Furthermore, the "consent" rationale is consistent with the constitutional right to travel. It has long been recognized that the right to travel without unreasonable government interference is a constitutionally protected right.[59] However, this right is by no means absolute. The right to use the highways is restricted by licensing requirements and obligations to pay tolls and the right may be removed for failure to comply with highway safety regulations. Passport requirements also restrict travel but are justified by considerations of national security.[60] These examples illustrate instances where restrictions may be put on the right to travel, provided the restrictions are "necessary to promote a compelling governmental interest."[61]

The potentially catastrophic consequences of hijacking certainly give the government a "compelling" interest in protecting the public. Airport screening searches are both reasonable and necessary in promoting this interest.[62] The "consent" procedure adopted in *Davis* avoids the necessity of stretching the *Terry* doctrine to cover airport searches and provides an effective method of combatting air hijacking. Rather than restricting the public's right to travel, the *Davis* decision represents a step toward insuring that those who do travel will travel safely.

MARK MOSSMAN

59. "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

60. Zemel v. Rusk, 381 U.S. 1 (1965).

61. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

62. *See* 49 U.S.C. § 1511 (1970) which provides: "Subject to reasonable rules and regulations prescribed by the Administrator, [of the Federal Aviation Administration] any air carrier is authorized to refuse transportation to a passenger . . . when, in the opinion of the air carrier, such transportation . . . might be inimical to safety of flight."

WILLS—COLLISION INSURANCE PROCEEDS RESULTING FROM ACCIDENT WHEREIN DECEDENT WAS KILLED AND DECEDENT'S AUTOMOBILE, WHICH WAS THE SUBJECT OF A SPECIFIC BEQUEST IN DECEDENT'S WILL, WAS TOTALLY DESTROYED, PASS TO THE SPECIFIC LEGATEE AND THERE IS NO ADEMPTION OF THE BEQUEST OF THE VEHICLE.—*In re Estate of Wolfe* (Iowa 1973).

Testator, by his will, bequeathed to his brother any automobile which he owned at the time of his death. Testator was fatally injured in an automobile accident on June 6, 1971. His automobile, a 1969 Buick Electra, was rendered a total loss. Pursuant to a settlement agreement, the insurance proceeds were paid to the executor of testator's estate. A dispute arose regarding whether the insurance proceeds should be distributed to the specific legatee or to the residuary legatee. The district court awarded the insurance proceeds to the specific legatee; the residuary legatee appealed. *Held,* affirmed. The automobile insurance proceeds from the accident wherein the automobile, which had been the supporting personalty of a specific bequest in testator's will, was totally destroyed, pass to the specific legatee. There is no ademption of the bequest of the vehicle. *In re Estate of Wolfe,* 208 N.W.2d 923 (Iowa 1973).

The traditional rule of ademption[1] is that when real or personal[2] property which has been specifically given under a will is later destroyed or disposed of so that it does not exist as part of the testator's estate at the time of his death, nothing else may be substituted for that which was originally given.[3]

In re Wright's Will,[4] a New York case, exemplifies what has been termed the "identity" theory of the doctrine of ademption. Under the identity theory, the testator's intention is not considered when deciding the question of ademption.[5] Rather, the bequest fails and the legatee takes nothing if the specifically bequeathed property has been given away, sold, or destroyed during the testator's lifetime.[6] Applying this rule, the Oklahoma supreme court in *In re Barry's Estate*[7] held that, though the testatrix died within eight hours after the automobile collision, the legatee of the specifically bequeathed automobile was entitled to receive only the salvage value of the vehicle and not the proceeds

1. Stake v. Cole, 257 Iowa 594, 599, 133 N.W.2d 714, 716 (1965) (defining ademption as "a taking away").
2. Newbury v. McCammant, 182 N.W.2d 147, 150 (Iowa 1970) (noting that both real and personal property are equally subject to ademption).
3. Stake v. Cole, 257 Iowa 594, 599, 133 N.W.2d 714, 716 (1965); *In re* Estate of Bierstedt, 254 Iowa 772, 775, 119 N.W.2d 234, 236 (1963); *see* Warren, *The History of Ademption,* 25 IOWA L. REV. 290 (1940).
4. 7 N.Y.2d 365, 165 N.E.2d 561, 197 N.Y.S.2d 711 (1960).
5. *See* 6 BOWE-PARKER: PAGE ON WILLS § 54.15 (New Rev. Treatise 1962). Page, *Ademption by Extinction: Its Practical Effects,* 1943 WIS. L. REV. 11.
6. *In re* Wright's Will, 7 N.Y.2d 365, 368, 165 N.E.2d 561, 562, 197 N.Y.S.2d 711, 713 (1960); *see* Warren, *The History of Ademption,* 25 IOWA L. REV. 290, 314 (1940).
7. 208 Okla. 8, 252 P.2d 437 (1952).

