EQUITABLE ADEMPTION WITHIN THE FAMILY

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Introduction

A parent's generosity towards a child may often cause a family dispute. In particular, if one child has received a substantial gift of money or other material benefits during the parent's lifetime, other children will often look to the parent's will, and may invoke the law with regard to its provisions, in order to redress what they perceive as an injustice to themselves. A parent, it is said, has a duty to treat children equally. This is not, of course, in any sense a legal duty; but the law nevertheless recognizes that in some circumstances a child benefited by a parent should account for that benefit to his or her brothers and sisters.

The mechanism available for this purpose is the equitable doctrine of ademption,[1] otherwise known as the doctrine of satisfac-

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1. The word "ademption" in its legal usage applies to three quite different situations: first, where the subject-matter of a specific legacy is disposed of by a testator *inter vivos* or otherwise ceases to exist so that it forms no part of his estate at death; second, where a legacy is given for a particular purpose and is followed by a gift *inter vivos* by the testator to the legatee for substantially the same purpose; third, where a portion given *inter vivos* is regarded in equity as an ademption of a prior testamentary portion. This article is concerned only with the third of these situations.

   The word means, literally, a taking away (from, or of, what has been given by the will) It was a doctrine known to Roman law. "Giving the value of the thing to the legatee, *inter vivos*, was in general in substitution of the legacy": Buckland, *A Text Book of Roman Law* (3rd ed., 1975) at 346.

   The English usage of the word appears first to occur during the sixteenth century. See Swinburn, *Testaments* (1590), at 277: "Ademption is a taking away of legacies before bequeathed."

   The presumption against double portions is not part of the law of Scotland: *Johnstone v Haviland* [1896] A.C 95; *Kippen v Darley* (1858), 3 Macq. 203 (H.L.(Sc.)).

tion of legacies by portions.[2] The doctrine rests upon the presumption of equity that where two portions[3] have been given by a father to a child[4] — one by will followed by another given *inter vivos* — the latter is intended to be a substitution for the former. In the absence of evidence that the gifts were intended to be cumulative, the effect of the presumption is to extinguish[5] the testamentary gift either wholly or *pro tanto* depending upon whether it is less than or greater than the value of the *inter vivos* gift. The equitable doctrine is therefore often called "the presumption (or rule) against double portions", and will be generally so described in this article. The presumption is wholly a creature of equity and has nothing to do with any of the provisions of testator's family maintenance legislation.

Occasions calling for the application of the presumption in modern legal practice are not uncommon, but they are not always recognized. Because the impact of the presumption is usually only felt after a testator's death its potential significance is often not appreciated, either by the testator or by the child (or its brothers and sisters) at the time when the *inter vivos* gift is made. For this reason, evidence as to the testator's intention in making the gift — that is, to rebut or confirm the presumption — may not have been properly recorded at the relevant time, or may not be available after his death, perhaps many years later.

The presumption is of no legal effect during the testator's lifetime. But after his death its immediate effect is to cast upon the child

2. The equitable doctrine of ademption is sometimes treated as part of the law of satisfaction, as for example, by the learned editors of *Williams on Wills* (6th ed., 1987); *Hanbury and Maudsley's Modern Equity* (12th ed., 1985); *Snell's Principles of Equity* (28th ed., 1982); and *White & Tudor's Leading Cases in Equity* (8th ed., 1912). More commonly, the term "satisfaction" is confined to the satisfaction of portions by legacies, a topic with which this article is not concerned.

3. As to the definition of the word "portion", see below under the heading "What is a Portion?"

4. Or by a person standing *in loco parentis* to the legatee. The law under discussion in this article does not apply to dispositions made by mothers, unless the mother has elected to stand *in loco parentis*: *Holt v Frederick* (1726), 2 P. Wms. 357, 24 E.R. 663; *Bennet v. Bennet* (1879), 10 Ch.D. 474. Wherever reference is made in this article to a disposition by a father, that reference is intended to include a reference to a similar disposition made by any person standing *in loco parentis* to the donee.

5. Extinguish, *not* revoke: *Nagle v Corrigan* (1948), 48 S.R. (N.S.W.) 252 at 255, per Sugerman, J. The *Wills Act* expressly provides the modes only by which a will, or part of a will, may be revoked.

benefited *inter vivos* the burden of proving that the benefits given by will were intended to be additional to those already received. If sufficient evidence to rebut the presumption is lacking, so that this burden cannot be discharged, the child must bring the value of the *inter vivos* gift into account *vis-à-vis* brothers and sisters when the personal representative is making his final distribution among the testator's children pursuant to the terms of the will. The ultimate effect of the presumption is, therefore, to defeat the provisions of the will to that extent, notwithstanding (it may be assumed) that the testator gave the portion *inter vivos* in full knowledge of his existing testamentary arrangements. In contemporary society, in which family relationships are very often less well ordered than in the past, the presumption against double portions may appear as a curious legal anomaly without a sound theoretical basis. This is especially likely to be the case when it is known or believed, but cannot be proved, that the testator did in fact intend the benefits to be cumulative.

It is the purpose of this article to examine the history and modern operation of the presumption against double portions; to determine the present circumstances in which assets given by a parent *inter vivos* to a child must be brought into account by that child under the presumption in favour of brothers and sisters after the father's death; and to consider the theoretical bases upon which the presumption is supposed to rest. It will be argued that the rule as traditionally formulated and applied is not necessarily appropriate to modern family situations, and that far from giving effect to a testator's intention it may well operate so as to defeat it.

Rationale of the Presumption

The theoretical basis of the presumption has not always been explained by courts in the same way. Its most common formulation has been (and is) found in the maxim that "equity leans strongly against double portions"[6] — "feeling the great improbability of a parent intending a double portion for one child, to the prejudice generally, of other children".[7] This assumption has in its turn

6. *Lake v Quinton*, [1973] 1 N.S.W.L.R. 111 at 122, per Jacobs, P.

7. *Thynne v Earl of Glengall* (1848), 2 H.L.C. 131 at 153, 9 E.R. 1042, per Lord Cottenham, L.C.

been said to rest upon a *father's* presumed recognition of a moral duty to provide for the support of his children,[8] a duty that it is presumed he will have finally and permanently chosen to discharge by the provisions of his will. This is to base the presumption upon the father's intention. On the other hand, and in contrast to this, *equity itself* has recognized the existence of such a paternal duty and has sought to impose it by means of the presumption.[9] This is to base the presumption upon judicial policy. It is not (and never has been) necessarily presumed, however, that a father will have, or that he should, make equal provision for his children, although many dicta suggest that an additional or subsidiary purpose of the presumption is to minimize inequalities among them.

The classical formulation, both of the presumption itself and of the rationale for its existence in the law, is that of Lord Cottenham in *Pym v Lockyer*[10]:

> A father, who makes his will, dividing his property amongst his children, must be supposed to have decided, what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently ... it becomes necessary or expedient to advance a portion for [one of them], what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced.

