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WHITE *v.* SPRINGETT.

Will—Construction—Next of Kin according to the Statute of Distributions, exclusive of A.

A testator gave his estate to such of his three grandchildren, *S.*, *M.*, and *E.*, as should survive their father and attain twenty-five, but in case two only of them should die in the lifetime of their father or under twenty-five, and the amount to which the surviving grandchild would then become entitled should exceed £10,000, then the excess should go to the person or persons, exclusive of the surviving grandchild, who, under the Statute of Distributions, would immediately on the decease of the survivor of the other two grandchildren be entitled to the testator's personal estate if he had then died intestate.

S. and *E.* died under twenty-five, *E.* being the survivor of the two, and at her death *M.* was the sole next of kin of the testator, supposing him to have died at that time:—

Held (affirming the decision of the Master of the Rolls), that the persons who at the death of *E.* would have been the next of kin of the testator if *M.* also had then been dead, were entitled to file a bill for the administration of his estate.

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THIS was an appeal from a decision of the Master of the Rolls.

Richard White, by his will, dated the 11th of May, 1852, gave, devised, and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, and investment, and to stand possessed of the trust funds upon trust for all and every his three grandchildren, *Sarah Maria Hills*, *Mary Jane Hills*, and *Ellen Hills*, who should survive their father, *Robert Hills*, and should attain the age of twenty-five years, equally to be divided between them, if more than one, as tenants in common; and in case only one of his said grandchildren should survive her said father, and should attain the age of twenty-five years, then the whole to be in trust for such one of his said grandchildren; and in case none of his said grandchildren should survive her said father and should attain the age of twenty-five years, then upon trust for the person or persons who immediately after the decease of the survivor of his said three grandchildren would, under the statute for the distribution of the personal estates of intestates, be entitled to the testator's personal estate in case he had at such time died intestate, and, if more than one, in the shares in which they would be entitled to such personal estate.

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The will contained this further proviso—"Provided also, and I hereby further declare, that in case two only of my said three grandchildren shall depart this life in the lifetime of their said father or under the age of twenty-five years, and the amount of my property to which the survivor of my said three grandchildren would thereupon become entitled shall exceed in amount or value the sum of £10,000, then so much thereof as shall exceed that amount or value shall be held in trust for the person or persons, exclusive of my surviving grandchild, who under the said statute for the distribution of the personal estates of intestates would immediately after the decease of the survivor of my other two grandchildren be entitled to my personal estate in case I had at such time died intestate."

The testator died on the 21st of May, 1864, and his will was proved on the 26th of July, 1864.

Sarah Maria Hills died on the 30th of July, 1865, a spinster, and under the age of twenty-five.

Ellen Hills died on the 12th of September, 1867, also a spinster, and under the age of twenty-five.

Mary Jane Hills attained twenty-one in September, 1865, and on the 1st of August, 1866, she married *Philip Augustus Eagles*.

Robert Hills, the father of the three grandchildren, died in the testator's lifetime.

Mrs. *Eagles* would have been the sole next of kin of the testator according to the statute if he had died immediately after the death of *Ellen Hills*.

The residue of the testator's estate considerably exceeded the sum of £10,000.

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This suit was instituted for the administration of the testator's estate. The Plaintiffs claimed to be the persons who would at the death of *Ellen Hills* have been the next of kin of the testator according to the statute if he had died immediately after the death of *Ellen Hills*, and Mrs. *Eagles* had been then dead. The Defendants were the surviving executor and trustee of the will, and Mr. and Mrs. *Eagles*, and the trustees of their marriage settlement.

The Master of the Rolls on the hearing of the cause on the 13th of July, 1868, made the common administration decree, with the addition of an inquiry who were the person or persons, exclu-

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sive of the Defendant Mrs. *Eagles*, who, under the statute, would immediately after the decease of *Ellen Hills* be entitled to the testator's personal estate in case he had at such time died intestate.

Mr. and Mrs. *Eagles* appealed.

