INDEX.

Notice of Appeal.

(Filed June 14, 1926.)

New Jersey Prerogative Court

In the Matter
of the
Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of ISABELLA S. JOHNSON, deceased.

On Appeal to New Jersey Court of Errors and Appeals.

The appellants Maude Bell and the Trust Company of New Jersey, assignee of John T. Minugh, hereby appeal from the decree of the New Jersey Prerogative Court affirming the decree of distribution of the Bergen County Orphans' Court, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

ROBERT CAREY,
Proctor for and of counsel with
appellant Maude Bell.

FISK & FISK,
Proctors for and of counsel with
The Trust Company of New Jersey, assignee of John T. Minugh.

Dated June 11th, 1926.

We conceive there is good cause for appeal in above stated cause.

ROBERT CAREY,
Proctor for and of counsel with appellant Maude Bell.

FISK & FISK,
Proctors for and of counsel with appellant The Trust Company of New Jersey, assignee of John T. Minugh.

Petition of Appeal.

(Filed June 14, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter
of the
Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of the ordinary affirming the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of ISABELLA S. JOHNSON, deceased.

On Appeal from the New Jersey Prerogative Court.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Maude Bell and the Trust Company of New Jersey, assignee of John T. Minugh, the appellants in the above stated cause, respect-

fully shows that your petitioners find themselves aggrieved by a decree made in the New Jersey Prerogative Court by his Honor Edwin Robert Walker, Ordinary of the State of New Jersey, bearing date May 24, 1926, and affirming the decree of distribution of the Bergen County Orphans' Court in this respect, to wit:

That the said decree of the New Jersey Prerogative Court affirms the decree of distribution of the Bergen County Orphans' Court, and your petitioners humbly appeal from the whole of the degree of affirmance of the Ordinary which decrees as aforesaid, upon the ground that same is erroneous for that the said Ordinary should have decreed that the appellant Maude Bell, and that the appellant The Trust Company of New Jersey, assignee of John T. Minugh, were each entitled to one-third portion of the residue of the estate of the said Isabella S. Johnson, deceased, instead of a one-fourth part thereof each.

Your petitioners therefore pray that the said decree of affirmance of the said Ordinary may be and in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

ROBERT CAREY,
Proctor for and of counsel with
appellant Maude Bell.

FISK & FISK,
Proctors for and of counsel with
appellant The Trust Co. of New
Jersey, assignee of John T.
Minugh.

Answer to Petition of Appeal.

(Filed June 30, 1926.)

NEW JERSEY
COURT OF ERRORS AND APPEALS.

In the Matter of the Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of the ordinary affirming the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of ISABELLA S. JOHNSON, deceased.	On Appeal from the Prerogative Court.

The answer of Sadie D. Pumyea, the respondent, to the petition of appeal of Maude Bell and The Trust Company of New Jersey, assignee of John T. Minugh.

This respondent, Sadie D. Pumyea, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admits that a decree was, on the 24th day of May, 1926, made, and entered on the 28th day of May, 1926, in the New Jersey Prerogative Court, in the matter of the Estate of Isabella S. Johnson, deceased, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree this respondent prays to refer thereto when the same shall be produced.

This respondent is advised and believes, that the said decree is agreeable to equity, and she

prays that the same may be affirmed, with costs to be adjudged to this respondent.

RUNYON & JOHNSON,
Proctors for and of counsel
with Respondent, Sadie D. Pumyea.

Agreed Statement of Facts.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of ISABELLA S. JOHNSON, deceased.	On Appeal.

Transcript of proceedings on appeal in the above matter, before Hon. Vivian M. Lewis, Vice Ordinary, at the Chancery Chambers, Jersey City, New Jersey, on the fourteenth day of April, nineteen hundred and twenty-six.

APPEARANCES:

ROBERT CAREY, Esq. (represented by WILLIAM L. RAE, Esq.), Proctor for Appellant Maude Bell;

FISK & FISK, Esqs., Proctors for Appellant The Trust Company of New Jersey;

RUNYON & JOHNSON, Esqs., Proctors for Sadie D. Pumyea.

Mr. Johnson: Isabella S. Johnson died at Englewood, Bergen County, New Jersey, on February 17, 1924, leaving a last will and testament in which she bequeathed and devised her entire estate to her son, Harrison T. Johnson. Harrison T. Johnson died on February 16, 1924, so that the bequests and devises in the will of Isabella S. Johnson in his favor, lapsed; so that as a matter of law, Isabella S. Johnson died intestate. Harrison T. Johnson had no children, being an unmarried man, and no brothers or sisters, nor the representatives of any brothers and sisters. Isabella S. Johnson, therefore, left her surviving as her nearest of kin, the children or representatives of two deceased sisters, namely, Sadie D. Pumyea, the child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, and Maude Bell, and John T. Minugh, the children of Amelia Minugh, a deceased sister of Isabella S. Johnson.

All of the children of Isabella S. Johnson predeceased her. Catherine Turnbull, a sister of Isabella S. Johnson, predeceased her by several years. Miss Turnbull died unmarried and intestate.

E. Howard Foster was appointed administrator c. t. a. of the estate of Isabella S. Johnson, by the Surrogate of Bergen County. He subsequently accounted, and his account was approved, and thereupon, on February 2, 1926, the Bergen County Orphans' Court made an order of distribution, decreeing that the estate of Isabella S. Johnson, should be distributed as follows:

One-half part to Sadie D. Pumyea, the child or representative of Mary D. Fowles, a deceased sister of Isabella S. Johnson.

One-quarter part each to Maud Bell and John T. Minugh, children of Amelia Minugh, a deceased sister of Isabella S. Johnson.

Mr. Rae: I agree to this state of facts and so does Colonel Fisk.

Opinion.

(Filed May 28, 1926.)

NEW JERSEY PREROGATIVE COURT.

In the Matter
of the
Appeal of MAUDE BELL, *et al.*, from the decree of distribution of the Orphans' Court of Bergen County in the mater of the estate of ISABELLA S. JOHNSON, deceased.

ROBERT CAREY, Esq., for the Appellant, Maude Bell.

Messrs. FISK & FISK, of counsel with Appellant, The Trust Company of New Jersey, Assignee of John T. Minugh.

Messrs. RUNYON AND JOHNSON, of counsel with the Respondent, Sadie D. Pumyea.

LEWIS, V. O.:

This is on appeal of Maude Bell and The Trust Company of New Jersey, Assignee of John T. Minugh, from the Decree of Distribution in the Orphans' Court of Bergen County in the matter of the estate of Isabella S. Johnson.

The facts are not in dispute.

