[HIGH COURT OF AUSTRALIA.]

IN RE TENNANT.

MORTLOCK . . . . . APPELLANT;
DEFENDANT,

AND

HAWKER AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

HAWKER AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

HAWKER AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, 1941, *Sept.* 17, 18, 19.

MELBOURNE, 1942, *Feb.* 24.

Rich, Dixon and McTiernan JJ.

Will—Hotchpot clause—Ascertainment of proportionate shares—Time for ascertainment—Income of estate—Mode of division among beneficiaries.

Where a will contains a hotchpot clause the question whether the proportionate shares of the beneficiaries in corpus are to be ascertained by means of a valuation of the estate made as at the date of the death of the testator or as at some other time prior to conversion, rather than by waiting for final realization, depends upon the intention of the testator as appearing from the provisions of the will.

Until ascertainment of the shares of the beneficiaries in corpus, their shares in the intermediate income are to be calculated by adding to the income of the estate interest at the rate adopted by the court (namely four per cent per annum) on the amount or value of the advancements required to be brought into hotchpot, and, in dividing the aggregate fund among the beneficiaries, deducting from the share of an advanced beneficiary the interest so calculated on the amount or value of his advancement. After the proportions in which

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the beneficiaries are entitled to share in corpus have been ascertained, income should be divided between them in the same proportions as those in which they are entitled to corpus.

The two methods of dividing income above set out are not alternatives and there is no rivalry between them; the first applies until the application of the second is made possible by the complete ascertainment of the fractional shares of corpus. There is thus no conflict between the decision in *In re Poyser*; *Landon* v. *Poyser*, (1908) 1 Ch. 828, and *In re Hargreaves*; *Hargreaves* v. *Hargreaves*, (1903) 88 L.T. 100.

By his will a testator directed that his trustees should sell his estate and should stand possessed of his residuary trust funds in trust for all his children in equal shares. The shares of his daughters and one of his sons were settled. By a hotchpot clause the testator directed that the value of any land, shares or property transferred by him in his lifetime to any child should be taken as part of the share to which the child was entitled, and that the trustees should deduct the value thereof from the share or portion to which the child was entitled. The will directed that the amount or value of any such land, shares or property should, so far as the trustees could arrive at it, be the value thereof at the date of his death, but if sold in his lifetime should be the net proceeds of sale. A second hotchpot clause directed that as regards moneys advanced to any child the same should be deducted from the share to which such child should be entitled at his death. The will further directed that a house given to his widow for her life and a fund set aside to satisfy a life annuity to her should afterwards fall into the residuary trust funds. The will conferred a power of investment, a power to postpone conversion of the testator's real and personal estate or any part of it for so long as the trustees thought fit, a power to continue existing investments although hazardous, a power to conduct a sheep farm, and powers of leasing and management.

Held, on the construction of the will, that an intention was disclosed on the part of the testator that the proportional or fractional shares of his children in the residuary estate should be ascertained on the conversion of the estate. The intermediate income should accordingly be divided into shares ascertained by adding to the income of the residue interest at four per cent per annum on the advances, dividing the aggregate by the number of beneficiaries and, in the case of each advanced beneficiary, deducting the interest on the amount of his or her advance.

Decision of the Supreme Court of South Australia (*Napier* J.) affirmed.

APPEALS from the Supreme Court of South Australia.

Andrew Tennant made a will which, so far as material to this report, was in the following words:—"I also devise to my . . . wife . . . during her life only . . . the lands and house . . . known as 'Essenside.' . . . I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my Trustees upon trust that my Trustees shall sell call in and convert

the same into money and shall with and out of the money produced by such sale calling in and conversion and with and out of such part of my personal estate as shall consist of money pay my funeral and testamentary expenses and just debts and the legacies bequeathed by this my will or any codicil thereto And shall stand possessed of the said residuary trust funds and the investments for the time being representing the same (hereinafter called the residuary trust funds) Upon the trusts following that is to say Upon trust to invest a sum sufficient in their opinion to yield a net annual income of two thousand pounds And I direct my said Trustees to pay the said net annual income of two thousand pounds free from all succession or other duty to my said dear wife during her natural life for her sole and separate use without power of anticipation such payments to be made in equal quarterly sums of five hundred pounds each and the first of such payments to be paid within four calendar months of my decease And I declare that after such a sum sufficient in their opinion to yield a net annual income of two thousand pounds has been so set apart or invested the rest of my trust estate shall be liberated from all liability in respect of the payment of the said net annual income And upon the death of my said wife the capital sum so set apart and invested from which such annual income may be derived shall together with 'Essenside' and the said paddock adjacent thereto fall into and form part of my residuary trust funds And as to my residuary funds in trust for all my chilldren (*sic*) in equal shares And I further declare that as to the share or shares in the said residuary trust funds of any son or sons of mine under the trusts of this my will my Trustees shall (subject as hereafter limited and directed in respect of the share of my son William Andrew) pay the same to him or them absolutely But as to the share or shares in the said residuary trust funds of my son William Andrew and of any daughter or daughters of mine under the trusts of this my will I direct my Trustees to invest the same and pay the amount derivable therefrom to the said William Andrew Tennant and my respective daughters for their sole and separate use free from the control of any present or future husband And I hereby declare that any daughter of mine who may not leave issue or descendants her surviving shall have power to absolutely dispose of her share in the said residuary trust funds by will but not otherwise And as regards my son William Andrew I direct that my Trustees share (*sic*) invest the share to which he is entitled under this my will and the income thereof or so much thereof as my Trustees shall consider sufficient shall be paid to him or applied to his benefit and the share or portion together with any accumulations of income of my said son William

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Andrew shall after his death be held by my Trustees in trust for his children or child and if more than one in equal shares and shall be paid over to such children of my said son William Andrew as are males on their attaining the age of twenty-five years and to such children as are females on their attaining the age of twenty-one years and in the event of the death of my said son William Andrew without leaving any children him surviving them (*sic*) the share to which the children of my said son William Andrew would have been entitled shall fall into and form part of my residuary trust funds Provided always and I hereby declare that should my said son William Andrew die leaving a widow my Trustees may pay to such widow such portion of the income arising from the share of my said son William Andrew as they in their absolute and uncontrolled discretion shall deem sufficient for her maintenance and support and after a sum sufficient for such purpose shall have been set apart and invested the rest of the share of my said son William Andrew shall be liberated from all liability for any payment to such widow and on the death of such widow the portion of my said son William Andrew so set apart and invested shall fall into and form part of my residuary trust funds as if no widow had survived my said son William Andrew And I direct that after the death of any of my daughters leaving issue her or them surviving my Trustees shall stand possessed of the share or interest of such daughter in trust for the children or child if more than one in equal shares such issue to take *per stirpes* and not *per capita* and shall pay to the children of my daughters the share or interest to which he or she is entitled upon their attaining the age of twenty-one years And I confer upon my Trustees full power to deal with such share or shares or interest of and in the residuary trust funds and the accumulations thereof (if any) in all respects as if such daughters or daughter had predeceased me leaving issue And I further declare that in the event of any child of mine dying during my lifetime without leaving issue or thereafter without having exercised his or her power of appointment by will then the surviving husband or wife (if any) of such child (excepting however as is hereinbefore directed as regards the wife of my said son William Andrew) shall for his or her life be entitled to the share or interest in the residuary trust funds to which such child would have been entitled to if he or she had survived me and upon the death of the husband or wife of such child then the share to which such child would have been entitled shall fall into and form part of my residuary trust funds And I direct that the value of any land shares or property transferred by me in my lifetime to any child of mine including the sum of Twenty thousand pounds which I have settled on my daughter

Jessie Clara as her marriage portion shall be taken as part of the share to which any such child is entitled under this my will and my Trustees shall accordingly deduct the value thereof from the share or portion to which such child is entitled under this my will And I direct that the amount of the value of any land shares or property shall so far as my Trustees can arrive at such be the value thereof as at the date of my death but in the event of any such land shares or property being sold during my lifetime by any child to whom such land shares or property shall have been transferred then I direct that the net amount for which the same shall have been sold shall be deemed to be the value thereof within the meaning of the directions hereinbefore contained and such amount shall accordingly be deducted as aforesaid But I direct that the Heddon Bush property which I purchased for and transferred to my said son John shall for the purposes aforesaid be estimated as of the value of Thirty thousand pounds and no more and shall be taken as a satisfaction to that extent of the share of my said son John under this my will even if sold for more than that amount during my lifetime And I direct that as regards moneys advanced by me to any child the same shall be deducted from the share to which such child shall be entitled at my death under this my will But I declare that any moneys paid to any child as pocket money or allowance for his or her personal expenditure during my life shall not come within the directions hereinbefore contained but shall be deemed absolute gifts . . ." The will went on to confer a power of investment, a power to postpone conversion, a power to continue existing investments although hazardous, a power to conduct a sheep farm, and powers of leasing and of management. It also contained a provision for conferring upon the trustees the power to absolutely determine and decide what part of the moneys arising from the carrying on of the business of sheep farming was capital and what income.

The testator died in 1913 and was survived by his widow, who died in 1921, and by six children, namely, William Andrew Tennant, Frederick Augustus Tennant, John Tennant, Rosina Forsyth Mortlock, Jessie Clara Anstruther-Gray and Adelaide Hawker. No child of the testator had predeceased him. On the marriage of Jessie Clara Anstruther-Gray the testator had made a settlement by which he became bound to pay £20,000 for her benefit. This obligation was discharged by his trustees in 1919. To Frederick Augustus Tennant the testator had transferred property of a value of £17,588, and to John Tennant he had transferred "Heddon

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Bush." No advance had been made to William Andrew Tennant, Rosina Forsyth Mortlock or Adelaide Hawker.

William Andrew Tennant died on 20th February 1939 leaving him surviving a widow but no issue.

A deed of family arrangement dated 27th June 1939 was entered into under which the beneficiaries entitled to income agreed that they should be deemed to have received their correct shares of income up to 21st November 1937.

After the testator's death the estate increased in value. At the time of his death it was estimated at £516,296, whereas in July 1939 it was estimated at £620,000.

An originating summons was issued out of the Supreme Court of South Australia, and, on the hearing thereof, *Napier* J. held that, in order to give effect to the hotchpot clause, the testator's residuary estate should be valued as at the date of the division thereof, and not as at the date of the death of the testator. His Honour further held that after 21st November 1937, and pending division, in order to provide the income of the residuary estate, interest at four per cent per annum on the sums required to be brought into hotchpot should be added to the actual income of the residuary estate, and the amount of such interest should be deducted from the shares in income of the advanced children. His Honour further held that, subject to the trustees' power to provide for William Andrew Tennant's widow's maintenance, his share must be added to and go in augmentation of the vested or settled shares of the other children of the testator.

