1936 *Present :* **Dalton S.P.J., Akbar and Poyser JJ.**

VANDERSTRAATEN *v.* EATON.

67—D. C. (Inty.) Kandy, 5,127.

Inheritance—Uncles and aunts—Includes those of half blood—Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876, s. 35.

The expression "uncles and aunts" occurring in section 35 of the Matrimonial Rights and Inheritance Ordinance includes uncles and aunts of the half blood.

CASE referred to a Bench of three Judges on a construction of section 35 of the Matrimonial Rights and Inheritance Ordinance. The question arose on the administration of the estate of the late Eva Eaton, who died unmarried, intestate and without issue. The point for determination was whether the words "uncles and aunts" in the section mean uncles and aunts of the full blood only or whether they include uncles and aunts of the half blood.

H. E. Garvin (with him *Ameresinghe* and *Mackenzie Pereira*), for appellant.—Some of the respondents are the descendants of the paternal grandfather of the deceased by a second marriage. By a third marriage, there is also a child of the paternal grandfather of the deceased, who is a step aunt. We say that the respondents of both categories do not succeed. The learned Judge is wrong in holding that the respondents are entitled to succeed. The question of heirship must be regulated by the provisions of Ordinance No. 15 of 1876. The Common law does not apply, the legislature has not adopted the Common law so far as this particular point is concerned; no doubt in the case of an omission one is entitled to look into the Roman-Dutch law, but this is not a case of omission. Here there is a deliberate departure from the Common law. Prior to the Ordinance No. 15 of 1876, the rules of intestate succession as obtaining in North Holland as laid down in the Placaat of 1599 (*vide Vanderstraten's Appendix, page 17 at 20*), obtained in Ceylon. Ordinance No. 15 of 1876 adopted some of the provisions, and disregarded others. In section 35, provision is made for children of the half blood, uncles and aunts are provided for, no provision for uncles and aunts of the half blood. Section 35 clearly shows that the legislature changed the Common law and omitted uncles

and aunts of the half blood from participating. Uncles and aunts referred to in the section can only mean the brothers and sisters of the parents. They cannot include half uncles and half aunts.

H. V. Perera (with him *Van Geyzel*), for respondents.—One cannot disregard the source from which the legislature has taken the provisions. The law of North Holland drew no distinction between the full and half blood; for the purposes of inheritance, these were treated alike. Very strong reasons must be urged in order to justify a departure of the underlying principle, an uncle is an uncle whether an uncle or a step uncle. One cannot treat the two differently. In principle the law of North Holland differed from the law of South Holland. According to the South Holland law, the devolution of property was based on the principle that the property should go back to the source from whence it came, the half blood always taking with the half hand—vide *Grotius II., 28, 6; Lee's Roman-Dutch Law, p. 359.*

Section 35, uncles and aunts failing, provides the inheritance for their children, also great uncles and aunts to be with them *per capita.* This further supports the view that uncles and aunts include those of the half blood.

February 12, 1936. DALTON S.P.J.—

This appeal, which has been referred to a Bench of three Judges, raises a question of construction of section 35 of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876. The question has not been an easy one to answer, but the argument of counsel has been of great assistance to the Court. In the reference to this Court we are asked to say whether the expression "uncles and aunts", where it occurs in section 35, includes uncles and aunts of the half blood.

The question arises out of the administration of the estate of the late Eva Eaton, who died unmarried, intestate and without issue. She left surviving her the following groups of relatives:—

(1) The descendants of her father's full brother, Archibald Eaton, her father and this uncle being children of her paternal grandfather by his first marriage.
(2) Certain full brothers and sisters of her mother and children of deceased brothers and sisters of her mother.
(3) Descendants of her paternal grandfather by his second marriage, called in the course of the case descendants of step aunts.
(4) A child of her paternal grandfather by his second marriage, also called in the course of the case step aunt.

It is conceded that the persons set out in groups (1) and (2) are heirs of the deceased, under the provisions of section 35 of the Ordinance. The question to be answered is whether the persons in groups (3) and (4) are also entitled to succeed as heirs, being an aunt of the half blood and descendants of aunts of the half blood only. Do the words "uncles and aunts" in section 35 mean uncles and aunts of the full blood only, or do they include uncles and aunts of the half blood?

The learned Judge in the lower Court has decided the question by applying the Common law, under the provisions of section 40 of the Ordinance, coming to the conclusion that section 35 is silent as to the rights of the half blood, and therefore he holds that the law of the North Holland, as set out in the Placaat of 1599, governs the case. He decides the question in this way, but appears to be of opinion also, though not deciding the question on that ground, that the words "uncles and aunts" as used in section 35 include uncles and aunts of the half blood. If he is of that opinion, and if it is correct, there is no room for the application of the provisions of section 40 of the Ordinance.

The law of inheritance which was applied in Ceylon, prior to the Ordinance No. 15 of 1876, from the year 1822 up to 1871 is found in the Aasdoms law, the law of North Holland, as set out in the Placaat of December, 1599 (see *Dona Clara v. Dona Maria* [1]). In 1871, however, the Appeal Court judgment of this Court in C. R. Colombo, 76,626 (*Vanderstraaten's Reports 172*) threw doubt upon the question, indicating that the South Holland law (Schependoms law) was in force here. It is of interest to note that both South Africa and British Guiana had in the course of time suffered from similar difficulties. The decision in the matter under consideration in 1871, however, was the same, whichever law was applied. The question was settled by the enactment of Ordinance No. 15 of 1876. So far as it deals with the question of inheritance, it enacts with one or two amendments the provisions of the law of North Holland as set out in the Placaat of 1599, and provides in section 40 that in all questions relating to the distribution of the property of an intestate, if the Ordinance is silent, the rules of the Roman-Dutch law as it prevailed in North Holland are to govern and to be followed.