Isabella S. Johnson died in Englewood, Bergen County, New Jersey, on February 17, 1924. Her husband had predeceased her and she never remarried. She had five children, four of whom died in infancy, the eldest of the four being nine

years of age at the time of death. One son, Harrison T. Johnson, lived until February 16, 1924, predeceasing his mother by but a few hours, Isabella S. Johnson left a will in which she devised and bequeathed all her real and personal estate to her son, Harrison T. Johnson, but he predeceased her and being unmarried at the time of his death the bequests and devises in his favor in his mother's will lapsed. Isabella S. Johnson, therefore, died intestate leaving as her nearest next of kin children of two deceased sisters, namely, Sadie D. Pumyea, a child of Mary D. Fowles, a deceased sister of the said Isabella S. Johnson, and Maude Bell and John T. Minugh, children of Amelia Minugh, a deceased sister of Isabella S. Johnson. The section of the Statute of Distributions covering the distribution in this case are Sub-Sections 3 and 4 of Section 169, Chapter 63, of the Laws of 1918. The above sub-sections have been construed by the late Vice Ordinary, John E. Foster, in the appeal of Messler, 127 Atlantic Reporter, Page 85, affirming a decree of distribution made by the Orphans' Court of Monmouth County. The parties in the case before me are children of deceased sisters of Isabella S. Johnson and are in the same degree of relationship as the parties in the Messler case, except that in the Messler case the parties were children of deceased sisters of the half blood whereas in the case at bar the parties are children of deceased sisters of the whole blood, but in the distribution of personal property the half blood participates equally with the whole blood.

I shall follow the views of the learned Vice Ordinary in the Messler case.

The decree is affirmed.

Decree of Affirmance.

(Filed May 28, 1926.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of ISABELLA S. JOHNSON, deceased.	On Petition of Appeal.

This matter coming on to be heard on the petition of appeal of Maude Bell and The Trust Company of New Jersey, assignee of John T. Minugh, children of Amelia Minugh, a deceased sister of Isabella S. Johnson, deceased, from that portion of the decree of distribution entered in the Bergen County Orphans' Court on February 2nd, 1926, which ordered the residue of the estate of Isabella S. Johnson to be distributed in the following proportions, to wit: one-half part thereof to Sadie D. Pumyea, a child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, and one-fourth part each to Maude Bell and John T. Minugh, children of Amelia Minugh, a deceased sister of Isabella S. Johnson, deceased, and on the answer of Sadie D. Pumyea to said petition of appeal and an agreed statement of facts; and the court having heard Robert Carey, Esq., of counsel with the appellant, Maude Bell, and Fisk & Fisk, of counsel with the

appellant, The Trust Company of New Jersey, assignee of John T. Minugh, and Runyon & Johnson, of counsel with the respondent, Sadie D. Pumyea, and having duly considered the questions brought up by this appeal;

It is, on this 24th day of May, 1926, on motion of Runyon & Johnson, of counsel with said respondent, Sadie D. Pumyea, ORDERED, ADJUDGED AND DECREED that the decree of the Bergen County Orphans' Court entered on February 2, 1926, directing a distribution of the Estate of Isabella S. Johnson, deceased, be, and the same is hereby in all things affirmed.

The right to apply for counsel fees and costs is reserved.

Respectfully advised,

E. R. WALKER,
Ordinary.

VIVIAN M. LEWIS,
V. O.

We approve the within decree as to form, without prejudice, however, to the right of appeal as to the proportion of distribution.

ROBERT CAREY,
Proctor, Maude Bell.

FISK & FISK,
Proctors, The Trust Company of New Jersey, assignee of John T. Minugh.

53 OCT.T.1926
54 OCT.T.1926

New Jersey Court of Errors and Appeals

In the Matter

of

The appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of HARRISON T. JOHNSON, deceased,

and

In the Matter

of

The appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of ISABELLA S. JOHNSON, deceased.

On Appeal from New Jersey Prerogative Court.

BRIEF FOR APPELLANTS.

Statement of Fact.

The facts in these cases are not in dispute and are as follows:

Harrison T. Johnson died on February 16th, 1924, at Englewood, Bergen County, New Jersey, leaving his mother, Isabella S. Johnson, him surviving. He died intestate and unmarried and left no brothers nor sisters nor the representatives of any brothers or sisters him surviving. His father

had predeceased him, and his mother had not remarried. Subsequently Howard Foster, of Bergenfield, Bergen County, New Jersey, was appointed administrator of the estate of Harrison T. Johnson by the Surrogate of Bergen County, and qualified as such. Thereafter he accounted. His account was approved, and on February 2, 1926, the Bergen County Orphans' Court made an order of distribution, decreeing that the residue of the estate in the hands of the said administrator should be distributed as follows:

One-half part to Sadie D. Pumyea;
One-quarter part to Maude Bell;
One-quarter part to John T. Minugh, or his assigns.

John T. Minugh had previously assigned all of his interest in this estate to the Trust Company of New Jersey, who are represented by Fisk and Fisk.

Isabella S. Johnson, the mother of Harrison T. Johnson, died the day after Harrison T. Johnson or on February 17, 1924, leaving a last will and testament in which she left all of her estate to Harrison T. Johnson her son. These bequests and devises in favor of her son lapsed by reason of his death before her, and she, as a matter of law, died intestate. Isabella S. Johnson left her surviving the children of two deceased sisters, namely, Sadie D. Pumyea, the child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, and Maude Bell and John T. Minugh, the children of Amelia Minugh, a deceased sister of Isabella S. Johnson. Isabella S. Johnson had another sister, Miss Catherine Turnbull, who predeceased her, intestate and unmarried. The nearest of kin of Isabella S. Johnson are the representatives or children of Mary D. Fowles and Amelia Minugh,

deceased sisters of Isabella S. Johnson, namely, Sadie D. Pumyea, the daughter of Mary D. Fowles, deceased, and Maude Bell and John T. Minugh, daughter and son, respectively, of Amelia Minugh.

Isabella S. Johnson died at Englewood, Bergen County, New Jersey, on February 17th, 1924, leaving a last will and testament in which she bequeathed and devised her entire estate to her son, Harrison T. Johnson. Harrison T. Johnson died on February 16, 1924, so that the bequests and devises in the will of Isabella S. Johnson in his favor lapsed so that as a matter of law, Isabella S. Johnson died intestate. Harrison T. Johnson had no children, being an unmarried man, and no brothers or sisters, nor the representatives of any brothers or sisters. Isabella S. Johnson therefore, left her surviving as her nearest of kin, the children or representatives of two deceased sisters, namely, Sadie D. Pumyea, the child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, and Maude Bell, and John T. Minugh the children of Amelia Minugh, a deceased sister of Isabella S. Johnson.

All of the children of Isabella S. Johnson predeceased her. Catherine Turnbull, a sister of Isabella S. Johnson, predeceased her by several years. Miss Turnbull died unmarried and intestate.