On this analysis, the presumption against double portions assumes that the testator's family's circumstances, and its interpersonal relationships, are to remain unchanged from the date of his will to the date — perhaps many years afterwards — of his death. It presumes that the relative needs of his children will not change during this period, and that he will not have (or come to have) favourites among them. It presumes the absence of comprehensive testators' family maintenance legislation and the non-existence of welfare legislation. It is, in short, a presumption of continuity,

8. *In re Furness*, [1901] 2 Ch. 346 at 349, per Joyce, J.; *Pym v Lockyer* (1841), 5 My. & Cr. 30, 41 E.R. 283, per Lord Cottenham, L.C.; *Montagu v. Earl of Sandwich* (1886), 32 Ch.D. 525 at 541, per Bowen, L.J.

9. See, for example, *Bennet v. Bennet* (1879), 10 Ch.D. 474 at 476-78, per Jessel, M.R.; *Pym v Lockyer* (1841), 5 My. & Cr. 30 at 35, 41 E.R. 283, per Lord Cottenham, L.C.

10. (1841), 5 My. & Cr. 30 at 46.

stability, harmony and responsibility within the family. Expressed in these terms it is painfully obvious that such a presumption of the law could well be inappropriate to the circumstances often encountered in modern family life. For these reasons, the presumption has always attracted a strong degree of judicial criticism, as will be seen.

History of the Presumption

The presumption against double portions is largely a creature of the development and consolidation of equitable jurisdiction under Lord Hardwicke and his successors in the Lord Chancellorship in the second half of the eighteenth century, although its origins are clearly visible nearly one hundred years earlier. The eighteenth century jurisdiction of the Court of Chancery in relation to wills and the administration of estates of deceased persons was closely akin to what would now be called family law. In this regard the Court was often called upon to settle disputes between near relatives. In exercise of this jurisdiction it developed certain presumptions, of which the presumption against double portions is one, which in the second half of the eighteenth century were to develop into fixed rules of equity.[11]

The presumption against double portions appears originally to have been associated with the practice of the Court of Chancery of allowing parol evidence to show the intention with which an *inter vivos* gift to a child was made by a father when the administration of the father's will was in question. In 1670 in *Hale v. Acton*[12] parol evidence was allowed to show that an *inter vivos* gift was intended as an anticipation of a legacy and was held, as such, to be an ademption of it. This was not a case involving a *presumption* against double portions, but it was cited in *Izard v. Hurst*[13] in 1698 when it was already "agreed to be the constant rule of this court [that is, the Court of Chancery] that where a legacy was given to a child, who afterwards upon marriage or otherwise had the like or a greater sum it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise."[14]

11. See generally, Holdsworth, 6 *A History of English Law* 644-57.
12. (1669-70) [sic] 2 Chan.Rep.C. 35, 21 E.R. 609.
13. (1698), 2 Free. 224, 22 E.R. 1173.
14. Ibid.

This case may well be the earliest reported instance of the application of the presumption by the Court. It is of particular interest because it involved a marriage portion given to a daughter in a sum of money equal in total to legacies given to her by her father's will (made before the *inter vivos* gift) and codicil (made afterwards). But it is already apparent that the doctrine of the Court in this area was well developed: the re-publication of the will by the codicil was held not to amount to sufficient evidence of the testator's intention to the contrary because, "the words ratifying and confirming do not alter the case, though they amount to a new publication, *being only words of form*, and declare nothing of the testator's intent in this matter."[15]

The suggestion that the portion given *inter vivos* must be of at least the value of the legacy was disregarded in *Hoskins v Hoskins*[16] in 1706 in which, possibly for the first time, the Court applied the presumption to reduce a legacy *pro tanto* where the *inter vivos* portion was less.

Two further refinements of the presumption appear in Atkyns' Reports for the year 1742. In *Spinks v. Robins*[17] the *ejusdem generis* principle was applied by Lord Hardwicke to rebut the presumption in a case in which the portions given *inter vivos* were contingent but the legacies were not; and in *Shudall v. Jekyll*[18] the presumption was applied, again possibly for the first time, to a case where the testator was not the father of, but merely stood *in loco parentis* to, the donee. By 1756 Lord Hardwicke was able to regard it as settled that "this Court inclines *against double portions*".[19]

It would appear that at this period in the history of the presumption it was applied and developed by the Court in the family context for much the same reason as the corresponding equitable doctrine of the satisfaction of portion debts by legacies was developed: namely, as a kind of primitive testator's family maintenance policy of treating children, as far as possible, equally. The well-known

15. Ibid. (emphasis supplied).
16. (1706), Pr.Ch. 263, 24 E.R. 127.
17. (1742), 2 Atk. 491, 26 E.R. 696.
18. (1742), 2 Atk. 516, 26 E.R. 710.
19 *Watson v Earl of Lincoln* (1756), Amb. 325 at 326, 27 E.R. 218 (emphasis that of the Court). Lord Hardwicke cites as authority for this proposition, *inter alia*, Montesquieu, *Spirit of Laws*, in relation to the Athenian Laws.

maxims that "equality is equity" and that "equity will not suffer a double satisfaction to be taken" were first formulated and popularized at this time.[20]

It is apparently not until the year 1789 that critical references to the presumption appear in the reports. Two cases in Brown's Chancery Cases for that year show Lord Thurlow, L.C., both accepting the doctrine as established law in his Court, but also disapproving of it. In the leading case of *Powel v. Cleaver*[21] the Lord Chancellor commented that, "whatever foundation there might be for the original application of the rule, that the advancement of a parent shall not be a further gift, it is not now to be disputed: *but it is obvious that the intent of the testator is as often disappointed as saved by it.*"[22] Similar strictures appear in *Debeze v. Mann*[23] to the effect that, "nobody can reason upon this subject without thinking how often such a rule must disappoint the intention of the donor."[24]

The principal criticism to which the presumption has always been open also received specific attention both by Lord Thurlow in *Debeze v Mann* and, in 1811, by Lord Eldon in the leading case of *Ex parte Pye*.[25] That criticism is that because the presumption against double portions is said to depend upon the testator's presumed intention, it entails a corresponding presumption that the testator has forgotten what is in his will. This is *a fortiori* the case when there is a codicil re-publishing the will. Lord Thurlow pinpointed this fundamental difficulty in the former case when he observed, with a touch of the caustic wit for which he was famous, that: "[t]he supposition must be that he forgets what he has given by his will; and in establishing such a presumption the court does not recollect

20. These two maxims of equity are, respectively, Maxim III and Maxim XI of Richard Francis' celebrated *Maxims of Equity*, first published in 1728. As Holdsworth (op. cit.) observes (Vol. XII, 188), "as Dean Pound has pointed out 'his maxims for the most part are independent attempts to state principles derived from study of the cases.' In some cases something like the maxim can be found in the cases cited to illustrate it; but in many cases it is the author's own deduction."
21. (1789), 2 Bro.C.C. 500, 29 E.R. 274.
22. Ibid. at 517-18 (emphasis supplied).
23. (1787), 1 Cox 346, 29 E.R. 1197.
24. Ibid. at 351
25. (1811), 18 Ves.Jr. 140, 34 E.R. 271.