Section 35 of the Ordinance is as follows:—

> "All the persons above enumerated failing, the inheritance goes first to the nearest in the ascending line *per capita,* although it should happen that on the one side both the grandfather and the grandmother, and on the other side only one of these parents should be alive. Afterwards to uncles and aunts and the children of deceased uncles and aunts *per stirpes.* Uncles and aunts failing, then to their children and also great uncles and aunts with them *per capita*".

The North Holland (Aasdoms) law on this question is set out in section 9 of the Placaat of December 18, 1599, which is in the following terms, following the translation in *Vanderstraaten's Reports*:—

> "9. All the aforesaid persons being extinct, in such cases uncles and aunts shall succeed *per capita* and with their children in the first degree by representation, to all the goods without any distinction, whether the uncles and aunts are related to the deceased's father and mother from half or full blood".

The next paragraph is as follows:—

> "10. In case there may be no uncles and aunts, those who are nearest related to the deceased by blood shall succeed *per capita* to all the goods without any distinction whether or not the relationship is

[1] (*1822*) *Ramanathan's Reports 33.*

descending *from* the *full* or *half* brothers, or sisters; and accordingly grand uncles and grand aunts together with full cousins shall succeed and divide the same *per capita* ".

The argument advanced before us on behalf of the appellant, the administrator, was that one must look to the words used in section 35 of the Ordinance to answer the question before the Court. That section omits any reference to uncles and aunts of the half blood, and it must, it is argued, in the circumstances, be taken to show a definite intention to change the law; that the language of the section is plain and the words " uncles and aunts " normally mean a father's or mother's full brothers and sisters.

In construing section 35 of the Ordinance one is entitled to look at the law whence the provisions of the section are derived, for it is relevant to the question to ascertain whether, on the subject of inheritance, the Ordinance is re-enacting the Common law (the law of North Holland) or amending it.

Under the old North Holland law there was no distinction between the whole and the half blood, whereas under the South Holland law, on the principle that the property must go to the side from whence it came (*Grotius II., 28, s. 6*) the half blood always took with the half hand. It has been pointed out by Professor R. W. Lee (*Roman-Dutch Law, p. 359*) that the Placaat of 1599, in trying to supply a Common law for North Holland, made changes in the old Aasdoms law in the direction of the Schependoms law, whereas the Ordinance of 1580 departed from the old Schependoms law, in one respect only, namely, to restrict representation in the collateral line to the fourth degree. Subject to the changes made in 1599, however, the underlying principle of the North Holland law remained the same. Under the North Holland law then, all earlier heirs failing, uncles and aunts succeeded *per capita*, whether they were of the half or whole blood. This is enacted in section 9 of the Placaat, which made no change in the latter respect from the old Aasdoms law.

It has been suggested that the draftsman of Ordinance No. 15 of 1876, presumably the Attorney-General of the day, when he came to frame section 35 of the Ordinance, intentionally omitted the words " whether the uncles and aunts are related to the deceased's father or mother from half or full blood " from the section, and intended to provide for uncles and aunts of the full blood only. I have no doubt, having regard to the underlying principle of the old law, that had he intended to make that change, he would have made it in clear and express terms. No reason has been advanced why in this section it should be thought desirable to make such a change; on the other hand, if any such change has been made, the effect has been to cut out uncles and aunts of the half blood altogether, since by section 35 uncles and aunts failing, the inheritance falls to their children and also great uncles and aunts with them *per capita*, there being no succession here by representation beyond the fourth degree.

It has been noted in the lower Court that Van der Linden (*Institutes, bk. I., chap. X s. 2*) in commenting upon section 9 of the Placaat of 1599 refers to the succession of uncles and aunts and their children of the

first degree by representation, but omits any reference to the whole or half blood. It has been suggested that this reference may be the source of an error on the part of the draftsman of section 35 in omitting any mention of the half blood. I do not think there is anything in this suggestion. The words used by Van der Linden make it plain that, when dealing with the law of intestate succession, uncles and aunts whether of the half or whole blood are included in the words "uncles and aunts". The addition of the words in section 9 of the Placaat referring to half and whole blood is, if any explanation is required, by way of parenthesis. The omission of the words in section 35, in my opinion, effected no change in the law at all. If the draftsman had Van der Linden before him, he was no doubt using the words in exactly the same way and with the same meaning as Van der Linden.

Although the learned Judge has decided the question before him with the same result, but on other grounds, there is, in my opinion, no room in this case for the application of the provisions of section 40 of the Ordinance.

I would therefore answer the question in the reference as follows: The expression "uncles and aunts" occurring in section 35 of Ordinance No. 15 of 1876 includes uncles and aunts of the half blood. The appeal therefore fails.

In my opinion, this is a proper case in which the costs in the lower Court and of this appeal should be paid out of the estate.

AKBAR J.— I agree.

POYSER J.—I agree.

Appeal dismissed.