54, 1930

No. 98 of 1929.

In the Privy Council.

On Appeal from the Supreme Court of Canada.

BETWEEN

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALT-SPRINGS, a body Corporate, ALEX. C. MACDONALD, WILLIAM FRASER, WILLIAM H. MACKAY, D. HEDLEY ROSS, MUNRO GUNN, ROBERT A. ROBERTSON, GEORGE GRAY, RODERICK MACKAY 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.*

RESPONDENTS CASE.

CASE OF THE RESPONDENTS.

RECORD

1. This action was brought by the Respondents respectively members in full communion, *pro tempore* Moderator, and the Session of St. Luke's Presbyterian Congregation of Salt Springs in the County of Pictou, Province of Nova Scotia, against the Appellant Corporation, and the individual Appellants whose various capacities are set forth in Paragraph 2 of the Statement of Claim, claiming *inter alia*, pp. 1-7

(A) That the alleged meeting of St. Luke's Presbyterian Congregation of Salt Springs held on or about the 27th day of July, 1925, whereby the said congregation purported to vote concurrence in union with the United Church of Canada, and all proceedings taken thereat were and are null and void and of no effect.

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(B) That Reverend Robert Johnston is Moderator *pro tempore*, or Interim Moderator, of the said Congregation.

(C) That the said Congregation is a Presbyterian Congregation.

(D) That the said Congregation is not a congregation of or in connection with the United Church of Canada.

(E) An injunction restraining the Defendants from using the real or personal property of the said Congregation, or suffering the same to be used on the footing that the said Congregation is a congregation of, or in connection with the United Church of Canada, or in any manner inconsistent with the status of the said Congregation as a Presbyterian Congregation.

2. The material facts are not in dispute and are, briefly, as follows :—

p. 9

(A) For a long time prior to the 10th day of June, 1925, St. Luke's Presbyterian Church of Salt Springs was a congregation in connection or communion with the Presbyterian Church in Canada, within the bounds and under the jurisdiction of the Presbytery of Pictou.

p. 16
p. 43, l. 17

(B) By a vote taken on December 22nd, 1924, under the provisions of "The United Church of Canada Act," cap. 100, Canada 1924, the congregation voted not to concur in the Union of Churches contemplated by that Act and consequently did not enter the Union on June 10th, 1925, and the Church property continued to be held for it by the Trustees incorporated by Cap. 217 of the Acts of Nova Scotia, 1906. Almost immediately after this vote, the Reverend C. C. Walls, who was then Minister of the Congregation and Moderator of the Session, resigned.

p. 16, l. 33
p. 43, l. 28

p. 9, l. 12
p. 21, l. 39—p. 22, l. 1.

(C) On May 5th, 1925, the Presbytery of Pictou, having jurisdiction in that behalf, according to the Rules and Procedure of the Presbyterian Church, appointed Reverend Robert Johnston to be Interim or *pro tempore* Moderator of the Session of St. Luke's Presbyterian Church of Salt Springs; and until after July 27th, 1925, no minister was inducted to the charge.

p. 26, l. 8
p. 106, ll. 1-12

(D) In the month of July, 1925, requisitions were signed by a large number of the congregation, asking the Elders to convene a congregational meeting for the purpose of taking a second vote on the question of Union.

pp. 30-31, ll. 24-36

(E) No meeting of the Session was called to consider or discuss the question of calling a second congregational meeting, as is required by the Rules and Forms of Procedure of the

Presbyterian Church, but a notice purporting to call such meeting was read during service on Sunday, July 19th, 1925, by one W. H. MacKay. And after the conclusion of the service, on Sunday, July 26th, 1925, a similar notice was read by one Robert A. Robertson. RECORD

(F) Notwithstanding the illegality of the manner in which it was called, the alleged congregational meeting was held on July 27th, 1925, and purported to pass the resolution contained in Exhibit " C." Only those members of the congregation who were in favour of the Union attended the meeting. p. 31, l. 37 p. 106, ll. 24-39

(G) The allegations contained in paragraphs 16, 17, 18 and 19 of the Statement of Claim, upon which the Respondents base their claim for relief are not denied. p. 5, ll. 25-48 p. 6, ll. 1-4