From this decision the unadvanced beneficiaries (or their representatives) brought two appeals to the High Court. These appeals were heard together.

Tait, for the appellant in the first appeal. The substantial question is whether the rule in *In re Hargreaves* ; *Hargreaves* v. *Hargreaves* (1), or the rule in *In re Poyser* ; *Landon* v. *Poyser* (2) applies. It is submitted that the former is the general rule and the latter is the exception. Alternatively, you apply the former rule where, as here, the will tells you to do so. Therefore the estate should, for the purpose of the hotchpot clause, be valued as at the date of death. *In re Hargreaves* (1) was followed in *In re Gilbert* ; *Gilbert* v. *Gilbert* (3) ; *Re Hart* ; *Hart* v. *Arnold* (4) ; *In re Mansel* ; *Smith* v. *Mansel* (5) ; *In re Gunther's Will Trusts* ; *Alexander* v. *Gunther* (6) ; and *In re Oram* ;

(1) (1903) 88 L.T. 100.
(2) (1908) 1 Ch. 828.
(3) (1908) W.N. 63.
(4) (1912) 107 L.T. 757.
(5) (1930) 1 Ch. 352.
(6) (1939) Ch. 985.

Oram v. *Oram* (1). *In re Poyser* (2) was followed in *In re Craven*; *Watson* v. *Craven* (3); *In re Forster-Brown*; *Barry* v. *Forster-Brown* (4); *In re Tod*; *Bradshaw* v. *Turner* (5); *In re Cooke*; *Randall* v. *Cooke* (6); and *In re Wills*; *Dulverton* v. *Macleod* (7). The will itself indicates that the principle of *In re Hargreaves* (8) should be applied. The primary division of residue is into sixths, and four of the six shares are settled. Therefore in four of the six cases the testator has to provide for income, and income runs from death. You can't find the income unless you know what the share is. The hotchpot clause refers to "the share," and the testator speaks of the value of the "land" and the value of "the share." He is not fixing one time as time for valuation of the "land" and another (which may be thirty years later) for valuation of "the share." As a general principle of administration the value of the share is to be fixed as at date of death, unless there is something to the contrary in the will (*In re Oram* (1)). *In re Mansel* (9) shows that *In re Hargreaves* (8) states the general rule and is not a new departure.

[DIXON J. Is not that passage directed to a situation where trustees have no other problem than ascertaining shares of income?]

I submit not. A decision about income must involve a decision about capital, and *In re Mansel* (10) shows that *In re Hargreaves* (8) is to be applied unless there is difficulty in arriving at a fair and proper valuation of the residue or unless the testator appears not to have contemplated an immediate division, and neither of these exceptions applies here. But every case in which *In re Poyser* (2) was followed is to be explained as coming within one or other of these two exceptions. In each case there was a reason why *In re Hargreaves* (8) could not be applied. If, contrary to these submissions, it is held that *In re Poyser* (2) applies, the rate of interest should be higher than four per cent. That is the recognized rate to be received on trust investments, but here the evidence is that the rate actually received in the past and likely to be received in the future is much higher. [Counsel also referred to *Theobald* on *Wills*, 9th ed. (1939), p. 659; *Law Quarterly Review*, vol. 31, p. 314; *Law Quarterly Review*, vol. 32, p. 348; *In re Ritchie*; *The Union Trustee Co. of Australia Ltd.* v. *Ritchie* (11); *Ackroyd* v. *Ackroyd* (12); *Stewart* v. *Stewart* (13).]

(1) (1940) Ch. 1001.
(2) (1908) 1 Ch. 828.
(3) (1914) 1 Ch. 358.
(4) (1914) 2 Ch. 584.
(5) (1916) 1 Ch. 567.
(6) (1916) 1 Ch. 480.
(7) (1939) Ch. 705.
(8) (1903) 88 L.T. 100.
(9) (1930) 1 Ch., at p. 361.
(10) (1930) 1 Ch. 352.
(11) (1936) V.L.R. 64.
(12) (1874) L.R. 18 Eq. 313
(13) (1880) 15 Ch. D. 539.

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Reed K.C. (with him *Norman*), for the appellants in the second appeal, adopted on behalf of these appellants the argument already addressed to the Court.

Mayo K.C. (with him *Astley*), for certain beneficiaries, respondents in both appeals. The regular chancery practice is that laid down in *In re Poyser* (1). Alternatively, if *In re Hargreaves* (2) establishes the general practice, this will brings the case within the exceptions to that practice. The rule in *In re Hargreaves* (2) is a rule of administration. It has not the force of a rule of construction, and to apply *In re Hargreaves* (2) here means the attainment of inequality, not of equality, which was the testator's object. *In re Hargreaves* (2) is not to be applied unless the testator has made it clear that he intended a notional division on an estimated value—an immediate ascertainment of the fractional shares (*Hanbury, Modern Equity*, 2nd ed. (1937), p. 477). The argument of the appellant based on the provision relating to land, shares and other property is fallacious, for the testator has indicated several methods for arriving at the amount to be brought into hotchpot. The only shares given to children are shares in the residuary trust funds, that is, in the proceeds of conversion. [Counsel referred to *In re Wills* (3); *In re Tod* (4); *In re Izard (deceased)*; *Watkins* v. *Izard* (5); *In re Willoughby* (6); *In re Craven* (7); *Jarman* on *Wills*, 7th ed. (1930), p. 1146; *In re Gunther's Will Trusts* (8); *In re Rees*; *Rees* v. *Genge* (9).] The direction in the will to value advances at the date of death is consistent with our contention and with the rule in *In re Poyser* (1). For the purpose of a computation based on that rule, a valuation is necessary for working out interest at four per cent. This pointer as to valuation is as strong in support of *In re Poyser* (1) as in *In re Hargreaves* (2), if not stronger. No case cited is absolutely binding on this Court. *In re Hargreaves* (2) applies a canon of construction only, or, alternatively, if it states the equitable practice, the rule does not apply to corpus. The case does not apply if the will contemplates postponement (*In re Wills* (10)). There must be some permanence about the value to be assigned (*In re Mansel* (11); *In re Craven* (12); *In re Cooke* (13); *Halsbury's Laws of England*, 2nd ed., vol. 34, p. 425; *Theobald* on *Wills*, 9th ed. (1939), p. 659). The residue cannot be treated as a series of

(1) (1908) 1 Ch. 828.
(2) (1903) 88 L.T. 100.
(3) (1939) Ch. 705.
(4) (1916) 1 Ch. 567.
(5) (1936) N.Z.L.R. 130.
(6) (1911) 2 Ch. 581.
(7) (1914) 1 Ch. 358, at p. 369.
(8) (1939) Ch. 985.
(9) (1881) 17 Ch. D. 701, at p. 704.
(10) (1939) Ch., at pp. 716, 717.
(11) (1930) 1 Ch. 352.
(12) (1914) 1 Ch. 358, at p. 370.
(13) (1916) 1 Ch. 480, at p. 490.

fragments (*In re Allen*; *Dow* v. *Cassigne* (1); *Williamson* v. *Carter* (2)).

Ligertwood K.C. (with him *L. T. Gun*), for other beneficiaries, respondents in both appeals. *In re Hargreaves* (3) was wrongly decided and departed from the practice of the Court of Chancery which had endured for more than a hundred years (*Andrewes* v. *George* (4); *Ackroyd* v. *Ackroyd* (5); *In re Rees* (6); *In re Forster-Brown* (7); *In re Wills* (8); *Law Times Journal*, vol. 188, p. 194). If *In re Hargreaves* (3) were rightly decided, the basis of the decision was that the will fixed the rights of the children *inter se* at the date of the death. In such a case only should the rule be applied (*In re Tod* (9); *In re Willoughby* (10)). Such a direction was found in *In re Gilbert*; *Gilbert* v. *Gilbert* (11); *Re Hart* (12); *In re Mansel* (13); *In re Gunther's Will Trusts* (14); *In re Oram* (15). *In re Hargreaves* (3) is not to be applied where the testator has not contemplated any ascertainment of the relative fractional shares of his children at the date of his death, where the testator has not contemplated an immediate distribution at his death (*In re Poyser* (16); *In re Craven* (17); *In re Mansel* (18)), or where there is difficulty in justly valuing the estate at the date of the death (*In re Cooke* (19); *In re Mansel* (18)). If for one of these reasons *In re Hargreaves* (3) is not to be applied, advances are brought into hotchpot by charging the share of the advanced child pending the final distribution of the estate with interest at four per cent per annum (*In re Poyser* (16)). The limitations indicated above of *In re Hargreaves* (3) have been recognized in every textbook (*Theobald* on *Wills*, 8th ed. (1927), p. 871; *Lewin* on *Trusts*, 14th ed. (1939), p. 283; *Godefroi* on *Trusts*, 5th ed. (1927), p. 408; *Halsbury's Laws of England*, 2nd ed., vol. 34, p. 424; *Hanbury*, *Modern Equity*, 2nd ed. (1937), p. 477; *Jarman* on *Wills*, 7th ed. (1930), p. 1146; *Underhill* on *Trusts*, 9th ed. (1939), pp. 246, 255). On the true construction of the present will the testator did not contemplate any ascertainment of the relative fractional shares of his children at the date of his death, nor did he contemplate any immediate distribution of his estate upon his death. There is a

(1) (1903) 1 Ch. 276.
(2) (1935) 54 C.L.R. 23.
(3) (1903) 88 L.T. 100.
(4) (1830) 3 Sim. 593 [57 E.R. 1045].
(5) (1874) L.R. 18 Eq. 313.
(6) (1881) 17 Ch. D. 701.
(7) (1914) 2 Ch. 584.
(8) (1939) Ch. 705.
(9) (1916) 1 Ch. 567.
(10) (1911) 2 Ch. 581.
(11) (1908) W.N. 63.
(12) (1912) 107 L.T. 757.
(13) (1930) 1 Ch. 352.
(14) (1939) Ch. 985.
(15) (1940) 1 Ch. 1001.
(16) (1908) 1 Ch. 828.
(17) (1914) 1 Ch. 358.
(18) (1930) 1 Ch., at p. 361.
(19) (1916) 1 Ch. 480.

