

MICHAÏLO POLUSHIE AND OTHERS (DEFENDANTS) .....	} APPELLANTS;	1905
		* Oct. 28, 30, 31.
AND		
THE REVEREND IWAN ZACKLYN- SKI, PAVLO PASEMKO AND PETRO MELNYK, TRUSTEES OF THE CONGREGATION OF THE GREEK CATHOLIC CHURCH AT STAR, IN ALBERTA (PLAINTIFFS) .....	} RESPONDENTS;	1906
		* Feb. 21.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-  
WEST TERRITORIES.

*Title to land—Ambiguous description of grantee—"Greek Catholic Church"—Evidence—Construction of deed—Reversal of concurrent findings.*

Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," N.W.T. and it appeared that this description was ambiguous and might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome, it was held that the construction of the grant should be determined by the facts and circumstances antecedent to and attending the issue of the grant and that, in view of the evidence adduced, the words did not mean a church united with the Roman Catholic Church and subject to the jurisdiction of the Pope.

Judgment appealed from reversed, the Chief Justice and Girouard J. dissenting, on the ground that the concurrent findings of the courts below upon matters of fact ought not to be disturbed.

**A**PPEAL from the judgment of the Supreme Court of the North-West Territories, affirming the decision of the trial judge by which the plaintiffs' action was maintained with costs.

\*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclellan JJ.

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The case is fully stated in the judgments now reported.

*Ewart K.C.* and *Short* for the appellants.  
*C. deW. Macdonald* for the respondents.

THE CHIEF JUSTICE (dissenting).—This is an appeal upon a question of fact from the concurrent judgments of the two courts below. The case is a complicated one, but I would not feel justified in holding that the judgments in favour of the respondents are clearly wrong. The findings of the trial judge, after a careful and patient hearing of the numerous witnesses brought forward by both parties, should not be interfered with.

GIROUARD J. (dissenting).—This appeal involves no principle of law, but a mere question of fact, namely, whether a certain church built by Galicians in the North-West Territories was intended for a Russian Orthodox Church or a Greek Catholic Church in communion with the Church of Rome. After reading the evidence, I think that the least that can be said is, as found by the two courts below, that it is very contradictory. The trial judge, who saw the witnesses, found it not satisfactory, especially as to the change of religious faith or severance from the Church of Rome. His judgment shews that he believed the plaintiffs' witnesses rather than those of the defendants. He observes:

It is impossible for me to believe that they (the Galicians of Star) could have attended the services of fathers Dymytrow, Tymkiewicz and Zacklynski (Roman Catholic priests) extending over a period of four years and have remained during the whole of that period in ignorance of the fact that their services were those of the Uniate (that is Roman Catholic) church and not of the Orthodox (Russian) Church.

In appeal, Mr. Justice Wetmore says that the evidence is of a very contradictory character, and he adds:

If I had been in his place (Scott J.) my findings would have been of a similar character. But whether they would or not, this is not a case where a court of appeal should, in view of the conflicting character of the testimony and of the conclusions of facts open to be inferred from it, interfere with the trial judge's findings.

When we read the letter dated 1st April, 1900, addressed to the Spiritual Father Zacklynski (one of the respondents, undoubtedly a Roman Catholic priest) in which two of the defendants and some twenty-two co-religionists who signed it declare that they are "Uniates," that is, in union with the Church of Rome, and expressed the following request:

We require to have you, rev. father Zacklynski, permanently for our pastor, and we will pay you a yearly salary of two dollars per family. Each half year we will bring the money, besides the revenue from fees. We have a church finished. In the church we have an altar and symbolium and cross and two banners. Of church books we have the gospels and ritual for precentor and viaticum and further the collects. The presbytery is not yet finished, but we shall finish it in a short time, but for the meantime we have a suitable residence 100 paces from the church. We have a very good farm for the spiritual father, the same land on which the church is built;

when we read this and other evidence, it is almost impossible to come to the conclusion that the trial judge was wrong.

Two courts, undoubtedly more acquainted with the subject matter than we are, and knowing better the locality and the people interested, their customs, manners, education and intelligence, came to the conclusion that the plaintiffs must succeed. The appellants admit that the evidence is contradictory, in fact hardly one single fact of importance could be agreed to by counsel before us. Is this a case where the findings of two courts should be disturbed?

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If I were satisfied that it was wrongly decided I would not hesitate to reverse, but I am not satisfied that the courts below were wrong. The very title of the church, rightly or wrongly—that point is not before us, for we are not called upon to correct it—shews that it was in favour of the “Greek Catholic Church,” that is the Roman Catholic Church, to which these people always belonged before coming to this country, and not to the Russian Orthodox Church. I recognize the right of every congregation or individual to change his religion, and adopt any one he chooses not prohibited by law, but that change must be made in no equivocal terms. Here we have no resolution of the congregation; the opinions or consents of individual members taken by one man hired to do so at so much per head cannot change the situation; he did not even obtain the consent of the majority of the congregation. Even if he did the minority is entitled to hold the property, as the nature of the trust cannot be changed or altered except by and with the consent of all parties interested, or an Act of Parliament. *The General Assembly of the Free Church of Scotland v. Overtoun* (1) is an authority in point.

