

54, 1930

In the Privy Council.

No. 98 of 1929.

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APPELLANTS' CASE.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS a body Corporate, ALEX. C. MACDONALD, WILLIAM FRASER, WILLIAM H. MAC KAY, D. HEDLEY ROSS, MUNRO GUNN, ROBERT A. ROBERTSON, GEORGE GRAY, RODERICK MAC KAY and JOHN R. YOUNG (Defendants) *Appellants*,

AND

ALEXANDER CAMERON, GORDON PROUDFOOT, C. A. MAXWELL, K. A. MURRAY, JOHN BISHOP, W. C. PROUDFOOT, ROBERT JOHNSTON, JOHN McN. CAMPBELL and ALEXANDER HALLIDAY (Plaintiffs) *Respondents*.

CASE FOR THE APPELLANTS.

1. This is an appeal by the Defendants, by special leave, from a judgment of the Supreme Court of Canada (Anglin C.J.C., Newcombe, Rinfret and Smith JJ.—Duff J. dissenting) dated the 5th February, 1929, affirming, with a material variation, a judgment of the Supreme Court of Nova Scotia, in banco (Rogers, Graham and Carroll JJ.—Mellish J. dissenting), dated the 9th April, 1927, reversing the decision at the trial (Harris C.J.), dated the 2nd February, 1926, whereby the Respondents' action had been dismissed. Record. p. 102. p. 63. p. 49.

2. By certain Statutes providing for the union, on the 10th June, 1925, of the Presbyterian, Methodist and Congregational Churches in the United Church of Canada the right was reserved to any congregation of any of the churches to elect by a vote of its members to remain outside the union.

The questions in issue in the present appeal are: firstly, whether a congregation, which prior to the union had elected to remain outside,

Record. could, after the union had taken place, reverse its previous decision and enter the United Church and, secondly, whether a vote taken at a certain congregational meeting was under the regulations applicable effective for this purpose.

p. 2, l. 1. **3.** The Appellants are the trustees of St. Luke's Presbyterian congregation of Salt Springs, prior to the union a congregation of The Presbyterian Church in Canada and, by virtue of the provisions of chapter 217 of the Statutes of Nova Scotia, 1906, a body corporate, and the elders of the said congregation.

Appendix,
p. 1.
Record.
p. 1, l. 4.

The Respondent the Reverend Robert Johnston claims to have been 10 interim moderator, the Respondents John McN. Campbell and Alexander Halliday claim to have been duly appointed assessors and the other Respondents claim to have been members of the said congregation.

Appendix,
p. 25.

p. 5.
p. 55.
p. 73.

4. The Presbyterian Church in Canada, the Methodist Church and the Congregational Churches in Canada, referred to in the legislation herein-after mentioned as "the negotiating churches," agreed to unite on the terms of a document known as the "Basis of Union" and in 1924 legislation was passed by the Parliament of Canada and by the Legislatures of the several Provinces of Canada, including the Legislature of Nova Scotia, giving effect to the union as on the 10th June, 1925. The Dominion Act 20 is chapter 100 of the Statutes of Canada, 14-15 Geo. V. The Nova Scotia Acts are chapter 122 of the Statutes of 1924 and chapter 167 of the Statutes of 1925. The Dominion legislation, dealing primarily with the incorporation of the new church, and the Provincial legislation, dealing with matters of property and civil rights, together cover the whole legislative field and unite the negotiating churches with their congregations in a new church called "The United Church of Canada" and vest the property of the congregations on the trusts therein declared.

5. Section 10 of the Dominion Act is in part as follows :—

p. 9.

"10. (A) If any congregation in connection or communion with 30
"any of the negotiating churches shall, at a meeting of the congregation
"regularly called and held . . . decide by a majority of votes of
"the persons present at such meeting and entitled to vote thereat not
"to enter the said Union of the said Churches, then and in such case
"the property, real and personal, belonging to or held in trust for or
"to the use of such non-concurring congregation shall remain un-
"affected by this Act, except that . . . in respect of any such
"congregation which does not enter any church so formed (*i.e.*, by
"non-concurring congregations) such property shall be held by the
"existing trustees or other trustees elected by the congregation free 40
"from any trust or reversion in favour of the respective negotiating
"Churches and free from any control thereof or connection therewith."

p. 58.

