SPECIFIC LEGACIES OF UNSPECIFIC THINGS—
ASHBURNER v. MacGUIRE RECONSIDERED*

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The specific legacy is the heart of the common-law scheme of legacies. Indeed, that scheme is scarcely more than a statement of the incidents of the specific legacy and a division of all legacies into those that are, or are not, (and some that both are and are not) specific. The specific legacy is also a fruitful source of harm; by definition it is one which will cause fortuitous loss to legatees in either of two common contingencies. Why this is so, and whether it need be so, it is the purpose of this paper to discuss.

I. FUNDAMENTAL INCIDENTS OF THE COMMON-LAW SCHEME
OF LEGACIES

T, a testator, duly executes a will as follows: "I leave my grey mare, Bessie, and such money as I may have at my death in the First National Bank, to *L*; one thousand dollars to *L1*; the rest and residue of my estate to *L2*". The will is typical in form; typical also are various contingencies to which its form subjects it. Three are particularly important: (a) *T* withdraws the money from the bank and disposes of the mare (or she dies) in his lifetime; (b) *T* dies owning the mare—and substantially nothing else; (c) the mare foals the day after *T*'s death.

(a) *Ademption*. Most important is the first contingency. There is no money in the bank and no mare; what of *L*? As to the money, it can scarcely be said that there is a problem. *T*'s phrasing of the gift makes it unmistakably conditional on a contingency that has not happened: *T*'s having money in the bank at his death. It is idle to speculate about *T*'s real intent, and wonder if he actually contemplated such a consequence as the failure of the gift when he, for reasons probably having nothing to do with *L*, took the money from the First National Bank and spent it or put it in some other bank. *T* has expressed himself too clearly to leave any room for "construction" that might save the gift.

The case of the mare is not so simple. It might be said: *T* knew

* The writer is indebted to his former student, Mr. Wilbur Dull, of the Iowa Bar, for valuable assistance in the research connected with the writing of this article.

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of his will, he knew of Bessie's disposal or sale, he didn't change his will—ergo his original intent to benefit *L* must have changed. But this is too easy. No one familiar with the habits of testators will believe it. The great number of cases where *T* leaves his will untouched, although a change in circumstances has made it operate in a way he could not possibly desire, precludes any such assumption. Experience seems to warrant exactly the contrary assumption, to suggest that the explanation of *T*'s failure to change his will is much less likely to be found in any change of intent than in ignorance, forgetfulness, or just the procrastination of an ordinary human being who knew he ought to change his will, meant to, but never quite got around to it.

Where courts express themselves, they agree that probably *T*'s intent to benefit *L* has not changed. Shall we then give *L* Bessie's value, shall we try to trace the proceeds if she has been sold, shall we direct the executor to buy a similar mare or Bessie herself, if she is alive and on the market? There are two objections to any of these solutions. The first is doctrinal; courts, in giving effect to wills, are supposed (or suppose they are supposed) to stick closely to what *T* has said and not go very far in giving effect to intent that *T* probably had (or would have had, if he had thought of the contingency) but never expressed. *T* has said "my grey mare Bessie"; he hasn't said some one else's mare, or her value, or her discoverable proceeds. The second objection is practical: we cannot be sure that the gift to *L* was not based solely on *L*'s known love of horseflesh (or even of this particular mare); assuming that it was not, we still cannot be sure that *T* contemplated any alternative form of gift or that any possible one would not upset the general scheme of *T*'s disposition; finally, it will in most cases be impossible either to repurchase the mare or trace her proceeds, and often be difficult to duplicate or set a value on her with any degree of accuracy.

Doctrinal and practical difficulties thus compel us to treat the gift of the mare in the same way that we treat the gift of the money. Each is conditioned, the one more or less expressly, the other not expressly but by necessity, on the survival of the subject matter of the legacy as part of *T*'s estate. The case of the mare shows it is not necessary that the condition be express; hence we do not include that in the definition. Using only what is essential, we say that the two gifts thus illustrate what is called the "specific" legacy, one that may be defined as "a gift of some specific part of *T*'s estate", and whose prime attribute is that it must fail (technically, be "adeemed"¹) whenever the

1. If *T* has given *L* \$1,000 by will, and later gives *L* \$1,000 *inter vivos* with the intent thereby and therewith to pay the legacy, the latter ceases to be operative; it is said to be "satisfied". Sometimes this process is referred to as "ademption by satisfac-

specific part of *T*'s estate has ceased to be such at *T*'s death. This, we admit, is a rule of unfortunate necessity; we do not think we are doing what *T* would like; we are forced to do it because the form or substance of *T*'s gift leaves us no alternative which we can regard as both feasible and consistent with his *expressed* intent.²

(b) *Abatement*. Consider the second contingency, that *T* dies owning the mare and substantially nothing else. The case of *L2* gives us little concern. Literally, the gift to him is not payable either from the mare, the money in bank, or the thousand dollars given to *L1*; it is the residue, what is left, if anything, after the other legacies are paid. It is easy to extend this (and as a matter of conventional construction we do so extend it) to: what is left after *all* other charges against the estate are satisfied. The residue, as Lord Hardwicke said in *Purse v. Snaplin*,³ is considered "as the gleanings of the testator's estate". No doubt this sometimes disappoints the intent of a testator who had in mind a very definite thing or share for *L2* and simply chose this unfortunate way of expressing it.⁴ However, the assumption is probably valid in the average case, and it is, moreover, a very useful tool in achieving a complete disposition of *T*'s estate.

The case of *L1* is more difficult. The will gives him no particular money, as it does to *L*; any thousand dollars will do. The legacy is in substance a demand against *T*'s estate for a thousand dollars worth of value. Now it appears that the estate is inadequate to meet all the different kinds of demands against it. *T* has given no indication of preferring *L* to *L1*. Why should not the mare be sold and the proceeds pro-rated between *L* and *L1*? In the first place, habit is against such a proceeding. In settling an estate (one's own or another's) it is natural and convenient in the payment of obligations to use up ready money before selling particular property. This establishes a kind of pattern, with ready money the fund for money obligations and particular property postponed if not enjoying an actual immunity. More important, doctrine definitely confirms such an immunity and precludes any such sharing of the loss as suggested. Expressed intent

tion" and the process described in the text is distinguished by the term "ademption by extinction". See ATKINSON, WILLS (1937) 687. The writer herein conforms to what he believes to be the better and simpler usage: to refer to the processes as "satisfaction" and "ademption" respectively.

2. "The property constituting the specific legacy had been sold; it had ceased to exist. The exact thing which was given by the will could not physically be passed on to the legatee. From the very nature of the case and of the gift the legacy became extinct." Crane, J., in *Matter of Ireland*, 257 N. Y. 155, 158, 177 N. E. 405, 406 (1931).

3. 1 Atk. 414, 418 (Ch. 1738).

4. See, e. g., *Will of Kendrick*, 210 Wis. 218, 246 N. W. 306 (1933).

must govern. If *T* has given *L* the mare and nothing else, he has likewise given no part of her to any one else. As Lord Macclesfield said in *Clifton v. Burt*,⁵ "if one gives a specific legacy of a horse, or diamond, and also a pecuniary legacy of £500 to *B*, and there are not assets to pay both, still the specific legatee shall be preferred and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto*, to make such legatee buy his legacy, against the manifest intention of the testator." The gifts to *L* and *L1* are mutually exclusive; neither legatee may trench on what is given to the other. Technically we describe this result by saying that *L*'s legacy is a "general" one and that general legacies "abate" (i. e., are cut down) after residuary ones (which we have seen are the first to suffer) but before specific ones. Again we must consider this as a rule of unfortunate necessity; we do not think that *T* had any idea of preferring *L*, but the form in which he has framed his disposition compels it.

(c) *Accretion and Interest*. The third contingency raises the issue: whose is the colt? The gift of the mare is specific; failing so complete an inadequacy of assets that even specific legacies have to abate to pay debts, no one but *L* has any claim to her. She requires no conversion or liquidation or realization. While the exigencies of administration mean that *L* can scarcely have her in the flesh at the moment of *T*'s death, there is no reason why he can't be treated as her real owner from that time. Hence she is *L*'s mare when she foals and the colt is naturally *L*'s, too. *L1*, on the other hand, has only a claim or demand against the estate; this naturally is not subject to increase, although like any other claimant *L1* should be given interest if it is not paid when due. The nature of *L1*'s claim precludes supposing it payable at *T*'s death; before such claims can be paid, the assets must be got in, converted into cash, and so on. On the other hand, it might be difficult or at least inconvenient to determine at exactly what time it could readily have been paid. For convenience of administration we set an arbitrary time, usually a year from *T*'s death, from which interest runs on general legacies.

5. 1 P. Wms. 678, 679-80 (Ch. 1720). In *Hern v. Merick*, 2 Salk. 416 (Ch. 1712), pecuniary legatees sought to have a devise abated to pay debts, but "the Court seemed to admit, that if the lands had descended, the legatees might have been relieved in this manner; but since the testator had devised them, it was resolved, that they ought to be exempted; for it was as much the testator's intention that the devisee should have this land as the others should have the legacies, and a specific legacy is never broke into, in order to make good a pecuniary one". In *Towle v. Swasey*, 106 Mass. 100, 106 (1870), Colt, J., said: "By making it [the legacy] specific, the testator gives the strongest expression of his intention to exempt it from such reduction [to pay debts]. It is set apart from the other assets, and must be . . . paid in full before anything is paid to the general legatees."

II. THE SPECIFIC LEGACY AS THE HEART OF THE SCHEME

Such is the common-law scheme of legacies.⁶ It is logical, simple, and (if one is willing to hew strictly to the line, ignoring disappointed expectations) easy to apply. It is also apt, like some other simple and logical schemes, to work with extreme harshness and inequality. The heart of it is the specific legacy concept. Everything is defined in terms of this, since a general legacy is one that is not specific, and a residuary legacy just a specific legacy of a particular sort, one construed as made in contemplation, rather than disregard, of mortality. (And a fourth type of legacy, the demonstrative, discussed *infra*, will turn out to be one whose essence is that it may be held specific or not, as circumstances require.) As the heart of the scheme, the specific legacy concept is also responsible for the inequality of its operation.

(a) *How it works harm.* General legacies cause no trouble. If we suppose *T*'s will to consist of thousand dollar legacies to *L*, *L1*, *L2* and *L3*, and his net estate remains worth as much as \$4,000, no changes in its form and character will prevent the four legatees from getting what they were intended to; if the net estate is less than \$4,000, the legatees will share the loss equally, which is fair, and, as far as one may guess, what *T* would wish. Add specific legacies—and both specific and general legatees are in jeopardy. Suppose legacies of four specific things, *w*, *x*, *y*, and *z*. If *T* subsequently trades *w* for *v*, *L* takes nothing. The loss is *not* unavoidable, as in the previous instance, not one automatically adjusted by the form of the gift, but rather one caused by the form of the gift and whose incidence is wholly accidental. Or suppose specific legacies to *L* and *L1*; general legacies to *L2* and *L3*; if an abatement is necessary to pay debts the loss may fall wholly on *L2* and *L3*, since their legacies will abate before those of *L* and *L1* are touched. The incidence is again accidental; there is no reason for thinking *T* would wish it.

