Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

1909.
January 12.

In the Matter of the Estate of the late PHILIP AMBROSE of Kandy, deceased.

WISE *et al. v.* MUNIAREM.

D. C., Kandy, 2,079.

Inheritance by grandchildren—Per stirpes—Per capita—*Matrimonial Rights and Inheritance Ordinance (No. 15 of 1876), ss.* 28, 34. Where a person dies leaving only grandchildren, such grandchildren take *per stirpes* and not *per capita.*

APPEAL from a judgment of the District Judge of Kandy (F. R. Dias, Esq.). The facts material to the report sufficiently appear in the judgments.

Van Langenberg (with him *H. J. C. Pereira* and *H. Jayawardene*), for the administrator, appellant.

Bawa, for the petitioners, respondents.

Cur. adv. vult.

January 12, 1909. HUTCHINSON, C.J.—

This is an appeal by the administrator of the estate of the late Philip Ambrose, against an order for a judicial settlement of his accounts. The facts are fully set out in the judgment under appeal and in the judgment of Wendt J. on a former appeal in the same matter, and I will confine myself to dealing with the points argued on the hearing of this appeal.

The first and most important question is whether the intestate's grandchildren inherited *per stirpes* or *per capita.* His two children,

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Martin and Isabella, both died in his lifetime. Martin left six children; Isabella left two; and all these eight grandchildren survived the intestate. Neither the administrator (who was Isabella's husband), nor Agnes (who was Martin's widow), inherited any share from the intestate. When this matter first came before the District Court, the Judge, Mr. Dias, held that the grandchildren took *per capita*. On appeal from his order, this Court, without deciding that question, set the order aside, on the ground that all the parties interested were not before the Court, and remitted the case in order that the respondents' application might be dealt with as an application for a judicial settlement, all parties interested being cited before the hearing. This order on appeal was made on December 19, 1905. The matter came again before Mr. Templer, District Judge, in September, 1907; he settled issues, the first of which was: Did the grandchildren take *per stirpes* or *per capita?* He took up that issue first, and on September 25, 1907, he ruled that they took *per stirpes*. The further hearing was adjourned to January 21, 1908, when the case came before another Judge, Mr. Dias, who proceeded to deal with the issues which had been settled by Mr. Templer. And after taking evidence, he made the order now under appeal. He first held, without making any reference to Mr. Templer's ruling of September 25, that the heirs took *per capita*.

It has not been contended that he had power to over-rule his predecessor's ruling of September 25. But if he had adopted it, it would have been open to review on this appeal, and we must now decide whether the inheritance is *per stirpes* or *per capita*. This depends on the provisions of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876. Section 28 enacts that "children, grandchildren, and remoter descendants are preferred to all other in the estate of their parents; all the children take equally *per capita*, but the children or remoter issue of a deceased child take *per stirpes* or by representation." And section 34 enacts that "except when otherwise expressly provided, if all those who succeed to the inheritance are equally near in degree to the intestate, they take *per capita* and not *per stirpes*." These enactments govern the question. Mr. Templer says that it was stated at the Bar that the Ordinance, so far as inheritance is concerned, was merely declaratory of the common law, and he finds the rule of the common law stated in *Thompson's Institutes;* but I do not think that we can go into that, for the Ordinance recites that it is intended to amend the law relating to inheritance. And section 40 of the Ordinance, enacting that in questions where the Ordinance is silent the rules of the Roman-Dutch Law are to govern, has also no application, because this is not a question on which the Ordinance is silent.

It is very strange that on a question of such common occurrence there is no decision reported. None, however, has been quoted to us. In my opinion section 28 means what it means to say, that

grandchildren take *per stirpes* in every case; and I would make a declaration accordingly.

The respondents are the husbands and the two children of Kate (one of Martin's children). The administrator must account to them for their share on the footing that the children were entitled between them to one-half of Kate's share, which was one-twelfth (the other half being that to which their father became entitled on her death). But in taking this account the administrator is entitled to credit for any payments made in Kate's lifetime, for it is in evidence that they were made with her express consent and that of her husband, and the latter has not disputed this. And in taking the accounts the administrator is also to be credited with all payments made to any of the heirs for which he has receipts from them.

The appellant's counsel points out that the respondents are claiming as heirs of Kate (who survived the intestate), and that there is no evidence that her estate was worth less than Rs. 1,000, and no administration has been taken out to her. I think that at this late stage of the proceedings, and considering the probability that Kate's estate was not worth Rs. 1,000, we can dispose of that objection by directing the District Court to take evidence on the point, and to require, if it is found necessary, that administration to her estate be taken out before making any order for payment to her representatives. Paragraph (2) of the judgment under appeal seems to be right. As to paragraph (3), I think that there is sufficient evidence of the receipt by Kate of her share of the money and jewellery, without any written receipt. The administrator should be credited with that in his account. Paragraph (4) I think is right. Paragraph (5), I think there is sufficient evidence that the payments to Kate's mother in Kate's lifetime were made with her consent, and the administrator should be credited with them. Paragraphs (6), (7), (8), and (9) I think are right. Paragraph (10) is right, except that the share of the administrator's son John was one-fourth.

The order of the District Court should be amended in accordance with the above directions. No fraud or wilful misconduct by the administrator has been alleged. But he was in the wrong, and I would not alter the order of the District Court as to costs. I would make no order as to the costs of this appeal.

WENDT J.—

I entirely agree with the decision of the Chief Justice upon each of the points submitted to us at the argument of the appeal. I desire to add a few words on one of these points only, namely, that as to the construction of The Matrimonial Rights and Inheritance Ordinance, 1876. I felt a difficulty in accepting the contention that where the heirs are all grandchildren they must take *per stirpes*, because although section 28 of the Ordinance by itself appeared

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clearly to lay down that rule, yet it was obvious that the Legislature had adopted the language of Henry's translation of *Vanderlinden, Book 1., ch. X., sec. 2.* Vanderlinden in that passage was laying down a principle common to both the North Holland and South Holland systems of inheritance, and my difficulty arose from the impression I had that the Roman-Dutch Law—or, at all events, the North Holland system which is adopted in our Ordinance—recognized a division *per capita* in the case of descendants of the intestate as well as in the case of collaterals. Had that impression been correct, there would have been some colour for applying section 34 of the Ordinance to the present case. But a careful study of *Vanderlinden* and *Grotius* has made it clear that in the case of descendants representation was the rule *ad infinitum*, division *per capita* being entirely excluded (see especially *Grotius' Introduction 2, 28, 13, Maardorp's translation, 2nd Edition, p. 133*). Accordingly, I think that we must give effect to the plain words of section 28, and hold that the division among the grandchildren must be *per stirpes*. The learned District Judge (Mr. Dias) in applying section 34 has ignored its opening words: "except when otherwise expressly provided." Section 28 is an express provision otherwise. I agree with the order as to costs proposed by the Chief Justice.

Judgment varied.