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serious difficulty in justly valuing the estate as at the date of death on an accurate and definite basis. If *In re Poyser* (1) is to be applied, interest should be debited against advances at four per cent per annum and no more (*Stewart* v. *Stewart* (2); *In re Rees* (3); *In re Hargreaves* (4); *In re Davy* (5); *In re Cooke* (6); *In re Oakley* (7)). Every textbook cited above states that four per cent per annum is the proper rate. See also *Williams* on *Executors*, 11th ed. (1921), vol. II., p. 1241.

Tait, in reply. The respondents ask the Court to take the value of advances as at the date of death but the value of the estate at another date.

Cur. adv. vult.

1942, Feb. 24. The following written judgments were delivered :—

RICH J. The question in the present appeals is as to the basis upon which the capital of the residuary funds comprised in the testator's estate and the intermediate income should be distributed. It originates in the hotchpot clauses inserted in the testator's will.

The intention of a testator in inserting a hotchpot clause in his will is to provide that there shall be a fair division among his children, and that they shall be equal *inter se*. Similarly the intention of the Statute of Distributions is "grounded upon the most just rule of equity, equality" (*Edwards* v. *Freeman* (8)). In the present will the testator's intention is clearly expressed with regard to "his residuary funds," viz., that they are to be held in trust for all his children in equal shares. The problem is one which is apt to arise whenever a fund of capital is distributable amongst a group of persons some of whom have already received, or must be treated as having received, something on account of their shares. It is obvious that in such a case some adjustments must be made in respect of what has already been received, not only upon a distribution of capital but upon any distribution of the intermediate income pending a final distribution. In general, that method of administration should be adopted which is most calculated to produce a fair result in the circumstances of the particular case, subject to two considerations, first that the provisions of the controlling instrument may, by accident or design, require the adoption of a particular method

(1) (1908) 1 Ch. 828.
(2) (1880) 15 Ch. D. 539.
(3) (1881) 17 Ch. D. 701.
(4) (1903) 88 L.T. 100.
(5) (1908) 1 Ch. 61.
(6) (1916) 1 Ch. 480.
(7) (1926) S.A.S.R. 362.
(8) (1727) 2 P.Wm. 435, at p. 443 [24 E.R. 803, at p. 806].

or preclude the adoption of another, and, second, that the use of a simple method which produces a reasonable approximation to fairness is to be preferred to attempts to achieve meticulous accuracy if they involve elaborate actuarial computations, valuations, or applications to the court. If it has been authoritatively stated that a particular rule may be applied in the absence of special circumstances, it is of great importance, in order that personal representatives may be able to administer their estates without incurring the expense of recourse to the court, that the applicability of the rule should not be put in doubt by unnecessary refinements. But this is a counsel of perfection. It is obvious that adjustments, for all relevant purposes identical with those required in the present case, may be necessitated by the equitable doctrine of ademption, or for purposes of hotchpot occasioned by express provision or arising under an intestacy, or by reason merely of the fact that a partial distribution of assets has been made by a personal representative on a basis not strictly proportionate to the shares of the beneficiaries: Cf. *In re Tod* (1). Since in all these cases the problems are the same, it is perhaps a laudable ideal that the methods for resolving them should be the same. Indeed, it has been established that if it is necessary to determine the value of the property advanced, this must be done, in the absence of some provision to the contrary, as at the date when the advance was made. This is so whether the case is one of ademption (*Watson* v. *Watson* (2)), or of an express provision for hotchpot (*In re Crocker*; *Crocker* v. *Crocker* (3)), or of an appropriation *in specie* by a personal representative (*In re Richardson*; *Morgan* v. *Richardson* (4)). In the case of an appropriation *in specie* to a beneficiary by a personal representative in part satisfaction of his share, no valuation other than that of an appropriated asset (and of any other assets similarly appropriated) may be necessary. The authorities show that, in this type of case, if the rest of the assets are from time to time sold, and the proceeds distributed, or allocated to settled shares, there is no reason why the administration of the estate should be encumbered by a general valuation, or why capital distributions should not be made on the basis of the value of what is distributed at the time when it is distributed, notwithstanding that the estate may have depreciated in value since the testator's death (*In re Lepine*; *Dowsett* v. *Culver* (5)—Cf. *Herbert* v. *Badgery* (6)), or that the value of the appropriated asset may have risen or fallen (*In re Richardson*;

(1) (1916) 1 Ch. 567, at p. 576.
(2) (1864) 33 Beav. 574 [55 E.R. 491].
(3) (1916) 1 Ch. 25.
(4) (1896) 1 Ch. 512.
(5) (1892) 1 Ch. 210.
(6) (1894) 15 L.R. (N.S.W.) Eq. 236; 11 W.N. 113.

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Rich J.

Morgan v. *Richardson* (1)). And the intermediate income may be adjusted by charging the advanced beneficiary with interest at the rate of four per cent per annum on the value of the appropriated asset taken as at the date of appropriation (*In re Richardson* (2) ; *In re Nickels* ; *Nickels* v. *Nickels* (3)).

If there is a relevant difference between the cases of an advance made by a testator in his lifetime which has to be brought into hotchpot and of an appropriation of an asset to a beneficiary at a valuation by a personal representative in part satisfaction of his share which should involve the application of any different methods adjusting distributions of corpus or income, it will depend on the provisions of the will. Prima facie the same type of adjustment is called for in each case. Otherwise it is conceived that the special complications which some of the authorities have introduced in the hotchpot type of case are in the main, if not entirely, unnecessary.

As the solution of the question in the present case is mainly one of interpretation of the relevant provisions of the will I shall state them shortly. The testator directed that his trustees should sell his estate, with certain exceptions not material to be stated, and should stand possessed of his residuary trust funds in trust for all his children in equal shares. The shares of the daughters and of the son William were settled. By the first hotchpot clause he directed that the value of any land, shares or property transferred by him in his lifetime to any child of his, including £20,000 settled on his daughter Jessie Clara as a marriage portion, should be taken as part of the share to which any such child is entitled, and the trustees shall accordingly deduct the value thereof from the share or portion to which the child is entitled. The amount of the value of any such land, shares or property, so far as the trustees could arrive at it, should be the value thereof at the date of his death, but if sold in his lifetime should be the net proceeds of sale, which amount should be accordingly deducted. The "Heddon Bush" property transferred to his son John was to be valued at £30,000. The second hotchpot clause directed that as regards moneys advanced to any child the same should be deducted from the share to which such child should be entitled at his death. Apart from the precise directions for fixing the value of the specific land, shares or property transferred by him in his lifetime the testator gave no directions with regard to fixing the value of his assets. The will further directed that the house given to his widow for her life and the fund set aside to satisfy her annuity were to fall into and form part of

(1) (1896) 1 Ch. 512.
(2) (1896) 1 Ch., at p. 516.
(3) (1898) 1 Ch. 630.

the residuary trust funds. And it confers upon the trustees a wide power of postponement of conversion, and powers to retain " doubtful or hazardous " investments and to " carry on any business of sheep farming in which I am engaged either solely or in partnership with any other person for so long as they in their absolute discretion shall think fit " and that " they shall not be responsible for any loss or losses that may occur or arise or be occasioned by such carrying on of and continuing of such sheep-farming business and for such purposes my Trustees may with moneys out of my residuary trust funds take up leasehold lands of the Crown and purchase stock for stocking and carrying on the same And I confer upon my Trustees the power to absolutely determine and decide what part of the moneys arising from the carrying on the business of sheep farming is capital and what income." These provisions, together with that for the testator's widow, are clear indications that the testator intended that the fractional proportions of the children should be ascertained after actual conversion, when the hotchpot clauses will be applicable.

This interpretation distinguishes the present case from that of *In re Hargreaves* (1). That case was, it has been said, " decided solely on the very exceptional language of the will, which pointed to an immediate ascertainment of the fractional shares of the advanced and unadvanced children respectively at one definite period, namely, the day of the death of the testator, and on the basis of the market prices current at the time " (*In re Forster-Brown* (2)). In *Hargreaves' Case* (1) calculation of interest was not involved, as the capital value of each advance was to be added to the net estate at the death of the testator, and the income derived therefrom from the date of the death was divisible among the children according to the fractional proportions thus ascertained. Having regard to the particular dispositions of the will I fail to understand why this method of calculation was not correct. And I consider that it should be followed in similar cases where the exact shares of the beneficiaries are directed to be ascertained at death. Indeed, it has been applied in *Re Hart* (3) and in *In re Mansel* (4). *Hargreaves' Case* (1) does not, I think, establish any rule of administration or disturb any existing practice, and there is no conflict between the decision in *Hargreaves' Case* (1) and that in *In re Poyser* (5), as they are dealing with entirely different dispositions. No doubt *Hargreaves' Case* (1) was " argued on the part of the appellants only,

(1) (1903) 88 L.T. 100.
(2) (1914) 2 Ch. 584, at p. 591.
(3) (1912) 107 L.T. 757.
(4) (1930) 1 Ch. 352.
(5) (1908) 1 Ch. 828.

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since the principle of construction suggested by *Romer* L.J. in the Court of Appeal was as favourable to the respondents as that applied by *Joyce* J. in the Court below, and was accordingly accepted by them without demur," and it was about to be appealed to the House of Lords but was compromised (*In re Forster-Brown* (1)). And the note of the case in the *Weekly Notes* (2) may explain the reason why it did not find its way into the *Law Reports* (*In re Craven* (3)). But these matters do not affect the binding character of the decision in any similar case and, I have already stated, it has been followed in other cases. But where by the terms of the particular will the ascertainment of the exact proportions in which the beneficiaries are entitled to corpus is postponed, then to overcome the difficulty which arises in the distribution of intermediate income, the court established the practice stated in *Andrewes* v. *George* (4), editor's note, and restated in *In re Rees* (5). The practice is that "advanced children must bring their advances into hotchpot with interest at four per cent per annum from the time for distribution to the time of actual distribution" (*In re Tod* (6)). So far as the rate of interest is concerned, if the general standard of income return should ever be proved to have found a stable level above or below four per cent it is always competent to the court to change the rate without changing the method of calculation: Cf. *Re Jones*; *Jones* v. *Baxter* (7); *Union Trustee Co. of Australia Ltd.* v. *Graham* (8); *Re Tindal*; *Perpetual Trustee Co. Ltd.* v. *Tindal* (9).

