

to the erection and repair of houses of worship—two lawful objects, and the one to which the larger portion of the fund had always been devoted.

We may presume that the contributors expected and intended that the First Presidency would apply their gifts to such purposes as they might deem practicable and right, and if they should deem any object impracticable and wrong that they would devote the whole of it to such of the objects deemed practicable and right. The church authorities now propose to apply the entire fund to the two purposes named which must be conceded practicable and lawful, and they on behalf of the entire sect pray the court to decree that they shall devote it to those two lawful purposes and that they may be prohibited from applying it to any other.

In the case of Jackson vs. Phillips and others, the court said: "When a charitable intent appears on the face of the will but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner the gift will be supported and its application restrained within the bounds of the law."

When the dedication is broad enough to allow the trustee to apply the fund to unlawful as well as lawful purposes the court will limit its application to the lawful ones. When the terms of the gift authorize the trustees to devote the fund to either of the two subjects, one legal and the other illegal, its application will be confined to the legal purpose and the illegal one will be rejected. "The principle of these cases seems to be the same that although a valid charitable use should happen to be joined by way of alternative with one which is invalid, no matter how, the manner being altogether indifferent, the former will not be prejudiced by its connection with the latter."

Bocey's Law of Trusts, p. 232.

There is English authority entitled to great weight, to the effect that if a testator gives one charitable fund to two or more objects in definite proportions and one fails, the other objects that have not failed may be substituted for the one that has and the entire fund may be devoted to them, unless the terms of the will exclude such an application.

In the case of Attorney General vs. Ironmongers' Company, 7 English Chancery Reports, 578, Lord Chancellor Brougham said, "When a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, it is clear that the court may thus execute his intention in the event of an impossibility of applying that portion to its original destination."

The character of charity is impressed on the whole fund; there is good sense in presuming that, had the testator known that one object was to fail he would have given its appropriate fund to the increase of the funds destined to the objects of his bounty; and there is convenience in acting as he would himself have done. This is the foundation of the doctrine of *cy pres*." This case was also before the court when Cottonham was Lord Chancellor, and in considering the rule of construction in such cases he said:

"It is obviously true that if several charities be named in a will and one fail for want of objects, one of the others may be found to be *cy pres* to that which has failed; and if so, its being approved by the testator ought to be an additional recommendation; but such other charity ought not, as I conceive, to be preferred to some other more nearly resembling that which has failed."

In such a case the weight of authority in this country, as we think, is that the amount specially directed to be applied to the object that fails will be devoted to any

other whether expressly named in the will or dedication or not so named, if the terms of the will or dedication, in the light of the circumstances, authorize the court to infer that such an application is within the general intent of the testator or donor.

But the case of Attorney General vs. The Ironmongers' Company is not analogous to the one in hand. In that the trustee was directed to apply one half of the estate to one object and the other half to two other objects in equal proportions, so that it was necessary to apply the portion which the testator had expressly devoted to the object that failed to other objects; it was necessary to substitute another or other objects.

It appears from the evidence before us that the contributions to the fund in controversy were made with the understanding that they should be applied to church purposes, but that it was optional with the First Presidency to which object, and if to more than one, the amount to each. The donations were to all or any as those church officers might determine, and the court is asked to limit the application to two church purposes that are lawful. We have no doubt that this court in the exercise of its ordinary chancery jurisdiction may limit the application of this fund to the lawful purposes.

Defendant's solicitors also insist that the report of the master and accompanying evidence show that the church abandoned the practice of polygamy by the means of, and in obedience to the manifesto of its President, and a resolution of its general conference adopted on the 6th of October, 1890.

In that manifesto, which is in evidence, the following language is found:

"We are not teaching polygamy or plural marriage or permitting any person to enter upon its practice * * * Inasmuch as laws have been enacted by congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws and to use my influence with the members of the church over which I preside to have them do likewise. * * * And I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land."