of the collision insurance policy.[8] However, other jurisdictions have either refused to apply the "identity" theory under similar circumstances[9] or have created exceptions to the theory.[10]

The Supreme Court of Iowa applied the strict identity rule in *In re Will of Miller*.[11] The testator's will, in *Miller*, directed the executor of his estate to sell certain described real property and distribute the proceeds to specified legatees.[12] The court held that since the testator had sold the property subsequent to the execution of his will, he therefore had died without land. Hence the specific legatee could not take the contract proceeds though unpaid at testator's death.[13] Subsequent to *Miller*, the identity rule has been held applicable, so that ademption occurs, when the testator sells[14] or releases[15] the property of a specific bequest or devise. Ademption was also held to occur in *In re Estate of Stonebrook*,[16] when the testator sold the specifically devised homestead though he purchased another homestead within five days and occupied it thereafter until his death.[17] It is significant in these cases[18] that each testator had knowledge of the condition of his estate, in relation to his will provisions, at the time the testator disposed of the specific devise or bequest.[19] Furthermore, each testator had the opportunity to change the provisions of his will after the disposal.[20] In addition, although not stressed by the court, the testator's conduct in relation to the property was not consistent with the will provisions.

However, in *Newbury v. McCammant*,[21] the Iowa supreme court held that the remaining, identifiable and unpaid contract proceeds from the sale of certain

---

8. *Id.*; *noted in* 53 COLUM. L. REV. 885 (1953).

9. *In re* MacDonald's Estate, 133 Cal. App. 2d 43, 283 P.2d 271 (1955) (district court of appeals discussed and then rejected the *Barry* decision giving the collision insurance proceeds to the specific legatee); Reading v. Dixon, 10 N.C. App. 319, 178 S.E.2d 322 (1971) (legatee received insurance proceeds from specifically bequeathed silverware which was stolen during testator's lifetime).

10. *See In re* Buda's Will, 21 Misc. 2d 931, 197 N.Y.S.2d 824 (Sur. Ct. 1960) (legatees received the collision insurance proceeds because the general "identity" rule was held inapplicable in situations of "common disaster"). *See also In re* Estate of Cramm, 27 App. Div. 2d 8, 275 N.Y.S.2d 769 (1966); *In re* Thum's Estate, 69 Misc. 2d 244, 329 N.Y.S.2d 760 (Sur. Ct. 1972) (indicating that the *Wright* rule is no longer effective in New York due to subsequent legislation). *But see* Pepka v. Branch, — Ind. —, 294 N.E.2d 141 (Ct. App. 1973).

11. 128 Iowa 612, 105 N.W. 105 (1905). *But see* Newbury v. McCammant, 182 N.W.2d 147, 149 (Iowa 1970).

12. *In re* Will of Miller, 128 Iowa 612, 105 N.W. 105 (1905).

13. *Id.* at 621, 105 N.W. at 108.

14. *In re* Estate of Sprague, 244 Iowa 540, 57 N.W.2d 212 (1953).

15. *In re* Estate of Keeler, 225 Iowa 1349, 282 N.W. 362 (1938).

16. 258 Iowa 1062, 141 N.W.2d 531 (1966).

17. *Id.* at 1065, 151 N.W.2d at 532.

18. *In re* Estate of Stonebrook, 258 Iowa 1062, 141 N.W.2d 531 (1966); *In re* Estate of Sprague, 244 Iowa 540, 57 N.W.2d 212 (1953); *In re* Estate of Keeler, 225 Iowa 1349, 282 N.W. 362 (1938).

19. *See In re* Estate of Stonebrook, 258 Iowa 1062, 1069, 141 N.W.2d 531, 534 (1966).

