Privy Council Appeal No. 98 *of* 1929.

The Trustees of St. Luke's Presbyterian Congregation of Saltsprings and others - - - - - - - - *Appellants*

v.

Alexander Cameron and others - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1930.

Present at the Hearing:
VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD DARLING.
LORD ATKIN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

Profiting by 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. They have, nevertheless, not been entirely successful, as the present appeal shows, in avoiding the pitfalls which seem to lie in the path of all legislative efforts to deal with ecclesiastical affairs. A special complication besetting legislation in the case of the uniting Churches in Canada arose from the circumstance that it was necessary to resort both to the Dominion legislature and to the several Provincial legislatures. Inasmuch as the organisations and activities of the uniting Churches extended throughout the whole Dominion the Parliament of Canada alone could merge and incorporate them as a single United Church of Canada. On the other hand, inasmuch as the property of the uniting Churches was distributed throughout the Provinces, the disposal of church

property in each Province consequent upon the union was a matter for the respective Provincial legislatures in the exercise of their privative power to deal with Provincial property and civil rights. The requisite statutes were accordingly passed by the Dominion and the Provincial legislatures respectively, the design being to secure by their co-operation the enactment of a coherent and consistent scheme for the constitution of the United Church and the regulation of its property. It was, however, inevitable that the Dominion statute incorporating the United Church should deal with the transference of the property of the uniting Churches to the new corporation, notwithstanding the distribution of the property throughout the Provinces. Such Dominion legislation might have sought justification in the accepted principle that the Parliament of Canada is entitled to deal with Provincial property and civil rights in so far as may be necessary to enable it to legislate effectually on a matter within its competence. Section 29 of the Dominion Act obviously hesitates a doubt on the subject, for it runs as follows :—

> " Inasmuch as questions have arisen and may arise as to the powers of the Parliament of Canada under the British North America Act to give legislative effect to the provisions of this Act, it is hereby declared that it is intended by this Act to sanction the provisions therein contained in so far and in so far only as it is competent to Parliament so to do."

The difficulty was surmounted by inserting in the Nova Scotia Act and in some at least of the other Provincial Acts a section declaring that " the provisions of the Act of Incorporation shall have full force and effect with respect to any property or civil rights within this Province."

The substantive question in the present case is whether the congregation of St. Luke's Presbyterian Church at Saltsprings in the Province of Nova Scotia is or is not, in view of the events which have happened and the relative legislation, a congregation of the United Church of Canada. To determine this question it is necessary to examine the provisions of both the Dominion Act of Incorporation and the Nova Scotia Provincial statute in their relation to the facts of the case.

The Dominion Statute incorporating the United Church of Canada was assented to on the 19th July, 1924, and by Section 2 came into force on the 10th June, 1925, except the provisions required to permit the vote provided for in Section 10 being taken, which came into force on the 10th December, 1924. The scheme of the Act 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 Section 4 it was provided that the union of the three churches should become effective upon the day upon which the Act came into force, *i.e.*, the 10th June,

1925, and the three churches as so united were thereby constituted a body corporate and politic under the name of "The United Church of Canada." The congregations of the three Churches were by the operation of this section merged in the United Church and became congregations of that Church. Section 5 provided for the vesting in the United Church from and after the 10th June, 1925, of the general property belonging to the uniting Churches, and Section 6 provided that, subject to the provisions of Section 8, from and after the 10th June, 1925, the property of every congregation of the uniting Churches should be held for the benefit of the same congregation as a part of the United Church.

It was, however, contemplated that some congregations might not concur in the union. To meet their case it was enacted in section 10 that if any congregation of any of the uniting Churches should at a meeting held within six months before the 10th June, 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 Section 4 (*c*) 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 Sections 10 and 11 to safeguard the position of non-concurring congregations, including the appointment of a Commission to secure to them a fair and equitable apportionment of property.

Under this scheme every congregation of the three uniting Churches had presented to it the option of associating itself with or disassociating itself from the union. If within the six months between the 10th December, 1924, and the 10th June, 1925, a congregation decided in accordance with the procedure prescribed in the Act not to concur in the union, it thereby effectually excluded itself from the merger which took place on the 10th June, 1925, and became entitled to the rights and privileges of a non-concurring congregation as set out in the Act. A congregation which took no steps during the six months preceding the 10th June, 1925, to vote itself out of the union automatically entered the United Church and became subject as regards its constitution and its property to the whole provisions applicable to the United Church and its congregations.

