Wills & Estates
Winter Term 2018

Lecture Notes – No. 11

VOID CONDITIONS

Two policies seemingly pull in opposite directions in property: the law seeks to maximize the right of the proprietor to give his or her property subject to whatever conditions are thought appropriate. At the same time, there is a broader interest in certainty of property rights to facilitate transactions. Hence we favour early and complete vesting of rights where possible.

The law has held that certain types of condition are void for public policy reasons, but not many – inciting crime, inducing separation and divorce, and preventing marriage unreasonably are a few examples. These are socially-constructed reasons that may change as social conditions change.

Re Goodwin
(1969), 3 DLR (3d) 281 (Alta SCTD)

The will included the following gift:

> I Give, Devise and Bequeath all my real and personal estate of which I may die possessed in the following manner, that is to say: One-half to my daughter, Ruth Elaine Claire Goodwin**, one-quarter to my daughter-in- law, Judeth Goodwin, provided she does not re-marry**, and one-quarter to my grandson, William Trent Goodwin.
>
> **If my daughter-in-law should re-marry then her one-quarter share shall go to my said grandson**, William Trent Goodwin.

Here the issue is whether the restraint is on marriage in an unjustified manner or whether the intention of the testator reflects a more principled approach to distributing his assets.

Per Riley J:

> 8. A distinction is of course drawn between a condition against marriage or requiring marriage with a particular person or a particular class of persons and a condition wherein the words used relating to marriage merely describe the interest to be taken by the donee. There is no prohibition to a gift to a donee so long as the donee remains unmarried for marriage may be the ground for which a gift is given or is revoked.
>
> ...
>
> 19. **The intention of the testator was only to provide for the daughter-in-law while she was in fact a widow and that upon her remarriage it was**

> **his intention to provide for his grandson on the basis that his daughter-in-law would then be provided for out of her subsequent remarriage.**
>
> **20. The will does not [attempt to] avoid the "in terrorem rule" and in no sense is a restraint against marriage.**
>
> 21. Even if Judith North (nee Goodwin) is entitled to the realty on the death of the deceased, it is divested upon the remarriage, and she is only entitled to the interest on the realty from the date of the death until the date of her remarriage meaning thereby from January 16, 1968, to July 27,1968. The maxim *de minimis non curat lex* would seem to apply: see Osbaldeston v. Bechthold, [1953] 2 S.C.R. 177.

Re Kent
[1982] 13 ETR 53 (BCSC)

A common type of condition that is sometimes employed is a forfeiture of gifts should the beneficiary dispute the Will. The testator seeks to protect the estate's assets against frivolous litigation. This is a difficult point as it seems to place restraints on the ability of a person to access the courts and is unnecessary given the procedural protections and the costs rules. However, is it necessary to strike the condition out on policy terms?

The will read in part:

> I HEREBY WILL AND DECLARE that **if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection with any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease and I HEREBY REVOKE all said benefits** and I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate to be distributed as directed in this my Will; PROVIDED that if such person whose benefits are so revoked would otherwise share in the residue of my Estate his or her benefits so revoked shall be divided equally among the remaining shares into which the residue of my Estate may be divided or as if such person had predeceased me and had left no issue surviving me.

In this case the Court employed a traditional approach looking to whether there was a substitute donee should the condition be breached; as there was, the traditional rules would save the gift. However, was the condition void on the general point of being contrary to policy?
Per Lander LJSC:

> The motive for the inclusion of para. 9 in the will was to carry forward his intent that his children's shares be limited. The creation of this clause was a disincentive for them to contest the will which would subvert his intentions.
>
> ...

As to ground two, that is the challenge made that para. 9 is a clause in terrorem, such a condition attached to a legacy of personalty may be void if made in such a manner. **There are three criteria which must be met before the doctrine in terrorem is applicable:**

(i) The legacy must be of personal property or blended personal and real property. See Re Hamilton (1901), 1 O.L.R. 10; Re Schmidt, 57 Man. R. 316, [1949] 2 W.W.R. 513 (K.B.).

