RAUBENHEIMER *vs.* EXECUTORS OF VAN BREDA.

The law of this Colony as to intestate succession—Representation, how far allowed amongst collaterals.—Spies *vs.* Spies *commented upon.*

The law of this Colony as to intestate succession is regulated by the Charter granted by the States-General to the Dutch East India Co. on the 10*th of January,* 1661.

By this law, when a deceased leaves neither parents nor descendants him surviving, one half of his property is to go to the next of kin on the paternal side, and the other half to the next of kin on the maternal side.

Representation is not allowed amongst collaterals further than the grandchildren of brothers and sisters and the children of uncles and aunts inclusively.

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In this case the plaintiff G. F. Raubenheimer claimed that, in right of his wife, to whom he was married in community of property, and who was a cousin on the maternal side of the late H. W. van Breda, who had left neither parents nor descendants him surviving, he was one of the heirs *ab intestato* of the said late H. W. van Breda. The question to be decided was the true law of intestate succession in this Colony. Plaintiff maintained that Breda's intestate estate should be divided into two moieties, one moiety to go to the next of kin on the father's side, and the other to the next of kin on the mother's side, the next of kin on each side dividing the moiety apportioned to them *per stirpes.* Defendants held that the whole estate should go to Breda's next of kin, who happened to be the sons of the half-brothers of the deceased on the paternal side. The facts of the case are sufficiently set forth in the judgment of the CHIEF JUSTICE.

Leonard, Q.C., for plaintiff. The *Placaat* passed by the *States-General* of Holland in 1661, regulated the law of succession *ab intestato* in the Dutch East Indies, and, it is submitted, still regulates that of this Colony. From *Tennant's Notary's Manual* (chapter 5), it is clear that the

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law of succession is to be regulated by the Statute law, or the *Ordinance of the States-General of Holland and West Vriesland*, published in the year 1580, but with the modification that the surviving parent shall be entitled to the whole of the goods of an intestate if the latter die without leaving brothers or sisters or their descendants; should he have such next of kin, one half of the property of such intestate shall go to them and the remaining moiety to the surviving parent. This, subject to the alteration of the *Placaat* of 1661. In the case of *Spies* vs. *Spies* (2 Menzies, p. 476), an admission was made by counsel with reference to the law of North Holland, which law was embodied in the *Placaat* of 1599, but this admission ought not to have been made. Up to the year 1580 there were two main branches of the law of intestate succession which prevailed in the United Provinces. These are treated of in *Grotius* (Maasdorp's Translation, Book 2, chapter 28). In 1580 so complicated a system was found inconvenient, and an attempt was made to reduce the law on this point to one standard. The law passed in 1599 never became the law here. The law of South Holland would not permit the half-blood in cases of this sort to take the whole estate to the exclusion of the relatives on the other side.

Upington, A.G. (with him *Maasdorp*), for defendants. It is a mistake to suppose that the law of South Holland and the law of the *Ordinance of* 1580 were imported into this Colony. It seems that some difficulty having arisen as to what was really meant by the *Political Ordinance* of 1580, relief was given by the passing of the enactment of 1599. This view is strengthened by the character of the judgment in *Spies* vs *Spies*. It was there said that the law of North Holland, limited only by certain enactments which were afterwards passed, was supposed to be the law of this Colony. If this be correct it is absurd to say that the law of North Holland has no effect in this Colony. It is only where there has been an absolute failure of brothers and sisters either of full or of half blood that an estate is given to the next of kin. The most important towns in North Holland seem always to have desired to give this right to half brothers and sisters. The great bulk of those interested in the law of North Holland were anxious that the distribution should take place in accordance with the provisions of the *Placaat* of

1599. This law when introduced into the Colony provided that the rights of half brothers and sisters should be equal to those of brothers and sisters of the whole blood.

Leonard, in reply. It is the *Schependom's* law that applies in this Colony, and by it the half blood can only take the half of the property.

Cur. adv. vult.

