Wills & Estates
Winter Term 2014

Lecture Notes – No. 11

Subject-Matter and Types of Testamentary Gifts

- A Will contains gifts of property. Obviously not all gifts can be completed – T must actually own the property, and, no one other than the Estate (e.g. a secured lender) has a better claim on the property.

- Absent provisions in the Will on point, the type of gift that is made is important in determining whether it can be satisfied wholly or partially from the assets of the deceased.

Two related concepts are important.

Abatement

Abatement refers to the process by which the assets of a solvent Estate are used to pay debts, liabilities, and expenses which arise on the testator's death. If there are insufficient assets to pay creditors, then the Estate is insolvent and no gifts can be satisfied. Where the Estate is solvent but there is insufficient property to satisfy all gifts, then some gifts will abate – that is, will be used to pay the deceased's debts on a shared basis. If the Will doesn't provide specific terms on the point, then the residue and then general legacies and then specific legacies abate in order (and pro rata). In other words, specific gifts take priority over general gifts which in turn takes priority over residuary gifts. See s.5 of the Estates Administration Act:

> Subject to section 32 of the Succession Law Reform Act, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from the person's will or any codicil thereto, is applicable rateably, according to their respective values, to the payment of his or her debts, funeral and testamentary expenses and the cost and expenses of administration.

The 'contrary intention' to prefer one set of legatees over another in respect of abatement as set out in the Will must be clear on the face of the document.

Lindsay v Waldbrook
(1897), 24 OAR 604 (C.A.); cb, p. 539

Here five legacies were set out in the Will in relation to a fund of money arising from the sale of real property. There wasn't enough money in the fund to satisfy all the gifts. Should all of the gifts abate or only one? The question was whether the words setting up the clause set out a 'contrary intention' to treating all of the legatees differently. The argument made by one legatee was that his share was to be set aside and invested and used for his education and maintenance. On appeal, it was held that the testator did not display an intention in the Will to treat this gift differently in respect of priority over the other four legacies. Thus, **only clear language to effect the testator's intention to**

give one general legatee priority over another will allow for avoidance of the pro rata approach to abatement.

Ademption

Ademption occurs where the property subject of the legacy no longer exists as part of the testator's estate and as a result the gift is void.

Thus, where a house is destroyed by fire (in which the testatrix perishes), the insurance money falls into the residue of the estate as a gift of the house under the will adeems; **Re Hunter (1975), 8 O.R. (2d) 399 (H.C.J.); cb, p.544**.

[Please note the Succession Law Reform Act, s.20(2)(b) would now operate to allow the legatee receive the insurance proceeds. See also **Re Clements Estate, 2007 NSSC 168; cb, p.579, fn9,** where T dies in a house fire before most of the house was destroyed. Thus, when T died his beneficial interest passed to the devisees to be held by the Estate Trustee subject only to abatement.]

McDougald Estate v. Gooderham
(2005), 17 E.T.R. (3d) 36 (Ont CA); cb, p.547, fn110

The Substitute Decisions Act provides:

> 35.1
> (1) **A guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will.**
> (2) Subsection (1) does not apply in respect of a specific testamentary gift of money.
> (3) **Despite subsection (1),**
> **(a) the guardian may dispose of the property if the disposition of that property is necessary to comply with the guardian's duties**; or
> (b) the guardian may make a gift of the property to the person who would be entitled to it under the will, if the gift is authorized by section 37.
>
> ...
>
> 36.(1) The doctrine of ademption does not apply to property that a guardian of property disposes of under this Act, and anyone who would have acquired an interest in the property acquires a corresponding interest in the proceeds.
> ...
>
> 37.(1) A guardian of property shall make the following expenditures from the incapable person's property:
> 1. The expenditures that are reasonably necessary for the person's support, education and care.
> 2. The expenditures that are reasonably necessary for the support, education and care of the person's dependants.
> 3. The expenditures that are necessary to satisfy the person's other legal obligations.