And the resolution adopted by the general conference of the church on motion of Lorenzo Snow is: "I move that recognizing Wilford Woodruff as the President of the Church of Jesus Christ of Latter-day Saints, and the only man on earth at the present time who holds the keys of the sealing ordinance, we consider him fully authorized by virtue of his position to issue the manifesto which has been read in our hearing, and which is dated September 24, 1890; and that as a church in general conference assembled, we accept his declaration concerning plural marriage as authoritative and binding."

It appears from the evidence reported by the Master that Wilford Woodruff, the president of the church, testified that his object in issuing the manifesto was "to announce to the world that the plural marriage had been forbidden by the church and that it could not be practiced thereafter; that it was presented to the quorum of the twelve apostles and accepted by them; that it was afterwards presented to the officers and members of the church assembled at their sixtieth semi-annual conference on October 6th, 1890; that the conference received and adopted it by a unanimous vote; that there was present about ten thousand officers and members; the representation was a fair one * * * from the whole Territory, * * * and other places." The witness further testified in substance that he has never heard of any opposition to it or dissent from it by any mem-

ber of the Church; that to the best of his knowledge the members of the Church willingly accepted and adopted it; that it would be contrary to the law of the Church for any member of it to enter into or contract a plural marriage. That any person entering into plural marriage after that date would be liable to excommunication from the Church, that there has not been any polygamous or plural marriage entered into, or contracted by any member of the Church to his knowledge since the date of the manifesto; that he has not since that date assented to the practice of polygamy in any way or manner and that he does not know of any other officer of the Church that has; that he does not have any hope or expectation that the practice of polygamy will ever be re-established in the future; that all the revolutions that the Church has were accepted by a vote; that he believes in the principle of polygamy and presumes that the members of the Church do; that a principle may be believed in as a true one and still not be practiced; that a failure of any member to follow the manifesto would become a subject of Church discipline; that the intention of the manifesto was to require obedience to all the laws; that he issued the manifesto by inspiration and that he believed it was his duty to do so; that the manifesto and the resolution is the law of the Church, the law of God to us. We are required to abandon that doctrine or tenet of our faith in our practices. He was asked: Q. President Woodruff, do you believe that the principle of plural marriage was revealed to the Church through Joseph Smith from the Almighty? A. I do. Q. Do you believe that the Almighty has revealed to the Church, through you, that it is discontinued and abandoned? A. I do.

Q. You believe that? A. Yes, sir. The witness further answered, "my view is that inspiration is revelation."

The witness further testified in substance that the manifesto also prohibited the practice of unlawful cohabitation. Other witnesses holding high official positions in the Church corroborated the testimony of its President, and there is no evidence before us tending to prove that any of the Church authorities, or that with their consent any of its members, since the date of the manifesto, have to their knowledge taught, advised, counseled or consented to the practice of polygamy or unlawful cohabitation.

If the uncontradicted testimony and evidence before us can be relied upon, it proves that the Church authorities and its members regard the manifesto and its resolution of October 6th, 1890, as prohibiting the practice of polygamy, and that they regard this prohibition as the law of God to them. That within the pale of civilization where laws exist against it, the practice of polygamy is wrong, but that outside of this limit it may be rightfully practiced.

Assuming that they believe that the Supreme Lawgiver in a revelation to Joseph Smith then head of the church sanctioned polygamy, and in another revelation about forty years afterwards to Wilford Woodruff then its head, prohibited its practice within the limits mentioned it follows that they believe that that Lawgiver sanctions polygamy where the sentiments of civilization are not against it, and where it is not prohibited by law; but there were such sentiments and laws are against it, it is wrong, that the Almighty regards the sentiments of civilization and the will of human law-makers as expressed in obedience to their reason and consciences as binding on the people within their jurisdiction; that he requires obedience to the law of the land.

The theory of civil or municipal government as expressed in the declaration of independence is, that it is based upon the will of the people, expressed according