Postea (July 12th),—

DE VILLIERS, C.J.:—The plaintiff in this case claims, in right of his wife, to be one of the heirs *ab intestato* of the late H. W. van Breda, who died intestate on the 24th of July, 1879. The claim is founded on the fact that the plaintiff's wife is one of the four children of the maternal aunt of the intestate, and therefore one of the next of kin on the maternal side of the intestate. On the paternal side, the next of kin admittedly are the children of the two half brothers of the intestate. The relationship of the parties stands thus. The late Michiel van Breda, sen., was twice married, first to C. van Reenen, and next to Elizabeth Lategaan. By his first wife he had two children, viz., Michiel van Breda, jun., and Dirk van Breda; and by his second wife he had one child, viz. the intestate. He died before these children; and M. van Breda, jun. as well as Dirk van Breda, died before the intestate. The mother of the intestate likewise predeceased him, and she left a sister and a brother her surviving, both of whom have since died leaving issue, the plaintiff's wife being one of the sister's children. Both M. van Breda, jun., and Dirk van Breda left issue them surviving; but the intestate never was married. It is clear therefore that the children of M. van Breda, jun., and of Dirk van Breda, being nephews, and therefore in the third degree of consanguinity, are nearer of kin to the intestate than the plaintiff's wife, who is only a cousin of the intestate, and therefore in the fourth degree. But, on the maternal side, the plaintiff's wife is clearly one of the next of kin, and the question now arises, whether the whole estate of the intestate should go to the descendants of his half brothers, or whether his estate should be divided into two moieties, one moiety going to the next of kin on the paternal side,

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and the other moiety to the next of kin on the maternal side. A further question arises, viz., whether, assuming that the next of kin on the maternal side are entitled to one moiety, they take that moiety *per capita*, i.e., share and share alike, or *per stirpes*, i.e., by representation. The law bearing upon these questions, although complicated, is by no means obscure. The *Charter* granted by the *States-General* to the Dutch East India Company, on the 10th January, 1661, regulates the law of succession *ab intestato* in this Colony. That *Charter* adopted as the law of succession the provision of the *Political Ordinance* of 1580, as interpreted by an *Edict* of the *States* bearing date the 13th of May, 1594, with one modification, which does not affect the question now at issue. That modification is, however, in one sense important as explaining a widespread misapprehension that the North Holland law of succession prevails in this Colony. The *Political Ordinance* of 1580 on the face of it shows that it was not intended to be confined to North Holland, but was intended to apply to all the provinces over which the *States-General* then exercised powers of legislation. Before that time a wide difference in the laws and customs relating to succession had existed between the different provinces of the Netherlands; the so-called "*Schependoms*" law being prevalent in South Holland and Zeeland, and the so-called "*Aasdoms*" law, which was more in conformity with the old Civil law, being prevalent in North Holland and West Vriesland. After the passing of the *Ordinance* of 1580, complaints were made to the *States-General* that it was extremely distasteful to the inhabitants of South Holland, as being opposed to their ancient customs; and accordingly in the year 1599 the *States-General* issued a *Placaat* restoring the main provisions of the "*Aasdoms*" law, but confining those provisions to certain places mentioned in the *Placaat*, all of which were situated in what may be roughly designated as North Holland. The result was that thenceforth the law of succession in South Holland was regulated by the *Ordinance* of 1580, and the law of succession in North Holland by the *Placaat* of 1599. In consequence of doubts which arose as to which of these statutes was applicable to the Dutch East Indies, including, of course, this Colony, which at that time was under the jurisdiction of the Dutch East India Company, a *Charter* was granted to that Company by the *States-General*

on the 10th of January, 1661. It so happens that this *Charter*, while adopting the *Ordinance* of 1580 (as interpreted by the *Edict* of 1594), introduced a modification which accords with a portion of the 3rd section of the *Placaat* of 1599—that is, with one particular provision of the North Holland law; and thus the conclusion—clearly erroneous as it appears to me—was arrived at that the law of North Holland relating to succession *ab intestato* is the law of this Colony. That this was not the opinion of the Legislative authorities of this Colony during the period of the Dutch occupation is clear from the resolution of the Governor in Council, bearing date the 19th June, 1714, by which the Board of Orphan Masters was directed in all cases of succession *ab intestato* to follow the 19th to the 29th sections of the *Ordinance* of 1580, and the *Edict* of 1594, in so far as they had been adopted by the *Charter* of 1661. The articles of the *Political Ordinance* thus enumerated (19 to 29 inclusive) are the only ones contained in the *Ordinance* which relate to succession. It is a mistake, therefore, to speak either of the North Holland or of the South Holland law as the law of this Colony. No doubt by far the greater number of provisions of the so-called South Holland law are applicable to this Colony, but these provisions have been modified, as already explained, by the partial adoption in the *Charter* of 1661 of a certain important provision of the North Holland law. It is difficult indeed to conceive how any doubt or misconception could have arisen on the subject but for a decision of the SUPREME COURT in the year 1846, in the case of *Spies* vs. *Spies*, as reported by Mr. Justice JAMES BUCHANAN in 2 *Menzies* (p. 476). I have failed to find a report of this case among the manuscripts left by the late Mr. Justice MENZIES, but the report as published is fully borne out by the record filed in the Registrar's Office. It is there stated that the Counsel for both parties admitted that by the *Charter* of 1661 the law of North Holland, including the *Ordinance* of 1580 and the *Edict* of 1594, was made the law of the Colony. This admission is clearly founded upon a mistake. The *Charter* of 1661 says nothing of the North Holland law, but merely adopts as the law of succession *ab intestato*, in the East Indies, the Ordinance of 1580, and the *Edict* of 1594, with the modification to which I have already referred. That modification was intended to provide for the particular