It is not necessary in the present case to express an opinion as to whether in cases such as *In re Wills* (10), *In re Gunther's Will Trusts* (11), *In re Oram* (12), the course of basing the administration of the estate upon estimates of value made at an arbitrary date rather than upon values actually realized or determined for the purposes of actual appropriations can be regarded as necessary or justifiable. It may be pointed out, however, that the view expressed by *Farwell* J. in *In re Gunther's Will Trusts* (13), that a date for valuation should be chosen which is fixed, and not one which is in

(1) (1914) 2 Ch., at pp. 591, 592.
(2) (1903) W.N. 24, 28.
(3) (1914) 1 Ch. 358, at p. 364.
(4) (1830) 3 Sim. 393, at p. 395 [57 E.R. 1045, at p. 1046].
(5) (1881) 17 Ch. D. 701.
(6) (1916) 1 Ch., at p. 576.
(7) (1929) 30 S.R. (N.S.W.) 26, at p. 40; 46 W.N. 190, at p. 193.
(8) (1931) 31 S.R. (N.S.W.) 528, at pp. 531, 532; 48 W.N. 194, at p. 195.
(9) (1933) 34 S.R. (N.S.W.) 8, at pp. 15, 16; 50 W.N. (N.S.W.) 247, at p. 249.
(10) (1939) Ch. 705.
(11) (1939) Ch. 985.
(12) (1940) Ch. 1001.
(13) (1939) Ch. 985, at p. 991.

any way dependent upon the energies of the executors and administrators, is not borne out by such authorities as *In re Lepine* (1) and *In re Richardson* (2). It is desirable that estates should be administered and distributed, so far as possible, in accordance with their actual position and results, and that the rights of beneficiaries should not be regulated by estimates made at arbitrarily fixed periods unless the provisions of the controlling document or the necessities of the case so require.

For these reasons I am of opinion that the appeals should be dismissed. As the parties concur in asking that the costs of all parties, those of the trustees as between solicitor and client, should be paid out of the estate that order will be made.

DIXON J. The will of the testator contains directions that certain money and property which in his lifetime he gave to some of his children by way of advancement shall be taken as part satisfaction of their respective aliquot shares in residue, that is to say brought into hotchpot, and the question upon these two appeals is how the directions are to be applied in ascertaining the amounts or proportions of corpus taken by the testator's children and the shares of income payable to them. When a disposition requires that a fund should be distributed equally among a class and then goes on to provide that those members of the class who have received advancements should bring them into hotchpot, the effect is to qualify the statement that the shares in the fund shall be equal and to direct a method of calculation which may be expected to result in some other proportions. The purpose of directing the hotchpot commonly is to ensure that children obtain from their parent by advancement and under his will equal portions or equality of benefit.

In a distribution of corpus this is done by adding the aggregate amount of the advancements made by the testator to the amount of the corpus of the testator's estate and then dividing the total equally. This gives a prima-facie share from which the amount advanced to each respective child must be deducted to obtain his or her distributable share in the estate. The same result may be arrived at in another way. Out of the testator's estate each unadvanced child and each child who has been advanced in less degree than the child who has received the greatest advancement may be credited with amounts which will bring them all up to an equality and then the remainder of the estate may be divided equally. This is only another expression of the same mode of division.

(1) (1892) 1 Ch. 210.

(2) (1896) 1 Ch. 512.

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It is evident that to ascertain in this way the proportionate shares of corpus which in any given case advanced and unadvanced children are to take, it is necessary to express in money both the value of the respective advances and of the testator's residuary or other fund to which the hotchpot provision applies. Usually the advancements are expressed in money, and if the hotchpot clause covers gifts of property *in specie* then often the will supplies the value or a means of fixing it. In the absence of any other indication there must be a valuation as at the date of the gift.

But the necessity of reducing the residuary estate to monetary expression is a cause of difficulties that have not been so simply answered. The choice is presented between waiting for the actual realization in money of all the assets comprising the estate, or fixing the values by estimation as at some earlier point of time. If the former course is adopted the proportional or fractional shares in the residuary estate which, as a result of the operation of the provision for hotchpot upon the direction to divide equally, the children are to take will not be ascertained until actual conversion in money is completed, a thing often not required except for the purpose of final distribution. If the latter course is adopted, the fact that the value of property does not remain constant means that the proportional or fractional shares taken by the beneficiaries will vary according to the period chosen for fixing them by means of valuation. A very simple example will suffice to show this. Suppose a residue consists of land or securities which as at the testator's death are valued at £25,000, as at the death of his widow at £27,000, and as at the time when his youngest child attains twenty-one years of age at £33,000; that the will disposes of it upon trust for the widow for life and after her death for such of his children as attain full age in equal shares with a provision that advances should be brought into hotchpot; that there are four children and they attain twenty-one; and that the eldest child has received £3,000 in his father's lifetime by way of advancement. If the value at the death of the testator is taken the fractional proportions would be obtained by adding first the advance of £3,000 to the value of £25,000 and dividing the total of £28,000 by four. The quotient of £7,000 would then, if values remained constant, represent the prima-facie share of each child from which in the case of the eldest his advance of £3,000 must be deducted, leaving £4,000 for him. The proportions are thus 4 : 7 : 7 : 7, that is, fractions of 4/25ths for the eldest and 7/25ths for the others.

If, however, the death of the life tenant were chosen as the time for ascertaining the proportions an application of the same process

to the value at that date would give the eldest child a 9/54th share and the others a 15/54th share each. If the date of vesting in interest were taken the fractions would be 2/11ths and 3/11ths.

It is therefore evident that if the fractional or proportional shares of the beneficiaries are to be ascertained before the final distribution of the estate it is a matter of much importance to determine as at what time or upon what event it is to be done. For the proportions fixed by reference to the values then ruling will govern the shares in which the corpus is to be enjoyed, whatever fluctuations in the value of the estate there may afterwards be and whatever it may finally realize.

Further, if it is right at any point of time before final distribution to ascertain definitively the proportional or fractional shares of the beneficiaries in corpus, and if in virtue of their interests in corpus they are entitled to the intermediate income, it would seem inevitably to follow that the same proportions will govern the distribution of the income.

It will thus be seen that under provisions requiring distribution in proportional shares obtained by bringing advances into hotchpot the first question must be, Are the proportions not to be ascertained until final realization for distribution or on the other hand are they to be ascertained earlier and, if so, at what time or upon what event ?

The question would appear to be one for which the answer should be sought in the provisions of the will. For the meaning and operation of the will should determine when the proportions in which the estate is to be distributed should be ascertained. If the matter is not one to which the testator expressly adverts and the plan upon which his dispositions are constructed does not imply an answer, then it may be necessary to invoke some presumption or some general rule. But in principle the question is one rather of interpretation than of administration. For it goes to the nature of the dispositions intended.

If as a matter of interpretation the conclusion is reached that the proportional shares are ascertainable only upon final realization or distribution, then a question may present itself with respect to intermediate income. For, quite consistently with that conclusion, it may be found that nevertheless the beneficiaries entitled to corpus in the shares yet to be definitively ascertained are to enjoy the income. Indeed, that question may arise even when there is to be an earlier ascertainment of the proportions in which corpus is shared. For earlier still it may be necessary to divide intermediate income or surplus income among the beneficiaries entitled to corpus.

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The necessity of distributing intermediate income among the persons entitled to corpus before the time arrives when their exact proportional interests in corpus can be ascertained does appear to call for a rule of administration. In fact there is a well-settled rule. The amount or value of the advancement is taken, and interest at the rate adopted by the court is calculated thereon over the period to which the income is attributable. The interest is added to the income of the estate and the aggregate fund of interest is then divided by the number of beneficiaries. This gives the prima-facie share of each in the income, but from the shares of an advanced beneficiary is deducted the interest calculated on the amount or value of the advancement made to him by the testator.

Thus, in the example I have already given, suppose there was to be no ascertainment of the precise shares of corpus either until actual distribution or at all events until the youngest child attained twenty-one and that in the meantime income was to be distributed among the four children. In other words, there would be an income-bearing fund to be distributed or proportioned at a subsequent time but by a calculation involving as one step the addition to the fund of the amount or value of the advancement of the eldest son, viz., the sum of £3,000.

Suppose the income for a given year produced by the corpus is £1,500. To that would be added interest at four per cent on £3,000, or £120. The total £1,620 would be divided by four. The prima-facie share of each in the year's income would be £405, but from that there would be deducted in the case of the eldest son the interest, £120, calculated on the amount by which he had been advanced, leaving £285 as his share.

Until the proportional or fractional shares of corpus are definitively fixed, there is, I believe, no other way of arriving at the shares of income; though it is true that questions have been raised as to how the interest rate should be fixed. Once the fractional shares in corpus have been ascertained there is no longer any necessity to apply such a method of determining the shares of income. The proportions should apply equally to corpus or income.

It would seem therefore in point of reason that the two modes of calculating the shares of income are not alternatives; one applies until the other is made possible by the complete ascertainment of the fractional shares of corpus. They are, however, generally regarded as rival methods for doing the same thing, for solving the same difficulty. Each appears to have its supporters, who represent them as being in opposition; one is condemned on the mistaken ground that it is an innovation, the other as a departure from

principle. To apply one or the other seems sometimes to be treated as an act of faith rather than of reason. Each has suffered the misfortune of being labelled by the name of a case.

No doubt it is often very difficult to say which method of distributing income should be applied under the provisions of trust instruments. But I cannot help thinking that the difficulty arises not from the rival claims of the two methods to perform the same office, but from the inadequacy, obscurity or complexity of the dispositions which, by introducing a hotchpot clause, necessarily raise the question whether the fractional shares are or are not to be defined and ascertained before realization for final distribution, and, if so, when. To my mind it is on the answer to this question that the choice of methods depends, and not on grounds of doctrine, of traditional practice or of preference for one chain of cases to another.

It is indeed only too easy to arrange the decided cases in opposing ranks or lines. But a close examination of them has led me to believe that it is an error to do so. I shall afterwards say something about the authorities, but for clearness I have thought it better first to state what in principle appears to me to be the position and why and how the difficulties arise. To complete this statement it is perhaps desirable to refer particularly to trusts for immediate conversion with a power of postponement, as being a natural source of difficulty where there are interests for life and subject thereto a distribution of corpus in shares ascertained by means of a provision for hotchpot. It is also desirable to deal with the facts and dispositions of the present case and show how the foregoing general considerations apply.

First then I shall speak of the confusion likely to arise in such questions out of dispositions based upon trusts for immediate conversion with a power of postponement.