(ii) The condition must be either a restraint on marriage or one which forbids the donee to dispute the will.

(iii) The "threat" must be "idle"; that is the condition must be imposed solely to prevent the donee from undertaking that which the condition forbids. Therefore a provision which provides only for a bare forfeiture of the gift on breach of the condition is bad.

However, if the donor indicates that he intended not only to threaten the donee but also to make a different disposition of the property to fix a benefit on another in the event of a breach of the condition, the "threat" is not "idle" and the condition is valid: Feeney, Canadian Law of Wills (Construction), vol. 2, 2nd ed. (1982), pp. 200-201.

In this instance there is no doubt that the legacies in this case contain personalty and, further, there is no doubt that the "condition" enjoins the petitioners from disputing the will.

In this instance is such a "threat" idle? Ordinarily if a provision which contains such a condition is followed by a gift over in the event of a breach of that condition, the condition is held to be valid: Jarman on Wills, p. 1255. While certain authorities question whether a gift over is always necessary, I have concluded in this instance that para. 9 of the testator's will creates a gift over. The words, "I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate" are sufficient to constitute a gift over for the purpose of meeting the in terrorem doctrine. Therefore the paragraph is valid and not subject to the doctrine, even if para. 9 does not completely deprive the court of jurisdiction. However, by depriving the petitioners of their right to apply for relief under the Wills Variation Act, para. 9 may be invalid as a provision which is contrary to public policy.
18 It is apparent that this "public policy" ground is not well known to the common law and indeed does not appear to have been argued in Canada, as indicated by the paucity of Canadian authorities...

...

20 It cannot be denied with respect that the intent of the legislature in creating the Wills Variation Act is to ensure adequate maintenance and support for specified individuals. It is a matter of public policy that support and maintenance be provided for those defined individuals and it would be contrary to such policy to allow a testator to circumvent the provisions of the Wills Variation Act by the creation of such as para. 9.

> **It is important to the public as a whole that widows, widowers and children be at liberty to apply for adequate maintenance and support in the event that sufficient provision for them is not made in the will of their spouse or parent. I have concluded that the intent of para. 9 was to prevent any such application. It is not necessary for the purposes of this decision to conjure up scenarios wherein inequitable and distressing results are created for a widow or children by being deprived of maintenance and support while an "undeserving" beneficiary takes under a will. Paragraph 9 therefore is void as against public policy.** The petitioners shall have their costs of this application from the estate.

Thus, in this case, access to justice was denied and the condition was void.

Re McBride
(1980), 6 ETR 181 (Ont HCJ)

The testator didn't like his daughter in law; if his son was married to her at the testator's death, the property would go to charity. If they were not married, the son would inherit. The will read in part:

> (e) Upon the death of my said wife, if my son Robert McBride is married to Geraldine Elizabeth Gibbons, who formerly resided at 14 Cavell Avenue, Mimico, to divide all that then remains of my estate in equal shares among:
>
> (i) The Ontario Heart Foundation
> (ii) The Canadian Cancer Society
> (iii) The Ontario Society for Crippled Children
>
> (f) **Upon the death of my said wife, if my son Robert McBride is not married to Geraldine Elizabeth Gibbons, to pay, transfer and convey all that remains of my estate unto my son, Robert McBride for his own use absolutely.**

Did the condition fail or did the gift fail? Only the condition. Per Henry J:

> 10 I have considered the language of paras. 3(e) and 3(f) of the will with care and find that on their face, the only reasonable view to take of the testator's intention is that he intended to promote the divorce of the spouses either as a result of one of them committing a matrimonial offence, or by collusion. The affidavit fortifies me in this conclusion and I find accordingly.
>
> 11 The condition is therefore void as being contrary to public policy. See Re Fairfoull (1974), 41 D.L.R. (3d) 152 , affirmed (sub nom. Can. Permanent Trust Co. v. Bullman), [1974] 6 W.W.R. 471, 18 R.F.L. 165 (B.C.) (further proceedings); and authorities therein cited.
>
> ...
>
> 13 ...[a]lthough, as I have found the condition is void as being contrary to public policy, the gift does not fail if the reason for invalidity is malum