E. Howard Foster was appointed administrator c. t. a. of the estate of Isabella S. Johnson, by the Surrogate of Bergen County. He subsequently accounted and his account was approved, and thereupon, on February 2, 1926, the Bergen County Orphans' Court made an order of distribution decreeing that the estate of Isabella S. Johnson, should be distributed as follows:

One-half part to Sadie D. Pumyea, the child

or representative of Mary D. Fowles, a deceased sister of Isabella S. Johnson.

One-quarter part each to Maud Bell and John T. Minugh, children of Amelia Minugh, a deceased sister of Isabella S. Johnson.

Harrison T. Johnson left a net estate after the payment of debts and the administration charges of $44,778.95 and Isabella S. Johnson left a net estate of $61,093.83 after the payment of debts and administration charges. The only question involved in these appeals is the proportion of distribution of the Bergen County Orphans' Court and the Prerogative Court holding that the proportion of distribution should be one-half part to Sadie D. Pumyea and one-quarter part each to Maude Bell and Trust Company of New Jersey, assignee of John T. Minugh, while appellant's contention is that distribution should have been ordered in the proportion of one-third to each of the above named distributees.

Counsel have stipulated that the appeals in these cases may be argued and briefed together as the identical legal questions are involved in each.

Argument.

The learned Vice Ordinary in his opinions affirming the decrees of the Bergen County Orphans' Court held that he was bound by the opinion of Vice Ordinary Foster in the *Appeal of Messler*, 127 Atlantic Reporter, page 85. This is admittedly a case on all fours with the cases at bar. We respectfully point out, however, that this case was never taken up to the Court of Errors and Appeals and in our opinion is not a correct interpretation of sub-sections three and four of Chapter 63 of the Laws of 1908.

A careful search of the authorities of this State

does not reveal any cases since the *Messler* case dealing with the proposition here involved.

In the present cases the distributees are all related in equal degree to the decedents. They therefore form a rank of kinsmen between whom and the decedents there was none of nearer kin. We contend that it has always from earliest times been the doctrine under the various statutes of distribution that the claimants take *per stirpes* only when they stand in unequal degree but that if they stand in equal degree with none nearer of kin in existence, that then they take *per capita,* or each an equal share. In Blackstone's Commentaries, Paragraph 684 of Book No. 2, that learned barrister, judge and teacher lays down the following rule regarding distribution:

> "Before I quit this subject, I must, however acknowledge, that the doctrine and limits of representation, laid down in the Statute of Distributions, seem to have been principally borrowed from the civil law; whereby it will sometimes happen, that personal estates are divided *per capita* (share and share alike) and sometimes *per stirpes* (by representation); whereas the common law knows no other rule of succession but that *per stirpes* only. They are divided *per capita* to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis* (by right of representation), in the right of another person. As if the next of kin be the intestate's three brothers, A, B, and C; here his effects are divided into three equal portions, and distributed *per capita,* one to each; but if one of these brothers, A, had been dead leaving three children, and another, B, leaving two; then the distribution must have been *per stirpes;* viz., one-third to A's three children, another third to B's two children; and the remaining third to C the surviving brother;

yet if C had also been dead, without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights *per capita,* viz., each of them one-fifth part."

In the case of *Wagner* v. *Sharpe,* 33 Equity, page 520, the same question as in the cases at bar arose under the then existing statute and the Ordinary in dealing with the situation said:

"The question presented is in reference to the distribution of the personal estate of an intestate who left neither widow nor descendants, nor father or mother, or brother or sister, but whose next of kin were thirty-six nephews and nieces, the children of his nine deceased brothers and sisters. The orphans' court directed that the distribution be made to the nephews and nieces *per capita.* The appellant, who is the only child of a sister of the intestate, insists that the distribution should be *per stirpes* and not *per capita.* The statute provides that in case there be no children, nor any legal representative of them, then one moiety of the estate shall be allotted to the widow of the intestate, and the residue shall be distributed equally to every one of the next of kindred of the intestate who are in equal degree, and those who represent them; provided that no representation shall be admitted among collaterals after brothers' and sisters' children. And that in case there be no widow, all the estate shall be distributed equally to and among the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate and their legal representatives as aforesaid, and in no other manner whatever. The English statute (of 22 and 23 Car. II, c. 10), of which the above is an almost literal copy, had, when the latter became part of our law, been so often and authoritatively construed on the very point raised by this appeal that the construction was then settled. Walsh *v.* Walsh, 1 Eq. Cas., 249;

Janson *v.* Bury, Bunb., 157; Durant *v.* Prestwood, 1 Atk., 454; Stanley *v.* Stanley, *id.*, 455; Lloyd *v.* Tench, 2 Ves. Sen., 213. It was established that where an intestate leaves brothers' and sisters' children, and no brother or sister, the children take *per capita* as next of kin, and not by representation. It is unnecessary, as it would be unprofitable, to do more than merely cite the cases. That construction has remained ever since undisturbed. 2 Wms. Exrs., 1513; 2 Kent's Com., 425; Ross's Trust, L. R. (13 Eq.), 286. But it is urged that by the decision of the court of errors and appeals, in Davis *v.* Vanderveer, 8 C. E. Gr., 558, it is held that the right of representation exists among brothers' and sisters' children *inter sese*, where there is no unequal kinship—no brother or sister of the intestate living at his death. The language of the court speaking of the proviso in the act, is:

> "'It has been well settled by the courts in England for over a century and a half and always acted upon, so far as anything to the contrary appears, since the passage of the act, that the effect of this proviso is to limit or qualify the right of representation among collaterals, so that they can take only as next of kin *per capita*, except in the one case of the children of deceased brothers and sisters of the intestate, among whom alone, of the collaterals, the right to take *per stirpes* by way of representation may exist.'

"The case before the court was one of unequal kinship, and it was held that first cousins take the personal estate of the intestate, to the exclusion of children and grandchildren of other first cousins deceased. The question now raised was not before the court. But the language of the court is not indicative of any dissent from what was, up to that time, the established and accepted doctrine. The meaning obviously is, and that is all that the court intended to say, that the right of representa-

tion among collaterals is limited to brothers' and sisters' children, and does not apply at all to any case of collaterals where the next of kin are all more remote than brothers and sisters. The decree appealed from will be affirmed with costs, and a counsel fee of $50.00 to the respondents to be paid out of the estate before distribution."

In the note appended to this case the following cases are cited:

"In the following cases the heirs or next of kin in equal degree took per capita":

In Miller's Appeal, 40 Pa. St. 387, one died intestate, leaving as his heirs at law the children of his three deceased brothers, one brother leaving one child, another four children, and the third nine children; also, Krout's Appeal, 60 Pa. St. 382, Thompson, C. J.; Davis *v.* Rowe, 6 Rand. 355.

