CANADIAN CHURCH UNION CASES AND THE LAW OF WILLS*

Profiting from the experience of the Presbyterian Churches which united in Scotland in 1900, the Canadian Churches which proposed to unite in 1925, adopted the safer course of invoking in advance the sanction of the Legislature to their union. The United Church of Canada Act[1] is clear and simple. The preamble recites that the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches of Canada had adopted a Basis of Union scheduled to the Act and had agreed to unite and form one body or denomination of Christians under the name of "The United Church of Canada". By s.4 it was provided that the union of the three churches should become effective upon the day upon which the Act came into force, (June 10, 1925), and the three churches as so united were thereby constituted a body corporate and politic under the above name. Section 5 provided for the vesting in the United Church from and after June 10, 1925, of the general property belonging to the uniting churches. It was contemplated that some congregations might not concur in the union. To meet their case it was enacted in s.10 that if any congregation should at a meeting held within six months before June 10, 1925, decide by a majority of votes not to enter the union, the property of such non-concurring congregation should remain unaffected by the Act, and s.4c. provided that members of any non-concurring congregation should be deemed not to have become members of the United Church. Elaborate provisions are contained in ss.10 and 11 to safeguard the position of non-concurring congregations, including the appointment of a commission to secure to them a fair apportionment of property. A congregation which took no steps during the six months preceding June 10, 1925, to vote itself out of the union, automatically entered the United Church and became subject as regards its constitutions and its property to the whole provisions applicable to the United Church and its congregations.[2]

It soon became apparent that the law of wills must be numbered among the pitfalls which seem to lie in the path of all legislative efforts to deal with ecclesiastical matters.

---

* The present article was awarded the Sir Joseph Chisholm prize at Dalhousie Law School in 1938.

[1] 1924 (Can.) c. 100; all the provinces passed Acts in 1924, except P.E.I. and Ont. in 1925, Que. in 1926.

[2] *Ferguson* v. *MacLean*, [1930] S.C.R. 630.

The problem arose as to the effect of the Union on the interpretation of a will which had been made before, but which took effect after the Union, where one of the affected bodies was a beneficiary. It first came before the Supreme Court of Canada in *Re Patriquin.*[3] By a will made in 1924, the testatrix bequeathed $100 "to the Trustees of the Tatamagouche Presbyterian Church", and a residue "to Tatamagouche Presbyterian Church". There were other charitable bequests. She was then a member of that church. She died in 1926. In 1925 a vote was taken in the congregation pursuant to the Act of Union, as a result of which the congregation became part of the United Church of Canada. Afterwards the dissentients organized a Presbyterian congregation, the Sedgewick Memorial Church at Tatamagouche. The United Church at Tatamagouche, the Sedgewick Memorial Church, and the next-of-kin claimed the bequests. At the trial Chisholm J. held, though not without some doubt, that the congregations which went into the Union, did so without losing their identity and the United Church at Tatamagouche was entitled to the bequests. The Supreme Court of Nova Scotia, *en banc*, unanimously reversed this decision, holding that the church in existence at the date of the will had ceased to exist as the result of the Union. As to the Sedgewick Memorial Church, it was not the church referred to which could not be held to have been "merely in a state of suspended animation revived on the organization of the Sedgewick Memorial Church". The ordinary rule as to lapsed legacies applied as this was not a case where the *cy pres* doctrine could be applied. The property would be dealt with as if undisposed of by the will. The Supreme Court of Canada affirmed this decision as to the United Church, which alone was before the Court. Smith J. delivered the judgment of the court: "There was at the date of the will of the testatrix, a religious body named the Presbyterian Church in Canada, having a congregation of that church at Tatamagouche to which the testatrix belonged. That congregation, or at least the majority of those who composed it, have now become a congregation of the United Church of Canada, an incorporated body that came into existence. . subsequently to the date of the will. I think that the Supreme Court in banco has correctly held that the present congregation of the United Church at Tatamagouche is not the same entity as 'the Tatamagouche Presbyterian Church' to which the testatrix made this bequest and therefore cannot take it. We have incorporated

[3] [1930] S.C.R. 344; 60 N.S.R. 343; 60 N.S.R. 344. Note also *United Church* v. *Murphy*, [1931] 1 D.L.R. 452.

by the Act, an entirely new and distinct legal entity, and what we have to consider is whether or not that entity is the same organization as that which she had in contemplation as her beneficiary. There can be no doubt that it was not present to her mind that there was to be any such change as subsequently took place, and it seems clear that the beneficiary that she had in mind was 'the Tatamagouche Presbyterian Church' as a congregation of the Presbyterian Church as it then existed, and it cannot be said that a congregation of the United Church of Canada at Tatamagouche is the same religious organization as was within the contemplation of the testatrix in making this bequest to the Tatamagouche Presbyterian Church." It was also held that the question in issue must be decided without regard to the fact that the testatrix became a member of the Sedgewick Memorial Church.

