M. R. WHITE *v.* SPRINGETT. July 13, 14.

Will—Construction—Gift to next of kin exclusive of A.—A. sole next of kin.

A will provided that if two of the testator's three grandchildren should die under twenty-five, and the property which the surviving grandchild thereby became entitled should exceed £10,000, then the surplus thereof should go to the persons other than the surviving grandchild, who would have been the testator's next of kin according to the statute, if the testator had died at the time of the decease of the survivor of the two deceased grandchildren.

On the death of two of the grandchildren under twenty-five, the surviving grandchild was the person who would have been the testator's sole next of kin according to the statute, if the testator had died at the period mentioned.

Held, that no intestacy had taken place, but that the next of kin, exclusive of the surviving grandchild, were entitled to the surplus over £10,000.

Richard White, who died in 1864, gave by his will his real and personal property to trustees, upon trust to sell, call in, and invest, and stand possessed thereof upon trust, for all and every of his three grandchildren, who should survive their father Robert Hills, and attain twenty-five, equally, and in case one of them only should survive her father and attain twenty-five, then the whole to be in trust for such grandchild: Provided that in case two of his three grandchildren should die in the lifetime of their father or under twenty-five, and the property to which the surviving grandchild would thereby become entitled should exceed £10,000, then so much thereof as should exceed that amount should be held in trust for the person or persons other than the surviving grandchild who, under the Statute of Distribution, would immediately after the death of the survivor of the two deceased grandchildren have been entitled to the testator's personal estate in case the testator had at such time died intestate.

The testator's three grandchildren survived him. Two of them had since died without attaining twenty-five. The third grandchild had not attained twenty-five. She had recently intermarried with Mr. Philip Eagles. The residuary estate exceeded £10,000. Robert Hills died in the lifetime of the testator.

The bill was filed by persons claiming to be the persons, exclusive of Mrs. Eagles, who would, according to the statute, immediately after the decease of the survivor of the two deceased grandchildren have been entitled to the testator's personal estate in case the testator had at such time died intestate, against the surviving trustee of the will, Mr. and Mrs. Eagles, and their trustees. It prayed for the administration of the real and personal estate of the testator so far as it remained unadministered.

Southgate, Q.C., and *Villiers*, for the plaintiff.

G. W. Collins for the trustee of the testator's will.

Jessel, Q.C., and *Casson*, for Mr. and Mrs. Eagles, submitted that the plaintiffs had not made out their title. The gift was to those persons who should be next of kin of the testator at a certain period, exclusive of Mrs. Eagles. In the events which had happened, Mrs. Eagles was the only one of those persons. The gift therefore failed, and there was an intestacy. They cited *Bullock v. Downes*, 9 H. L. Cas. 1; *Withy v. Mangles*, 10 Cl. & Fin. 215; *Lee v. Lee*, 8 W. R. 443, 1 Dr. & Sm. 85.

T. Hughes for the trustees of Mrs. Eagles' marriage settlement.

July 14.—Lord ROMILLY, M.R., said.—The argument amounts to this, that if the surviving grandchild is to be excluded from being one of the next of kin, then there are no next of kin. Suppose the statute had said, this shall be divided amongst such and such persons as next of kin, but a third surviving grandchild shall not be reckoned among the next of kin. Then if there was only a third surviving grandchild there would not be any next of kin at all. But even if that argument prevailed the result would still be that the surviving grandchild could not take, because she is excluded by the will from being one of the next of kin, and not merely excluded for the purpose of letting in the others, but excluded absolutely; so that if I were to hold that according to the will the plaintiff could not take, the result would be that there would be no next of kin at all. The grandchild cannot be the next of kin, for the testator has expressly said she is not to be the next of kin, the consequence of which would be that the surplus above £10,000 would according to the will be a species of *bona vacantia*, and the Crown would take it. There is no means of giving an express and plain meaning to the words except by saying that the next of kin are to take, excluding the surviving grandchild.

Solicitors, *Parker, Lee, & Haddock*, agents for *Mr. C. Cave*, of Cranbrook, Kent; *Monckton & Monckton*, agents for *Monckton & Son*, Maidstone.