In The Privy Council

ON APPEAL

FROM THE SUPREME COURT OF CYPRUS.

BETWEEN

ZALIHE VELI AND OTHERS OF POLIS

Appellants - Plaintiffs

AND

SEVIM ISMAIL AND OTHERS OF CHRYSOCHOU,

Respondents - Defendants

RECORD OF PROCEEDINGS

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INDEX OF REFERENCE

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RECORD OF PROCEEDINGS

No. 1

Writ of Summons.

In the District Court of Paphos

No. 1
Writ of Summons, 20th October, 1956.

IN THE DISTRICT COURT OF PAPHOS.

Action No. 1202/56.

Registry of Paphos.

Between

ZALIHE VELI OF POLIS CHRYSOCHOU, Suing as next friend and natural guardian of her minor children Ismail and Nahite Nevzat Ismail Eff.

Plaintiff

and

1. SEVIM ISMAIL OF CHRYSOCHOU
2. KATRI ISMAIL OF CHRYSOCHOU
3. MENSUR ISMAIL OF NICOSIA AUDIT DEPART - MENT
4. EMINE ISMAIL OF CHRYSOCHOU
5. HANIFE HUSNU OF CHRYSOCHOU Defendants

In the District Court of Paphos.

No. 1
Writ of Summons, 20th October, 1956.
(Continued)

To the above-named defendants

all of Chrysochou except Defendant No. 3 of Nicosia.

This is to command you that within ten days after the service of this writ you enter an appearance in an action against you by Zalihe Veli of Polis Chrysochou.

The Plaintiff's claim in the action is set out in the indorsement overleaf.

The Plaintiff's address for service is: Niazi Kiamil Aghas, advocates's clerk, Ktima, Paphos.

And take notice that in default of your entering an appearance in the manner specified below the Plaintiff may proceed in the action and judgment may be given in your absence.

Filed and sealed on the 20th day of October, 1956.

(Sd) Chr. P. Mitsides
Advocate for Plaintiff.

N.B. — An appearance may be entered either personally or by advocate by delivering to the Registrar at Paphos a memorandum of appearance, and on the same day by delivering at the Plaintiff's address for service a duplicate of such memorandum dated, signed and sealed by the Registrar.

INDORSEMENT OF CLAIM.

The Plaintiff's claim is:-

1. That Sevim, Katri, Mensur and Emine Ismail be ordered to bring into hotchpot whatever they received from their deceased predecessor Ismail Katri Bey during his lifetime or that they be excluded from taking any share in the inheritance of the said deceased.

2. Alternatively a declaration by the Court that they are not entitled to take any share in the estate of the said deceased Ismail Katri.

3. That the defendants be ordered to give an account of the mesne profits and all crops and Income derived and enjoyed by them from the said estate since the death of the deceased.

4. The costs and expenses of the present action.

Filed the 20th day of October, 1956.

(Sd) Chr. P. Mitsides
Advocate for Plaintiff.

No. 2.

In the District Court of Paphos.

No. 2.

Statement of Claim, 10th December, 1956.

Statement of Claim.

1. Ismail Katri Bey late of Chrysochou the common ancestor of the parties died about the year 1954.

2. He left his lawful heirs:-

a) Sevim Ismail of Polis (Chrysochou), daughter
b) Katri Ismail of Polis (Chrysochou) son
c) Mensur Ismail of Nicosia, son
d) Emine Ismail of Polis (Chrysochou) daughter
e) Hanife Husnu of Polis (Chrysochou) wife
f) (i) Ismail Nevzat Ismail Eff.
(ii) Zahite Nevzat Ismail Eff. minor children of his predeceased son Nevzat Ismail who died about the year 1953. They are represented in this action by their mother Zalihe Veli of Polis (Chrysochou) who is their next-of-kin.

3. The said Ismail Katri Bey during his lifetime gave to his children the defendants Nos. 1, 2, 3, 4 and 5 movable property including money and immovable property by way of advancement and/or under a marriage contract and/or as dowry.

4. At the time of his death the said deceased left movable and immovable properties to which the plaintiff and the defendants are entitled as his lawful heirs. After the death of the said deceased the defendants or some of them particularly defendant No. 2 have been administering or managing the deceased Ismail Katri Bey's estate without giving any account of their income or profits thereof to the plaintiffs.

5. As the plaintiffs received nothing from the said deceased during his lifetime in any of the above ways the plaintiff claims against the defendants-

A. That Sevim, Katri, Mensur Ismail and Emine Ismail be ordered to bring into hotchpot whatever they received from their deceased predecessor Ismail Katri Bey during his lifetime or that they be excluded from taking any share in the inheritance of the said deceased.

B. Alternatively a declaration by the Court that they are not entitled to take any share in the estate of the said deceased Ismail Katri.

C. That the defendants be ordered to give an account of the mesne profits and all crops and income derived and enjoyed by them from the estate since the death of the deceased.

In the District Court of Paphos.

D. The cost and expenses of the present action.

10.12.1956 (Sd) Chr. Mitsides
Counsel for plaintiffs.

No. 2. Statement of Claim, 10th December, 1956. *(Continued)*

No. 3. Statement of Defence and Counterclaim, 12th January, 1957.

No. 3

Statement of Defence and Counterclaim.

1. The facts alleged in paragraphs 1 and 2 of the statement of claim are admitted.

2. With regard to paragraph 3 of the statement of claim defendants say that it is not alleged therein what movables, or money or immovables were given to each of them when it was given and under what circumstances, and therefore defendants cannot answer the allegations in the said paragraph.

3. With regard to paragraph 4 of the statement of claim defendants admit that the aforesaid deceased left some movable and immovable property. Defendant No. 2 also admits that after the death of the deceased he was looking after the property left by the deceased and he kept an account which he will present to Court.

4. With regard to paragraph 5 of the statement of claim defendants allege that Nevzat Ismail the father of the minor plaintiffs had received from his deceased father Ismail Katri by way of dowry, or marriage portion or by way of advancements:

(a) two pieces of land about 60 donums in extent worth £1500.-
(b) one pair of oxen worth £120.-
(c) thirteen ewes worth £65.-
(d) one donkey worth £15.-
(e) one building site in the village worth £60.-
(f) wheat of the value of £70.-

Counterclaim.

5. Defendants repeat the allegations in paragraph 4 of the Defence and Counterclaim that plaintiffs in case they claim any share by inheritance on the property left by the deceased, they should be ordered to bring into hotchpot the property their deceased father had received as alleged in paragraph 4 of the defence.

Defendants further claim the costs of the counterclaim.

12.1.1957. (Sd) M. Fuad Bey,
Advocate for defendants.

No. 4

In the District Court of Paphos.

No. 4. Reply and Defence to the Counterclaim, 21st. January, 1957

Reply and Defence to the Counterclaim.

1. The plaintiff joins issue with the defendants on their defence.

2. The plaintiff denies seriatim each and everyone of the allegations contained in the defence contrary to or inconsistent with her statement of claim.

3. In answer to para. 4 of the defence, the plaintiff who is the lawful wife of Nevzat Ismail who died in the year 1953 denies all and every one of the allegations in the said para. as if they were set out and denied seriatim; it is admitted only that 2 pieces of land and one building site were transferred and registered by gift but not as dowry, or marriage portion or by way of advancement as alleged; she further denies their value and extent as given in the defence.

The deceased Nevzat Ismail's property was encum - berred by debts amounting to £600 approximately and the plaintiff having been appointed by the Turkish Family Court as guardian of her minor children and in her capacity also as the lawful wife and heir of the deceased Nevzat Ismail has paid off the above debt of £600 as herein - before mentioned, out of her own funds. The net income of the said deceased Nevzat Ismail Eff. could not exceed and does not exceed the amount of £40.- per annum.

4. With reference to the counterclaim the plaintiff will contend at the trial that the defendants or any of them are not entitled in law to any hotchpot or any other remedy or relief as alleged by them. The plaintiff further denies liability for costs of the alleged counterclaim.

21.1.1957

(Sd) Chr. Mitsides
Counsel for plaintiff.

No. 5

No. 5. Proceedings at Trial. 16th March, 1957.

Proceedings at Trial

Coram: L. Zenon, P. & A. Attalides, D.J.,

16.3.57. Civil Action No. 1202/56.

For plaintiff: Mr. Ch. Mitsides and Altay.
For defendants: Fuad Bey.
Parties present.

In the District Court of Paphos.

No. 5. Proceedings at Trial, *(Continued)*

Parties agree that the father of the plaintiffs has received from his father Ismail Katri Bey by way of advancement or under marriage contract movable and immovable property to the value of £1650.- and that Sevim Ismail (defendant 1) has received from his father Ismail Katri Bey movable and immovable property by way of advancement or marriage contract to the value of £1200.- No other heir has received anything from the late Ismail Katri Bey during his lifetime. Parties also agree that for the purpose of estimating each share of the heirs of Ismail Katri Bey and the value of the property left by the said deceased Ismail Katri Bey shall be the value at which such property shall be estimated by the Commissioner for the Estate Duty.