The relinquishment by the Roman Catholic bishop, so much relied upon by the appellants, means nothing as far as the Roman Catholic creed is concerned. There is no law in the North-West Territories or in any part of the country or in the Catholic Church government which requires that the title of a Roman Catholic church should be in the name of its diocesan bishop; it is usually done in this manner, but there is no law which requires it should be so done. In the

(1) (1904) A.C. 515.

Province of Quebec it is not so held, and according to the common law prevailing anywhere in the Dominion, it may be held in the names of trustees (as in this case) for the benefit of any church designated. An ordinance passed in 1898 by the North-West Territorial legislature so provides in express terms. The Greek Catholic Church cannot mean the "Greek Orthodox Church" first mentioned in the requisition for the permit to build, and subsequently changed in the title to "Greek Catholic Church." The very fact that the two names are used shews that they cannot mean one and the same church and the evidence establishes that they constitute two different bodies. The letter of the Dominion lands agent to the Department, of the 25th May, 1898, cannot supersede the certificate of title.

For these reasons I have come to the conclusion that the appeal should be dismissed with costs.

DAVIES J.—This case arose out of a dispute between rival bodies of Galicians residing in a settlement called Star, N.W.T., as to the religious uses and purposes to which the church built by them in that settlement should be dedicated.

The plaintiffs, who sued on behalf of themselves and other members of the congregation of the church, claimed an injunction restraining the defendants in whose names, as trustees, the church premises stood, from using or permitting the church to be used for religious purposes and uses other than those in communion with and under the jurisdiction and control of the Roman Catholic Church.

The judgment or decree from which this appeal is taken adjudged the lands of the church erected thereon to be

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the property of that branch of the Greek Church and which is united with the Roman Catholic church and which may be properly designated as the United Greek Catholic Church.

The defendants contested the suit on the ground that the people who built the church and obtained the patent for the lands had, before or at the time they began to build the church and afterwards when they obtained their formal patent for the lands, severed any connection they may have had when in Galicia with the Roman Catholic Church, and repudiated being subject to the jurisdiction and authorities of that church, claiming to be united with and subject to the jurisdiction of the Greek Catholic Orthodox Church, the bishop of which, in North America, has his seat in San Francisco.

Although the question incidentally arises it is not necessary for us to decide whether the church and premises in dispute are subject to the jurisdiction of the Bishop of the Greek Catholic Orthodox Church or not. The sole question necessary for us to determine is whether or not they are united with and subject to the jurisdiction of the Roman Catholic Church.

If they are not the appeal must be allowed and the action dismissed.

The facts are very voluminous, and complicated, and rendered more difficult properly to appreciate and decide because of the singular and unique position in which the church to which these people belonged in Galicia stood towards the Roman Catholic Church in that country, and also because the witnesses with rare exceptions gave their evidence through interpreters, many of the witnesses understanding the English language very little, and most of them not at all; while the great bulk of them were almost totally illiterate and ignorant.

It is clear beyond any doubt that the Russo-Greek Catholic Orthodox Church as such was prohibited for political reasons in Galicia by the Austrian Government, and that the church which was permitted and did exist in Galicia and which may properly be called a branch or offshoot of that church, was subject to the jurisdiction and supremacy of the Pope of Rome, though having a hierarchy and bishop of its own and a "use" or form of worship and ritual with vestments similar to those of the Greek Church.

What the official or legal name or designation of that church in Galicia was, is difficult if not impossible to determine under the evidence.

The respondent in his factum and argument at bar insisted that it was the Greek Catholic Church, the same designated in the patent of the lands, but admitted that it was known as and called by many different names according to the nationality or religion of the person who spoke of it.

The Ruthenians themselves call it "The Ruthenian Church." The Poles call it "The Ruthenian Church." The Church of Rome also calls it the "Ruthenian Catholic Church." Catholics of the Greek rite "The Graeco-Ruthenian Church," and outsiders in order to give it a description properly describing its relation to the Greek Church and the (Roman) Catholic, call it "Uniate" or "Greek Uniate."

### The Roman Catholic bishop Legal says of it:

The Greek Church is the portion of the Christian Church not in communion with Rome which uses the Greek or oriental liturgy. The Greek Catholic Church of Galicia is a portion of the Roman Catholic Church using a liturgy in the Slavonic language. I have heard it called by the name of "The Uniate Greek Church." We also call it "The United Ruthenian Church" and "The United Greek Ruthenian Church." I would call them Catholics of the Ruthenian Rite to distinguish them from Catholics of the Latin or Roman Rite. The Greek Catholic Church of Galicia has exactly the same Creed as the Roman Catholic Church but I believe their liturgy is that of the Greek or Eastern Church, which is very different from that of the Roman Catholic Church.

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The testimony on the other hand of ecclesiastics called on behalf of the defendants was to the effect that the Greek Catholic Church meant the Greek Orthodox or Greek Catholic Orthodox or Eastern Church, as distinguished from the Roman Catholic or Western.

