THE REV. JOEL TOMBLESON WRIGHT (PLANTIFF) ..... } APPELLANT ;

AND

THE INCORPORATED SYNOD OF THE DIOCESE OF HURON (DEFENDANTS) ..... } RESPONDENTS.

1884
*Dec. 8.
1885
*June 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Member of Synod—Trust, Construction of—Vested rights—Commutation fund.

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support "and maintainance of the clergy of the Diocese of Huron in "such manner as should from time to time be declared by any "by-law or by-laws of the Synod to be from time to time passed "for that purpose." In 1860, a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active services hould receive each $200, with a provision for increase in certain events. In 1873, the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors oft he Church Society) repealed all previous by-laws respecting the fund, and made a different appropriation of it.

Held (affirming the judgment of the court below, Fournier and Henry, JJ., dissenting,) that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and making a different appropriation of it, for the support and maintainance of the clergy of the Diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition.

APPEAL from a judgment of the Court of Appeal for Ontario (1), reversing the judgment of Proudfoot, J. (2).

*PRESENT.—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, JJ.

(1) 9 Ont. App. R. 411. (2) 29 Gr. 348.

1884

WRIGHT v. INCORPORATED SYNOD OF THE DIOCESE OF HURON.

The facts of the case are fully given in the report of the case 29 Gr. 348, and in the judgments of the court below, reported in 9 Ont. App. Rep. 411.

Dalton McCarthy, Q. C., *Harding* with him, for appellant; *S. H. Blake*, Q. C for respondents.

The points relied on by counsel and cases cited are fully noticed in the reports of the case in the courts below and in the judgments hereinafter given.

RITCHIE, C.J.:—

I think the judgment of the Court of Appeal must be sustained and the appeal dismissed. I cannot see that the plaintiff has made out any valid and binding contract or vested right whereby he became entitled to receive an annuity of $200 out of the funds in question, and that no power existed in the Synod whereby a change in its management of the fund could be made which would affect him, on the contrary I think the synod had, by the express provisions concerning the management of the fund, the power of determining from time to time by by-law, in what manner the trust fund should be dealt with, provided always it was for the support and maintenance of the clergy of the diocese.

The learned judge of first instance, says: "The plaintiff had the right to assume when placed on the fund that he would remain there while the conditions on which the grant was made continued to exist." On the other hand, may it not with much more force be said, that in as much as the trust was for the support and maintenance of the clergy, in such a manner as shall from time to time be declared by any by-law or by-laws to be from time to time passed for that purpose, the plaintiff had no right to assume that the disposition of the fund would not be from time to time altered as the exigencies of the diocese, and the maintenance and

support of the clergy then might, in the judgment of the synod, require.

STRONG, J.:—

In stating the reasons for the conclusion at which I have arrived that this appeal must fail, I shall be as concise as possible. I need not trace the title to the trust fund in question from the clergymen who originally commuted their charges on the clergy reserves, with the Government of Canada, to the Church Society of the Diocese of Huron, and from the latter society to the Synod of Huron, the present defendant, all of these mutations are sufficiently set out and explained in the pleadings and in the judgments delivered in the courts below. It is sufficient for the present purpose to say that upon the 2nd March, 1869, the defendants held this fund subject to the claims upon it of the original commuting clergymen upon trusts which may be stated as follows, viz.: "For the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the synod to be from time to time passed for that purpose." The principal, and as it seems to me the only substantial question which we are called upon to decide is that involved in the construction of this trust. If the by-law of the 2nd of March, 1869, under which the plaintiff in effect claims title to an irrevocable annuity for his life or during active service as a clergyman of the Diocese of Huron is in excess of the powers conferred on the synod as trustees of the fund, it is of course to that extent void, though before determining it to be void we must endeavor so to construe its terms as to read it consistently with the trust and to make it *intra vires* of the trustees. What, then, was meant by the founders of this charity, for such in law it is, when they declared

1885

WRIGHT v. INCORPORATED SYNOD OF THE DIOCESE OF HURON.

