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that the plaintiffs are not entitled to any share in it. Costs of appeal of both parties to be paid out of the estate.

Solicitors, for the appellant, *Creagh & Creagh.*

Solicitors, for the respondents other than the trustees, *Windeyer & Williams.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MOCATTA . . . . . APPELLANT;

AND

MOCATTA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—Gift to "representatives" of deceased person.

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SYDNEY, *April* 16, 19.

Griffith C.J., Isaacs and Rich JJ.

By his will a testator directed that during the lives of his children and the lives and life of the survivors and survivor of them his trustees should pay the annual rents and profits of certain land to and amongst the children who should be alive and the executors or administrators of such of them as should happen to die, "the representatives of any deceased" child "to receive the part or share to which such" child "if living would be entitled."

Held, that the word "representatives" meant the executors or administrators of any deceased child.

Decision of the Supreme Court of New South Wales (*Harvey* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

By his will, dated 16th February 1859, Henry Osborne, deceased, devised certain land to his trustees, and as to it directed as follows:—"I direct that during the lives of my sons and

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daughters (except my sons James and Francis) and the lives and life of the survivors and survivor of them my said trustees or trustee shall pay the annual rents proceeds dues and profits to arise from the said lands or parts or shares of land to and amongst all and every my sons and daughters (except my sons James and Francis) who shall be alive and the executors or administrators of such of them (except my sons James and Francis) as shall happen to die the representatives of any deceased son or daughter to receive the part or share to which such son or daughter if living would be entitled."

One of the sons of the testator was Ben Marshall Osborne.

An originating summons was taken out by Hugh Osborne Mocatta, an infant, who was beneficially entitled under the will of Ben Marshall Osborne, and the Perpetual Trustee Co. Ltd., executor and trustee of that will, for the purpose of obtaining the construction by the Court of the above-mentioned clause of the will. Among the defendants to the summons was Ada Frances Mocatta, who was the mother of the plaintiff, and one of the daughters of Ben Marshall Osborne, and she was made a representative of the next of kin of Ben Marshall Osborne.

The originating summons was heard by *Harvey* J., who, following a previous unreported decision of the Court, held that in the case of Ben Marshall Osborne the moneys payable from time to time under the above-mentioned gift were to be held by his trustees upon the trusts declared in his will.

From that decision Ada Frances Mocatta now appealed to the High Court.

Lucy Throsby Manning, one of the class represented by Ada Frances Mocatta, had expressed her desire not to be a party to the appeal.

Loxton K.C. (with him *W. A. Parker*), for the appellant.

Knox K.C. (with him *R. H. Long Innes*), for the respondents, were not called upon.

During argument reference was made to *Jarman on Wills*, 6th ed., p. 1616, note (*y*); *In re Bywater*; *Bywater* v. *Clarke* (1);

(1) 18 Ch. D., 17.

Walker v. *Marquis of Camden* (1); *In re Crawford's Trusts* (2); *In re Ware*; *Cumberlege* v. *Cumberlege-Ware* (3); *Walter* v. *Makin* (4); *In re Horner*; *Eagleton* v. *Horner* (5).

GRIFFITH C.J. The only question raised on this appeal is as to the construction of certain words in a will made in 1858. The testator directed that during the lives of all his sons (except James and Francis) and his daughters, the trustees of his will should pay the annual rents and profits of certain land "to and amongst all and every my sons and daughters (except my said sons James and Francis) who shall be alive and the executors or administrators of such of them (except my said sons James and Francis) as shall happen to die the representatives of any deceased son or daughter to receive the part or share to which such son or daughter if living would be entitled."

It is contended by the appellant that the words "the representatives of any deceased son or daughter" do not mean the executors or administrators to whom the annual rents and profits were directed to be paid, but some other persons, children or next of kin, or some of them.

The general rule is that the term "representatives" when used in a will means, in the absence of context to the contrary, executors or administrators of the person represented. The law is summed up by *Stirling* J. in *In re Ware*; *Cumberlege* v. *Cumberlege-Ware* (3). The only question in this case, therefore, is whether there is a context which indicates that the testator intended that the word was not to be taken in its primary legal sense. It is not necessary to refer to the different provisions of the will. It is sufficient to say that there is no such context. So far, indeed, as the context is relevant it goes to confirm the *primâ facie* inference that the testator intended that the word should bear its primary meaning.

The appeal therefore fails.

ISAACS J. I quite agree, and will only add that the word "receive" is correlative to the word "pay." The trustees are to

(1) 17 L.J. Ch., 488.
(2) 2 Drew., 230.
(3) 45 Ch. D., 269.
(4) 6 Sim., 148.
(5) 37 Ch. D., 695.

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Rich J.

pay to the representatives, and the representatives are to receive from the trustees.

RICH J. I agree. I can find no indication in the whole context of the will that the testator's intention was to use the word "representatives" in any other than its ordinary sense.

Appeal dismissed with costs. The difference between party and party costs and solicitor and client costs to be retained out of the shares of the daughters other than Lucy Throsby Manning.

Cons *Keehn v Maib* (1992) 1 TasR(NC) N7

Solicitor, for the appellant, *F. C. Petrie.*
Solicitors, for the respondents, *Wilkinson & Osborne.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FISK . . . . . APPLICANT;
PLAINTIFF,

AND

ANDERSON AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 22.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Practice—Appeal to High Court—Appeal in formâ pauperis—Appeal not instituted—Reducing or dispensing with security—Res judicata—Rules of the High Court 1911, *Part I., Order III., r.* 1; *Part II., Sec. III., r.* 12; *Sec. V., r.* 1.

On an application to reduce the amount of or to dispense with the security for the costs of an appeal to the High Court from the Supreme Court of a State, where a similar application has already been refused, the matter is *res judicata.*