Section 8A of the Provincial Act is in similar terms. It provides that :—

"the property . . . belonging to or held in trust for or to the
"use of such non-concurring congregation shall be held by the existing

“trustees, or other trustees elected by the congregation, for the sole benefit of said congregation.”

6. The Dominion Act by Section 10 provided that the vote should be taken “at any time within six months before the coming into force of this Act (*i.e.*, 10th June, 1925) or within the time limited by any statute . . . passed by the Legislature of the Province in which the property of the congregation is situate before such coming into force.” Appendix, p. 9.

The Provincial Act of 1924 provided that the vote might be taken within six months after 10th June, 1925, but the amending Act of 1925, chapter 10 167, Section 1, provided that any vote on the question of entering the Union taken prior to its coming into force in accordance with the Dominion Act was to be deemed to be a vote of the congregation for the purpose of the Provincial Act. p. 58. p. 73.

7. A meeting of St. Luke's Presbyterian congregation of Saltspings was held on the 22nd December, 1924, and the congregation duly voted by 69 to 55 not to enter the union. Accordingly the congregation became a non-concurring congregation and its property remained vested in the trustees in trust for the congregation. Record. p. 43, l. 17.

8. Section 8 (A) of the Nova Scotia Act, after providing for the vote 20 above mentioned, has the following further provisions :—

“Should such congregation decide in the manner aforesaid at any later time to enter the Union and become part of The United Church then this Act shall apply to the congregation and all the property thereof from the date of such decision.” Appendix, p. 58.

9. The Dominion Act, while it contains no similar provisions, does, it is submitted, confer on the United Church of Canada power, after the union, to receive congregations which had previously elected to remain outside the union.

Section 26 of the Dominion Act ratifies and confirms the Basis of Union 30 set forth in Schedule A to the Act and declares that “in so far as the terms and provisions thereof relating to polity and administration are not inconsistent with the provisions of this Act, they shall have the same force and effect as if expressly set out herein.” The Basis of Union contains under the heading “Polity” the following provisions :— p. 23.

“II. THE PASTORAL CHARGE (CIRCUIT OR CONGREGATION). p. 31.

“A. *Charges existing previous to the Union.*”

* * * * *

“8. Churches, charges, circuits or congregations, received subsequent to the Union, into The United Church, with the approval of Presbyteries, shall be entitled, if they so desire, to the privileges of Sections 4, 5 and 7.” 40

“B. *Charges to be formed subsequent to the Union.*”

* * * * *

“10. New Pastoral charges or local churches shall be formed with the consent of a Presbytery by persons residing within its p. 32.

“ bounds, who declare their adherence to the principles of The United Church, and their desire for the formation of such charge or church.”

Moreover Section 8 of the Dominion Act refers to :

Appendix,
p. 9.

“ a congregation received into The United Church after the coming into force of this Act ” and

Section 18 of the Dominion Act declares that The United Church shall have power :

p. 20.

“(J) to do all such lawful acts or things as may be requisite to carry out the terms, provisions and objects of the Basis of Union and of this Act.” 10

The Basis of Union contains the following declaration :—

p. 25.

“ It shall be the policy of The United Church to foster the spirit of unity in the hope that this sentiment of unity may in due time, so far as Canada is concerned, take shape in a Church which may fittingly be described as national.”

Record,
p. 16, ll. 31-37.

p. 9, ll. 12-21.

10. After the vote against entering the union of the 22nd December, 1924, the then Minister, who was in favour of union, resigned, and on the 5th May, 1925, the Presbytery of Pictou, Nova Scotia, appointed the Respondent the Reverend Robert Johnston, who strongly opposed union, to be moderator pro tempore or interim moderator. 20

Appendix,
p. 22.
Record,
p. 12, l. 21.
p. 35, l. 29.

After the union of the churches on the 10th June, 1925, the Presbytery of Pictou continued to function as a Presbytery of the United Church of Canada but ceased, in accordance with Section 22 (B) of the Dominion Act, to have any jurisdiction over non-concurring congregations. A new Presbytery of non-concurring Presbyterian congregations had been formed by the Reverend Robert Johnston and others, but the congregation of St. Luke's did not adhere to this Presbytery. Accordingly it was an independent unit and retained its property.

p. 106, l. 25
et seq.

