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practice I have mentioned and that, if his attention had been drawn to it, he would have made the order as to costs which we now make.

Order of Supreme Court varied by ordering that the costs of the appellant in the Supreme Court be paid out of the estate. Otherwise appeal dismissed. Appellant to pay costs of this appeal. Set-off of costs.

Solicitors for the appellant, *Madden, Drake & Candy.*

Solicitors for the respondent, *Hedderwick, Fookes & Alston.*

B. L.

Cons *Stamp Duties, Chief Commissioner of* v *Buckle* (1998) 72 ALJR 243

Cons *Fawthrop & Repatriation Commission, Re* (1994) 36 ALD 140

Appl *Bradney Pty Ltd & Comr of State Revenue (Vic), Re* (1996) 33 ATR 1087

Cons *Hay* v *Hay* (1998) 23 FamLR 247

Cons *CSD (NSW)* v *Buckle* (1998) 192 CLR 226

[HIGH COURT OF AUSTRALIA.]

WALLACE AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

LOVE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 12, 13.

MELBOURNE. *Oct.* 13.

KNOX C.J., HIGGINS and STARKE JJ.

Will—Construction—Gift of annuities—No distribution until estate free from annuities—Appropriation to assure annuities—Right of trustees to distribute before death of annuitants—Bequests of shares in company—Advancement of legatees—Agreement for hotchpot of shares—Hotchpot of dividends—"Encumbrances"—Secured and unsecured debts.

A testator, having by his will given all his property to trustees upon certain trusts including a trust to pay certain annuities, expressly declared that until his estate was free from (*inter alia*) the annuities there should be no division

of corpus among the beneficiaries, and he empowered his trustees to appropriate a sum of money to assure the annuities but made no provision for exonerating the rest of his estate from liability in the event of such an appropriation being made.

Held, that the trustees were not entitled to distribute the corpus until the annuitants were dead.

At the time the testator made his will he had a large number of shares in a certain company, and by his will he directed that a certain number of these shares should, at the time fixed therein for distribution, be transferred to each of his named children; after the making of the will the testator transferred a number of the shares to some of those children, and at the time of his death he had not a sufficient number of shares left to satisfy the bequests of shares to his children. On proceedings being instituted by the trustees for the determination by the Court of the question whether the gifts of shares to some of the children had not been adeemed by the transfers made by the testator during his lifetime, an agreement was arrived at by which the shares transferred during the testator's lifetime were to be brought into hotchpot, and it was agreed that each of the children should "when the period of distribution arrives" be entitled to receive from the trustees such number of shares as added to the number to be brought by him into hotchpot would make the number set opposite to his name in the agreement. It was also agreed that none of the beneficiaries who brought shares into hotchpot should be liable to account for interest or the value of the shares so brought into hotchpot.

Held, that as to the shares agreed to be brought into hotchpot the dividends therefrom during the period between the death of the testator and the time fixed for distribution were not required to be brought into hotchpot.

By his will the testator directed that when and so soon as his estate should be free from all "encumbrances," including certain annuities, the trustees should distribute the estate in a certain way.

Held, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that, on the language of the whole will, the term "encumbrances" included all debts of the estate, whether secured or unsecured and whether incurred by the testator or by the trustees.

Per Higgins J.:—The mere fact of the existence of some petty or current obligation incurred by the trustees in connection with the estate—such as a caretaker's wages or a solicitor's costs—does not, under the will, delay the time fixed for distribution. There is no reason for refusing to give the word "encumbrances" its ordinary technical meaning.

Decision of the Supreme Court of New South Wales (*Harvey* J.) in part affirmed and in part reversed.

APPEAL from the Supreme Court of New South Wales.

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The following statement of the facts is taken from the judgment of *Knox* C.J. and *Starke* J. :—