Parties further agree that only question left for the decision of the Court is whether the plaintiffs in reckoning their share in the estate of Ismail Katri Bey are bound to bring into account the immovable and movable property received by their father during his lifetime from their grandfather Ismail Katri Bey or not.

Adjourned to 13.4.57.

(Sd) L Zenon
President.

13.4.57.

On the application of counsel for parties action adjourned to the 29.6.57.

(Sd) L. Zenon
President.

14.6.57.

On the application of both counsel action adjourned sine die to be fixed after the long vacations.

(Sd) L. Zenon
President.

Counsel as before. 12.12.57.

For plaintiff Mr. Hakki Souleyman for Mr. Mitsides apply for adjournment.

Fuad Bey: I have no objection. I claim my costs.

Court: Adjourned to 14.2.58. Costs of Defendants allowed in any event.

(Sd) L. Zenon,
President.

ACTION No. 1202/56. 18.4.58.

For the plaintiffs: Mr. Mitsides with Mr. Altay.
For the Defendants: Fuad Bey with Mr. J. Clerides, Q.C., Parties present.

Court directs that shorthand notes be taken.

Zenon, P.D.C.

Mr. Mitsides, I see in the file a letter dated the 14th January, addressed by your Junior to Fuad Bey, by which he states that your clients want the whole case to be heard, and also to have evidence as to the amounts. You will remember that on the 16th March we made a record as regards the amounts to be contributed, and the only point to be decided by the Court was whether the defendants, inheriting their share in the property are bound to bring into account the property received by their father from his father, during his lifetime.

You understand that we cannot entertain this application in the way it is now- supported only by this letter; it should be a proper affidavit, showing the facts as to why the Court should hear this evidence. So do you insist on that letter?

Mitsides:

We do not insist on that letter, Your Honour. Now, it is Fuad Bey who has to begin. He has now to prove his counterclaim, that he is entitled to what he claims. If he does not prove that he loses his case. I made my statement of claim: he admits that Sevim contributed a certain amount: there is no question about the others.

Fuad Bey:

Your Honours, the law which governs the case is Cap. 220 of the Wills & Succession Law, Section 51, p. 1690.
(Reads: .... Any child, or other descendant of a deceased who becomes entitled to succeed to the statutory portion and to the undisposed portion, if any, etc....)
We know what the parties have received, but I draw your attention to the wording of this section - particularly to... "he has at any time received" - and I also want to draw your attention to the fact that the wording is the same as the English Law of distribution, 1670 - which I do not

In the District Court of Paphos.

No. 5. Proceedings at Trial, 18th April, 1958. *(Continued)*

propose to read, but which I submit is the same, and the English cases which I shall cite.
(Halsbury's Laws of England: 22 and 23 Caroline, 2 Chap. 10. ed. 1929, vol. 5 at p. 111 onwards.
Now, there are many cases decided in England which very clearly prove the principle that a child cannot inherit anything more than what the father would have got, because he succeeds as a representative of the deceased father.
I shall refer your Honours to the well-known case of Proud v. Turner, reported now in the English Reports, 24th vol. at p. 862.
(Reads:..... 'A father had several children, and in his life-time advanced in part to one of them, etc': .....)
There are many other cases and I must refer you to the case of Ford, 1902, 2 Ch. 605.
In that case the Will he made had failed, therefore the deceased was reckoned to have died intestate, and the ruling was that the statute applied.
I don't want to refer to any other cases.
The only case which I found, which, if read in digest alone, might give a wrong impression, is the case of Gist v. Tunfrey, 1906, 1 Ch. p. 57

(Reads from p. 62... .'A bachelor, lunatic, died intestate, leaving a brother, sister and children of a deceased sister as his sole next-of-kin, etc'.....)
In my opinion the answer to the argument is that the children take the share to which the parent would have been entitled under the statute, but without reference to any bargain made by the parent in her life-time, or any alienation or disposition, etc.....
.....'The payments to Marianne, the deceased sister of the lunatic, were payments to a person ..... for maintenance.... and as between father and child would not have been considered as an advance.....'
.....'The order of the Lunacy Court only directed that this amount be brought into account'.....
Therefore, Your Honours, this money advanced as maintenance was not an advancement and therefore it is an exception to that rule.
This only proves that any advancement made must be brought into hotchpot.
Now, that this is the law, and though I don't think that we are bound by any other laws, in the Civil Laws of France I found a passage in Laniolle, 3, at p. 501:

(Reads..... 'Le fils.....').

Even if he renounces the inheritance of his father and has not benefited from it, he must still bring it into hotchpot.

Mitsides.

I think that the argument of my Learned Friend is so definite that one hardly dares to answer it. Anyhow, the law he has cited is not applicable in Cyprus, but even if the English statute would help us to construe our statute, the death occurred after 1925.

In order to guide you, instead of going to Queen Carolines' time, you can see Hailsham's Laws of England, vol. 10, at p. 572 - so it is unnecessary to go further back than 1925. There is no provision when a man dies intestate. All the authorities are interpretations of hotchpot cases. The 11th ed. of Theobald on Wills, at p. 659, under heading 'Hotch-Pot Clauses' - starts like this:-

.....'In many cases the instrument contains a direction that advances made by the testator are to be brought into hotch-pot' etc....

One particular rule might help, though I don't think it is applicable: at p. 661 it says:.....

.....'Directions to the child does not affect the issue, so even if in an instrument there is a direction that a child shall bring into hotch-pot what he has received, etc':.....

..... 'An advance cannot be brought against the issue of a child who takes his share;:.....

Of course, the cases of Regis are also foreign cases and are interpretations of hotch-pot cases in England.

Now, in vol. 19, the Supreme Court ruled in the case of Vouros, and recently in the Mourtabelis case, when we have got our own law, whether we consider it morally just or not, we are bound by that law, and I don't think that there can be any doubt that you can ask any descendant of a deceased, who has not himself received anything by the way mentioned in Section 51, to bring into hotchpot what another has received. He has to bring into hotchpot what he has received - not what another has received. Under Schedule 1 of Cap. 220, para. 1700, they don't inherit through their father, but they inherit direct.

(Reads:.... 'Descendants living at the death of the deceased, etc.'.....)

In the District Court of Paphos.

No. 5. Proceedings at Trial, 18th April, 1958. *(Continued)*

That, construed together with Section 51 shows that they inherited directly from their grandfather.

Something else has been introduced to your Honours, about the French Code or the Italian Code, by the other side. I don't contradict my Learned Friend....

Zenon, P.D.C. There is a specific article in the French Code.

Mitsides:

But I don't think it helps my learned Friend at all..

(Reads from Droit Civil: vol. 3, p. 548, para. 2224:..... 10

..... 'Les fils .....y compris les beins donnes' .....)

So there it is EVEN if he has received the share of his father, but here he inherits directly, as our law speaks. I don't think I need elaborate any further.
If Your Honours will see, for guidance, the Roman Law, on the basis of which the Code Napoleon was based, and possibly our own law, I will read from the Greek edition of Dernbaun, vol. 4: .....

In any case, we have got our own law, and in our own law it is my humble submission that the grandchildren in this 20 case inherited directly from their grandfather, and not from the father.

You will probably remember that I said that there is no provision for contribution; at p. 584 there is a statutory provision of advancement and for maintenance, and if under the statute an advancement was made, under the strict provision of that paragraph that advancement might be considered against the portion of an heir.

(Reads from Laws of England: Vol. 10, p. 584. para. 845:) Consider the injustice of it if a son who was a profli- 30 gate, took a big amount from his father, the children would be punished in their share of the property.

Fuad Bey:

Under our law the children of a deceased person receive per stripes, which means as representatives and nothing else.

(Cites Lloyed V: Tench, English Reports, vol. 28, at pp. 138 and 139.)

Court: Judgment reserved.

(Sd) L.E. Zenon,
P.D.C.
18.4.58.

In the District Court of Paphos.

No. 5.
Proceedings at Trial, 18th April, 1958.
(Continued)

No. 6.
Judgment

No. 6.

Judgment of L. E. Zenon P.D.C.

Zenon, P. D. C.

This is an action by two minors, namely, Ismail Nevzat Ismail and Zahite Nevzat Ismail, suing through their mother, Zalihe Veli.

The plaintiffs' father, Nevzat Ismail, who died in the year 1953, was the brother of the defendants.

The deceased and the defendants are the children of Ismail Kadri Bey, who died in the year 1954.