(b) *Why it works harm unnecessarily: the conventional definition criticized.* The specific legacy concept is doubtless an inevitable one; its consequences are necessary evils. Testators are bound, in a certain number of cases, to make gifts which because of their phrasing ("such money as I have at my death") or their subject matter ("Black-acre") are incurably specific. These evils, however, need not be com-

6. The statements made as to the incidents and operation of these legacies are too elementary to require any citation of authority; citation has been limited to a few quotations thought to corroborate the writer's suppositions as to the origin and basis of these incidents. Such judicial rationalizations are very rare, particularly in the early cases; the incidents seem for the most part just to have been taken for granted. Discussion of the doctrine, said once to have been current, that ademption depends upon intention, is postponed until the section dealing with demonstrative legacies.

mon. That they are, is due to a definition of the specific legacy in terms of form rather than substance. The specific legacy is not a philosophic necessity nor the expression of any profound considerations of policy; it is simply the name applied for convenience to a type of gift to which certain consequences naturally attach.

"Some specific part of *T*'s estate." That is the phrase used above; it is typical enough.⁷ Its gross inaccuracy lies in its tacit assumption that *all* gifts of some specific parts of *T*'s estate must necessarily be subject to the consequences referred to: ademption and (to a relatively lesser extent, as far as importance goes) immunity to abatement. Today, the common and important subject matter of legacies is what may be referred to generally as "securities" or "investments" or "intangibles". "My 50 shares of General Motors stock." "My money in the X Bank." "J. S.'s note and mortgage." It is obvious, on the one hand, that such legacies, *treated as specific*, are peculiarly vulnerable to ademption under present business practice when not only is change of investment so common but the form of a particular investment so likely to change almost over night. It is even more obvious, on the other, that they should *not* be treated as specific, since the considerations applicable to the gift of the mare and which have been allowed to define the type, apply with little or no force to legacies such as these. The practical difficulty scarcely exists. It is highly unlikely that *L* was given the stock because of his personal fondness for it; it may be duplicated; there is no difficulty about valuing it and no occasion for tracing its proceeds.

The doctrinal difficulty nominally remains—*T* said "my"—but it is difficult to give it much weight in this context. "My brown horse" describes one different from all others, "my 50 shares of General Motors stock" does nothing of the sort. "My" is the vital part of the description in the first instance; in the second it is unimportant, even superfluous, since *T*'s shares don't differ from any others and since we know without being told that all the gifts he is making are to be satisfied from his estate. A testator naturally disposes of his estate in its present form (and few large estates are kept in cash) but in substance he is parcelling out *value*. If *T*, having a credit in London, were to leave "\$5,000 to *A*, 1000 guineas to *B*, and my 200 shares of General Motors stock to *C*", it would not be argued that the gift in guineas would be made specific by the fact that *T*'s London credit was

7. "A legacy is 'specific' when it is a bequest of a *specified* part of the testator's personal estate which is so distinguished." 2 WILLIAMS, EXECUTORS (12th ed. 1930) 746. "A specific legacy is a gift of a specific thing, or of some particular portion of the testator's estate, which is so described by the testator's will as to distinguish it from other articles of the same general nature." 2 PAGE, WILLS (2d ed. 1926) 2040.

exactly 1,000 guineas. *T* was thinking of so much value; he described it in its present form in part to save himself the trouble of reducing it to dollars at the day's rate of exchange and in part because he plainly (if unwisely) assumed that a certain proportion of his assets was going to remain in the form of guineas. Do not exactly the same considerations apply to the shares, although *T*, casually and as a matter of habit, said "my" shares?

After all, the doctrinal limitation must not be so narrowly applied as to defeat its own purpose. It is a limitation imposed on themselves by courts; there is no constitutional or rational rule requiring that wills be construed with complete literalness. On the contrary, good construction usually inheres in exactly a wise and tactful choice of the proper mean between an over-literal interpretation and one going so far in the other direction as to substitute the will of the court for that of the testator; it permits an occasional instance of what may be called *tacit cy pres* interpretation (as distinguished, i. e., from the *cy pres* interpretation expressly indulged in certain cases of charitable trusts). An extremely pertinent example is afforded by the well-known case of *Harding v. Glyn*,⁸ where property was left to one, in trust to appoint it at her death to such of the kin of *J. S.* as she should think fit. On the trustee's dying without appointing, the court held that the property should go to the next of kin of *J. S.* as determined by the Statute of Distribution. Call this "power in trust", "implied gift" or what you like, the common sense explanation remains that the court although unable to effectuate the gift in the exact *form* intended by *T* (*viz.*, through an appointment by the trustee) felt that giving the property to *J. S.*'s next of kin effectuated the *substance* of the gift, and in a way that *T* would certainly have preferred to having it fail utterly because of the merely formal impossibility. If *Harding v. Glyn* is sound (and it has been Anglo-American law for two hundred years)⁹ would it not be equally sound (not to say a good deal more conservative) to construe a legacy of "my 50 shares of *X* stock" as in substance one of "50 shares of *X* stock or the equivalent" with the "my" purely formal?

(c) *How the harm could be minimized: a suggested re-definition.* The thesis of this paper is that the specific legacy should be re-defined so as to include not all legacies *formally* specific, but only those specific in substance, those which have been referred to above as "incurably" specific, those, in short, which either because of the nature of the thing given or the form of the gift must inevitably fail if the thing given is not available, but will, on the other hand, if they survive, naturally

8. 1 Atk. 469 (Ch. 1739).

9. See 2 JARMAN, WILLS (7th ed. 1930) 628; RESTATEMENT, TRUSTS (1935) § 415.

take priority over general legacies when abatement is necessary. This will include primarily (1) gifts of unique tangibles, such as "my grey mare Bessie" and "Blackacre" and (2) conditioned gifts of tangibles or intangibles, such as "the bonds I own at my death". It will exclude most gifts of securities, though referred to as "my" or otherwise particularly described; these will be returned to the category of general legacies. As general legacies, they will adjust themselves automatically in the various vicissitudes which the estate may undergo. Thus a major source of friction in the form of litigation and disappointment will be eliminated.¹⁰

III. JUDICIAL DISSATISFACTION WITH THE SPECIFIC LEGACY—FOUR SIGNIFICANT GROUPS OF CASES

No cases can be cited that explicitly accept such a thesis as that suggested above. There is plenty of evidence, however, that courts are dissatisfied with the working of the specific legacy, or at least with the most conspicuous of its consequences: ademption. Rather curiously, courts seem seldom to realize or resent the inequality caused by the second aspect of the specific legacy, its priority over general ones when abatement is necessary. This is perhaps thought of as effecting a balance, and compensating the specific legatee for the risk of ademption he runs. But courts will go far to avoid ademption. Sporadic cases do it virtually by judicial fiat; for example, some of the cases

10. Is legislation necessary? The lapse problem affords some analogy. Where *L* dies before *T*, it has, since *Brett v. Rigdon*, 1 Plowd. 340 (K. B. 1568), been taken for granted by courts that they may not, as a matter of construction, treat the legacy as made to "*L* or his estate", and that it must fail. Insofar as this rule may rest on the proposition that *T* would necessarily rather have the gift fail than go to *L*'s estate, legislatures have disagreed. In nearly all jurisdictions statutes provide for substitutional taking in certain cases. (For an analysis of the statutes, see Mechem, *Some Problems Arising Under Anti-Lapse Statutes* (1933) 19 IOWA L. REV. 1.) Similar legislation would be helpful, if carefully thought out, in effecting a re-definition of the specific legacy. The statutes found in a few jurisdictions, preventing ademption where property specifically bequeathed is subsequently disposed of by the guardian of a lunatic testator, see Note (1932) 45 HARV. L. REV. 710, 716, might serve as models. However, the writer believes that legislation is not essential and that the matter can be handled within the limits of judicial construction. After all, there is a substantial difference in degree between the lapse problem and the ademption problem. If the legacy is "my *X* stock to *L*", it is easier to construe it "my *X* stock or its equivalent" than to construe it "*L* or his equivalent". Finally there is one lapse situation where relief has been found without legislation. If the residue is given to several as tenants in common, and one dies, the conventional rule holds that one share of the residue lapses. Since, however, it is the purpose of the residue to prevent any part of the estate being undisposed of, and since the word "residue" is admittedly construed in a conventional rather than a literal way (as evidenced by the fact that lapsed legacies "fall into" the residue, though literally excluded therefrom), it can be argued that *T* would probably prefer having the whole residue go to the remaining residuary legatees than having it go to his next of kin, and that the conventionalized meaning of "residue" can be stretched to express this preference. A few courageous cases have lately reached this result. *Corbett v. Skaggs*, 111 Kan. 380, 207 Pac. 819 (1922); *In re Estate of Zimmermann*, 122 Neb. 812, 241 N. W. 553 (1932). This certainly goes further than the construction suggested in the specific legacy cases.

refusing to allow ademption where *T* becomes insane and his guardian sells the property bequeathed appear to rest ultimately on nothing save the court's unwillingness to apply the rule where it will work with such aggravated hardship.¹¹ Beyond these, four fairly well-marked groups of cases may be distinguished, which it is proposed to discuss. They have it in common that they take advantage of some ambiguity in the *language* (though often not in the apparent meaning) of the gift to thrust on it a construction that avoids ademption. It is believed that they support the thesis suggested herein both in that they are consistent with it in result and that they are scarcely to be explained except as tacitly recognizing the soundness of the propositions on which the thesis is based.

(a) *The time-of-death construction.* *T*, making a legacy of "my books" or "my horses and carriages" may well mean those, *and only those*, he then has. His language, however, in the context (writing an instrument not to take effect until his death) is ambiguous; it may just as well refer to the books or horses and carriages he has at his death. The latter construction is likely to be more convenient, as it will prevent ademption and obviate what might be the awkward fact question—just what books did he have when he made the will? The possibility that it will lead to what Vice Chancellor Wood¹² called a "monstrous" result and carry to *L* much more than *T* could have intended, has not often been realized and could usually be averted by tactful construction. Accordingly the time-of-death construction is conventional in case of generic or inclusive gifts.¹³ A New York case¹⁴ illustrates a more radical application of this construction. *T* gave "my diamond brooch" to *L*, *T* then having one. Subsequently she bought another; later she traded both in as part payment on a third which she had at her death. The court, quoting from the well-known case of *Tift v. Porter*,¹⁵ said "the presumption is stronger that a testator intends some benefit to a legatee than that he intends a benefit only upon the collateral condition that he shall remain till death the owner of the property bequeathed", and held that the (third) brooch passed. There can be little doubt that when *T* made her will she had in mind the brooch she then owned and that the "my diamond brooch" referred to in the will was that one and no other. On the other hand, it is quite possible that as she made the subsequent trades she supposed

11. *In re Cooper's Estate*, 95 N. J. Eq. 210, 123 Atl. 45 (1923); cf. *Matter of Ireland*, 257 N. Y. 155, 177 N. E. 405 (1931). For suggestive discussion and an exhaustive collection of the authorities, see Note (1932) 45 HARV. L. REV. 710.

12. In *In re Gibson*, L. R. 2 Eq. 669 (1866).

13. The cases are collected and discussed in Note (1938) 23 IOWA L. REV. 380.

14. *Waldo v. Hayes*, 96 App. Div. 454, 89 N. Y. Supp. 69 (4th Dep't, 1904).

15. 4 Seld. 516, 521 (N. Y. 1853).

the will would pass the new brooches. And certainly few will doubt that the ultimate result is one that *T* would prefer to having *L* take nothing.¹⁶ It is a result, however, difficult to reconcile with current notions about specific legacies; it goes so far (farther than the thesis of this paper) as to hold that the legacy of even a quite specific chattel is not "incurably specific" at least when *T* leaves another chattel, answering the *letter* of the description and not inordinately different in character and value.