It should be noted that as the United Church was the only appellant to the Supreme Court of Canada, only the interests of that church were dealt with. No decision was given regarding the Sedgewick Memorial Church, the continuing Presbyterian congregation. The Supreme Court of Nova Scotia had found that this church was not entitled to the bequests. In all the courts the question involved was whether or not the legatee had ceased to exist by being merged in a new corporation subsequently created.

The only cases mentioned in the judgment of the Supreme Court of Canada dealing with the question of the identity of the legatee were *Re Whorwood*,[4] and *Re Donald*.[5] In *Re Whorwood* there was a bequest to Lord Sherborne. He died before the testator and it was held that the successor in title was not entitled to the bequest, for the reason that he was manifestly not the identical person described by the testator. In *Re Donald* there were bequests to certain military units. By the Territorial Reserve Forces Act these units were transferred to the Territorial Forces under new names. The bequests were held valid as the units continued to exist though under different names. The Court distinguished the latter case on the facts. It seems unfortunate that the Court did not discuss the matter at greater length.[6]

No doubt having regard to the conduct of the testatrix in *Re Patriquin* the effect of the decision was to carry out the inten-

[4] (1887), 34 Ch. D. 446.
[5] [1909] 2 Ch. 410.
[6] See Lamont J. in *Ferguson* v. *MacLean*, *supra* at p. 662; note that the learned judge was not present when *Re Patriquin*, *supra*, was decided.

tion of the testatrix. The New Brunswick case of *Weatherby* v. *Weatherby*,[7] decided in 1927, before the *Patriquin Case*, would not have reached such a happy result if the reasoning of the Supreme Court had been employed. A testator by will dated March 10, 1924, instructed his executors to install a memorial window in "The St. James Presbyterian Church at Scotch Ridge"; he bequeathed $250 to the Women's Missionary Society of the same church; and left the residue of his estate to the chairman and treasurer of the same church, the income to be used for the general expenses of the church. The church was part of the Presbyterian Church in Canada and was incorporated under the name of "St. James and Union Church of Scotch Ridge". The testator died July 10, 1925, after the said church had become part of the United Church of Canada. There was no other Presbyterian Church at Scotch Ridge. Sir Douglas Hazen C.J. held: "In my opinion the St. James Presbyterian Church of Scotch Ridge. . . has not. . . ceased to exist because it has become a part of the United Church of Canada, nor has it lost its identity by so doing or changed its nature and become something foreign to that which the testator intended to be the object of his bounty. It is the only church at Scotch Ridge now in existence and the only one which existed at the date of the will, and in my opinion, it is still the St. James Presbyterian Church at Scotch Ridge." To have held otherwise would have frustrated the obvious intention of the testator who had made his will just prior to the Union and who continued to attend the church after the Union. Had the question arisen three years later, the decision of the Supreme Court in the *Patriquin Case* might have caused the bequests to go as on an intestacy.

Such was the result of the more recent case of *Re Thorne*.[8] A testator by his will in 1917 bequeathed various legacies, among which were three, "to the Methodist Church of Sandy Cove", "to the Methodist Church of Centreville", and "to the Methodist Church of Port Wade". The legacies did not vest till 1932, the testator having died in 1918. It was held that under the authority of *Re Patriquin* the three Methodist Churches named in the will had ceased to exist after the coming into force of the United Church of Canada Act of 1924. The case cannot be criticized as frustrating the intent of the testator, shown by his subsequent conduct, as he had died before the union of the churches.

[7] (1927), 53 N.B.R. 403.
[8] [1935] 4 D.L.R. 778.

In *re Spaulding*,[9] a testatrix by her will in 1918 bequeathed two-thirds of the residue of her estate "to the Trustees of the General Funds of the Watford Presbyterian Church to be used by them in the best interests of the church". The testatrix died in 1925 shortly after the church had voted in favour of the Union. No doubt reconciled to the decision of the Supreme Court, the United Church did not contest the bequest with the dissenting Presbyterian congregation and the next-of-kin.