"By his will dated 10th November 1913 Harry Clifford Love devised and bequeathed his whole estate to his trustees upon trusts which are, as far as material, as follows, viz. :—'Upon trust out of the net annual income dividends and profits thereof to pay to my wife Annie Paton Love an annuity of six hundred and twenty-four pounds during her life by equal weekly payments the first of such payments to be made at the expiration of one week from my decease And to my sister Elizabeth Love an annuity of two hundred and eight pounds per annum during her life by equal weekly payments the first of such payments to be made at the expiration of one week from my decease And subject thereto to apply such net annual income dividends and profits in payment of the debt now due and owing by me to the Australian Bank of Commerce Limited or any debt incurred in lieu thereof until such time as such debt shall have been fully paid and satisfied And when and so soon as such debt shall have been paid off and my estate freed from all encumbrances (subject to the payment of the said annuities) to divide such net annual income dividends and profits equally between my thirteen children hereinafter mentioned And I declare that when and so soon as my estate shall be free from all encumbrances including the said annuities my trustees shall stand possessed of my said trust estate Upon trust to transfer to each of my children hereinafter named five thousand shares in Clifford Love & Co. Limited and as to the balance then remaining of my said trust estate to divide the same equally between my children namely David Horace Love Joseph Clifton Love George Roland Love Clifford Newton Love Helen Gill Theresa Ferguson Henrietta Isles Bessie Amy Louisa Fitzsimons Annie Christina Colvin Ethel Maud Wallace Muriel Blanche Rhoda Fitzsimons Vera Elsa Ferona Fahl and Maria Evelyn Newton Leiper And I expressly declare that until the time when the debt now owing by me to the Australian Bank of Commerce Limited or any debt incurred in lieu thereof is paid off and the whole of my estate is free from all encumbrances including the said annuities (hereinafter referred to as "the time fixed for distribution") there shall be no division of the corpus of my trust

estate among the beneficiaries entitled thereto under the provisions of this my will I empower my trustees if they think fit to raise by mortgage of the whole or any part of my trust estate or by charging the same or any part thereof a sum or sums sufficient at the time of such mortgage or charge and to appropriate the same as a fund for answering the said annuities by investing the same sum or sums or by purchasing in the names of my trustees such annuities such purchase of annuities to be made in the discretion of my trustees either from the Government or any public company or from any private person or persons but so that the annuities or either of them if purchased from any private person or persons shall be well secured on real freehold property And I declare that if any one of my children shall die in my lifetime or after my decease before the time fixed for distribution leaving a child or children who shall survive me and who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then the last mentioned child or children shall take but take absolutely and if more than one equally between them the shares and interests (principal and income) in my said trust estate (including the shares in Clifford Love & Co. Limited) both original and accruing which his her or their parent would have taken if such parent had survived me and also the time fixed for distribution And I further declare that in the event of any of my children hereinbefore named dying in my lifetime or after my decease before the time fixed for distribution without leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then the share (principal and income) in my said trust estate (including the shares in Clifford Love & Co. Limited) of my child or children so dying (or the part thereof still remaining) shall be distributed under the provisions of this my will as if such my child or children had never lived.'

" At the date of his will the testator was the holder of 69,101 shares in Clifford Love & Co. Ltd., but between that date and his death in April 1919 he transferred to some of his children 25,000 of these shares. He left him surviving thirteen children, and consequently

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there was not enough of these shares in his estate to satisfy the bequest of 5,000 to each of his children.

"In May 1920 proceedings were instituted for the determination (*inter alia*) of the following question: Whether and to what extent the gifts of shares under the will were adeemed by the transfers of shares made by the testator as above mentioned. These proceedings terminated in an agreement which was approved by the Court on behalf of infants and of beneficiaries not parties to the proceedings but represented by parties. The material portion of this agreement is as follows:—'(1) In determining the number of shares in Clifford Love & Co. Limited to which the beneficiaries under the said will are entitled all shares transferred by the testator to his children respectively (or their husbands) between the date of his will and the date of his death as set forth in the affidavit of James Leiper filed in this suit shall be brought into hotchpot and the total number of shares after such bringing into hotchpot shall be distributed amongst such beneficiaries as hereinafter set forth. The holders of the shares so transferred by the testator as aforesaid shall transfer to the trustees of the will or the persons nominated by them such shares if any as may be necessary to carry out the terms of this settlement. The total number of shares to be so distributed shall be 69,101. Of the shares in the said Company remaining in the estate of the testator at the time of his death, each of the persons hereinafter mentioned shall when the period of distribution arrives be entitled to receive from the trustees such number of shares as added to the number to be brought by him or her into hotchpot as aforesaid shall make the number set opposite his or her name hereunder:—Theresa Ferguson, 5,600; Helen Gill, 5,600; Henrietta Isles, 5,600; Bessie Amy Louisa Fitzsimons, 5,600; Muriel Blanche Rhoda Fitzsimons, 5,600; Annie Christina Colvin, 5,600; Ethel Maud Wallace, 5,600; Vera Elsa Ferona Fahl, 5,600; Marie Evelyn Newton Leiper, 5,600; Joseph Clifton Love, 4,600; George Roland Love, 4,600; David Horace Love, 4,600; the trustees of C. N. Love's settled share, 4,901. Further J. C. Love, G. R. Love and G. T. Isles undertake then to transfer to the trustees of C. N. Love's settled share 99 shares in the said Company and to David Horace Love 400 shares in the said