3. The case, by consent of the parties, was tried before the Honourable the Chief Justice of Nova Scotia, in Halifax, on November 11th, 1926, without a jury. The learned Chief Justice held, in effect, that the appointment of the Reverend Robert Johnston by the Presbytery of Pictou as Interim Moderator on May 5th, 1925, was invalid, and that the meeting of July 27th, 1925, was effective to pass the congregation into the United Church of Canada, and that all congregational property also so passed. pp. 43-48

4. From this decision, the present Respondents appealed to the Supreme Court of Nova Scotia, *in banco*, and the appeal was heard at the January 1927 Sittings, before a Court consisting of The Honourable Mr. Justice Mellish, The Honourable Mr. Justice Rogers, The Honourable Mr. Justice Graham and the Honourable Mr. Justice Carroll. p. 49, l. 20

5. The decision of Mr. Justice Mellish is to the effect that the congregational meeting of July 27th, 1925, was regularly called and was effective to pass the congregation into the United Church of Canada, but notwithstanding this, that by reason of the provisions of Section 6, of the United Church of Canada Act, being Cap. 122 of the Statutes of Nova Scotia for the year 1924, no property of the congregation would pass to or come under the control of the United Church, unless and until the congregation, at a meeting thereof regularly called for the purpose, should consent thereto. p. 56, l. 8

6. The decisions of Mr. Justice Rogers and Mr. Justice Graham are to the effect that the alleged congregational meeting of July 27th, 1925, was irregularly called and therefore invalid ; and that the congregation is not a congregation in connection with the United Church of Canada. They, however, did not agree with the decision of Mr. Justice Mellish that, even if the meeting had been regularly called and valid, a pp. 50, 59

RECORD.

separate vote would have to be taken in order to pass the property. They further held that it was and is competent to take a second vote under the provisions of Cap. 122 of the Acts of Nova Scotia, 1924.

p. 63

7. Mr. Justice Carroll concurred in the decision of Mr. Justice Rogers and Mr. Justice Graham as to the invalidity of the meeting and vote of July 27th, 1925, and also concurred with Mr. Justice Mellish as to the conditions or terms upon which the property was held.

p. 63

8. The order granted upon these decisions is printed in the Record.

9. From the Judgment and Order of the Court *in banco* the Defendants appealed to the Supreme Court of Canada, and the Plaintiffs
p. 66 gave notice that, on the hearing of such Appeal they would contend that the Order of the Court *in banco* should be varied, by striking therefrom the whole of Paragraph 4 thereof. 10

10. The Appeal was heard at the October 1928 Sittings of the Supreme Court of Canada, before a Court consisting of the Right Honourable The Chief Justice of Canada, the Right Honourable Mr. Justice Duff, the Honourable Mr. Justice Newcombe, the Honourable Mr. Justice Rinfret and the Honourable Mr. Justice Smith.

pp. 80-101

11. The decisions of the Court were delivered on February 5th, 1929, and were in effect as follows :— 20

pp. 80-82

The learned Chief Justice while concurring with the disposition of the Appeal as proposed by Mr. Justice Newcombe, held that the Meeting of July 27th, 1925, being held under the provisions of Section 8 (a) of the Nova Scotia Act, could not bring about the entry of the Congregation into the United Church of Canada, that body being a Dominion Corporation ; that the last sentence of Section 8 (a) of the Nova Scotia Act purports to authorise the Meeting for which it provides, to arrive at only one decision, i.e., to enter the Union and become part of the United Church. " The application of the Act to the Congregation and to the property thereof " is manifestly dependent upon such decision being 30 effectively made. If the resolution passed at the meeting of July 27th were inefficacious to cause the Congregation to become part of the United Church, it could not bring about the application of the Nova Scotia Act either to the Congregation or to its property.

pp. 89-101

Mr. Justice Newcombe delivered a decision, concurred in by Mr. Justice Rinfret, in which he held that the power of non-concurrence which the Appellant Congregation duly exercised under the Dominion Act, having been once invoked with affirmative consequences, was exhausted and could not be reviewed by the Congregation. That the latter part of Section 8 (a) of the Nova Scotia Act is *ultra vires* the Legislature 40

of Nova Scotia in that it purports to permit the Provincial Act to operate in a manner which affects the Constitution of the United Church as incorporated and established by Act of the Parliament of Canada; that Parliament gave no effect to a resolution in the terms of that passed at the Meeting of July 27th, 1925. RECORD

