

MIDDLETON, J.

DECEMBER 20TH, 1916.

RE LABATT.

*Will—Construction—Distribution of Estate after Death of Wife—
Statutory Next of Kin—Per Capita Distribution.*

Motion by the executor of the will of one Labatt, deceased, for an order determining a question of construction.

The motion was heard at the London Weekly Court.

N. P. Graydon, for the executor and for certain beneficiaries and an absentee in the same interest.

E. H. Ambrose, for the sisters of the testator.

MIDDLETON, J., in a written judgment, said that the testator died on the 12th June, 1877, leaving a widow, but no children. The widow lived until the 28th June, 1916. At the time of the testator's death, his heirs at law and next of kin were his two sisters, two brothers, and a nephew and niece, children of a deceased brother.

By his will dated the 1st March, 1877, the testator directed his executors to invest the residuary estate, some \$35,000, and to pay the income to his wife during her life, and upon her death "to divide and pay all my said residuary estate . . . unto and equally between and amongst the person or persons who at the decease of my said wife would be my next of kin and entitled to my personal estate under the English statutes for the distribution of the personal estate of intestates if I were to die immediately after the decease of my said wife as tenants in common."

During the 39 years that the wife survived, two of the brothers died, one leaving three and the other nine children.

The question submitted was, whether the division was to be per stirpes or per capita?

This was determined in favour of a per capita distribution by the decision in *In re Richards, Davies v. Edwards*, [1910] 2 Ch. 74. There the direction was, that the estate was to be held "for and equally between" the statutory next of kin. Swinfen Eady, J., held that, as there was no reference to the statutory mode of distribution, but the statute was only referred to for the purpose of defining the class, the word "equally" must have its full effect, and the statutory next of kin would take per capita.

There was nothing in this will to indicate in any way that the