1918.

Present: Bertram C.J. and Shaw J.

CADERAMEN *v.* ALLES *et al.*

140—D. C. Colombo, 46,380.

Intestate succession—Person dying intestate leaving one uncle on paternal side and six uncles and aunts on maternal side—Ordinance No. 15 of 1876, s. 35.

A deceased intestate left him surviving seven uncles and aunts and their children: one uncle was on the paternal side, and six uncles and aunts were on the maternal side.

Held, that the paternal uncle got only one-seventh and not one-half.

The words "*per stirpes*" in section 35 of the Matrimonial Rights Ordinance (No. 15 of 1876) governs only the words "children of deceased uncles and aunts," and not the earlier phrase "uncles and aunts" as well.

THE facts appear from the judgment.

Drieberg, for appellant.

Bawa, K.C. (and *Samarawickreme*), for respondent.

Cur. adv. vult.

August 2, 1918. BERTRAM C.J.—

In this case Mr. Drieberg has raised a point which, though barely arguable, is of some historic interest. The case under consideration is that of a deceased intestate who left neither descendants, nor brothers, nor sisters (nor their issue), nor ascendants surviving, but only uncles and aunts and their children. One of the uncles in question was on the paternal side; the other uncles and the aunts (six in number) were on the maternal side. Mr. Drieberg contended that the property in question should be divided equally between the paternal and the maternal heirs. On this footing the paternal uncle would get one-half of the property; on the footing contended for by the other side he would get only one-seventh.

Mr. Drieberg bases this contention upon a sentence in section 35 of the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876: "Afterwards to uncles and aunts and the children of deceased uncles and aunts *per stirpes*." He maintains that the words "*per stirpes*" govern the whole clause, that is to say, not only the phrase "children of deceased uncles and aunts," but also the earlier phrase "uncles and aunts" as well; and that the meaning of "uncles

and aunts *per stirpes* " is that one-half should go to the paternal uncles and aunts (or their children), and one-half to the maternal uncles and aunts (or their children).

The simple answer to this contention is that, if this was what was intended by the Legislature, the expression which it would have used would not have been "*per stirpes*" but "*per lineas.*" See *Voet XXXVIII., 17, 2:—*

Succeditur ab intestato vel in capita, vel in lineas, vel in stirpes . . . . . In capita successio fit, cum pro numero personarum succedentium in tolidem partes hereditas dividitur . . . . . In lineas, cum bona partim paternæ, partim maternæ lineæ defuncti cedunt, licet dispar in utraque linea succedentium numerus sit . . . . . In stirpes denique, cum iure representationis succeditur; quod ius representationis est fictio iuris, qua gradu remotiores subintrant in locum proximioris defuncti . . . . . .

See also *Huber Prælect. Iuris Civilis) III., 9:—*

Hi autem neque secundum capita, nec representatione, bona partiuntur; Nullæ enim hic stirpes sunt, quæ faciunt representationem, Quomodo igitur? secundum lineas.

See also *Van Cleef's Case*, reported in *Vanderstraaten's Reports, page xxvii:* " the succession takes place in three different manners viz., by heads, branches, and lines. " This consideration in itself concludes the point, but as the question is one of some historical interest, it may be well to consider it historically.

For this purpose it is necessary to go back to the 118th Novel of Justinian, which is the foundation of all schemes of intestate succession in countries affected by the Roman law. This scheme of succession may best be understood if it is realized that its originally simple principle, namely, the creation of three successive orders of descendants, ascendants, and collaterals, is modified by the interposition of a fourth and intermediate order between the first and second, namely, that described in French law as the order of " privileged ascendants and collaterals, " that is to say, the father, the mother, brothers and sisters, and their issue. It is the development of the various points arising out of the constitution of this privileged order which gives the only elements of complexity to Justinian's scheme.