Company. In the event of the death of any of the said beneficiaries prior to the time of distribution fixed by the will the said shares so to be distributed or transferred to him or her shall be transferred to or held in trust for the person or persons entitled in that event under the provisions of the will to the share or interest of such beneficiary in the estate of the testator. (2) None of the said beneficiaries who bring shares into hotchpot as aforesaid shall be liable to account for interest or the value of the shares so brought into hotchpot.'

"In September 1921 the trustees took out an originating summons for the determination of certain questions which, so far as this appeal is concerned, may be stated shortly as follows:—(1) What liabilities were included in the word 'encumbrances' in the will? (2) Whether the trustees might properly distribute any part of the corpus of the trust estate before the death of both annuitants provided that a sum sufficient to satisfy the annuities was set apart and retained by the trustees. (3) Whether, on the trustees distributing among testator's children dividends received by the trustees in respect of shares in Clifford Love & Co. Ltd., all or any part of the dividends paid after the death of the testator in respect of the shares transferred by the testator to his children between the date of the will and the date of his death ought to be brought into hotchpot and the total amount of the dividends received by the trustees and of the dividends so brought into hotchpot distributed in the proportions directed by the decretal order of 21st February 1921.

"*Harvey* J. determined these questions and made the following declarations:—(1) 'That according to the true construction of the will and codicils of the above-named deceased the word "encumbrances" in the said will mentioned includes all moneys payable out of the estate of the said deceased in respect of (a) the unsecured debts due by the said deceased; (b) the debts secured by mortgage over the estate of the said deceased or portion thereof and incurred by the said deceased; (c) the debts secured by mortgage over the estate of the said deceased or portion thereof and incurred by the executors of the will of the said deceased in (aa) payment of New South Wales stamp or probate duty, (bb) payment of Commonwealth estate duty, (cc) payment of mortgage debts due by the said deceased

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and (dd) payment of costs of administration.' (2) 'That the time for distribution of the corpus of the estate of the said deceased is when the annuities named in the said will shall have ceased to become payable and when all the "encumbrances" on the said estate have been paid and satisfied, and that the trustees will not be justified in distributing among the children of the said deceased for their own use and benefit any portion of the corpus of the said estate before all the "encumbrances" have been paid or after all "encumbrances" other than annuities have been paid even though a sum sufficient to satisfy the said annuities has been set apart and retained by the trustees of the said will and codicils.' (3) 'That the children of the above-named deceased are entitled during their respective lives (subject as to the defendant Clifford Newton Love to the cesser clause in the second codicil mentioned) to be paid the dividends received by the trustees in respect of shares in Clifford Love & Co. Ltd. between the date of the death of the said deceased and the time fixed for distribution mentioned in the said will and available for distribution in the following shares and proportions namely:—Theresa Ferguson, $\frac{5600}{441101}$; Helen Gill, $\frac{2600}{441101}$; Henrietta Isles, $\frac{3600}{441101}$; Bessie Amy Louisa Fitzsimons, $\frac{2600}{441101}$; Muriel Blanche Rhoda Fitzsimons, $\frac{2600}{441101}$; Annie Christina Colvin, $\frac{2600}{441101}$; Ethel Maud Wallace, $\frac{2600}{441101}$; Vera Elsa Ferona Fahl, $\frac{2600}{441101}$; Maria Evelyn Newton Leiper, $\frac{2600}{441101}$; Joseph Clifton Love, $\frac{4600}{441101}$; George Roland Love, $\frac{4600}{441101}$; David Horace Love, $\frac{2600}{441101}$; Clifford Newton Love, $\frac{4901}{441101}$.'"