(b) *The substantially-the-same-thing construction.* In *In re Slater*,¹⁷ Cozens-Hardy, M. R., remarked that it was no use trying to trace the thing given "unless you can trace it in this sense, that you can find something which has been changed in name and form only, but which is substantially the same thing." This doctrine has been useful; courts have been astute to find the real thing still lurking behind a mere change in name or form. Where a note is bequeathed, a renewal note will pass, because the obligation is the real thing given.¹⁸ Stock in the X State Bank will pass after it has become stock in the X National Bank; a certain share in a given economic entity is the real thing bequeathed, and it is still there.¹⁹ A legacy of "the money owned by me which is on deposit in the Troy Savings Bank" was held not adeemed by the subsequent withdrawal of the money and its deposit in another bank;²⁰ what was given, the court said, was not the debt but the "fund", which still remained. This is interesting. For one thing, the reliance on ambiguity is marked. Strictly speaking, *T* didn't "own" any money on deposit; it was easy for the court to interpret such inartificial language in any way that suited its purpose. For another, if the claim against the second bank could be substituted for the claim specified by *T*, why could not any other be substituted, or—in short—so much money?

Even more interesting is the very recent Maine decision of *Gorham v. Chadwick*.²¹ The will bequeathed "my stock in the H. Trust Company", *T* then owning ten shares of such stock, of par value of \$100 per share and apparently taken to be of about that actual value. Two years before *T*'s death the bank failed. A hundred per cent assessment was levied upon stockholders, to be paid for by subscribing for new stock. *T* surrendered her stock and subscribed for forty new

16. Cf. *In re Sikes*, [1927] 1 Ch. 364, where the disparity in value was relatively much greater.

17. [1907] 1 Ch. 665, 672.

18. Succession of Shaffer, 50 La. Ann. 601, 23 So. 739 (1898).

19. *In re Peirce*, 25 R. I. 34, 54 Atl. 588 (1903); cf. *In re Slater*, [1907] 1 Ch. 665. For further citation of authority, see Smith, *Ademption by Extinction* (1931) 6 WIS. L. REV. 229, 234-5; Note (1938) 23 IOWA L. REV. 380, 381-2.

20. *Willis v. Barrow*, 218 Ala. 549, 119 So. 678 (1929).

21. 135 Me. 479, 200 Atl. 500 (1938).

shares (i. e., four for each old share) at \$25 per share. At the same time she voluntarily subscribed for sixty-nine shares of new preferred stock to be issued as part of the reorganization. After *T*'s death her administrator paid the subscriptions from *T*'s assets and the hundred and nine new shares were issued to the administrator. The court held that *L* took the forty new shares but not the further sixty-nine. As to the first, there had been "a change in form but not in substance"; as to the second, "no intention to include this after-acquired stock in the bequest is found".

The technique is a little faulty here. The court ignores the time-of-death construction entirely. Both groups of shares were equally "after-acquired". The court's statement about form and substance can hardly be accepted if by "substance" the court meant (as it obviously did) *T*'s interest in a business. Since the capital was wholly new, it would be more accurate to say that there had been a change in substance but not in form. Quite new wine in the old bottle. The result, however, is excellent. The time-of-death interpretation would have approached being "monstrous" here. And an analysis of form and substance that cuts a little deeper than the court's leads to this simple interpretation of the legacy: "ten shares of my *H. Trust Company* stock or its equivalent".

(c) "*X shares of Y stock*"—the rule of *Robinson v. Addison*. Very numerous, very important, and very suggestive is a third group of cases. In *Robinson v. Addison*,²² *T* bequeathed to *L* "five and a half shares in" the *X Corporation*, and to *L1* and *L2* each "five shares in" the same corporation. When he made the will *T* had exactly fifteen and a half shares of this stock; he disposed of it all later and died owning none. The legacies were held general and not adeemed. If *T* meant to give only the shares he had, he could have designated them as "his". "The mere circumstance", Lord Langdale, M. R., continues, "of the testator having, at the date of his will, a particular property, of equal amount to the bequests of the like property which he has given without designating it as the same, is not a ground upon which the Court can conclude that the legacies are specific . . . He intended his legatees to have so many canal shares, but not giving the specific shares that he had, he gave nothing which was distinguished or severed from the rest of the testator's estate, but in effect gave such an indefinite sum of money as would suffice to purchase so many shares as he had given, those shares being any such shares as could be purchased, and not certain particular and defined shares".²³

22. 2 Beav. 515 (Ch. 1840).

23. *Id.* at 520-1. Cf. Lord Eldon's remarks in *Sibley v. Perry*, 7 Ves. 522 (Ch. 1802).

This case represents the usual, but by no means universal, rule. It is important to determine on exactly what it rests. Had *T* said "five and a half of my shares in the *X* Corporation" the gift would almost certainly have been held specific. But would *T* have made a gift of five and a half shares unless he meant the five and a half shares he had? Is it not, as the court said in *Drake v. True*,²⁴ "more probable than otherwise that she [*T*] intended . . . to dispose specifically of the stock she then owned?" Or, as Crane, J., said in *Matter of Security Trust Company*,²⁵ "The law is not so unscientific as to insist upon the use of the word 'my' when other words may clearly indicate the intention of the testator to give shares then in his ownership." The explanation of *Robinson v. Addison* must be found in something other than interpretation of *T*'s specific intent, viz., in the proposition that since *Y* shares are all alike and readily obtainable on the market at a uniform price, there is less likelihood of frustrating *T*'s general scheme and intent by treating the legacy as general and buying the shares for *L* than by treating it as specific and sending *L* away, empty-handed, the former being an alternative *T* has conveniently made possible by neglecting to say (although he doubtless had in mind) "my".

Conflicting pulls are more apparent in the stock cases than anywhere else. Generally, it may be said of legacies that they have a fixed polarity; the factors impelling courts to construe legacies as general are so much commoner and so much more persuasive than those tending in the opposite direction that the normal pull is in favor of the general construction. *T* may sell his bequeathed stock, just as he may sell anything else he has bequeathed; if he does, the conventional pull operates, and the rule of *Robinson v. Addison* shows its strength. On the other hand stock, more than anything else *T* will be bequeathing, is subject to possibilities of change that completely reverse the constructional polarity and impel the court to treat the legacy as a specific one if possible. A share of stock is more volatile, not to say whimsical, than a bond, a certificate of deposit, a mortgage, a diamond brooch, or an acre of land, since, unlike them, it is quite apt to split five for one just before *T*'s death or be the source of an extraordinary dividend just after his death. If it does, the convenient disregard for *T*'s probable intent on which *Robinson v. Addison* is based becomes nowhere near so convenient; the pull is now in favor of an interpretation stressing *T*'s real intent, declaring the legacy specific, and so protecting *L*.

These conflicting pulls naturally lead to conflicting decisions. The nominal rule that a gift of "*X* shares of *Y* stock" is general (a rule

24. 72 N. H. 322, 323, 56 Atl. 749, 750 (1903).

25. 221 N. Y. 213, 220, 116 N. E. 1006, 1007 (1917).

similarly applied in *Graham v. Graham's Executor*²⁶ to "8,000 lbs. of iron" and in *Kingsland v. Kingsland*²⁷ to "two horses . . . and two cows") is most uniformly followed where *T* at his death owns less than the named number of shares.²⁸ A majority of courts are glad to apply the convenient fiction that *T* intended his executor to buy the necessary shares. Only in Missouri and New Hampshire,²⁹ it seems, will the courts insist sternly on the real intent, and turn *L* away empty-handed. Where the question is whether a dividend declared since *T*'s death shall go to *L* or the residuary legatee, the rule is usually applied but with reluctance; very slight evidence in the will will serve to show that *T* meant the stock he had, thus making the gift specific and carrying the dividends to *L*.³⁰ In the infrequent cases where *T* dies owning sufficient stock but with an insufficiency of other assets generally, so that general legacies must abate, the legacy has been held specific and so protected at the expense of the general legacies.³¹

*In re Mandelle's Estate*³² is typical of a small but very interesting group of cases. The will gave *L* "1200 shares of *X* stock", *T* then owning nearly four thousand shares. Subsequently the stock structure was changed, *T* receiving five new shares in place of each of the original ones. It was held that the legacy was specific, that *T*'s interest though changed in form was unchanged in substance, and that *L* was entitled to six thousand of the new shares. At least three other cases have reached a similar result.³³

26. 45 N. C. 291 (1853).

27. 60 N. J. Eq. 65, 47 Atl. 69 (Ch. 1900).

28. *Mecum v. Stoughton*, 81 N. J. Eq. 319, 86 Atl. 52 (1913); *Matter of Dewint*, 161 Misc. 398, 292 N. Y. Supp. 198 (Surr. Ct. 1936); *Davis v. Cain's Ex'r*, 1 Ired. Eq. 304 (N. C. 1840); *Pearce v. Billings*, 10 R. I. 102 (1871); *In re Blomdahl's Will*, 216 Wis. 590, 257 N. W. 152 (1934); *Robinson v. Addison*, 2 Beav. 515 (Ch. 1840); cf. *Jeffreys v. Jeffreys*, 3 Atk. 120 (Ch. 1744).

29. *Waters v. Hatch*, 181 Mo. 262, 79 S. W. 916 (1904); *Fidelity Bank v. Hovey*, 319 Mo. 192, 5 S. W. (2d) 437 (1927); *Drake v. True*, 72 N. H. 322, 56 Atl. 749 (1903); see also *Jewell v. Appolonio*, 75 N. H. 317, 74 Atl. 250 (1909). The Massachusetts law seems uncertain. See *White v. Winchester*, 6 Pick. 48 (Mass. 1827); *Unitarian Society v. Tufts*, 151 Mass. 76, 23 N. E. 1006 (1890); *Thayer v. Paulding*, 200 Mass. 98, 85 N. E. 868 (1908). The decision in *Ferreck's Estate*, 241 Pa. 340, 88 Atl. 505 (1913) appears to rest on the special language of the bequest.

30. *L* does not take the dividend: *Bond v. Evans*, 92 Colo. 1, 17 P. (2d) 311 (1932); *Norris v. Thomson's Ex'r*, 16 N. J. Eq. 218 (1863); *In re Low*, 103 N. J. Eq. 435, 143 Atl. 222 (1928); *Tift v. Porter*, 8 N. Y. 516 (1853); *Matter of Liell*, 139 Misc. 513, 247 N. Y. Supp. 386 (Surr. Ct. 1931); *Hood v. Garrett*, 53 Ohio App. 464, 5 N. E. (2d) 937 (1936). *L* takes the dividend: *In re Estate of Lague*, 267 Mo. 104, 183 S. W. 608 (1915); *Sherman v. Riley*, 43 R. I. 202, 110 Atl. 629 (1920). See also *Smith v. Smith*, 192 N. C. 687, 135 S. E. 855 (1926).

31. *Vogel v. Saunders*, 92 F. (2d) 984 (App. D. C. 1937); *Waters v. Hatch*, 181 Mo. 262, 79 S. W. 916 (1904); *Martin, Petitioner*, 25 R. I. 1, 54 Atl. 589 (1903). See also *Gardner v. Viall*, 36 R. I. 436, 90 Atl. 760 (1914).

32. 252 Mich. 375, 233 N. W. 230 (1930).