The plaintiffs' claim is that defendants 1, 3 and 4 bring into hotch-pot whatever they have received from their father during his lifetime by way of advancement or marriage portion, and for an account by the defendants of the income of the property of the said Ismail Kadri Bey. Defendants resist the plaintiffs' claim and they counterclaim that, in order that the plaintiffs succeed in the property of their grandfather, they should bring into hotchpot the property their father received, by way of dowry, marriage portion or advancement, from his deceased father, Ismail Kadri.

This action came for the first time before this Court on the 16th March, 1957, and there was an agreement by the parties to the effect that the father of the plaintiffs received from his father, Ismail Katri, by way of advancement or marriage contract, movable and immovable properties to the value of £1,650.- and that Defendant 1 has received from his father, again by way of advancement or marriage contract, property to the value of £1,200.- and that the other defendants received nothing from the late Ismail Katri.

In the District Court of Paphos.

No. 6.
Judgment
(Continued)

On that day it was agreed by Counsel for the plaintiffs and the defendants that the only question remaining for the decision of the Court is whether the plaintiffs, in reckoning their share in the estate of Ismail Katri, are bound to bring into account the movable and immovable property received by their father during his lifetime from their grandfather, Ismail Katri.
Counsel for the defendants contended that they are so bound and he based his contention on the Statute of Distribution of the year 1670, in England, and on the several decisions of the English Courts on this point.
He argues that the children inherit from their grandfather by representation of their father, and therefore they should bring into account what their ancestor, (who predeceased the person to be inherited from), in this case, their grandfather, whatever their father received from their grandfather during his lifetime, by way of advancement, marriage contract or dowry, namely, the amount agreed upon, of £1,650.-
Further, he submitted that the words per-stirpes mean 'by representation'.

Counsel for the plaintiffs contended that the Court should not look at the English Statute of Distribution, as we have our own law, namely the Wills & Succession Law, Cap. 220 to apply, and the English Statute, and decisions under it, have no bearing in this case, as long as there is a Cyprus Statute regulating the point to be decided.

Both Counsel referred the Court to French Law and French authorities.
We agree with counsel for the plaintiffs that as long as we have our own Statute to apply, neither English nor French law or authorities are helpful in deciding the point in issue.

The first question to be decided is whether the children of a person, who has predeceased their grandfather, inherit from their grandfather by representation or in their own right.
Section 46 of Cap. 220 runs as follows:

.....'Subject to the provisions of this Law as to the incapacity of persons to succeed to an estate and subject to the share of a surviving wife or husband of the deceased, the class of person or persons who on the death of the deceased shall become entitled to the statutory portion, and the undisposed portion, if any,

and the shares in which they shall be so entitled, if more than one, shall be as set out in the several columns of the First Schedule to this Law:

Provided that persons of one class shall exclude persons of a subsequent class' .....

If, now, we look at the First Schedule of Cap. 220, to which that section refers, we find, under the heading 'Succession of Kindred', as follows, in three different columns, entitled: 'Class': 'Persons Entitled': Shares':
and under the title 'Class', one reads - First Class; and under the heading 'Persons Entitled' one reads, in para. (1) (b):- Descendants living at the death of the deceased, of any of the deceased's legitimate children, who died in his lifetime; and under the heading 'Shares', para 1 (b): In equal shares, per stirpes.

Cap. 220, is a law to amend and to consolidate the law relating to Wills and to testamentary and intestate succession. The previous Law was Law 20 of 1895, and there the succession of kindred was regulated by Section 43, 1 (a), which reads as follows:.... 'All' or such one or more of the lawful children living at his death, and the descendants living at his death, or any of them who have died in his lifetime, and with more than one, in equal share, per stirpes'.

Now, the expression, per stirpes, is defined in Section 49 of Cap. 220, reading as follows:

.....'Where in this law it is provided that any class of persons shall become entitled to the statutory portion and the undisposed portion per stirpes, it means that the child of any person of the defined class who shall have died in the lifetime of the deceased and who, if he had survived the deceased, would have become entitled on the death of the deceased to a share in the statutory portion, and the undisposed portion, if any, shall become entitled only to the share which the parent would have taken if he had survived the deceased'.....

We take the view that the interpretation of this section combined, is to the effec that the descendants living at the death of the deceased, of any of the deceased's legitimate children who died in his lifetime, inherit from the deceased in their own right, and not by representation of their deceased father. Only their share in the estate of the

In the District Court of Paphos.

No. 6. Judgment *(Continued)*

deceased is regulated by the words - per stirpes - as is clearly shown by Section 48, and the first Schedule to the Law, and, to be more clear in the present case we hold that the Plaintiffs inherit from their grandfather, Ismail Katri, in their own right, and not as representing their predeceased father, and the share they shall take is the share their predeceased father would be entitled to in the estate of the deceased Ismail Katri. To our mind the expression per stirpes has nothing to do with the right of the persons to succeed in the property of the deceased but simply regulates their share in that property.

We would like to add that the wording of Section 51 strengthens our above view, as the wording is that the child or other descendant shall, in reckoning his share bring into account all movable and immovable property that he has at any time received from the deceased.

If the Legislator wanted that grand children inheriting in the succession of their grandfather should bring into account movable and immovable property which the grand father gave to their father during his lifetime, he would have clearly so stipulated. The wording used in the section - 'he has received from the deceased' - means to our mind, the person who actually received any movable or immovable property from the deceased.

In order to complete the picture we think we should mention that in Section 44 (a) of Cap. 220, the following words appear - 'whether they be living or represented by descendants'. - but this expression appearing in that section, in our view, cannot destroy the combined effect of Sections 46, 49 and 51, so as to make us come to the conclusion that the plaintiffs do succeed in the property of their grandfather by representation of their predeceased father, and not in their own right.

We therefore hold that the plaintiffs are entitled to succeed to the property of Ismail Katri Bey without bringing into account the movable and immovable property received by their father during his lifetime from their grandfather Ismail Katri.

We further order that the costs of this action of both parties be paid out of the estate of Ismail Katri Bey.

(Sgd) A. M. Attalides,
D. J.

(Sgd) L. E. Zenon,
P.D.C.

27th June, 1958.

On the application of Mr. Loris time to lodge appeal extended up to 1.11.58.

(Sgd) L. E. Zenon.
P. D. C.

No. 7.

In the Supreme Court of Cyprus.

No. 7. Notice of Appeal.

NOTICE OF APPEAL.

IN THE SUPREME COURT.

On appeal from the District Court of Paphos.

Action No. 1202/56.

Between: ZALIHE VELI AND OTHERS of Polis

Plaintiffs

and

SEVIM ISMAIL AND OTHERS of Chrysochou

Defendants.

TAKE NOTICE that the defendants hereby appeal from the judgment given in the above action on the 27th day of June, 1958, whereof a copy is attached to this notice.

AND TAKE NOTICE that his appeal is against the whole of the said judgment.

AND FURTHER TAKE NOTICE that his grounds of appeal and the reasons therefor are.

1. The interpretation put on sections 43, 44 (a), 49 and 51 of CAP. 220 is wrong and therefore the trial Court went wrong in law in holding that "the plaintiffs are entitled to succeed to the property of Ismail Katri Bey without bringing into account the movable and immovable property received by their father during his lifetime from their grandfather Ismail Katri".

And this to pray that the above finding of the trial Court be reversed and the plaintiffs ordered to bring into account the movable and immovable property received by their father during his lifetime from their grandfather Ismail Katri.

(Sd) Raouf R. Denktash

Advocate for Appellants.

Filed: 12.8.1958.

In the Supreme Court of Cyprus.

No. 8.
Arguments *on Appeal.*
3rd. December, 1958.

ARGUMENTS ON APPEAL.

Civil Appeal No. 4264.

3rd December, 1958.
In the Supreme Court of Cyprus.
Between:

Zalihe Veli and others of Polis,
Respondents - Plaintiffs,
and
Sevim Ismail and others of Chrysochou,
Appellants - Defendants.

Appeal by defendants from the Judgment of the District Court of Paphos, dated the 27th June, 1958, in Action No. 1202/56.
Coram: Zekia & Zannetides, J. J.,
(Shorthand notes of the proceedings ordered to be taken)
For appellants: M. Fuad Bey.
For respondents: Mr. Chr. Mitsides with Mr. A. Izzet.

Fuad Bey: In this case a certain Ismail Katri of Chrysochou died about 1954 and he left as his lawful heirs the appellants and the respondents who were the children of a son who had predeceased him. Now the respondents claim that they should be allowed to take inheritance from their grandfather and brought an action to that effect. The appellants resisted the claim on the ground that if they wanted to have a share in the inheritance they should bring into account the advances made to their deceased father. The only point which was left for the trial Court to decide was whether an advancement of about £1,650 made to the father of the respondents should be brought into hotch-pot before they were entitled to get inheritance.