Of the shares transferred by the testator during his lifetime 3,000 were transferred without consideration to each of his daughters Vera Elsa Ferona Fahl, Maria Evelyn Newton Leiper, Muriel Blanche Rhoda Fitzsimons, Ethel Maud Wallace, Annie Christina Colvin and Helen Gill; 2,000 each to Bessie Amy Louisa Fitzsimons and Henrietta Isles; 1,000 to the husband of Bessie Amy Louisa Fitzsimons, and 2,000 to David Horace Love.

The plaintiffs to the originating summons of September 1921 were George Roland Love, James Leiper, Ernest Waddell Perkins and Joseph Clifton Love, who were the executors of the will of the

testator; and the defendants were the eleven children of the testator other than the plaintiffs George Roland Love and Joseph Clifton Love, and Clifford Stirling Colvin, a grandchild of the testator as representing his grandchildren.

An appeal to the High Court from the decision of *Harvey* J. was brought by Ethel Maud Wallace, Muriel Blanche Rhoda Fitzsimons and Maria Evelyn Newton Leiper on the grounds (*inter alia*) (1) that his Honor was in error in declaring that the trustees would not be justified in distributing among the children of the testator any portion of the corpus of the estate after all encumbrances other than annuities had been paid even though a sufficient sum to satisfy the said annuities had been retained and set apart by the trustees; (2) that his Honor was in error in declaring that the children of the testator were entitled during their respective lives to be paid the dividends received by the trustees in respect of shares in Clifford Love & Co. Ltd. between the date of the death of the testator and the time fixed for distribution and available for distribution in the shares and proportions specified in the decree; (3) that his Honor should have declared that the children of the testator were entitled to be paid the said dividends so available as aforesaid in equal shares; and (5) that his Honor was in error in declaring that the word "encumbrances" as used in the will of the testator included all debts and liabilities of the estate of the testator whether secured or unsecured.

Flannery K.C. (with him *Mason*), for the appellants.

R. K. Manning, for the respondents the plaintiffs and Joseph Clifton Love and Clifford Newton Love.

Browne, for the respondent Theresa Ferguson.

Jordan, for the respondent Clifford Stirling Colvin.

The Solicitor for David Horace Love, Helen Gill and Henrietta Isles to submit to the order of the Court.

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[During argument reference was made to *In re Willoughby*; *Willoughby* v. *Decies* (1); *In re Dallmeyer*; *Dallmeyer* v. *Dallmeyer* (2); *In re Rees*; *Rees* v. *George* (3); *Re Hargreaves*; *Hargreaves* v. *Hargreaves* (4); *Re Poyser*; *Landon* v. *Poyser* (5); *In re Tod*; *Bradshaw* v. *Turner* (6); *Harbin* v. *Masterman* (7); *May* v. *Bennett* (8); *Re Taylor*; *Illsley* v. *Randall* (9); *In re Parry*; *Scott* v. *Leak* (10); *Jones* v. *Barnett* (11); *Egg* v. *Blayney* (12); *In re Bettesworth and Richer* (13).]

Cur. adv. vult.

Oct. 13.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. (after stating the facts as above set out) :—The questions raised by this appeal are whether these declarations are correct. The learned Judge thought that the word "encumbrances" in this will meant liabilities secured or unsecured. In his opinion "the main intention of the testator" was that the estate should be kept together and not distributed so long as his debts remained unpaid; that so soon as it was cleared by payment of his debts and by the death of the annuitants it should become distributable. We agree with his opinion. The word "encumbrances," in its ordinary connotation, means that a person or estate is burdened with debts, obligations or responsibilities. True, the word is in law especially used to indicate a burden on property, a claim, lien or liability attached to property (see *Oxford Dictionary*, under title "Encumbrance"). But when we remember that the whole estate of the testator is liable in the hands of his executor for payment of debts and the expense of administering his estate, it is not an extravagant use of language to say that his "whole estate is not free from encumbrances" until those debts and expenses are paid. The estate would, in fact, be burdened with those debts, and no technical use of the word "encumbrance" can alter that result. And practical difficulties would

(1) (1911) 2 Ch., 581, at pp. 594, 597, 600.
(2) (1896) 1 Ch., 372, at pp. 378, 384, 391.
(3) (1881) 17 Ch. D., 701.
(4) (1903) 88 L.T., 100.
(5) (1908) 1 Ch., 828.
(6) (1916) 1 Ch., 567.
(7) (1896) 1 Ch., 351.
(8) (1826) 1 Russ., 370.
(9) (1884) 50 L.T., 717.
(10) (1889) 42 Ch. D., 570, at p. 584.
(11) (1899) 1 Ch., 611.
(12) (1888) 21 Q.B.D., 107.
(13) (1888) 37 Ch. D., 535.