how much a change of affection, a change of circumstances, or a prospect of a better marriage may alter his first intention."[26]

Lord Eldon, on the other hand, who was well aware that "Lord Thurlow ... would have disapproved the establishment of it [the presumption] and Lord Kenyon ... thought it a very wholesome rule"[27] made it plain, on this point, in *Ex parte Pye* that, "I am not much impressed by the objection that he had not altered his will. The answer is that the subsequent advance operates [as] a revocation; and therefore actual revocation was unnecessary."[28]

Ex parte Pye itself was the case in which the equitable doctrine of ademption received its definitive formulation, and has always been cited as one of the leading cases on the subject. Lord Eldon was required to decide, *inter alia*, whether the presumption applied to a disposition *inter vivos* by the putative father of the donee who had not held himself out as being *in loco parentis* to her. He held that it did not, notwithstanding that in so deciding, "I believe I am disappointing the actual intention".[29] The presumption had by now undoubtedly become a fixed rule of equity. It was explained by Lord Eldon as follows:

> I may state as the unquestionable doctrine of the Court, that, where a parent gives a legacy to a child, not stating the purpose, with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule ... and a sort of feeling upon which is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part....
>
> [W]here a father gives a legacy to a child, [it] must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, *yet the father will be intended to have the same purpose in each instance*; and the advance is therefore an ademption of the legacy.[30]

26. (1787), 1 Cox 346 at 351. Judicial criticism of the presumption has occurred constantly since Lord Thurlow's day. For a modern comment, see *Elder's Trustee etc. Co. Ltd v. Eastoe* [1963] W.A.R. 36, in which Hale, J., said, at 38: "this presumption ... in some cases will give effect to ... the intention of the testator. It appears to me that in as many or more cases it could easily have the opposite effect."

27. *Trimmer v. Bayne* (1802), 7 Ves. 508 at 515, 32 E.R. 205.

28. (1811), 18 Ves. Jr. 140 at 155, 34 E.R. 271. The case was decided, of course, well before the enactment of the *Wills Act, 1837* (U.K.) which provided for statutory modes of revocation. Lord Eldon's use of the word "revocation" is loose, and his statement is not technically correct today in the light of the *Wills Act* provisions.

29. Ibid.

30. Ibid. at 151.

Inherent in this authoritative formulation is the long legacy of eighteenth century cases. It contains all the essential elements of the modern rule, the seeds of much additional litigation, and an affirmation of the self-contradictory rationale of the rule itself. Substantively, however, it was now established that:

(1) The will must ante-date the gift *inter vivos*;
(2) the gifts must both be portions;
(3) a gift to a child by will is presumed to be a portion;
(4) a substantial gift upon the occasion of marriage is also a portion;
(5) the testamentary gift must be of personal property, not realty;
(6) the gifts must be from father to child;
(7) they must be *ejusdem generis*;
(8) the ademption may be *pro tanto*; and
(9) the rule applies upon the basis of what "will be intended" to the father, as a matter of judicial policy, as "a sort of artificial rule ... and a sort of (judicial) feeling".

The self-contradictory nature of the presumption is a point that need not be laboured. The testator's intention is one that will be imputed to him by the court notwithstanding that having made his *inter vivos* gift he has chosen not to change his will in the light of that gift. As Lord Thurlow would have said, the testator must be presumed to have forgotten what is in his will.

Exactly why the Court of Chancery should have developed so extraordinary a doctrine is explicable partly upon the basis of the particular needs of English society in the eighteenth and nineteenth centuries. The notion of a "portion", upon which the presumption has always depended, went hand in hand with the system of primogeniture guaranteed by the system of entailed lands. By means of the entail, freehold land, until recently the ultimate basis of wealth, descended almost automatically from heir to heir — that is, from eldest male to eldest male — without itself being the subject of testamentary disposition. Primogeniture was, until 1925, "the cornerstone of the English social system,"[31] in contradistinction, for example, to the French Civil Code's system of equal divi-

31. Jowitt, *Dictionary of English Law*, 1403.

sion of all assets, including land, in cases of inheritance, without regard to primogeniture.[32] For this reason it was an essential characteristic of a portion that it consist of personal property, not realty[33]: a portion was naturally considered to be a share of a deceased man's remaining property which he was under a social and moral duty to parcel out equally among his younger children for their maintenance and support in life.

Against this background it is not surprising that the presumption against double portions should have been the subject of continuing litigation throughout the nineteenth century. In 1841 Lord Cottenham confirmed in *Pym v Lockyer*[34] that it extended to cases where the testator had chosen to stand *in loco parentis* to the legatee. He did so on the ground that:

> In the case of a parent, a legacy to a child is presumed to be intended to be a portion; because providing for the child is a duty which the relative situation of the parties imposes upon the parent: but that duty ... may be assumed by another, who, for any reason, thinks proper to place himself, in that respect in the place of a parent; and, when that is so, the same presumption arises against his intending a first gift to take effect as well as a second; because both ... are considered to be portions.[35]

The "duty" of support is presumed *by the law* to entail equality of treatment as between those to whom the duty is owed and (even) towards whom it is voluntarily assumed.

By 1879 Jessel, M.R., accepted it as axiomatic in *Bennet v. Bennet*[36] that a father is under a duty "to make provision"[37] for a child and that the duty is a moral obligation known to courts of equity.[38] It arises from the mere fact of paternity, so that "no evidence is necessary to show the obligation to provide for his child ... you have only to prove the fact that he is the father ...; but in

32. Civil Code, Art. 745.

33. *Davys v. Boucher* (1839), 3 Y. & C.Ex. 397, 160 E.R. 757.

34. (1841), 5 Myl. & Cr. 30, 41 E.R. 283.

35. Ibid. at 35. In *Re Pollock* (1885), 28 Ch.D. 552 Lord Selborne, L.C., extended the presumption to the case where a testator or testatrix, not having parental or quasi-parental duties towards a legatee, has nevertheless recognized the existence of a moral obligation as the basis of the legacy, and has subsequently made a lump sum payment to the legatee *inter vivos*.

36. (1879), 10 Ch.D. 474.