Now the congregation of St. Luke's with which this appeal is concerned, at a meeting of the congregation held on the 22nd December, 1924, as to whose regularity no question is raised, duly decided by a majority not to enter the union. The meeting complied with the requirements of section 10 of the Dominion statute and by its decision the congregation became within the meaning of the Act a non-concurring congregation to which on the 10th June, 1925, all the statutory provisions relating to non-concurring congregations became applicable.

On the 27th July, 1925, however, there was held what purported to be a meeting of the congregation at which it was

resolved by the unanimous vote of those present, being one hundred members out of a total membership of one hundred and sixty-four, that St. Luke's Presbyterian Church should concur in the union of the Churches and become part of the United Church of Canada. The present controversy concerns the competency, the regularity and the efficacy of this resolution.

So far as regards the Dominion statute there is no provision made for the reversal either before or after the 10th June, 1925, of a decision of non-concurrence by a congregation. In any case the decision by the congregation on the 22nd December, 1924, not to concur in the union stood unaltered at the 10th June, 1925, and under the Dominion Act it accordingly remained outside the union and came within all the provisions of the Act applicable to non-concurring congregations.

To understand the question which has arisen it now becomes necessary to turn to the Nova Scotia Act. This statute was passed by the Provincial legislature on the 9th May, 1924, and under Section 29 came into operation on the incorporation of the United Church by the Dominion Act on the 10th June, 1925. The preamble, after reciting that the three Churches have agreed to unite in terms of the Basis of Union and have petitioned the Parliament of Canada to incorporate the United Church, proceeds to narrate that application has been made to the Legislature of the Province "to enact as hereinafter set forth with regard to the property rights and powers hereinafter mentioned." The Act, of course, contains no provisions as to the constitution and incorporation of the United Church, but proceeds at once to provide in Sections 3 to 7 inclusive for the disposal of the Provincial property of the three Churches and their congregations on the union becoming effective on the 10th June, 1925. Those sections correspond and are practically identical with Sections 5 to 9 inclusive of the Dominion Act. Unfortunately the parallelism between the two enactments is not maintained. The Dominion Act in Section 10 proceeds to deal with the case of congregations which within the six months preceding union decide not to concur. The Nova Scotia Act, which up to this point makes no reference to non-concurrence, proceeds in Section 8 to enact as follows :—

> "8. (*a*) Provided always that if any congregation in connection or communion with any of the negotiating churches shall at a meeting of the congregation regularly called and held within six months after the coming into force of this section decide by a majority of votes of the persons present at such meeting and entitled to vote thereat not to concur in the said union of the said churches then and in such a case the property real and personal 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. 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."

There are several observations to be made upon this enactment. In contrast with the Dominion statute which provided for the exercise within six months *before* the incorporation of the United Church of the option not to concur the Provincial legislature here contemplates a resolution not to concur being passed within six months *after* the incorporation of the United Church and a possible further decision " at any later time " to enter the union. To have provided in the Dominion statute for the passing of a resolution not to concur within six months after the incorporation of the United Church would have been quite inconsistent with the scheme of incorporation which drew the line at the 10th June, 1925, and automatically included in the United Church all congregations which had not within the preceding six months decided not to concur while it equally excluded all such congregations as had so decided. As the Nova Scotia Act makes no reference to the case of a congregation deciding before the 10th June, 1925, not to concur in the union, Sections 3 and 4 of that Act read by themselves without reference to the Dominion Act would apparently affect the property of all congregations of the uniting Churches notwithstanding that a particular congregation might under the Dominion Act have decided before the 10th June, 1925, not to concur in the union. The Dominion Act provides for a congregation remaining outside the union by a vote taken before union while the Provincial Act provides only for taking a congregation out of the union after it has been brought in. Section 8 (*a*) of the Nova Scotia Act does not, however, profess to *enable* congregations, on the one hand, to decide not to concur within six months after the incorporation of the United Church or, on the other hand, at any later time to decide to enter the union. It assumes the taking of such decision by a congregation and prescribes what shall be the effects thereof on property. Indeed, Section 8 (*a*), which begins with the words " Provided always," is in the form of a proviso to the preceding sections relating to church and congregational property; it does not profess to affect the constitution of the United Church, and in their Lordships' view could not competently do so. The fundamental question would therefore appear to be whether Section 8 (*a*) affords any competent statutory warrant (1) for a congregation which, by not deciding within six months *before* the 10th June, 1925, not to concur, has under the Dominion Act automatically become a congregation of the United Church, deciding within six months *after* the 10th June, 1925, not to concur in the union, or (2) for a congregation which has decided within six months before the 10th June, 1925, not to concur in the union subsequently deciding to enter the union, with the consequential effects on church property prescribed by Section 8 (*a*). Their Lordships are of opinion that Section 8 (*a*) does not competently authorise either of such steps. The constitution of the United