In Stent *v.* McLeord, 2 McCord Ch. 354, an intestate left a nephew, the son of a deceased brother, and four nephews and nieces, the children of a deceased sister, his next of kin.

In Snow *v.* Snow, 111 Mass. 389, the next of kin of an intestate were the son of a deceased sister and the four children of another deceased sister.

In De Haven's Case, 1 Clark (Pa.) 336, two brothers of an intestate died in her lifetime, one leaving one child and the other seven children.

In Clifton *v.* Holton, 27 Ga. 321, a testator gave certain property to H., but if H. should die before attaining twenty-one, then over to H.'s "blood relations of nearest kin, to be divided equally among them." H. died under twenty-one. When the will was made he had one sister, M., living, four children of a deceased sister and seven of another deceased sister. M. died after the testator, but before H., leaving six children; see Ennis *v.* Peutz, 3 Bradf. 387; Mortimer *v.* Slater, L. R. (7 Ch. Div.) 322.

In Skinner *v.* Wynne, 2 Jones Eq. 41, two daughters of an intestate died in the lifetime of their father, one leaving two children and the other one. See Eshleman's Estate, 74 Pa. St. 42.

In Person's Appeal, 74 Pa. St. 121, a decedent had three children, all of whom died in his lifetime, the first having one child, the second one, and the third three.

In Brown *v.* Taylor, 62 Ind. 295, an intestate left no children, but the descendants of three children, viz., a son of his oldest son, a daughter and son of his second son, and two sons of his third son. See Cox *v.* Cox, 44 Ind. 368; Bransford *v.* Crawford, 51 Ga. 20.

In McKinney *v.* Mellon, 3 Houst. 277, the intestate's next of kin were the children of two deceased sisters of his father of the whole blood, and the children of four deceased sisters of his father of the half blood. See Edwards *v.* Bucksdale, 2 Hill Ch. 416; Hallet *v.* Hare, 5 Paige 315; Redd *v.* Clopton, 17 Ga. 230.

In the case of *Smith* v. *McDonald,* 71 Eq., page 261, the controversy was between living first cousins of Cornelia B. Halsey and descendants of first cousins on one side and descendants of deceased great-great-grandparents and all great-uncles and great-aunts on the other side. The Orphans' Court ordered distribution among living first cousins *per capita* and among descendants of deceased first cousins *per stirpes* and this decree was affirmed by both the Prerogative Court and the Court of Errors and Appeals. The Court cites the case of *Wager* v. *Sharpe, supra,* holding:

> "The right of nephew and nieces for instance to share *per stirpes,* depends upon whether the aunt or uncle survives."

In the case of *Hayes* v. *King,* 37 Eq., page 1, a testatrix gave all the residue of her estate, real and personal to her mother, and provided that in

case her mother should die before herself it should go to her mother's heirs at law. Her mother did die before testatrix. Her heirs at law at the death of the testatrix were two children of one deceased sister and three children of her deceased brother. The Court held:

> "Therefore in this case the three children of Mr. Hayes and the two of Mrs. King are the persons entitled and they take the personal estate *per capita,*"

citing *Wagner* v. *Sharpe, supra.*

From a study of the foregoing authorities it cannot be doubted but that the next of kin in the present case would take *per capita* and not *per stirpes,* unless the act of 1918 brought about a change so radical as to sweep aside the whole mass of decisions germane to the subject. Vice Ordinary Foster in the *Messler* case, *supra,* held that the Act had such a drastic effect. We respectfully maintain that it did not.

The Act of 1918 now reads:

> "3. If there be no husband or widow, as the case may be, then all of the said estate to be distributed equally to and among the children, and in case there be no child nor any legal representative of any child then equally among the parents and brothers and sisters—and the representatives of deceased brothers and siters; provided, that no representation shall be admitted among collaterals after deceased brothers' and sisters' children."
>
> "4. If there be no husband or widow, child or any legal representative of any child, nor a parent, brother or sister, nor the representative of a deceased brother or sister, then all of the estate to be distributed equally to the next of kindred, in equal degree, of or unto the intestate and their legal representatives as aforesaid."

Section 3 provides that the personal estate shall be distributed among parents and brothers and sisters (obviously living) and the representative of deceased brothers and sisters; the living brothers and sisters forming the nearest rank of kinsmen and taking *per capita* and the representative of deceased brothers and sisters taking *per stirpes* because they are a step further removed from the nearest living rank of kinsmen.

It apparently did not occur to the Legislature to make any express provision for the distribution amongst nephews and nieces where they form the nearest rank.

Section 4, rather carelessly repeating the phraseology of Section 3, then provides that if there are no brothers or sisters living nor representative of them, distribution shall be made to the next of kindred of equal degree. The clear purpose of this section was to provide for distribution to kindred more remote than brothers' and sisters' children in the absence of nearer kindred. It cannot be construed to direct any distribution amongst nephews and nieces either *per stirpes* or *per capita.* To say as Vice-Ordinary Foster says that the section removes the children of deceased brothers and sisters from their classification as next kin and places them among the collateral relatives of the intestate among whom the statute now directs the personal estate to be equally divided, is merely an unnecessary torture of the English language. The statute only says that when some brothers and sisters are living the children of deceased brothers and sisters shall take equally by representation. The learned Vice-Ordinary italicizes the words in Paragraph Three "and the representative of deceased brothers and sisters" apparently with the idea of thus physically

separating them from their context, and then later in his opinion says:

> "By the terms of the amendment of 1918 *express* and explicit directions are given that upon the failure of other specified relatives to survive the decedent, the personal estate is to be distributed equally to and among the representatives of deceased brothers and sisters."

We emphatically say that this is not so and challenge anyone to show where there is any express provision for distribution to newhews and nieces where they form the nearest rank of kinsman.

Vice-Ordinary Foster's opinion is more than a construction of the meaning of the Legislature; it is an attempt to interpolate bodily a new paragraph dealing with distribution among nephews and nieces when they form the nearest rank and to undertake by such interpolation to set aside the whole scheme of distribution which the opinion itself shows prevailed continuously to 1918.

We contend that it would be pure guesswork for any Court to say how the Legislature meant to provide for distribution to nephews and nieces when they form the nearest rank, when the Legislature itself failed absolutely to provide for such a contingency.

It is respectfully submitted that the decree of the Prerogative Court affirming the decree of distribution of the Bergen County Orphans' Court should be reversed.

Respectfully submitted,

ROBERT CAREY,
Proctor for Appellant Maude Bell.

WILLIAM L. RAE,
Of Counsel.

FISK AND FISK,
Proctor for Appellant Trust Company of New Jersey, Assignee of John T. Minugh.

WILLARD C. FISK,
Of Counsel.

APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY
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Notice of Appeal.