As to the invalidity of the Meeting of 27th July, 1925, he agreed with the reasons of the majority of the Supreme Court of Nova Scotia en banc, and held that a meeting of non-concurrence is held under the authority of the United Church of Canada Act, and should be held before the Union comes into force, and that it is for the purposes of this case a meeting of a congregation of the Presbyterian Church in Canada, and, in the absence of any statutory provisions, the regulations of that Church applicable to holding a congregational meeting under like circumstances were apt to regulate the Meeting for which the Statute provides. Rule 19 of the Rules and Forms of Procedure of the Presbyterian Church in Canada requires that Meetings of the Congregation shall be called by the authority of the Session, and Rule 50 reiterates that it is the duty of the Session "to call congregational meetings." These Rules were not followed as to the Meeting of July 27th, and there was no antecedent Meeting of the Session. Section 10 (d) of the Dominion Statute itself specifically provides that a Meeting of the Congregation for the purpose of expressing non-concurrence may be called by the authority of the Session of its own motion, and shall be called by the Session on requisition to it in writing of twenty-five members entitled to vote in a Congregation such as Salt Springs, having over one hundred and not more than five hundred members. There was no compliance with these provisions; and in consequence, the Meeting of 27th July was not regularly called or held, and that consequently, if for no other reason it failed of its purpose.

Mr. Justice Smith in his decision agreed with the Chief Justice of Canada and Mr. Justice Newcombe that the Provincial Act could not introduce into the Dominion Corporation a Congregation that the Dominion Act in pursuance of the vote of non-concurrence under it expressly excluded. He also agreed with the conclusions of Mr. Justice Newcombe that the Meeting of July 27th, 1925 was not regularly called and held, and concurred in the disposition of the Appeal as proposed by Mr. Justice Newcombe. p. 101

Mr. Justice Duff, dissenting, took the view that, after the coming into force of the Act of Incorporation (Cap. 11 14-15 George V) the Congreation of Salt Springs was segregated from the parent body; that the United Church had power to receive it; and that its disposition was a matter for Provincial Legislation. That in virtue of the amending Act pp. 82-89

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(1925 N.S. Cap. 167) the vote of non-concurrence held under the provisions of the Act of Incorporation was a vote for the purposes of the Nova Scotia Act, and consequently the latter part of Section 8 (a) of the Nova Scotia Act was applicable to the congregation. Further, that the authority of the Interim Moderator had lapsed, when the disruption occurred, and that, in the circumstances, the proceedings of the Elders in calling the Meeting of July 27th, 1925, sufficiently complied with the Statutes and the Rules of the Church.

He was therefore, of the opinion that the Appeal should be allowed.

p. 102

12. By the formal Judgment of the Supreme Court of Canada, dated February 5th, 1929, the Appeal was dismissed, and the Judgment of the Supreme Court of Nova Scotia *in banco* was varied by striking out paragraph 4 thereof.

p. 103

13. By Order in Council dated August 15th, 1929, special leave was given to the Defendants to appeal to His Majesty in Council.

14. It is submitted, in the first place, that the United Church of Canada, being a Dominion Corporation, it is not competent to the Legislature of Nova Scotia to pass legislation providing for the reception into that Dominion Corporation of other bodies, which in effect the last Clause of Section 8 (a) of the Nova Scotia Act purports to do. Even if it be admitted that the Salt Springs Congregation having voted non-concurrence became on the consummation of the Union a detached Congregation subject solely to Provincial Legislation, the extent of Provincial legislative power would be to give it authority to enter the United Church but could not of itself bring about such entry.

15. It is submitted, in the second place, that even if the last paragraph of Section 8 (a) of the Provincial Statute is within the competency of the Provincial Legislature, it nevertheless has no application to Salt Springs Congregation because Salt Springs is subject to Section 8 (aa) of the Act which overrides the latter portion of Section 8 (a).