The court below in its form of judgment or decree says that it is that branch of the Greek Church which is united with the Roman Catholic Church and which may be properly designated as "The United Greek Catholic Church."

I am satisfied, however, from a careful perusal and comparison of the evidence of the different witnesses, that the phrase or terms used in the patent, as I gather from the certificate of title, to describe the church in dispute, namely, "The Greek Catholic Church," does not necessarily and legally imply the Roman Catholic Church or a church in union with and subject to its jurisdiction, and that the name and description being doubtful and ambiguous, we are necessarily driven to a consideration of all the facts and circumstances connected with the building of the church, and the patenting of the land, in order properly to determine the meaning of the terms of the trust.

As to the difference between the church indifferently called by the witnesses the "Uniate," or "Greek Uniate," or "Greek Catholic," or "Ruthenian Church," or "Greek Ruthenian," or more popularly "Ruska Church," as it existed in Galicia, and designated by the court below in their decree as "The United Greek Catholic Church," and "The Greek Orthodox Church of the East," they are formulated by agreement of parties in the appeal book.



The former affirms and the latter denies the following Roman Catholic dogmas or beliefs:

1. The infallibility and supremacy of the Pope.
2. The immaculate conception of the Virgin.
3. Purgatory, and
4. The double procession of the Holy Ghost.

The study I have given to the evidence convinces me that the trial judge, Scott, J., was right in his conclusion that these Galician peasants

did not trouble themselves very much over the differences in creed between the two churches (Eastern and Western). Many of them do not understand what these differences are.

There is also little, if any, difference in the rites, ceremonies, vestments and ritual of the Orthodox Eastern Church or Greek Orthodox Church, and those of the Galician Church called "Uniate," "Ruthenian," "Greek Catholic," and "Ruska." To the ordinary ignorant Galician peasant such as those of this Star congregation, I would conclude from the evidence there would not be any.

The real vital difference present to the minds of these people, as I gather from their testimony, was the supremacy of the Pope and the authority and jurisdiction of the Roman Catholic bishop over them.

In their own country, Galicia, these people ecclesiastically and the church to which they belonged, though having bishops and a hierarchy of their own, were beyond doubt subject to the supremacy and jurisdiction of the Pope.

As bishop Legal says in his evidence:

If Greek Catholics (by which term he meant these very people) go to a place where there is no Hierarchy or Bishop of their own rite they are enjoined to submit themselves to the Roman Catholic Hierarchy there, but they must return to their own rite as soon as an opportunity occurs.

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When these people emigrated to the North-West they were not only free to follow or accept any form of religion that they wished and determined on, but they *knew* that was so. Witness after witness testifies to this fact.

The question then arises: Did they remain in the church to which they belonged in Galicia owing obedience to the Pope of Rome, and subject to his supremacy or did they unequivocally change and throw off that allegiance?

I am of opinion that they did the latter, and that amid much conflict of testimony, hard, if not impossible, to reconcile on other points, the evidence on this one point is clear that these Galicians made up their minds on coming to the North-West Territories to repudiate and did repudiate the authority and jurisdiction over them of the Pope and of the Roman Catholic bishop of the diocese, and that the church they built was not intended to be, and was not in law, under such jurisdiction.

Evidence was given in order to shew why they did this. That it was owing to the taxation they had to bear for the church in Galicia and which they feared they would be subject to in Canada. That it was because their hearts were with the church of their brothers in blood in Russia and that they only had submitted in Galicia because the law prohibited there the Greek Orthodox Church. That they really believed the tenets and held the faith of the Eastern Church as distinguished from the Western. These reasons do not concern me. They may be true in whole or false in whole, true in part and false in part, as from the evidence I conclude. But what I am concerned with is the fact itself. Did they for any reason clearly repudiate the supremacy and jurisdiction of the

Roman Catholic Church, and erect a church building intended not to be in communion with it?

Whether or not they could without such repudiation, and if they had remained subject to the jurisdiction of the Church of Rome, have secured to themselves the right to worship in this country according to the forms, ceremonies, and rights of the Greek Orthodox Church which they seemed to have possessed by law in Galicia, including the right which they also possessed there to have married priests, is a question I do not propose to enter into, as it is not necessary for the decision of this appeal. I will assume for the purpose of my argument that they could. What then are the facts in evidence respecting the determination of these Galicians to establish a church not in communion with or subject to the jurisdiction of the Pope?

They are of several kinds. First oral evidence of their acts and declarations when preparing to build and while building their church and obtaining their patent; second, written evidence of their intentions, desires and determination; and third, evidence that the Roman Catholic bishop of the diocese appreciated and recognized the facts, accepted them doubtless reluctantly, but acquiesced to the extent hereafter referred to.