inevitably arise if the direction to transfer the shares in Clifford Love & Co. so soon as his whole estate is free from encumbrances meant so soon as his secured debts were paid. Finally, it is to be noted that the testator speaks of "the debt now owing by me to the Australian Bank of Commerce Limited" and "*any debt* incurred in lieu thereof" without specifying the character of the debt (secured or unsecured), in conjunction with his use of the words "all encumbrances."

We are not impressed with the argument that the mere non-payment of petty expenses would postpone the time of distribution, for we must assume a regular course of administration controlled, if need be, by a Court of competent jurisdiction.

The second declaration challenged by this appeal is, we think, clearly right. The will contains an explicit prohibition against distribution of any part of the corpus until the estate is free from (*inter alia*) the annuities. It is true that power is conferred on the trustees to appropriate a sum to assure the annuities, but there is no provision exonerating the rest of the estate from liability in the event of this being done. It cannot, therefore, be asserted until both annuitants are dead that the estate—*i.e.*, the whole estate—is free from the annuities (see *In re Evans and Bettell's Contract* (1)). We were asked, on authorities such as *Harbin* v. *Masterman* (2) to say that the trustees might distribute the estate of the testator after setting aside a sum to satisfy the annuities. It is impossible, however, to exercise the jurisdiction founded upon administration only against the express provisions of the testator's will (see *Glenn* v. *Federal Commissioner of Land Tax* (3) ; *In re Evans and Bettell's Contract*).

The third declaration made by *Harvey* J. was, in our opinion, erroneous. The learned Judge came to the conclusion that the first clause of the agreement scheduled to the order of 1st February 1921 meant that whenever it became material *for any purpose* to consider what was the testator's holding of shares in Clifford Love & Co., then his trustees should treat the shares transferred to the children as part of the assets of the testator's estate. We think,

(1) (1910) 2 Ch., 438. (2) (1896) 1 Ch., 351.
(3) (1915) 20 C.L.R., 490.

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on the contrary, that the agreement stipulated for "equality of portion" in "the capital division of his estate," and had nothing to do with dividends between the date of the testator's will and the date of his death. Indeed clause 2 of the agreement emphasizes this conclusion, and our construction is in accordance with the interpretation usually given to the common hotchpot clauses, to be found in many wills (*In re Rees*; *Rees* v. *George* (1); *In re Willoughby* (2)).

HIGGINS J. I take the grounds of appeal in their order. In my opinion, the learned primary Judge was right in declaring that the trustees would not be justified in distributing, before the time fixed for distribution, corpus of the estate after all "encumbrances" other than annuities have been paid, even though what seems to be a sufficient sum to provide for the annuities be retained and set apart.

The will has been sufficiently set out. So far as material, the trustees are to hold the whole estate upon trust to pay out of the income £624 per annum to the testator's widow during her life and £208 to his sister; and subject thereto, to apply the income in payment of a debt owing by the testator to the Australian Bank of Commerce or any debt incurred in lieu thereof; and when and so soon as the debt shall have been paid and the estate free from all "encumbrances" (subject to the payment of the annuities) to divide the income equally between his thirteen children; and when the estate shall be free from all encumbrances (including the annuities) to transfer to each of the children 5,000 shares in the business and to divide the balance of the estate between the children. The testator expressly declared that until the debt should be paid off and the estate free from all encumbrances including the annuities (referred to as "the time fixed for distribution") there should be no division of the corpus among the beneficiaries; and he provided that neither of the annuitants should be allowed to have the capital value of the annuities in lieu thereof. The difficulty arises from a power given to the trustees to raise by mortgage or by charging a sum sufficient at the time, and to appropriate the same as a fund for answering

(1) (1881) 17 Ch. D., 701. (2) (1911) 2 Ch., 581.

the annuities (a) by investing the sum or (b) by purchasing annuities. The testator declared that if any child should die in his lifetime or afterwards before "*the time fixed for distribution*" leaving children who should attain twenty-one or (being daughters) marry, these children should take absolutely the parent's share in principal and income.