> prohibitum and not malum in se. While the distinction between the two is somewhat obscure according to the scholars, I adopt the reasoning in Re Fairfoull , supra, where it was held that a testator's attempt to invade the sanctity of his son's marriage was malum prohibitum and that although the condition is void, the gift does not fail.
>
> ...
>
> 16 What then is the gift that is preserved? Reading paras. 3(e) and (f) together their combined effect reflects the testator's intention to disinherit his son if he is married to Geraldine but to pass the entire residue to him on the death of his mother if he is not. The object of the testator, as I see it, is to achieve dissolution of the marriage and not to deprive his son for any other reason or motive. He intends his son to inherit but seeks to terminate the marriage. When the condition fails the gift to Robert McBride is absolute; the charities were never intended to benefit except as a device to induce termination of the marriage.
> 17 In the result, therefore, Robert McBride will be entitled to the residue upon his mother's death, regardless of whether he is or is not then married to Geraldine.

Re Collier
(1966), 60 DLR (2d) 70 (Nfld SCTD)

A condition might be invalid as a matter of inconsistency with legal rules which must be upheld; for example, the types of property rights that might be recognized at law. If it violates any such rule it is void as ‘repugnant’. Here the will made a gift of property and attempted to restrict future alienation in a way long ago held to be unenforceable.

The will read in part:

> With regard to the Forest Road property now occupied by myself it is my will that this also be held and enjoyed by Alice Maud Cumming for her lifetime, together with the cottage situated thereon and now occupied by G. Piercey. And after her death I give and bequeath the whole to my nephew Eric Collier or his children, or son if having one, but if Forest House be occupied by Alice Cumming and her family at the time of her death, it is my wish, that the family may still continue to occupy the same for twelve months if they so wish to give them time to make other arrangements.
>
> ...
>
> **And further with regard to this property, as it has been in the family of my late mother for seven generations, it shall not be sold, mortgaged or exchanged, or conveyed in any way, from the descend — of said family for ever.**

Per Puddester J:

> 15 The test is one of repugnancy. **The original rule was that you cannot annex to a gift in fee simple a condition which is repugnant to that gift. It has long been recognized that the right of alienation is a necessary**

> **incident to the fee simple. Does the condition in effect destroy or take away that right?** As the Pearson and Macleay cases show, many years ago some exceptions were made to the original rule, but, as we have seen, they did not find too ready acceptance even in times close to their own. **In more modern times, the tendency of courts, while recognizing the existence if not the soundness of those cases, seems to me to be not to perpetuate, and certainly not to add to, those exceptions by extending in any degree the concept of the limited condition.** Indeed, the fundamental principle now adopted is "that a condition, the effect of which would be to destroy or take away the enjoyment of the fee simple given is repugnant to the rights conferred on the holder of the fee", to use the words of McRuer C.J.H.C. in the Malcolm case.
>
> 16 Frederick Collier's will gives to Eric Collier an absolute estate in the Forest Road property and then adds a condition which limits alienation of the property to a small class; a class which, at any given time, may be difficult to ascertain in any event, a class which, at any given time, for a variety of reasons, may not exist at all, but a class in which, nevertheless, must be found at any given time a person willing and financially able to enter into dealings about the property**. If that condition is good, then Eric Collier is to all intents and purposes deprived for his whole life of his right to alienate the property and thus of full enjoyment of the property. In my view, both on principle and on authority, such a condition is repugnant to the absolute estate given to Eric Collier and as such is invalid.**

Re Macdonald
[1971] 2 O.R. 577 (HCJ)

Here the question was in respect of a condition that was impossible to fulfil. Is the condition void?