Court: So there is no dispute to that effect?

Fuad Bey: No dispute as to what advances each child had. The amount of that was agreed and settled and that was the only question left for the Court to decide. As Your Lordships will see from the judgment at page 14 of the record, the question came for the first time before this Court on the 16th March, 1957, and there was an agreement by the parties to the effect that the father of the plaintiffs received from the father Ismail Katri by way of an advancement or marriage contract, immovable and movable properties to the value of £1,650. The appellant No. 1 received from his father by way of advancement to the value of £1,200 and the other defendants (appellants)

received nothing from the late Ismail Katri. On that day it was agreed by the parties that the only question remaining for the decision of the Court is whether the plaintiffs in reckoning their share in the estate of Ismail Katri are bound to bring into account the movable and immovable property received by their father during his lifetime from their grandfather Ismail Katri. Then the judgment proceeds and reads:-

> "Counsel for the defendants contended that they are so bound and he based his contention on the Statute of Distribution of the year 1670, in England, and on the several decisions of the English Courts on this point.
>
> He argues that the children inherit from their grandfather by representation of their father, and therefore they should bring into account what their ancestor, (who predeceased the person to be inherited from), in this case their grandfather, whatever their father received from the grandfather during his lifetime, by fay of advancement, marriage contract or dowry, namely, the amount agreed upon, of £1,650."

I think there is a little misunderstanding. I never contended before the trial Court that the law applicable to this case was the English Law. As Your Lordships will see from page 9 of the notes at the bottom when I first started making my submission - Your Lordships will see that I started by saying "Your Honours, the law which governs the case is Cap. 220 of the Wills and Succession Law" particularly Section 51 page 1690. So there was no suggestion on my part that that was the law applicable.

Court: Perhaps you said that they are pari materia?

Fuad Bey: What I submitted My Lords and what I contend now is that the law applicable to the present case is Cap. 220, our Law, section 51. But my submission was that the Statute of Distribution (of 1670) governed the hotchpot and the bringing into account of advances made and later the Administration of Estates Law, 1925 which repealed that Law and re-enacted it in another form In substance they are similar to our law and I ask the Court to interpret our law in the way which was interpreted in England. My submission was this My Lords, as Your Lordship will see from Statutes of Distribution. Therefore the Statute of Distribution, Halsbury's Statutes of England Volume 9, 2nd Edition, page 658 lays down:-

"And in case any childe other than the heir at law who shall have any estate by setlement from the said intestate, or shall be advanced by the said intestate in his life time by portion not equall to the share which will be due to the other children by such distribution as aforesaid, then soe much of the surplu - sage of the estate of such intestate to be distributed to such childe or children as shall have any land by setlement from the intestate, or were advanced in the life time of the intestate as shall make the estate of all the said children to be equall as neere as can estimated."

That is the section which tries to equalize the shares of the different children and in this connection there is nothing to say that the grandchildren are included or excluded from it. That was my submission. Our Law is exactly the same. It refers to section 51 of the Statute Law, 2nd Volume, My Lords, page 1690:

"51. Any child or other descendant of the deceased who becomes entitled to succeed to the statutory portion, and to the undisposed portion if any, shall in reckoning his share bring into account all movable and immovable property that he has at any time received from the deceased-

(a) by way of advancement; or ....."

There is no reference to grandchildren. It refers to child and "the property received by such child", "child or other descendant of the deceased". So "bring into account" all that he received - well of course in this case the allegation was that the defendants have not received anything; he, the deceased, received, therefore they are not entitled. So the function and the substance of the laws of both are the same. The question is if the child has received, whether the children, or his issues, are liable and expected to bring into hotchpot what their father has received. Now My Lords I will refer to the other law which came into force in 1925, Administration of Estates Act 1925, replaced previously. Hanbury page 451, Modern Equity 2nd Edition.

"The English rule is laid down in section 47 (1) (iii) of the Act in the following words-
'Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for

the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child, ... and shall be brought into account at a valuation (the value to be reckoned as at the death of the intestate) in accordance with the requirements of the personal representatives."

Now the principle of hotch-pot, I am reading again from Hanbury, page 450 My Lords, section 47 (1) (iii).

"Principle of hotch-pot: section (47) (1) (iii) - Apart from one exception, the method or operation of the statutory trusts is the same, whether the beneficiaries are (a) issue, (b) brothers and sisters, (c) uncles and aunts. But the exception is important. For the doctrine of hotch pot applies to (a), but not to (b) or (c). The scheme of intestate succession is framed to fulfil the probable wishes, which can never be certainly known, of the intestate, any equity always presumes that a father intends to preserve peace among his children by giving them portions as nearly equal as they may be rendered."

But there is no reason why he should take care that one of his brothers or uncles should be richer or poorer - that is why this section has been put in.

I am reading now from Volume 10 Halsbury's Laws of England, 2nd Edition, page 585, towards the end of the paragraph.

"Children of the intestate bring into account all advances made by the intestate at a value determined as at the death of the intestate in accordance with the requirements of the personal representative (q). Footnote (q): Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 47 (1) (iii), and compare Trustee Act, 1925 (15 Geo. 5, c. 19), s. 22 (3). Remoter issue taking in substitution for a child bring into account advances made to their parent, see ibid, s. 47 (1) (i)."

What I submitted to the trial Court was that the English Authorities considering the section I have quoted are to the effect that grandchildren can bring into hotchpot what their parents have received and I cited the case, I

think I may refer to that case - it is the case of Proud and Turner, 24 English Reports, page 862.

> "A father had several children, and in his lifetime advanced in part one of them. The child thus advanced in part died in his father's life-time, leaving issue, afterwards the father died intestate, possessed of a considerable personal estate, the issue of the dead child must bring into hotchpot what that father received in part of advancement, as he, if living, must have done, in regard the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than their father, if living, would have been, and have claimed his distributive share."

The trial Court came to the conclusion that the grand - children inherited according to our law directly from their grandfather, and only through their father in regard to his share and that is what it means in that case. They quoted section 49 of Chapter 220 and they say "per stirpes" and then say their view of the interpretation of this section combined is to the effect that the descendants living at the death of the deceased of any deceased legitimate children who died in his lifetime inherit from the deceased in their own right and not by representation - only their share in the estate of the deceased is included by the word "per stirpes".

Court: They are entitled to the share of the deceased. Now what is the share of the deceased? That is the only point. If that share of the deceased father has to be ascertained, as it has to be, by taking the advancement then your case is clear.

Fuad Bey: First of all the Court admits the expression "per stirpes" but I would have to refer Your Lordships to a few words on that. My Lords first of all if Your Lordships would look at Wharton's Law Lexicon "per stirpes" means "by the right of representation - literally, according to the stocks". I would like to refer Your Lordships to Lloyed v. Tench 1751, 28 English Reports, page 541, where it is clear.

The Court in their judgment agreed with that when he only referred to the share and not to the inheritance to which they are entitled. First of all I submit that they interpreted, with all due respect, the literal interpretation of section 49 which is in my favour.

"49. Where in this Law it is provided that any class

of persons shall become entitled to the statutory portion and the undisposed portion per stirpes, it means that the child of any person of the defined class who shall have died in the lifetime of the deceased and who, if he had survived the deceased, would have become entitled on the death of the deceased to a share in the statutory portion, and the undisposed portion if any, shall become entitled only to the share which the parent would have taken if he had survived the deceased."

It definetely says the person who is entitled "per stirpes" to the inheritance and so forth. That in itself is a clear direction that that is the interpretation which should be put upon it. I do not understand why the Court should take "per stirpes" as qualifying the share and not the manner of getting the share, although the section, in my humble submission clearly lays it down.

Zannettides J.; Whether the legislator in drafting section 49 had in mind section 51 - because there may be cases, for instance Second Class (b), as defined, they do inherit per stirpes. There is no question of hotchpot. So the questions is whether in drafting section 49 the legislator had in mind section 51 so as to include the hotchpot.

Fuad Bey: If they inherited per stirpes they must because they are representing the father. The Court held, I believe, in reading the judgment the Court said, there are three columns in the Schedule. They looked at the Schedule and they said "Class", "Persons Entitled", 'Shares" and they said as a matter of fact there is no per stirpes in the second column and they say it is "in equal shares" only. First of all in my humble submission the schedule which refers to section 46 - that section in itself makes no distinction. In section 46 to which the schedule refers there is nothing in which it says that the grandchildren inherited in their own right. If there was any intention on the part of the legislator that the children were to inherit in their own right he would have said so - not a word about that there. Now in the schedule, in my humble submission there was no necessity to put per stirpes in the second column because it is already explained in section 49, "persons entitled". The Court said it only says per stirpes in the share. There was no necessity to mention it in the schedule because section 49 already says, lays down the way the right by which they are entitled.