It is urged for the appellants that the provision for appropriation of sums to answer the annuities involves that the rest of the corpus may, on such appropriation, be distributed—that, in effect, the "time fixed for distribution" may be accelerated. There is no provision in the will that the appropriation for the annuities is to release the rest of the estate for distribution; and, in my opinion, without express words to the contrary, the annuities would still remain charged on the whole estate notwithstanding the appropriation (*In re Parry* (1); *In re Evans and Bettell's Contract* (2)). Moreover, in this will, the testator has expressly declared that there is to be no division of the corpus among the beneficiaries until "the time fixed for distribution"—a date fixed for the definite time when the encumbrances should be cleared off and the annuities fully satisfied. And if, by the course suggested, the time fixed for distribution could be accelerated, it would mean that the substantive rights as between children and grandchildren would be seriously altered—if a child died between the accelerated date and the regular "time fixed for distribution," his children would be deprived of the share to which, under the clause for substitution of grandchildren, they would be entitled. Mr. *Jordan*, acting for grandchildren, therefore objects.

Ground 2 raises the question of the effect of the hotchpot provision contained in certain "terms of settlement" embodied in a decretal order of 10th December 1920.

At the time of the will the testator had a great number of shares in a company called Clifford Love & Co. Ltd. The will directs that the trustees shall transfer to each of the thirteen children, at the time for distribution, 5,000 of these shares. After the will the testator at various times gave some of these shares to some of his children—to six of them 3,000, to Mrs. Isles 2,000, to Mrs. Fitzsimons 2,000, and to one son 2,000; and at his death the testator had only 44,101

(1) (1889) 42 Ch. D., at p. 584. (2) (1910) 2 Ch., 438.

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left in his estate. In a previous originating summons of 5th May 1920 the question was raised whether the legacy of 5,000 shares each was not adeemed in part by these gifts; and, if so, at what values, with what interest, &c. During the course of that case, the parties came to a compromise called "terms of settlement," subject to the approval of the Court as regards the infant defendants; and the Court by decretal order of 10th December 1920 approved of the compromise on behalf of the infants and of beneficiaries not parties to the summons, and ordered that it be carried into effect. The Court made no other answer to the questions, treating them as concluded by the terms of settlement. The terms of settlement have been fully set out already. They provide for hotchpot as to the shares. But there have been dividends received by the trustees in respect of all the shares since, as well as before, the death of the testator; and those children of the testator who did not get from the testator during his life any gifts of shares urge that the hotchpot applies also to dividends paid after the death on shares transferred before the death (question 8 of the present summons).

Looking now at the terms of settlement, it is clear that it relates to the shares and to the shares only:—"In determining the number of shares in Clifford Love Limited to which the beneficiaries under the said will are entitled, all shares transferred by the testator to his children respectively (or their husbands) between the date of his will and the date of his death . . . shall be brought into hotchpot and the total number of shares after such bringing into hotchpot shall be distributed amongst such beneficiaries as hereinafter set forth. The holders of the shares so transferred by the testator as aforesaid shall transfer to the trustees of the will or the persons nominated by them such shares if any as may be necessary to carry out the terms of the settlement. The total number of shares to be so distributed shall be 69,101. Of the shares in the said company remaining in the estate of the testator at the time of his death each of the persons hereinafter mentioned shall when the period of distribution arrives be entitled to receive from the trustees such number of shares as added to the number to be brought into hotchpot as aforesaid shall make the number set opposite his or her name hereunder":—Theresa Ferguson 5,600, and so on—5,600 to each daughter,

4,600 to each of three sons, and the balance, 4,901, to the trustees of C. N. Love's settled share. "In the event of the death of any of the said beneficiaries prior to the time for distribution fixed by the will the said shares so to be distributed or transferred to him or her shall be transferred to or held in trust for the person or persons entitled in that event under the provisions of the will to the share or interest of such beneficiary in the estate of the testator."