So far the problem has only concerned those bequests which related to a particular congregation of one of the uniting churches. The question as to the disposition of a bequest to a fund of the entire church-body first came before the Supreme Court of Canada in *Re Gray*.[10] The testatrix by will in 1921, while a member of the Presbyterian Church in Canada, made certain bequests "to the Home Mission Fund of the Presbyterian Church in Canada" and "to the Foreign Mission Fund of the Presbyterian Church in Canada". The testatrix's congregation entered the United Church of Canada and she continued to be a member of that congregation until her death in 1929. At the trial Graham J. held that the part of the Presbyterian Church which merged in the United Church, became in fact a new church under a new name, differing in polity and doctrine from the Presbyterian Church (continuing), which had retained substantially the old name, and which had continued the old polity and doctrine, and that the bequests should go to the Presbyterian Church (continuing). The Supreme Court of Nova Scotia *en banc*, affirmed this decision, (Hall J. dissenting in favour of the United Church). It was held also that there was no statutory prohibition against the use of the name "Presbyterian Church in Canada".[11] The United Church appealed to the Supreme Court of Canada. It claimed that the Presbyterian Church in Canada, as it existed before the Act, became a constituent part of the United Church of Canada without the loss of its identity, and that the gifts in question should pass to the United Church of Canada. The Court, following *Re Patriquin*, refused to allow the appeal. The Court stated that it could see no distinction in principle between the case where funds were the object of the bequests, as in the present case, and a congregation, as in the *Tatamagouche Case*. It expressed no opinion as to the right of the continuing Presbyterian Church to the

[9] [1936] O.W.N. 481.
[10] [1934] S.C.R. 708; [1933] 2 D.L.R. 400; [1932] 3 D.L.R. 250.
[11] See 1924 (Can.) c.100, s.10c.

gifts, as against other parties interested as residuary legatees or as next-of-kin, that question not being before it.

Again it should be noted that as the United Church was the only appellant to the Supreme Court of Canada, only the interests of that church were dealt with. The Court, however, expressly stated that the decision did not affect the rights of other interested parties. In other words, the question involved was not whether the legatee had ceased to exist by being merged in a new corporation, but whether the legatee named in the will was the claimant before the Court. The finding of the Court was that so far as the United Church was concerned, the legatee had ceased to exist. For any authority as to the validity of the bequests to the 'Presbyterian Church in Canada', one must revert to the Supreme Court of Nova Scotia.

Previously a different result had been reached in *Re Ferguson*.[12] The testator, a minister of the Presbyterian Church in Canada, before the Union bequeathed certain legacies to three Funds of the Presbyterian Church in Canada, which he had accurately described by the words used. The testator died in 1926. Rose J. held that the bequests were valid gifts to the Board of Trustees of the 'Presbyterian Church in Canada', a body still alive and competent to receive them. The Legislature had declared that the 'Presbyterian Church in Canada' had united with other bodies without losing its identity. In a dissenting judgment in the Supreme Court of Nova Scotia in *Re Gray*, Hall J. agreed with this decision.[13]

The same result was reached in *re Stephens*,[14] before *re Gray* had gone to the Supreme Court. The testatrix by will in 1916 bequeathed the residue of her estate equally "to the Home Mission Board of the Presbyterian Church in Canada" and "to the Foreign Mission Board of the Presbyterian Church in Canada". She died in 1930. Baxter J. held that the object of the gift did not cease to exist. "In my opinion the work of the Home and Foreign Mission Boards mentioned in the will, is still being carried on, by two bodies if you like, but in character precisely the same work which the testator desired to benefit. These Boards did not exist *per se* at the death of the testator, but there can be no doubt that agencies of the United Church did exist for the same purposes and that the Presbyterian Church

[12] (1926), 31 O.W.N. 200.
[13] [1933] 2 D.L.R. 400.
[14] (1933), 6 M.P.R. 305.

had become a component part of the United Church. . . . Whether it preserved its identity or not is a matter in my view of no importance in this case."[15] The bequests were held to be payable to the United Church in Canada since that was the desire of both churches. The learned Judge stated that the case came within *Re Withall*,[16] and more particularly within the reasoning of the Court of Appeal in *Re Watt*.[17] Both cases deserve careful attention.

