

In order, therefore, to provide for the contingency mentioned and probably for the case of a legatee dying in his lifetime, and to prevent an intestacy as to the part of the corpus that might otherwise have been disposed of, the will contains a declaration in these words:

“I declare that all lapsed legacies and shares of my estate under this my will, and all portions of my estate of which but for this provision I might die intestate, shall become part of my residuary estate, and shall be payable and divisible, as near as the then existing circumstances will permit, in like manner as hereinbefore directed with respect to such residuary estate, and this provision shall apply as well to lapsing and accruing legacies and shares as to original legacies and shares and till my estate is finally distributable, my will and intention being that all legacies or shares lapsing or failing of effect shall revert to and be divided among my remaining sons and their issue in the manner, shares, and proportions hereinbefore directed, as far as may be possible, and, to prevent an intestacy of any part of my estate, I direct that any portion thereof which at the date of the final distribution shall remain undisposed of shall be equally divided among all my then surviving grandchildren, and the issue then living of any deceased grandchildren, such issue to take the part the parent would have taken if living, and if more than one as tenants in common.”

The present controversy has arisen owing to Henry Totten having died childless, and his brothers Warren and Norman having predeceased, and his brother Osborne alone having survived, him.

The Chief Justice of the King's Bench treated the words “remaining sons” as meaning “surviving sons,” and accordingly determined that the children of Warren and Norman, as these sons had predeceased Henry, were not entitled to share in that part of the corpus which was set free owing to Henry having died childless.

I am unable with great respect to agree with that view.

It is manifest from the provisions of the will that equality between the sons as to the income of the residuary estate, and equality between their respective families as to the corpus, is the dominant idea of the testator. Each son has given to him an equal share of the income during his lifetime, and for the family of each son the same provision is made out of the corpus, one-fourth to each in the same events