37. Ibid. at 476 and 477.

38. Ibid. 476-78

the case of a person *in loco parentis* you must prove the fact that he took upon himself the obligation."[39]

By this time the testator's family maintenance policy embodied in the presumption stands revealed as fully developed. It was, moreover, a policy directed especially at fathers. In the same case it was held that the obligation does not extend to a mother, even though she be widowed. The fact that until the late nineteenth century married women suffered considerable disabilities in relation to property ownership could only reinforce the view that it was naturally the father of a family to whom the children, and the law, looked for support in the station in life into which they had been born. In the absence of social welfare legislation it was also natural that the courts — and particularly courts administering equity — should develop doctrines giving effect to these considerations, and that the presumption against double portions should be one of them. The presumption could, and can, be attracted by portion gifts made by mothers, but only by proof that the mother stood *in loco parentis* to the child — a singular irony which seems ever to have eluded judges dealing with this subject.[40]

The central weakness of the presumption could not, however, forever remain undiscovered: namely, that a father might very well intend to give substantial preferential treatment to one or more of his children for any of the reasons identified by Lord Thurlow in *Debeze v. Mann,* or, indeed, for many others. Towards the end of the century the presumption again began to attract judicial criticism. Thus Bowen, L.J., in *Montagu v. Earl of Sandwich*[41] conceded that "it is an extremely difficult doctrine to apply" but (with exemplary modesty) that because "one finds [it] embedded in the law ... the last thing which I propose to do is to attempt to fritter away a rule which I find established by the authority of those who

39. Ibid. at 478.

40. *Bennet v. Bennet* (1879), 10 Ch.D. 474; *Holt v Frederick* (1726), 2 P. Wms. 357, 24 E.R. 763. But only ironical when considered apart from authority: in *Bennet v. Bennet*, Jessel, M.R., said (at 478): ". . . in our law there is no moral legal obligation ... on a mother to provide for her child: there is no such obligation as a Court of Equity recognises as such. .. and therefore, when a mother makes an advancement to her child, that it not of itself sufficient to afford the presumption in law that it is a gift, because equity does not presume an obligation which does not exist."

41. (1886), 32 Ch.D. 525 at 541.

are wiser than myself".[42] By 1891 it was being argued in the Court of Appeal in *Re Lacon*,[43] on appeal from a decision of Romer, J., by counsel for the appellant, that "the doctrine has ... been treated with disfavour, and there is no tendency to extend it"[44]; to which Lindley, L.J., responded immediately that, "[w]e should not perhaps invent it in these days, but we have inherited it".[45]

Re Lacon involved a testamentary gift of partnership shares in a banking business to be equally divided among the testator's sons. When the will was made, one of the sons, Ernest, had been employed in the business as its London manager for which he was paid a salary. Later Ernest was admitted as a partner in the firm and two of his father's partnership shares were transferred to him upon which he gave up his salary. After the testator's death another of the sons claimed that the testamentary gift to Ernest was adeemed *pro tanto*. Romer, J., applied the presumption and found for the plaintiff, but did not forbear from observing that, "[l]ike other Judges in some similar cases I ... may doubt whether the effect of the application of the rule of presumption against double portions is to carry out the intention of the testator, but I am not at liberty to act upon any such doubt".[46] The decision was reversed by the Court of Appeal. The circumstances surrounding Ernest's receipt of the two partnership shares showed that he was intended to have a greater share in the business than his brothers, even upon the assumption that the dispositions were portions. The case is often cited, not least because the decision at first instance represents a high-water mark in the application of the "rule of presumption" (sic) in disregarding circumstantial evidence tending to rebut it. The reversal of that decision by the Court of Appeal marks the beginning of a more flexible approach to the resolution of problems which the presumption raises.

42. Ibid. at 542.
43. [1891] 2 Ch.D. 482.
44. Ibid. at 490.
45. Ibid. at 489.
46. Ibid.

What is a Portion?

The original meaning of this word was simply its ordinary meaning — a share, part, parcel or allocation: the proportion of a testator's personal estate passing to his children, or impliedly promised to them, or to which they had a moral claim by ties of blood and natural affection, or by the expectation of society. Because it excluded realty it was natural also that in certain circumstances money or other assets might be "advanced" to, or settled upon, a child, or on its behalf, by a father: this was, and is, especially likely to be the case when a child is seeking to establish itself in life, and in eighteenth and nineteenth century English society was also especially the case upon the occasion of a marriage settlement.

We have seen that during the eighteenth century the concept of a portion came to give expression to a father's "moral obligation known to Courts of Equity" to make "provision" for a child. By 1811 Lord Eldon spoke of it as "a debt of nature".[47] In *Pym v. Lockyer*[48] Lord Cottenham was at pains to distinguish a provision made by a father in discharge of this debt or obligation from "mere bounty".[49] Historically, this is the distinction that lies at the heart of the definition of a portion. A portion, as the concept came to be understood by courts of equity, was a payment made inter vivos in *anticipation* of the child's right "known to Courts of Equity" to be provided for by its father. The concept, then, involved not merely the making of a provision for the child, but in relation to the presumption against double portions also included the giving *inter vivos* of what (or part of what) by the terms of the father's will, the child was going to receive *later*. This is why it came to be spoken of as an ademption of the testamentary provision, albeit an ademption in equity if not at law. By contrast, "mere bounty" entailed something given *in addition*, and therefore in no sense an ademption of what was given by will. These questions, one would have thought, were matters of intention. But because the presumption against double portions was, and is, said to apply only in the absence

47. (1811), 18 Ves.Jr. 140 at 151, 34 E.R. 271.
48. (1841), 5 My. & Cr. 30, 41 E.R. 283.
49. Ibid. at 35.

of evidence to the contrary, the courts administering the doctrine had to develop indicia of portions.[50]

It may be said immediately that a testamentary disposition to a child is ordinarily presumed to be a portion by its very nature. The reason appears to be not so much that it is necessarily made for the purpose of making a "provision" for the child, as because testamentary gifts certainly amount to a "final" distribution of assets that it has taken the testator a lifetime to acquire. They are, as it were, final distributions of capital, and therefore do represent in an ultimate sense the "portion", or share of the testator's property falling to the child.

As to portion gifts made *inter vivos*, it has been said that a portion is easier to recognize than define — a truism reflected in the fact that judicial definitions have tended to proceed by example. The classic judicial definition is that of Jessel, M.R., who in the leading case of *Taylor v. Taylor*[51] defined it as:

> ...something given by the parent to establish the child in life, or to make what is called a provision for him — not a mere casual payment.... You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways.... Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to show the purpose.[52]

In this oft-quoted dictum the Master of the Rolls was summing up a long line of cases in which the concept had been under consideration. He held that portion gifts included (1) payment of the admission fee to one of the Inns of Court in the case of a child going to the Bar; (2) the price of a commission and of equipping a child entering the army; and (3) the cost of capital plant and machinery incurred for the purpose of starting a child in business. On the other hand, they did not include (4) the cost of outfitting

50. It is apparent that the word "portion" begs the legal question that it is employed to answer. To say that a gift *inter vivos* is a portion is really to say that it is, indeed, a "portion" (or share) of the father's estate — yet this is the question at issue. That question can only be answered by reference to the indicia in cases where evidence is lacking. The indicia therefore cannot be ignored. And to the extent that they appear to be fixed and inflexible then to that extent it must be a concept of little value, and also potentially mischievous, in the legal system.

51. (1875), L.R. 20 Eq. 155.