Church was a matter solely for the Parliament of Canada, and it was for that Parliament to define the conditions of membership of the corporation which it set up. The Provincial legislature could not competently alter the conditions of membership of the United Church and nowhere avowedly attempts to do so. Section 8 (*a*) of the Provincial Act in providing certain consequences as regards property which are to follow decisions of congregations either not to concur in the union or to enter the union does not and could not properly empower congregations to take such decisions affecting, as they must necessarily do, the constitution of the United Church. If such decisions cannot be taken consistently with the constitution of the United Church as defined by the Parliament of Canada then the consequences as regards property of such decisions cannot become operative. The authors of the Provincial Act of Nova Scotia which was passed on the 9th May, 1924, may, for aught their Lordships know, have contemplated that the Dominion Statute, which was not assented to till the 19th July, 1924, would contain provisions for congregations deciding after the 10th June, 1925, not to concur in the union or at a later time deciding to enter the union and may have thought it right to legislate for the consequences on property of such decisions should they be authorised by the Dominion legislature, which, however, did not prove to be the case.

Their Lordships, while finding in the Dominion statute no warrant for such decisions as are contemplated in Section 8 (*a*) of the Provincial statute, are not to be taken as holding that once a congregation has decided under Section 10 of the Dominion statute not to concur in the union it is for ever after debarred from being received into the United Church. Far from it. The Basis of Union scheduled to and ratified by section 26 of the Dominion Act under Head A dealing with " Charges existing previous to the Union " expressly refers in paragraph 8 to " congregations received subsequent to the Union into the United Church." And section 8 deals with the property of " a congregation received into the United Church after the coming into force of this Act " as does also section 6 of the Provincial Act. No procedure, however, is prescribed in the Dominion statute for the reception of a congregation into the United Church after the 10th June, 1925, nor is it specified how an effective decision may be taken by a congregation with a view to its reception. As the Provincial statute could not, in their Lordships' view, effect the subsequent entry of a congregation into the union the case has thus not been competently provided for in either statute. Appropriate legislative measures can readily be taken, if so desired, to deal with the matter.

Their Lordships, being of opinion that St. Luke's Congregation having duly decided before the 10th June, 1925, not to concur in the union could not at their own hand competently or effectively decide after the 10th June, 1925, by a majority to enter the Union, have considered whether the resolution of the 27th July,

1924, could be treated as a decision to apply to the United Church for reception with the effect, if the application were acceded to, of enabling the congregation to enter the United Church and by virtue of Section 8 (*a*) to carry its property with it. There are, in their Lordships' view, insuperable difficulties in the way of so interpreting the situation. Section 8 (*a*) in terms speaks of a decision at any later time to enter the Union and become part of the United Church and the resolution of the 27th July, 1925, was a resolution to concur in the union and to become part of the United Church. Such a decision could not be effectively taken if Section 8 is read literally. But reading it as a resolution to apply for reception by the United Church which, by the way, would not be a decision in terms of Section 8 (*a*), then the concluding words of Section 8 (*a*) manifestly could not apply. For on a decision being taken under the last sentence of Section 8 (*a*) " this Act shall apply to the congregation and all the property thereof from the date of such decision." The Act with all its consequences might properly enough apply if the congregation could by force of its own decision enter the union and become part of the United Church. But how could it reasonably apply to the congregation and its property from the date of a decision to apply for reception, for the United Church might decline to receive it ? Incidentally, if the Nova Scotia Act became applicable to all the property of St. Luke's congregation such congregational property as is dealt with in Section 6 would not be transferred without the consent of a meeting of the congregation regularly called for the purpose. No such meeting has been held.