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case in which one of the parents of the intestate survived him, and could not affect the decision of the Court in *Spies* vs. *Spies*, in which case (as in the present) both parents of the deceased had predeceased her. In that case the question was not raised (as might fairly have been done on behalf of one of the defendants) whether the estate ought to be divided equally between the paternal and maternal lines. The sole question presented to the Court for decision was how far representation extended amongst collaterals, and the decision of the Court upon this point appears not to have been inconsistent with the provisions of the *Ordinance* of 1580; on the contrary, it purported to be founded on one of the provisions of that statute. The sections of the *Ordinance* applicable to the present case are the 27th and the 28th. The 27th runs thus:—"The estate of the deceased shall go to his next of kin on the father's and mother's side, and be divided into two equal parts, without any distinction being made whether the deceased inherited more from his father than from his mother, or *vice versâ*." Now, the context clearly shows that this section was intended to apply to the case in which the deceased died without either descendants or parents him surviving. In such a case the general rule is laid down that the succession shall be *per lineas*, one half of the estate going to the next of kin on the paternal side, and the other half to the next of kin on the maternal side. That this section was so understood by *Grotius*, as well as by *Van der Linden*, is clear from the following passages. The former in his *introduction* (*book* 2, *chapter* 28, § 18), quoting the 27th section of the *Ordinance* as his authority, says:—"If both the father and the mother of the deceased be dead, then the inheritance is divided into two equal portions, to wit, the father's and the mother's side, without regard to whether the deceased could have left behind more property from the side of the father than from that of the mother." And *Van der Linden*, in his *Institutes* (*book* 1, *chap.* 10, *sect.* 2, *par.* 6), referring to the case in which parents, descendants, and full brothers and sisters fail, says:—"In case all the half brothers and sisters, their children and grandchildren, are related to the intestate only on one side, then according to the law of South Holland, they take only half of the goods, and the other half goes to the next of kin on the other side." In support of this view he relies, not upon the authority of any

text writer on the law of South Holland, or upon any judicial decision affecting that law, but upon the 27th section of the *Ordinance*. Applying the provisions of that section to the present case, it is clear that the plaintiff's wife being one of the next of kin of the intestate on the maternal side is one of his heirs *ab intestato*. This being so, the further question arises whether she is to share the maternal half equally with all the maternal cousins of the intestate, or whether she and her brother and sisters are entitled, as representing their mother, to claim one half of such maternal half; in other words, whether cousins take *per stirpes* or *per capita*. Upon this point the terms of the 28th section of the *Ordinance* of 1580 are express:—"Representation shall not be admitted among collaterals, further than the grandchildren of brothers and sisters, and the children of uncles and aunts inclusively, and all other collaterals, being the next of kin of the deceased, and in equal degrees, shall take *per capita*, to the exclusion of all who are in a more remote degree of consanguinity, the nearest excluding those more remote." Representation being admitted among the children of uncles and aunts, the plaintiff's wife, as one of four children of the intestate's maternal aunt, is entitled to one-fourth of their mother's share of the maternal half, and therefore to one-sixteenth of the net assets of the estate, and a declaration will be made accordingly. The costs of this action must be paid by the estate.

DWYER, J., concurred.