On December 22nd, 1924, Salt Springs under the provisions of Section 10 of the Dominion Act definitely voted non-concurrence in Union, and consequently, when the Union became effective on June 10th, 1925, did not become part of the United Church. A marked difference between the Dominion and Provincial Statutes is that under the Dominion Act a vote of non-concurrence may be held at any time within six months' before the coming into force of that Act, while under the latter, non-currence may be voted at a Meeting held within six months after the coming into force of the Provincial Statute. The Provincial Statute, however, was amended by Chapter 167 of the Acts of 1925 which pro-

vided in effect that any vote on the question of entering the Union taken prior to the coming into force of the Act in pursuance and in accordance with the provisions of the Act of Incorporation should be deemed the vote of such Congregation for the purposes of the Provincial Statute. This amending Statute became effective on May 7th, 1925 before the Union was consummated. The effect of this amendment was to make the vote of non-concurrence taken on December 22nd, 1924 under the provisions of the Dominion Act a vote of non-concurrence for the purposes of the Provincial Act and for all purposes of that Act, including Section 8 (aa). If, as has been suggested, it is a vote of non-concurrence which would make applicable to Salt Springs Congregation the last clause of Section 8 (a), it is a vote that would make effective the provisions of Section 8 (aa) which provides that: "notwithstanding the provisions "of this sub-section (a) no congregation of the negotiating Churches ". . . . shall be deemed to have entered the Union or become part "of the United Church, nor shall the property, real or personal, belonging "to or held in trust for or to the use of such congregation be affected by "the provisions of this Act, if within six months from the day upon "which this Act comes into force such Congregation at a Meeting of the "congregation regularly called shall 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." By its very terms this is an overriding section and provides that such a Congregation as Salt Springs having voted non-concurrence, is no longer subject to the provisions of the Provincial Statute relative to Union, and the latter clause of Section 8 (a) relied on by the Appellants has no application whatever to it. RECORD

16. It is further submitted that under its Constitution the United Church of Canada had no power to receive Salt Springs Congregation into the Union. The Dominion Statute contains no provision for the taking of a second vote and there is no express power granted to it to receive congregations that have once voted non-concurrence.

It is suggested by Mr. Justice Duff that power to receive congregations after the coming into force of the Union is given to the United Church by Section 18 (j) of the Incorporating Act and that that power is recognised by Section 8 of that Act and by Article 8 of the Basis of Union. With the greatest deference it is submitted that whatever power these sections may confer upon the United Church to receive into the Union after its consummation congregations other than "Congregations of the "negotiating Churches" they are wholly inefficacious to override the express provisions of Section 10 or to enable the United Church to receive "Congregations of the negotiating Churches" which have once voted not to concur in the Union. p. 83

Section 8 of the Act referred to clearly differentiates between

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"a congregation of the negotiating Churches" and "a congregation "received into the United Church after the coming into force of this Act."

17. It is further submitted that even if the United Church has power under its Constitution to receive Salt Springs Congregation into the Union, and even if the Provincial Statute is effective to give Salt Springs Congregation authority to enter the Union, the combined effect of these Statutes, supplemented by vote of concurrence on July 27th, 1925, even if regularly passed, would not be effective to pass either the Congregation of Salt Springs or its property into the United Church without some action on the part of the United Church as such to bring the Congregation and its property into the Union. The Record contains no evidence of any such action.

18. It is further submitted that even if there was legislative authority to take a second vote in Salt Springs Congregation on the question of entering the Union, the Meeting purported to have been held on July 27th, 1925, was not regularly called or held as there was no antecedent meeting of the Session authorizing it. On this point Respondents beg to adopt as their own the reasons of Mr. Justice Rogers and Mr. Justice Graham in the Supreme Court of Nova Scotia *in banco* and of Mr. Justice Newcombe and Mr. Justice Smith in the Supreme Court of Canada. Clearly the Meeting was not summoned in accordance with Rules 19 and 50 of the Book of Forms and Rules of Procedure of the Presbyterian Church in Canada. The powers and duties of the Moderator with regard to Meetings of the Session are to be found in Rules 53, 54, 58 and 59. Section 10 (d) of the Dominion Act clearly contemplates that a congregational meeting to vote on the question of concurrence shall be called by the Session. In this connection it is to be noted that the requisition to the Elders for the holding of a Meeting purported to be signed by "members in full communion of St. Luke's Presbyterian Congregation at "Salt Springs" and requested the Elders to call a Meeting of the Congregation "to be held at the earliest time possible under the Constitution of the "Church." It was clearly, therefore, in contemplation of the parties that the meeting to be called was to be called and held in accordance with the Constitution of the Presbyterian Church in Canada and not otherwise, and it is equally clear that it was not so called and held.