The will read in part:

> To pay and transfer Ten Percent (10%) to the WINDSOR PUBLIC LIBRARY BOARD, Windsor, Ontario, provided the house known as the "BABY HOUSE" situate on Pitt Street West, in the City of Windsor, has not been moved from its original foundation and providing the City of Windsor gives to my Executors the necessary assurance that such house will not ever be moved from its original foundation, such bequest to be used in collecting historical objects for showing and preservation in such "Baby House". If, at the time of my wife's death, or at the time of my death if she should predecease me, the "Baby House" is still standing on its original foundation and location, then my Executors shall request the City of Windsor to give the necessary assurance that such House will not ever be moved and the City shall have one year from the date of the death of the survivor of my wife and myself to give such assurance to my Executors. If at the death of the survivor of my wife and myself the City of Windsor fails or will not give to my Executors the necessary assurance that such House will not ever be moved from its original foundation, then this bequest shall fail and fall into and form part of the residue of my Estate.

The City of Windsor could not give the assurance as they did not own the land and lacked jurisdiction to give such an assurance. Thus the condition failed but the gift remained. In essence it was regarded as a wish.

Per Lacourciere J:

> 10 The second objection can be disposed of on the basis of the following findings of fact and conclusions of law:
>
> 1. **The condition precedent attaching to the gift to the Windsor Public Library Board that the City of Windsor gives necessary assurances that Baby House will never be removed from its original foundation is impossible of performance.**
>
> 2. **The impossibility existed at the time the testator drew his will and has continued to exist to the present, and continues to exist.**
>
> 3. **The testator knew of the impossibility at the time he drew his will.**
>
> 11 There are several reasons for this impossibility. First and foremost, the City of Windsor does not own the land in question and therefore is in no position to give any assurance as to its use. The covenant of re-grant should the land cease to be used as a museum does not alter this. Further, it is doubtful whether the city can give the type of assurance requested, and also whether there can ever be an adequate assurance given as to the use of real property for ever.
>
> 12 Macdonald must have been aware of the first ground of impossibility as he was a party to an agreement reciting who was the owner of the land, which agreement antedates the execution of his will, and had been president of the association which owned the historic Baby property.
>
> **13 As the gift in question was given subject to a condition which was at the time of its creation and to the knowledge of the testator impossible of performance, the condition must fail and the gift remains free of the condition. On these facts, the Windsor Public Library Board is to receive the 10% without any assurance being given.**
>
> 14 The law in England is well settled on this point. It is summarized in Williams on Wills, 3rd ed. (1967), p. 270, and is as follows:
>
> A condition precedent obviously impossible or a condition becoming impossible by operation of law before the date of the will, is repugnant and void and the gift remains.
> This is a development from the civil law as the gift is one of personalty and has its roots deep in the common law. As early as 1759, this was held to be the proper construction: Lowther v. Cavendish (1758), 1 Eden 99, 28 E.R. 621; affirmed 3 Bro.P.C. 186, 1 E.R. 1260.

...

> **19 On the present facts the testator must have known of the impossibility when he drafted the condition. Yet he still made the grant. It would be absurd to impute to him an intent to draft a totally ineffective clause in a document as solemn and important as his will when he had full knowledge of its ineffectiveness. In the absence of anything to the contrary, it must be that the gift for the benefit of an institution which he actively supported was paramount to the testator and so the condition must fail. The only reasonable interpretation that can be given the condition to enable the clause to have any effect when written is that, if at the death of the life tenant it is possible for the city to give the assurances, then it must give the assurance as a condition precedent to gift taking effect.**

Re Tuck's Settlement Trusts
[1978] Ch. 49; cb, p.744

An uncertain disposition is void but the construction of the words might be resolved by extrinsic evidence.

SUBJECT-MATTER AND TYPES OF TESTAMENTARY GIFTS

- A Will contains various provisions, principally gifts of property. Obviously not all gifts can be completed – T must actually own the property, and, no one else (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, the assets that would otherwise be used to make the gifts will be used to pay the deceased's debts instead. 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.