20. *See In re* Estate of Keeler, 225 Iowa 1349, 1357, 282 N.W. 362, 366 (1938) (testatrix knew that she had cancelled the note and mortgage but did not change her will though she lived approximately a year-and-a-half after she took title).

21. 182 N.W.2d 147 (Iowa 1970).

described real property did not adeem.[22] Although in *Newbury* the testatrix's will directed the executor to sell the property and to distribute the proceeds therefrom to named devisees, the testatrix sold the property herself subsequent to the execution of the will. The court stated that there was no ademption since the remaining unpaid proceeds were identifiable, in existence, and constituted the identical property which testatrix intended should pass to the devisees.[23] Unlike earlier Iowa decisions,[24] in *Newbury* the court seemed unconcerned with the fact that testatrix had knowledge of the condition of her estate, in relation to her will provisions, at the time of the sale of the property. Nor was the court concerned with the fact that testatrix died nearly two years after entering the contract for the sale of the real estate. It appears that the effect of *Newbury* is that the specific devise does not adeem when the testatrix's conduct in relation to the specific devise is not inconsistent with her will provisions, notwithstanding that testatrix has the opportunity to change her will provisions.

The Supreme Court of Iowa in *In re Estate of Bierstedt*[25] held that the unexpended proceeds from a court-ordered sale of property, which is the subject of a specific devise, does not adeem when the sale is made while the testator is mentally incompentent. The court in *Bierstedt* noted that the insane or incompetent testator is denied the opportunity to change his will.[26] Again, in *Stake v. Cole*,[27] the court held that the court-approved sale of specifically devised property by the guardian of an incompetent testatrix does not work an ademption to the extent that the proceeds of the sale are not used for the care and maintenance of the ward and are traceable into the hands of the executor.[28] It appears logical to hold that ademption does not occur in such situations. If the testator had not become mentally incompetent, it is likely that such a sale would not be necessary. However, if a testator's maintenance does require that specifically devised or bequeathed property be sold, and if the testator is mentally competent at such time, then he has an opportunity to change his will. Whereas, if the testator has become mentally incompetent by the time of such sale, he has no opportunity to change his will in light of the sale.

The identity rule was held inapplicable in *In re Estate of Wolfe*,[29] wherein the Iowa supreme court determined that the destruction of property which is the subject of a specific bequest, simultaneous with the death of the testator, does not work an ademption.[30] The court noted that the occurrence was an

22. *Id.* at 151.
23. *Id.*
24. *See* cases cited note 18 *supra.*
25. 254 Iowa 772, 119 N.W.2d 234 (1963). *See generally* Wilmerton v. Wilmerton, 176 F. 896 (7th Cir.), *cert. denied*, 217 U.S. 606 (1910); Walsh v. Gillespie, 328 Mass. 278, 154 N.E.2d 906 (1959); Warren, *The History of Ademption*, 25 IOWA L. REV. 290, 324-25 (1940).
26. *In re* Estate of Bierstedt, 254 Iowa 772, 775, 119 N.W.2d 234, 236 (1963).
27. 257 Iowa 594, 133 N.W.2d 714 (1965).
28. *Id.* at 599, 133 N.W.2d at 717. *See also* 6 BOWE-PARKER: PAGE ON WILLS § 54.18 (New Rev. Treatise 1962).
29. 208 N.W.2d 923 (Iowa 1973).
30. *Id.* at 925.

involuntary disposition by an event whereby the testator was denied, by death, any opportunity to change his will after the event had occurred.[31] Thus, it appears that the court determined that a specific bequest will not adeem where the testator has not had an opportunity to indicate his intention.