In *Re Watt*, the testator by will in 1925 directed his residuary estate to be divided among six named institutions of which one was the "Southwark Diocesan Society". The testator died in Dec. 1929. There was no society known by that name. Up to Jan. 1929, there had been a society known as the "Southwark Diocesan and South London Church Fund", but at that date a society called the "South London Church Fund and Southwark Diocesan Board of Finance" was incorporated for the purpose of taking over the assets of that society upon the existing trusts and continuing the work of that society. Clauson J. held that the testator intended the gift to be to the "Southwark Diocesan and South London Church Fund", but that as at the time of the testator's death that society had no separate existence, there was a lapse. In the Court of Appeal, Lord Hanworth M.R. held that in spite of the incorporation of the new society, the identity of the object of the bequest had not been lost. True a legacy to A does not mean a legacy to B "but charity is always favoured by equity, and we think that, in what is a matter of some difficulty, the testator has substantially designated under the words he has used the body that still carries on the work in which he was interested years ago, work carried on in a district in which he lived, and which is now in charge of and being administered by this more modern body". Lawrence L.J. and Romer L.J. held that in the special circumstances of the case it was one that falls under that class of cases where there is a gift, not to a particular person or association, but for the purpose of carrying on a particular charitable work.

In *Re Withall*, the testatrix by will directed her executors to sell the residue of her property and pay the proceeds to the "Margate Cottage Hospital", an endowed charity. A short time before her death the Hospital had ceased to exist, but the funds existed and had been treated as applicable to the purpose of another hospital. Clauson J. held that as the funds had not

[15] (1933), 6 M.P.R. 305 at pp. 307-8.
[16] (1932), 101 L.J. Ch. 414; see note in (1934), 12 Can. Bar Rev. 114.
[17] (1932), 101 L.J. Ch. 417 (note).

come to an end the trust still existed, and there was therefore a good charitable gift. "My decision is that the next-of-kin have no interest in the matter and that the testatrix's residue is to be applied for the purposes of the Margate Cottage Hospital." The funds were directed to be paid to the persons who, under a scheme settled by the Charity Commissioners relating to the charity known as the "Margate Cottage Hospital", were declared to be the proper persons to receive the funds of that charity.

It has been stated that the citation of authorities in cases on wills, is really only justified where principles of construction are involved. This is not a very helpful guide. The steady growth of the unwieldy mass of authority on the construction of wills does not assist the solution of points of difficulty, but rather tends to have the opposite effect. But in truth the so-called authorities are in reality only the application of certain well-known rules of construction to the facts of each particular case. So in the present discussion the statement of the rule of construction employed by the courts to the effect that if the beneficiary dies in the life-time of the testator the gift fails, is of little assistance. Our difficulty involves the further question, to use a metaphor,—When does the beneficiary die? We should then of necessity resort to the cases to find out the attitude of the courts on his question. Under what circumstances has a particular institution or fund of that institution, been declared non-existent? The Supreme Court has applied a rule of construction to a peculiar situation which no doubt may continue to arise for some time. The decision, however, has become an authority which can be applied in many cases, more or less extraordinary. It should not be lost sight of, when any criticism of the decision is attempted, that the Court was asked to rule on a question which involved an exercise of discretion. That it acted in a certain manner should be open to the criticism only that in the light of other decisions it might very well have decided differently. With this in mind, we shall examine those cases where there were degrees of failure which were not held to constitute a lapse.

In *Re Adams*,[18] by will in 1873 a testator bequeathed a legacy "to the endowment for the United Presbyterian Church at Hexham". In 1876 the English congregation (including the one at Hexham) of the United Presbyterian Church of Scotland, amalgamated into one synod with the Presbyterian Church in England, and the joint body called themselves the "Presby-

[18] (1888), 4 T.L.R. 757.

terian Church of England". On the testator's death in 1886, the claim of the congregation at Hexham was resisted by the residuary legatee on the ground that, by reason of the alteration in the constitution of that body, the legacy had lapsed. Mr. Justice Chitty said that he had no hesitation in coming to the conclusion that the existing Presbyterian Church at Hexham was entitled. The legacy, he sated, was not given to the general body of which that church formed part, but to the particular church at Hexham which in substance remained unaltered.

In *Re Joy*,[19] by will in 1882 a testator bequeathed legacies to the A and B societies. In 1883 the societies amalgamated with identical objects. The testator died in 1885. It was held that for the purpose of the will both societies must be deemed to be still in existence, and both legacies were valid.

In *Re Watt*,[20] Lord Hanworth M.R. held that in spite of the incorporation of the new society, the identity of the object of the gift had not been lost.

