JANE ALEXANDER PRINGLE (PLAINTIFF) .... } APPELLANT;

1914
*Nov. 18.
*Dec. 29.

AND

DAVID ANDERSON AND OTHERS, TRUSTEES OF ST. MATTHEW'S CHURCH (DEFENDANTS) .... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Construction of will—Legacy to church committee—Contribution to "building fund"—Ulterior disposition—Application to purpose intended—Lapse of devise—Art. 964 *C.C.*

At a time when the congregation of St. Matthew's Presbyterian Church, in Montreal, was heavily encumbered with debt incurred in building the church, a committee was formed to collect contributions to be applied in liquidating the debt by means of a "building fund," and the testatrix made her will by which she bequeathed certain real property to that committee. Several years later the committee were relieved of their duty and the building fund ceased to exist, and during the year previous to the death of the testatrix the original debt in respect of which the building fund had been established was fully paid. There remained, however, at the time of her death balances of debt still due for expenses incurred for other building purposes. In an action to have the bequest declared to have elapsed on account of failure in its ulterior disposition,

Held, affirming the judgment appealed from (Q.R. 46 S.C. 97), Duff and Anglin JJ. dissenting, that, in the circumstances of the case, the bequest must be construed as á bounty to the trustees of the church for the purposes of building expenses, including debts incurred for such purposes subsequent to the construction of the church; that the motive of the testatrix was not to make a contribution to any particular fund, but to benefit the congregation in respect to its building liabilities generally, and that the

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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legacy did not lapse in consequence of the "building fund" having ceased to exist and the extinction of the debt in regard to which contributions to that fund were to be applied.

Per Duff and Anglin JJ. dissenting.—It was of the essence of the gift that it should be capable, at the time of the death of the testatrix, of being applied in furtherance of the specific purpose for which the "building fund" had been instituted and, that having become impossible, it lapsed under the provisions of article 964 of the Civil Code.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal(1), affirming the judgment of Mr. Justice Dunlop, in the Superior Court, District of Montreal.

The circumstances of the case and the questions in issue on this appeal are stated in the judgments now reported.

C. M. Holt K.C. and *W. F. Chipman* for the appellant.

J. E. Martin K.C. for the respondents.

THE CHIEF JUSTICE.—The question at issue between the parties on this appeal relates to the validity of a bequest in a will made in notarial form, at Montreal, in May, 1892, by a lady who died at a very advanced age, in 1909.

The clause of the will in dispute is in these words:

Secondly, I give, devise and bequeath unto the Trustess of the Building Fund of St. Matthew's Presbyterian Church, Wellington Street, in the City of Montreal, those two certain houses situate in the St. Gabriel Ward of the said City of Montreal, fronting on Rushbrooke Street and bearing the numbers forty-eight and fifty (48 and 50) of said street, with the property upon which the said houses are erected as now belonging to me said testatrix.

(1) Q.R. 46 S.C. 97.

To have, hold and enjoy said property unto said trustees, their successors and assigns as *their absolute property in virtue hereof.*

We are asked to say what the intention of the testatrix was when she used this language to describe the devisees.

A brief statement of the circumstances under which the bequest was made will, I believe, materially help us to understand the sense in which the late Mrs. Boyd must be presumed to have used the words in which she expressed her intention in respect of this portion of her estate for, as a very eminent judge said,

all writings tacitly refer to the existing circumstances under which they are made.

I have also present to my mind the rule of the Quebec Code, article 12, that where a law is doubtful or ambiguous it is to be interpreted so as to give effect to it and, as Laurent says, Vol. 14, No. 292,

il en doit être de même des testaments qui sont des lois d'intérêt privé.

See also the articles of the Civil Code, 1013-1021, which relate to the interpretation of contracts, and *Martin* v. *Lee*(1).

When the will was made and at the death of the testatrix, there was in Montreal a congregation known as "St. Matthew's Presbyterian Church," of which the testatrix had been at all times a very zealous member. That congregation had a legal existence, and its property was held in the name of the trustees, now respondents, under the authority of the Quebec statute, 38 Vict., ch. 62, section 4 of which reads:—

Whenever any congregation, society or mission, in communion or connection with said united church, shall hereafter be desirous of

(1) 14 Moo. P.C. 142.