In this case, the Testatrix was incapable and her Attorney under a Power of Attorney for Property sold some Florida property to pay for her care. Gillese JA held:

> 29 **At the time that the attorneys considered selling the Palm Beach property, they faced two apparently conflicting obligations. The first was their obligation to ensure that Ms. McDougald's assets were managed prudently. They had to manage Ms. McDougald's property so as to provide her with adequate care while ensuring that her assets were preserved. Both at common law and by virtue of s. 32(1) of the Act, as discussed below, the attorneys were required to act diligently, with honesty and integrity and in good faith, for Ms. McDougald's benefit.**
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> **30 The attorneys' second obligation was to ensure that Ms. McDougald's testamentary intentions were fulfilled.** Under the terms of Ms. McDougald's will, her sister, Cecil Hedstrom, was to receive the Palm Beach property. The fact that a corporation owned the property was not a problem because paragraph 4 of the will directed her trustees to do whatever was necessary to transfer property held by the corporation to the beneficiary.
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> 31 **Absent the anti-ademption provision, the trustees could not have fulfilled both obligations. If they sold the property in order to prudently manage Ms. McDougald's assets, they would upset Ms. McDougald's desire to give the property to her sister. If they retained the property and transferred it to Ms. Hedstrom on Ms. McDougald's death, they would have permitted Ms. McDougald's assets to be depleted.**
>
> **32 Section 36(1), as interpreted above, enabled the trustees to meet both obligations.** They were able to manage Ms. McDougald's property prudently. In this regard, it is worthy of note that the application judge found that the attorneys' decision to sell the property was prudent. And, the attorneys were able to respect Ms. McDougald's clear wish that her sister receive the property, by giving her the proceeds of sale of the property.
>
> 33 As the application judge noted, **the Act is to be given a large and liberal interpretation so as to best ensure the attainment of its objects. The intent of the Act is to provide a structure to protect individuals who are incapable of managing their financial affairs. It provides methods by which the property of persons whose capacity is diminished may be managed by others, including by means of a continuing power of attorney. Unlike a capacitated testator, Ms. McDougald did not have the ability to revise her will when it became apparent that the property should be sold. On the interpretation of s. 36(1) of the Act given above, the attorneys were able to take the steps required to manage Ms. McDougald's property in a way that respected her needs and her wishes at a time when she was incapable of managing her affairs on her own.**

Abatement and Ademption Treatment Based on Character of the Property

Specific legacy (i.e. a gift of a specific property)	A specific legacy which adeems fails. A specific legacy carries all income, profit and accretions on it. General legacies abate before specific legacies. Expenses in respect of preservation of the subject-matter can be charged against the legacy.
General legacy (i.e. a gift of specified property from the general assets of the estate; e.g. a gift of shares, which the estate may have to purchase)	General legacies abate before specific legacies. General legacies don't adeem.
Demonstrative legacy (i.e. a general gift but primarily from a specific fund held by the estate, e.g. from an investment certificate)	A demonstrative legacy may adeem but only in respect of that fund upon which it is to be drawn. A demonstrative legacy is treated as a specific legacy and will abate after general legacies.
Pecuniary legacy (i.e. a simple gift of money from the general assets of the estate)	Pecuniary legacies are treated as general legacies and will abate before specific legacies.
Residuary legacy (i.e. a gift of the residue of the testator's general personal assets after other bequests are satisfied).	A residuary legacy carries all income, profit and accretions on general legacies.

Property abates as follows:

1. Residuary personalty;
2. Residuary real property;
3. General legacies (including pecuniary bequests from the residue);
4. Demonstrative legacies (i.e bequests from the proceeds of a specific asset or fund, such as a bank account, which does not form part of the residue);
5. Specific bequests of personalty; and
6. Specific devises of real property.

Illustrative Cases:

Re Millar
(1927), 60 OLR 434 (S.C.); cb, p.527

Here there was a general legacy which was impossible to fulfil. The preamble to the Will read:

> This will is necessarily uncommon and capricious because I have no dependents or near relatives and no duty rests upon me to leave any property at my death and what I do leave is proof of my folly in gathering and retaining more than I require in my lifetime.