(Filed June 14, 1926.)

New Jersey Prerogative Court

In the Matter
of the
Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of HARRISON T. JOHNSON, deceased.

On Appeal to New Jersey Court of Errors and Appeals.

The appellants, Maude Bell and The Trust Company of New Jersey, assignee of John T. Minugh, hereby appeal from the decree of the New Jersey Prerogative Court affirming the decree of distribution of the Bergen County Orphans' Court, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

ROBERT CAREY,
Proctor for and of counsel with
Appellant Maude Bell.

FISK & FISK,
Proctors for and of counsel with
The Trust Company of New
Jersey, assignee of John T.
Minugh.

Dated June 11th, 1926.

We conceive there is good cause for appeal in above stated cause.

ROBERT CAREY,
Proctor for and of counsel with
Appellant Maude Bell.

FISK & FISK,
Proctors for and of counsel with
Appellant The Trust Company
of N. J., assignee of John T.
Minugh.

Petition of Appeal.

(Filed June 14, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of the Ordinary affirming the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of HARRISON T. JOHNSON, deceased.	On Appeal from the New Jersey Prerogative Court.

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Maude Bell, and The Trust Company of New Jersey, assignee of John T. Minugh, the appellants in the above stated cause, respect-

fully shows that your petitioners find themselves aggrieved by a decree made in the New Jersey Prerogative Court by his Honor Edwin Robert Walker, Ordinary of the State of New Jersey, bearing date May 24, 1926, and affirming the decree of distribution of the Bergen County Orphans' Court in this respect, to wit:

That the said decree of the New Jersey Prerogative Court affirms the decree of distribution of the Bergen County Orphans' Court, and your petitioners humbly appeal from the whole of the decree of affirmance of the Ordinary which decrees as aforesaid, upon the ground that same is erroneous for that the said Ordinary should have decreed that the appellant Maude Bell, and that the appellant The Trust Company of New Jersey, assignee of John T. Minugh, were each entitled to one-third portion of the residue of the estate of the said Harrison T. Johnson, deceased, instead of a one-fourth part thereof each.

Your petitioners therefore pray that the said decree of affirmance of the said Ordinary may be and in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

ROBERT CAREY,
Proctor for and of counsel
with Appellant Maude Bell.

FISK & FISK,
Proctors for and of counsel with
Appellant The Trust Co. of New
Jersey, assignee of John T.
Minugh.

Answer to Petition of Appeal.

(Filed June 30, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of the Ordinary affirming the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of HARRISON T. JOHNSON, deceased.	On Appeal from the Prerogative Court.

The answer of Sadie D. Pumyea, the respondent, to the petition of appeal of Maude Bell and The Trust Company of New Jersey, assignee of John T. Minugh.

This respondent, Sadie D. Pumyea, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admits that a decree was, on the 24th day of May, 1926, made, and entered on the 28th day of May, 1926, in the New Jersey Prerogative Court, in the matter of the estate of Harrison T. Johnson, deceased, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree this respondent prays to refer thereto when the same shall be produced.

This respondent is advised and believes, that

the said decree is agreeable to equity, and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

RUNYON & JOHNSON,
Proctors for and of counsel with
Respondent Sadie D. Pumyea.

Agreed Statement of Facts.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from decree of distribution of the Bergen County Orphans' Court in the matter of the estate of HARRISON T. JOHNSON, deceased.	On Appeal.

Transcript of proceedings on appeal in the above matter, before Hon. Vivian M. Lewis, Vice Ordinary, at the Chancery Chambers, Jersey City, New Jersey, on the fourteenth day of April, nineteen hundred and twenty-six.

APPEARANCES:

ROBERT CAREY, Esq. (represented by William L. Rae, Esq.), Proctor for Appellant Maude Bell;

FISK & FISK, Esqs., Proctors for Appellant Trust Company of New Jersey;

RUNYON & JOHNSON, Esqs., Proctors for Sadie D. Pumyea.

Mr. Johnson: Harrison T. Johnson died on February 16, 1924, at Englewood, Bergen County, New Jersey, leaving his mother, Isabella S. Johnson, him surviving. He died intestate and unmarried, and left no brothers nor sisters nor the representatives of any brothers or sisters him surviving. His father had predeceased him, and his mother had not remarried. Subsequently Howard Foster, of Bergenfield, Bergen County, New Jersey, was appointed administrator of the estate of Harrison T. Johnson by the Surrogate of Bergen County, and qualified as such. Thereafter he accounted. His account was approved, and on February 2, 1926, the Bergen County Orphans' Court made an order of distribution, decreeing that the residue of the estate in the hands of the said administrator should be distributed as follows:

One-half part to Sadie D. Pumyea;

One-quarter part to Maude Bell;

One-quarter part to John T. Minugh, or his assigns.

John T. Minugh had previously assigned all of his interest in this estate to the Trust Company of New Jersey, who are represented by Fisk and Fisk.

Isabella S. Johnson, the mother of Harrison T. Johnson, died the day after Harrison T. Johnson, or on February 17, 1924, leaving a last will and testament, in which she left all of her estate to Harrison T. Johnson, her son.

These bequests and devises in favor of her son lapsed by reason of his death before her, and she, as a matter of law, died intestate. Isabella S. Johnson left her surviving the children of two deceased sisters, namely, Sadie D. Pumyea, the child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, and Maude Bell, and John T. Minugh, the

children of Amelia Minugh, a deceased sister of Isabella S. Johnson. Isabella S. Johnson had another sister, Miss Catherine Turnbull, who predeceased her, intestate and unmarried. The nearest of kin of Isabella S. Johnson are the representatives or children of Mary D. Fowles and Amelia Minugh, deceased sisters of Isabella S. Johnson, namely, Sadie D. Pumyea, the daughter of Mary D. Fowles, deceased, and Maude Belle and John T. Minugh, daughter and son, respectively, of Amelia Minugh.

Mr. Rae: I agree to this state of facts and so does Colonel Fisk.

Opinion.

(Filed May 28, 1926.)

NEW JERSEY PREROGATIVE COURT.

In the Matter

of the

Appeal of MAUDE BELL, *et al.*, from the decree of distribution of the Orphans' Court of Bergen County in the matter of the estate of HARRISON T. JOHNSON, deceased.

ROBERT CAREY, Esq., for the Appellant Maude Bell.

Messrs. FISK & FISK, of counsel with Appellant The Trust Company of New Jersey, Assignee of John T. Minugh.

Messrs. RUNYON and JOHNSON, of counsel with the Respondent Sadie D. Pumyea.

Opinion.

LEWIS, V. O.:

This is on appeal of Maude Bell and The Trust Company of New Jersey, Assignee of John T. Minugh, from the decree of distribution of the Orphans' Court of Bergen County in the matter of the estate of Harrison T. Johnson.