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acquiring any land, or real property of any description whatsoever, for the site of any church, chapel, meeting-house, school, manse, glebe, burial-ground, or appurtenances thereto, the same may be acquired by trustees for any one or more of the said objects, which shall be designated in the deed of acquisition, and by any name assumed in said deed, sufficient to shew the connection or communion of its members with said united church, and the locality where such congregation, society or mission is to be established; and such deed shall not require to be registered at any prothonotary's office, but shall be subject to the ordinary laws of registration applicable to individuals, and such congregation, society or mission shall be entitled to acquire, take or hold lands and real estate, for the purposes aforesaid, without license, in mortmain.

Some years before the will was made a committee was appointed by the congregation to raise a building fund for the purchase of a site for a new church and to provide for its construction. In due course the property was acquired, and the church was finished in 1891, but not completely paid for. The will was made in 1892. It appears by the trustees' annual report for the year ending 31st December, 1893, that the church property was heavily encumbered and there was, in addition, a large floating indebtedness. The same conditions continued to exist in 1894. More prosperous days appeared in 1897 and it was then decided to close the building and sinking funds and open a mortgage fund to provide for the payment of the capital and interest of the debt due on the church property. The Building Fund Committee then passed out of existence, although there was outstanding a mortgage on the property of over $12,000. The importance of this will be more apparent when I come to consider the objections made to the validity of the bequest. In 1901 the congregation found it

very necessary to the upbuilding of the church that the musical part of the services should be of a high order,

and it was resolved to purchase a suitable organ which apparently cost something over $2,000. In 1903 the

mortgage fund was merged into the revenue fund and in the same year a new building was substituted for the annex to the church at a cost of about $5,000, a contract was let for repairs, and the erection of "MacVicar Hall" to accommodate the Sunday School pupils was decided on. This hall is part of the religious establishment and is connected with the church by a passage-way. In 1907 there appears to have been a very full discussion of different schemes formulated to liquidate the mortgage indebtedness on the church proper. Increased efforts were put forward in 1908 and, finally, it was announced at a meeting held in January, 1909, not that the liabilities of the congregation had been liquidated, but that the balance due on the mortgage was paid off. The deceased, who was throughout, as I have already said, a very active church member, died on the 5th August, 1909, without making any change in her will.

At that time, as was found by the trial judge,

there was a debt upon "MacVicar Hall," which is part of the church property under the control of the trustees, of $3,750; there was a debt upon the manse of $4,500, and upon the organ installed in the church of between two and three thousand dollars. Then there were always repairs, improvements, extensions and depreciations to be provided for, to which the legacy could properly be applied and which are clearly covered by the intention of the testatrix.

The contention now put forward is that the legacy lapsed because the specific fund designated by the testatrix as "the building fund" ceased to exist in 1897 at a time when, as I have already pointed out, the financial condition of the congregation was at its worst. The church property was then burdened with a very heavy mortgage and consequently most in need of the help which clearly the testatrix intended to give

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when she made her will; and to hold that the bequest lapsed when the building fund was merged in the mortgage fund is, I respectfully submit, to effectually defeat the clearly expressed intention of the testatrix which was, not to aid any particular fund, but to assist in making provision for the buildings necessary to effectively carry on the religious work of a congregation with limited means in which she was deeply interested.

Let us now examine the will. I think we are all agreed that the devisees are the trustees of the church and that the will must be construed as if the devise read,

I give to the trustees of St. Matthew's Presbyterian Church for the purposes of the building fund.

It is not contended that the trustees were not competent to take or that they are not sufficiently identified, but it is said the purpose (*motif*) to which the proceeds of the legacy were to be applied had ceased to exist at the death of the testatrix and, therefore, the legacy lapsed.

This is not a case of lapsed legacy in the ordinary meaning of the term (arts. 900, 904 C.C.) nor is it a bequest to trustees under articles 868 and 869 C.C. The objection urged by the appellant does not appear to be based upon any particular provision in the Code, but I presume the intention of the appellant is to bring the bequest within the application of a principle well known in the civil law as

legs devenu caduc pour cause de cessation du motif pour lequel le testateur a fait le legs.

The distinction between this kind of legacy and a conditional legacy with which it is sometimes confounded, is well explained by Pothier, vol. 1, page 425, Nos. 67 and 68. See also 14 Laurent, at page 309, No. 292.

There is no uncertainty or ambiguity as to the intention of the testatrix. Her intention was to leave her property to the trustees of the church to which she belonged — to be applied by them, as I have already said, to the building needs of the congregation and the reference to the building fund was merely to indicate the agency through which at that time the funds for the building were being collected.