It will be noticed that in the distribution of both sets of shares—those transferred during the life and those remaining at the death—the hotchpot provision is, by this settlement, applied not to 5,000 shares as bequeathed to each child by the will; the daughters are to get 5,600; and that the distribution contemplated is future—at the time fixed for distribution. So far, nothing is said as to interest on the shares transferred during life, or as to the values of the shares. As to these clause 2 provides that "none of the said beneficiaries who bring shares into hotchpot as aforesaid shall be liable to account for interest or the value of the shares so brought into hotchpot." No question had been raised in the originating summons on which this decretal order was based as to dividends; the questions were asked on the assumption that the ordinary practice in ademption cases would be applied, of ascertaining the values of the property given during life, and the values of the property remaining at the death, and of levelling up on a value basis the benefits given to those beneficiaries who did not get transfers of property during life. The value of the portion given is ascertained as at the time it is given (*Watson* v. *Watson* (1)). But all questions of values and interest thereon are wiped out by this special agreement for settlement; the parties consent thereby to a new agreement under which the whole body of 69,101 shares mentioned is in due time—the time fixed for distribution—to be distributed in certain proportions; and this "compromise," as the order calls it, is complete in itself and binding, and must be obeyed as it stands. There is no provision for hotchpot as to the interim dividends, and therefore no obligation on those beneficiaries who got dividends to account for them. It is also a mistake to think that the word "hotchpot" involves the charging of interest as from the death of

(1) (1864) 33 Beav., 574.

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the testator on advances made during life to some of the beneficiaries. The children who were not advanced are, under the will, merely entitled to 5,000 shares each on the arrival of the time fixed for distribution; and they have no right to complain provided that at that time they get their 5,000 shares notwithstanding the transfer of shares made by the testator before death. The position is put, luminously as usual, by *Jessel* M.R. in *In re Rees* (1): "He" (the testator) "means that . . . all the children shall, at the widow's death, take the same shares as they would have taken if no advances at all had been made." And that explanation has been approved and followed in *In re Evans and Bettell's Contract* (2); *In re Willoughby* (3); *In re Tod* (4); *In re Forster-Brown*; *Barry* v. *Forster-Brown* (5); and see *Halsbury's Laws of England*, vol. XXVIII., p. 842.

In my opinion, therefore, ground 2 of the appeal should be upheld, and in this respect the declaration made by *Harvey* J. set aside.

Ground 4 has been withdrawn at the bar.

Ground 5 raises a question as to the meaning of the word "encumbrances" in the will. Subject to the annuities, the trust is to apply the net income, dividends, &c., in payment of a debt owing at the date of the will and of the death of the testator to the Australian Bank of Commerce, or any debt incurred in lieu thereof, until full satisfaction:—"And when and so soon as such debt shall have been fully paid off" (it was a mortgage debt, an *encumbrance*) "and my estate freed from all *encumbrances* (subject to the payment of the said annuities) to divide such net annual income dividends" &c. "equally between my thirteen children . . . And I declare that when and so soon as my estate shall be free from all *encumbrances* including the said annuities" (the annuities were charged on the income, and were, in strict language, *encumbrances*) "my trustees shall stand possessed of my said trust estate upon trust to transfer" to each child 5,000 shares in Clifford Love & Co. Ltd., "and as to the balance then remaining of my said trust estate to divide the same equally between my children" (naming them) "And I expressly declare that until the

(1) (1881) 17 Ch. D., at p. 704.
(2) (1910) 2 Ch., 438.
(3) (1911) 2 Ch., 581.
(4) (1916) 1 Ch., 567.
(5) (1914) 2 Ch., 584.

time when the debt now owing by me to the Australian Bank of Commerce Ltd. or any debt incurred in lieu thereof is paid off and the whole of my estate is free from all *encumbrances* including the said annuities (hereinafter referred to as 'the time fixed for distribution') there shall be no division of the corpus of my trust estate" &c. In his second codicil the testator recites the foregoing trust for payment of income to beneficiaries as a trust "after payment of certain annuities and the payment off of certain *encumbrances*."

It appears that the executors have paid off all the unsecured debts owing by the testator—some £703 1s. 8d.; that the amount owing to the Australian Bank of Commerce, £7,855 16s. 2d. with interest, was secured by mortgage, and that it has been fully paid—in part by means of an equitable mortgage given to the Bank of New South Wales, and in part by the proceeds of the sale of shares in the Australian Bank of Commerce; and that a mortgage debt owing by the testator to the Australian Mutual Provident Society has been paid off out of the purchase-money of certain land in Clarence Street. So far as the affidavits inform us, there are no unpaid debts of the testator or of his trustees at present except that due on mortgage to the Bank of New South Wales—now about £7,390. The trustees want to know, of course, at what time they may treat the estate as "freed from all encumbrances" so that they may distribute income and (ultimately) corpus. It is not usual for the Court to answer hypothetical questions that may arise in the future; but, as there are express findings of the learned Judge on the subject and an appeal as to those findings, probably we should express an opinion.