In 1892 the Galicians first began to come to the present settlement. In 1896, or the winter of 1897, there were about 18 families there, including both settlements, Star and Wostok, and they held a meeting together at Sowka's house and determined to write to the Greek Orthodox bishop Nicola, at San Francisco, for a priest. In April, 1897, reverend father Dymytrow, a Uniate priest in communion with the Church of Rome visited the settlements and held three

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services. In June, 1897, the reverend fathers Kamneff and Alexandroff, two priests of the Greek Orthodox Church, sent by bishop Nicola, came to the colony, held services, administered sacraments and, it is said, received the allegiance to the Orthodox Church of some 60 families to which numbers the colony was now increased. They set about organizing congregations, getting land, permits for logs, etc., the orthodox congregation of the settlement of Wostok being one result of their visit.

There is some doubt and dispute as to the number of the families of the Star settlement that took an active part in these proceedings, and I am not inclined to lay too much stress therefore upon these facts. But that many of the leaders of the Star settlement associated themselves with those of the adjoining settlement of Wostok in all that was done until the moment when the location for the church came to be decided on seems to me clear.

In September, 1897, father Dymytrow returned for a two weeks' visit holding services and administering the sacraments. At this time the project of building a church at Star settlement ripened towards completion. The land in question was procured, a cemetery upon it was consecrated by father Dymytrow and at one of the services held in a school house bishop Legal, co-adjutor of the Roman Catholic bishop of the diocese, was present and at the close of the service pronounced the benediction. The services were conducted in a language the bishop did not understand, and few if any of the people present understood him, but the bishop was then aware of the desire of the people not to remain in communion with his church, promised them assistance, and sought through an interpreter naturally and properly to retain them in that

communion. He afterwards no doubt in the most perfect good faith, but without the knowledge of any of the Galicians, had the necessary entry made for the land in the name of the Roman Catholic bishop of the diocese and it was not till some time afterwards they found out the fact.

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The decision to erect a church having been reached in November, 1897, the three present trustees made application for a permit to cut timber on the Government lands for a church and the Government agent at Edmonton sent to them a form of requisition to be filled out and signed. Not being able to read or write they went to a Mr. Morrison who was accustomed to assist them in any writings they required, taking with them the form of requisition which was partly in blank. At its head in the agent's handwriting was a memo. as follows:

I must know where the church is to be built, on what quarter section, and this requisition must be signed by the trustees for the Church or by the priest in charge.

Then followed the printed form with blanks for the quantity of timber required, the place where it was desired to cut the timber, and the quarter section where the church was to be built, all of which Morrison filled up. Then followed "remarks," written also by the agent, as follows:

This timber is required and will be used in the erection of a church building for the mission of the church and for no other purpose.

Morrison says he interrogated the three trustees as to the kind of church they required and ascertained it was for the "Greek Orthodox," which words he inserted in the blank by their instructions. These words are entitled to greater importance because in blue pencil beneath the blank left by the agent were writ-

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ten the words "State whether Catholic or Greek Orthodox." He therefore had to interrogate them on the very point we now have in dispute. Was the church proposed to be built to be a Catholic Church or a Greek Orthodox Church, as opposed to a catholic one, by catholic all parties understanding Roman Catholic? Having got their answer "Greek Orthodox," he wrote in the words and witnessed their marks being put to the requisition. As the document was put in evidence and comes up before us amongst the original records I find the words "Greek Catholic Church" written in blue pencil across the face of the requisition, but there is no evidence when or by whom they were written, and Morrison does not remember whether they were there or not when he filled up the document. I attach great importance to this document not only because of its contents, but because of the time when it was filled up, long before there was the slightest sign of any trouble between the members of the congregation. If these three trustees were at that time voicing the desires and intentions of their neighbours and friends by whom they had been appointed, there can be little doubt what kind of church was intended to be built.

This was in November, 1897. It was not till January, 1898, that bishop Legal made the entry for the land in the bishop's name.

The Galicians that winter went to work getting out the logs for the church, and in April had it partially erected when father Tymkiewicz arrived. Some of these Galicians worked for three winters getting out logs and lumber under this permit, and it was with these logs and this lumber the church edifice was built. The Rev. Father was sent to this country at the instance, as I understand, of the Roman Catholic

bishop. He was a "Uniate" churchman, in communion with and subject to the Church of Rome and remained with these Galicians as their priest from April till August, 1898. For some reason, doubtless good, his evidence was not given, but the defendants and other members of the congregation gave evidence which was not rebutted that he represented himself to the congregation as an orthodox priest, and told them they should not take anything from the French bishop, that, he, Tymkiewicz, did not belong to the French bishop and that if the people took anything from him he, the priest, would leave them. This it was said he told them every time he held Sunday services. It was during the time he was their priest, and with his full knowledge and concurrence, if not at his direct instance, that the people succeeded in getting the entry made by the co-adjutor bishop Legal for the land cancelled and a relinquishment signed by bishop Grandin or the proper officials of the diocese of the lands. This relinquishment was not in evidence either, but it was accepted as satisfactory by the department before issuing the patent to the trustees.

When in April or May the members of the congregation learned that the title to the church land had been applied for in the name of the coadjutor bishop Legal, meetings were held and it was determined to get the title back. Bishop Legal himself had gone to Europe, but several visits were made by the defendants and other leaders amongst the Galicians to bishop Grandin or the officials acting for him, with the result that the bishop finally executed the necessary relinquishment.