pp. 52-56
pp. 61-63
pp. 100-102

p. 106

19. It is further submitted that even if there was any statutory authority for holding the meeting of July 27th, 1925, and even if it had been regularly and validly held, and even if it was effective to pass Salt Springs Congregation as such into the United Church of Canada, it was nevertheless ineffective to pass the property of the Congregation to the United Church.

The property in question in this action was before the Union by virtue of Chapter 217 of the Acts of Nova Scotia 1906 held by the

Respondent Trustees solely for the benefit of the Congregation. Apart from this, by Section 10 (a) of the Dominion Act and Section 8 (a) of the Provincial Act upon the Congregation voting non-concurrence all its property was held by existing Trustees for the sole use of the Congregation. By Section 8 of the Dominion Act and Section 6 of the Provincial Statute (which are in identical terms) it is provided that any property belonging to or held by or in trust for or to the use of any congregation after the coming into force of the sections in question solely for its own benefit shall not be subject to the sections vesting property in the United Church or to the control of the United Church (Sections 5 and 6 of the Dominion Act and Sections 3 and 4 of the Nova Scotia Act), " unless and until " any such congregation at a meeting thereof regularly called for the " purpose shall consent that such provisions shall apply to any such " property or a specified part thereof." These provisions were evidently passed to give effect to Article 7 of the Basis of Union which contains the same provisions. RECORD

When these provisions came into force on June 10th, 1925, Salt Springs Congregation having previously voted non-concurrence was not a part of the United Church and held its property solely for its own use.

No meeting has ever been called or held to deal with the question of property. The sole and only avowed purpose for which the meeting of July 27th, 1925 was called and held was " for the purpose of con- p. 31, l. 49
" sidering and voting upon a resolution that St. Luke's Presbyterian p. 32, l. 1
" Church, Salt Springs, concur in the Union of the Churches provided for p. 106, l. 15
" by Chapter 122 of the Acts of Nova Scotia for 1924, and that said " St. Luke's Presbyterian Church at Salt Springs, shall become part of " the United Church of Canada." The situation is not helped by the last clause of Section 8 (a) of the Provincial Act, which even if applicable would only make the property subject to the provisions of Section 6 above referred to.

20. The Respondents therefore submit that this Appeal should be dismissed for the following among other,

REASONS.

(1) Because the last paragraph of Section 8 (a) of the Provincial Statute in so far as it purports to provide for the passing of Congregations into the United Church of Canada is *ultra vires* the Legislature of Nova Scotia.

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(2) Because Salt Springs Congregation on voting non-concurrence became subject to Section 8 (aa) of the Provincial Statute and Section 8 (a) does not apply to it.

(3) Because the United Church had no power under its constitution to receive into the Union Salt Springs Congregation after that Congregation had once voted non-concurrence.

(4) Because even if Salt Springs had power under the Provincial Statute to enter the Union and even if under the Dominion Statute the United Church had power to receive it that power was never exercised so far as the United Church of Canada was concerned.

(5) Because the Meeting of July 27th, 1925, was not regularly called and held.

(6) Because the Congregation never at a Meeting thereof regularly called for the purpose consented that the provisions of Sections 3 or 4 of the Provincial Act should apply to any part of the property of the Congregation or that any such property should be subject to the control of the United Church.

(7) Because the Judgment of the Supreme Court of Canada is right and should be affirmed.

C. B. SMITH.

H. P. MACKEEN.

No. 98 of 1929.

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On Appeal from the Supreme Court of Canada.

BETWEEN

TRUSTEES OF ST LUKE'S PRESBYTERIAN CONGREGATION OF SALT SPRINGS, a body Corporate, ALEX C. MACDONALD, WILLIAM FRASER, WILLIAM H. MACKAY, D. HEDLEY ROSS, MUNRO GUNN, ROBERT A. ROBERTSON, GEORGE GRAY, RODERICK MACKAY 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*

Respondents' Case

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