> **Estates Administration Act, s.5**
>
> 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.)

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 in question abate or should some be preferred?

The question here was whether the words setting up the clause set out a 'contrary intention' to treat 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 than others within the same class. 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.)**

[Please note the Succession Law Reform Act, s.20(2)(b) would now operate to allow the legatee receive the insurance proceeds.]

McDougald Estate v. Gooderham
(2005), 17 E.T.R. (3d) 36 (Ont CA); cb, p.540, note 8; fn 163

In this case, a woman was incapable and her Attorneys under a Power of Attorney for Property sold some Florida property to pay for her care. The property was subject of a disposition in her Will. The Court of Appeal examined the section of the Substitute Decisions Act dealing with ademption; s.36(1).

> 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.

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.**
>
> **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.
>
> 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.**

[*McDougald Estate v Gooderham* is also important in estate litigation generally and stands for the proposition that the normal costs rules apply in most cases; see *Sawdon Estate v. Sawdon*, 2014 ONCA 101 (Ont. C.A.); *Salter v. Salter Estate* (2009), 50 E.T.R. (3d) 227 (Ont. S.C.J.)]

Abatement and Ademption

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.
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.)

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.]

Celentano Estate v Ross
2014 BCSC 27 (BCSC)

The Deceased's estate was insufficient to make all gifts set out in the Will. The Will of the Deceased provided in part:

> To pay or transfer the sum of $50,000.00 each in US funds (such funds to be taken from my US bank accounts) to the following SHRINERS HOSPITALS:
>
> i) PORTLAND HOSPITAL, 3101 SW. Sam Jackson Park Road, Portland, Oregon, 97201-5090 (504) 241-5909, and
>
> ii) SPOKANE HOSPITAL, 911 W. Fifth Avenue, Spokane, Washington, 99204-2901 (509) 455-7844
>
> to be used for the benefit of children and I DECLARE that the receipt of the person who professes to be the proper person to receive this legacy shall be a sufficient discharge therefor.

What sort of gift was provided?

Donegan J.:

> [31] In my view, the Shriners' legacies cannot be construed as general legacies. In so finding, I consider not only the specific language used in the bequest, but also its context in the entire will.
>
> [32] In determining the deceased's intentions, **I must consider the will as whole. It is notable that the Shriners' legacies are the only bequests that are specified to come out of a particular fund. All other legacies are pecuniary and are clearly general legacies. Those other legacies have no reference to the actual state of the property; they are something simply to be provided out of the deceased's general estate.**
>
> **[33] The Shriners' legacies were treated differently by the deceased. By using the words "$50,000.00 each in US funds (such funds to be taken from my US bank accounts)", the deceased specifically referred to the actual state of the property (the existence of her US bank accounts). Her use of the word "my" also suggests that the gift is specific and not general. She provided that recourse for**

> **payment of the Shriners' legacies is to come from a particular fund - her US bank accounts.**
>
> **[34] To my mind, the real issue in this case is not whether the Shriners' legacies are general or specific; it is whether they are specific or demonstrative.**
>
> [35] Given that there are sufficient funds in the US bank accounts to pay the Shriners' legacies, it is not, practically speaking, necessary for me to decide the point. However, I am of the view that they are demonstrative.
>
> …
>
> [37] For all of these reasons, I declare that the Shriners' legacies are demonstrative legacies and, as such, have priority over the funds held in the US bank accounts.

Culbertson v Culberston
(1967), 60 WWR 187 (Sask CA); cb, p.523

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.

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)

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)

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...
>
> **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.)

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.)

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...**
>
> ... 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.

> I would answer this question in the negative...

Re Cudeck
(1977), 16 O.R. (2d) 337 (C.A.)

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.