In *Re Waring*,[21] a testatrix bequeathed a legacy to the "St. A School", which, at the date of the will, was carried on under a trust deed as a Church of England school under the management of the vicar of the parish. Before the death of the testatrix the school ceased to be carried on during the week in accordance with the trust deed, but was used on Sundays as a Sunday School. It was held that the legacy had not lapsed, as there had not been a 'total loss' of the institution.[22]

In *Re Wedgwood*,[23] by will a testatrix bequeathed a legacy "to St. Mary's Home. . . of 15 Wellington Street, Chelsea", (in reality 15 Wellington Square). At the date of the testatrix's death, the same work had been transferred from one institution to the other, and there had been a slight change of locality. The same name had been retained. It was held a valid bequest to "St. Mary's Home".

It would seem from these decisions that there might be some grounds for criticizing the categorical judgment of the Supreme Court in the *Patriquin Case*.

As we have seen, there was no distinction made in *Re Gray* between legacies to a certain congregation and to a fund of the general body of the church. The cases seem to show that the

[19] (1889), 60 L.T.R. 175.
[20] *Supra*.
[21] [1907] 1 Ch. 166.
[22] JARMAN, WILLS, 7th ed., vol. 1, p. 231, note (a), doubts the correctness of this decision.
[23] [1914] 2 Ch. 245.

courts lean more favourably to preserving a gift to a fund. In *Re Edwards*,[24] there was a bequest to "The Wesleyan Methodist Foreign Mission". It was a part of the Wesleyan Methodist Church. Subsequently, and as a result of union with other Methodist bodies, the word "Wesleyan" was, by statute deleted from the name of the church and that of the Foreign Mission. Later the property of the Foreign Mission was vested in the Methodist Church. It was held, though it was not necessary to the decision, that the Foreign Mission of the Wesleyan Methodist Church had, in fact, continued to exist under the control of the Methodist Church. In *Re Wilson*,[25] by will a trust was established, the income of which was to be devoted to a District Nurse Fund. It was held that although the Fund had been divided into two parts, it had not ceased to exist. In each of these cases there was the fact that the change had occurred before the execution of the will, so that the decision did not turn on the existence of the legatee.

In *Re Faraker*,[26] the bequest was "to Mrs. Bailey's Charity, Rotherhithe". There had been a "Hannah Bayly's Charity", which had been consolidated with thirteen other charities in Rotherhithe, under a scheme of the Charity Commissioners. It was held in the Court of Appeal that "Hannah Bayly's Charity" was an endowed charity and could not be destroyed. It was not extinct though its objects had been changed in accordance with law, and the consolidated charities were entitled to take.

Re Withall has already been noted in *Re Stephens*.[27] There, although the legatee of the bequest, "the Margate Cottage Hospital", had ceased to exist, there still remained funds of that endowed charity. The court accordingly directed that the bequest be applied "for the purposes of the Margate Cottage Hospital". The disposition of the fund under the guidance of the Commissioners would ultimately decide the destination of the bequest.

The English courts seem to be prepared to go a long way in preserving bequests to a beneficiary which was an endowed charity whose funds are the only remaining evidence of its existence. No argument of this nature appears to have been considered in *Re Gray*.

The doctrine of *Re Withall* savours very strongly of the application of the *cy pres* doctrine. It is perhaps opportune

[24] (1911), 2 O.W.N. 765.
[25] (1909), 25 T.L.R. 465.
[26] [1912] 2 Ch. 488.
[27] *Supra*.

to discuss at this point, that principle in connection with our problem.

If a legacy is given to A, it cannot be claimed validly by B. To this premise there is found in the law relating to charitable trusts an exception known as administration *cy pres*. The expression *cy pres* indicates the idea that where the exact intention of the testator is not carried out, his intention is carried out 'as nearly as' may be. In *Att.-Gen.* v. *Downing*,[28] Wilmot C.J. stated the rationale of the exception in the following words: "The donation was considered as proceeding from a general principle of piety in the testator. Charity was the expiation of sin and to be rewarded in another state; and therefore, if political reasons negatived the particular charity given, this Court thought the merits of the charity ought not to be lost to the testator nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a presumption, that the principle, which produced one charity, would have been equally active in producing another, in case the testator had been told that the particular charity he meditated could not take place. The Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious, would entitle him to the same reward." But upon the failure of a particular charitable purpose, it must be shown that there is to be found in the trust instrument a transcendant intention on the part of the testator to benefit charity in general.[29] This is a matter of construction in each instrument.

The distinction is clearly apparent in *Re Fitzgibbon*,[30] where the testatrix directed in her will that a certain sum should be set apart in trust for a prize to be given to any immigrant domestic going through the Women's Welcome Hostel. Subsequently the Women's Welcome Hostel was amalgamated with the Girls' Friendly Society and the property was transferred to the new Society which was not carrying on the work of caring for immigrant domestic girls in the manner of the Hostel. Middleton J. found that there was no general intention to devote the fund to charity for the main and only object of the testatrix was to forward the work of the Hostel. Administration (*cy pres*) was accordingly refused.