Strong, J.

that it should be applied to the purposes designated in such manner as should be declared "from time to time" by by-laws to be "from time to time" passed? It is plain that this must depend entirely on the meaning to be attributed to the words "from time to time," an expression, it will be observed, twice repeated. Did the settlors, by that expression, intend to confer on the members the power to create absolute vested interests in the fund or in its income, or must it be taken to mean that such dispositions as the synod should make, should be by by-laws at all times subject to repeal or alteration? No one can doubt that the terms of this declaration of trust would not warrant the permanent alienation of the capital of the fund, for such a disposition of it would clearly be a breach of trust since the trustees would be thereby incapacitated from dealing with it from time to time by by-laws to be passed from time to time. Then the income of the fund is to be held on precisely the same trust as the principal for the words are, "shall have and hold the said commutation money and all interests and proceeds thereof upon trust," as before stated. Therefore, a permanent alienation of the income would be as objectionable as a similar alienation of the corpus. Next, if a permanent alienation is inadmissible, upon what principle can it be said that an alienation of revenue for a fixed limited time is authorized? None that I can see. Such a disposition of the income would disable the trustees from performing the duties of their trust, which is from time to time as they in their discretion shall think fit (for such is the construction we must attribute to this provision), to make by-laws regulating the administration of the income of the fund—which they could not do if their hands were tied by irrevocable disposition of the proceeds binding on them for a fixed and limited time however short.

I, therefore, come to the conclusion that the terms of

this trust made it incumbent on the trustees to reserve to themselves such power as should enable them to be free to act at all times, and did not warrant any disposition of the income which should not be subject to be recalled or altered by any by-laws which the synod might think fit to pass. It is, therefore, unnecessary to consider the terms and proper construction of the by-law of 2nd March, 1869, under which the plaintiff makes title. That by-law must either be in conformity with the trust, as I construe it, in which case the plaintiff has no right to object to its alteration or repeal, or if it is to be construed as attempting to give the plaintiff a vested and irrevocable interest it is *ultra vires* of the trustees and void. If the terms of the trust had been sufficiently wide to have authorized the trustees to confer a permanent and limited interest in the revenue, it would of course have been essential to the disposition of the case to have considered the proper construction of the by-law, and to have ascertained from it what interest the synod intended to give to clergymen of the class to which the plaintiff belongs, but that alternative in the view I take, does not arise. I think it right, however, to state that if we were restricted to a consideration of the terms of this by-law of March, 1869, I should be unable to determine that it amounted to a grant of an annuity to the plaintiff either for life or for his term of office or during active service. In this aspect of the case *Weir* v. *Mathieson* (1) might have been found to have some application. But I prefer to rest my judgment on the broader ground first indicated, and, therefore, I no not feel called upon to say anything decisive as to the construction of the by-law. The argument of analogy derived from the law relating to powers of appointment and the case of *Hele* v. *Bond* (2), which was pressed upon us by the counsel for the

(1) 3 Ont. Err. & App. R 123. (2) Sugden on Powers, (8 ed.) 370.

1885

WRIGHT v. INCORPORATED SYNOD OF THE DIOCESE OF HURON.

Strong, J.

appellant has, in my opinion, no application here. In the case of a power, an exercise of which is made subject by the instrument of its creation to a power of revocation, the law, no doubt, is settled that the donee cannot revoke an appointment unless he expressly reserves to himself a power to do so. Thus the donee of a power so subject to revocation can exercise an option. But in executing a trust the terms prescribed by the settlor must be strictly followed, and if a trust fund is directed to be applied exclusively in such a manner and by such instruments as are from time to time subject to revocation by the trustees, it is a clear breach of trust on the part of the trustees to attempt to execute the trust in any other manner than that so prescribed, and such attempted execution is void. To put it still more concisely, in the case of the power it is optional with the donee to provide for a revocation or not as he may elect. In the case of a trust it is obligatory upon him to execute it according to the very terms the settlor has directed.

As regards the canon or by-law (it matters not which it is) of June, 1876, I am unable to see any valid objection to that enactment. The plaintiff himself had given notice of a proposal to amend the by-law of 1875, and the amendment proposed by Mr. Logan, which the synod ultimately adopted, was strictly an amendment to the canon or by-law introduced by the plaintiff. Further, the consequence of an omission to give notice was not according to the constitution, that the regulation should be void, but merely that the business should not be entitled to precedence according to the order indicated. Moreover, I am of opinion that these provisions of the constitution are entirely directory, and that it was competent to the synod to dispense with their observance without at all events making by-laws or canons passed without a strict observance of their

requirements subject to be avoided and disregarded as nullities in a judicial proceeding. Upon this head I refer to what has been said by Mr. Justice Patterson, with whose judgment upon this point I entirely concur.

The appeal should be dismissed.