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Zannetitdes J.,: It is necessary that they should put per stirpes because suppose that there are children of two predeceased brothers. The one brother has 5 children the other has one child, so if they do not say "per stirpes" it would be misleading.

Fuad Bey: Section 49 clearly lays it down what it means and where to use it:

"Where in this Law it is provided that....."

How can a person be entitled to a share per stirpes when his father is dead? It was not necessary to put it in the Schedule. The Schedule is part of the Law.

Zannetides J.,: It does no harm I think.

Fuad Bey: My submission is that it is unnecessary. Section 46 reads:

"the class of person or persons who on the death of the deceased shall become entitled to the statutory portion" etc.

In the section the legislator uses the words "persons entitled" and the share they are entitled and no mention is made that they are entitled in their own right. Although the section 49 explains how children become entitled. Children of a deceased person become entitled per stirpes - there is nothing in section 46 to say anything different, that they are entitled in any other way.

Court: The schedule is incorporated in 46?

Fuad Bey: Yes, there is nothing and it would be in my humble submission unreasonable to draw the inference that if it speaks of persons entitled we must read into it the words "in his own right".

They took the first schedule into consideration which in my humble submission is not necessary. There is noth - ing in the schedule which justifies the mention of the use of the word. It is true that the word "per stirpes" is used in two instances, as Your Lordships will see. It is used in two instances - Class 1 (b) and Class 2 again (b). It is used in two instances. A share of those persons are entitled to be equal to the share of the deceased whom they represent - that is the only reason why it has been put in these two cases because it refers to people who get it through their deceased parents. Now My Lords another section in my humble submission in our Law which shows

that the children inherit in the representative capacity is section 1 7and 19:

> "17. No persons shall be capable of succeeding to an estate who-"

Section 17 lays down certain incapacities to inheritance. Now if the children My Lords according to this law inherit it in their own right then there would be no necessity to put in section 17. Section 19 reads:

> "19. The descendants of an incapacitated person, who but for his incapacity would be entitled to succeed by operation of law to an estate, shall be entitled to succeed to the estate in the same manner as if the incapacitated person had died in the lifetime of the intestate; but the person incapacitated upon whose descendants the estate devolves shall be debarred from any subsequent right of enjoyment thereof accorded to him by law".

Section 44 of the law, page 1688 of our Law, Cap. 220 reads.

> "(a) any child or descendant thereof, such share shall be the one-sixth of the statutory portion and of the undisposed portion, but if there be more children than five (whether they be living or represented by descendants)..."

My Lords looking at Jarman on Wills page 1140, Volume 11, 7th edition:

> "Hotchpot. In many cases the testator does not rely upon the presumption of law against double portions,"

Specially with regard to children, and we have the law to read. To put double portions on certain people is against the law. I should also refer to Maxwell on Interpretation of Statutes - it is the 10th edition, page 6-

> "In considering Wills and indeed Statutes and all written instructions, the grammatical and ordinary sense of the words is to be adhered to since that would lead to some absurdity or some repugnancy to law".

In my humble submission the interpretation which the Court put on this clause, which in my humble submission is not justified would lead to absurdity. If the son had died one hour before the father then his children would have to bring into hotchpot £2,000 received. Every law is

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the same. If the legislator decided to institute different law on this principle it should have said so in clear words and not in the way that the Court has read it.

Mr. Mitsides: May it please Your Lordships. As it has been stated this is a matter of interpreting our own statutes; and all the other authorities of foreign law though they do help us they do not apply directly but they are merely a guidance to the interpretation of our statute. First, Section 46 creates a description of the class of persons who are entitled to inherit. It says:

> "46. Subject to the provisions of this Law as to the incapacity of persons to succeed to an estate and subject to the share of a surviving wife or husband of the deceased, the class of person or persons who on the death of the deceased shall become entitled to the statutory portion, and the undisposed portion if any, and the shares in which they shall be so entitled, if more than one, shall be as set out in the several columns of the First Schedule to this Law:"

It creates a class of persons, the persons who are legally entitled to inherit. We go then to the 1st Schedule at page 1700. There it says: First Class 1 (a) legitimate children. 1 (b) descendants from legitimate children living at the death of the deceased. There the descendants of the predeceased children are legally entitled in their own right under section 56 to inherit. Class 1 (b) are heirs per stirpes and there is a definition of "per stirpes" in section 49. Section 49 does not create anything new but simply explains what they inherit. Per stirpes means that they do not get more than the share falling to the portion of their parent which parent would have taken if he had survived the deceased.

Court: This is exactly what the other side contends. They should not get more than their portion.

Mr. Mitsides: But if you read section 51 carefully in its ordinary and grammatical sense, there is an obligation created. Otherwise if we read it in a different way it means that the children would be liable for the debts of their parents or for their other obligations. That is not what the law means. They get the share of their parents without any obligation.

Zannetides J.,: Free of any obligation?

Mr. Mitsides: You get your share but then section 51 im-

poses certain obligations independent of your legal rights that is they shall bring into account if they have received anything at any time from the deceased.

Court: You think that it is separate, whereas logic says it must be inseparable. You see if we say that I am entitled to the share of A and only to that share the manner of calculating that share is something auxiliary and inseparable from the share in itself because the share of A should be reckoned in the same way but there is a statutory provision. Notwithstanding that you say No the share must be undiminished.

How will you find out what is the share. I am entitled to the share of my father and the other says how am I to find that share? There is a manner of ascertaining the two things. How can you separate them? But you said that that has nothing to do with it. Because the question is what clearly will come to me from that share.

Mr. Mitsides: Your Lordships with the utmost respect let us see. The share is defined by section 46 and Schedule 1. Section 51 imposes a limitation on the share by the obligation "shall bring into account"; well this obligation is created by a particular section on certain persons - not all the persons. It would have been easy to say in section 49 "subject to the provisions of section 51". No they say you are going to get your share and only the share of your parent but if you fall into the class of section 51 you shall bring into account. It is an obligation.

Court: I understand. You mean quite separately. What is the combined effect of both? You see the other is providing a manner for the ascertainment of the share, the amount of the share. The share is there. What is the amount you have to take into consideration? What is down there? Now if your clients are entitled as he says only to the share of the deceased then what is the share of the deceased. That is the point that you have to consider when you come to the other.

Mr. Mitsides: The share of the predeceased does not exist by itself. The descendants get the entire share of their predeceased parent under section 49.

Court: Section 49 created an obligation; we have to consider as if the parent was alive and find his share and the heirs have got only that share and nothing else. Well if

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that presumption according to the principle of per stirpes has been created by a later section, why then you stop there.

Mr. Mitsides: Because that share is subject to the obligation, under section 51.

Court: It is not a question of obligation. The question is what is the share? It will have to come in relation to the deceased parent and therefore in ascertaining the share. And in doing so you say well only the legal share, you want to say, but where is the word "legal'. It is not there. And the share means under the provisions of the Statute what his share is and it means his diminished share. It is something as of right.

Mr. Mitsides: My lord may I explain my point of view. All the children are entitled to equal shares by section 46 of the Schedule. If some children - and there is no distinction between the children - have received nothing under section 51, they get the whole share. But some children in reckoning their shares bring into account what they have received directly from the deceased. But this is not an obligation on all the heirs. First of all comes the right that those children are entitled to inherit the share of their deceased parent. If some of the children have received something they have got an obligation to bring into account what they have received. It is not part of the estate, it is a differently created obligation.

Zannetides J.,: What you said in reckoning his share they must bring into account. The bringing into account means, proceed to find what the share is.

Mr. Mitsides: It is an obligation on certain particular persons in the case of descendants. That is why the two sections should not be read together, but if some descendants have received something then they must bring into account in reckoning their shares.

Certain persons have got, in reckoning their own shares, to carry out certain obligations. Now that obligation is the one under section 51, that is some descendants in reckoning their shares have certain obligations: who are the descendants who have got these obligations? They are the descendants who have received something at any time directly from the deceased. The creation of a separate section makes it strong that it is only those who have received something directly must bring into acca-

unt. If as in this case a certain amount of money had been given to their parent the grandchildren who are inheriting would be obliged to pay for the sins of their fathers in reckoning in their shares what their father has received but probably has not given down to them. If the parent had lived the grandchildren would have no obligation under section 51 to bring into account in reckoning the share of their parent. They are going to get the share of their father only but not the obligation to contribute because the father who has received during his lifetime does not live to bring himself into account what he has received.

Court: It is the same. Why should they not pay the debts of their father?

Mr. Mitsides: But they are not obliged to pay because under our law they inherited directly from their grand - father My Lords.

Court: The other point is that is not an obligation; it is a matter of reckoning. If it was an obligation you might say that's another. But in reckoning the share of the deceased there is no obligation until they meet his debts.