SMITH, J.:—This action is brought to try a case of disputed succession *ab intestato*. The following facts were *inter alia* admitted:—(1) Hendrick Willem van Breda died in this Colony intestate on July 24th, 1879, leaving neither descendants nor ascendants, nor full brothers or sisters or their children surviving him. (2) The intestate was the only son of Michiel van Breda by his second wife, Elizabeth Beatrix Lategaan. (3) M. van Breda by his first marriage had issue two sons, Michiel van Breda and Dirk van Breda, both of whom died before the intestate, each leaving issue, who are still alive. (4) The intestate's mother had one sister, Maria Jacoba Lategaan, married to Andries Jacobus Burger, and one brother, Benjamin Gottlieb Lategaan. Both the

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brother and sister died before the intestate, but each left issue, who are still alive. (5) The plaintiff married, in community of property, Maria Jacoba Burger, one of the issue of the said marriage of A. J. Burger and M. J. Lategaan. The other issue consisted of three sons, all of whom are still alive. The question to be decided is whether the children of the intestate's half-brothers (M. van Breda and D. van Breda) are entitled to the whole of the intestate's estate, or whether the first cousins are entitled to a half-share as being the next of kin of the intestate's mother. The plaintiff claims one-sixteenth of the estate, as having married, in community of property, one of the four children of the intestate's mother's sister, whose children, the plaintiff contends, are entitled to divide, *per stirpes*, with the children of her brother, one-half of the intestate's estate. It seems to me that the question would be quite free from doubt, but for a statement in the case of *Spies* vs. *Spies* reported in 2 *Menzies* (p. 476), that "the North Holland law, including the *Political Ordinance* of the *States-General*, of 1st April, 1580, and the interpreting *Ordinance* of 13th May, 1594, is the law of this Colony in intestate succession." This statement is in my opinion incorrect. Either the words "North Holland law, including," should have been omitted, or they should have been, "The law of North Holland, so far as it is included in." It is stated in *Van der Linden*, that inheritance *ab intestato* in the old times in Holland was of two kinds, either according to the *Aasdomsch* or according to the *Schependomsch Recht*. From these two laws the *States* of Holland, in the year 1580, framed a law of inheritance, under the title of the new *Schependom*, or South Holland right of inheritance *ab intestato*; but those who inhabited the Northern quarter being accustomed to the *Aasdomsch Recht* and not being reconciled to the new law, in the year 1599 a new law was made, whereby the succession *ab intestato* was regulated for certain specified towns. This law was termed the New *Aasdomsch*, or the North Holland and West Vriesland law of succession *ab intestato*. On the 15th of May, 1594, an *Ordinance* interpreting some parts of the *Ordinance* of 1580 was promulgated. By a *Placaat* of the 10th of January, 1661, it was ordered that the succession *ab intestato* for persons residing or journeying to and from the Dutch East Indian possessions should be regulated by the *Political*

Ordinance of 1580, with certain modifications, and the interpreting *Ordinance* of 1594. It is admitted that this *Placaat* applied to this Colony. On the 19th of June, 1714, the Governor in Council passed a resolution directing the Board of Orphan Masters in all cases of succession *ab intestato* to follow the articles of the *Political Ordinance* of 1580, referring to the subject and the interpreting *Ordinance* of 1594. I find no mention in the *Placaat* of 1661 of the law of North Holland, as stated in the report of *Spies* vs. *Spies*. The *Political Ordinance* of 1580 was called the New *Schependom* Law, or the law of inheritance of South Holland, and therefore it seems to me that it would have been more correct to say that the South Holland law, as included in the *Political Ordinance* of 1580, is the law of inheritance *ab intestato* in this Colony. In deciding then the question raised in this case, I do not see that the Court has anything to do with the North Holland law. All that has to be looked to is the *Political Ordinance* of 1580; the interpreting *Ordinance* of 1594, and the modifications in the *Placaat* of 1661, having no application to the point in dispute. It seems to me quite free from doubt that, according to section 27 of the *Ordinance* of 1580, the estate of the intestate should be divided into two equal parts, and that one-half should be distributed to his next of kin on the father's side, and the other half to the next of kin on the mother's side (see *Van Leeuwen*, "Roman Dutch Law," B. 3, c. 13, § 4, concluding paragraph; and *Van der Linden*, "Institutes," B. 1, c. 10, § 6). The result will be that one-half of the intestate's estate will be divided into two shares, one share going to the children of M. J. Lategaan, and the other to the children of B. G. Lategaan, which will entitle the plaintiff's wife to one-sixteenth of the estate.

[Plaintiff's Attorney, H. P. DU PREEZ.
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