52. Ibid. at 157.

an army officer and his wife proceeding to India, nor their passage money; (5) the payment of debts incurred by an army officer; nor (6) housekeeping and other living expenses paid on behalf of a clergyman — the latter three examples being not "provisions", but mere temporary assistance to the persons concerned. In the result it was held that a father who paid a substantial sum of money to discharge debts of honour that his son had incurred in India had not advanced him *inter vivos* by way of portion.[53]

The concept of a portion as enunciated by Jessel, M.R., also includes the notion of substantiality: a large sum in one payment is presumed to be a portion, whereas in the case of a small sum evidence is required. The concept of size or amount is both absolute and also relative. Does the definition of a portion take into account the means of the testator? In *Re Hayward*[54] Upjohn, J., in what he regarded as "a borderline case", held that the sum of £500, "not by itself a large sum", was nevertheless quite large compared to the total assets of the father, but not so large as to attract the presumption against double portions. On this decision Mr R.E. Megarry (as he then was) commented: "Perhaps there are three categories, namely sums which are large for all purposes, sums which are small for all purposes, and, between, sums which may be large or small depending upon the donor's wealth and station in life. There is much to be said for this latter view, although any view has its difficulties."[55]

The decision of Upjohn, J., was affirmed by the Court of Appeal which also regarded it as a borderline case. The judgment of Jenkins, L.J. (with whom Sellers, L.J., and Vaisey, J., concurred) agreed that the question of size or amount was to be decided "relatively as well as absolutely,"[56] but appeared to regard the absolute size as the more important factor because otherwise a person with $100 in the world, "could properly be held to be making

53. As to a father paying a child's debts, it was held in *Re Scott*, [1903] 1 Ch. 1, that this was temporary assistance and not a portion, the Court of Appeal preferring the view of Jessel, M.R., in *Taylor v. Taylor* to that of Wood, V.-C., in *Boyd v Boyd* (1867), L.R. 4 Eq. 305, and of Pearson, J., in *In re Blockley* (1885), 29 Ch.D. 250.

54. (1957) Ch. 528.

55. (1957), 73 L.Q.Rev. 22-23.

56. [1957] 3 W.L.R. 50 at 60.

a permanent provision for one of [his two] sons by giving him [$50] ... no less than half his estate".[57]

The size of the *inter vivos* gift is also relevant to the point that the court will not add up a series of small gifts to a child in order to hold that in total they amount to a sum large enough to be a portion.[58] Any suggestion to the contrary would involve members of a family in an ongoing exercise of accounting that would clearly be detrimental to the family itself. As Jessel, M.R., said, "... nothing could be more productive of misery in families than ... to hold that every member of the family must account strictly for every sum received from a parent."[59]

Is the age of the recipient of the *inter vivos* gift relevant to the definition of a portion? Clearly, the older cases suggest that it is. A middle-aged person is hardly likely to look to a parent to "establish himself in life", and in *Re Hayward* both Upjohn, J., and the Court of Appeal took notice of the fact that the donee was middle aged, Sellers, L.J., going so far as to say that had the donee been twenty years younger then the result might have been different.[60]

From the foregoing it may be concluded that the indicia of a portion given *inter vivos* are as follows:

(1) It must be a gift from father to child (or from one standing *in loco parentis* to the donee);
(2) it must be made for the purpose of establishing or setting the child up in life, either in business or in some other substantial way;
(3) the age of the child at the date of the gift may well be relevant to indicium (2) in a borderline case;
(4) it must be given in one lump sum;
(5) it must be of a reasonably substantial size or amount; and
(6) the means of the donor are relevant to indicium (5) in a borderline case.[61]

57. Ibid.

58. *Suisse v. Lowther* (1843), 2 Hare 424 at 434, 67 E.R. 175, per Wigram, V.-C.; *Schofield v. Heap* (1858), 27 Beav. 93, 54 E.R. 36; *Watson v Watson* (1864), 33 Beav. 574, 55 E.R. 226.

59. *Taylor v Taylor* (1875), L.R. 20 Eq. 155 at 158.

60. [1957] 3 W.L.R. 50 at 60 and 61.

61. As in *Re Hayward*, supra.

There is no requirement of the law that it must be understood between donor and donee, either expressly or by implication, that the gift *inter vivos* is an advancement in the non-technical sense of what would otherwise have been given to the child by the donor's will. This is undoubtedly because we are here dealing with a *presumption* of the law which is applicable only in the absence of evidence to the contrary.[62]

The foregoing considerations do not, however, necessarily dispose of modern problems in this area. For example, the concept of a young person "establishing himself in life" is undoubtedly broader and more flexible now than it was when British soldiers and their wives were going "out" to India, or when clergymen with large families were being maintained by wealthy parents. In particular, educational opportunities are today more pervasive, and are likely to be much more prolonged, and commercial and employment activity covers a far wider field, than when Jessel, M.R., defined the portion in 1875. In the highly developed economies of the modern world it may well be that a parent could make "provision" for a child in ways not contemplated when the law in this area became established. The very concepts of "provision" and of a person establishing himself in a life are evolutionary because they fundamentally refer to individuals in society. Today, for example, they might well be taken to include the outlay of substantial sums of money in defraying educational expenses, or to finance foreign travel in order for a child to gain business or other experience of lasting value, or to support a child beyond the call of moral duty (for example, an unmarried adult mother). But it is also clear that none of these examples falls within the accepted definition of a portion — either because they involve ongoing payments or because they might be said to amount merely to temporary assistance.

The *Ejusdem Generis* Principle

The presumption against double portions has traditionally been said only to apply where the portion given by will and that given *inter vivos* are similar in two respects: first, as to the nature of the

62. Where there is such an understanding as is here referred to the case is known as one of "express ademption": for an example, see *Re Ashton*, [1898] 1 Ch. 142. This article is not concerned with the subject of express ademption.

property given; second, as to the legal or equitable nature of the interests in that property. The *ejusdem generis* principle has been an essential part of the equitable doctrine since *Holmes v. Holmes*[63] in 1786. Because the very concept of ademption entails a taking away, or diminution, of something already given (by the will), it follows that if what has been given *inter vivos* is not *ejusdem generis* with the testamentary gift then the testator cannot be presumed to have intended the former to be an ademption of the latter. As Jenkins, L.J., observed in *Re Edwards*, "[t]he essence of ademption surely is that there should have been a gift by will of property belonging to the testator or testatrix at the date of the will, followed by some dealing *inter vivos* with the property inconsistent with the testamentary gift".[64] The rationale of the *ejusdem generis* principle is said to be that it assists a court in judging the presumed intention of a testator.

Where there is identity or close similarity between the essential legal characteristics of the two portion gifts, then the presumption must (in the absence of evidence to the contrary) be stronger than where they are very different. Nevertheless, as will be seen, significant differences both as to the nature of the property and as to the interests given need not preclude the operation of the presumption against double portions. This suggests that the *ejusdem generis* principle is nowadays, and in this country, both weak and of flexible application. These considerations in their turn suggest that this aspect of the presumption against double portions is a vehicle for policy decisions.