The formal application by the trustees for a patent was not in evidence, but the letter written by the agent of the department in Edmonton to the secretary

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of the Department of the Interior, Ottawa, was put in by consent, perhaps to avoid necessity of calling the agent. However, the letter is most important as shewing what the intentions, desires and determination of the people of the Star settlement were at its date, 25th May, 1898, when Tymkiewicz was their priest and before, as far as I can gather, there was the slightest dispute or variance between or amongst the members of the congregation. The letter reads:

EDMONTON, 25th May, 1898.

Sir:—

With reference to your file 438627, I beg to enclose herewith what purports to be an assignment from His Lordship Bishop Grandin of L.S. 1 of section 27, 56, 19 W. 4 M.

It appears to have been an error asking for a patent in His Lordship's name. This land is not intended to go to the Catholic Church, but to the members of the Greek Catholic Little Russian denomination who are settled in this vicinity.

The trustees for these people are Mikel Polischy, John Polopovisky and Mikel Melnyk.

They were very deeply concerned over the fact it was proposed to hand this land over absolutely to the Roman Catholic Church; they insist on having the entire control in their own hands, and as it is highly desirable to meet their wishes in this connection, I should be glad (if the relinquishment which I herewith enclose is inadequate) if you will be so good as to have an instrument prepared to meet the case.

I am, Sir, your obedient servant,

A. D. L.

The Secretary, Department Interior,  
 Ottawa, Ont.

It was in July following the receipt of this letter that the patent of the lands issued to the trustees, defendants

in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake in the said district.

Reverend father Zacklynski, who came to them as priest about the latter end of July, came, therefore, after the issue of the patent.



I am of the opinion that the construction of the patent must be determined by the words themselves and if they are ambiguous by the facts and circumstances surrounding and preceding its issue, and that the great mass of testimony as to Zacklynski's engagement by these Galicians as their priest, and doings and sayings while with them, has little or no relevance to the real question to be decided. I hold the same with respect to the subsequent engagement and services of Korchinski, a priest of the Greek Orthodox Church, and who was made one of the defendants in this suit, but disclaimed any desire to enter or be forced into litigation.

The trusts existed when each of these priests came there. It only remains to determine what they were. That determination must rest upon preceding and contemporary facts and circumstances and not upon subsequent ones, more particularly those arising after the trouble in the congregation arose.

Reviewing, therefore, these preceding and contemporary facts and circumstances in the light of the declarations contained in the requisition for the timber limit and in the land agent's letter for the patent, enclosing the relinquishment of the lands from His Lordship bishop Grandin, I cannot entertain any doubt that the "Congregation of the Greek Catholic Church at Limestone Lake" did not mean a church united with and subject to the jurisdiction of the Pope of Rome, and the authorities of the Roman Catholic Church.

I think the plaintiffs have entirely failed to discharge the onus of proof which lay upon them and that the appeal should be allowed, the judgment of the court below reversed and the action dismissed with costs.

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IDINGTON J.—The appellants obtained from the Crown a grant of sub-division one of section twenty-seven, township fifty-six, range nineteen west of the fourth meridian,

in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake in the district of Alberta.

This is evidenced by a certificate of title, dated 6th July, 1899, issued out of the Land Titles Office, for the North Alberta Land Registration District.

The grant was led up to by events I will refer to, which took place eighteen months, or more, prior to this date.

It is unnecessary, here, to determine the exact trusts upon which defendants hold the property in question.

It is only necessary to determine, whether or not that trust was and is, explicitly or impliedly, to serve the purposes of a church, and all that might be incidental to a church, for the uses of a congregation that recognized and recognizes the jurisdiction of the Pope.

If such was not the trust then the plaintiffs' action must fail.

Such is the legal issue. Let us not lose sight of it.

The learning imported into the case, as to the racial, or linguistic, or ecclesiastical origins of the people concerned, or of their forefathers, matters much less than such an ardent pursuit, as is presented, of that learning might imply. Still less does the name of the faith, or church organization or growth of either matter here. The name Greek Catholic is ambiguous. It has been used as properly designating entirely different bodies.

A few salient facts relating to the origin and status of that branch of the Roman Catholic Church,

that may be known here, in order to avoid any confusion, as Uniates, of Galicia, must be kept in view. As to these facts there is no room for controversy and in truth there is not any controversy.

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The outcome of ancient strife, national and religious, has left in Galicia, a Province of Austria, three churches recognized by the State and each with a distinctly separate ecclesiastical head, responsible to, and recognizing, the jurisdiction of the Pope.

By reason of their original race and creed, which had disavowed the authority of the Pope, the ancestors of the people now in question, when they came to the recognition of the papal authority, were known to learned ecclesiastics as "Uniates."

It was an appropriate designation of them. It was so none the less, though it may have been a constrained recognition.

It was not, apparently, the name that the people generally called themselves. The very constraint, through which it was brought about, may have tended in the popular mind to the ignoring of the term Uniate. And as a result, they called and continued to call themselves as of the "Greek Catholic Church" up to the time now in question.