When the cases in which the Iowa supreme court has considered the question of ademption are examined in their totality, the court's formulation of the ademption rule[32] is not entirely clear. However, the *Wolfe* case does indicate that the court has determined that specific legacies will adeem where such an intention is indicated by the testator.[33] Further, it appears that the court has determined that when the disposition of the property which is the subject of a specific bequest or devise occurs by the voluntary act of the testator, ademption will not occur when the testator's conduct indicates an intention not inconsistent with the provisions in his will. Such an instance is *Newbury v. McCammant*,[34] wherein the testator disposed of the property, and the proceeds therefrom were existent and identifiable. However, when property which is the subject of a specific bequest or devise is disposed of by the voluntary act of the testator, ademption will occur where the testator's conduct indicates an intention which is inconsistent with his will provisions. Such a situation occurs when the testator intermingles the proceeds with his general estate. Finally, when the property which is the subject of a specific bequest or devise is extinguished by an involuntary act of the testator, ademption will only occur when: (a) the testator has had an opportunity to indicate his intention[35] and has not indicated an intention that ademption should not occur,[36] or (b) the property is necessary for the testator's court-ordered care and support.[37] Such instances are exemplified by situations where the property is sold by court order for an incompetent testator,[38] destroyed by fire,[39] stolen,[40] or destroyed in a collision.[41]

The testator in *Wolfe* was denied the opportunity to change his will and thereby indicate his intention. Further, since the testator's death and the destruction of the property were simultaneous, the court was not required to determine the time period which is necessary in order to provide a testator an "opportunity to indicate his intention."[42] However, in reaching this decision, the court referred to *Dixon v. Reading*,[43] a North Carolina case wherein

31. *Id.*
32. *See* 57 IOWA L. REV. 1211 (1972) (a comment prior to the *Wolfe* decision, stating that the court has only delineated exceptions to the identity rule).
33. *In re* Estate of Wolfe, 208 N.W.2d 923, 925 (Iowa 1973) (the right rule is that legacies are adeemed only where such an intention appears on the part of the testator himself).
34. 182 N.W.2d 147 (Iowa 1970).
35. *In re* Estate of Wolfe, 208 N.W.2d 923 (Iowa 1973).
36. Newbury v. McCammant, 182 N.W.2d 147 (Iowa 1970).
37. Stake v. Cole, 257 Iowa 594, 133 N.W.2d 714 (1965).
38. *In re* Estate of Bierstedt, 254 Iowa 772, 119 N.W.2d 234 (1963).
39. *In re* Thum's Estate, 69 Misc. 2d 244, 329 N.Y.S.2d 760 (Sur. Ct. 1972).
40. Reading v. Dixon, 10 N.C. App. 319, 178 S.E.2d 322 (1971).
41. *In re* Barry's Estate, 208 Okla. 8, 252 P.2d 437 (1952).
42. *See* note 31 *supra* and accompanying text.
43. 10 N.C. App. 319, 178 S.E.2d 322 (1971).

the court determined that a twenty-eight day period was not a sufficient time period to allow the testator an opportunity to change his will, after the extinguishment of the specific bequest had occurred.[44] The ascertainment of a sufficient period of time is difficult. Realistically, a two-day period does not appear sufficient. One and one-half years appears to provide more than a sufficient opportunity.[45] Perhaps the Iowa supreme court, unlike the *Dixon* court, will find that a twenty-eight day period is sufficient time to allow a testator an opportunity to recognize that his will provisions need to be changed. This question must await determination by the Iowa supreme court.

Although a review of its decisions indicates that the Supreme Court of Iowa has not clearly formulated the doctrine of ademption, it does appear that the court has indicated the direction which it is taking. It appears that the rule, when finally formulated, may be that ademption of a specific bequest or devise will not occur unless (a) the testator is capable of indicating his intention,[46] and (b) the testator has had a sufficient opportunity to indicate his intention.[47] Further, when a testator is capable of indicating his intention and has had a sufficient opportunity to indicate his intention, ademption will not occur if the testator does in fact indicate an intention that there be no ademption.[48]

ROBERT BELSON

---

44. Reading v. Dixon, 10 N.C. App. 319, 320, 178 S.E.2d 322, 323 (1971) (though testator had not changed his will provisions at the time when he became physically and mentally incompetent approximately twenty-eight days after the silverware was stolen, the court held that the bequest had not adeemed and that the specific legatees were entitled to the insurance proceeds).

45. *In re* Estate of Keeler, 225 Iowa 1349, 282 N.W. 362 (1938). *See also In re* Estate of Stonebrook, 258 Iowa 1062, 141 N.W.2d 531 (1966) (two years provided a sufficient opportunity).

46. *See* note 37 *supra.*

47. *In re* Estate of Wolfe, 208 N.W.2d 923 (Iowa 1973).

48. *See* Newbury v. McCammant, 182 N.W.2d 147, 151 (Iowa 1970).