The clause in question read:

> To each Protestant Minister exercising his clerical functions at an annual salary and resident in Toronto at the time of my death and to each Orange Lodge in Toronto I give one share of the O'Keefe Brewery Company of Toronto Limited.

Not only had O'Keefe Brewery Company been reorganized by the time of the testator's death, but the successor firm was privately held and so shares could not be purchased.

It was held that the gift created a general legacy which could be satisfied by the value of the shares in question if they could be purchased.

Middleton JA approved of the dicta in Re Gray (1887), 36 Ch.D. 205, 211, '**a general legacy of this kind amounts in effect to a direction to the testator's executors to buy the shares or other property designated ... if the legatee had a choice in the matter and said that he would rather not have shares, he would then take the amount of money which would have had to be expended in buying them.'**

[nb: in essence then this was a gift of money, valued notionally as against the shares. As the property was not actually owned by the testator at any time, the gift did not adeem.]

Re Webster
[1937] 1 All ER 602 (Eng. C.A.); cb, p.530

The testator's Will included the following bequest to his son:

> I bequeath to the said Frank Eric Webster the sum of £3,000 to be paid to him out of the share of my capital and loans in the business of Webster & Bullock, City Meat Market, Birmingham, and I direct that provided the said Frank Eric Webster shall within six months of my death be accepted by the remaining partners in the said business as a partner as from the date of my death upon terms mutually acceptable to the said Frank Eric Webster and the remaining partners of the said business the said legacy of £3,000 or any part thereof shall not be withdrawn by the said Frank Eric Webster until after the expiration of 12 months from the date of my death, and in the meantime shall bear interest at the rate of £ 5 per centum per annum.

At the time of the testator's death, his share in the partnership was worth much less than £3,000 and the firm was in debt. As the court held that the gift was demonstrative but was not intended to be limited to the specified fund (the value of the testator's share of the business), the gift could properly be satisfied out of the testator's residuary estate.

Per Lord Wright MR:

> It may be convenient here to refer to the judgment of Sir William Page Wood V-C in the case of Paget v Huish (1863), 1 H&M 663, 671:
>
> **'These are, therefore, the three classes of gifts: First, a general gift, in which no special fund is pointed at for payment; secondly, a specific gift out of a particular fund alone; and, thirdly, a gift where a particular fund is pointed out as primarily applicable, but where the gift is not to fail by the failure of the particular fund.** In this case I think there is a clear intention that the gift should take effect in any event, because, after bequeathing several legacies, the testator proceeds thus: "I give and devise the following annuities," specifying them, and then adds a declaration that these annuities shall be paid by the trustees out of the rents of the real estate thereby devised. Subsequently, there is a gift to the trustees of all the real estate and the residuary personal estate, upon trust, out of the rents of the realty to pay the annuities, and subject thereto to apply the real and residuary personal estate upon certain specified trusts. All this appears to me only to show that the testator, after making a positive gift, points out the particular fund which he desires to have first applied, and which he supposes to be adequate for the purpose. It is clear that he preferred that the gift should be satisfied out of the realty rather than the personalty; but the question now is, whether he preferred that it should fail altogether rather than be thrown upon the personalty...
>
> Applying that here, I ask myself **whether there is an indication of an intention that the gift was to fail on failure or insufficiency of the partnership interest.** Now, the first words, "I bequeath to the said Frank Eric Webster the sum of £ 3,000," are, in themselves, obviously appropriate only to a specific gift. Then come the words: 'to be paid to him out of the share of my capital and loans in the business of Webster & Bullock, City Meat Market, Birmingham.'
>
> **These words ought, I think, to be construed as meaning "to be paid to him primarily out of the share," and not as meaning "to be paid to him only out of the share of the capital and loans."** That is very much on the same lines as the view expressed by Page Wood V-C, in the case to which I have just referred.
>
> **So far, I should think, and this was what the learned judge also thought, that the gift is clearly a demonstrative legacy.** Then comes the remainder of the clause which I have read. Now, that does not, in my judgment, change the character of the gift; it provides for what is to happen in a particular contingency, which may or may not occur; in fact, it did not occur, but, if that contingency had occurred, then the payment of the legacy, or some part of it,