It is to be observed that there seems to have been, notwithstanding all this long recognition on the part of these people and their ancestors of the jurisdiction of the Pope, a tendency to revert to the ancient faith and practice.

This kind of atavism, if I may be permitted to use such a word in relation to church matters, is not without precedent or parallel.

I am quite prepared, therefore, to give credence to the mass of evidence, I may say overwhelming mass of evidence, in this case, that very many of the early

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Galician settlers in the North-West Territories were animated by a desire to assert, in the first place, what to them was an unwonted freedom of action, and in the next place to ignore the papal authority.

This was shewn by the first step that the defendants and others took when they moved in the matter of securing for themselves and others public religious services in the new settlement.

Now what did they do? Did they go to the Roman Catholic bishop in the North-West and ask him for guidance and assistance? If they had been loyal believers in the authority of the Pope, surely that would have been the first step they would have taken. Instead of doing so they write or one of them writes to the bishop of Alutsk and Alaska, to have him supply the settlement with a priest. Certainly this bishop was not a Roman Catholic bishop. His reply seems to indicate that he had the greatest antipathy to the Pope and papal authority. Yet this letter in reply was read in public meeting to the people whom the appellants represented and claim yet to represent.

We hear of nothing to indicate objections thereto on the part of any one.

This correspondence had its beginning in a meeting of these people in 1896. And it seems to me to have in it the root of the whole matter.

A second letter was received. Another place benefited by it and a church there arose out of it as well as this one in question.

A good many of the people, at first concerned in the movement, went off to this other church which was nearer to them I take it. They were all from Galicia, both those who went to this church and the other one. And many of them in the other church had the same origin as those who are now in question.

There is no doubt of the other church being one that does not recognize the papal authority.

There is only, in the fact I refer to of some going to that kind of church, this: that it shews the ferment amongst these people had begun and spread as the appellants assert.

The next important fact is the visit of the reverend father Dymytrow to the settlement in April, 1897, when he held three services there. He was in truth a Roman Catholic priest. Much stress has been laid upon this fact, and the further fact that some, if not all of the appellants and their friends attended these services. Why should they not have done so?

It is beyond my comprehension to conceive why they should, if religious men, feeling the needs of public worship, and of the aids of a priest, abstain from doing so because the priest, in accord with them in other respects, was one who recognized papal authority. He was nearest there, in faith, to what they believed.

On the occasion on which bishop Legal appeared, at one of such services, they were held in a school house, and not in this church. What were people like the appellants to do under such circumstances? Keep away, or go and make a nuisance of themselves? It is urged, if I understand the contention on this point, that they should have protested against the bishop's presence. I most decidedly say, decency forbade them doing so.

Father Dymytrow did not build, or initiate then the building of, the church in question. He said they were too poor to build then. Notwithstanding that, within two or three months afterwards, they followed out what they had previously projected, and still desired, in regard to building this church. They met on more than one occasion to settle this matter of

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church building and the site thereof. And every appellant has sworn, and is abundantly corroborated by many other witnesses, that they determined to build a church for the uses of those who desired to worship in a Greek or Greek Catholic or Russian or Orthodox Church or church of any other name one pleases, but, most clearly and decidedly, not one over which the Pope would have jurisdiction.

They selected the appellants as trustees.

In June, 1897, two men, named respectively Kamneff and Alexandroff, came as missionaries and held services according to the rules of the Greek Orthodox, or from a Roman Catholic point of view, heterodox church. Reverend father Alexandroff was then, he says, only a deacon of that church.

The reverend father Kamnell, I take it, was a priest in that church.

They were sent by the "Bishop of North America and the Aleutian Islands," the same that under another title I have already referred to.

These two missionaries served, in the Limestone Lake District, for a considerable time, and chose a church site, and made entry in the land office therefor, and suggested to the people concerned in this to take another selected site. But its being too far away did not meet with approval.

There was no church built or started at the place now in question when Alexandroff came. He came in the summer, and the church building started in the fall of the same year. The site in question was selected whilst Alexandroff was there; some say by him or approved by him.

Wasył Polushie says:

We started to get out the logs shortly after father Alexandroff came the first time and were working at it when father Dymytrow came the second time.

It seems from some of the evidence that logs were got from private property and this may relate to such contribution.

But the next step taken to build was getting a permit from the Government to use timber from Crown lands.

This very important piece of evidence shews an application of 29th Nov., 1897, signed by Michailo Melnyk and Michailo Polushie, two of the defendants, and one Fedor Melnyk. All signed this by making their mark. It is a printed form filled up by one who had no interest in the matter, and beyond doubt wrote just what he was told to write.

In filling up there appears the following:

This timber is required and will be used in the erection of a church building for the mission of the Greek Orthodox Church, and for no other purpose.

On this form appears a memo. in pencil "state whether Catholic or Greek Orthodox" and in pencil across a corner of the form appears words "Greek Catholic Church."

How this pencil marking, in handwriting of clerks or officers of Government came about is not explained, and I will not speculate. One thing is quite clear, that at least two of the appellants on the date of this document intended that the church should be built for the "Greek Orthodox Church" which, it is conceded on all sides, is not the church for which respondents claim it, but that for which the defendants now claim it.