CONVERSION

(a) Generally

Ademption occurs when the property set out in a particular disposition in the Will is no longer in existence or is no longer owned by the testator. This is technically a conversion of the property during the lifetime of the testator – *actual* conversion.

Equitable conversion occurs in circumstances where the Estate has the property but the testator dealt with the property *inter vivos* in a manner in which it would be unconscionable to deny a third party's interest; for example, where the testator gives a gift of a car in his Will but executes a contract for sale in respect of that same car and where the sale has not been completed and title remains with the Estate Trustee. The purchaser may have a better equity in the car than the legatee under the Will.

Church v. Hill
[1923] S.C.R. 642

Per Mignault J:

> So long as the conditions of the agreement of sale were carried out, the vendor was entitled only to this purchase money, and the purchaser, on completing its payment, had the right to demand a conveyance. Had the vendor refused to make this conveyance, the purchaser would have been entitled to compel him to do so by an action for specific performance; and therefore the interest which the purchaser acquired under the sale agreement was certainly an interest which equity would recognize and one commensurate with the relief which equity would give by way of specific performance.

Thus, the vendor cannot deny the equity of the purchaser to the property *inter vivos* or through his Will.

(b) Options (to Purchase)

A gift in the will is adeemed in a circumstance where the testator grants an option to purchase the property in favour of another inter vivos and that option is exercised.

Re Carrington
[1932] 1 Ch. 1

Here the option was exercised after the death of T. How does one deal with a gift of personalty in the will made subject of an option to purchase which was exercised after the death of the testator? Here it was held that it was not the the granting of the option which affected the gift, but rather its exercise. Thus, the gift was held to have adeemed through exercise of the option which caused a conversion on that date. As the gift adeemed, the proceeds of the sale fell into residue rather than going to the now-disappointed legatees of the gift of that same property. The rule applies equally in respect of personalty and realty.

(c) The Effect of Republication (of the Will)

When one re-executes a will, the effect is to make the will de novo. However, the court may still interpret the effect of the provisions of a republished will consistent with its terms and T's intent.

Re Reeves
[1928] 1 Ch. 351

The T made a will that gave 'all my interest in my present lease' to his daughter. Two years later he renewed the lease; three years after that he made a codicil which had the effect of confirming his will. Did the gift relate to the term and value of the lease when the will was originally made (and which had now expired) or the longer term and greater value that the lease had when the codicil was made (and which had yet to expire)? Russell J. held that notwithstanding the fact that the will and codicil were one legal document and could be read consistent with either interpretation, here the clause should be interpreted to emphasize 'my *present* lease'; thus, the gift was of the value of the lease at the time of republication. Thus, the gift could be made rather than having the lease fall into residue.

(d) Statutory Reform

The SLRA, s.20 provides:

> Operation of will as to interest left in testator
> 20.(1)
> **A conveyance of or other act relating to property** that is the subject of a devise, bequest or other disposition, **made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of his or her death.**
>
> Rights in place of property devised
> (2)
> **Except when a contrary intention appears by the will**, where a testator at the time of his or her death,
>
> (a) has a right, chose in action or equitable estate or interest that was created by a contract respecting a conveyance of, or other act relating to, property that was the subject of a devise or bequest, made before or after the making of a will;
>
> (b) has a right to receive the proceeds of a policy of insurance covering loss of or damage to property that was the subject of a devise or bequest, whether the loss or damage occurred before or after the making of the will;
>
> (c) has a right to receive compensation for the expropriation of property that was the subject of a devise or bequest, whether the expropriation occurred before or after the making of the will; or

> (d) has a mortgage, charge or other security interest in property that was the subject of a devise or bequest, taken by the testator on the sale of such property, whether such mortgage, charge or other security interest was taken before or after the making of the will,
>
> **the devisee or donee of that property takes 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**.

Thus the statute cuts back the operation of the conversion doctrine substantially and allows the property-substitute to pass to the donee.

DiMambro Estate v. DiMambro
(2002), 48 E.T.R. (2d) 22 (Ont S.C.J.)