33. *Fidelity Title and Trust Co. v. Young*, 101 Conn. 359, 125 Atl. 871 (1924); *Garabrant v. Callaway*, 113 N. J. Eq. 424, 167 Atl. 1 (1933); *Will of Martin*, 252 N. Y. 582, 170 N. E. 151 (1929). And see *Partridge v. Partridge*, Cas. t. Tal. 227 (Ch. 1736).

In some instances there is a gift of a named number of shares and an amount of cash. Taken literally, this does not preclude treating the gift of shares as general, but solicitude for real intent has usually come to the front here. *T*, it is said, must intend a distinction; he cannot be taken to have intended a gift of money made in two ways. Hence the gift of stock is specific. In some instances this has been favorable to *L*;³⁴ in others it has resulted in ademption and disappointment.³⁵ Other cases deal with stock not for sale or that has ceased to exist. The first alternative has arisen where the gift was of stock of a privately held corporation, *T* and a few others owning it all; it has been easy, and in the actual cases, convenient, to say that *T* must have intended to give the stock he owned.³⁶ Where the stock has ceased to exist a real difficulty is presented. In *Bailes v. Halsey*³⁷ the gift was of one United States bond of a described type "of the face value of \$500". At *T*'s death such bonds had all been paid and the government had ceased to issue them but the court found the solution not difficult: *L* was held entitled to five hundred dollars. In *In re Gray*,³⁸ however, where the gift was of "fifty shares in" a corporation that had ceased to exist at *T*'s death, the court said that the legacy was one of so much money as would buy the fifty shares at *T*'s death, and that since the shares were not for sale at any price it was impossible to determine the amount and the legacy must fail for uncertainty.

Thus, where *T* has given a number of shares, without specifying which ones, the courts have, by virtually treating the description as ambiguous, been able in most instances to achieve a desirable result. Since, however, this is commonly done by disregarding what *T* plainly had in mind, the question arises whether any sound considerations of policy forbid doing the same thing when *T* has expressly said what in the other cases he has only, as we have put it, "plainly had in mind".

34. *Fidelity Title and Trust Co. v. Young*, 101 Conn. 359, 125 Atl. 871 (1924); *Matter of Security Trust Co.*, 221 N. Y. 213, 116 N. E. 1006 (1917); *Will of Martin*, 252 N. Y. 582, 170 N. E. 151 (1929).

35. *New Albany Trust Co. v. Powell*, 29 Ind. App. 494, 64 N. E. 640 (1902); *Fidelity Bank v. Hovey*, 319 Mo. 192, 5 S. W. (2d) 437 (1928). In *Metcalf v. Framingham Parish*, 128 Mass. 370 (1880) it does not appear what the contingency was.

36. *Matter of Security Trust Co.*, 221 N. Y. 213, 116 N. E. 1006 (1917); *Matter of Strassenburgh*, 136 Misc. 86, 242 N. Y. Supp. 447 (Surr. Ct. 1929); *Matter of Tiffany*, 157 Misc. 873, 285 N. Y. Supp. 971 (Surr. Ct. 1935). For extensive citation and discussion of the New York authorities on the point, see Mersch, *Is Tift v. Porter Modified, or Are Bequests of Closely-Held Stock an Exception to It?* (1938) 7 *FORDHAM L. REV.* 364.

37. 179 Ga. 182, 175 S. E. 472 (1934).

38. 36 Ch. D. 205 (1887). When the will was made *T* owned 70 shares; the company was then an unlimited one. Later the company was transformed into a limited company; in the reorganization *T* received 140 shares in place of his original 70. The name and apparently the substance of the organization remained the same. Such cases as *Gorham v. Chadwick* (discussed, *supra* p. 555) and *In re Mandelle's Estate* (discussed, *supra* p. 558) suggest that a more imaginative treatment of the problem is possible.

Why not treat a gift of "my X shares of Y stock" as general unless T has in some way unmistakably indicated not simply that he means the Y shares he has (which he does by the form of the gift) but that he really wishes the gift to be contingent on his ownership of those shares at his death? In Rhode Island, climaxing a series of rather unusual decisions, the court, in *Industrial Trust Company v. Tidd*,³⁹ comes very close to saying that it will construe legacies of stock, with or without "my", to be specific or general as convenience in the particular case requires, but this liberality has not been observed elsewhere, a hard and fast rule prevailing that gifts of "my" stock must be held specific.⁴⁰ The stock cases thus, by and large, present an unedifying picture. Where T , as he naturally will, says "my", courts conceive themselves to be handcuffed by a rule of construction bound to lead to disappointed hopes in a high percentage of cases; where T doesn't say "my", courts avoid the disappointment but only by sacrificing honesty and consistency. Both alternatives could be avoided by applying the rule of *Robinson v. Addison* to all gifts of stock save those expressly conditioned as above-mentioned.

Suppose T gives, not "10 shares of Y stock" but "\$1,000 in Y stock" or "\$1,000 of Y stock" or "\$1,000 out of my Y stock". Such cases are plainly very similar to and are often treated as interchangeable with those just discussed, yet there is a difference. Here the monetary value is given; from that may be determined the number of securities. In the former type, the number of securities is given, with the monetary value to be figured from that. Here what we have called an ambiguity becomes very marked and assumes a special form: the gift is of so much money—yet identified to some extent with certain specific property. Did T mean "\$1,000—in Y stock if it is on hand and convenient but, if not, in cash or any other securities, since \$1,000 in any form will suit L and fulfill my intent to benefit him to that extent", or did he mean "as much of my Y stock as is worth \$1,000"?

39. 49 R. I. 188, 141 Atl. 464 (1928). In *Pearce v. Billings*, 10 R. I. 102 (1871), a legacy of "20 shares in the Globe National Bank" was held general, to prevent redemption. In *Mahoney v. Holt*, 19 R. I. 660, 36 Atl. 1 (1896) the legacy was of "200 shares of the common stock of the U. S. Rubber Co., now owned by me and standing in my name upon the books of the said company". This was said not to be distinguishable from the legacy in the *Pearce* case, and was so held general, to prevent redemption—an almost unique decision. Then in the three cases of *Martin*, Petitioner, 25 R. I. 1, 54 Atl. 589 (1903), *Gardner v. Viall*, 36 R. I. 436, 90 Atl. 760 (1914), and *Sherman v. Riley*, 43 R. I. 202, 110 Atl. 629 (1920), legacies like that in the *Pearce* case were held specific, to prevent abatement or carry dividends. The court in the *Tidd* case thus had before it a striking demonstration, in its own decisions, that a legacy of stock, with or without "my" could be construed as general or specific according to the exigencies of the case.

40. The authorities stating or exemplifying this rule are innumerable. See 2 JARMAN, WILLS (7th ed. 1930) 1039-40; 2 PAGE, WILLS (2d ed. 1926) 2046-47; cf. *Mahoney v. Holt*, stated in preceding note; *Gilmer v. Gilmer*, 151 Miss. 33, 117 So. 830 (1928).

To answer this question, we must consider a final group of cases, that come closer than any others to a tacit acceptance of the thesis suggested above; they are grouped around a concept never very fully explored or completely understood, that of the so-called "demonstrative" legacy, whose essence is precisely ambiguity in the form just described.

(d) *The Demonstrative Legacy: 1. History and analysis.* In the seventeenth and eighteenth centuries, when the law of legacies was still very much in the formative stage, it was sometimes said that ademption was a matter of intent, i. e., that a specific legacy would not be adeemed unless *T* disposed of the property in such a way as to indicate he meant to revoke the gift.⁴¹ In modern times it is often flatly stated that such *was* the early law of ademption.⁴² On such a view, the legacy of the mare Bessie might be adeemed by her sale but certainly not by her death, the latter scarcely raising any presumption of intent to revoke. Rather oddly, it was never explained how ademption was avoided. *T*'s lack of intent to adeem could not bring the mare back to life. Did *L* take her value or her hide? The explanation is simple. The cases relying on intent didn't involve mares or horses (though, as we shall see, courts were fond of using horses as illustrations) or chattels of any sort. Investigation shows that they were all alike, all gifts of a liquidated debt owed *T*.⁴³ If *D*, the debtor, paid *T* by urgent request or under compulsion of judgment, this showed intent to adeem and the gift was gone; if *D* came around and paid voluntarily, no intent to adeem was inferred. True, the debt, the nominal subject matter of the gift, had ceased to exist—but the *amount* could easily be treated as the real subject matter. If, for example, the legacy was "*D*'s bond for £1,000", £1,000 from the general assets would satisfy *L* perfectly, and the court seems to have had no qualms on the doctrinal point.

The intent rule thus rested on a tacit admission that at least some gifts of particular investments, if specific in form, were not specific in the most important sense of being subject to ademption by *T*'s subsequent collection or conversion of the investment. Further admission of the same thing was found in another group of cases which avoided ademption without any mention of intent at all by simply treating the legacies as general. *Pawlet's Case*⁴⁴ is the most famous. The legacy there was of "the sum of £500 which my sister, the Lady Cholmeley

41. This probably traces back to Swinburne. See SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES (1590) Part VII, § 20, particularly p. 281. Cases purporting to apply such a rule are collected and discussed in the opinion in *Ashburner v. Macguire*, 2 Bro. C. C. 108 (1786).

42. As in *In re Slater*, [1907] 1 Ch. 665.

43. The very interesting opinion in *Blackstone v. Blackstone*, 3 Watts 335 (Pa. 1834) is one of the rare judicial utterances to advert to this.

44. *Raym. Sir. T.* 335 (K. B. 1679).

hath now in her hands of mine". The debt was paid off before *T's* death, but the court, saying nothing about intent, held that the legacy was a "pure" one, one "in numerat" and not a "specifick" one, and so still payable.

Inevitably, the intent criterion proved unworkable. Important decisions could not be left to what was virtually guesswork; conflicting inferences were too possible. In *Ford v. Fleming*,⁴⁵ for example, a legacy of part of a debt was held not adeemed by *T's* subsequent suit and recovery. The court, reversing the usual inference, said the suit showed no intent to adeem but rather a desire to protect *L* from a bad debtor! This was obviously intolerable. In *Ashburner v. Macquire*⁴⁶ and *Stanley v. Potter*,⁴⁷ Lord Thurlow carefully examined and ultimately repudiated the notion, that ademption could rest on intent. There was no certain rule, he said in the latter case, "except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and if specific, whether the thing remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B. if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate. And I do not think that the question in these cases turns on the intention of the testator. The idea of proceeding on the *animus adimendi* has introduced a degree of confusion in the cases which is inexplicable, and I can make out no precise rule from them upon that ground: . . . I believe it will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing given remains or not. For where a testator gives by his will a particular sum of money, and he afterwards receives and spends it, I see no end to the confusion arising from the following any other line".⁴⁸

It is regrettable that Lord Thurlow did not see that the "degree of confusion" caused by making guesses about the *animus adimendi* could be eliminated without any necessity of taking such strong ground about specific legacies and assimilating legacies of a particular horse to legacies of a particular sum of money. *Pawlet's Case* (which involved a particular sum of money) showed what could be done without making anything turn on intent. Lord Thurlow's view might advantageously have been accepted as to horses, with *Pawlet's Case* left to govern all cases of investments. So satisfactory a compromise was not reached. Lord Thurlow's view, as we know, ultimately prevailed,

45. 2 P. Wms. 469 (Ch. 1728).

46. 2 Bro. C. C. 108 (1786).