In Section 49 there is nothing but the description of the portion of each heir; deceased's portion cannot be arrived at unless the provisions of section 51 has been complied with because it says the method of finding out the actual amount of what the share is just the matter of section 51. It speaks of a method of reckoning - working out the figure of what is the share. It is not anything else.

Mr. Mitsides: As far as I can see the obligations are adopted from the Civil Law and not from the Estates Administration Act 1925. It is an adoption of the Italian Civil Code because this statute is a repetition of the Wills and Succession Law 1885, and the Italian Code was based on the Code Napoleon in which there is this provision on this matter of hotchpot. It says that:

> "Liberalite faite au pere du successible. - Le fils n' en doit pas le rapport (art. 848), alors meme qu'il aurait deja recueilli la succession de son pere, y compris le bien donne. Cela est vrai lorsque le fils succede de son chef (art. 848)."

Court: We have sometime ago decided that apart from other authority there are English Authorities but we

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have no objection to your going into other authorities because I had the same with our Turkish Authority and it was stated that as authority they cannot be advanced, you see before this Court, but if you say the origin is there they may help to guide us.

Mr. Mitsides: The Wills and Successions Law was copied from the Italian Code. Planiol, Volume III, Les Succes - sions, 10th edition, 1927 page 548. Stroud's Judicial Dic - tionary, page 2148:

> "Per Stirpes. (1) A distribution of property "per stirpes and not per capita" means that all the bene - ficiaries will not, necessarily or probably, take equal shares, but that the property is to be divided into as many parts as there are stocks and each stock will have one, and only one, of such parts, though such stock may consist of many persons whilst another may only consist of one person;"

No question of revision.

If you go to the English hotchpot, the hotchpot clauses are only contained in wills. As far as I can see from what I know of the English law there is no provision in either of these Acts of anybody bringing into the hotchpot anything unless there was an instruction containing the direction that advances made by the testator are to be brought into hotchpot. It is only on the instructions of the testator that the hotchpot clause applies. And I quote Theobald on Wills 11th Edition page 659:

> "Hotchpot Clauses". At page 661 "Direction as to child that does not affect the issue."

My Lords I do not pretend to have exhausted the subject. But what I find and what I understand from the English cases is that there is no obligation by statute. Numerous questions have arisen on the subject of hotchpot clauses. This direction does not apply as it applies to the child. But I must say there is this qualification at p. 661.

"But where the issue..... against the issue." I respectfully submit that you cannot decide that the children of the children i.e. the descendants do not inherit by their own right but in a representative capacity because section 49, that what it means. Otherwise I must say that I cannot see why section 51 should be put by itself and create an obligation on particular descendants of the deceased

who have received from the deceased at any time directly. If the intention of the legislator was not as I humbly submitted, the two sections would have combined together. The whole law of ours, section 46 and 49, means that the children of the children and generally the descendants, by their own right inherit directly from grandfather; they are not heirs of their parent and therefore section 51 cannot impose upon them the obligation of the parent. They did not inherit in a representative capacity but in their own right and the other section which my learned friend has quoted to you supports the same view.

Court: The question is what they are to take. The question is there. Or does 51 only provide a method of reckoning and nothing else. They are entitled to the share of the father and that share should have to be ascertained.

Mr. Mitsides: The share of the father is provided by section 49.

Zannetides. J.: The share won't be certain until the reckoning.

Mr. Mitsides: The parent has taken something from the father and the grandchild has also received something from the father then by your interpretation you create an obligation of a double hotchpot. Under section 49 he has got to take the share of the parent but then there is the obligation under section 51.

I shall quote to you section 51. In considering Wills and Statutes we must note that the grammatical and ordinary sense of the words is to be adhered to unless they would lead to absurdity.

Zannetides, J.: You create double hotchpot and he has not got the share of the parent. But the obligation is his. You either have got to say he brings into hotchpot what his parent has received and then obtain the share of the parent under section 49 or you say "no" because he has got to reckon what he received directly.

Court: What the Court will say there? Uness you say anything to the contrary, we shall take one view on that. I do not think you can ever argue on that. It is dubious. We might put them together or we might say they are entitled to the father's share and therefore ignore altogether what they received but since it is not clear enough it is not established what will be the position of such state of

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things. How can we build on it any argument?

Mr. Mitsides: I submitted to you to consider that point as well because if you say "well this must be the share of the parent therefore his obligation under sectian 51 would mean nothing."

Zannetides J, Personally I do not see any difficulty in answering your question. The father received something which he is bound to reckon and also the child from the grandfather. So the father dies; and so one of the children as you say has received an advancement from the two advancements one to the father and one to the child. The process is very easy to find what the share of the father would be.

Mr. Mitsides: It would be against the law. It would mean that first the share of the father is made up and then the share of the grandchildren is made in a different way. The father must contribute and the grandchildren must also contribute because they have also received an advancement. If that would be the correct interpretation we must get two different calculations, the share of the parent and the share of the grandchildren.

Court: You cannot have two references because I must get my share per stirpes and per stirpes means "All share of my father".

Mr. Mitsides: In this way it will be found only if you reckon what the father has received.

Court: No, what the grandchild has received.

Mr. Mitsides: Then you are not giving me per stirpes.

Court: In finding the share of the grandchild you have also to reckon the share of the father.

Mr. Mitsides: If you adopt my argument then I can get the share of my parent subject to the obligation to bring into account what I have received from my grandparent.

Court: It is the class which is entitled. It is the class which inherits.

Mr. Mitsides But the class may be one person. You cannot get anything else except the share of the parent and in

reckoning that share you cannot reckon what the parent has received. I must get my share per stirpes, you say "no" there is another further obligation created. You come to my argument because another obligation remains important. They are the heirs per stirpes and section 51 creates on them an obligation. Now after I have found the per stirpes share then you may come and say but indeed you have got this obligation under section 51. It is important to what I was submitting to you, and I have got the obligation to bring in what I have received and not what somebody else has received. That will help you in my humble submission to give the proper construction to this separate section 51. The expression used in the statute "in reckoning his share to bring into account what he has at the time received from the deceased" means that what a live person has received and I do repeat to you that it is the live person who is obliged to bring into account. The word "per stirpes" as well as the expression "representative" are only to define the limitation of issue and nothing more but as regards their shares and obligations these two sections stand by themselves. Section 46 gives the right to inherit and section 51 creates an obligation on particular heirs. Section 49 only explains the words "per stirpes" that is, that it is the share of the father devolving on his particular children. It does not create an obligation on them to contribute anything.

May it please Your Lordships.

C. A.V.

(Sd) M. Zekia,
J.

No. 9.

JUDGMENT OF ZEKIA, J.

The present appeal arises from the interpretation and combined effect of sections 43, 44 (a), 49 and 51 of the Wills and Successions Law (CAP. 220).

A certain Ismael Katri of Polis-tis- Chrysochou, the intestate and the common ancestor in this case, died in the year 1954 and left as his lawful heirs the appellants and respondents. Appellants (a), (b) and (c) are the sons of the said deceased, (d) his daughter and (e) his widow. The two respondents are the children of a predeceased son, Nevzat Ismael, who died a year earlier than his father,

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the above intestate.

The subject matter of the dispute at the hearing in the Court below - on remaining matters an agreement having been reached, was reduced to one legal point, na - mely, whether the respondents as the children of a pre-deceased parent were bound to bring into hotch-pot the advance made by the intestate to their parent in calcu - lating the share of these two children in the estate of their grandfather, the said intestate.

The trial Court found that the respondents were en- 10
titled to succeed to the share of their predeceased parent in the estate of the grandfather without obligation to bring into account the movable and immovable property receiv-ed by their deceased parent from the common ancestor. In other words, they claim that they are entitled to the share of their parent undiminished by any gift or advan-cement, etc. made to him by their grandfather.

The reasons of the trial Court's judgment appear in the following extract:

> "We take the view that the interpretation of this 20
> section combined" (referring apparently to sections 43, 44 (a), 49 and 51) "is to the effect that the descen dants living at the death of the deceased, of any of the deceased's legitimate children who died in his lifetime, inherit from the deceased in their own right, and not by representation of their deceased father. Only their share in the estate of the deceased is re - gulated by the words per stirpes as is clearly shown by Section 49, and the first Schedule to the Law, and, to be more clear in the present case we hold that the 30
> plaintiffs inherit from their grandfather, Ismael Kat-ri, in their own right, and not as representing their predeceased father and the share they shall take is the share their predeceased father would be entitled to in the estate of the deceased Ismael Katri. To our mind the expression per stirpes has nothing to do with the right of the persons to succeed in the property of the deceased but simply regulates their share in that property. We would like to add that the wording of Section 51 strengthens 40
> our above view, as the wording is that the child of other deseendant shall, in reckoning his share, bring into account all movable and immovable property that he has at any time received from the deceased.