---

[28] (1767), Wilm. 1.
[29] See Parker J. in *Re Wilson*, [1913] 1 Ch. 314 at p. 321; Kay J. in *Biscoe* v. *Jackson* (1887), 35 Ch. D. 460 at p. 463.
[30] (1922), 51 O.L.R. 500.

In *Weatherby* v. *Weatherby*,[31] one of the grounds of the decision had been that the bequests were to be applied *cy pres* which arrived at the same result as that reached by holding that the beneficiary named in the will had not lost its identity. Again the same result was reached in *Re Watt*,[32] where the majority in the Court of Appeal applied the bequests *cy pres*.

It may be said, however, that an attempted gift to an organization once existent, seems almost invariably to be viewed by the courts as showing an intent to benefit only that particular recipient, and the gift fails for want of a donee. Where the testator selects a particular charity and takes some care to identify it, it is difficult for the court to find a general charitable intent if the society ceases to exist before the testator's death.[33] However a general charitable intent may be inferred where no charitable institution as described in the will has ever existed.[34] The application of the law sometimes produces odd results, and it has been remarked that it would appear that if a testator wishes to insure that his money will be devoted to charitable purposes, it is dangerous to describe the charity too accurately. Nevertheless there is much wisdom in the attitude adopted by the Court in *Fisk* v. *Att.-Gen.*,[35] where having held a gift to have lapsed, Vice-Chancellor Wood said: "I am far from saying that the argument (re *cy pres*) may not some day or other require further consideration. . . But a great deal may be said about the prospect of a conflict between rival charities, and the risk of the Court giving to charity A a fund which the testator intended to give to a rival charity B, but which expired in his life-time."[36] The decision in *Weatherby* v. *Weatherby*[37] therefore, seems to be out of line with the authorities. The decision of the majority of the Court of Appeal in *Re Watt*,[38] can be justified on the ground that the inaccurate description of the beneficiary, was evidence of the testator's general charitable intent.

The American decisions, on similar facts, have tended to find the general intent necessary to apply the gift *cy pres*.[39]

[31] *Supra*; see *Re Marr* (1930), 39 O.W.N. 349.
[32] *Supra*.
[33] *Clark* v. *Taylor* (1853), 1 Drew. 642; *Re Rymer*, [1895] 1 Ch. 19; *Re Harwood*, [1936] Ch. 285; compare *Re Wedgwood*, [1914] 2 Ch. 245.
[34] *Re Clergy Society* (1856), 2 K. & J. 615; *Re Knox*, [1936] 3 All E.R. 623; note *Re Bailey* (1931), Sol. J. 75, 415-6, where the principle is carried a step forward.
[35] (1867), L.R. 4 Eq. 521.
[36] (1867), L.R. 4 Eq. 521 at p. 528.
[37] *Supra*.
[38] *Supra*.
[39] *Mason* v. *Bloomington* (1908), 86 N.E. 1044; *Rhode Island Hosp. Trust Co.* v. *Williams*, 50 R.I. 385, 148 Atl. 189; see (1935), 48 Harv. L.R. 1162, 1172.

A second problem came before the Courts as the result of the Act of Union. It arose from section 15 of the Act (Dominion)[40] which is as follows:

> Where, prior to the coming into force of this Section, any existing trust has been created or declared in any manner whatsoever for any special purpose or object having regard to the teaching, preaching, or maintenance of any principles, doctrines, or religious standards, or the support, assistance or maintenance of any congregation or minister or charity, or for the furtherance of any religious, charitable, educational, congregational, or social purpose in connection with any of the negotiating churches, such trust shall continue to exist and to be performed as nearly as may be for the like purposes or objects in connection with the United Church as the United Church may determine, and anything done in pursuance of the Act of Incorporation or of this Act shall not be deemed to be a breach of any such trust. . . and the entry of any congregation into the United Church shall not be deemed a change of its adherence or principles or doctrines or religious standards within the meaning of any such trust.