47. 2 Cox Ch. 180 (1789).

48. *Id.* at 182.

but not without a struggle. In the process, the generality of its application was narrowed and something of the mercifulness of the older doctrines salvaged by the gradual recognition of a fourth type of legacy, half general and half specific, one known before and indeed to some slight extent borrowed from the civil law, and yet one not fully standardized and defined until Lord Thurlow's rule focused attention on it. This was, of course, the demonstrative legacy.

The notion had been, as it were, latent in the cases. Familiar decisions were now seen to have rested either on something different than had been supposed or at least on something that had not adequately been stressed. Looking back, it was observed that *Pawlet's Case* need not be treated as involving a "particular sum of money". It said "the" sum of £500, to be sure, and so on, but it might be argued that *T* had meant "£500" with the rest just by way of comment: "£500—as for example the £500 now in the hands of my sister, Lady Cholmeley". Or, at any rate, it could be argued that *T*'s language could bear such a meaning (whatever he really meant) which would not be true if he had simply said: "the money Lady Cholmeley owes me". The same thing was true of a good many of the cases that had been handled on the intent theory; they dealt with language admitting the interpretation that *T* meant not a particular fund but just a particular amount of money—plus the suggestion where it could be found. Finally, there were cases like *Smallbone v. Brace*,⁴⁹ where a legacy of "£400 to be paid unto him out of £500 in the hands of" *J. S.* was held not to abate as against general legacies. That seemed to have little affinity for *Pawlet's Case* and certainly not to be consistent with it, yet it turned out that a crude synthesis of the two could be achieved, whereby they illustrated different aspects of the same sort of legacy. Both cases favored the legatee. If one case was vouched for the proposition that the legacy could be construed either way, the other case proved it. Indeed *Smallbone v. Brace* did something for the respectability (if not the logic) of the doctrine; it showed that old vested rights were being scrupulously respected. *L* could still insist that his legacy was specific; *Pawlet's Case* had simply given him the added privilege of claiming that it was general, if he liked that version better.

It is not suggested that this development was conscious, let alone articulate. Such a doctrine did crystallize, however. Old cases were cited for it. It seems not far-fetched to regard it as a by-product of *Ashburner v. Macguire*, and to say that the old instinct to avoid ademption, deprived of one outlet by Lord Thurlow's short-sighted decisions, found at least a partial new one in this groping, bungling and typi-

49. Rep. t. Finch 303 (Ch. 1677).

cally common-law way. Authoritative definition came late; scarcely before the nineteenth century do we meet a complete and lucid statement. In *Tempest v. Tempest*,⁵⁰ Lord Cranworth said: "A demonstrative legacy is in the nature of a specific legacy, as of so much money, with reference to a particular fund for payment; it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets, yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets". In an earlier case, Sir Richard Pepper Arden, M. R., had spoken a little more realistically and given the explanation of the matter: "A sum of money may be given, and a reference made to a particular part of the estate, as that part, out of which the testator thinks it most convenient that it should be paid . . . The Court is so desirous of construing it a general legacy, that if there is the least opening to imagine, the testator meant to give a sum of money, and referred to a particular fund only as that, out of which in the first place he meant it to be paid, the legatee will have this advantage: that it shall be considered pecuniary, so as not to have the legacy defeated by the destruction of the security, if that should be destroyed, and that he has a right to call for an appropriation".⁵¹

"The least opening . . ." This is the key to the matter. In other words, if *T* will oblige by phrasing his gift in even slightly ambiguous language, courts will seize the opportunity and thrust on it the least plausible (from the standpoint of what was probably in *T*'s mind as he wrote) but most useful interpretation. "My money in the bank" remains specific, it is a "particular sum of money" within Lord Thurlow's definition, although it is readily ascertainable how much money *T* had in the bank then and the next day when he withdrew it—but "\$500, viz., my money in the bank" or "\$500, to be paid from my money in the bank" is sufficiently ambiguous, it gives the "least opening" Sir Richard Pepper Arden spoke of, to permit being construed as a gift of \$500 simpliciter if necessary, although we may have little doubt that in each of the three cases *T* had very much the same intent, and had in mind simply a fund or part of it.

The concept, despite its limitations, has had wide application and proved of great value as a way of escape from the specific legacy. The phase of it that makes the legacy specific, is of course as unfortunate as it is illogical. This traces back to the rule of *Smallbone v. Brace* and its inclusion, from timidity, love of conformity, and a naive belief

50. 7 De G. M. & G. 470, 473 (Ch. 1857).

51. *Chaworth v. Beach*, 4 Ves. 555, 565 (Ch. 1799). And see the great argument of Mitford in *Roberts v. Pocock*, 4 Ves. 150 (Ch. 1798).

in the possibility of eating your cake and having it too, in a doctrine logically hostile to it. As a result, the demonstrative legatee gets what seems an unintended and undeserved preference over general legatees where abatement is involved.⁵² Furthermore, the inconsistency inherent in the concept cannot (and does not) fail to produce confusing results in the cases. Decisions classing a legacy as specific, where abatement is concerned, make treacherous guides where not abatement but ademption is the issue. In the former instance *L* is as well protected by calling the legacy specific as demonstrative; courts are likely to adhere to the familiar and call the legacy specific. The case thus gets into the books for the proposition that such and such a legacy is specific; the distinction lightly made in a case where nothing turned on it may prove tragic for the legatee in a later case where the issue is not whether the legacy is demonstrative or general but whether it is demonstrative or specific, and where the legatee finds his legacy sacrificed to the authority of a case that never would have classified the legacy as specific had ademption been threatened.⁵³

The common phase of the concept, however, is that making the legacy general and so preventing ademption. One can only applaud this, while at the same time regretting that the possibilities of this aspect have not been fully realized. Crystallization is, by definition, loss of fluidity; this is particularly unfortunate in the case of the demonstrative legacy which, at its best, is something that has scarcely hardened beyond a state of mind, a willingness to scrutinize the indi-

52. *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278 (1900); *Dugan v. Hollins*, 11 Md. 41 (1857); *O'Day v. O'Day*, 193 Mo. 62, 91 S. W. 921 (1906); *Florence v. Sands*, 4 Redf. Surr. 206 (N. Y. 1880); *Matter of Obst*, 115 Misc. 711, 185 N. Y. Supp. 283 (Surr. Ct. 1920); *Myers v. Myers*, 88 Va. 131, 13 S. E. 346 (1891); *Will of Loewenbach*, 222 Wis. 467, 269 N. W. 323 (1936); *Acton v. Acton*, 1 Meriv. 178 (Ch. 1816). In *Acton v. Acton*, *supra*, where the legacy of £4,000 was to be paid from money in the hands of *T*'s agent, it was argued persuasively on behalf of the general legatees: "Suppose the agent in this case had been a bankrupt; it is not to be imagined that the testator meant the legacy to depend upon such a contingency. He could not have intended that it should be altogether lost, provided there was no fund in the hands of his banker or agent to answer it. Then, if this legatee would have had the benefit, in the case supposed, of such a construction as that the legacy is not specific, but general, it is but fair that, in the case which has actually happened, she could incur a diminution in proportion to the other general legacies." However, Sir W. Grant, M. R., answered briefly: "This is a question of priority, not of apportionment. No other legatee can have any right to the fund so appropriated until after payment of the £4,000. That legacy must therefore be paid in full out of the money reported to be in the agent's hands at the time of the death of the testator."

53. An illustration is afforded by the cases of *Baker v. Baker*, 319 Ill. 320, 150 N. E. 284 (1925) and *Waters v. Selleck*, 201 Ind. 593, 170 N. E. 20 (1931). In the first case the legacy was of "the sum of five hundred dollars, the same to be paid out of any moneys or notes I may have on hand at the time of my death"; the court went to considerable length in determining that this was specific and not demonstrative, although this made no difference since the fund was adequate to pay the legacy and the question was whether it abated with general legacies. In the second case, the legacy was "\$5,000, in cash out of the Burbank estate". The Burbank estate produced less than \$5,000; the legacy was held specific and so was pro tanto adeemed; the *Baker* case (in which no question of ademption was involved) was one of the authorities relied on.

vidual legacy to see if there is not some possibility of construing it so as to avoid ademption. Courts are prone to insist on a formula; they are prone to be literal about intent, to be impressed with the fact that *T* had a fund in mind—when the only way of doing something for *T* is to forget precisely that fact when his use of language has made it possible. *T* probably very seldom, if ever, actually *intends* a demonstrative legacy, just as he must very seldom intend (when he gives *X* shares of *Y* stock) his executor to go out and buy the stock; to suppose that he does, and then insist that he must, is to sacrifice the enormous convenience all around (and to *T* most of all) of being satisfied with the mere money legacy that he (literally) *might* have meant.⁵⁴

2. *The Authorities.* Analysis of the cases is not easy. If we must have a formula, it should be as liberal and flexible as possible, e. g., a legacy is demonstrative whenever it is, expressly or by implication, one of *X* dollars, identified in some way and to some extent with the *Y* fund. This might even be broadened to: "any legacy on which *T* himself sets a money value". However, the factors just mentioned have worked towards a narrower statement. Most of the disputed cases turn exactly on this choice, between a broad, flexible definition and the narrower one which often seems to allow but one form of demonstrative legacy: "*X* dollars, to be paid from the *Y* fund". This is certainly the most common form; such a legacy is almost universally treated as at least *prima facie* demonstrative.⁵⁵ Testators show no partiality for any particular sort of fund; insurance money, money in bank, capital in a business, money owing on notes or otherwise, proceeds of sale—these have been common instances. One important application of the doctrine is found in the familiar case of *Pierrepoint v. Edwards*.⁵⁶ *T* left all his estate to trustees for conversion and investment, directing them to pay his wife an annuity of \$7,000 "out of the income of the estate thus invested"; the residue of the income and the corpus at her death he gave to brothers and sisters. On the income's

54. In the *Selleck* case, quoted in preceding note, the court said: "If the testator had said: 'I bequeath to my daughter . . . \$5,000 in cash and direct my executor to pay it out of the money coming to me from the Burbank Estate, if possible, otherwise out of any funds in his hands', there would be no question but that such bequest is a demonstrative legacy." The further discussion of the court seems to assume that such an intent must be expressed by *T*, either expressly or by clear implication. If this is true, demonstrative legacies will obviously be very rare. See, illustrating the same point of view, *In re Pratt* [1894] 1 Ch. 491.

55. The cases are very numerous; as typical may be cited: *Kramer v. Kramer*, 201 Fed. 248 (C. C. A. 5th, 1912); *Maxim v. Maxim*, 129 Me. 349, 152 Atl. 268 (1930); *Shepard v. Bryan*, 195 N. C. 822, 143 S. E. 835 (1928); *Estate of James Cascaden*, 8 Phila. 582 (Pa. O. Ct. 1871); *Cogdell v. The Widow*, 3 Desauss. Ch. 346 (S. C. 1811); *State ex rel. Burrow v. Cothron*, 21 Tenn. App. 519, 113 S. W. (2d) 81 (1937). But see *Hanley v. Fernell*, 54 R. I. 84, 170 Atl. 88 (1934).