The facts are not in dispute.

Harrison T. Johnson died in Englewood, Bergen County, on February 16, 1924, intestate and unmarried, leaving him surviving as his only next of kin his mother, Isabella S. Johnson, who inherits his personal estate under the statute of distribution and left no brothers or sisters, nor the legal representatives of deceased brothers or sisters. His father, Peter S. Johnson, had predeceased him by many years. Under the statute the decedent's personal estate therefore passed to his mother, Isabella S. Johnson. The latter died on February 17, 1924, a few hours after the death of Harrison T. Johnson. Isabella S. Johnson left a will wherein she bequeathed her entire estate to her son, Harrison T. Johnson. The personal property of which Harrison T. Johnson died possessed and which went to his mother, Isabella S. Johnson, passed by reason of the lapsing of the provisions in her will upon her death to her nearest next of kin, being the representatives of deceased sisters of Isabella S. Johnson, deceased, viz.: Sadie D. Pumyea, a child of Mary D. Fowles, a deceased sister of said Isabella S. Johnson, and Maude Bell and John T. Minugh, children of Amelia Minugh, a deceased sister of said Isabella S. Johnson. All of these are over the age of twenty-one years. The distribution of the estate of Isabella S. Johnson is governed by Sub-Sections 3 and 4, Section 169 of the Statute of Distributions, being Chapter 63, of

the Laws of 1918. The above sections have been construed by the late Vice Ordinary Foster in a decision handed down by him on December 26, 1924, in the appeal of Messler, 127 Atlantic Reporter, page 85, affirming a decree of distribution made by the Orphans' Court of Monmouth County. The parties in the case before me are children of the deceased sisters of Isabella S. Johnson, and are in the same degree of relationship as the parties in the Messler case, except that in the Messler case the parties were children of deceased sisters of half blood whereas in the case at bar the parties are children of deceased sisters of the whole blood, but in the distribution of personal property the half blood participates equally with the whole blood.

I shall follow the views of the learned Vice Ordinary in the Messler case.

The decree is affirmed.

Decree of Affirmance.

(Filed May 28, 1926.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Appeal of MAUDE BELL and THE TRUST COMPANY OF NEW JERSEY, assignee of JOHN T. MINUGH, from the decree of distribution of the Bergen County Orphans' Court in the matter of the estate of HARRISON T. JOHNSON, deceased.	On Petition of Appeal.

This matter coming on to be heard on the petition of appeal of Maude Bell and The Trust Company of New Jersey, assignee of John T. Minugh, children of Amelia Minugh, a deceased sister of Isabella S. Johnson, deceased, from that portion of the decree of distribution entered in the Bergen County Orphans' Court on February 2nd, 1926, which ordered the residue of the estate of Harrison T. Johnson to be distributed in the following proportions, to wit: one-half part thereof to Sadie D. Pumyea, a child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, and one-fourth part each to Maude Bell and John T. Minugh, children of Amelia Minugh, a deceased sister of Isabella S. Johnson, deceased, and on the answer of Sadie D. Pumyea to said petition of appeal and an agreed statement of facts; and the Court having heard Robert Carey, of counsel with the appellant Maude

Bell, and Fisk & Fisk, of counsel with the appellant The Trust Company of New Jersey, assignee of John T. Minugh, and Runyon & Johnson, of counsel with the respondent Sadie D. Pumyea, and having duly considered the questions brought up by this appeal;

It is, on this 24th day of May, 1926, on motion of Runyon & Johnson, of counsel with said respondent Sadie D. Pumyea, ORDERED, ADJUDGED AND DECREED that the decree of the Bergen County Orphans' Court entered on February 2, 1926, directing a distribution of the estate of Harrison T. Johnson, deceased, be, and the same is hereby in all things affirmed.

The right to apply for counsel fees and costs is reserved.

Respectfully advised.

E. R. WALKER,
Ordinary.

VIVIAN M. LEWIS,
V. O.

We approve the within decree as to form, without prejudice, however, to the right of appeal as to the proportion of distribution.

ROBERT CAREY,
Proctor, Maude Bell.

FISK & FISK,
Proctors, The Trust Company of New Jersey, assignee of John T. Minugh.

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New Jersey
Court of Errors and Appeals

IN THE MATTER OF The Appeal of Maude Bell and The Trust Company of New Jersey, assignee of John T. Minugh, from the decree of the New Jersey Prerogative Court affirming the decree of distribution of the Bergen County Orphans' Court in the Matter of the Estate of HARRISON T. JOHNSON, deceased.	On Appeal from Prerogative Court. (Case No. 54)
IN THE MATTER OF The Appeal of Maude Bell and The Trust Company of New Jersey, assignee of John T. Minugh, from the decree of the New Jersey Prerogative Court affirming the decree of distribution of the Bergen County Orphans' Court in the Matter of the Estate of ISABELLA S. JOHNSON, deceased.	On Appeal from Prerogative Court. (Case No. 53)

BRIEF FOR RESPONDENT, SADIE D. PUMYEA.

The appeals in both of these cases present the identical question and are briefed together for convenience sake and by consent of counsel.

These appeals bring up for review the decrees of the New Jersey Prerogative Court affirming decrees of distribution entered by the Orphans' Court of Bergen County on February 2, 1926, in the

matter of the Estates of Harrison T. Johnson and Isabella S. Johnson.

Harrison T. Johnson died on February 16, 1924, intestate and unmarried, leaving him surviving his mother, Isabella S. Johnson, who inherited his estate.

Isabella S. Johnson died on the following day, February 17, 1924, leaving a last will and testament in which she named her said son, Harrison T. Johnson, as sole beneficiary, but, as he predeceased her, was unmarried, and left no brothers or sisters, nor the representatives of deceased brothers or sisters him surviving, the devises and bequests in his favor lapsed and Isabella S. Johnson, as a matter of law, died intestate.

Isabella S. Johnson left her surviving the representatives of two deceased sisters, namely, the respondent, Sadie D. Pumyea, who is the child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, and the appellants, Maude Bell and John T. Minugh, who are the children of Amelia Minugh, a deceased sister of Isabella S. Johnson. Isabella S. Johnson had another sister, Catherine Turnbull, who predeceased her, intestate and unmarried.

The Orphans' Court of Bergen County ordered the estate of Harrison T. Johnson distributed to and among the said Sadie D. Pumyea, Maude Bell and John T. Minugh as representatives, respectively, of Mary D. Fowles and Amelia Minugh, deceased sisters of Isabella S. Johnson, deceased, in the following proportions:

> One-half part to Sadie D. Pumyea, the child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, deceased;
>
> One-fourth part each to Maude Bell and John T. Minugh (or his assigns) children of Amelia Minugh, a deceased sister of Isabella S. Johnson.