Are we to suppose that these men deliberately at that time set about to perpetrate a fraud? Why should they? No doubt the bounty of the Crown was open to any church in that country. No need of fraud.

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This, it must be observed, was at or about the time father Dymytrow was in the neighbourhood for two weeks. Were they acting for him or with him? Can it be supposed that it was the result of anything suggested by him? If so it would, I infer, be more in accord with him as he is presented by the evidence for appellants, rather than what the respondents ask us to infer it was.

There is much evidence to shew that he told them not to accept anything from the French bishop or to recognize him. And that is uncontradicted.

Shortly after or about this time it seems bishop Legal, or some one in his name, applied for the lot in question for the purposes of a Roman Catholic Church. We are not enlightened on this point by his evidence. Though he was a witness for respondents, he was not asked as to how this came about, or the purpose of the surrender of claim to it which I am about to advert to.

It is quite clear, however, that when this entry was discovered by the appellants, and those they represented, that steps were at once taken to have it set aside.

The bishop, or those who represented him, after demurring yielded, and the claim the bishop had made was duly and properly assigned or surrendered to or for the appellants. Thereupon the entry was made in the names of the appellants, with the concurrence of the reverend father Tymkiewicz and a French priest, who, I take it, was there to represent the bishop.

Father Tymkiewicz is said to have been a Roman Catholic priest, sent from Galicia specially to minister to the wants of these Galicians. Why should he have taken this step? It may have been that he simply de-



sired to appease these people whose church property in Galicia had usually been held by their own archbishop, and where that could not be done lay trustees were to be entrusted instead, but yet to hold it for the Roman Catholic Church or those in the fullest sense holding the faith of that church.

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Is the evidence consistent with that? Is it not rather consistent with an entire surrender of all claims of that kind in favour of the appellants and their friends, holding the well-known views they did hold, on the question of the supremacy of the Pope?

I cannot conceive how, under all the circumstances, father Tymkiewicz, knowing, as he must have known, the then attitude of these appellants on the point in question, could have intended they should be bound or expected to execute a trust so repugnant to them.

Nor can I understand why, if he did, no record was kept by him or some one else of what the trust was.

Again, it is said by many witnesses that father Tymkiewicz had been present at the meeting of the people moving to get the property out of the bishop's hands and, later, told them not to take a single thing from the French bishop. How can that be at all reconciled with the creating of a trust in favour of Roman Catholic authority or of those of the Roman Catholic faith?

Then we have before this surrender the proper remonstrance of the bishop with these people for leaving or wanting to leave their religion. We have also evidence of his promise, if they would abide by the old faith, to help them build the church. And we have the fact that he never contributed anything to the erection of the church.

All that seems to me quite inconsistent with any intention, on the part of those concerned, to impose

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upon the appellants any such trust as is sought to be enforced in this suit.

It seems quite consistent with a desire on the part of those having authority to speak for the Roman Catholic Church not to do anything that would, or might be, inconsistent with future pleasant relations with those who were so much akin to them in faith; that gentle methods would be much more likely to lead them, or some of them, in the desired way than any legal bond.

The conclusion seems to me irresistible that once and for all the bishop, on behalf of his church, abandoned all claim and thus ended the matter.

The respondents, though calling him as a witness, did not venture to question him on this point. This seems most significant.

As to all that followed if the trust was not impressed at the outset it goes for nothing.

I cannot see why so much has been made of the later occurrences. The evidence as to reverend father Zacklynski is overwhelming that he was telling these people to have nothing to do with the supremacy of the Pope or with his church, and it is not denied. Moreover he ended, as he practicably admits he began, by asking (if Spaczinski is rightly reported) this congregation to abjure both Russian and Roman and keep their own church.

This latter incident is reported differently by other witnesses. Who is correct? Why was the plaintiff, Zacklynski, the author, it would seem, of all this disturbance, not brought as a witness to this wonderful thirty-five days' trial?

Surely he was informed during that time of what was being said about him.

It is a remarkable thing that of those who testified for the respondents the lay plaintiff, Petro Melnyk, seems to be the only one of the settlers who had lived there from the time of the earlier meetings to organize a church. Then came in March, 1897, Mr. Spaczinski, the leading witness for respondents. He is sworn never to have contributed anything to building this church, and does not deny it. He is sworn to have recanted with the others, but denies it.

He, however, accepted the books of father Alexandroff to act as lay reader, apparently in accord with the recantation. He was recalled in reply and states that reverend father Zacklynski asked them, at the rupture with him at his last meeting, to swear that they would stick to their own religion, not go over to the Orthodox Russian Church, nor to the Roman Catholic Church. Other witnesses differ from this version entirely.