The trustees take the bequest in their quality as trustees, subject to the obligation to apply it to the purpose mentioned in the will of the testatrix, and at her death that property vested in them conditionally upon their accounting for the disposition they made of it. The effect of such a testamentary disposition is very clearly explained by Pothier, Vol. 1, page 425, No. 68, and at page 443, No. 116. The committee appointed to collect for the building fund could not take, they had no legal independent existence, they were merely subordinate agents appointed temporarily by the congregation for a specific purpose. They had no title to the property or to the possession of any of the buildings of the congregation beyond that of any of their fellow-worshippers. To hold that when the building committee was dissolved the bequest was at an end, would be to say that, although the building liability which the bequest was intended to provide for continued to exist, the trustees were not to get the benefit of it because one of the agencies through which it was expected to raise funds had failed to accomplish that purpose.

I have gone over the history of the different means adopted to collect funds for the purpose of shewing that at the opening of the succession there was a liability on the congregation arising out of its building

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operations to which the proceeds of the legacy might be applied as the testatrix intended.

I venture to urge these additional reasons: The manse and "MacVicar Hall" are built on the original church site, they are necessary auxiliaries to effective church work and are all now part of the original establishment. The organ is incorporated in the building and is an inherent part of it as much as the pews, railings or altar, and surely the balance still due on its purchase price is a debt on the church building of which it forms a part. The same may be said of the manse and "MacVicar Hall," they are a part of the curtilage of the church and, although the relative positions of the buildings are not made quite clear on the evidence, they are all situate on the lot originally bought for the church and if sold to satisfy the claims now due on them I do not see how any part of the church property could escape: *Marson* v. *London, Chatham and Dover Railway Co.* (1).

It is impossible for me to come to any other conclusion than that (1) the trustees take under the will subject to the obligation to apply the proceeds of the bequest in the liquidation of the building liabilities, and (2) that the manse, hall and organ are all part of the general property of the congregation used for its religious purposes and that the motive of the testatrix was not to contribute to a particular fund, but to benefit the congregation in all those respects.

I would dismiss the appeal with costs.

IDINGTON J.—The late Margaret Boyd, who died 5th August, 1909, by her last will and testament, dated 13th May, 1892, made the following devise:—

(1) L.R. 6 Eq. 101.

2. I give, devise and bequeath unto the Trustees of the Building Fund of St. Matthew's Presbyterian Church, Wellington Street, in the City of Montreal, those two certain houses situate in the St. Gabriel Ward of the City of Montreal fronting on Rushbrooke Street and bearing the numbers 48 and 50 of said street, with the property upon which the said houses are erected as now belonging to me the said testatrix.

To have, hold and enjoy said property unto said trustees, their successors and assigns as their absolute property in virtue hereof.

The appellant, as tutor of her minor daughter, who was named in said will residuary legatee of the estate of deceased, brings this action to have said devise declared null and void and to have it declared that the property referred to therein forms part of the residue of the said estate.

I shall presently refer to the grounds specially taken by appellant, but before doing so it seems to me that we should consider who, if any one, is the devisee. It seems to be assumed by appellant in launching this action against the respondents that they are the devisees named or designated in said devise.

The respondents are the trustees of the property of said church holding it as such for the congregation of said church.

They are appointed, I understand, by the congregation, but whether by members of the church or members and adherents is not explained and possibly is not material except in the connection I am about to advert to.

It is conceded that they are appointed and enjoy such rights of property as they do possess by virtue of 38 Vict. ch. 62, and also seems to be conceded that all the property real and personal belonging to or used by the congregation and those ministering to or serving the said congregation in connection with said church, known by the name of "St. Matthew's Pres-

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byterian Church," is vested in the trustees appointed under said Act.

The 4th section of said statute is as follows:—

4. Whenever any congregation, society or mission, in communion or connection with said united church, shall hereafter be desirous of acquiring any land, or real property of any description whatsoever, for the site of any church, chapel, meeting-house, school, manse, glebe, burial-ground, or appurtenances thereto, *the same may be acquired by trustees for any one or more of the said objects which shall be designated in the deed of acquisition*, and by any name assumed in said deed, sufficient to shew the connection or communion of its members with said united church, and the locality where such congregation, society or mission is to be established; and such deed shall not require to be registered at any prothonotary's office, but shall be subject to the ordinary laws of registration applicable to individuals, and such congregation, society or mission shall be entitled to acquire, take and hold lands and real estate for the purposes aforesaid, without license, in mortmain.

