

1929

\*Oct. 10.

1930

C. K. McLELLAN, EXECUTOR OF THE LAST  
WILL AND TESTAMENT OF ELIZA PATRI-  
QUIN, DECEASED .....

APPLICANT

AND

\*April 10.

—

R. B. FRASER AND OTHERS, TRUSTEES OF  
THE PRESBYTERIAN CHURCH AT TATA-  
MAGOUCHE, IN CONNECTION WITH THE  
UNITED CHURCH OF CANADA.....

APPELLANTS;

AND

GORDON FRASER AND OTHERS,  
TRUSTEES OF SEDGEWICK MEMORIAL  
CHURCH .....

CROSS-APPELLANTS:

AND

EDWIN C. McLELLAN, APPOINTED BY  
ORDER OF THE SUPREME COURT OF NOVA  
SCOTIA IN BANCO TO REPRESENT THE  
CLASS COMPRISED OF THE NEXT OF KIN  
OF ELIZA PATRIQUIN.....

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN  
BANCO

*Will—Church congregations—Bequest for “Tatamagouche Presbyterian Church”—Congregation becoming, after date of will and before testatrix’ death, part of the United Church of Canada.*

By her will, made January 5, 1924, P. bequeathed \$100 “to the Trustees of the Tatamagouche Presbyterian Church,” and a residue “to Tatamagouche Presbyterian Church.” She was then a member of that

\*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

church. She died May 2, 1926. On January 12, 1925, a vote was taken in the congregation, pursuant to c. 100, statutes of Canada, 1924, when a majority voted for union, and, as a result, the congregation, on June 10, 1925, became a part of the United Church of Canada.

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*Held*, that the congregation could not take under said bequests; by becoming a congregation of the United Church of Canada at Tatamagouche, it had become something so different from the congregation for whose benefit the bequests were made, that it did not now come within the description in the will; the present congregation was not the same entity as the congregation which P. contemplated as her beneficiary. (*In re Donald*, [1909] 2 Ch., 410, and *In re Magrath*, [1913] 2 Ch., 331, distinguished). As to the bequest to "the Trustees of the Tatamagouche Presbyterian Church," it was to a corporation which, even if it continued to exist, was not now one for carrying into effect the testatrix' object, and the same principle applied as in the case of the other bequest.

The fact that, about the time the congregation became part of the United Church of Canada, P.'s name was, at her request, removed from its roll and she became a member of Sedgewick Memorial Church, a continuing Presbyterian Church formed at Tatamagouche by those of the original congregation opposed to the union, was not admissible as a guide to interpretation of the will. The question in issue must be decided without regard to whether P. remained in the United Church congregation or left it.

Judgment of the Supreme Court of Nova Scotia *in banco* (60 N.S. Rep., 343), which held that there was an intestacy as to said bequests, affirmed in the result.

APPEAL (by leave granted by the Supreme Court of Nova Scotia) from the judgment of the Supreme Court of Nova Scotia *in banco* (1) which varied the decision of Chisholm J. (2).

The proceedings were commenced by originating summons in the Supreme Court of Nova Scotia, at the instance of the executor of the will of Eliza Patriquin, late of Tatamagouche, Nova Scotia, deceased, to construe the said will and determine to what body or persons bequests left under certain clauses of the will should be paid.

Chisholm J. (2) held that the present appellants were entitled as beneficiaries to the legacies bequeathed under the clauses in question. The Supreme Court of Nova Scotia *in banco* (1) held that the property in dispute should be dealt with as if undisposed of by the will, and it was de-

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clared that the next of kin or persons entitled by law, had the deceased died intestate, were entitled to the legacies provided for by the said clauses.

The cross-appellants, the Trustees of Sedgewick Memorial Church, filed a notice discontinuing their appeal.

The clauses in question of the will, and the material facts of the case, are stated in the judgment now reported. The appeal was dismissed with costs.

*Donald McInnes* for the appellants.

No one *contra*.

The judgment of the court was delivered by

SMITH J.—Eliza Patriquin made her last will, dated the 5th day of January, 1924, and died on the 2nd day of May, 1926. The clauses of the will that give rise to the questions here involved read as follows:

7. I bequeath to the Trustees of the Tatamagouche Presbyterian Church, One Hundred Dollars.

10. If there is any balance remaining I bequeath such balance to Tatamagouche Presbyterian Church.

At the date of the execution of the will, the testatrix was a member of the Tatamagouche Presbyterian Church.

On the 12th day of January, 1925, a vote was taken in Tatamagouche Presbyterian Church congregation, pursuant to the provisions of Chapter 100, Statutes of Canada, 1924, when a majority of the members of the congregation voted for union, and, as a result, the congregation became a part of the United Church of Canada on the 10th of June, 1925.

The bequests under clauses 7 and 10 of the will quoted above are claimed by this congregation of the United Church of Canada at Tatamagouche. The respondent, Edwin C. McLellan, was, by order, appointed to represent the class comprising the next of kin of Eliza Patriquin. The cross-appellants, the Trustees of Sedgewick Memorial Church, have filed a notice discontinuing their appeal and disclaiming any interest in the bequests referred to.