In England, it has always been accepted that the presumption against double portions does not ordinarily apply to land because land could not be the subject of a portion gift.[65] In this country the position is otherwise, as Long Innes, J., pointed out in *Public Trustee v. Regan*:

> ... the statement that a devise of land could not ordinarily be termed a portion, however correct it may be as applying to England, with its system of entail, can scarcel be regarded as accurate in this country where a considerable proportion of the population is engaged in pastoral pursuits, and where lands, originally acquired in very large areas, are subsequently sub-

63. (1783), 1 Bro. C.C. 555, 28 E.R. 1295, in which an *inter vivos* gift of stock-in-trade was held not to adeem a legacy.

64. [1958] 1 Ch. 168 at 178.

65. *Davys v. Boucher* (1839), 3 Y. & C.Ex. 397, 160 E.R. 757; *Jarman on Wills* (7th ed.) 1128.

divided and re-subdivided by the holders thereof among their children, and very frequently by way of portion ...[66]

The principle that the gifts must be *ejusdem generis* as to the nature of the property given was first clearly laid down by Lord Commissioner Hotham in *Holmes v. Holmes*[67] when he held that a legacy was not adeemed by an *inter vivos* gift of stock-in-trade. The principle was developed by Sir William Grant in *Bengough v. Walker*[68] in 1808 who held that an *inter vivos* gift of a share of a mill, to be specifically valued at a certain figure, operated to adeem a legacy of a smaller amount: the property was not *ejusdem generis*, but the reference to a specific valuation indicated an intention to adeem the legacy because it represented an *inter vivos* portion in specified money's worth. This approach, of treating different kinds of property as *ejusdem generis* when directions as to valuation have been given by a testator, was accepted in *Re Jaques*[69] and applied in *Re George*.[70] Alternatively, it might be said that the ejusdem generis principle has no application where the *inter vivos gift* is expressly the subject of a money valuation at the time when it is made.

We have seen that the legal or equitable interests given must also be *ejusdem generis*. In *Lake v. Quinton*[71] a testator gave the income from part of his residuary estate upon trust for all his children until they attained the ages of 25 (if males) or 30 (if females) and, as and when they respectively attained those ages, the corpus on trust for them in equal shares. Later the testator was divorced from his second wife and two property settlements were created, one in 1967 and the other in 1968. The first settlement created a trust of a dwelling house property for his second wife for life, with remainders to such of the children of his second marriage as should survive their mother equally; the second created a trust of company shares for the testator for life, remainder to such of the children of his second marriage as should attain the age of 21 equally. It was held by the New South Wales Court of Appeal that all the testator's children enjoyed vested interests in the shares of residue, but liable to defeasance by their failure to attain the specified ages

66. (1933), 33 S.R. (N.S.W.) 361 at 368.
67. (1783), 1 Bro. C.C. 555, 28 E.R. 1295.
68. (1808), 15 Ves.Jr. 507, 33 E.R. 847.
69. [1903] 1 Ch. 267.
70. [1949] 1 Ch. 154; see also *Re Tussaud's Estate* (1878), 9 Ch.D. 363.
71. [1973] 1 N S.W. L.R. 111.

under the will; that the settlement of the company shares adeemed *pro tanto* the testamentary shares of residue given to the children of the second marriage; but that the shares of residue were not adeemed by the settlement of the dwelling house property.

In support of these conclusions the Court held that both the interests given to the children by the settlement of 1968 and by the will were portions; that the contingent gift of the company shares vesting at age 21 was *ejusdem generis* with the vested shares (albeit liable to divestiture) of residue ceasing to be liable to divestiture at higher ages; that the settlement of the company shares could fairly be regarded as an anticipation of the gifts of the corpus of residue; and that the children of the second marriage had not rebutted the presumption against double portions.

On the other hand, the interests in the dwelling house property were held not to be *ejusdem generis* with the interests in the residue given by the will: rather, they were "very different in kind"[72] having "so different beneficial features"[73] that the presumption against double portions did not apply. It was accepted by the Court that, "not only can real estate be a portion, but it can be *ejusdem generis* with personalty for the purposes of the rule"[74] against double portions.

Lake v. Quinton remains the leading Australian case on the subject. In the light of this decision, it may be asked whether, if vested interests in property defeasible until a higher age can be *ejusdem generis* with contingent interests vesting at a lower age, and if realty can be *ejusdem generis* with personalty, is there any point in the *ejusdem generis* principle at all? If realty is *ejusdem generis* with personalty for this purpose, what kind of property would not be *ejusdem generis*?

It is submitted that in modern Australian legal practice the real issue to be decided in cases involving the presumption against double portions, where other evidence of intention is absent, is not whether ademption arises by way of presumed intention because the portions are *ejusdem generis*, but whether ademption must, in view of the nature of the property and of the interests given therein, be taken to have been intended. Such an approach would frankly

72. Ibid. at 121, per Jacobs, P.
73. Ibid. at 143, per Hutley, J.A.
74. Ibid. at 142, per Hutley, J.A.

focus upon the real point at issue, would reduce the occasions for policy decisions reached under the guise of excessive legalism, and would make irrelevant a mass of old case law decided in an outmoded social and commercial context.

Rebutting the Presumption

The presumption against double portions may be rebutted by evidence showing that the gifts were intended to be cumulative. For this purpose "all relevant circumstances must be considered in reaching a decision".[75] Clearly, this will include the express and implied terms both of the will and of any instrument evidencing the gift *inter vivos*. It is to this end that the *ejusdem generis* principle is directed. In particular, it is the reason why that principle extends to cases where, although the property may be very different, the *inter vivos* gift has been given an express cash valuation.

Because the presumption only operates where the will antedates the *inter vivos* gift, one would not normally expect to find evidence tending to rebut the presumption upon the face of the will. But one might well expect to find such evidence after the will, and, more particularly, associated with the occasion of the *inter vivos* gift. Since many such gifts are not supported by documentation, the question whether parol evidence exists and, if so, whether it is admissible to rebut the presumption, may often be crucial.

The history of the presumption shows quite clearly that such parol evidence is admissible, notwithstanding the rule that parol evidence may not be adduced to vary or explain the clear terms of a will. The reason is that such evidence is admissible not for the purpose of contradicting the terms of the will, but for the purpose of proving the intention with which the *inter vivos* gift was made and, in particular, whether it was made with the intention that the two gifts be cumulative.