There never were any other trustees known to said congregation than those so appointed and thus vested with power of taking real estate.

Section 13 empowers said trustees to acquire lands by devise or bequest. No one else is given the power to acquire by devise and hold for said congregation any lands. A devise of land to any one else to hold for the congregation would seem to be void as offending against the mortmain Acts. The respondents are, and I assume were, the trustees so duly appointed and possessed of the powers the said Act confers.

Now, if any lawyer had, only with the knowledge imparted by the foregoing, been asked whether respondents could take under said devise, would he have had any serious doubt or difficulty in answering in the affirmative ?

He would likely criticize the words "of the building fund" and possibly suggest they might be treated as surplusage or if not so as imposing a restriction

upon the uses to which the proceeds of the property, which must be sold within a limited term to comply with the law, could be applied, and probably in line with well known decisions he would suggest the sentence should be read as if to the trustees *"for* the building fund."

It could not be applied towards foreign missions, for example, or indeed any service of that kind. Nor could it be used to pay the minister's salary or other like expenses of the church or congregation.

Such is the way this devise appears to me. It does not seem very ambiguous, if at all, or more so than many others which have been given operative effect.

The language of Sir George Jessell in *In re Roberts* (1), as follows,—

> the modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty,

seems appropriate.

If the language is not in fact ambiguous we have no right to look elsewhere for its meaning.

It is urged, however, that the words "of the building fund" when used by the testatrix must, under the circumstances in which she was placed in relation to this church of which she was a member, have had a peculiar significance and import. As such member probably she had taken part in constituting this Board of Trustees.

It is shewn in the evidence that some ten years before she made this will the congregation had passed a resolution that

(1) 19 Ch. D. 520.

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> a committee be appointed to determine upon the site for the proposed *new building*, and devise some means of raising a fund for the purpose,

and a week later another

> that a permanent committee be appointed to raise a building fund,

and thereupon a committee was appointed accordingly.

It appears this committee continued in existence till after the church was built and after this will was made.

It is testified by one of the respondents this was done to facilitate the procuring of funds, to be kept separate from the funds for the maintenance and general working of the church.

It also appears that before the testatrix died the church debt for the building of the church itself had been paid off, but that the other buildings in connection with the church for the service of the congregation, such as a manse and Sunday school or meeting-house and building of an organ in the church had been entered upon, but the expense thereof had not been satisfied; that the fund known as the building fund aforesaid had been merged with a sinking fund and a mortgage created on the whole property which far exceeded the value of this devise.

It is suggested that with all this being done the fund meant to be described in the devise had ceased to exist and hence the devise must be held to have lapsed.

Is that the necessary conclusion from all that transpired ?

At first sight it wears a plausible appearance, but it does not seem to me of such force as to work out the desire of appellant.

There was a committee, but that committee never was the trustee of anything. What they got was the property of the trustees proper and subject to their control so far as needed to be used for the purposes to which the subscribers thereto had donated their contributions.

This committee and that fund were all subject to be dealt with by the trustees as they in fact did deal therewith; no doubt with the approbation of the congregation from time to time.

The committee and this mode of bookkeeping were no doubt highly proper and expedient means of accomplishing part of the building projects of the trustees, but they do not seem to necessarily imply that a testatrix making such a devise could ever have supposed that the phraseology of her will was thus narrowly limiting her intentions.

The remarks of Mr. Justice Swinfen Eady in *Attorney-General* v. *Belgrave Hospital for Children* (1), as to looking at the testator's knowledge of an institution to be benefited by his will, are worth observing in this whole connection.

She outlived the committee but not the trustees, and I have no doubt she would have changed her will if she had supposed the disappearance of the committee and its fund as a means of bookkeeping could have or be supposed to have, had the effect of revoking her will *pro tanto*.

I think the appeal fails and must be dismissed with costs, which let us hope will not be exacted.

DUFF J. (dissenting).—I am unable to accept the view which has prevailed in the courts below and with

(1) [1910] 1 Ch. 73.

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the majority of this court. I will briefly indicate my reasons for thinking that the appellants are entitled to succeed.