The will gave T's house and contents to two people and the residue to others. T sold the house during her lifetime but the transaction had yet to be completed at her death. Who inherits the proceeds (the contract for sale being binding on the estate)? The two devisees as per s.20(2)(a). Per Day J.:

> [19] Where the testator, before her death, sells or otherwise disposes of property that is the subject matter of a specific gift under her will, the testator has converted the property and the gift adeems. If the testator enters an agreement to sell the property but dies before the completion of the sale, the property is still subject to an agreement to sell it. Even though the property is still legally in the deceased's estate, there is a notional conversion of the property in equity, and the gift adeems...
>
> [20] Under the common law, the Sale Agreement to sell the Home is a notional conversion of the gift of the Home under the Deceased's Will even though the Deceased still holds legal title to the Home. Therefore, under the common law, the gift by Will of the Home to Samantha and Crescenzo would adeem, and the proceeds would go to into the residue of the estate. However, there is a remedial statutory provision in Ontario that saves the gift from ademption.
>
> ...
>
> [22] Samantha and Crescenzo are entitled to the proceeds of the sale of the Home. According to s. 20 of the Act, they are entitled to same rights as the Deceased with regard to the Home. Although Samantha and Crescenzo are not entitled to receive the Home itself because it is the subject of the Sale Agreement, they are entitled to receive the benefit of the Deceased's contractual rights under the Sale Agreement. Samantha and Crescenzo are entitled to enforce the Sale Agreement and receive the net proceeds from the sale.

ELECTION

Election is an equitable doctrine which operates where the beneficiary is left a choice by the testator – take the gift in the Will and disclaim some right to some thing, or, elect to disclaim the gift in the Will and take that other thing (in which case the gift in the Will adeems).

A use of the doctrine which was somewhat popular in the older English practice was for T to give property to A, but on condition that something A owned would go to B. This was done by giving both A and B the respective properties in the Will, and thus forcing A to elect to take the gift under the Will (and complete the gift to B) or elect not to take the gift. If A elects against taking the gift in the Will, A's gift under the Will adeems.

Granot v Hersen Estate
(1999), 173 D.L.R. (4th) 227 (Ont. C.A.)

The testator left a Will in which he gave a specific legacy of $600,000 and some Ontario realty to his son. The testator left the residue of his Estate to his daughter which included some Swiss realty. Swiss law operated to force the testator's Estate to hold a ¼ share in the condominium for the son. The question arose whether the son had to elect between the gift in the Will or the forced inheritance provision in Switzerland.

At trial, it was held that the son had to elect between the gift in the will or the ¼ share in respect of the Swiss property. The appeal was allowed. Doherty JA reviewed the authorities at some length and held:

> In summary, my review of the English and Canadian cases indicates that the following principles are applicable to the interpretation of this will:
>
> **• the doctrine of election applies only where the testator clearly intended to dispose of another's interest in property while at the same time making a gift to that person under his will;**
>
> **• that intention must be made express or appear by necessary implication from the terms of the will;**
>
> **• one starts from the premise that the testator only intended to dispose of his or her own property in the will; and**
>
> **• general words in a will like "all my estate" or a residuary gift in general terms will not, standing alone, evince an intention to dispose of property or an interest in property which the testator was not entitled to dispose of in his will.**
>
> Applying those principles, I am driven to the conclusion that Lillian Granot has failed to show that Henry Hersen intended to dispose of Roland Hersen's 1/4 interest in the Swiss condominium in his will. The doctrine of election has no application and Roland Hersen is entitled to both the 1/4 interest in the Swiss condominium and the gifts under the will.

> In coming to that conclusion, **I do not pretend to have divined Mr. Henry Hersen's true intention when he penned his will. I have no idea what he actually intended. Absent any solid indication of the testator's true intention in the words of the will, I, like previous courts, favour an interpretation which brings certainty and consistency. Those goals are best achieved by staying the course and applying the well-settled principles established over the last 200 years.**

SATISFACTION

Satisfaction is an equitable presumption which can be rebutted on proof of the testator's contrary intention (in respect of which extrinsic evidence is admissible). If the testator gives a gift to a person to whom he is indebted, the legacy is treated as satisfaction of the debt.