> might have to be postponed. In so far as it was to be paid only by being withdrawn from the partnership assets, it was to remain there until after the expiration of 12 months from the date of the death. That means that it was for the benefit of the partnership, and to that extent for the benefit of the son, because it only applies if he became a partner; and it would mean that, instead of the testator's interest being paid out in four quarterly instalments, it should remain unaffected for the whole period of 12 months. But, in my opinion, the addition of that purely conditional and hypothetical clause does not change the character of the original words, which are clearly words appropriate to making a demonstrative gift.

Culbertson v Culberston
(1967), 60 WWR 187 (Sask CA); cb, p.533

Here the situation was the opposite of the Webster case above. The Will gave 'the following amounts to the following persons' and named 31 people. It then provided:

> I direct that each of the above legacies shall be paid out of the money realized from the sale of my farm lands, and if the amount... should not be sufficient to cover the full amount of the said legacies, then each person shall take a proportionate share.

The sale of the lands during the testator's lifetime resulted in a fund well in excess of the legacies but, on his death, the executor received only a much smaller amount as what remained owing. Previous payments had been put in a general bank account and their identity lost. At first instance it was held that the legacies were demonstrative and should be paid in full, using the balance of the purchase price first, then the general estate. On appeal, it was held that the legacies were specific and payable only out of the balance of the purchase price. Thus, the legacies adeemed equally ('pari passu'). The testator's language, given its natural and ordinary meaning, limited payment to this particular fund.

Per Maguire J.A.:

> 2 The late Moses Culbertson died on June 30, 1965. By his last will and testament bearing date June 30, 1960, the testator bequeathed 31 legacies of varying amounts, totalling $24,750, to certain charitable institutions and named persons. In respect to these legacies the will read:
>
> > I give devise and bequeath the following amounts to the following persons and organizations.
>
> 3 Then followed the names of the persons and organizations together with the amount given to each.
>
> 4 This provision in the will is immediately followed by the following paragraph:
>
> > I direct that each of the above legacies shall be paid out of the money realized from the sale of my farm lands and if the amount recovered from the sale of my farm lands should not be sufficient to cover the full

> amount of the said legacies, then each person shall take a proportionate share in accordance with the amount he would have received if the full amount of the legacies had been realized.

5 The residue of the estate, remaining after certain other bequests or provisions not of importance in our present consideration, was devised and bequeathed to his brother, William, and William's wife, in equal shares.

6 At the date of the will, the testator owned 850 acres of farm lands. These lands were sold by him on July 4, 1963, under an agreement of sale for a total sale price of $30,000. At the date of death the sum of $9,288.75 remained payable under this agreement.

...

15 **With every deference to the learned chambers judge, I am of the opinion that the language used by the testator, given its natural and ordinary meaning, limits the payment of the legacies to the fund to be realized from the sale of his farm lands. To place upon the words of the testator an interpretation that he intended the legacies to take effect out of some other of his property if the fund proves inadequate would, in my opinion, defeat entirely his direct and specific instructions that the legacies abate if the fund should be deficient. In my view, by reading the two paragraphs together and giving to the language there its natural and ordinary meaning, the legacies constitute a bequest of the specific fund to be realized from the sale of the testator's farm lands to the amount of the bequests: If the fund should be deficient, the legacies would abate; if the fund exceeds the amount of the legacies, the excess would fall into residue.** While the courts do not favour construing a bequest or devise in a will, as being specific when there is doubt, recourse cannot be taken to this rule of construction when, from the language of the will, the intention of the testator can be determined.

16 Payment of these legacies may, therefore, be made only from the fund designated by the testator. The portion of the sale proceeds received by the testator in his lifetime, having lost identity as such proceeds and thus as part of the designated fund, there remains only the balance of the sale price of the lands remaining payable at the testator's death, namely, $9,288.75, which may constitute the fund.

