
\textsuperscript{29} E.g., \textit{In re} Ireland's Estate, 257 N.Y. 155, 177 N.E. 405 (1931); Hoke v. Herman, 21 Pa. 301 (1853); \textit{In re} Barrow's Estate, 103 Vt. 501, 156 A. 408 (1931).
\textsuperscript{30} \textit{In re} Ireland's Estate, 257 N.Y. 155, 158, 177 N.E. 405, 406 (1931).
\textsuperscript{31} New York by statute has modified the rule as set out in the Ireland case. N.Y. Estates, Powers and Trust Law § 3-4.4 (McKinny 1967).
depend on the intention of the testator.\textsuperscript{33} However, in another case there is language concerning the nature of specific legacies which indicates adherence to the \textit{in specie} theory.\textsuperscript{34} Early Virginia cases indicate that ademption generally operates as a matter of law without regard to the intention of the testator.\textsuperscript{35} However, the case of \textit{Bryson v. Turnbull}\textsuperscript{36} appears to put Virginia in line with the majority of American jurisdictions which hold that the sale of the subject of a specific legacy by the guardian of an incompetent testator does not work an ademption.\textsuperscript{37} It is also suggested that an insubstantial change in the form of a specific legacy will not result in an ademption.\textsuperscript{38}

As previously stated, the weight of authority is to the effect that a specific legacy is adeemed when the testator in his lifetime disposes of the subject matter of the legacy contrary to the terms of his will.\textsuperscript{39} However, in the cases such as the principal case, the majority of American courts hold that there is no ademption of the specific legacy insofar as the proceeds are traceable into the estate.\textsuperscript{40} But there is one qualification that must be made. In these cases the legacy is adeemed to the extent the proceeds of the sale are expended to support the incompetent testator.\textsuperscript{41} The courts in considering a case such as the principal case have obviously not followed the \textit{in specie} rule, the application of which would make it necessary to find that the legacy was adeemed when the specie of the property was changed or its identity substantially altered. Rather they have preferred to call into operation the \textit{intention} test and thus avoid the harsh result — ademption — that would follow from an application of the \textit{in specie} test.

\textit{James Alan Harris}

\textsuperscript{35} May v. Sherrard's Legatees, 115 Va. 617, 628, 79 S.E. 1026, 1028 (1913); Skipwith v. Cabell's Ex'or, 19 Gratt. (60 Va.) 758, 795 (1870).
\textsuperscript{36} 194 Va. 528, 74 S.E.2d 180 (1953). Although this case does not deal in terms of ademption, it presents a factual situation much like that of the principal case. Testatrix devised specific land and subsequently became incompetent. After the testatrix became incompetent a guardian sold part of this land and collected payments for other lands condemned by the United States government. The court held that the proceeds from the guardian's sale and from the condemnation proceedings should pass under the will of testatrix to the persons who would have taken the real estate under the will.
\textsuperscript{37} \textit{Id.} at 536. 74 S.E.2d at 187.
\textsuperscript{38} Hill v. Hill, 127 Va. 341, 347, 103 S.E. 605, 607 (1920).
\textsuperscript{39} Cases cited note 5 \textit{supra}.
\textsuperscript{40} Cases cited note 13 \textit{supra}.
\textsuperscript{41} Cases cited note 18 \textit{supra}.