[ZEKIA, J. and ZANNETIDES, J.]

SEVIM ISMAEL AND OTHERS,
Appellants (Defendants).

v.

ZALIHE VELI AND OTHERS,
Respondents (Plaintiffs).

(Civil Appeal No. 4264).

Administration of Estates—Hotchpot—Intestacy—Property given by way of advancement to predeceased child—Whether brought into account by children of recipient upon distribution of intestate's residuary estate—Wills and Succession Law, Cap. 220, sections 44 (a), 46, 49, 51 and Schedule 1.

A person died in 1954 intestate leaving a widow, several children and the children of a predeceased son. On the question whether in reckoning the share of the grandchildren in the intestate's estate, property given by the intestate to their father by way of advancement should be brought into account, the Supreme Court, reversing the judgment of the Lower Court:-

Held: The combined effect of s. 44 (*a*), s. 46, s. 49 and s. 51 of the Wills and Succession Law and Sch.1 thereto was that a person who succeeded to a share in the estate of the deceased intestate as a child of a father who predeceased the intestate was bound to bring into account any property which the predeceased received from the intestate in his lifetime by way of advancement.

Per Curiam: If there were no express provision in our law to guide us on this matter the principle of hotchpot as one of the doctrines of equity would have been applied by virtue of s. 33 (1) of the Courts of Justice Law, 1953.

Appeal allowed.

Editor's Note: The Respondents appealed against the judgment of the Supreme Court to the Judicial Committee of the Privy Council. The judgment of the Privy Council, delivered on the 27th July 1960, is reported in this volume immediately after the judgment of the Supreme Court (*post*). The P.C. upholding the decision of the Supreme Court dismissed the appeal.

Appeal.

The intestate's children, the defendants, appealed against the decision of the full District Court of Paphos (Zenon, P.D.C., and Attalides D.J.) dated June 27, 1958, in Action No.1202/56, that in reckoning the share of the grandchildren in the intestate's estate the property received by their father during the lifetime of the intestate by way of advancement should not be brought into account.

M. Fuad Bey for the appellants.

Chr. Mitsides (*A. Izzet* with him) for the respondents.

Cur. adv. vult.

The judgment of the court was delivered by:

ZEKIA, J : The present appeal arises from the interpretation and combined effect of sections 44(a), 49 and 51 of the Wills and Succession Law (Cap. 220).

A certain Ismael Kadri of Polis-tis-Chrysokhou, 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, 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, namely, whether the respondents as the children of a predeceased parent were bound to bring into hotchpot the advance made by the intestate to their parent in calculating the share of these two children in the estate of their grandfather, the said intestate.

The trial Court found that the respondents were entitled 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 received by their deceased parent from the common ancestor. In other words that they are entitled to the share of their parent undiminished by any gift or advancement, 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 section combined (referring apparently to sections 44 (a), 46, 49 and 51) is to the effect 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 deceased is regulated 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 plaintiffs inherit from their grandfather, Ismael Kadri, 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 Kadri. 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 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 Kadri Bey without bringing into account the movable and immovable property received by their father during his lifetime from their grandfather Ismael Kadri".

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 columns of the First Schedule to this Law:.....".

"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 life-time."	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 immovable property shall be brought into account if the deceased has left a will and has made therein specific provision that such movable property or immovable property shall not be brought into account".

Section 49 of the Wills and Succession Law in plain and unambiguous language enacts that if a father dies intestate and leaves children and grandchildren and the father of the grandchildren pre-deceases him such grandchildren will be entitled to receive *per stirpes*, that is, collectively in equal 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 suggests 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 we 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. Sections 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 the share of their father, Nevzat. In section 44(a) reference is made to a pre-deceased parent being represented by his or her living descendants. This is quite in line with the principle of representation and indeed both Stroud's Judicial Dictionary and Wharton's Law Lexicon in defining the term *per stirpes* support 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 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 ; 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.
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> (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 grandchildren who received *per stirpes* the share of a pre-deceased parent would have been exempted from bringing into hotchpot any property received by way of advancement etc. by their parent from the intestate, the grand-father. 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 section 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".

If there were no express provision in our Law to guide us on this matter the principle of hotchpot 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 Hanbury, 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.

Appeal allowed.