11. On the 27th July, 1925, at a further meeting of the congregation attended by one hundred members out of a total membership of one hundred and sixty-four, it was resolved unanimously that the congregation should concur in the union and become part of the United Church. 30

p. 5, ll. 5-18.
p. 5, ll. 32-37.
p. 32, l. 21.

After this meeting ministerial supply was furnished to the congregation through the Presbytery of Pictou, a Presbytery of the United Church of Canada.

12. On the 1st September, 1925, the Respondents commenced an action against the Appellants, joining as Defendants two ministers of the United Church who are no longer parties to the appeal.

p. 6, ll. 33-48.
p. 7, ll. 1-6.

The Respondents claimed *inter alia* declarations that the meeting of the 27th July, 1925, and all proceedings taken thereat were null and void and that the congregation was a Presbyterian congregation and not a congregation of the United Church of Canada and an injunction restraining the Defendants from using the property of the congregation as a congregation of the United Church of Canada and restraining the Defendants from interfering with the exercise by the Respondent Robert Johnston of the office of Moderator or interim Moderator of the congregation. 40

The Appellants denied that the said Robert Johnston had any right to act as Moderator or interim Moderator of the congregation and they relied on the vote at the meeting of the 27th July, 1925, and alleged that the congregation was part of the United Church. Record.
p. 7, l. 19.
p. 8, l. 21.

13. In the Nova Scotia Courts the only question in dispute was whether the meeting of the congregation held on the 27th July, 1925, was regular. Its regularity was challenged on the grounds that it had been called by the elders of the congregation and not by the Session and that the notice of the meeting, although read at or immediately after the church services on the 10 19th and 26th July, 1925, had not been authorised by the Session or given from the pulpit. p. 82, l. 37.

The question of regularity was considered to depend on whether certain regulations contained in the Book of Forms (known as the "Blue Book") had, so far as applicable to a non-concurring congregation, been observed. Appendix,
pp. 79-84.

14. In 1889 the General Assembly of the Presbyterian Church in Canada, the supreme court of that Church, approved and adopted the Book of Forms as then submitted to the Assembly "as a useful guide for the members, the office bearers and the courts of the Church in the transaction of Ecclesiastical business." A further edition of the Book of Forms was prepared in 1902 including certain amendments. Since the publication of the 2nd Edition of the Book of Forms certain legislation had been passed by the General Assembly and this legislation up to 1902 was incorporated in the 3rd Edition. The prefatory note to the 3rd Edition states that the date of the new legislation has been affixed so that it can be easily found in the Assembly Minutes. No such notation appears with respect to any of the rules referred to in the courts below. The position of the General Assembly with respect to such rules is, therefore, that indicated in the prefatory note to the 2nd Edition, namely: that the Book of Forms was approved and adopted as a useful guide in the transaction of Ecclesiastical business. p. 79.
p. 80.

15. The rules in the Book of Forms which appear to have any relevance to the subject matter of the action are summarised as follows:— The session consists of the minister and elders of a congregation (rule 49). The minister is moderator of the session (rule 52). One of the functions of the session is to call congregational meetings (rule 50). The moderator presides at meetings of the session (rule 53). When the congregation has no minister the moderator pro tempore is appointed by the Presbytery (rule 54). When for any cause the number of elders is not sufficient to form a quorum of the session application is made to the Presbytery to appoint assessors (rule 59). Meetings of the congregation are called inter alia by the authority of the session of its own motion or on requisition in writing of a number of persons in full communion. Meetings are called by public notice specifying the object of the meeting and read before the congregation on at least one Sabbath before the time of meeting (rule 19). The Presbytery consists of representatives of congregations within certain territorial bounds and certain other ordained ministers and an equal number of elders (rule 74). Some of the duties of the Presbytery are:—to provide for the

Record. supply of ordinances in congregations; to form new congregations; to adopt measures for the promotion of the religious life of congregations within the bounds and to visit them; and in general to superintend the congregations and sessions within the bounds (rule 75).

16. The events leading up to the meeting of the congregation on the 27th July, 1925, may be summarised as follows:—

On the 10th July, 1925, a meeting took place between the Reverend Robert Johnston, who, although he had ceased to be a member of the Presbytery which appointed him and had joined in forming a new Presbytery, still assumed to act as interim Moderator, and five of the 10 elders of the congregation. At this meeting differences of opinion arose. The elders were desirous of entering the United Church and the Reverend Robert Johnston insisted that the congregation, having voted in favour of non-concurrence, would have to come under the rules and discipline of the Presbyterian Church, and that unless the elders were willing to continue on those terms new elders would have to be elected.