The devise we have to construe is in the following terms:—

> Secondly: I give, devise and bequeath unto the Trustees of the Building Fund of St. Matthew's Presbyterian Church, Wellington Street, in the City of Montreal, those two certain houses situate in the St. Gabriel Ward in the said City of Montreal, fronting on Rushbrooke Street and bearing the numbers 48 and 50 of said street, with the property upon which the said houses are erected as now belonging to me, said testatrix. To have, hold and enjoy said property unto said trustees, their successors and assigns as their absolute property in virtue hereof.

I did not understand it to be disputed in the oral argument presented to us on behalf of the respondents that this clause in the will of the late Mrs. Boyd does sufficiently express a direction as to the employment of the proceeds of the gift by which the trustees are bound and against whom it could be enforced. I think I am doing no injustice to the argument of Mr. Martin, who presented his case with his usual candour, in saying that he admitted that any attempt on the part of the devisees to apply the proceeds of the gift in support, for example, of foreign missions, or in payment of the minister's salary, would be a departure from the terms of the trust. That being so (and I think the admission was a very proper admission, because it appears to me to be hardly arguable that this is a gift to the trustees of the congregation of St. Matthew's to be applied for the support of religious objects in any manner the congregation should think fit) it follows that the principle which must govern us in the determination of the dispute that has arisen is furnished by article 964 C.C., which is in the following words:—

964. The legatee who is charged as a mere trustee, to administer the property and to employ it or deliver it over in accordance with the will, even though the terms used appear really to give him the quality of a proprietor subject to delivery over, rather than that of a mere executor or administrator, does not retain the property in the event of the lapse of the ulterior disposition, or of the impossibility of applying such property to the purposes intended, unless the testator has manifested his intention to that effect. The property in such cases passes to the heir or the legatee who receives the succession.

The point for decision is whether at the time of the death of Mrs. Boyd it had become impossible to apply the proceeds of her bounty according to the directions of her will. The substantial question in dispute is as to the meaning of the words employed by the testatrix when read, as they must be, in light of the facts which she must be presumed to have had in mind and with reference to which the intended disposition of her property was framed. The will was executed in May, 1892. Ten years before that, in order to make provision for the building of a church, a fund known as the "building fund" had been instituted by the congregation. A permanent committee had been created charged with the collection and administration of the fund. In February, 1892, that committee was discharged, but the fund remained on foot, the church having in the meantime been constructed, and a special committee was appointed for the purpose of securing contributions to the fund to enable the congregation to discharge the debt upon the church then secured by mortgage and amounting to $12,000. The members of the congregation were appealed to and asked to promise to contribute weekly or monthly by "Special Envelope Contributions." This appeal was made pursuant to a report adopted at a special meeting of the congregation and reported

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in the "Monthly Record" for March. The object of the fund — the object the members of the congregation were asked to aid by their contributions — was exclusively to provide for the payment of the existing mortgage debt and I can entertain no doubt that this was the fund described by the testatrix in her will as the "building fund" or that this was the object she had in view. A year before the death of the testatrix this object had been completely accomplished. Not only had the fund itself ceased to exist; the circumstances had so entirely changed between the date of the making of the will and the date of the testatrix's death as to make a contribution to the "building fund" which the testatrix had known for twenty-five years, an act of no meaning. It follows, therefore, that the specific and limited purpose to which the gift had been dedicated having been fully accomplished, there had supervened (at the time of the testatrix's death) the "impossibility" of applying the property which was the subject of the gift to the "purpose intended" within the meaning of article 964.

The courts below have held that the application of the property in payment for an organ, the cost of building a manse, the cost of building an annex, would be within the purposes of the will. With great respect it appears to me to be hardly arguable that these objects were within the objects of the "building fund" instituted in 1882, and to which contributions were invited in February, 1892, three months before the execution of the will. The fact that separate funds were instituted for the purpose of carrying out some of these objects, and that no part of the building fund or of the mortgage fund in which it was afterwards merged was ever applied to any purpose other than

the payment of the cost of the church building proper, tells very strongly against this suggestion of the respondents. Indeed, I think the evidence demonstrates that the object of the fund was exclusively that already mentioned.

I read the clause we have to construe as shewing, on the part of the testatrix, the existence of an intention, in 1892, when she executed her will, to provide for a contribution to take effect at her death to the fund which she knew and for which contributions were then being solicited, and I think it was of the essence of the gift that it should be capable at her death of being applied in furtherance of the specific purpose for which she in common with the other members of the congregation must have known that this fund was instituted.