The estate of Isabella S. Johnson was ordered distributed by the same Court to Sadie D. Pumyea, Maude Bell and John T. Minugh, as representatives, respectively of Mary D. Fowles and Amelia Minugh, deceased sisters of Isabella S. Johnson, deceased, in the following proportions, viz:

> One-half part to Sadie D. Pumyea, the child of Mary D. Fowles, a deceased sister of Isabella S. Johnson, deceased;
>
> One-fourth part each to Maude Bell and John T. Minugh (or his assigns) children of Amelia Minugh, a deceased sister of Isabella S. Johnson, deceased.

On appeal by Maude Bell and John T. Minugh, the Prerogative Court affirmed the decrees of distribution made by the Orphans' Court of Bergen County, Vice-Ordinary Lewis holding that the question of the proportion of distribution (which was the only question before that court and is the only question before this court) was correctly settled by the late Vice-Ordinary Foster in *Appeal of Messler, 127 Atlantic Reporter, page 85.*

The appellants admit that the *Messler* case is on all fours with the cases at bar (page 4, appellants' brief).

The facts are not in dispute, the appeals being directed only to the proportion of distribution.

The decrees of distribution appealed from were made under Subsections 3 and 4, Section 169, Chapter 63 of the Laws of 1918, being an amendment to the Statute of Distributions, said subsections reading as follows:

> Subsection 3: If there be no husband or widow, as the case may be, then all of the said estate to be distributed equally to and among the children; and in case there be no child, nor any legal representative of any child, then equally among the parents and brothers and

sisters, and the representatives of deceased brothers and sisters; provided that no representation shall be admitted among collaterals after deceased brothers' and sisters' children.

Subsection 4: If there be no husband or widow, child or any legal representative of any child, nor a parent, brother or sister, nor the representative of a deceased brother or sister, then all of the estate to be distributed equally to the next of kindred, in equal degre, of or unto the intestate and their legal representatives as aforesaid.

These subsections were construed by the late learned Vice-Ordinary John E. Foster in *Appeal of Messler, 127 Atlantic Reporter, page 85* (affirming a decree of distribution of the Monmouth County Orphans' Court, Hon. Rulif V. Lawrence presiding), wherein the relationship of the parties to the decedent was identical with that of the relationship of the parties in the cases at bar to Isabella S. Johnson, except that in the Messler case the distributees were children of half-sisters, but this is immaterial, since in the distribution of personal property the half-blood share with the whole blood (*Smith* v. *McDonald,* 71 N. J. Eq. p. 264).

The appellants claim that the late Vice-Ordinary Foster's decision in the Messler case is not a correct interpretation of the said subsections of the Statute of 1918, but they fail to furnish any good reason for their disagreement with the clear and logical decision rendered in that case, nor do they offer any rational substitute for the construction placed on the statute by this late learned jurist.

The appellants are surprised that a careful search of the authorities in this State reveals no cases on the subject since the Messler case (we assume they except the cases at bar). This is easy to explain: the appellants in the Messler case must

have been convinced that Vice-Ordinary Foster was right in his construction of the Statute for they carried their appeal no further, and the absence of other cases on the subject would indicate to us that the construction placed upon the statute by that learned jurist in the Messler case has been accepted and acquiesced in by the Bench and Bar as the correct one.

It will also be observed that, although the legislature has met several times since the decision was rendered by the late Vice-Ordinary Foster in the Messler case, it has not disturbed the law, and the statute remains the same today as it was when enacted in 1918.

The fact that the Legislature has not amended the Act of 1918 is to us a positive indication that the construction placed by Vice-Ordinary Foster on the subsections under review effectively carries out the legislative intent.

The cases cited in appellants' brief (except the Messler case) are not in point, as they deal with constructions of enactments to the Statute of Distributions made prior to 1918. One need only glance at the Statute as it stood at various periods prior to 1918 to see that the Amendment of 1918 makes vital changes in the statute in respect to the subsections under review.

Vice-Ordinary Foster clearly explains the change made in the Statute of Distributions by the Act of 1918, when, at page 86 of the Messler case, he says:

> "Prior to 1918, by virtue of the statute, the nieces and nephews of an intestate were entitled to participate in the distribution of the personal estate only as next of kin of the decedent, and, if they were related in equal degree to the intestate, they took a part or share of the estate per capita. But, if the claimants to the estate were related to the decedent in

unequal degree, or if they claimed by representation, then they took per stirpes. Fidler v. Higgins, supra (21 N. J. Eq. 138); Davis v. Vanderveer's Adm'r, 23 N. J. Eq. 581; Wagner v. Sharp, 33 N. J. Eq. 520; Fisk v. Fisk, 60 N. J. Eq. 195, 46 A. 538; Smith v. McDonald, 69 N. J. Eq. 765, 61 A. 453, affirmed 71 N. J. Eq. 261, 65 A. 840.

"In 1918 the Legislature, by Chapter 63 of the Laws of that year (P L. 1918, p. 179) amended subsections 3 and 4 of section 169 of Chapter 47 of the Acts of 1914 (P. L. 1914, p. 69), which had amended certain subsections of section 169 of subdivision 14, relating to distribution under the Orphans' Court Act (Comp. St. vol. 3, page 3874, et seq.).

"The amendments to subsections 3 and 4, made by the Act of 1918, make these subsections now read as follows:

"Subsection 3: 'If there be no husband or widow, as the case may be, then all of the said estate to be distributed equally to and among the children; and in case there be no child, nor any legal representative of any child, then equally among the parents and brothers and sisters, *and the representatives of deceased brothers and sisters;* provided that no representation shall be admitted among collaterals after deceased brothers' and sisters' children.'

"Subsection 4: 'If there be no husband or widow, child or any legal representative of any child, nor a parent, brother or sister, *nor the representative of a deceased brother or sister,* then all of the estate to be distributed equally to the next of kindred, in equal degrees, of or unto the intestate and their legal representatives as aforesaid.'

"The words in italics are the pertinent parts of the amendments with which we are now concerned; and it is clear that the effect of these amendments is to take the children or representatives of deceased brothers and sister of the intestate out of their former classification

as next of kin of the decedent, and to place them among the collateral relatives of the intestate among whom the statute now directs the personal estate shall be equally divided, before other next of kin of more remote degree can participate in its distribution.

"The present statutory direction is a variation from the scheme of distribution that had continuously prevailed prior to 1918, for, not only are the children (representatives) of deceased brothers and sisters of the intestate removed from participation in the distribution of the estate as next of kin, but they are now placed in priority over all others classed as next of kin, in the event that the intestate does not leave surviving any of the other relatives previously specified in the statute."

