language of clause 19 is in the form of what was called in the old days of special pleading a negative pregnant, that is to say, it is such a form of negative expression as implies an affirmative; and that the necessary implication in this case is, that the testatrix intended that there should be no lapse of any legacy where the legatee predeceased her leaving issue; and that, instead of the legacy falling into the residue, it should go to such issue.

The whole trouble in the case, it seems to me, has arisen from a misconception of the law by the testatrix, under which she apparently assumed that it was necessary to provide expressly that in case any of the legatees predeceased her without leaving issue the legacy should lapse and go to the residuary estate, and by implication assumed that if a legatee predeceased her leaving issue there would be no lapse.

Where a legacy fails by reason of the death of a legatee (not being a child or other issue of the testator) in the lifetime of the testator it has long been settled law that unless a contrary intention appears in the will such legacy lapses and shall, if there is a residuary bequest, be included in it whether or not the legatee leaves issue.

It is also clear, as stated by Vice-Chancellor Wickens, in Browne v. Hope (1872), L.R. 14 Eq. 343, at p. 347, "that a testator may prevent a legacy from lapsing, but the authorities shew that in order to do that he must do two things; he must in clear words exclude lapse; and he must clearly indicate who is to take in case the legatee should die in his lifetime."

Now, in this case, if permitted to conjecture, I should say that, by a misconception of the law, the testatrix thought that if any legatee predeceased her leaving issue such issue would, under the law, take the legacy; but there is nothing in the language used by her to justify a judicial opinion that she intended by her will to give the issue any such right. The most that can be suggested is, that she made no express provision because she erroneously assumed that the law rendered it unnecessary for her to do so.

The right of the issue or of any one claiming through the deceased legatee to have a lapsed legacy withheld from its strictly legal destination—the residuary gift—must rest upon a plain and unequivocally expressed intention of the testatrix that it is to be given to them and not to the residuary legatees.

Beyond a conjecture of what the testatrix thought would happen under the law if a legatee predeceased her leaving issue, I can find no sufficient language in this will to indicate either an intention to prevent a lapse or to give the legacy in question to the issue of Richard Davern.