56. 25 N. Y. 128 (1862).

proving inadequate, it was held that the annuity was payable from capital,⁵⁷ Denio, J. saying that "when the testator bequeaths a sum of money, or, which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled, merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund".⁵⁸ Judge Denio's statement (quoted from *Dickin v. Edwards*⁵⁹ and traceable back at least as far as *Mann v. Copland*⁶⁰) could be realistically rephrased: "When *T* bequeaths a sum of money, with nothing to suggest he contemplated its nonpayment, the gift will not be permitted to be destroyed merely by the direction that the money be paid out of a particular fund, unless it affirmatively appears from the nature of the fund or otherwise that *T* would not wish the sum paid *except* from the fund". The application of the doctrine to annuities is doubtless an exceptionally happy one, since annuitants, like other life tenants, are apt to have more claim on *T*'s bounty than remaindermen.

Sometimes the direction to pay from a fund is found by implication, as in *In re Barklay's Estate*,⁶¹ where a direction to executor to retain \$300 from a fund, the remainder of which was disposed of, was followed by a gift of \$100 to each of three grandchildren; the court pointed out that the retention of the \$300 was meaningless unless it was construed as a fund from which the three legacies were to be paid. On the other hand intent may appear, or be suspected, to have the legacy actually conditioned on the continued existence of the fund. Thus in *Ellis v. Walker*⁶² the legacies were to be paid from *T*'s in-

57. Accord: *Lansburgh v. Lansburgh*, 37 F. (2d) 997 (App. D. C. 1930); *Thomas v. King*, 182 Ga. 463, 185 S. E. 820 (1936); *Moore v. Alden*, 80 Me. 301, 14 Atl. 199 (1888); *Addon v. Smith*, 83 Me. 551, 22 Atl. 470 (1891); *Smith v. Fellows*, 131 Mass. 20 (1881); *Eggleston v. Merriam*, 83 Minn. 98, 85 N. W. 937 (1901); *Florence v. Sands*, 4 Redf. Surr. 206 (N. Y. 1880); *Matter of Anderson*, 143 Misc. 250, 256 N. Y. Supp. 529 (Surr. Ct. 1932); *Matter of Burton*, 156 Misc. 175, 281 N. Y. Supp. 579 (Surr. Ct. 1935); *Matter of Ingraham*, 158 Misc. 602, 286 N. Y. Supp. 128 (Surr. Ct. 1936); *Boomhower v. Babbitt's Adm'r*, 67 Vt. 327, 31 Atl. 838 (1895); *First Huntington Nat. Bank v. Colvin*, 114 W. Va. 193, 171 S. E. 413 (1933). But cf. *Stiff v. W. B. Worthen Co.*, 177 Ark. 204, 6 S. W. (2d) 527 (1928); *Byrne v. Byrne*, 123 N. J. Eq. 6, 195 Atl. 848 (Ch. 1938); *Watrous v. Smith*, 7 Hun 544 (N. Y. Sup. Ct. 1876); *Delaney v. Van Aulen*, 84 N. Y. 16 (1881); *Houston Land & Trust Co. v. Campbell*, 105 S. W. (2d) 430 (Tex. Civ. App. 1937).

58. 25 N. Y. 128, 131 (1862).

59. 4 Hare 273 (Ch. 1844).

60. 2 Madd. 223 (Ch. 1817).

61. 10 Pa. 387 (1849). See also *Wilcox v. Rhodes*, 2 Russ. 452 (Ch. 1826); *Disney v. Crosse*, L. R. 2 Eq. 592 (1866).

62. *Ambl.* 309 (Ch. 1756). In *Allen v. Allen*, 76 N. J. Eq. 245, 74 Atl. 274 (Ch. 1909), *T* bequeathed his wife "the sum of seventeen thousand dollars to be paid to her out of the securities which I now hold, instead of cash". This was held to be not demonstrative but specific. The effect, however, was to give *L* the income of the securities from *T*'s death, rather than interest from a year from death. *Quaere*, if the legacy would have been held specific if *T* had died with no securities but ample cash assets. And see *Georgia Infirmary v. Jones*, 37 Fed. 750 (C. C. S. D. N. Y. 1889); *Warren v.*

terest in a business "if he did not draw it out of trade before he died". Lord Hardwicke held this phrase to make the gift conditional (i. e., purely specific) and to preclude its payment from the general assets—although one may wonder whether *T* meant the condition to go to the gift itself and not simply to the mode of payment. Several cases dealing with a legacy to be paid from an undistributed share in an estate, or from the proceeds of an unliquidated claim, treat the legacy as specific, perhaps on the notion that *T*, providing for payment from a fund whose amount is inherently speculative, must intend the legacy to be speculative, too.⁶³ Conversely, a gift *prima facie* specific may be made demonstrative by language not referring to a fund so much as suggesting *T*'s intent that the legacy was to be paid in any event, as in *Williams v. Hughes*,⁶⁴ where gifts executing a power of appointment (the fund subject to appointment proving inadequate) were held payable from the general assets because *T* in a later clause of the will directed that they be paid directly after death "in common with the other legacies", a phrase the court felt to indicate an intent to put all the legacies on the same footing, not only as to time of payment but as to sources available for payment. Such acuteness contrasts favorably with the unimaginativeness of *Ellis v. Walker*.

Where the gift of an amount of money is followed by language, not making it payable *from* a fund, but identifying it *as* a fund ("\$500 which *J. S.* owes me") the cases hesitate. The legacy is not within the conventional formula, and *T*'s preoccupation with the fund is rather conspicuous. However, it still says "\$500", and it still seems more likely than otherwise that *T* would rather have *L* paid from the general assets than not at all, particularly as the usual case is one where the general assets have been increased by *T*'s collection of the debt. *Pawlet's Case* might have served for a model in England, but the later decisions fluctuated. In *Chaworth v. Beach*⁶⁵ there was a legacy of "the sum of £8,000 . . . which is vested in the bank of" *X*. The Master of the Rolls made the statement already quoted ("the least

Phebus, 132 Kan. 816, 297 Pac. 657 (1931); *Stevens v. Fisher*, 144 Mass. 114, 10 N. E. 803 (1887); *In re Douglas' Estate*, 149 Minn. 276, 183 N. W. 355 (1921); *Graham v. Graham's Ex'r*, 45 N. C. 291 (1853); *In re Preston's Estate*, 157 Ore. 631, 73 P. (2d) 369 (1937); *Smith's App.*, 103 Pa. 559 (1883).

63. *Georgia Infirmary v. Jones*, 37 Fed. 750 (C. C. S. D. N. Y. 1889); *Maybury v. Grady*, 67 Ala. 147 (1880); *In re Goodfellow's Estate*, 166 Cal. 409, 137 Pac. 12 (1913); *Waters v. Selleck*, 201 Ind. 593, 170 N. E. 20 (1930); *Gelbach v. Shively*, 67 Md. 498, 10 Atl. 247 (1887); *Bliss v. American Bible Society*, 84 Mass. 334 (1861); *In re Preston's Estate*, 157 Ore. 631, 73 P. (2d) 369 (1937); *Coard v. Holderness*, 22 Beav. 391 (Ch. 1856). *Contra*: *McLean v. Adam* [1921] Vict. L. R. 492.

64. 24 Beav. 474 (Ch. 1857). See also *Bradford v. Brinley*, 145 Mass. 81, 13 N. E. 1 (1887); *Methodist Church v. Hebard*, 28 App. Div. 548, 51 N. Y. Supp. 546 (1898); *Baptist Female University v. Borden*, 132 N. C. 476, 44 S. E. 47 (1903); *Vickers v. Pound*, 6 H. L. Cas. 885 (1858).

65. 4 Ves. 555 (Ch. 1799).

opening" and so on) but went on to hold it not applicable to the case at hand. "If this is not a specific legacy", he said, "there never can be one, except of some specific article"⁶⁶—a statement to which two answers might be made, first, that it would be an excellent thing if there were no specific legacies except of specific articles, and, second, that even by the ordinary view the legacy differed from one of "the sum which is vested, etc." Several subsequent cases⁶⁷ followed *Chaworth v. Beach*; others reverted to the older and more liberal view.⁶⁸ The American cases on the point are likewise conflicting but a majority hold the legacy to be general or demonstrative. *In re Doeppkes' Estates*⁶⁹ is interesting. *T* left her son "the sum of \$3,000, being the amount of life insurance left by my husband to me". When the will was made, *T* had the fund segregated; no doubt she thought of the legacy as a gift of the fund. It was dissipated before her death and counsel insisted that the gift could not be treated as demonstrative, since it was a gift not *out of* but *just of* a fund. The court, however, held that whatever might have been *T's* intention, the legacy could be treated as a bequest of \$3,000 simpliciter, and the words following treated as "simply descriptive". The decision seems clearly right.⁷⁰ Suppose the legacy had been reversed, and had read "the life insurance left by my husband, amounting to \$3,000". In *Ashburner v. Macguire*, Lord Thurlow said: "The distinction between, I bequeath the £500 due on a bond from *A. B.*, and I bequeath the bond from *A. B.* is very slender."⁷¹ True—but a "slender" distinction may afford that "least opening" Sir Richard Pepper Arden spoke of. In the Supreme Court case of *Kenaday v. Sinnott*,⁷² a legacy of "deposits of currency

66. *Id.* at 565.

67. *Innes v. Johnson*, 4 Ves. 568 (Ch. 1799); *Gardner v. Hatton*, 6 Sim. 93 (Ch. 1833); *Davies v. Morgan*, 1 Beav. 405 (Ch. 1839); *Sidebotham v. Watson*, 11 Hare 170 (Ch. 1853).

68. *Le Grice v. Finch*, 3 Meriv. 50 (Ch. 1817); *Sparrow v. Josselyn*, 16 Beav. 135 (Ch. 1852).

69. 182 Wash. 556, 47 P. (2d) 1009 (1935).

70. In *In re McIntosh's Estate*, [1923] 2 W. W. R. 605 (Manitoba 1923), *T* bequeathed his sister "\$900, which I authorize and direct my trustee to pay by the cancellation of a promissory note for that amount made by my said sister in favor of myself". No such note existed but the legacy was held demonstrative and payable out of the general assets. A legacy of "eighteen hundred dollars that is standing out" was held demonstrative in *Hallowell's Estate*—*Teas' Appeal*, 23 Pa. 223 (1854). See also *Collar v. Gaarn*, 64 Colo. 160, 171 Pac. 63 (1918); *Frank v. Frank*, 71 Iowa 646, 33 N. W. 153 (1887); *Harrison v. Denny*, 113 Md. 509, 77 Atl. 837 (1910); *Langstroth v. Golding*, 41 N. J. Eq. 49, 3 Atl. 151 (Ch. 1886); *Enders v. Enders*, 2 Barb. 362 (N. Y. Sup. Ct. 1848); *Giddings v. Seward*, 16 N. Y. 365 (1857); *Newton v. Stanley*, 28 N. Y. 61 (1863); *Matter of Marshall*, 80 Misc. 1, 141 N. Y. Supp. 540 (Surr. Ct. 1913); *Matter of Ingraham*, 104 Misc. 644, 172 N. Y. Supp. 234 (Surr. Ct. 1918); *Matter of Kilborn*, 166 Misc. 627, 2 N. Y. S. (2d) 896 (Surr. Ct. 1938); *Corbin v. Mills' Ex'rs*, 19 Gratt. 438 (Va. 1869). But cf. *In re Jepson's Estate*, 181 Cal. 745, 186 Pac. 352 (1919); *Davis v. Close*, 104 Iowa 261, 73 N. W. 600 (1897); *In re Stilphen*, 100 Me. 146, 60 Atl. 888 (1905); *Tipton v. Tipton*, 1 Cold. 147 (Tenn. 1860).