The form of such trusts involves what may be called a preliminary supposition that the entire residuary estate will be at once turned into money, and the limitations and directions which follow are usually expressed on this supposition. In particular, trusts of corpus for a class are expressed as if there were a fund of money in hand for division whether by payment or by appropriation. Directions that advances shall be brought into hotchpot take varying forms. The hotchpot provision may say that the advances are to be " deducted " from the advanced child's share, to be " taken in satisfaction " or " in part satisfaction " or " in or towards satisfaction of the share " or to be " taken " or " brought into account." Sometimes the words " by way of hotchpot " are added or there is

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some other express reference to "hotchpot." With all such expressions it is natural to understand the direction as referring to a "deduction" from, "satisfaction" of, or "accounting" against a money fund, and when there is a direction for immediate conversion and a trust of proceeds there is clear ground for treating those proceeds as the money fund in contemplation. If there were no power of postponement, and if there be no prior charges on corpus of uncertain incidence or amount, then every consideration would point to the conclusion that upon conversion the fractional shares in residue should be immediately ascertained. If a life interest or any other charge upon income were interposed, that in itself would be no objection to an immediate determination of the proportion of the shares in corpus. But other considerations are necessarily introduced by the customary power of postponement and direction that the actual income from the estate pending conversion shall be dealt with as if it were the income after conversion. These provisions may be regarded as enabling the trustees to postpone not only the conversion, but all the consequences which would be associated with immediate conversion if it has taken place including the ascertainment of the proportional or fractional shares in corpus. In other words, conversion may still be regarded as the occasion of, or condition precedent to, a definition of the proportion in which children take corpus.

On the other hand, it would be possible to regard the provisions as meaning that postponement should not affect the rights of beneficiaries *inter se*. The inference that the hotchpot was to be done by deduction from the proceeds of conversion might then be displaced and room made for an implication that the proportions must be fixed before conversion, although it might involve valuation. The choice between these views might be determined by the manner in which the limitations and dispositions of the will were constructed. For instance, if one of the class of beneficiaries could call for his share at or after some specified time or event, that would be strong reason for saying that, even though it meant valuation, the fractions must be settled.

The facts of the present case, which may be shortly stated, involve some of the difficulties to which I have referred. The testator, who died in 1913, left an estate of a value of about £550,000. His widow survived him until 1921. He left six children, three sons and three daughters. On the marriage of one of his daughters, Mrs. Jessie Clara Anstruther-Gray, he made a settlement by which he became bound to pay £20,000 for her benefit. This obligation was discharged in 1919 by his executors and trustees. To his son Frederick Augustus

he transferred property of a value of £17,588, and to his son John he transferred an estate called "Heddon Bush" which he bought expressly for him. He did not advance his remaining son, William Andrew, or his other daughters, Mrs. Mortlock and Mrs. Hawker.

By his will, after devising a house to his wife for life and bequeathing to her furniture and the like and a small pecuniary legacy, the testator devised and bequeathed all his property not otherwise disposed of to his trustees upon trust for conversion and out of the moneys arising from conversion to pay debts and legacies and to stand possessed of the residue upon trusts which he proceeded to state. The first trust is to invest an amount sufficient in their opinion to yield an annuity to his widow of £2,000. There is a declaration that the setting aside is to operate in exoneration of the rest of the estate. There is a direction that after her death the fund together with the house devised to her for life is to fall into residue. The residuary funds are to be held "in trust for all" the testator's "chilldren in equal shares." There is then a declaration that the trustees shall pay the shares of sons (except William Andrew) to them absolutely. The shares of William Andrew and of the testator's daughters are then settled. In the event, which in fact happened, of William Andrew's dying without leaving children that share is to fall into and form part of the testator's residuary trust fund, subject to a proviso giving the trustees a discretionary power to provide for his widow's maintenance.

There is a provision for the case, which did not happen, of a child of the testator predeceasing him. In that event the widow or widower of that child is to take the life interest in his or her share which on the death of his widow or her widower is to fall into residue. The main provision for bringing advances into hotchpot follows. It is a direction that the value of any land, shares or property transferred by the testator in his lifetime to any child of his, including the sum of £20,000 which he had settled on his daughter Jessie Clara as her marriage portion, should be taken as part of the share to which any such child is entitled under his will, and his trustees should accordingly deduct the value thereof from the share or portion to which such child is entitled under his will. To this there is added a direction that the amount or value of any land shares or property shall, so far as his trustees can arrive at it, be the value at the date of his death, unless it has been sold in his lifetime, in which case the amount obtained on the sale is to be taken as the value. There is a specific provision for the property given to his son John, "Heddon Bush." The provision fixes the value at £30,000 and directs that it shall be taken as a satisfaction to that extent of the share of

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John under the will even if the property is sold for more in the testator's lifetime. Then comes a further hotchpot clause dealing with possible gifts of money, but excluding pocket money or allowances for personal expenditure. In that clause the expression occurs: "the same shall be deducted from the share to which such child shall be entitled at my death under this my will."

The will goes on to confer a power of investment, or a power to postpone conversion of the testator's real and personal estate or any part of it for so long as the trustees think fit, a power to continue existing investments although hazardous, a power to conduct a sheep farm, and powers of leasing and of management.

It will be seen that the testator has not made any provision for fixing the value of the assets of his estate, though he has either fixed or authorized his trustee to fix the value of the property given by him to his children by way of advancement. The plan of the will makes the trust for conversion the basis of subsequent dispositions, and the language as well as the substance of the hotchpot provision proceeds upon the same basis. In other words, prima facie the fractional shares or proportions are to be ascertained on complete conversion. The power to postpone conversion prima facie would involve a postponement of distribution and appropriation, and the real question seems to be whether there are countervailing considerations sufficiently strong to imply a duty or power to ascertain the fractions at some earlier time notwithstanding that it can only be done by valuation.

It happens upon the circumstances of the present case that the question affects interests in capital and has little or no importance with respect to the distribution of income. The reason is that by a deed of family arrangement made on 27th June 1939 the beneficiaries entitled to income agreed that they should all be deemed to have received their correct shares of income up to 21st November 1937, the date of the death of F. A. Tennant, under whose advice or direction the estate had been administered.

But owing to a considerable enhancement in the value of the estate it is a matter of importance whether the fractional shares in corpus should be fixed on the one hand as at the death of the testator or at the end of a year therefrom, or on the other hand at the time of actual distribution. There is, of course, the possibility of adopting some intermediate date.

So far I have dealt with the question upon which these appeals depend without reference to authority. It is now necessary briefly to state what I believe to be the effect of the chief decisions upon

the subject. It is necessary to do so both for the purpose of explaining why I think that the foregoing views are justified by authority, and also for the purpose of showing what guidance the decisions give in relation to the question of interpretation on which the appeals turn.

In my opinion the decided cases show not only that where there is a hotchpot provision and it becomes necessary to ascertain the shares of income it is an old practice to compute interest upon advances, add it to the income of the trust fund, divide by the number of beneficiaries, and subtract the interest calculated on the advances from the shares of the advanced beneficiaries, but also that it seems to have been clearly perceived that the correctness of applying this method to a particular case must depend upon the question whether the trust instrument did or did not intend that the proportional shares in the trust fund should be ascertained before actual distribution. *Andrewes* v. *George* (1) is usually cited as the earliest decision. It applies the rule of administration by which interest is credited and debited. There was a trust to pay debts and to invest the residue in government securities and pay the dividends to the testator's widow for life and at her death to transfer the capital to the children. There was a direction to deduct from the shares of a child so much money as had been advanced and lent by the testator to the child so as to render the shares of each equal and of the amount they would have been if sums had not been advanced but had at the testator's death remained attendant on the directions of his will. *Shadwell* V.C. decided that the testator meant that the deduction should be made at the time when his property became divisible, and that that time was the death of the widow, and he accordingly directed that interest should be computed from her death. It will be noticed that his decision depended upon his construction of the will, and the question of construction was whether the time at which the advances were to be brought into hotchpot was at the date of distribution or earlier. *Hilton* v. *Hilton* (2) was another case in which income was distributed before the fractional shares were ascertained and the distribution was done by crediting interest on the advances to the income of the fund and deducting the interest from the share of each advanced beneficiary. The testator directed the postponement of the distribution of the estate until the youngest child attained twenty-one, and directed the trustees to carry on a business. *Malins* V.C. treated the death of the testator as the time at which corpus vested, but actual division of the assets as the time for applying the hotchpot provision. He

(1) (1830) 3 Sim. 393 [57 E.R. 1045]. (2) (1872) L.R. 14 Eq. 468.

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directed that interest upon advances made by the testator should be calculated as from his death for the purpose of determining the shares of income, but that the corpus of the advances should be brought into hotchpot when capital should be divided. It has been repeatedly said that until the decision of the Court of Appeal in *In re Hargreaves*; *Hargreaves* v. *Hargreaves* (1) no-one had put forward or applied the method of calculating the shares of income which rests on first having ascertained the fractional shares in capital and then applying the same fractions to income. But this is quite a mistake. Almost thirty years earlier it had been done by *Jessel* M.R., and there are other references to the method. In *Ackroyd* v. *Ackroyd* (2) *Jessel* M.R. stated, without expounding, the principle of adjustment of income in accordance with the fractional shares of corpus. The testator devised and bequeathed specifically to several of his children certain real and personal estate to which he affixed a value, but stated that he had advanced certain of his children in amounts which he named. His will then proceeded to bequeath the residuary property upon trust for conversion, and the whole proceeds upon trust for his eight children equally. The will contained a direction that the shares or fortunes of his children should be equal, and to that end the real and personal property specifically devised and bequeathed to some of them and the advances made to others of them should be taken by them respectively on account of their shares at the amounts or prices which he had named.

Before the distribution of the residue the executor absconded with about £10,000, but after the lapse of some years the greater part of this sum was recovered. The question for decision was how the amount recovered should be treated; what part of it should be attributed to interest and what to principal, and how the respective amounts should be distributed among the beneficiaries. *Jessel* M.R. treated the amount recovered as composed of interest payable by the executor and of principal, that is to say, of an amount of principal which together with the interest thereon would make up the amount recovered. He said that the sums directed by the testator to be brought into account should be brought into hotchpot as part of the principal sum. He went on to say: "The shares of principal which the legatees were entitled to receive being thus ascertained that part of the sum recovered which was attributable to interest would be divided among them in proportion to their shares in principal." This of course means that he applied the method which is erroneously said to have made its first appearance in *In re Hargreaves* (1). He applied it in order to ascertain how the

(1) (1903) 88 L.T. 100.