Re Halliday Estate
2011 MBQB 35

Per Menzies J.:

[1] Winnifred Joyce Halliday (the testatrix) passed away October 18th, 2007. She had executed her last will and testament on January 13th, 2006 which was admitted to probate on October 20th, 2010. The executor of her estate is her son Charles Halliday. The will was short consisting of three pages of directions including the following clause:

> 3 (c) My house and land excluding contents shall be sold and the proceeds for same shall be paid over and conveyed to Sherwood Home in Virden, Manitoba, West-Man Nursing Home in Virden, Manitoba, the Virden Community Cemetery, Virden Health Centre Auxiliary, the Canadian Red Cross, the Salvation Army, and the congregation of the Presbyterian Church in Virden, Manitoba; all for the general purposes in equal shares. **In the event my house and land have been sold prior to my decease then to transfer and deliver the sum of $10,000.00 to each of the named beneficiaries**.

[2] In March of 2007, the testatrix transferred the house and land to her son Charles Halliday (the executor of her will). Prior to the transfer, Charles Halliday was living and working in Alberta. The testatrix transferred the house and land to Charles Halliday in exchange for him agreeing to move to and live in Virden, Manitoba where she resided.

[3] The executor asks for directions respecting the bequests contained in clause 3 (c) of the will.

...

[11] There are generally two types of legacies, namely specific and general. They were described in Halsbury's *Laws of England* (4th ed., 1998) as follows:

> A specific legacy must be of some thing or of some interest, legal or equitable, forming part of the testator's estate; it must be a part as distinguished from the whole of his personal estate; it must be identified by a sufficient description, and separated in favour of the particular legatee from the general mass of the testator's personal estate…

A general legacy may or may not be part of the testator's property: it has no reference to the actual state of his property, and is a gift of something which, if the testator leaves sufficient assets must be raised by his executors out of his general personal estate. Whether or not a particular thing forms part of the testator's personal estate is a pure question of fact; so long as it is the testator's at his death it is capable of being specifically bequeathed. Whether or not it has been separated from the general personal estate depends on the true construction of the will. In the case of real estate a devise, whether of a specific property or by way of residue, is specific [Vol. 17, paras. 1228-9]

[12] **A specific legacy will be subject to the doctrine of ademption. Courts are slow to define a legacy as a specific legacy and will not do so unless the intent to create a specific legacy is clearly expressed.** {See: *Diocesan Synod of Fredericton v. Perrett*, [1955] 3 D. L. R. 225}.

[13] There is little doubt as to the intent of the first portion of the bequest in this clause. The wording indicates the house and land is to be sold and the seven beneficiaries are to receive an equal portion of the proceeds of the

> sale. The first portion of clause 3 (c) constitutes a specific legacy. As the house and land did not form a part of the testatrix's estate on her death nor did the proceeds of sale from the property exist, that portion of the bequest must adeem. The gift fails.
>
> [14] **It is the second portion of the clause which must be examined to determine whether the testatrix has bequeathed a specific legacy which has adeemed or a general legacy which passes to the named charities.**
>
> [15] **The executor argues that because all bequests to charities exist in the same clause, the clause must be read together to mean that any gift to the charities must come from the proceeds of sale of the house and land. As there are no proceeds of sale from the house and land, the gift fails.**
>
> **[16] I cannot accede to that argument. The wording of the second portion of the clause is clear using the ordinary meaning of the words. In my opinion, this portion of the will provides that in the event that the house and land are sold prior to the testatrix's death, each of the named charities receive the sum of $10,000.00. There is no wording which requires the gift to each charity to come from any specific source or fund. The gift is a general legacy.**
>
> ...
>
> [24] On a reading of the will in this case, I am satisfied the principal concern of the testatrix was not the sale of the house and land but rather the gift to the named charities.

Date From Which Will Speaks

The Succession Law Reform Act provides:

> 22. Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to,
>
> (a) the property of the testator; and
> (b) the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator under subsection 20 (2).