FOURNIER, J.:—

I am sorry to differ from the judgment of the majority of this court, but I interpret the trusts as Mr. Justice Proudfoot has, and for the reasons given in his judgment, I am in favor of allowing the appeal.

HENRY, J.:—

I also feel bound to sustain the decision of the Vice-Chancellor in this case, and I entirely endorse all the reasons which he gives for his judgment. The fund in this case applicable to the clergymen of the diocese, who were not originally to receive the commutation, was an accumulating one. It was provided to be received after the death of the different incumbents on the commutation fund; and provision was made, that the funds, arising from the death of the different incumbents, should be appropriated by the trustees, for the support and maintenance of the clergy from time to time, as, by the by-laws of the Church Society, should be provided. This is the agreement referred to:—

Indenture day of A.D. 1855, between the Church Society of the diocese of Toronto of the one part and

of the other part. Wheraes A. M. is a clerk in holy orders, and is incumbent of and as such is now and has been in receipt of £121 13*s.* 4*d.*, from the Clergy Reserved Fund, and whereas the said A. M., under and by virtue of a statute lately passed by the provincial parliament, is entitled with the consent of the Bishop of the said diocese to receive from the Government of Canada a certain sum of money in commutation of his said salary of £121 13*s.* 4*d.*, and has consented and agreed to pay the said sum so to be received from the government as such commutation to the said Church Society in

1885

WRIGHT v. INCORPORATED SYNOD OF THE DIOCESE OF HURON.

Henry, J.

consideration of the payment by the said Church Society to the said A. M. of the said sum of £121 13*s.* 4*d.* per annum in manner hereinafter mentioned, and in further consideration of the several covenants hereinafter mentioned respecting the said commutation money. Now this Indenture witnesseth that for the consideration aforesaid and in consideration of the said commutation money to be paid by A. M. to the said Church Society, the said Church Society covenants and agrees with the said A. M., his executors and administrators, that the said Church Society shall and will well and faithfully pay to the said A. M. the annual sum of £121 13*s.* 4*d.* by even and equal payments on the first days of the months of January and July in each and every year, so long as the said A. M. continues to do duty in holy orders as aforesaid in the said diocese, and in the event of his being disabled from doing such duty by sickness or bodily or mental infirmity, so long as such sickness or infirmity shall continue; and when and as soon as such annual payment to the said A. M. shall cease the said Church Society shall have and hold the said commutation money and all interest and proceeds thereon upon such trusts for the support and maintenance of the clergy of the said church within the said diocese, or such other diocese as the diocese shall hereafter be divided into; and in such manner as shall from time to time be declared by any by-law or by-laws of the said Church Society, to be from time to time passed for that purpose, so long as the said trust shall continue to be administered by the said society; and in the event of the synod of the said diocese being legally invested with corporated powers so as to be enabled to carry out the trusts aforesaid, shall and will transfer and assign the said commutation money and any securities in which the same may be invested and all interest and proceeds then unappropriated arising therefrom to the said synod by whatever corporate name called, upon the same trusts and interests and purposes as the same shall and may be held and taken by the said Church Society by virtue of these presents. In witness whereof the said Church Society affixed corporate seal, &c.

We have to construe that agreement before we go any further, and my construction of it is this—the funds were not provided at the time, they were to be the result of the death of the different incumbents, and the coming in of the funds; and that agreement gave the trustees power to appropriate them from time to time as new cases should arise; but not to re-appro-

priate the same money. Having once made the appropriation of certan sums as they came in, they had the right, from time to time, only to make appropriations of the further funds as they accumulated.

If we look at the nature of the circumstances in which the clergy stood, the provisions of the different by-laws, and the object of the donors, we shall find that this was intended as a permanent provision for the clergy. We find as a condition of the grants, that the stipends that the clergymen received from the different parishes should be given up. There were certain other considerations connected with the grant, and although it is not stated in plain terms, I think the proper construction of the agreement is that when these clergymen came within the rules laid down, the society had no right to change the appropriation made in their favor, and mix them up and change them from time to time.

It is true that the words used "from to time" bear two different constructions, and which of these are we to adopt?