(2) (1874) L.R. 18 Eq. 313.

corpus should be distributed and also to ascertain the shares of income to be taken. It would be unnecessary to mention *Field* v. *Seward* (1), which comes next in order of date, were it not referred to by *Jessel* M.R. in *In re Rees*; *Rees* v. *Genge* (2), a case often cited for the exposition of the practice of the court by the Master of the Rolls. In *Rees' Case* (2) there was a trust for conversion, income to be paid to the wife for life, then specific legacies were to be paid to sons, and subject thereto a trust to divide the residue amongst the children living at the testator's death and attaining full age or being daughters marrying. There was a direction that advances should be brought into hotchpot and accounted for as part of the respective shares in residue and that an allowance should be made for the same accordingly.

The judgment of the Master of the Rolls makes the following points:—1. That the provisions of the will relating to hotchpot contained nothing special and the case depended upon principle. 2. That the will meant that all the children should at the widow's death take the same shares as if no advances had been made; that therefore for the purpose of division you must consider the estate as ascertained at the death of the widow, and if it is not immediately divided you calculate interest on the advances from her death at four per cent; by this means the children get the same shares as if there had been no advances. 3. That it is settled you cannot claim interest on the advances during the testator's lifetime.

He refers to *Field* v. *Seward* (1), where there was no life interest or other postponement, and for that reason *Bacon* V.C. charged interest from the death of the testator. He gives the Vice-Chancellor's reason, viz., that the other children are to be just in the same position as if the advanced son had received no advances. "That is to say, to produce equality in dividing the fund, you must, in the account, charge interest on the advance from the time when it would have produced interest as part of the common fund" (3).

It will be seen that the foundation of this reasoning is the view that you must first discover at what point of time the will intends that the calculation of the shares into which the estate is divided should take place. The process of bringing into hotchpot amounts to an ascertainment of the total fund and the division into shares of that total fund. If an immediate distribution is not then made interest should be charged in order to produce equality, not equality of benefit but equality of portion. The purpose of charging interest is to see that, as from the date when the testator intended the

(1) (1877) 5 Ch. D. 538. (2) (1881) 17 Ch. D. 701.
(3) (1881) 17 Ch. D., at p. 706.

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beneficiaries to share in income from a common fund, the shares in that income are properly calculated notwithstanding that the ascertainment of a precise interest in corpus does not then take place. It is consistent with this view that after the time arrives when the interest in corpus is to be ascertained, the distribution of subsequent interest should be in accordance with the proportion of corpus fixed.

In *In re Dallmeyer*; *Dallmeyer* v. *Dallmeyer* (1) the rule so frequently ascribed to *In re Hargreaves* (2) was again anticipated. It was *Rigby* L.J. who relied upon it, and, in a dissenting judgment, Lord *Herschell* referred to it. The circumstances were peculiar. The testator by his will gave his sons in succession the option of succeeding to his business. He then gave pecuniary legacies and an annuity to his widow, and provided for maintenance, &c. He directed the accumulation of the income of residue until his youngest child should attain twenty-one, and then a distribution of the corpus and the accumulations among the children then living. He authorized his trustees to make advances to his sons in order to establish them in the world. His will made the following provisions:— (*a*) That the son electing to succeed to his business should be debited with the value thereof to be estimated by the trustees in the division of his residuary estate and that if the value exceeded the total amount of the son's expectant share then the son should refund the excess to the residuary estate. (*b*) That advances made by the trustees to establish a child should be taken in part satisfaction of the share to which a son might be entitled. The testator had advanced sons, and the trustees exercised their power of advancing in the case of other sons. The Court of Appeal, consisting of Lord *Herschell* and *Smith* and *Rigby* L.JJ., held that, under the foregoing provision for debiting the value of the business to the son who took it, no interest should be charged before the period of distribution, because the will did not say that it should. Lord *Herschell* and *Smith* and *Rigby* L.JJ. held that in the provision relating to advancements by the trustees to establish a son in the world no interest before the date of distribution should be charged, because the will contained no warrant for treating sums advanced to a son as if they still formed part of the fund bearing income to be accumulated as a condition of admitting such son to a share in the accumulations. Lord *Herschell* made a reference to the distribution of income in accordance with fractional shares of corpus first ascertained. He said:—"Of course the same result in a matter of figures might be arrived at in other ways than by debiting compound interest on

(1) (1896) 1 Ch. 372. (2) (1903) 88 L.T. 100.

the advances. It was suggested during the argument that the accumulations ought to be regarded as accretions to the expectant shares of the several children, and that, as from time to time advances were received by one of them, his interest in the accumulations ought to be treated as *pro tanto* diminished; but this is not, in my opinion, the scheme of the will. The persons who are to share in the division of the trust premises and the accumulations thereof are to be ascertained only at the period of distribution" (1). It is important to notice that again the decisive factor is considered to be the time at which the share in the division of the trust premises is to take place, and where income is to be equalized before that date it is to be done by debiting interest.

Rigby L.J. dissented on the question of how advances made by the trustees should be treated. In his view there should be an attempt at equalizing distribution of income from the time of the advances. He said:—"It would seem therefore, and the equality which as to residue is the governing rule expressed" in a particular provision of the will "requires . . . that the share to which an advanced child or his issue may be entitled in expectancy is to be treated as diminished by the amount of the advance as from the date when the advance is taken or made. The strict rights of the children, on this view of the will, would be worked out by a declaration that, as between the children, the accumulations from time to time of residue are to belong to them in the same proportions in which they are for the time being entitled in expectancy to the corpus including past accumulations, with consequential directions" (2). This, of course, is the principle by which the income is to be distributed in accordance with the fractional shares of corpus, once the time for ascertaining them has arrived.

In *In re Lambert*; *Middleton* v. *Moore* (3) the passage from the judgment of *Rigby* L.J. to which I have referred was cited and reliance was placed upon it. It is interesting to notice that, just as the judgment of *Romer* L.J. in *In re Hargreaves* (4) delivered nine years later, explaining the method of distributing income by first establishing the proportions in which corpus is shared and then dividing income accordingly, has since been attacked as an innovation, so, when *Rigby* L.J. put it forward, probably drawing his inspiration from *Jessel* M.R. in *Ackroyd's Case* (5), he was described as having "suggested what is said to be a new mode of dealing with the case" (*In re Lambert* (6), per *Stirling* J.). Though *Stirling* J.

(1) (1896) 1 Ch., at pp. 386, 387.
(2) (1896) 1 Ch., at pp. 395, 396.
(3) (1897) 2 Ch. 169.
(4) (1903) 88 L.T. 100.
(5) (1874) L.R. 18 Eq. 313.
(6) (1897) 2 Ch., at p. 177.

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confesses that he was very much struck at first with the argument, he rejected it as not producing an equal or fair result. It is easy to see that the case was not one for ascertaining the fractional shares as at the date of the death of the testator, and so his Lordship held. There is, therefore, no need to pursue the question whether the observations made with reference to what *Rigby* L.J. said are sound.

This was the state of authority when *In re Hargreaves* (1) was decided. The provisions of the will are abstracted in the report of the case before *Joyce* J. (2), though unfortunately some mistake has occurred in stating the conditional limitations of the widow's annuity or life interest.

It is unnecessary to say more of the provisions than that they disclose ample evidence of an intention that the fractional shares should be ascertained as at the death of the testator, or, in the language of the hotchpot clause itself, that the amount of the original shares should be fixed. *Joyce* J. referred expressly to the two methods of preventing an advanced child receiving more income pending distribution than he ought having regard to the advances (3). But his Lordship directed his decision chiefly to the question how the rate of interest should be fixed, and what provision in the calculations should be made for an annuity payable to the testator's widow. He decided that the shares of income should be ascertained by debiting four per cent on advances "from the testator's death down to the time when the estate ought to have been or should be deemed to have been divided" (4).

In the Court of Appeal (1) it was held that the fractional shares or proportions must be decided as at the testator's death and actual income divided in accordance therewith, and that the process of crediting the estate with interest on advances was unnecessary and inapplicable.

Cozens Hardy L.J. said: "On the language of this will I cannot doubt that an actual ascertainment of the shares as from the moment of the testator's death was contemplated" (1). *Collins* M.R. and *Romer* L.J. state the same view of the meaning of the will, *Romer* L.J. more than once, and it is the foundation of the judgment. If this is understood and the correctness of the construction of the will is assumed, the reasons given by *Romer* L.J. for the application to the division of income of the proportions in which the beneficiaries stood entitled to corpus can hardly be impugned.

The real difficulty in the case concerned the manner in which the burden of an annuity should be borne, a question not presently

(1) (1903) 88 L.T. 100.
(2) (1902) 86 L.T. 43, at p. 44.
(3) (1903) 86 L.T., at p. 45, col. 2.
(4) (1903) 86 L.T., at p. 46, col. 2.

material. It has been referred to by *Warrington* J. in *In re Poyser*; *Landon* v. *Poyser*, as reported in the *Law Times Reports* (1), and is fully considered in the judgment of *Mann* C.J. in *In re Ritchie* (2).

I find it by no means easy to understand why, apart from the question of the annuity, *In re Hargreaves* (3) should have given rise to so much difference of opinion and, as I think, misapprehension. Given the interpretation of the will, the decision seems inevitable. The importance it has received arises no doubt from the fact that in the judgment of *Romer* L.J. there is to be found an explicit and clear exposition of the principle it applies, and from the further fact that it provides an example of a will where an ascertainment of fractional shares was required as at the testator's death, notwithstanding that actual distribution was postponed. Within three weeks of the decision of the Court of Appeal in *In re Hargreaves* (3) a will came before *Buckley* J. which may have been susceptible of an interpretation requiring the application of that case (*In re Whiteford*; *Inglis* v. *Whiteford* (4)). But the provisions of the will are not sufficiently set out to be sure, and *Buckley* J., who refers to the judgment of *Joyce* J., was evidently unaware of the decision of the Court of Appeal. The only questions with which he dealt were the date from which and the rate at which interest was to be calculated.

In *In re Gilbert*; *Gilbert* v. *Gilbert* (5) *Neville* J. applied the process of ascertaining the fractional shares and then dividing income in the same proportions, and based his decision on *In re Hargreaves* (3).

Shortly afterwards, *Warrington* J. decided *In re Poyser*; *Landon* v. *Poyser* (6), a case to which it has become common to refer as if it was opposed to the principle applied in *In re Hargreaves* (3), though why it is difficult to understand. It is true that some expressions are to be found in the will which might be laid hold of in support of an interpretation justifying or requiring the application of that principle. But *Warrington* J. gave the will the contrary interpretation, and to that interpretation the will was obviously open. The will meant that the division of the estate was postponed, and for that reason interest must be calculated on advances in the manner which (in the case of some advances) the testator had expressly directed. To place such a meaning upon the dispositions necessarily made the immediate ascertainment of the fractional shares impossible, and involved the application in the meantime of the rule of administration by which interest on advances is added to the income for the purpose of determining the shares in which income is to be

(1) (1908) 99 L.T. 50, at p. 53.
(2) (1936) V.L.R. 64.
(3) (1903) 88 L.T. 100.
(4) (1903) 1 Ch. 889.
(5) (1908) W.N. 63.
(6) (1908) 1 Ch. 828.