Subsequently, under the erroneous impression that some of the elders had resigned, the Reverend Robert Johnston applied to a new Presbytery of Pictou, formed by non-concurring Presbyterian congregations, for the appointment of assessors to constitute the session pending the election of new elders. This Presbytery, although the congregation of St. Luke's had not adhered to it, assumed to appoint two assessors.

17. Ninety-nine of the one hundred and sixty-four persons qualified to vote at meetings of the said congregation signed a requisition, dated 15th July, 1925, requesting the elders to call a meeting of the congregation to be held at the earliest time possible for the purpose of considering and voting whether or not the congregation should concur in the union of the congregation with the United Church and become part thereof. All of the nine elders signed a notice dated the 18th July, 1925, calling a meeting of 30 the congregation for the purpose mentioned on the 27th July, 1925. This notice was read in Church on Sunday the 19th July and again on Sunday the 26th July, 1925. The notice was read by one of the elders in the Church during the service on the 19th July, 1925, the student who conducted the service having refused to read it; it was read by another of the elders on the 26th July, 1925, immediately after the benediction had been pronounced, the said Reverend Robert Johnston, who was in charge of the service on that day, having refused to read it and no opportunity having been given to the elders to read the notice during the service because no collection was taken and no announcements were read, and it was further read by the 40 Reverend Mr. Farquhar at a meeting in the Church on the afternoon of the 26th July, the last mentioned meeting not being held at the usual time of church service.

18. It is submitted that, when on the 10th June, 1925, the jurisdiction of the old Presbytery over the Congregation of St. Luke's came to an end, the said congregation, not having adhered to any new body, became an

independent unit ; that the appointment by the Presbytery of the Reverend Robert Johnston as interim Moderator lapsed at the same time ; that the regulations contained in the Blue Book were in the altered circumstances no longer applicable in their entirety to the congregation ; that it was the duty of the elders at the request or requisition of a substantial number of members of the congregation to call a meeting of the congregation ; that the Reverend Robert Johnston was unwilling to co-operate for this purpose ; that all that could be required in the circumstances was that the meeting should be fairly called in a manner conforming to the customary practice in such a degree as was reasonably practicable and that the meeting of the 27th July, 1925, and the resolution then passed were valid and effective.

Record.

p. 47, l. 40.

19. The Trial Judge (Harris C.J.) dismissed the Respondents' action on the 2nd February, 1926, holding that the congregation had the right to take a second vote, that the meeting of 27th July, 1925, was regularly held and that the vote taken was effective.

p. 49, l. 10.

p. 48, l. 38.

p. 47, ll. 10-

13, 47-48.

p. 48, ll. 1-12.

20. The Supreme Court of Nova Scotia in banco held (Mellish J. dissenting) on 9th April, 1927, that the meeting of the congregation on 27th July, 1925, and all proceedings taken thereat were null and void, not having been regularly held because of irregularity in the calling of the meeting by the session ; that the said Robert Johnston was at all material times interim moderator of the congregation and that the congregation was a non-concurring congregation and not a congregation of the United Church. The judgment contained a declaration that the congregation might, at a regularly called meeting held pursuant to the latter part of Section 8 (A) of the Nova Scotia Act of 1924, " enter the union and become part of The United Church."

p. 63, l. 32

et seq.

p. 64, l. 12.

21. The Supreme Court of Canada held (Duff J. dissenting) on 5th February, 1929, that after the union became effective on 10th June, 1925, there was no means by which the congregation could enter the United Church. Accordingly the judgment of the Supreme Court of Nova Scotia in banco was varied by striking out the declaration to the effect that the congregation might subsequently at a regularly called meeting enter the United Church.

p. 103, l. 15.

Chief Justice Anglin considered that, there being no provision in the Dominion Act corresponding to the last sentence of Clause (A) of Section 8 of the Provincial Act (set out in paragraph 8 above), the resolution passed at the meeting of 27th July, 1925, could not bring about the entry of the congregation into the incorporated body known as the United Church of Canada, since that body was a Dominion Corporation, and that such resolution could not operate indirectly to affect the property held by the Defendant trustees for the congregation. The ground upon which he dealt with the appeal was not raised in the pleadings ; and was not discussed before the Supreme Court of Canada or in either of the Courts below.

pp. 80-82.

p. 81, l. 28.

p. 82, ll. 14-

19.

p. 80, l. 4.