71. 2 Bro. C. C. 108, 111 (1786).

72. 179 U. S. 606 (1900).

entered on my bank book of the National Metropolitan Bank, amounting to \$10,000 more or less" was held demonstrative and payable although *T* had taken the money from the bank and bought bonds with it. Even more striking is *Lake v. Copeland*,⁷³ where a gift of a house "to be taken at the estimated price of \$2490" was held demonstrative when *T*'s title to the house turned out to be bad. Such cases would justify the suggested definition, *supra*, of the legacy as any on which *T* himself sets a money value.⁷⁴

The problem in the *Chaworth* and *Doepke* cases is akin to that arising where *T*, having made what would prima facie be a demonstrative legacy, *expressly* disposes of the rest of the fund (as distinguished, that is, from the usual case where he simply leaves it to pass by intestacy or a residuary gift). He may do this by making a second legacy, demonstrative in form but in fact exhausting the fund ("to *A*, \$500 from my money in bank; to *B*, \$250 from my money in bank", there being in fact \$750 in the bank). Or he may do it by a gift of the rest of the fund, either simpliciter ("to *A*, \$500 from my money in bank; to *B*, balance of my money in bank") or in such a way as to liquidate the residue, either expressly ("and to *B* the remaining \$250") or impliedly, by naming the amount, not of the residue but of the fund ("to *A*, \$500 of my \$750 in bank; to *B*, balance of money in bank"). Should *T* say, as in *May v. Sherrard*,⁷⁵ "To *A* two thirds of my money in bank; to *B* the remaining third", the gifts would certainly be treated as specific; they would abate rateably *inter se*, and both fail if *T* withdrew all his money from the bank. Are the four instances just given in substance the same and so subject to the same incidents—or does this again show too much deference to "real" intent and overlook the fact that *T* named amounts, which he didn't in *May v. Sherrard*?

The case where *T* gives the residue simpliciter is the easiest. While he has of course given the fund in parts, his failure to name the amount either of the fund or the residue makes it natural to treat the latter like a genuine general residue and interpret it: "should the fund survive, so that *A* is paid from it, I give whatever balance may remain to *B*". The demonstrative nature of the gift to *A* is thus not changed; he is paid in full from the fund, if it permits, in priority to general legatees; when the fund is exhausted, he comes in for the rest with the general creditors; *B* takes only what there may be left in the fund

73. 82 Tex. 464, 17 S. W. 786 (1891).

74. See *Matter of Goldburg*, 148 Misc. 607, 266 N. Y. Supp. 106 (Surr. Ct. 1933); cf. *In re Harrison's Estate*, 330 Pa. 555, 199 Atl. 153 (1938).

75. 115 Va. 617, 79 S. E. 1026 (1913).

after *A* is paid in full.⁷⁶ Even here, however, a few cases treat the gifts as being fractional parts of the fund; *A* and *B* abate rateably; neither, presumably, takes anything except from the fund.⁷⁷

In each of the other three versions the situation is substantially that of *Pawlet's* and *Doepkes'* cases except that the amount is identified not with all of a fund but with a certain part of it. *May v. Sherrard* is distinguishable by the important fact that the amount is mentioned. "\$500, being half of my money in bank" seems no more and no less specific than "\$500, being my money in bank" and it is not made any more specific by being coupled with a similar gift of the other half. The authorities are divided; perhaps more commonly the legacies have been treated as specific and so as to abate rateably *inter se*, and be adeemed by the dissipation of the fund.⁷⁸ Of the three versions, the case for a pro rata construction seems weakest where only the amount of the fund is named; *T* may simply be reciting the amount of the fund as a matter of information and still be thinking of the residue as fluctuating and contingent quite as if he had not mentioned the amount of the fund at all. However, in the well-known case of *Page v. Leapingwell*,⁷⁹ where *T* directed the sale of certain lands for not less than £10,000, made gifts totalling £7,800 "out of the monies arising by such sale", and finally made a gift to certain legatees of "the overplus monies arising from the sale", it was held that the legacies were specific and abated rateably on a deficiency of proceeds. "Why may not I infer", asked Sir W. Grant, M. R., ". . . that the testator did not mean, what the word 'overplus' usually imports, viz. whatever shall turn out to be the overplus; but that he was contemplating a certain overplus; and was making his disposition accordingly?"⁸⁰ This case has been cited and followed in many of

76. *Sykes v. Van Bibber*, 88 Md. 98, 41 Atl. 117 (1898); *Gardner v. McNeal*, 117 Md. 27, 82 Atl. 988 (1911); *Matter of Miller*, 118 Misc. 877, 195 N. Y. Supp. 253 (Surr. Ct. 1922); *Matter of Slater*, 143 Misc. 829, 258 N. Y. Supp. 956 (Surr. Ct. 1932); *In re Barklay's Estate*, 10 Pa. 387 (1849); *Bowen v. Dorrance*, 12 R. I. 269 (1879); *In re Hawgood's Estate*, 37 S. D. 565, 159 N. W. 117 (1916); *Darden v. Hatcher*, 1 Cold. 513 (Tenn. 1860).

77. *Baker v. Baker*, 319 Ill. 320, 150 N. E. 284 (1925); *In re Estate of Bush*, 89 Neb. 334, 131 N. W. 602 (1911); *Alsop v. Bowers*, 76 N. C. 168 (1877). See also *Matter of Barry*, 138 Misc. 519, 246 N. Y. Supp. 456 (Surr. Ct. 1930).

78. *Van Nest's Ex'r v. Van Nest*, 43 N. J. Eq. 126, 13 Atl. 179 (1887); *Davis v. Crandall*, 101 N. Y. 311, 4 N. E. 721 (1886); *Matter of Brundage*, 163 Misc. 1, 296 N. Y. Supp. 57 (Surr. Ct. 1937); *Smith's Appeal*, 103 Pa. 559 (1883); *American Trust & Banking Co. v. Balfour*, 138 Tenn. 385, 198 S. W. 70 (1917); *Badrick v. Stevens*, 3 Bro. C. C. 431 (1792); *Walker v. Laxton*, 1 Y. & J. 556 (Ex. 1827); *Haslewood v. Green*, 28 Beav. 1 (Ch. 1860); *Walpole v. Aphthorp*, L. R. 4 Eq. 37 (1867). But cf. *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278 (1900); *Patanska v. Kuznia*, 102 N. J. Eq. 408, 141 Atl. 88 (1928); *Doughty v. Stillwell*, 1 Bradf. 300 (N. Y. 1850); *Matter of Brundage*, 101 Misc. 528, 167 N. Y. Supp. 694 (Surr. Ct. 1917); *Keziah Hoppel's Estate*, 5 Phila. 216 (Pa. O. C. 1863).

79. 18 Ves. 463 (Ch. 1812).

80. *Id.* at 466.

the cases in this general group.⁸¹ It is to be noted that the group includes cases not strictly within the demonstrative legacy concept but rather dealing with a segregated fund, e. g. the final disposition of a trust fund and so involving no claim to payment except from the fund. The grouping, however, is a natural one, since the discussion tends to turn on the question whether the nominal residue of the fund is residual in fact or really a fractional share. Often the existence of a segregated fund or no depends upon a nice distinction that needs to be mentioned. A direction to sell land and pay from the proceeds so much, is usually treated as specific;⁸² a gift of so much, to be paid from the proceeds of land to be sold, is usually demonstrative.⁸³ The distinction is fine but characteristic. As the courts seem to rationalize it, the first instance is conceptually a gift of the land, although in shares to be realized by the sale. The second is a gift of so much, thought of as payable from a fund, but not so definitely dependent upon the fund as to be adeemed by its failure.

Reference has already been made to a group of cases, resembling but not exactly the same as *Robinson v. Addison*, where the gift is not of a *number* of shares (or other securities) but of a certain amount of money "in" or "of" or "out of" or "invested in" certain securities. The familiar double aspect—amount of money *and* identification with a fund—makes it possible to bring them within the demonstrative legacy concept. In many instances this is unnecessary; the desired end is obtained by applying *Robinson v. Addison* and calling the gift general. The demonstrative legacy notion is chiefly useful in two situations, first, where it is desired to treat the legacy as specific to avert

81. It is relied on in many of the not quite similar cases cited *supra* note 78. See, on similar facts, *Provident Trust Co. v. Graff*, 18 Del. Ch. 255, 157 Atl. 920 (1932); *Miller v. Huddleston*, L. R. 6 Eq. 65 (1868); cf. *Matter of Warner*, 39 Misc. 432, 79 N. Y. Supp. 363 (Surr. Ct. 1902). The cases are in disagreement as to the nature of the legacies when the fund increases. See *Matter of Low*, 232 App. Div. 414, 250 N. Y. Supp. 192 (2d Dep't, 1931), *aff'd without opinion*, 257 N. Y. 613, 178 N. E. 817 (1931); *Smith v. Fitzgerald*, 3 V. & B. 2 (Ch. 1814); *In re Cruddas* [1900] 1 Ch. 730; *Sinclair v. Young*, 14 Vict. L. R. 721 (1888). See also *In re Tunno*, 45 Ch. D. 66 (1890).

82. *Meily v. Knox*, 269 Ill. 463, 110 N. E. 56 (1915); *In re Estate of Carpenter*, 166 Iowa 48, 147 N. W. 175 (1914); *Boston Safe Deposit and Trust Co. v. Plummer*, 142 Mass. 257, 8 N. E. 51 (1886); *In re Hunter's Estate*, 132 Neb. 454, 272 N. W. 318 (1937); *Matter of Phillips*, 108 Misc. 413, 177 N. Y. Supp. 663 (Surr. Ct. 1919); *Matter of Purfield*, 159 Misc. 824, 289 N. Y. Supp. 297 (Surr. Ct. 1936); *Shaw v. Shaw*, 32 Ohio App. 168, 167 N. E. 611 (1928); *Stoevers Estate*, 45 Pa. Super. 451 (1911); *Newbold v. Roadknight*, 1 Russ. & M. 677 (Ch. 1830); *Dickin v. Edwards*, 4 Hare 273 (Ch. 1844); *In re Tunno*, 45 Ch. D. 66 (1890); *Boyd v. Boyd* [1928] N. Ire. 14. But cf. *Hammer's Estate*, 158 Pa. 632, 28 Atl. 231 (1893); *Fream v. Dowling*, 20 Beav. 624 (Ch. 1855); *Hodges v. Grant*, L. R. 4 Eq. 140 (1867).

83. *School District v. International Trust Co.*, 59 Colo. 486, 149 Pac. 620 (1915); *Hailey v. McLaurin's Estate*, 112 Miss. 705, 73 So. 727 (1917); *Gidden v. Gidden*, 176 Miss. 98, 167 So. 785 (1936); *Matter of Miller*, 118 Misc. 877, 195 N. Y. Supp. 253 (Surr. Ct. 1922); *Matter of Lord*, 134 Misc. 198, 236 N. Y. Supp. 136 (Surr. Ct. 1929); *Croom v. Whitfield*, 45 N. C. 143 (1853); *Darden v. Hatcher*, 1 Cold. 513 (Tenn. 1860); *Fowler v. Willoughby*, 2 Sim. & St. 354 (Ch. 1825); *Colville v. Middleton*, 3 Beav. 570 (Ch. 1840).

abatement (which can be done within the doctrines developed in the stock cases but only, as pointed out earlier, at a considerable sacrifice of logic and consistency) and, second, where the securities in or out of which the gift is made are described as *T*'s, as "\$1,000 of my General Motors stock". Treating this as parallel to "10 of my General Motors shares" makes it inescapably specific while treating it as demonstrative averts ademption where *T* dies owning less than \$1,000 worth of the stock.