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distributed. *Warrington* J., as if to emphasize the question of construction upon which the use of one or other method must depend, repeatedly refers to the fact that the decision in *In re Hargreaves* (1) was founded on the need of dividing the estate or ascertaining the shares at the date of death.

The judgment of *Parker* J. in *In re Willoughby*; *Willoughby* v. *Decies* (2), to my mind brings out the point with equal clearness. Speaking of the will in that case and disregarding the codicil, he refers to the necessity of setting aside certain sums and then says: "As soon as that is done there is a distributable estate, and after making a proper valuation for the purpose of ascertaining what is to be brought into hotchpot, the shares of the children will be capable of being ascertained, and, if in the meantime the divisible fund at his death has been bearing interest, that interest will belong to the children in proportion to their shares in the fund from which it arose." Further on he speaks of "an income-bearing fund, which is divisible, and it is divisible so as to secure that equality of portion, and the interest on it is divisible in proportion to the shares of the children in the fund itself." His judgment was affirmed in the Court of Appeal, where *Cozens Hardy* M.R. stated the rules commonly applicable for working out the consequences of a hotchpot clause (3). He mentions the rules relating to the crediting of interest to income. *Buckley* L.J., in a dissenting judgment, speaks of *In re Hargreaves* (1) as involving no different principle (4).

In *Re Hart*; *Hart* v. *Arnold* (5) *Eve* J. again emphasized the difference between dispositions under which the proportional shares are fixed before distribution and those where, though the fund bears distributable income, the shares of corpus remain to be fixed. Thus he says: "I think the testator" (*scil.* in the case before him) "contemplated that the shares would be ascertained as at the moment of his death and so intended, and in such a case I think that the method which *Romer* L.J. points out as the right method to adopt ought to be adopted."

In *In re Craven*; *Watson* v. *Craven* (6) *Warrington* J. had before him a will directing conversion with a power of postponement and declaring trusts of the proceeds for children attaining twenty-one or, being daughters, marrying under that age to be divided between them equally. There was a hotchpot clause, and advancements had been made to some of the children. The chief assets were shares in a family company which the trustees had retained. Their

(1) (1903) 88 L.T. 100.
(2) (1911) 2 Ch. 581, at pp. 591, 594, 595.
(3) (1911) 2 Ch., at p. 597.
(4) (1911) 2 Ch., at p. 600.
(5) (1912) 107 L.T., at p. 760.
(6) (1914) 1 Ch. 358.

value fluctuated and was difficult to determine. It was contended that the trustees should have fixed the proportional or fractional shares of the children as at the death of the testator or within a year therefrom. That contention so put was quite untenable, because the youngest child had not then attained a vested interest. On the construction of the will *Warrington* J. decided that the trustees were right, pending the division of the actual estate, in ascertaining the distributable shares of income by adding interest on the advances, dividing by the number of beneficiaries, and deducting the interest from the respective shares in the total. This conclusion was based primarily on the terms of the will, but *Warrington* J. emphasized the difficulty or impossibility of determining justly the value of the estate. This consideration is repeatedly relied upon as a ground for employing the means of adjusting income instead of fixing the fractional shares of corpus and dividing income in accordance therewith. The nature of the property is, of course, a matter to be taken into account in interpreting the provisions of a will, but if the conclusion were once reached that the will meant that the fractional shares were to be fixed by means of valuation, the fact that valuation was difficult and uncertain and involved some possibility of unfairness would be no ground for refusing to give effect to the intention.

The next case to be decided upon the subject is *In re Forster-Brown*; *Barry* v. *Forster-Brown* (1), a case that arose from an attempt to apply the second part of the decision in *In re Hargreaves* (2), the part dealing with the allocation of the burden of the widow's annuity. It came before *Sargant* J. The testator had died leaving a widow, a son named Percy, three other sons and two daughters. He directed that his residue should be held upon trust to convert and out of the income of the resulting trust fund to pay an annuity to his widow and subject thereto to hold capital and income in trust for such of his children other than Percy as attained twenty-one or being daughters married under that age, and so that the share of each son should be double that of each daughter. He directed that a sum of money should be set aside on trusts in favour of his son Percy. He had made a marriage settlement upon one of his daughters and his testamentary dispositions included a power to his trustees to make a like settlement upon the other daughter in the event of her marriage, a power the trustees exercised. The trustees postponed conversion. His widow survived the testator by some years. After her death the question was raised concerning the manner in which her annuity should have been borne or provided for. It

(1) (1914) 2 Ch. 584.

(2) (1903) 88 L.T. 100.

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appeared that, though the income of residue was sufficient to answer the widow's annuity and the interest on the sum to be set aside for Percy, there was not enough to avoid a deficiency, if, as between the five children, the burden of the annuity was to be borne according to the rule laid down by the second part of *In re Hargreaves* (1). That rule would require that the income, before deducting the annuity, should be divided in the fractional shares obtained in relation to corpus by the application of the hotchpot provision, and then that the burden of the annuity should be distributed among the beneficiaries according to the shares in which without a hotchpot provision they would take, that is equally in the case of *In re Hargreaves* (1), and sons taking twice the share of daughters in the case of *In re Forster-Brown* (2). *Mann* C.J. has given reasons for denying the correctness of the latter part of this rule (*In re Ritchie* (3)). If it were applied in *In re Forster-Brown* (2) it would produce not a share of income to be credited to the two daughters, but a deficiency or debit against them. It was contended that this deficit, accumulated over the widow's lifetime, should be deducted from the increased income to which they became entitled in consequence of the extinguishment of her annuity by her death. *Sargant* J. decided against this contention. It may be doubted whether the Court of Appeal in *In re Hargreaves* (1) meant that if the application of the second part of their decision produced in the case of the share of income of any beneficiary a minus or deficiency it was to be carried over, or accumulated and deducted from, subsequent years. But it was not on this ground that *Sargant* J. rejected the contention. He did so on the ground that the will did not mean that during the life of the widow the proportions of the corpus should be fixed. "In the present case," his Lordship said, "it seems to me impossible to say that the testator contemplated any immediate distribution of his estate, or any ascertainment of the relative fractional shares of his children as at that date" (4). It followed that the shares of income were to be determined by crediting interest on the advances, and dividing the aggregate and then deducting the interest on the respective shares. His Lordship speaks of *In re Hargreaves* (1) as a case depending on a special will, and appears to throw doubt upon it. Possibly he referred to the second part of the decision, which no doubt is open to serious question. In the result he made an order applying the first part to the period after the death of the widow. He declared that the two daughters "have not to be charged with any such deficiencies as suggested in the summons

(1) (1903) 88 L.T. 100.
(2) (1914) 2 Ch. 584.
(3) (1936) V.L.R. 64.
(4) (1914) 2 Ch., at p. 592.

down to the death of the testator's widow, but are entitled, as from that date, to the full income of their eighth shares in the testator's residuary estate after bringing the sums settled on them respectively into hotchpot " (1).

This case has I think been much misapprehended; in fact it was, as the foregoing account of it shows, an application of the two rules respectively to successive periods according to the intention of the testator that in the second period the fractional shares should be ascertained, while in the first they could not.

In *In re Cooke*; *Randall* v. *Cooke* (2) *Younger* J. decided that shares of income ought to be found by crediting interest on advancements and not by fixing by valuation the fractional shares of income, on the ground that there appeared " to be no definite period fixed for the actual appropriation to the particular settled shares " (3).

The importance of the case lies, I think, in the rejection of a submission that a rate of interest should be adopted arrived at by finding what rate of interest the income actually earned by the estate represented on the value of the assets, and in the adherence to the rate of four per cent per annum. But *Younger* J., while giving the true ground for the inapplicability of *In re Hargreaves* (4), treated it as an exceptional case, where, moreover, a principle had been applied for which he understood no previous authority had been found (5), a view which, though repeatedly expressed, is, I think, mistaken. The same view was put more strongly by *Sargant* J. in *In re Tod*; *Bradshaw* v. *Turner* (6). He expressed also his inability to see how a direction to debit a money advance against a share or to deduct it or to bring it into hotchpot can be carried out except by distributing the estate upon the basis that an amount equal to the advance is first paid to the unadvanced beneficiary. But in *In re Mansel*; *Smith* v. *Mansel* (7) *Farwell* J. illustrated how it could be done, by holding that the fractional shares must first be ascertained and income distributed accordingly. He took his stand on *In re Hargreaves* (4), after referring to the more recent cases, and decided the case on the ground that taking the will as a whole he could not say that there was any clear indication that the testatrix did not contemplate the possibility of an immediate division of the estate. This suggests an onus, but probably it is simply a question of finding what the will means without the aid of any particular presumption. In *In re Wills*; *Dulverton* v. *Macleod* (8), *Simonds* J. began a full consideration of the cases with a statement of the

(1) (1914) 2 Ch., at p. 593.
(2) (1916) 1 Ch. 480.
(3) (1916) 1 Ch., at p. 487.
(4) (1903) 88 L.T. 100.
(5) (1916) 1 Ch., at p. 489.
(6) (1916) 1 Ch. 567.
(7) (1930) 1 Ch. 352.
(8) (1939) Ch. 705, at p. 717.

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importance of a settled rule, and ended it with the rhetorical question: "Where then are the uniformity and certainty which are the *desiderata* in a rule of administration?" My answer is that there are two quite well-settled rules, each applicable in its place but for different purposes. The purpose of one, that for crediting income with interest on the advances, is to provide a means of distributing the income of an income-bearing fund among the persons entitled to the corpus before the fractional shares in which they are entitled to corpus can, according to the true meaning of the will, be ascertained. The purpose of the other is to distribute income (and corpus) by ascertaining the proportions after the time when, according to the true intention of the will, they are to be ascertained.