It appears in the record that about the time the congregation became part of the United Church of Canada the name of the testatrix was, at her request, removed from the roll of that congregation and that she became a mem-

ber of Sedgewick Memorial Church, a continuing Presbyterian Church formed at Tatamagouche by those of the original congregation opposed to the Union. Some argument was based on this incident. It, however, appears clear that evidence of what the testatrix did after the making of the will is no more admissible as a guide to its interpretation than evidence as to what she may have said would have been. We must decide the question presented without regard to whether the testatrix remained in the United Church congregation or left it.

There can be no doubt that at the time the will was executed the testatrix intended these two bequests for the benefit of the congregation to which she then belonged, and the sole question for determination is whether or not that congregation, under the circumstances that have since arisen, comes now within the description in the will or has become something so different that it does not now answer to the description.

On the return of the original summons before Mr. Justice Chisholm it was held that these bequests go to the congregation at Tatamagouche that became a congregation of the United Church of Canada (1). This decision was unanimously reversed by the Supreme Court of Nova Scotia *in banco* (2), where it was held that, as to these bequests, there was an intestacy.

The first question is whether or not the bequest under clause 10, of any balance remaining, to "Tatamagouche Presbyterian Church," is effective as a bequest to the congregation which has now become a congregation of the United Church of Canada at Tatamagouche.

Not much help is to be obtained from the cases cited in the appellant's factum.

In *In re Whorwood* (3), the bequest was 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.

The case of *In re Magrath* (4), seems to have no bearing. On October 31, 1909, "Queen's College, Belfast" was

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(1) (1928) 60 N.S. Rep. 343 (at (3) (1887) 34 Ch. D., 446.

p. 344).

(4) [1913] 2 Ch. 331.

(2) (1929) 60 N.S. Rep. 343.

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dissolved under the provisions of the *Irish Universities Act*, 1908, and by the same Act, "Queen's University of Belfast" was incorporated. The testatrix, by her will dated February 16, 1910, made a bequest to "Queen's College, Belfast." It was held that "Queen's University of Belfast" was sufficiently referred to by the words of the will, and that the legacy took effect in its favour, the words in the will being treated as a mere misdescription of the legatee. It will be seen that the principle applied there has no relation to the present case. Had the will in that case been dated prior to the dissolution of "Queen's College, Belfast," it would have more nearly resembled the present case, but the decision would in that case probably have been different, because in that event the bequest would have exactly described an institution then in existence, and subsequently dissolved. The contention here is that the legatee ceased to exist by becoming merged in a new corporation subsequently created.

The case of *In re Donald* (1), is more nearly in point, but is nevertheless capable of being distinguished. The bequests were for the benefit of certain military units. By the *Territorial Reserve Forces Act*, these units were transferred to the Territorial Forces under new names. Warrington J., in this case says:

In my opinion the effect of the Territorial and Reserve Forces Act, 1907, and of the Order in Council of March 19, 1908, made under it, is not to destroy these units, but to reorganize them, and they are treated both in the Act and in the Order in Council as existing entities which are transferred to, and from henceforth become units of, the Territorial Force, and are called by different names; but, so far as the Act and the Order in Council are concerned, they continue to exist as institutions under those names.

These units were all, both before and after the change, part of His Majesty's military forces, and the units, being simply transferred and given new names, did not, in the learned judge's opinion, cease to exist.

The situation to be dealt with here is not altogether similar. These 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, as stated, 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 of Canada 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 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.

The bequest of \$100 is to "The Trustees of the Tatamagouche Presbyterian Church."

By 10 Vic., c. 37, The Presbyterian Congregation at Tatamagouche was empowered to appoint three trustees to take charge of the House of Worship and of the adjoining cemetery, called the Tatamagouche Burial Ground, whose name of office shall be "The Trustees of the Presbyterian Church at Tatamagouche." There is power to fill vacancies caused by death, resignation or otherwise, and to remove trustees and appoint others, and the power and authority of the former trustees is to vest in their successors for all purposes intended by the Act. The trustees are authorized, in the name of their office, to sue and be sued.

Under the authorities it seems clear that these trustees became a corporation by implication. *The Conservators of the River Tone v. Ash, et al* (1); *Re Wansley and Brown* (2); *Beaty v. Gregory* (3).

(1) (1829) 10 Barnwell & Cresswell's Repts., 349.

(2) (1891) 21 Ont. R., 34.

(3) (1897) 24 Ont. App. R., 325.

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The statute 10 Vic., c. 37, does not provide for the vesting of any property in the trustees, and the only power given them is as to care and management of property already held. There are later statutes, authorizing the trustees to sell parts of the property and give title thereto, but there is nothing in the record that indicates that any property was vested in these trustees, and therefore sec. 20 of *The United Church of Canada Act*, N.S., 14-15 Geo. V, ch. 122, would seem not to apply to these trustees. If it does apply, subs. (b) expressly provides for their continuance as a body corporate.

The bequest of \$100, therefore, is to a corporation which, perhaps, continues to exist, but it is nevertheless necessary to consider, even if that be so, whether or not it is a corporation for carrying into effect the object that the testatrix had in view, namely, to hold or expend the bequest for the benefit of the "Presbyterian Church at Tatamagouche". It would seem that the same principle should be applied as in the case of the other bequest.

It follows, therefore, that the Trustees of the Presbyterian Church at Tatamagouche, if still a corporation, would take the bequest upon a trust different from that in the contemplation of the testatrix at the time of making her will, and that this bequest also lapses.

The appeal therefore must be dismissed, with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the cross-appellants: *T. R. Robertson.*

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