The cases pretty well correspond to this analysis. Where the threat of ademption is involved the legacies are more or less interchangeably spoken of as general⁸⁴ or demonstrative⁸⁵ unless *T* has referred to the securities as his own; then the demonstrative category is preferred.⁸⁶ One of the rare instances of refusal to take either way out is found in the case of *In re Pratt*.⁸⁷ The legacy was "800 pounds invested in 2½ Consols". Although in an earlier and oft-cited case, *Mytton v. Mytton*⁸⁸ the court had held demonstrative a legacy of the "sum of £3,000, invested in Indian security", North, J., refused to reach the same conclusion, remarking that the words "the sum of" made a great deal of difference. A testatrix, His Lordship somewhat naively supposed, used words "for some particular purpose". If *T* had intended a demonstrative legacy, she would have said "£800 paid out of my estate in any event, but preferably out of the 2½ per cent. Consols. . . . But it is singular, if this is what is meant, that the

84. In *Purse v. Snaplin*, 1 Atk. 414 (Ch. 1738), *T* gave "to my niece *Anne Snaplin* £5000 in the old annuity-stock of the *South-sea* company". In a later paragraph he gave to *Robert Purse* "£5000 in the old annuity-stock of the *South-sea* company". When he made his will and when he died *T* had exactly £5000 in old *South-sea* annuity-stock. The Master of the Rolls held the two legacies specific and decreed that the stock be divided between the legatees, but on appeal Lord Hardwicke held that the legacies were not specific and that both should be paid in full. "The testator intended," he said, *id.* at 417, "£5000 *South-sea* stock, which he was possessed of, should be applied in satisfaction of these legacies as far as it would go; as if he had given £5000 in money to *Anne Snaplin* and *Robert Purse*, and had only £5000, that must have been applied as far as it would go; and the executors, if the assets were sufficient, must have made up the rest; so it is in this case." Other cases holding the legacy general are *Smith v. Smith*, 23 Ga. 21 (1857); *Blundell v. Pope*, 21 Atl. 456 (N. J. 1890); *Blair v. Scribner*, 67 N. J. Eq. 583, 60 Atl. 211 (1905); *Estate of McGaw*, 85 Pa. Super. 545 (1925); *Bronsdon v. Winter*, Amb. 57 (Ch. 1738); *Sleeche v. Thorington*, 2 Ves. Sr. 560 (Ch. 1754).

85. In *Johnson v. Conover*, 54 N. J. Eq. 333, 35 Atl. 291 (1896), *T* bequeathed his wife "the sum of eight thousand dollars, invested in stocks". *T* disposed of all his stocks before his death but the legacy was held demonstrative, the court remarking that ". . . he [*T*] has left it doubtful whether his intention was not to give the sum of eight thousand dollars, which happened at the time to be invested in what he termed 'stocks'". *Id.* at 340, 35 Atl. at 294. To the same effect: *Ives v. Canby*, 48 Fed. 718 (C. C. Del. 1891); *Nash v. Hamilton*, 8 Ohio App. 66 (1918); *Wheeler v. Hartshorn*, 40 Wis. 83 (1876); *Mytton v. Mytton*, L. R. 19 Eq. 30 (1875).

86. *Smith v. Lampton*, 8 Dana 69 (Ky. 1839); *Martin v. Osborne*, 85 Tenn. 420, 3 S. W. 647 (1887); *Morris v. Garland*, 78 Va. 215 (1883); *Kirby v. Potter*, 4 Ves. 748 (Ch. 1799); *Deane v. Test*, 9 Ves. 146 (Ch. 1803).

87. [1894] 1 Ch. 491.

88. L. R. 19 Eq. 30 (1875).

phrase should not be used". Of the singularity that the lady should make specific gifts of many more Consols than she had, His Lordship had little to say; no one, he remarked, could explain that. And he was as little impressed by the singularity of the result: the frustration of *T*'s intent to make gifts to her two daughters. This seems to be the latest English word on the particular problem but it is hard to think that it will ultimately prevail over the earlier and more merciful view of *Mytton v. Mytton*.

Where *T* has sufficient securities of the sort *in* or *of* or *out of* which the sum is given but insufficient assets generally, so that *L* is threatened not with ademption but abatement, the authorities are few and inconclusive. Perhaps a small majority hold the legacies to be specific or demonstrative and so not to abate until after general ones.⁸⁹ Where dividends are involved, the demonstrative classification is of no help; as in the stock cases generally *L* can only be favored by forcing on the legacy the character of specific. A number of cases do this.⁹⁰ In *Evans v. Hunter*,⁹¹ on the other hand, where *T* died owning the "four thousand dollars in United States government bonds to be delivered to" *L* at *T*'s death, *L* was held not entitled to those particular bonds but to "any bonds of the United States in the amounts specified", apparently to allow a thrifty executor to satisfy the legacy by buying bonds of lower market value than owned by *T*. The case incidentally illustrates what seems usually to be taken for granted, that (in the case of bonds and other forms of debt) the amount referred to is face value, where the securities are not substantially depreciated; where there is substantial depreciation or where the description is very gen-

89. In *Avelyn v. Ward*, 1 Ves. Sr. 420 (Ch. 1749) a legacy of "£2000 in the stock or funds, commonly called *South Sea Annuities*", was held specific and not to abate with general legacies. Lord Hardwicke, pressed with his own decision in *Purse v. Snaplin*, 1 Atk. 414 (Ch. 1738), discussed *supra* note 84, said at p. 425: "Consider therefore how the present case differs from *Pierce v. Snaveling* [sic]. Here the testator was possessed, at the making of the will, of a sum in *South Sea* annuities equal to what he gives and more; and can the court construe him to intend that his executor should purchase out of the personal estate in general?" In *In re Newman*, 4 Dem. 65 (N. Y. Surr. Ct. 1886), a legacy of "the sum of \$2,000 in government bonds" was held general and to abate with other general legacies, the court saying: "He simply gives general legacies of money, payable in a certain manner." *Id.* at 67. See further *Estate of Apple*, 66 Cal. 432, 6 Pac. 7 (1885) (demonstrative); *Ballinger v. Ballinger*, 251 Ky. 405, 65 S. W. (2d) 49 (1933) (demonstrative, *semble*); *Blundell v. Pope*, 21 Atl. 456 (N. J. 1890); *Perry v. Maxwell*, 17 N. C. 488 (1834) (specific); *Peterborough v. Mortlock*, 1 Bro. C. C. 565 (1784) (general); *Simmons v. Vallance*, 4 Bro. C. C. 345 (1793) (general); *Page v. Young*, L. R. 19 Eq. 501 (1875) (specific).

90. See *In re Estate of Etzel*, 211 Iowa 700, 234 N. W. 210 (1931); *In re Calnane's Estate*, 28 S. W. (2d) 420 (Mo. 1930); *Crawford's Estate*, 293 Pa. 570, 143 Atl. 214 (1928); *Hosking v. Nicholls*, 1 Y. & C. C. 478 (1842); *Davies v. Fowler*, L. R. 16 Eq. 308 (1873).

91. 86 Iowa 413, 53 N. W. 277 (1892). See also *Dryden v. Owings*, 49 Md. 356 (1878); *Matter of Hodgman*, 140 N. Y. 421, 35 N. E. 660 (1893); *Olcott v. Ossowski*, 34 Misc. 376, 69 N. Y. Supp. 917 (Surr. Ct. 1901); *Webster v. Hale*, 8 Ves. 410 (Ch. 1803).

eral as simply "bonds" or "securities" the cases apparently give actual value or just cash. The general rule is probably based on convenience more than anything; in the *Evans* case it would be awkward to have to give the legatee a fractional share of a bond. In *Gilmer v. Gilmer*⁹² a will taking effect after the Civil War contained a legacy of "twenty thousand dollars in Confederate bonds". The court held that the legacy failed; if par value was meant, the bonds would be worth nothing, and if market value, no amount of Confederate bonds were worth that much. The decision, however, appears unnecessary and indefensible. To be contrasted is *Smith v. Smith*⁹³ where *T* bequeathed "notes to the amount of \$1600 on M. N. Killebrew, George W. Collier, security", and the legacy was held general and payable, although *T* had disposed of the notes in question and there was no showing that they could be duplicated.

Where the gift is of so much in securities *and* so much in cash, the few cases afford no rule. The conjunction was ignored in *Evans v. Hunter, supra*; it was expressly relied on in *Douglass v. Douglass*,⁹⁴ where the gift was held specific and adeemed. In *Rote v. Warner*⁹⁵ and *Jewell v. Appolonio*⁹⁶ the legacies were substantially in this form: "The sum of \$10,000 as follows: \$5,000 in cash, and \$5,000 in *X* Bonds". In the first the legacy was held demonstrative and not to adeem, the court saying that "the main or ruling idea" of *T* was the amount, and that if he did not at his death own the securities mentioned, the gift would be "fully satisfied" by the payment of the amount; in the second it was held specific to permit *L* to take income accruing since *T*'s death. Several interesting cases deal with gifts not in the conjunctive but the alternative. In *Fontaine v. Tyler*⁹⁷ and *Townsend v. Martin*,⁹⁸ the gift was of so much, in government stock, if *T* had it when he died; if not, from the general assets. It was held the gift would be specific so far as *T* died owning the government stock; but would be general otherwise. In a Missouri case,⁹⁹ *L* was given a sum "in cash or securities" *T* owned at his death; rather oddly, this was held demonstrative. Finally, a gift to *L* of "\$10,000 in stock to be selected by her", was held to refer to *T*'s stock, to be specific, and to carry dividends,¹⁰⁰ while a similar gift, save that the choice was to be

92. 42 Ala. 9 (1868); for a very interesting sequel, arising under the same will, see *Harper v. Bibb & Falkner*, 47 Ala. 547 (1872).

93. 23 Ga. 21 (1857).

94. 13 App. D. C. 21 (1898).

95. 9 Ohio C. D. 536 (1899).

96. 75 N. H. 317, 74 Atl. 250 (1909).

97. 9 Price 94 (Ex. 1821).

98. 7 Hare 471 (Ch. 1849).

99. *O'Day v. O'Day*, 193 Mo. 62, 91 S. W. 921 (1906).

100. *Bost v. Morris*, 202 N. C. 34, 161 S. E. 710 (1932).

made from stocks "left by" *T*, was held demonstrative and payable from the general assets when *T*'s stock was insufficient.¹⁰¹

IV. CONCLUSION

The cases discussed appear to indicate that courts are dissatisfied with the application of the conventional definition of specific legacy to gifts of securities, that they seek to avoid applying it where possible, and that the stock cases and demonstrative legacy cases in particular rest on a tacit but not express denial of the validity of the definition so applied. The re-definition which is implicit in these cases could advantageously be made explicit and of general application in some such form as this: a legacy of a named security shall not be deemed specific unless it clearly appears, from the language, the nature of the security, or the surrounding circumstances, not only that *T* was thinking in terms of the particular security but that he must have intended the gift to be conditioned on the continued existence (in his estate until his death) of the particular security in the particular form.

101. *Wetmore v. Peck*, 66 How. Pr. 54 (N. Y. Sup. Ct. 1882).