Mr. Justice Newcombe agreed with the view of Chief Justice Anglin that the power of non-concurrence, which the congregation had exercised under the Dominion Act, having been invoked with affirmative consequences,

pp. 89-101.

Record.
p. 99, ll. 30-33.

p. 100, l. 34
et seq.

p. 101, l. 36
et seq.

p. 89, l. 7.

pp. 82-89.

p. 83, l. 22.

p. 83, l. 42.

p. 83, l. 38.

p. 85, ll. 7-15.

p. 85, l. 46.

p. 86, l. 1.

p. 88, l. 25.

p. 86, l. 43.

p. 87, l. 42.

was exhausted and could not be reviewed by the congregation. He was also of the opinion that the congregational meeting of 27th July, 1925, was not regularly called because of non-compliance with the provisions of rules 19 and 50 set out in the Rules and Forms of Procedure of the Presbyterian Church in Canada and was, therefore, a nullity.

Mr. Justice Smith agreed with both Chief Justice Anglin and Mr. Justice Newcombe on both points.

Mr. Justice Rinfret concurred in the judgment of Mr. Justice Newcombe.

Mr. Justice Duff was of opinion that the congregation having by voting non-concurrence severed its former denominational connection, its civil rights and property became provincial matters within the exclusive jurisdiction of the Provincial Legislature; that the provincial legislation must be read with the Dominion Act of Incorporation, which empowers the United Church to receive congregations after the union, and that a non-concurring congregation, by taking the steps prescribed by Section 8 (A) of the Provincial Act and in co-operation with the United Church, could enter that church. He was further of opinion that a non-concurring congregation was outside the jurisdiction of the Presbytery and other superior church courts and that on the separation taking effect all rules involving the exercise of authority by the superior courts were ipso facto suspended or modified in their operation. He was disposed to think that the authority of the interim moderator also lapsed. In the circumstances he thought that what was required was a meeting fairly called in a manner conforming to the customary procedure in such a degree as was reasonably practicable and, having regard to the disruption, fairly demanded in the circumstances of the particular case. He considered that the meeting of 27th July, 1925, was in the circumstances properly called.

22. The Appellants submit that the appeal should be allowed and the judgment of the Supreme Court of Canada dated the 5th February, 1929, reversed, for the following, among other,

REASONS.

1. Because the Dominion Statute, dealing with the incorporation of the United Church, and the Provincial Statutes, relating to matters of property and civil rights in the Province, ought to be read together and effect given to the main purposes of both enactments.
2. Because under the said Statutes the non-concurring congregation of St. Luke's was entitled, after the union came into effect, to decide by a majority to enter the union and become part of the United Church.
3. Because the United Church had power under the Statutes and Basis of Union to admit the congregation into the United Church.

4. Because when the union came into effect the Presbytery of Pictou became a Presbytery of the United Church and ceased to have any jurisdiction over non-concurring congregations.
5. Because the congregation of St. Luke's never became subject to any other Presbytery and was after the union an independent congregation.
- 10 6. Because after the union the elders and congregation of St. Luke's were no longer bound to recognise an interim moderator who had ceased to be a member of the Presbytery which appointed him and had joined a new Presbytery not recognised by the congregation.
7. Because the elders, having received a requisition signed by a large majority of the members of the congregation for the calling of a meeting to consider and vote upon the question whether the congregation should concur in the union, were bound to comply.
- 20 8. Because notice of the meeting of the congregation on 27th July, 1925, signed by all the elders was given, as far as practicable, in conformity with the procedure and regulations applicable to the congregation.
9. Because the meeting of 27th July, 1925, was, within the meaning of the Statutes, regularly called and held and at that meeting one hundred members of the congregation voted in favour of entering the union and none against.
10. Because the Presbytery of Pictou of the United Church of Carada, thereafter recognized the congregation as a congregation of that Church.
- 30 11. Because the judgments of Harris C.J. at the trial, and Duff J. in the Supreme Court of Canada are right.

W. N. TILLEY.

HECTOR McINNES.

GERSHOM W. MASON.

LAURENCE A. LOVETT.



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