In *Re Richardson*,[41] a testatrix bequeathed $500 "to St. Andrew's Church, Beachbury". At the time both of the making of the will and of the death of the testatrix, there was in Beachbury only one church, a Presbyterian Church. Later this Church pursuant to the Act, joined the United Church of Canada. The members of the congregation who had opposed the Union, formed a Church also known as the St. Andrew's Church, a church of the "continuing Presbyterian Church or Presbyterian Church of Canada". The Court held that there was a valid bequest to the St. Andrew's Church which had joined the United Church of Canada. The decision rested on the interpretation of the Act of Union. As stated by Orde J. in *McLean* v. *Ballantyne*,[42] "The entry into the United Church of any Presbyterian congregation, carried with it the congregation's property, and in the eyes of the law did no violence to the trusts upon which that property was held."[43] Normally where a legacy is given to a charitable institution which exists at the testator's death, but ceases to exist before the legacy is paid over, it becomes the property of the charity and it is applicable to charitable purposes *cy pres*.[44] The effect of the Statute is to direct the application of the legacy.

[40] *Supra*; see also sec. 5 and *Laird* v. *MacKay*, [1937] O.W.N. 642.
[41] (1930), 39 O.W.N. 208.
[42] (1928), 62 O.L.R. 443.
[43] (1928), 62 O.L.R. 451; affirmed in *Ferguson* v. *MacLean*, [1930] S.C.R. 630; *cf.* the attitude of Ross J., in *United Church* v. *Murphy*, [1931] 1 D.L.R. 452.
[44] *Re Slevin*, [1891] 2 Ch. 236.

In *United Church* v. *Murphy*,[45] which was decided about the same time as *Re Richardson*, the point arose in somewhat different circumstances. A testator bequeathed a legacy to the Yarmouth Tabernacle Church (Congregational). He died before the Union Act came into effect. The Tabernacle subsequently became a congregation of the United Church of Canada. A short time later the Tabernacle Church joined with two other United Churches to form one congregation under the name of the Central United Church of Yarmouth. As the legacy was subject to a life-estate in the testator's wife, the Central United Church, on her death, sued to recover the legacy. Although the case was decided on another ground, the Court was of the opinion that the Central United could not claim to be the "unit, organization or congregation" for whom the Church Union Act preserved the legacy.

In *Re Kelley*,[46] a testator by will in 1904 bequeathed "for the benefit of the Congregational Church at Cheboque", the annual income of a $20,000 trust fund. There were certain conditions to be fulfilled by the minister and by the church, non-compliance with which meant the loss of the income to the church, and for the benefit of the School for the Blind, Halifax. Then followed the provision that "should said Church cease to exist or change its adherence, then and thereafter my trustees shall annually pay over the whole of the net annual income. . . to the said Halifax School for the Blind. . ." Some time after the death of the testator, the Congregational Church at Cheboque became part of the United Church of Canada. Both the trial judge and the Supreme Court of Nova Scotia, *in banco*, held that section 15 of the Act (Canadian), did not prevent the gift to the School for the Blind. The reasoning was that as the income became vested in the School for the Blind, by virtue of the Church ceasing to exist (*Re Patriquin*,) the section could not be invoked to deprive the School of its interest for "this Act must be read subject to the general rule that no legislation will be construed in such a way as to take away rights without clear and unambiguous words". This decision carries the doctrine of the *Patriquin Case* a step farther in apparent disregard of the intention of the Legislature.[47]

It would seem that the Courts of Nova Scotia have not looked too kindly on the United Church of Canada Act.

[45] *Supra*.
[46] [1934] 3 D.L.R. 379; [1933] 4 D.L.R. 416.
[47] *Cf*. the attitude of the English Court in *Re Talbot*, [1933] Ch. 895, under similar circumstances.

In *Re Blair*,[48] an Ontario Court had an opportunity to display its attitude on the Act. A testatrix made bequests to certain organizations in connection with congregations of the Presbyterian Church in Canada, providing in each case that the organization must remain a part of the Presbyterian body in Canada after the Union. Then followed: "I direct that the residue of my real and personal estate shall be paid to the Home and Foreign Mission Work of the Presbyterian Church in Canada. . . (also to other named charities)." In conclusion was the clause, "If no Presbyterian Church all money to be divided to charitable institutions". The testator died before the Union. It was held that the stipulation attached to the other bequests, that the donees must remain out of the Union, attached to the residuary bequest also. Evidence of the testatrix's opposition to the Union was admitted.

As stated in *Auger* v. *Beaudry*,[49] "whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator, is to give the fair and literal meaning to the actual language of the will". Had this been followed the residuary bequest would have been declared, by virtue of the Act, a valid gift to the United Church of Canada. As to the admission of extrinsic evidence, the rule is that you must first construe the will; if the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning or to give the will a different meaning.[50] This rule of construction should have excluded the evidence of the testatrix's opposition to the Union.