Up to this order of the " privileged ascendants and collaterals " no question arises of any competition between the paternal and maternal lines. No one has ever thought of making a distinction between father and mother for this purpose, and brothers and sisters and their issue, in the nature of the case, partake of both lines. But when we come beyond this order to the ordinary ascendants, and after the ordinary ascendants to the ordinary collaterals, the question of the two lines arises. In some degree or other almost all symtems of legislation recognize the principle that the inheritance should be split between the two lines, what is called in

French law *la fente entre les deux lignes*. It was recognized by Justinian himself in the 118th Novel, so far as relates to the ascendants. He provided that where the heirs entitled were grandparents (or ascendants of a remoter degree), half should go to the paternal ancestors and half to the maternal, so that, if, for example, only one paternal grandparent survived but two maternal grandparents, then the single paternal grandparent would take half the inheritance. See (*Corpus Iuris Civilis, III.*) *Nov. CXVIII., 2:* " *ex æquo inter eos hereditas dividitur ut medietatem quidem accipiant omnes a patre ascendentes, quanticumqe fuerint, medietatem vero reliquam a matre ascendentes, quantoscumque eos inveniri contigerit.* " But Justinian did not carry this principle further than the ascendants; he did not apply it to collaterals.

In other systems founded upon Justinian's, however, the principle has been applied to the collaterals also, not as an extension of Justinian's rule, but by virtue of another principle which prevailed as part of the customary law of certain parts of Western Europe (comprising both France and part of the Netherlands), namely, the principle expressed in the maxim " *paterna paternis, materna maternis* "; that is to say, that all the immovables which had descended to the deceased by paternal inheritance should devolve upon the paternal line, and, similarly, all immovables which had descended by maternal inheritance should devolve upon the maternal line.

The inconveniences and restrictions of this rule led to the development of an alternative rule, viz., that the whole inheritance, whether consisting of movables or immovables, or of inherited or acquired property, should be divided in equal halves, one going to the paternal and the other to the maternal line. This result was not attained in France till after the French Revolution in 1794, and it was embodied in the Code Napoleon. In Holland, however, it was attained in 1580, and the Placaat of that year gave it formal shape (see *Vander Linden, X., 1*). It appears, however, that the inhabitants of North Holland (who lived under a special customary law known as the *Aasdomsch Recht* as distinguished from the *Schependomsch Recht* which prevailed in the South of Holland) had no such custom as that expressed in the maxim " *paterna paternis, materna maternis,*" and rejected the placaat of 1580, which gave expression to a development of that principle. To meet their views a new Placaat was passed in 1599 recognizing their own customary law in the districts where it was previously observed, and making no distinction between the paternal and the maternal lines.

During the Dutch occupation of the maritime districts of Ceylon the question arose whether this Placaat of 1599 was in force in Ceylon, or whether Ceylon was governed by the Placaat of 1580. The history of this question will be found in the Appendix to Vanderstraaten's Reports, pages i to xxxi and *A* to *C*. In 1822

the Supreme Court, in a judgment drawn up by the Chief Justice, Sir Hardinge Giffard, came to the conclusion that the Placaat of 1599 was in force in the Colony. In 1871, under the presidency of Sir Edward Creasy, it came to a contrary conclusion. In 1876 (only five years after this latter decision) our own law was codified by the Matrimonial Rights and Inheritance Ordinance, 1876. The question is, which of the two views was the new codifying statute intended to embody? Of that there can be no question. Our statute adopts the North Holland law, and follows closely the phraseology of the statement of that law by *Van der Linden, chapter X.* There may be incidental points in which all the North Holland law is not incorporated, but it is provided 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 be followed.

What, then, were the principles of the two contending systems of law in this point? The law of South Holland is expressed in Article 27 in the Placaat of 1580. See *Vanderstraaten's Reports, Appendix A, page xi :* "The goods of the deceased shall always devolve upon and be inherited by the relation on the father's and mother's side of the deceased by dividing the same exactly into two, without reference or consideration whether the deceased's effects consists in a greater or less proportion of what he inherited from his father and mother respectively."

The law of North Holland, on the other hand, repudiated this division between the two lines altogether. It did not even adopt the principle of Justinian that there should be a division as between grandparents or remoter ascendants. Section 35 of our Ordinance expresses the same repudiation. There is no division between the lines either as regards ascendants or as regards collaterals. With regard to ascendants, this view is expressed; with regard to collaterals, it is implied. If the view contended for by Mr. Drieberg were correct, we should have this extraordinary result, that in a statute obviously intending to adopt the law of North Holland the Legislature expressly repudiated the principle of the division between the two lines in the case of ascendants (where Justinian had adopted it), yet adopted it in the case of collaterals (where the law of North Holland had repudiated it). This clearly was not, and could not have been, the intention of our law.

The appeal, therefore, in my opinion, should be dismissed, with costs.

SHAW J.—I agree.

Appeal dismissed.