If the legislator wanted that grandchildren inheriting in the succession of their grandfather should bring into account movable and immovable property which the grandfather gave to their father during his lifetime" he would have clearly so stipulated. The wording used in the section - 'he has received from the deceased' - means, to our mind, the person who actually received any movable or immovable property from the deceased .In order to complete the picture we think we should mention that in section 44 (a) of Cap. 220, the following words appear - 'whether they be living or represented by descendants', - but this expression appearing in that section, to our view, cannot destroy the combined effect of sections 46, 49 and 51, so as to make us come to the conclusion that the plaintiffs do succeed in the property of their grandfather, by representation of their predeceased father, and not in their own right. We therefore hold that the plaintiffs are entitled to succeed to the property of Ismael Katri Bey without bringing into account the movable and immovable property received by their father during his lifetime from their grandfather Ismael Katri".

It may be convenient to set out hereunder sections 44 (a), 46 with the first part of the Schedule attached to this section, 49 and 51:

"44..... If the deceased has left besides such wife or husband -

(a) any child or descendant thereof, such share shall be the one-sixth of the statutory portion and of the undisposed portion, but if there be more children than five (whether they be living or represented by descendants) then it shall be a share equal to the share of one of such children;"

"46. Subject to the provisions of this Law as to the incapacity of persons to succeed to an estate and subject to the share of a surviving wife or husband of the deceased, the class of person or persons who on the death of the deceased shall become entitled to the statutory portion, and the undisposed portion if any, and the shares in which they shall be so entitled, if more than one, shall be as set out in the several volums of the First Schedule to this Law:....."

In the Supreme Court of Cyprus.

No. 9. Judgment of Zekia, J., 14th. January, 1959. *(Continued)*

"FIRST SCHEDULE

Succession of the Kindred.

Class	Persons entitled	Shares
1. First class	1. (a) Legitimate children of the deceased living at his death and (b) descendants, living at the death of the deceased, of any of the deceased's legitimate children who died in his lifetime.	1. (a) in equal shares. (b) in equal shares per Stirpes.

"

"49. Where in this Law it is provided that any class of persons shall become entitled to the statutory portion and the undisposed portion per stirpes, it means that the child of any person of the defined class who shall have died in the lifetime of the deceased and who, if he had survived the deceased, would have become entitled on the death of the deceased to a share in the statutory portion, and the undisposed portion if any, shall become entitled only to the share which the parent would have taken if he had survived the deceased."

"51. Any child or other descendant of the deceased who becomes entitled to succeed to the statutory portion, and to the undisposed portion if any, shall in reckoning his share bring into account all movable property and immovable property that he has at any time received from the deceased-

(a) by way of advancement; or

(b) under a marriage contract; or

(c) as dower; or

(d) by way of gift made in contemplation of death:

Provided that no such movable property or im - movable property shall be brought into account if the deceased has left a will and has made therein specific provision that such movable property or im - movable property shall not be brought into account".

Section 49 of the Wills and Successions Law in plain and unambigous language enacts that if a father dies intestate and leaves children and grandchildren and the father of the grandchildren will be entitled to receive per stirpes, that is, collectively in esual shares the share of their parent who pre-deceased their grandfather. The section expressly states that they shall be entitled only to the share which the parent would have taken if he had survived the deceased. Now, therefore, in this case what the respondents were entitled to under section 46 and the annexed Schedule is what their deceased father, Nevzat Ismael, was entitled to receive as his share from his father, namely, the common ancestor, the intestate in this case.

The next pertinent question which suggest itself is what is the share of the deceased's parent or rather what would have been the share of the deceased parent had he been alive at the time of the death of Ismael, his father. In order to ascertain that we have to turn to section 51 of the same Law which in plain words enacts that a child or other descendant entitled to succeed shall in reckoning his share bring into account property received by him from the deceased by way of advancement, etc. In other words, section 51 prescribes in general terms the method of reckoning a particular share to which a descendant might become entitled.

In this case the share with which were are concerned is the share of the deceased parent, Nevzat, and the respondents, his children, are only entitled to that share and to nothing else.

In this case the share with which were are concerned is the share of the deceased parent, Nevzat, and the respondents, his children, are only entitled to that share and to nothing else. Section 49 and 51 read together in our view leave no room for doubt.

Now under section 46 and the annexed Schedule the respondents are entitled per stirpes, in equal shares to

In the Supreme Court of Cyprus.

No. 9. Judgment of Zekia, J., 14th. January, 1959. *(Continued)*

the share of their father, Nevzat. In section 44 (a) reference is made as to pre-deceased's parent being represented by their living descendants. This is quite in line with the principle of representation and indeed both the Stroud's Judicial Dictionary and Wharton's Law Lexicon in defining the term per stirpes supports this view.

Stroud's Judicial dictionary. Vol. 3, 3rd Edition, at p. 2148 states:

> "PER STIRPES. 1. A distribution of property 'per stirpes and not per capita' means that all the beneficiaries will not, necessarily or probably, take equal shares, but that the property is to be divided into as many parts as there are stock and each stock will have one, and only one, of such parts, though such stock may consist of many persons whilst another may only consist of one person; e.g. a gift to A for life, remainder to his children living at his death and the issue then living of his then deceased children 'per stirpes' and not 'per capita'; A had six children, five of whom died in his life time each leaving issue living at A's death, and one child survived him; the stirpital distribution is into six parts, one of which goes to A's surviving child, and one to and among the issue (however numerous) of each of the five deceased children. Cp. PER CAPITA.
>
> 2. Where a distribution of property amongst a CLASS embracing descendants' is to be per stirpes the principle of representation will be applied through all degrees, children never taking concurrently with their parents..."

In Wharton's Law Lexicon, 14th Edition, p. 760 it is stated:

> "Per stirpes: (by the right of representation - literally, according to the stocks). See PER CAPITA."

If section 51 was read in isolation of other sections the trial Court might have come to the conclusion they arrived at as indeed they were not bound by the English Law of distribution or legislation relating to intestacy. But the respondents being entitled per stirpes to the share of their deceased father they could not be considered entitled to obtain his share which for the purpose of ascertaining it is subject to the provisions of section 51, free from any deduction in respect of any portion advanced to

the said father by the intestate. Indeed we would have expected express provision if the grand-children who received per stirpes the share of a pre-deceased parent would have been exempted from bringing into hotch pot any property received by way of advancement etc. by their parent from the intestate, the grandfather. Let us consider similar legislation in England which contains similar provisions to sections 46 and 49.

Section 47 (1) (i), of the Administration of Estates Act, 1925, reads as follows:

> "(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:-
> (i) In trust, in equal shares if more than one, for all or any of the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking."

Section 47 (1) (i) contains terms similar to section 49 of our Wills and Succession Law. It enacts in general terms that the issue of a predeceased parent will receive his, the parents' share. In neither sections mention is made that the issue who receives per stirpes the share of their father will have to account for advances made to the predeceased parent. In other words in this respect there is complete similarity between section 49 of our Law and section 47 (1) (i) of the English Act.

In Williams on Executors, 2nd Volume, at p. 1044 the effect of section 47 (1) (i) of the Act is considered and it is stated:

> "It is only the children who are expressly made to account. Since, however, the issue take "the share which their parent would have taken, if living at the death of the intestate" they must account for advances made by the intestate to the child whose share they take."

In the Supreme Court of Cyprus.

No. 9. Judgment of Zekia, J., 14th. January, 1959. *(Continued)*

If there was no express provision in our Law to guide us on this matter the principle of hotch pot as one of the doctrines of equity would have been applied by virtue of section 33 (1) of the Courts of Justice Law, 1953. "Equity always presumes that a father intends to preserve peace among his children by giving them portions as nearly equal as they may be rendered" (See p. 451 of Modern Equity, 7th Edition).

It has been argued that the respondents as grand children could not inherit by representation because if that was the case they would have been liable for the debts of their deceased parent.Here we are concerned with the determination of the share only and to that extent the grandchildren receive by right of representation they may inherit in their own right; that is beside the point. What is material here is what is the share they inherited and how that share is to be ascertained. For these two points the principle of representation applies.

We are of the opinion, therefore, that this appeal should be allowed with costs of appeal but the direction as to costs in the Court below to stand.

(Sd) M. Zekia,
Judge of the Supreme Court.
(Sd) C. Zannetides,
Judge of the Supreme Court.

14th January, 1959.

No. 10. Application for leave to appeal to Her Majesty in Council. 5th February, 1959.

No. 10

Applicatian of plaintiffs for leave to appeal to Her Majesty in Council

IN THE SUPREME COURT. Civil Appeal No. 4264.
DISTRICT COURT OF PAPHOS
REGISTRY OF PAPHOS Action No. 1202/56.