To subject the fate of a congregation and its property to the decision of a majority of votes of its members would, in their Lordships' view, require clear enabling words, competently enacted. If the words of the concluding sentence of Section 8 (*a*) in their literal sense imply a power on the part of a congregation to enter the union at their own hand, then this enactment was beyond the competence of the Provincial legislation as affecting the constitution of the United Church which was a matter solely for the Parliament of Canada. If it is sought to use the enactment as impliedly authorising a decision by a majority of a congregation to apply for reception by the United Church this reading, even if such legislation was competent to the Provincial legislature, is plainly inadmissible, for the decision which the enactment contemplates is to have effect on the congregation and all its property from the date of such decision, and this could not be intended in the case of a mere decision to apply for reception which might be refused.

Their Lordships have not failed to notice the point that a decision at a later time to enter the union presupposes under Section 8 (*a*) of the Nova Scotia Act a previous decision not to concur in the union, which previous decision would apparently have to be one taken within six months *after* the union. The previous decision in the case of St. Luke's was taken within six

months *before* the union. This interposes a further difficulty. An amending Act was passed by the Nova Scotia legislature on the 7th May, 1925, which added to Section 8 of the principal Act the following sub-section :—

> " (*d*) 1. Any vote on the question of entering the said union taken in a congregation prior to the coming into force in pursuance of and in accordance with the provisions of the Act of incorporation shall be deemed to be the vote of such congregation for the purposes of this Act."

This may enable the decision not to concur which was reached by the congregation of St. Luke's on the 22nd December, 1924, before the Nova Scotia Act came into force to be reckoned as a vote of the congregation for the purposes of the Nova Scotia Act, but it does not appear to deem a decision taken on the 22nd December, 1924, to be a decision taken between the 10th June and the 10th December, 1925, which is what Section 8 (*a*) of the Nova Scotia Act appears to require as a condition precedent of a decision at a later time to enter the union.

The views which their Lordships have hitherto expressed assume that the meeting of the 27th July, 1925, was a valid meeting. But the regularity of that meeting and not the aspect of the case with which their Lordships have so far dealt was the point round which controversy centred in the Courts below. It is obvious that the meeting was open to criticism in matters of procedure, but their Lordships do not feel called upon to enter upon the question whether such criticism was necessarily fatal to the validity of the decision then taken. If such a decision, even if taken by a meeting otherwise unexceptionably regular, would have been, as their Lordships hold, without competent statutory warrant it becomes unnecessary to discuss the numerous alleged irregularities of procedure charged against it which are discussed at great length in the judgments of the learned Judges who considered the case in Canada. In the result their Lordships find themselves in general agreement with the view of the case taken by the learned Chief Justice of Canada which had the support of Newcombe, Rinfret and Smith JJ., and they are unable to accept the arguments of the appellants notwithstanding the powerful assistance which they derive from the dissenting judgment of Mr. Justice Duff. Their Lordships, however, consider that the formal judgment of the Supreme Court of Nova Scotia of the 9th April, 1927, which was varied by the formal judgment of the Supreme Court of Canada of the 5th February, 1929, by striking out the fourth paragraph thereof should be further varied by deleting from the second paragraph thereof sub-paragraph " (2) that the Reverend Robert Johnston was at all material times and is moderator *pro tempore* or interim moderator of the said congregation," and also by deleting from the third paragraph thereof the following words with which that paragraph concludes " and from interfering with the exercise by the plaintiff Robert Johnston of the rights, powers and privileges of the office

of moderator *pro tempore* or interim moderator of the said congregation." Their Lordships are not prepared to pronounce upon the position occupied by Mr. Johnston and do not find it necessary for the disposal of the case to do so.

Subject to this variation their Lordships will humbly advise His Majesty that the judgment appealed from be affirmed and the appeal dismissed with costs.

In the Privy Council.

THE TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS AND OTHERS

v.

ALEXANDER CAMERON AND OTHERS.

DELIVERED BY LORD MACMILLAN.

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