Re Trider
(1978), 84 D.L.R. (3d) 336 (NS Prob Ct)

The testatrix was looked after by a housekeeper-nurse. At the date of the testarix's death, the housekeeper-nurse was owed wages which she claimed in the amount of $10,000. The testatrix gave her a legacy under the will, and had revised the amount upward over a course of time. The executors claimed that the legacy fell under the presumption of satisfaction. Although the case was largely to do with jurisdiction, O'Hearn J accepted that a direction in the will to pay 'debts and legacies' rebuts the presumption of satisfaction.

DOUBLE PORTIONS

The equitable presumption against double portions is conceptually related to the presumption of advancement; it operates such that a parent does not intend to provide double portions for his or her children in the Will. Thus, where the testator makes a gift after the execution of a Will to a child, it represents an advance as against what the child will receive under the Will, and prevents a child receiving a double portion. (the presumption is sometimes also called 'ademption by advancement').

Re George's Will Trusts
[1949] Ch 154

The testator left a 1/3 share of the residue to his son Robert (a bank employee) and a 2/3 shares to his son Ernest (who assisted him in farming), with an option for Ernest to purchase the farmland (the main asset) from the estate for fair market value. The testator allowed his land to fall into a poor condition. The 'War Agricultural Executive Committee' settled a complaint against him whereby the testator made an *inter vivos* gift of his live and dead stock and transferred his farms to Ernest. After the testator died, Ernest exercised the option. Jenkins J explained the presumption before going on to apply it such that the gift of the land inter vivos was held to be an advancement against the portion set out in the will:

> I may now proceed to consider whether on the facts and in the circumstances which I have stated the rule against double portions applies to the gift of live and dead stock to Ernest, or perhaps more accurately whether there is anything in those facts and circumstances to exclude the application of the rule. The principles on which the rule is based and applied are succinctly stated by Lord Greene M.R. in In re Vaux [1939] Ch. 465, 481 where he says:
>
> > **The rule against double portions rests upon two hypotheses: first of all, that under the will the testator has provided a portion and, secondly, that by the gift inter vivos which is said to operate in ademption of that portion either wholly or pro tanto, he has again conferred a portion. The conception is that the testator having in his will given to his children that portion of the estate which he decides to give to them, when after making his will he confers upon a child a gift of such a nature as to amount to a portion, then he is not to be presumed to have intended that that child should have both, the gift inter vivos being taken as being on account of the portion given by the will.** When the word 'portion' is used in reference to the gift inter vivos, it has a qualitative significance, in this sense, that it is not every gift inter vivos that will cause the rule to come into operation. If a testator gives to a child as pure bounty and by way merely of a present a sum of money, that will not have the character to cause the rule to come into operation. Similarly there may be various reasons why the testator should give property to a child. He may wish to free him from some embarrassment, or something of that kind. In cases of that sort upon the facts a gift may not be a portion at all, in which case, of course, the rule does not apply.

Jenkins J held that the facts of the case reinforced the presumption rather than rebutting it.

Campbell v. Evert
2018 ONSC 593 (S.C.J.)

The presumption against double portions does not apply where the testator made a a Will in which two children were to be treated equally, but where the estate plan also included the settlement of an *inter vivos* Family Trust which would yield preferential treatment of one child.

DISCLAIMER

A gift must be accepted; if disclaimed, it reverts to the Estate for distribution as part of the residue (unless it was a gift of the residue in which case there is an intestacy in respect of the residue). See **Montreal Trust Co. v. Matthews (1979), 99 D.L.R. (3D) 65.** It is not uncommon for a person interested in a gift to disclaim in favour of a residuary beneficiary for tax reasons.