Between:

ZALIHE VELI AND OTHERS of Polis Plaintiffs,

and

SEVIM ISMAIL AND OTHERS of Chrysochou Defendants.

APPLICATION OF RESPONDENTS (PLAINTIFS).

In the Supreme Court of Cyprus.

No. 10. Application for leave to appeal to Her Majesty in Council. 5th February, 1959. *(Continued)*

THE HUMBLE PETITION of the plaintiffs (hereinafter referred to as "your petitioners" showeth as follows:-

1. On the 20th October, 1956, your petitioners instituted in District Court of Paphos Action No. 1202/56 whereby your petitioners claimed "(1) That Sevim, Katri, Mensur and Emine Ismael be ordered to bring into hotch pot whatever they received from their deceased predecessor Ismael Katri Bey during his life time or that they be excluded from taking any share in the inheritance of the said deceased; (2) Alternatively a declaration by the Court that they are not entitled to take any share in the estate of the said deceased Ismael Katri. (3) That the defendants be ordered to give an account of the mesne profits and all crops and income derived and enjoyed by them from the said estate since the death of the deceased. (4) The costs and expenses of the present action."

2. The defendants duly appeared and your petitioners delivered their Statemen tof Claim on the 12th December 1956, praying as stated in paragraph (1) hereof: On the 12th January, 1957, the defendants delivered their Defence and Counterclaim, and on the 21st January, 1957, your petitioners delivered their Reply and Defence to Counterclaim, which closed the pleadings.

3. The trial of the said action commenced on the 16th March, 1957, and after several adjournments, the Court sat on the 18th April, 1958, to hear legal arguments on the question whether your petitioners, in reckoning their share in the estate of Ismael Katri Bey, were bound to bring into account the immovable and movable property received by their father during his lifetime from their grandfather Ismael Katri Bey.

4. No evidence was given in the case.

5. The judgment of the District Court, which had been reserved, was delivered on the 27th June, 1958. The Court held that your petitioners were entitled to succeed to the property of Ismael Katri Bey without bringing into account the movable and immovable property received by their father from their grandfather Ismael Katri Bey. The Court ordered the costs of both parties to be paid out of the estate of Ismael Katri Bey.

6. The defendants appealed to this Court from the judgment of the District Court of Paphos, which appeal was heard on the 3rd December, 1958, and on 14th January, 1959, judgment was given, allowing the appeal of

In the Supreme Court of Cyprus.

No. 10. Application for leave to appeal to Her Majesty in Council. 5th February, 1959. *(Continued)*

the defendants, and ordering your petitioners to pay the costs of the Appeal.

7. Your petitioners crave leave to refer to your petitioners' said action, to the pleadings in the case and to the aforesaid judgment of this Court, and generally to all other proceedings in the said action.

8. Your petitioners feel themselves aggrieved by the judgment of this Court referred to in paragraph (6) hereof, and are desirous of appealing therefrom to Her Majesty in Her Privy Council.

9. The said judgment of the Supreme Court is a final judgment where the amount in dispute on appeal amounts to or is of the value of £300 sterling and upwards and the appeal involves directly or indirectly a claim or question to or respecting property or a civil right amounting to or of the said value of £300 and upwards.

YOUR PETITIONERS therefore pray:

1. That this Honourable Court will be pleased to grant to your Petitioners leave to appeal from the said judgment dated the 14th January, 1959, to Her Majesty in Her Privy Council.

2. That this Honourable Court will be pleased to direct that the execution of the aforesaid judgment of this Court shall be suspended pending the appeal to Her Majesty in Council.

3. That this Honourable Court will be pleased in case the said judgment is directed to be carried into execution to direct that the Defendants shall, before the execution thereof, enter into good and sufficient security to the satisfaction of this Honourable Court, for the due performance of such Order as Her Majesty in Council may think fit to make thereon.

4. That this Honourable Court will fix the kind and amount of the security and the period within which such security is to be furnished.

5. That this Honourable Court will fix the time or times within which your petitioners shall take the necessary steps for the purpose of procuring the preparation of the record for despatch to England and to give the necessary directions accordingly.

6. That this Honourable Court will make such further or other order in the said premises as may seem just.

And your petitioners will ever pray.....

The Cyprus (Appeal to Privy Council) Order in Council, 1927, Clauses 3, 5, 6, 7 et seq.

Nicosia, 5th February, 1959.

For Applicants,
(Sgd) Ahmed Izzet,
Advocate.

In the Supreme Court of Cyprus.

No. 10 *(Continued)*

No. 11

Affidavit in support of Petitioners' application for leave to appeal to Her Majesty in Council.

No. 11 Affidavit in support of Application for leave to Appeal to Her Majesty in Council. 5th. February, 1959.

On this 5th day of February, 1959, Zalihe Veli of Polis, being duly sworn, makes oath and states as follows:-

1. I say that the statements of fact made in the Petition filed herein (and marked "A" on the 5th day of February 1959) for leave to appeal to Her Majesty in Her Privy Council against the judgment of this Honourable Court dated the 14th January, 1959, is true in substance and in fact.
2. The matter in dispute on the appeal in respect of which the said judgment was made is of the value of over £300.

Dated this 5th day of February, 1959.

Her mark Zalihe Veli.

Sworn and signed before me this 5th day of February, 1959, etc.

(Sd) A. S. Olympios
Registrar Supreme Court.

No. 12.

ORDER granting conditional leave to appeal to Her Majesty in Council.

No. 12 Order Granting Conditional leave to appeal to Her Majesty in Council. 1st April, 1959.

UPON the petition of the above-named plaintiffs filed on the 5th day of February, 1959, praying for leave to appeal to Her Majesty in Her Privy Council from the judgment of the Supreme Court pronounced herein on the 14th January, 1959, coming on to be heard before this Court, and upon hearing what was alleged by Mr. Ahmed Izzet, of counsel for the petitioners-plaintiffs, and M. Fuad Bey, of counsel for the respondents-defendants herein, THIS COURT DOTH GRANT the petitioners con-

In the Supreme Court of Cyprus.

No. 12
Order Granting Conditional leave to appeal to Her Majesty in Council. 1st April, 1959. *(Continued)*

ditional leave to appeal from the said judgment to Her Majesty in Her Privy Council, subject to the following conditions:-

(A) That the sum of £300 be lodged as security by the petitioners in Court within two months from the date hereof for the due prosecution of the appeal and for the payment of such costs as may become payable to the respondents in the event of petitioners not obtaining an order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering the appellants to pay the respondents' costs of the appeal (as the case may be); and

(B) That the record be prepared within three months from to-day.

Dated the 1st day of April, 1959.

(Sd) M. Zekia,
J.

No. 13

No. 13
Order Granting final leave to appeal to Her Majesty in Council. 4th. July, 1959.

ORDER grating final leave to appeal to Her Majesty in Council.

UPON the application of the above-named respondents for final leave to appeal to Her Majesty in Her Privy Council from the judgment of this Court dated the 14th. January, 1959, coming on for hearing before this Court and upon hearing Mr. O. Beha, counsel for the appellants, and Mr. A. Izzet, counsel for the respondents, THIS COURT being satisfied that the conditions contained in an order of this Court made on the 1st day of April, 1959, have been complied with, DOTH GRANT final leave to appeal.

Dated this the 4th day of July, 1959.

(Sd) M. Zekia,
J.

No. 14.

In the Supreme Court of Cyprus.

No. 14. Letter referred to by Zenon, P.D.C., at page 7 of Record of Proceedings.

Letter referred to by Zenon P. D. C. at page 7 of the Record of the Proceedings.

Dear Colleague,

This is to notify you that I have been instructed by my client to inform you that she intends to dispute the whole case and not only the legal arguments in the above intituled action.

The grounds for the objection is that the declaration made by the parties before the Court on 16.3.1957, does not include the whole claim of the plaintiff. By mistake (1) value of the property that Sevim Ismail is supposed to have received in shown to be £1200, in fact this rep - resents the value of the immovable property and does not include the movables which worth £600.- all amounting to the sum of £1800.- (2) Mensur Ismail received by way of advancement i.e. education, a sum of about £1200, (3) Kadri Ismail benefited from the deceased during his life-time for about £100.- for his Medical treatment and operations in Cyprus and Instanbul, Turkey.

In respect of the last pragraph of the declaration re - corded in Court, the plaintiff denies any agreement or lia- bility as to the properties received by Nevzat Ismail.

(Sd) A. A. Altay
Advocate for plaintiff.

This prepared by A. A. Altay, advocate for the plaintiff and delivered to M. Fuad Bey, advocate for the defendants on this 14th day of January, 1958.

Filed on the 15th January, 1958.
(Sd) E. Simillides
For Registrar.