The answer to appellant's question as to what provision has been made for nephews and nieces under the Statute of 1918 is found in the plain wording of the statute and in the opinion of Vice-Ordinary Foster in the *Messler* case at page 86 and 87, wherein he says:

"The further effect of the amended statute is that it deprives nieces and nephews, in equal degree, in their capacity as the representatives of deceased brothers and sisters of the intestate, of the possibility of distribution being made among them per capita, as next of kin, for the terms of the statute, in its reference to the representatives of deceased brothers and sisters, are not mere words of description, but are clearly intended to indicate the capacity in which the (children) representatives of deceased brothers and sisters of decedent shall take part or share of the estate.

"By the terms of the amendments of 1918, express and explicit directions are given, that, upon the failure of other specified relatives to survive the decedent, the personal estate is to be distributed equally to and among the representatives of deceased brothers and sisters.

> "This direction is twofold in its terms, for it requires, not only an equal distribution, but an equal distribution to and among the representatives of intestate's deceased brothers and sisters, and it clearly eliminates such representatives—the nieces and nephews, in the instant case—from participation, as next of kin, and permits their participation in the distribution only in their capacity as representatives of their deceased parents."

The Statute of Distributions is a creature of the Legislature and the right to inherit thereunder is a gift from the Legislature, not a natural right. Changes in rights of inheritance are becoming frequent, and no one would be so bold as to suggest that the rule of the Legislature can be challenged as unjust because novel.

While not altogether material to the determination of the question presented by these appeals, it may be interesting to note that the Statute of Descent (2 Comp. Statutes, page 1918) provides that children of deceased brothers and sisters shall take their parent's share. The Legislature may have had this in mind when framing the Amendment to the Statute of Distributions of 1918.

Vice-Ordinary Foster emphasizes in his opinion that the words "representatives of deceased brothers and sisters" are not mere words of description, but are clearly intended to indicate the capacity in which the (children) representatives of deceased brothers and sisters of decedent shall take part or share of the estate. At page 87 of the *Messler* case he says:

> "The right of the appellants and of the other parties interested to participate in the distribution of this estate rests upon the statute and the statute in force applicable to this controversy is the Act of 1918, which in express terms permits the children of the deceased brothers

and sisters of the intestate to participate in the distribution of this estate only by way of representation, i.e., as the representatives of their deceased parents; and in granting this privilege of participation, the statute expressly directs that such distribution of the estate shall be made to and among such representatives equally.

"The decree appealed from directs an equal distribution of the estate among the nieces and nephews of decedent, as representatives of her deceased half-sisters, in strict conformity to the requirements of the amending Act of 1918, and I will therefore advise that it be affirmed."

Vice-Ordinary Foster has construed the statute as the legislature made it; it is the appellants who attempt interpolation when in their brief they say that, "the statute only says that when some brothers and sisters are living children of deceased brothers and sisters shall take equally by representation." The statute says nothing of the kind. It provides that, if there be no child, nor any legal representative of any child, then the estate is to be distributed equally among the parents and brothers and sisters, and the representatives of deceased brothers and sisters. To apply the reasoning of the appellants it would be necessary that a parent be living in order to enable brothers and sisters to inherit.

As Vice-Ordinary Foster very succinctly says in the *Messler* case at page 87, *"by the terms of the amendments of 1918, express and explicit directions are given that, upon the failure of other specified relatives to survive the decedent, the personal estate is to be distributed equally to and among the representatives of deceased brothers and sisters."*

Our point is brought home to us in the Estate of Harrison T. Johnson, for there his mother in-

herited under one of the very subsections under review because her son had no children, nor any brothers or sisters, nor representatives of deceased brothers or sisters, but only a parent (his mother, Isabella S. Johnson), who, under the statute, took all of his estate.

For the appellants to deny that the subsections under consideration mean what they say, is to deny that the appellants, Maude Bell and John T. Minugh, are the representatives (children) of a deceased sister of Isabella S. Johnson. In the instant cases, who are the representatives of deceased sisters but the children of the latter? And to permit them, as the 1918 Amendment to the Statute of Distributions does, to take in their representatives capacity is giving to them only what the Statute of Descent gives to them, the right to inherit their parent's share, and what the Statute of Distributions gives to a grandchild, the right to inherit his parent's share.

Certainly, the appellants would not be rash enough to assert that a grandchild, in the event that grandchildren only survived the intestate, would not take his parent's share; yet, similar phraseology is used in the statute "nor any legal representative of any child" as is used in subsections 3 and 4 of the Amendment of 1918 with reference to the representatives (children) of deceased brothers and sisters "nor the representative of a deceased brother or sister."

Our answer to appellant's challenge to be shown where there is any express provision for distribution to nephews and nieces, is simple: We need only refer to the Statute of 1918, wherein it is directed that they take as representatives of their deceased parents, who in these cases are the deceased sisters of the intestate, Isabella S. Johnson.

The appellants maintain there is no express provision in the Statute of 1918 for distribution to nephews and nieces and yet assert that the parties hereto cannot take as representatives unless one of the sisters be living, in which event it is assumed they admit that there would be no question of the nephews and nieces taking the share of their deceased parent in case a sister were living, yet, in this supposed case, the parties taking would still be nieces and nephews, but would take as representatives of their deceased parents. If a nephew or niece takes a deceased brother's or sister's share, when another brother or sister is living, is there anything unequal or unjust in permitting nephews and nieces to take by representation the share their deceased mothers (as sisters of the intestate) would have taken if living, especially when the statute in express words directs this to be done?

The appellants say that subsection 4 is carelessly drawn in that it repeats the phraseology of subsection 3; such repetition is not carelessness, but denotes an intent on the part of the Legislature to emphasize that it meant what it said in these subsections when it directed that, in the absence of parents or brothers and sisters, the representatives of deceased sisters shall take, as Vice-Ordinary Foster very aptly points out, *in their capacity as representatives of their deceased parents.*

Appellants do not, and are unable to offer any substitute for the masterly interpretation of the statute by Vice-Ordinary Foster in the *Messler* case, because there is none. No theory the appellants might advance could off-set the plain wording of the subsections of the Statute of Distributions under review as construed by Vice-Ordinary Foster.

In conclusion, it ought also to be observed that every court which has passed upon these subsections

of the 1918 Act, now under review, has given the statute the same construction placed thereon by the late Vice-Ordinary Foster in the *Messler* case.

We respectfully submit that no good reasons whatever have been advanced by the appellants for taking these appeals, or for reversing the decrees appealed from, and we respectfully submit that the decrees of the Prerogative Court affirming decrees of distribution of the Orphans' Court of Bergen County in both the above-entitled cases should be affirmed.

RUNYON & JOHNSON,
Proctors for and of Counsel with
Respondent, Sadie D. Pumyea.

EDMUND S. JOHNSON,
Of Counsel.