This section is based on the 1837 English Wills Act and establishes the ambulatory nature of Wills; that is, the Will can be created in respect of assets which comprise part of the testator's estate. Sometimes the question arises as to whether property acquired after the execution of the Will was intended to be excluded from the operation of a particular clause (i.e. a gift of the house in which T owned at the execution of the Will, or, the specific house which was owned at execution and which may have later been sold); alternatively, one might approach the question as one of interpretation of the term rather than operation of the Will.

Re Rutherford
(1918), 42 OLR 405 (HCJ); cb, p.548

Per Middleton JA:

> The section [the predecessor of the present s.22, SLRA] in effect provides that, **unless from the will itself you can see that the testator did not intend after- acquired property to pass, it must be read as though he had executed it immediately before his death.** In many cases this must result in imputing to the testator an intention which in fact he never had; but, on the other hand, the opposite rule would even more frequently result in defeating his intention, This is at once apprehended where the expression used is general, e.g., where there is a gift of "my house" or "my horse," and the testator had sold his house or his horse and had bought another. The wife to whom he had given his house or the son to whom he had given his horse would riot easily understand why nothing was given because of the sale of the property owned at the will's date. So this statute establishes the rule, as put by one Judge, that **the testator must be assumed to have read his will or carried it in his mind till shortly before his death, and to have refrained from any change because it expressed his intention at that time.**
>
> **Now two things have been frequently found in wills which the Courts have taken as an indication of a contrary intention. When a testator speaks of that which he gives as that which he owns at the date of the will, clearly that and that alone is given, for the provision is not that the will must in all respects be regarded as made immediately before the death.**
>
> **Then, when the will speaks of a specific thing, and is not general in its provisions, the thing given must be determined by the language used by the testator. Nothing else passes, for nothing else is given.** In this way Judges, always slow to recognise by decision the desirability of reform, cut down the full meaning and effect of the statute. But it has always been held that when the thing given remains, and has, been added to between the date of the will and the date of, death, the whole property answering the description at the latter date will pass.

Re Bird
[1942] OR 415 (CA): cb, p. 552

Here the testatrix bought a vacant lot in 1891 described as ‘Lot 57, Plan 184’ with a municipal address (set after she built a house on the property) of 14 Mitchell Avenue. She made a will devising it to her son, but later was required to tear it down and thereafter rebuilt is as two houses, 14 and 16 Mitchell Avenue. No change was made in the Will notwithstanding this development of the lot. There was a signed memorandum in which the testatrix set out her intention to give both houses to the son. While the dissenting judge would apply the statute strictly and only allow 14 Mitchell Ave to pass to the son, the majority held that there was a contrary intention.

Per Fisher JA:

> **It is clear to my mind, the testatrix having by her will specifically described and identified the property she devised to her son, that notwithstanding the fact that the description at the date of death applied to part only of the property, the devise covered and included not only the land itself, but all the buildings thereon at the date of death**, and further that even if there was a changed condition of the property subsequent to the making of the will, that changed condition satisfied the description of the property devised under the will...
>
> ... Lindley L.J. in In re Portal and Lamb (1885), 30 Ch. D. 50, [said] at p. 55: "It [meaning section 24 of The English Wills Act] does not say that we are to construe whatever a man says in his will as if it were made on the day of his death." Hawkins on Wills, 3rd ed., at p. 27, on the authority of In re Evans, says: "A specific devise is not cut down by an alteration in the property made after the date of the will..."
>
> The Court, in construing a will such as this, is entitled to take into consideration the condition of things in reference to which it was made, and, where there exists a specific description, to consider all the circumstances relating to the property and material to identify the thing described...
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> **I am of opinion that a contrary intention within the meaning of s. 26(1) of The Wills Act, appears here from the fact that the testatrix has used the description, "14 Mitchell Avenue" to refer to the whole Lot 57. The description "14 Mitchell Avenue" meant the same to her as the description "Lot 57", and therefore the will must be read as if she had said "Lot 57".**

Re Forbes
[1956] OWN 527 (C.A.); cb, p.554

Here a motion was for directions in respect of the first clause of the testator's Will, which read:

> To convey unto Anna Mae Poore of the Town of Wiarton in the County of Bruce, Married Woman, the premises **where I now reside** in the said Town of Wiarton to be hers absolutely. [emphasis added]

Did this clause refer to the property in which the testator lived at his death, or, the property in which the testator resided when he signed the Will? Based on the construction of the Will and the ordinary meaning of 'now', it was held that the testator intended to identify the property in which he resided at the time that he made the Will (and thus expressed a contrary intention to the Will speaking from the date of death).