The policy of admitting such evidence appears to be as old as the presumption itself, and was already well established when *Shudall v. Jekyll* was decided in 1742. It was accepted without question by Lord Thurlow in *Debeze v. Mann*.[76] Lord Eldon dealt with the matter at length in *Trimmer v. Bayne*[77] in 1802, when he held that

75. *Elders Trustee & Executor Co. Ltd v Eastoe*, [1963] W.A.R. 36 at 38, per Hale, J.
76. (1787), 1 Cox 346, 29 E.R. 1197.
77. (1802), 7 Ves. 508.

declarations of all kinds, whether made prior to, contemporaneously with, or after the making of the will were admissible, the weight to be accorded to them depending upon the circumstances:

> ... parol evidence is admissible to rebut the presumption; and my business is drily to determine, whether the parol evidence in this case has sufficient weight and power to overthrow the presumption.... A declaration at the time of making the will is of more consequence than one afterwards; and a declaration after the will as to what he had done ... is entitled to more credit than one before the will as to what he intended to do: for that intention may very well be altered: but he knows what he has done; and is much more likely to speak correctly as to that than as to what he proposes to do; though these parol declarations are all alike admissible; whether consisting of conversation with people ...; people making impertinent enquiries, and drawing from him angry answers, or in whatever form, they are all evidence. But they are entitled to very different credit and weight according to the time and circumstances.[78]

In the leading case of *Hall v. Hill*,[79] Sir Edward Sugden, L.C., held that extrinsic evidence in support of the presumption is only admissible if evidence in rebuttal has already been admitted. It seems to follow from the foregoing that where the *inter vivos* gift is itself evidenced by an instrument expressed in otherwise unambiguous terms extrinsic evidence may nevertheless be admitted to explain or even to contradict that instrument, despite the parol evidence rule, if the case is otherwise one to which the presumption against double portions applies. This is because of the ambiguity which is inherent in the instrument by reason of the presumption itself, and by the well-known exception to the parol evidence rule that admits extrinsic evidence where ambiguity in the instrument arises from extrinsic circumstances.[80]

There remain to be considered two particular aspects of the rebuttal of the presumption that are always relevant. The first is this: What weight, if any, can be given to the basic objection to the presumption that it entails a corresponding presumption that the testator has forgotten what is in his will? The answer seems to be that for policy reasons the presumption against double portions overrides what might be called the presumption of sound memory. In

78. Ibid. at 518.

79. (1841), 1 Dr. & War. 94 (Ir.).

80. *Kirk v Eddowes* (1844), 3 Hare 509, 67 E.R. 482; *Nevin v. Drysdale*, 36 L.J. Ch. 662; *Re Lawes* (1882), 20 Ch. D. 81; *Phipson on Evidence* (11th ed., 1970), 901-02; *Taylor on Evidence* (12th ed., 1931), 788-89. See also *Re Tussaud's Estate* (1878), 9 Ch.D. 363, in which it was held, *inter alia*, that the rule applies equally to deeds as to wills.

reality, of course, there is no reason whatsoever why it should do so. It cannot ever properly be presumed, in the absence of evidence to the contrary, that a testator does not remember what is in his will. For purposes of the presumption against double portions, however, it must be supposed that the very fact that a testator has given a portion to a child *inter vivos* is in and of itself evidence sufficient to rebut the presumption of sound memory. The soundness of the testator's memory must therefore be established by other evidence. But if so established, then the presumption against double portions must surely be rebutted.

This naturally raises a second question: What weight can be given to the fact that, having benefitted a child *inter vivos*, the testator has chosen not to alter his will so as to take account of that benefit; and more particularly, what if he has made a codicil altering his will, in some (for present purposes) irrelevant way, which otherwise confirms and re-publishes the will? There is a surprising dearth of authority on the first of these seemingly fundamental points. We have seen that Lord Eldon was not impressed by this argument, but his own answer to it — that the *inter vivos* gift itself "revokes" the testamentary provision — is unconvincing. Quite apart from the fact that his answer is question-begging for policy reasons, it is nowadays[81] conceptually unsound: express provisions of the *Wills Act* provide the only means by which a will or any part of a will can be revoked,[82] and they do not include the giving of a portion to a child *inter vivos*. The true conceptual basis of the presumption is not that the will has been revoked *pro tanto* but that the testamentary gift has been adeemed by reason of the testator's presumed intention. To state the matter in this way is to reveal the self-contradictory nature of the presumption: it is said to be based upon the testator's intention, but it is actually based upon a policy which not infrequently defeats that intention, as many judges have observed.

Does the existence of a codicil rebut the presumption? Again, we have seen that as early as 1698 this was denied on the ground that the re-publishing words of a codicil are "only words of

81. See notes 5 and 28, supra.
82. Ibid.

form".[83] However, in *Roome v. Roome*[84] they were accorded substantive effect and, as such, were regarded as decisive in rebutting the presumption. In *Ravenscroft v. Jones* Knight Bruce, L.J., thought that "the existence of ... a codicil, even though not decisive of the question, is a fact which cannot be left out of consideration".[85] In *Re Aynsley* Joyce, J., held that a codicil "must be taken to mean what it says",[86] and regarded it as immaterial whether the codicil had been drafted by the testator in person or by a professional draftsman for, in either case, the provisions of the will itself would either be specifically in the testator's mind or could be presumed to have been drawn to his attention. This approach seems to be correct: the occasion of making a codicil is almost certainly also an occasion for the testator to reconsider his will as a whole. One can imagine circumstances in which this is not the case, as where it can be proved that the testator did not, on the balance of probabilities, direct his mind to the fact that a portion had previously been given to a child. But it is submitted that in the absence of such evidence the existence of a codicil made after the *inter vivos* gift should ordinarily be regarded as sufficient to rebut the presumption.

Bringing into Account

Where the presumption against double portions cannot be rebutted by the beneficiary of the *inter vivos* gift then the value of that gift must be brought into account *vis-à-vis* brothers and sisters[87] at

83. *Izard v Hurst* (1698), 2 Free. 224, 22 E.R. 1173.

84. (1744), 3 Atk. 181, 26 E.R. 906.

85. (1864), 4 De G. J. & S. 224 at 228, 46 E.R. 904; *Re Scott*, [1903] 1 Ch. 1 at 14, per Stirling, L.J.

86. [1914] 2 Ch. 422 at 429.

87. But not *vis-à-vis* strangers: *Re Heather*, [1906] 2 Ch. 239; *Re Vaux*, [1938] 1 Ch. 581. In the latter case, Simonds, J. (as he then was) gives the following instructive example, at 590:

> A testator has two sons, A and B, and a nephew C, to whom he does not stand in loco parentis. He makes a will by which he gives a legacy of £3,000 to son A, and his residue equally between A, B and C. He then gives £3,000 to A in his lifetime, and I will assume that both legacy and gift *inter vivos* were portions so as to bring the rule into play. He dies, leaving a clear sum of £15,000 available for distribution. For the benefit of C the rule is not applied; he therefore gets one-third of the residue of £12,000, or £4,000. But as between A and B it is applied for the benefit of the latter, and accordingly of the remaining £11,000, A gets £5,500 and B gets £5,500. The testator is presumed to have intended equality between his children except so far as he has made express provision to the contrary. In the example given his intention is presumed to have been that A should get, in all, £3,000 more than B, and that intention has been carried out.

the time of distribution of their interests under the will by the personal representative. This is an exercise in executorship accounting, and may require professional valuations (and where life interests are concerned, actuarial valuations) to be obtained where the gift is not one of money or of other assets to which an express valuation has been assigned.