It is not unusual for difficulty to exist in elucidating the intention which is to be found in the insufficiently worked out dispositions or provisions contained in a will. The uncertainty arises I think from that source, though no doubt the cases, which I have discussed, considered in combination are even less helpful than usual. *Simonds* J. spoke unfavourably of *In re Hargreaves* (1), but a month later *Farwell* J. applied the principle which the Court of Appeal used in that case and again treated it as presumptively applicable, so that it could be displaced only by an intention to the contrary (*In re Gunther's Will Trusts*; *Alexander* v. *Gunther* (2)). In the latest case, *In re Oram*; *Oram* v. *Oram* (3), *Bennett* J. applied the same principle to solve not the same but an analogous problem, and held that the ascertainment of fractional shares must be by valuation.

When the cases which I have discussed are considered as a whole, I think they justify the conclusions that I expressed before dealing with the authorities.

Accordingly the question upon which the appeals depend is, in my opinion, whether the will discloses an intention on the part of the testator that the proportional or fractional shares of his children in his residuary estate should be ascertained before conversion. Though the answer is by no means free of difficulty, I think that the will does not disclose such an intention.

The will is framed upon the basis that then, by appropriation or by payment, the beneficiaries will receive their shares in the trust funds to arise from conversion.

The hotchpot clause is expressed in this hypothesis, as the word "deduct" shows. Two of the sons are to be "paid" their shares.

The trust for postponement of conversion is not expressed in terms which suggest that pending conversion beneficiaries are to have

(1) (1903) 88 L.T. 100.
(2) (1939) 1 Ch. 985.
(3) (1940) Ch. 1001.

their shares ascertained and distributed or appropriated as if there had been a conversion. The underlying assumption is perhaps rather to be that conversion may be considered unnecessary, because there is no need for an immediate distribution or division. At all events the will is consistent with the view that until conversion there can be no distribution or appropriation and no ascertainment or fixation of the exact fractional shares.

The fact that the testator directs that the valuation of the advances should be made as at his death does not appear to me to show that an immediate ascertainment of proportions was in his contemplation. It means no more than that for purposes of hotchpot he wished to fix the value of property given. It is evident that he wished to limit the value to be assigned to "Heddon Bush." Nor does there seem to be any significance in the fact that in the provision dealing with that property he speaks of the share to which his son John should be entitled at his death under that his will. The whole provision for hotchpot seems to assume conversion and require a deduction from the shares in the proceeds. The truth is, I think, that there is no sufficient ground for regarding the will as permitting valuation in lieu of realization.

Accordingly there should be no application of the hotchpot clause for the ascertainment of the shares of corpus until conversion. It is unnecessary to discuss the possibility of specific property being taken over by a beneficiary at a value. When distribution takes place settled shares may be appropriated. But it is not till then that the fractional shares can be finally settled. In the meantime the income must be divided into shares ascertained by adding interest on the advances to the income of the residue, dividing the aggregate by the number of beneficiaries and, in the case of each of the advanced children, deducting the interest on the amount of his or her advance.

The contention that a higher rate than four per cent should be adopted cannot receive effect. The rate adopted by the court and not a rate built up by averaging the rate of income from the estate has always been used. In England the rate adopted by the court is four per cent, and that rate is applied here. Over a long period of time four per cent per annum was the rate of interest adopted in the Court of Chancery for the purpose of adjusting rights giving interest on legacies and generally where no breach of duty was involved.

But changes in monetary conditions led to what may be described as judicial movements, first to reduce and afterwards to raise the rate. Experience of the marked fluctuations in interest rates has

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rather confirmed the policy of the court in fixing for its purposes a rate which over a long period represents a fair or mean rate of return for money. It will be sufficient to mention a number of cases in which the matter is discussed or illustrated: *In re Beech*; *Saint* v. *Beech* (1); *In re Baker*; *Baker* v. *Public Trustee* (2); *In re Davy*; *Hollingsworth* v. *Davy* (3); *National Trustees Executors and Agency &c. Co.* v. *McCracken* (4); *In re Black*; *Black* v. *Melbourne Hospital* (5); *Nixon* v. *Furphy* (6); *Skinner* v. *James Syphonic Visible Measures Ltd.* (7); *Permanent Trustee Co. Ltd.* v. *Reeves* (8).

There is a particular question arising from the death of William Andrew Tennant without children. Upon that event the will directs that the share his children would have taken should fall into and form part of the residuary trust funds. This has been taken to mean that the share becomes distributable among the remaining five children of the testator and, notwithstanding the illogical nature of the directions, this no doubt is the result intended.

If the shares in corpus were held to be ascertainable as at the death of the testator a question would have arisen whether the division should be five or six, but as the hotchpot clause has not become directly applicable before William Andrew's death, it appears to me to be correct to use five as the division.

The form of the questions in the summons is open to some objection. The wrong numerator is stated in question (*f*) (1), and "valued" in question (*f*) (2) is not a very happy expression.

But in the view I have adopted it is enough to dismiss the appeals.

It has been agreed that the costs of the appeals should come out of the estate.

I think that the order should be: Appeals dismissed. Costs out of the estate, those of the trustees as between solicitor and client.

McTIERNAN J. The will and the circumstances in which its provisions operate are set out and described in the preceding judgments, which I have had the opportunity of reading, and in them full reference is also made to the decisions which provide guidance in the determination of the present questions. I do not think it necessary to go over that ground again. The main question is in what manner are the hotchpot provisions of the will to be applied to secure equality of portion between the testator's children, that being the manifest intention of those provisions. Whether they

(1) (1920) 1 Ch. 40.
(2) (1924) 2 Ch. 271.
(3) (1908) 1 Ch. 61.
(4) (1898) 4 A.L.R. 31, at p. 33.
(5) (1911) V.L.R. 280.
(6) (1926) 26 S.R. (N.S.W.) 409: 43 W.N. 108.
(7) (1927) 28 S.R. (N.S.W.) 20: 44 W.N. 156.
(8) (1933) 50 W.N. (N.S.W.) 111.

will produce it in fact is a question that depends upon the directions given by the testator as to the value at which the advances are to be brought into hotchpot. The hotchpot provisions follow the direction that the residuary funds are to be held by the trustees on trust for all the testator's children in equal shares and direct that the value of any land, shares or property transferred by the testator in his lifetime to any one of them is to be taken as part of the share to which such child is entitled under the will and that the trustees should accordingly deduct the value thereof from the share or portion to which such child is entitled under the will. This direction is expressed to apply to the sum of £20,000 settled on a daughter as a marriage portion. The testator directed how the amount of the deductions was to be arrived at for the purposes of the hotchpot provisions. In the case of land, shares or property transferred by the testator in his lifetime to any child the amount of the deduction is the value as at the testator's death, according to the trustee's estimate, but if any such property were sold in his lifetime, the net amount realized on the sale.

In the case of a property, "Heddon Bush," transferred to his son John, the testator directed that the sum of £30,000 be the amount of the deduction even if it were sold at a higher price in the testator's lifetime. Money, with the exception of pocket money or personal allowances, advanced by the testator to any child, is directed to be deducted from the share to which such child is entitled at the testator's death under the will.

It is clear that the fractional shares to which the children are entitled in the residuary funds cannot be ascertained until the deductions directed by the hotchpot provisions are made. The value of the estate as at the testator's death in July 1913 was estimated at £516,296, whereas in July 1939 it was estimated at £620,000. If in order to carry out the hotchpot provisions the trustees are bound to take an estimated value of the estate as at the testator's death, the fractional shares of the children would be likely to be different from what they would be if the shares were ascertained by making the deductions directed from the amount of money realized upon the conversion of the residuary estate. The question when the fractional shares are to be ascertained is important for that reason. It is also important because the rule of administration to be applied depends upon the answer to it. For the appellants, the children who received nothing to be brought into hotchpot, it is contended that the will fixes the amount of the shares of all the children at the testator's death, that there is substantial identity in

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this respect between this will and that in the case of *In re Hargreaves* (1), and that the rule applied in this case should be used in working out the hotchpot provisions. On behalf of the respondents who received gifts in the testator's lifetime which are to be brought into hotchpot, it is contended that the intention of the will is that the fractional shares of the children should be ascertained by making the deductions directed by the hotchpot clause upon conversion, and that the intention of the clause to achieve equality requires the application of the rule of administration applied in *In re Poyser* (2).

Besides, counsel for the appellants condemned the rule in *Poyser's Case* (2) and counsel for the respondents condemned that in *Hargreaves' Case* (1), it being suggested that the latter case was a departure from the long-established practice in the administration of hotchpot provisions. There is no ground for the application of the rule in *Hargreaves' Case* (1) unless the testator's intention as disclosed by the will was that the amount of the share of each of his children was to be fixed at his death. If that was not his intention, there is no need to inquire into the merits of the rule of administration applied in that case. But if, on the other hand, the contention of the respondents is correct that upon the true construction of the will the fractional share of each child is to be ascertained upon conversion, I think that the rule in *Poyser's Case* (2) is so strongly supported by authority and principle that it should be applied to adjust the rights of the children during the period beginning with the testator's death. However, it is to be remembered that by the deed of family arrangement of 27th July 1939, it was agreed between the beneficiaries that the moneys paid as and for income up to and including 21st November 1939 should be deemed to be income and to have been divided among them in correct proportions. The construction of the will which in my opinion is the correct one is that the shares given to the children in the residuary funds were shares in the proceeds of conversion and not shares of the estimated value of the estate as at the testator's death or at any time prior to conversion. It was from the shares in such proceeds that the testator directed the value of the advances made to his children in his lifetime to be deducted. I adopt the view of *Napier* J., expressed after a review of the terms of the will: "I think that it follows that a notional division immediately upon the death of the testator would not have given the beneficiaries the rights and interests given to them by the will, i.e., their shares in the proceeds of an actual realization subject to the deductions directed by the testator." In support of the opposite view, counsel for the appellants relied

(1) (1903) 88 L.T. 100.

(2) (1908) 1 Ch. 828.

strongly on the provisions of the will that land, shares and other property the subject of the gifts made in the testator's lifetime, were to be brought into hotchpot at the value, so far as the trustees could arrive at it, which they had at his death. I do not think these provisions will sustain that contention, as they contain only one of several methods by which the testator directed that the amount of the deductions was to be determined.

I have nothing to add on the other questions, and agree that the appeals should be dismissed, and that, as the parties have agreed, the costs of the appeals be paid out of the estate, the costs of the trustees as between solicitor and client.

Appeals dismissed. Costs of all parties to be paid out of the estate, those of the trustees as between solicitor and client.

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Solicitors for the respondents, *Finlayson, Mayo, Astley & Hayward*; *Norman, Waterhouse, Chapman & Johnston*; *Thomson, Buttrose, Ross & Lewis*; *L. T. Gun*; *Piper, Bakewell & Piper.*

C. C. B.