ANGLIN J. (dissenting).—With the utmost respect for the learned judges of the provincial courts, and for those of my learned brothers who hold contrary views, I am of opinion that the devise in question in this action fails. Assuming in favour of the respondents that they are sufficiently identified by the description

> the trustees of the building fund of St. Matthew's Presbyterian Church, etc.,

as I rather think they are in view of the *habendum*

> unto the said trustees, their successors and assigns,

the purpose of the devise was to aid, not the general works or funds of the church under their control, but a specific fund designated by the testatrix as "The Building Fund."

There is nothing in the devise itself, or elsewhere

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in the will, to indicate that the testatrix had any such paramount general charitable purpose as would warrant the application of the *"cy-pres"* doctrine of English testamentary law. The bequest is for a specific, well-defined object and purpose (Theobald on Wills (7 ed.), p. 373), and the question is whether that object still exists — whether the particular charitable purpose can still be carried out. (4 Halsbury, 158.)

The building fund of the new "St. Matthew's Church," the establishment of which was recommended in a report of the 15th February, 1882, was instituted and placed in charge of a special permanent committee by resolution of the congregation of the 22nd February, 1882. The purpose was to separate the new church building fund from the other funds under the administration of the trustees of the church. The new church was completed in June, 1891. The building fund became the object of a special envelope subscription. It was well known to the testatrix, who was a subscriber to it. It was "active" when she made her will in 1892 and there is no room for doubt that it was that fund with its specific purpose which was the object of her bounty. In 1897 "the building fund" was replaced by "the mortgage fund." The debt on the new church was completely paid off in 1908. Since that time there has been no building fund for the church proper; there was no further occasion for such a fund. The testatrix died in August, 1909.

The respondents suggest, however, that there are still church debts to which the proceeds of the devise in question may be applied. These debts were incurred in connection with the erection of "MacVicar Hall" (a "Sunday school annex"), the purchase of the minister's manse and the installing of a new organ.

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"MacVicar Hall" was first projected in 1903 and was built in 1904. The manse property was acquired in May, 1909, the organ was also installed in 1909. Debts thus incurred were certainly not objects of the bounty of testatrix in 1892; and it is quite impossible to say that she intended to provide for payment of them. Indeed, to apply the proceeds of her devise to them may be something to which she would have had serious and decided objections. General repairs, improvements, etc., to which the respondents also say the devise may be applied, are ordinarily paid for, not out of a building fund but out of a revenue fund; and the trustees of St. Matthew's Church had, quite distinct from the church building fund, a revenue fund, which was not an object of Mrs. Boyd's testamentary bounty. If the church building fund had still existed after her death, no part of the proceeds of the devise to it could be legally diverted to any of these other purposes. *Attorney-General* v. *Belgrave Hospital for Children*(1).

The two Ontario cases cited by Archibald J. (*Tyrrell* v. *Senior*(2), and *Edwards* v. *Smith*(3)) are readily distinguishable from that now before us. In each of them there was a bequest in favour of a charitable or religious fund which actually existed in connection with the church to which the testator belonged, both at the time when he made his will and after his death, though under a name somewhat different from that used by the testator to describe it. The court in each instance was satisfied that the object of the testator's bounty was sufficiently identi-

(1) [1910] 1 Ch. 73.
(2) 20 Ont. App. R. 156.
(3) 25 Gr. 159.

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fied. In the present case the fund intended to be aided existed when the will was made, but had ceased to exist before the testatrix died. The governing rule under such circumstances is, I think, to be found in such cases as *In re Rymer*(1); *Corbyn* v. *French*(2); *Attorney-General* v. *Bishop of Oxford*(3); *Clark* v. *Taylor*(4); *Fisk* v. *Attorney-General*(5); *In re Wilson*(6), and *Burgess's Trustees* v. *Crawford*(7).

In my opinion, owing to the failure of its specific object or purpose the devise in question lapsed and the property passed to "the heir or legatee who received the succession." Article 964 C.C.

BRODEUR J.—I concur with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondents: *Foster, Martin, Mann, Mackinnon & Hackett.*

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(1) [1895] 1 Ch. 19.
(2) 4 Ves. 418, at pp. 431, *et seq.*
(3) 1 Br. C.C. 444*n.*
(4) 1 Drew, 642-644.
(5) L.R. 4 Eq. 521.
(6) [1913] 1 Ch. 314.
(7) [1911-12] S.C. (Ct. of Sess.) 387.