And in *Re Loggie*,[51] a New Brunswick Court had its opportunity. A testatrix by will in 1923, bequeathed to "aged and infirm ministers and widows of the Presbyterian Church the sum of $2500", and directed that the money be permanently invested by her executors, and the interest paid annually. She died in 1924. After the Union the executors petitioned the Court for instructions. It was held that though there was a fund for aged and infirm ministers of the Presbyterian Church in Canada, and a fund for ministers' widows and orphans of the Presbyterian Church in Canada, yet none of the funds met the

[48] (1926), 30 O.W.N. 144.
[49] [1920] A.C. 1010 at p. 1014.
[50] *Higgins* v. *Dawson*, [1902] A.C. 1. [*Sed quaere.* See *The National Society for the Prevention of Cruelty to Children* v. *The Scottish National Society for the Prevention of Cruelty to Children*, [1915] A.C. 207; *Day* v. *Collins*, [1925] N.Z.L.R. 280.—THE EDITOR.]
[51] (1927), 53 N.B.R. 395.

description of the bequest; and that therefore the executors should have possession and control of the corpus and pay the income annually to aged and infirm ministers of the continuing Presbyterian Church and their widows. The case is open to the same criticism as *Re Blair,* in that evidence of the testatrix's opposition to the Union was admitted.

A third problem arose as a result of the inadvertence of testators in accurately describing beneficiaries. Such cases occurred after the Union when the former names of organizations were more familiar to the minds of testators. In *Re Brown,*[52] a testatrix by will in 1929, bequeathed a legacy "to St. Paul's Presbyterian Church in the township of Sydenham". She had been a resident of Sydenham for many years, and had attended St. Paul's Church where her husband had been an elder. She later had moved to St. Mary's, at which place she had made her will. St. Paul's Church entered the Union in 1925. The residuary legatee contended that due to the Union, there was a lapse. It was held that "as there was no church at the date of the will corresponding with the description in the will, it was simply a case of misdescription of the legatee" and there was a valid gift to the "St. Paul's United Church" at Sydenham. This decision was based upon the proposition that where there is a gift to an individual, the testator cannot be supposed to intend to benefit a person whom he knows to be dead at the date of the will, though such a person may accurately answer the description given.[53] In the same way, a testator cannot intend to make a gift to a society which he knows has ceased to exist at the date of his will. In such a case, therefore, though the non-existent society exactly answers the description, some other society to whom the description applies with less accuracy may take.[54] In *Re Main,*[55] a rather different solution was reached. A testator by will in 1928 bequeathed to "the United Presbyterian Church of Rexton, New Brunswick". The only Presbyterian Church in Rexton had become a United Church in 1925. It was held that there was no misdescription as the word 'Presbyterian' had only been put in to distinguish the Church from other congregations which had entered the Union. A very different conclusion would have been reached had there been a continuing Presbyterian Church of Rexton. Courts are unwilling to hold a gift void for uncertainty, but if there is no legatee answering

[52] (1931), 40 O.W.N. 282.
[53] *Re Halston,* [1912] 2 Ch. 435; and see *Re Ofner,* [1909] 1 Ch. 60.
[54] *Re Magrath,* [1913] 2 Ch. 331; and see *Re Ovey* (1885), 29 Ch.D. 560, 564.
[55] (1933), 7 M.P.R. 139.

the description, and there are two or more persons or organizations to whom it more or less applies accurately, so that there is nothing to enable the court to decide between them, the gift is void.[56] Happily this situation did not arise in the present case.

A century ago, Lord Brougham in his famous speech on Law Reform said: "But even in wills, where we affect most to follow the intent, so nice is the construction, so technical has it become through many decisions of the Courts, and so imperfect consequently is the knowledge generally possessed by people on the subject, that a man cannot well be more in the dark on the subject of the distribution of his property after his will has taken effect, by his being naturally dead, than he is at the very moment of making it. . . The most notable part of these excessive refinements is, that they all proceed upon the act being evidence of a presumed intention, when no man can doubt that either there was no such intention, or one of the very opposite description."[57] Whatever at this date might be said about rules of construction in the interpretation of wills generally, one is driven to the conclusion after studying the cases which have arisen as a result of the United Church of Canada Acts, that any criticism which might be directed at those cases, ought not to be based on the rules of construction employed in their consideration.

BENSON A. ROGERS.

Dalhousie Law School.

[56] *Re Gray*, [1934] O.W.N. 17.
[57] SPEECHES OF HENRY LORD BROUGHAM, 1838, vol. 2, pp. 319, 452.