I am free to say that, looking at the nature of the whole surrounding circumstances, I can put but one construction upon them. It is true that if a person gives away what is his own, he has a right to impose such conditions as he pleases. But here is a fund that is placed under the control of the society as trustees of the donors; a fund not intended for the casual support of the clergy, but for their continuous support and maintenance. How could that be carried out if the society were to take to itself the power of withdrawing that aid in any one year, or for a term of years. If they could change it from year to year, if they could modify it, they could take it away altogether; and how, then, could they be said to be carrying out the undertaking to provide support and maintenance. It is to be noted

1885

WRIGHT v. INCORPORATED SYNOD OF THE DIOCESE OF HURON.

Henry, J.

that the fund was not for the maintenance of the clergy generally, but of each clergyman who was put upon that superannuation list.

What are the terms? It is provided that no other clergy shall be placed upon the list until other funds arise. A certain number are provided for, and it is provided that no further names are to be added. How, then, could there be that general supervision and control in these very words, which, if carried out, would deprive the church society of the power of revision.

Now, what does this mean? For how long a period is it intended? When a clergymen is superannuated, is it not the intention that the allowance should be made to him for life. Surely it was not intended to superannuate him for a year, when he is induced to give up his living on the understanding that he is to be superannuated. The agreement is not carried out by the superannuation for a year, or for any term less than the period of his natural life.

We are told in the judgments of some of the courts below that there was no contract. It is not necessary that a contract should exist. The question is what is the construction of the document by which the trust is created. It is not necessary, in order to carry out the object of the trust, that a contract should be entered into. The question is what is the construction of the document which creates the trust? If a contract existed at all, it would be between the settlor and those who were benefited by the trust; the Church Society were merely instruments, and, therefore, not in a position to enter into any contract at all.

Now, with regard to the by-law, I differ from those who sustain it.

The constitution under the law and under the statute requires that by-laws shall be made for the government of the society. The society made by-laws, which became

as binding as if enacted by the legislature. Under these by-laws the business to come before the meeting was provided to be only of two characters, first, that submitted by the bishop, and, second, that submitted by the committee. The plaintiff here gave notice, according to regulation, that he would submit an amendment to the by-law. That was brought forward regularly and properly, within the rules of the corporation. Every member submitted and was bound to submit to the by-laws. They were bound by them. If, then, there was a rule governing the meeting, every one was bound by that rule. And if the whole synod contracted with each individual member that there must be a certain rule of proceeding, that contract must be observed, or else what is done cannot have a legal binding effect.

Now, this motion to amend the by-law having been brought before the meeting, another member moved what purported to be an amendment to that motion. It was really nothing of the kind. It was another substantial motion to amend the original by-law. No notice had been given of such a motion ; and I take it that a notice was as absolutely necessary, as it was in the case of the resolution moved by the plaintiff ; and, if a notice is duly given of a motion to amend a by-law, that notice does not entitle another person to move a resolution to amend the by-law in a directly opposite direction. I think with the Vice-Chancellor who heard this case, that the by-law passed in 1876 was *ultra vires* and had no binding effect.

But we are told that the plaintiff took his stipend for two years under the by-law, altered as it was from the original one, and that therefore he is estopped from seeking to set aside the by-law that he complains of. I do not think his taking the stipend in that way can have that effect in law. He has brought this suit, not for himself alone, but in order to get a fair construction

1885

WRIGHT v. INCORPORATED SYNOD OF THE DIOCESE OF HURON.

Henry, J.

of the trust for himself and all the other clergy interested; and if what he did could be considered at all, it was merely a submission, for the time being, to a superior force over which he had no control. It is true he received a salary for two years under the changed by-law, but when that was at an end, his salary was taken away altogether. Surely his agreement to take his usual salary under the changed by-law could not be held to debar him from claiming any salary at all. He may say, "So long as I get the $200 a year I will not complain of the particular mode of appropriation," but the very moment it is taken away altogether, he has the right to complain, and I do not think he is prevented from doing so by anything he did.

I think the appeal ought to be allowed, and the judgment of the Vice-Chancellor restored.

TASCHEREAU, J.:

It is not without some difficulty that I have arrived at a conclusion on this appeal. My first impression was in favor of the appellant's contention, but for the reasons given by the Chief Justice and my brother Strong, I have come to the conclusion that the appeal should be dismissed. The by-laws were not accompanied with the formalities required by the constitution, but it is a question of form, and I would not differ from the court below on such a point. It is a question of hardship, no doubt, for the appellant in this case, but if the law is as stated, he is supposed to have known the law, knowing it he must have known it was in the power of the trustees to alter or repeal the by-law. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for Appellant: *Harding & Harding.*

Solicitors for Respondents; *Cronyn & Betts.*