Re Britt
[1968] 2 O.R. 12 (C.A.); cb, p.557

The testatrix's will read in part:

> 5. I WILL AND DECLARE that all monies owing on a First Mortgage on the lands and premises situate at 521/2 St. Patrick Street, in the City of Toronto, be paid to my daughter, Freda Koskie, my sons, Sam Britt, Sydney Britt and Arthur Britt, all of the City of Toronto, and to my granddaughter, Gloria Martin, of the City of Miami, in the State of Florida, one of the United States of America, in equal shares. [emphasis added.]

The property in question was subject of a foreclosure action, and the testatrix held an unenforced order for $11,000 on her death. Had the gift of 'all monies owing' become adeemed as the monies were converted into a judgment which was itself proprietary in character (i.e. a chose in action)? No - the change in respect of the property here was in name or form only (otherwise the debtor could avoid paying the estate).

Per Laskin JA:

> It is well to note that the testatrix did not, in para. 5, dispose of either her mortgage or of all her interest in the property; she used the words "all monies owing on a first mortgage" of the particular property. **Had the monies owing been paid off in her lifetime, it would be clear that the gift had been adeemed. Had she given the mortgage as such (instead of the money secured thereby) and final foreclosure had occurred in her lifetime, it would also be a proper conclusion that ademption resulted...**
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> ... because the mortgagee still retained the property at her death, the mortgage debt, although translated into a judgment on the covenant, remained enforceable by execution; in other words, it remained alive as a judgment debt. The question then becomes whether a bequest of a debt owing to a testator is adeemed where at his death it has become a money judgment.
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> I would answer this question in the negative...

Re Cudeck
(1977), 16 O.R. (2d) 337 (C.A.); cb, p.561

At issue here was a gift in the Will of money drawn from investment certificates which had been cashed by the testator during his life. The Court held that the money was a substitute for the entitlement to the value of the certificate and could be followed. The Will read in part:

> 4. I GIVE, DEVISE AND BEQUEATH all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my said Trustees upon the following trusts, namely:
>
> .....

> (e) To deliver over and pay to my friend, MARIE ANNE DORINIE, formerly of St. Lucia in the West Indies, and now resident at 2 Brahms Avenue, Apartment 902, Willowdale, Ontario, the proceeds of a Term Deposit of 28,000.00 principal plus interest, with the Royal Bank of Canada at Jane and Yorkwoods Gate, Downsview, Ontario, said Term Deposit having been made on or about November 10th, 1973, for her own use absolutely.

A later codicil to the will was executed and which read:

> 3. It is my intention to give a gift to my friend, MARIE ANNE DORINIE, of a term deposit in the amount of FORTY THOUSAND DOLLARS (40,000.00) plus any accumulative interest thereon, said term deposit being located at The Royal Bank of Canada at Jane and Yorkwoods Gate. This gift is referred to in my Will of November 14th, 1973 in paragraph 4(e), but the amount shown in paragraph 4(e) is TWENTY-EIGHT THOUSAND DOLLARS (28,000.00) and should be amended to read FORTY THOUSAND DOLLARS (40,000.00) and also after the date November 10th, 1973 the following words should be added "or at any time thereafter".

Before his death, the testator cashed the term deposit, deposit those same funds into his bank, withdrew a sum of money and placed that sum in a safety deposit box together with a letter confirming the gift to Dorinie. The testator's wife, as residuary legatee, argued that the gift had been adeemed by cashing the term and then commingling those funds with others. The Court of Appeal held that it had not, and applied dicta from Hicks v. McClure (1922), 64 S.C.R. 361, 364 per Duff J:

> Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such.

The funds in the safety deposit box could be identified as the funds arising from the term deposit.