Mr. *Jessel*, Q.C., and Mr. *Casson*, for the Appellants:—

The Plaintiffs have no title to file the bill. The words "exclusive of *A.*" mean the same thing as "except *A.*" The gift is to all the members of a class except Mrs. *Eagles;* in the events which have happened she is the only member of that class, and she being excepted there is no such class. The gift, therefore, fails, and there is an intestacy, under which Mrs. *Eagles* must take the whole of what is undisposed of by the testator: *Bullock* v. *Downes* (1); *Withy* v. *Mangles* (2); *Milne* v. *Gilbart* (3); *Lee* v. *Lee* (4); *Johnson* v. *Johnson* (5).

Mr. *Southgate*, Q.C., and Mr. *Villiers*, for the Plaintiffs, were not called on.

Mr. *G. W. Collins*, for the executors.

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SIR C. J. SELWYN, L.J.:—

I accede to the argument on behalf of the Appellants to this extent, that the current of modern decisions, and especially those in the House of Lords, has set strongly in favour of adhering strictly to the literal meaning of the words used by the testator in each case, without alteration or addition, and, as far as possible, without reference to other cases or other wills. I also agree that, in the particular event which has been referred to, viz., of the two grandchildren who died first having left children, there might have been at the death of the second of those two grandchildren a class of surviving children composed of the children of the two deceased grandchildren, and the children of the living grandchild. But I think, having made those admissions, and adhering to the cases which have been decided, and especially those in the House

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of Lords, the conclusion at which we must arrive is the same as that to which the Master of the Rolls has come. For it is to be observed that the testator, in the clause under discussion, has not said that where you have a class entitled to certain shares as next of kin one particular person is to be excluded from a share in a fund so to be derived; but what he has said is, that you are to look for an artificial class created by himself. They are not his next of kin according to the statute, because they would be the next of kin at the time of his death; but he creates for himself an arbitrary class, to be ascertained in a particular manner, and the question of the persons who are to constitute that class is what we have to look to. It is true he adopts the statute as one of the means by which that class is to be arrived at, but it is an arbitrary class created by himself, applying the statute to a particular time in order to arrive at that particular class of persons, and without any reference to

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any division of the estate, or any exclusion of a particular person from taking a share. He says you are to ascertain the persons excluding his surviving grandchild. In considering who are the artificial class you are to exclude from your consideration the surviving grandchild. Adopting those words, ascertaining this class of persons, and excluding from your consideration the surviving grandchild according to this arbitrary rule, in that case the statute would make the present Plaintiffs the persons constituting the class. I think, therefore, that they were entitled to file the bill, that the decree was correct, and that the appeal must be dismissed with costs.

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SIR G. M. GIFFARD, L.J.:—

I am of opinion that the Plaintiffs answer the description contained in the testator's will, of the "person or persons, exclusive of my surviving grandchild, who, under the said statute for the distribution of personal estates of intestates, would immediately after the decease of the survivor of my other two grandchildren be entitled to my personal estate in case I had at such time died intestate." I have no doubt that the object of these words is to exclude *Withy* v. *Mangles* (1), and *Bullock* v. *Downes* (2), because clearly, if these words had not been in the will, this particular

(1) 10 Cl. & F. 215. (2) 9 H. L. C. 1.

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grandchild would have taken. What the testator meant was this:—I mean my next of kin; but what I mean by that is, my next of kin exclusive of my one surviving grandchild; that is, I do mean those who are my next of kin to take, but I do not mean the surviving grandchild to take. Putting it in other words, it is this:—Putting my surviving grandchild out of consideration as being at that time my sole or one of my next of kin, ascertain who, excluding her, my next of kin are.

It was suggested as a very conclusive argument that there might have been the children of the two deceased grandchildren, and the children of this actually living grandchild. I confess I do not think that there is anything in that argument; and for this reason:—It is quite clear that the children of the two dead grandchildren would have taken, because they would be next of kin; it is equally clear that the children of the living grandchild would not have taken, for they would not have been the next of kin while their parent was alive. Putting that construction upon the will, the whole thing is consistent. In my judgment, we should be going directly against the intention of the testator if we came to any other conclusion than that at which the Master of the Rolls has arrived.

The appeal must be dismissed with costs.

Solicitors: Messrs. *Parker, Lee, & Haddock*; Messrs. *Monckton & Monckton*; Mr. *E. S. Cavell.*

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