My view is that the mere existence of an unsatisfied unsecured debt incurred by the trustees on behalf of the estate is not an "encumbrance" within the meaning of the will; and that the mere existence of such a debt will not delay "the time fixed for distribution," or the time for distribution of the income. Suppose that trustees have not yet paid a caretaker, as his weekly wage is not due; suppose that one of the solicitors has not yet rendered his bill of costs to date; suppose that someone who has acted as a clerk for the estate cannot be found or reached; suppose that municipal rates are not yet ascertained or ascertainable; I do not think that the "*time fixed for distribution*" is thereby postponed. It is because

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of such petty or current obligations, probably, that the testator used the word "encumbrances," not "debts." "Encumbrances" is a technical word, and ought to receive its technical interpretation unless there is a plain intimation to the contrary; and there is no such intimation here. Even if we treat the word as not technical, we must apply the ordinary meaning in common speech. The testator uses the proper meaning in speaking of annuities being assigned, charged or *encumbered*. According to *Wharton* an encumbrance is "a claim, lien or liability, attached to property." This definition of *Wharton's* is adopted by the *Oxford Dictionary*, which also adds "a burden on property." In the *Standard Dictionary* the meaning in law is stated as "a paramount claim or interest resting as a charge upon land, lessening its value to the owner or tenant; any lien or liability attached to real property; as, a mortgage, a registered judgment, and a right of dower are encumbrances." A trustee's obligation to a caretaker or to other employees or to solicitors or others is not a liability attached to property. It would not be even "a debt" of the testator or of his estate. Judgment for it would not be given *de bonis testatoris*. It would be "a debt" of the trustees personally, although, if rightly incurred, they would be entitled to be indemnified out of the trust estate as for a trust expense (*Staniar* v. *Evans* (1)). This right of the trustees is not an "encumbrance"; and the best test of this is that the trustees could give absolute title to any of the assets without the concurrence of any encumbrancer or other person. In a subsequent part of the will the testator explains what he means by "any *debt* incurred in lieu" of the mortgage debt owing by him to the Australian Bank of Commerce; he means another *mortgage* debt. His primary intention was that the annual income of his trust property should be applied in discharging the mortgage debt owing to that Bank; but he provides that if the Bank "should demand the payment of the debt due to it or any part thereof it shall be lawful for my trustees to raise *by mortgage* of my trust estate or any part thereof such sum or sums of money as may be required for the purpose of discharging the said debt or such part thereof as shall then remain unpaid and unsatisfied And I direct that my trustees shall discharge and satisfy such mortgage debt in the manner hereinbefore provided for the payment

(1) (1886) 34 Ch. D., 470.

of the said debt" to the Bank—that is, by payment out of the income. I cannot find here anything in the context of the will which should constrain us to give any meaning other than the usual and technical meaning to the word "encumbrance"; and there are, indeed, practical reasons against any other meaning. For the "time fixed for distribution" is the critical moment for fixing title, as between children of the testator and grandchildren; the time fixed for distribution depends on the time that all "encumbrances" are paid as well as annuities ended; and it is extremely improbable that the time fixed for distribution was meant to be postponed if someone found that a debt of sixpence to a messenger had been overlooked. In my opinion the word "encumbrances" does not mean debts "unsecured," and ground 5 of the appeal should be upheld.

For the declaration in the order of 3rd May 1922 *numbered* (3) *set out in the judgment of Knox C.J. and Starke J. substitute the following declaration*: "*This Court doth declare that, in the distribution by the trustees among the children of the testator of any dividends received by the trustees in respect of shares in Clifford Love & Co. Ltd., dividends paid after the death of the testator in respect of shares in that Company transferred to any child or husband of a child between the date of the will and the date of the death of the testator should not be brought into hotchpot.*" *Save as above mentioned appeal dismissed. Costs of all parties appearing on the appeal to be paid out of the estate of the testator, those of the trustees as between solicitor and client.*

Solicitor for the appellants, *A. P. Sparke.*

Solicitors for the respondents, *Perkins, Stevenson & Co.*; *W. U. Smyth King & Son.*

B. L.