In some cases questions may arise as to the date at which the benefit given *inter vivos* should be valued. Where the property is vested in and possessed by the donee, and is capable of valuation, then the proper date of valuation is the date at which the gift was made.[88] Difficult practical questions might arise in such a case if there has been a considerable lapse of time between the date of the *inter vivos* gift and the date of distribution of the testator's estate. On the other hand, where that benefit either is not vested, or is not possessory, or both, in the hands of the donee at the time when it is made, the principle governing the date of valuation is that the testator's children should be treated equally and in a "just and proper"[89] way by reference to the date of the beneficial enjoyment of the property in possession. In *Hatfield v Minet*[90] it was held by the Court of Appeal that, for purposes of hotchpot under the *Statute of Distributions*, annuities covenanted to be given to children *inter vivos*, but which did not constitute advancements until the father's death, were to be valued as at the date of the father's death, which was the date at which the daughters' beneficial enjoyment of the annuities commenced, not at the date of the covenant.

In *Lake v. Quinton* the New South Wales Court of Appeal was divided on this point, Jacobs, P., and Street, C.J. in Eq., being of the view that the "just and proper" date of valuation was the date of beneficial enjoyment of the interests in question in possession, not the date of the *inter vivos* gift; and Hutley, J.A., being of the latter view. Street, C.J. in Eq., pointed out that in the present case

88. *Watson v Watson* (1864), 33 Beav. 574, 55 E.R. 226; *In re Innes* (1908), 125 L.T.Jour. 60; *Lake v. Quinton*, [1973] 1 N.S.W.L.R. 111 at 144, per Hutley, J.A. (dissenting on this point).

89. *Hatfield v Minet* (1878), 8 Ch.D. 136 at 146, per Thesiger, L.J.: Cf. this judge's "theoretical and just" mode of valuation as at the date of the settlement. In this case James and Baggallay, L.JJ., in independent judgments, preferred to speak of achieving a "fair and equal" distribution among the children by valuing the gift as at the date of the father's death.

90. Ibid.

there were "strong practical reasons for preferring, as the date of valuation, the date when the subject of the gift vests in possession"[91] because of the elements of futurity and contingency involved in the dispositions in question. The reason was fundamentally that there is no "market in expectancies"[92] and that unless a property is capable of being marketed there is little basis for its valuation. Jacobs, P., was essentially of the same view, pointing out that:

> When beneficial enjoyment of the gift is assumed the gift is wholly or partly within the donee's disposition, so that the only fair course is to give to the donee the benefit or burden of changes of value from that time forward. Thus is true equality achieved among the children of a testator. On the other hand, if beneficial enjoyment is postponed until the testator's death in favour of a life interest in the testator, the whole purpose of achieving equality among the children would be lost sight of if the donee had to be satisfied with property which by the date of the testator's death might have become worthless. By a doctrine of equity designed to prevent a child sharing twice over rigidly applied according to a formula such a child might not share in his father's bounty at all. Equity can do better than that in designing its rules.[93]

It is submitted that this is the correct view. A "just and proper" valuation of any property can only be arrived at under market conditions. When non-possessory, and *a fortiori* contingent, property interests are in question it seems artificial and unfair to value them at any date other than that at which they are realistically disposable in the hands of the *inter vivos* donee.

If one of the purposes of the presumption against double portions is to achieve the "true equality" between children of which Jacobs, P., spoke, then a strict application of that principle would suggest that an interest component should be included in the figure brought into account by a child benefitted *inter vivos*. This is because the child will have enjoyed the use of the property for some period of time — perhaps for a long period — before its brothers and sisters have been able to enjoy their own testamentary entitlements. There appears, however, to be no reported Australian or English case in which this has been held to be the law.

91. [1973] 1 N.S.W.L.R. 111 at 134.
92. Ibid.
93. Ibid. at 124.

Conclusions

(1) The presumption against double portions is based upon two presumptions of equity as to a testator's continuing state of mind: first, that he recognises a moral duty to provide for the support and maintenance of children after his death; second, that he would not wish without good reason to make a double provision for this purpose for one child at the expense of others.

(2) It is within the province of the judicial system so to supervise the administration of a deceased man's estate that the moral duty referred to in point (1) will be discharged by order of the court where persuasive evidence to the contrary is not forthcoming. To this extent, it appears that during much of its history the presumption was in effect, and as a tacit part of its rationale, a primitive type of testator's family maintenance policy rule.

(3) In addition to points (1) and (2), the presumption is also partly based upon the concept that it is within the province of the judicial system to attempt to promote, by court order, the balance of happiness among children after their father's death, and in relation to his testamentary arrangements. To this extent the presumption is a palliative operating in a context in which the father himself is the very person who is unable to give evidence as to his real intentions.

(4) The presumption does not, and cannot possibly, take account of the privately held, but morally legitimate, motives of a testator in conferring a substantial benefit on a child *inter vivos*. It nevertheless presumes that these motives are confined only to a giving *inter vivos* of what (or part of what) would otherwise be given at death. It is submitted that such a presumption cannot be justified by ordinary experience.

(5) To the extent to which the presumption is not a mere rule of policy, it possesses the additional weaknesses that it presumes —
   (a) that the testator has forgotten what is in his will, and/or
   (b) that the testator did not have the presence of mind to change his testamentary arrangements after having conferred a substantial benefit upon a child *inter vivos*.

It is submitted that in ordinary experience the unlikelihood

of (a) and/or (b) actually being the case is such as to create a contrary presumption at least as strong as the presumption against double portions itself.

(6) To the extent to which points (4) and (5) are true the presumption operates so as to defeat a testator's real intention.

(7) A court wishing to avoid the effect of the presumption may do so, in the absence of other evidence that the gifts were intended to be cumulative, upon either or both of the grounds —
  (a) that one (or both) of the gifts is not a portion, and/or
  (b) that the gifts are not *ejusdem generis*.

(8) To the extent to which the presumption is a rule of policy, it has become superseded by testator's family maintenance legislation, the jurisdiction of the Family Court, and the existence of social welfare legislation.

(9) In contemporary society there is no sound basis for the rule that a mother owes no duty of support to a child for purposes of the presumption unless she has assumed an obligation to stand *in loco parentis* to that child.

(10) The presumption tends to cause the children of a deceased man to review benefits conferred upon their brothers and sisters during their father's lifetime in a selfish and self-serving way. It is submitted that to the extent to which it thus compounds the potential for disharmony within a family which already exists in the statutory forms referred to in point (8) it is an undesirable rule.

(11) Application of the presumption could work substantial hardship upon a child required to bring into account after his or her father's death the value of benefits received in the distant past when the child has had good reason to rely upon what is known of the contents of the father's will.

(12) The presumption against double portions provides an excellent example of the phenomenon of judicial protestations against a judge-made rule which judges themselves acknowledge that they are powerless to overturn.

(13) The foregoing conclusions apply *mutatis mutandis* to *inter vivos* gifts made by persons standing *in loco parentis* to the donee.

(14) The presumption against double portions should be abolished by the enactment of a statutory provision in the following form:

No presumption against double portions shall be held to arise upon the administration of the estate of a deceased person by reason solely of a gift of any property by the deceased during his lifetime to any child of the deceased or to any person to whom the deceased person stood *in loco parentis*.