He produces a book of which a part is translated. It indicates that "on the 4th day, 6th month of 1898 subscribers to finishing the church" appear as follows, etc. The first name, of ten, given is Pavlo Pasempko \$15. In the evidence Pasempko states that he came to Alberta in May, 1899. Which date, 1898 or 1899, is correct? Who is to blame for the inaccuracy? Or are there two Pavlo or Paulo Pasempkos? I think not. I refer to this trifling incident as illustrative of the difficulties in this case and doubt one may have as to the accuracy of Mr. Spaczinski. I refer to these matters, relating to him, because upon his accuracy depends the weight to be given to the signing of what I may designate "the call" to father Zacklynski, which, though subsequent to the creation of the trust now in question, is a piece of evidence that if the signers perfectly understood

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POLUSHIE } when signing, tends to reflect upon their evidence a  
light leading to discredit them.

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ZACKLYN- } He testifies that when the appellants and others  
SKI. } signed the call to father Zacklynski it was signed by  
Idington J. } all but four of those who did sign it, in a house he  
names, and that the paper was read by one Karetz to  
them. First he said it was written by Peter Stephura  
and then by Alexander Karetz and explains by saying  
Stephura had written one just like it. It contains the  
statement that the signers "are all Uniates." Zack-  
lynski came six months after this was sent by Step-  
hura. This witness, however, tells of one Petro  
Zwanyecz writing Zacklynski to come, but does not say  
whether before or after signing this paper.

None of these alleged writers appear as witnesses.

A number of the signers deny the reading or hear-  
ing it read.

The original shews twelve out of twenty signers  
to have signed by means of a mark. It is difficult to  
fix the attention of illiterate and even many literate  
people, though apparently listening, so that they can  
catch the meaning of what is read, unless sentence  
by sentence is explained. No one ventures to suggest  
such a thing was done.

I would be slow to bind such people by the expres-  
sion Uniate in such a document as meaning something  
that in the face of other facts is most improbable as  
having been at all present to their minds.

They had gone for six months without a priest.  
Why? Simply because they would not recognize the  
proper authorities of the Roman Catholic Church, at  
hand. And why not? We are not offered any ex-  
planation.

We are told that many of them had in the time of  
the reverend father Alexandroff formally repudiated

the head of that church. And they had just after that objected to the land being in the name of the bishop.

When father Zacklynski, who was found through the channels of a newspaper advertisement by him, and not through any application to the bishop, came, he, if the evidence of a great many church members is to be believed, was loud in proclaiming himself as an Orthodox Greek Catholic and not a Roman Catholic. And whenever he proposed borrowing from the bishop to pay a debt for the building of the priest's house those people were up in arms.

I think one cannot help, in reading the evidence in this case, being impressed with the want of support plaintiffs' case got from those who were there before the building of the church, and how strongly and distinctly those older settlers, who were there, and knew what happened, and who were the most active in promoting it, and the chief contributors to the building, speak on the subject.

The circumstances, and the evidence, seem to point nearly all one way, and that way against the establishment of a church that acknowledged the jurisdiction of the Pope.

It is not a case of conflict of evidence so much as a case needing to properly appreciate the evidence given and then to disregard the trifling unimportant incidents and matters subsequent to the creation of the trust, when the general scope and purpose of the parties in relation to that trust had already been made clear, and to apply that properly appreciated evidence to the interpretation of the ambiguous phrase in this certificate of title.

With every respect I think this evidence was not properly appreciated in the court below, and weight

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POLUSHIE given to the subsequent events that should have been  
discarded.

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ZACKLYN- I concur in the brief judgment of the Chief Justice  
SKI. of the court below.

Idington J. I would, but for the zeal with which the case has  
been pressed and the importance attached to it by  
those interested, have contented myself with that ex-  
pression of opinion.

I think the appeal should be allowed with costs.

MACLENNAN J.—A very careful perusal and con-  
sideration of the evidence in this case have led me to  
the clear conclusion that we ought to allow the appeal.

It is clear that at and prior to the 29th of Novem-  
ber, 1897, active proceedings had been taken among  
the Galicians in the vicinity of Limestone Lake for  
the building of a church. For this purpose land for a  
site and materials for the building had to be pro-  
cured. The people were very poor, and it was thought  
that land might be obtained, and lumber also, from  
the Government without payment. When a question  
of site came to be discussed there was a difference  
of opinion depending upon distances and convenience.  
The ultimate result of this difference was that two  
churches were built, I think about six miles apart;  
one of these was at Wostok, and it is admitted that  
the Wostok congregation is an undoubted Greek ortho-  
dox congregation. I think that is an important  
fact, seeing that one section of those who were in the  
first place acting together on the project of building  
a church, and who had no differences among them-  
selves, have built and are enjoying their property  
without dispute as orthodox, while the other congre-  
gation, without any difference of circumstances, have  
on hand the present unfortunate dispute.

On the date above mentioned, the 29th of November, 1897, a requisition was made to the land office for a permit to cut timber for the church. The requisition specifies the land on which the church was to be built, and declares with special emphasis that the timber was to be used in the erection of a church building for *the* mission of *the* Greek Orthodox Church, and for no other purpose. That requisition is signed by three persons, two of them being two of the present defendants. The land specified in this application consists of forty acres of Government land, and it is upon that land the church was built and now stands.

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In pursuance of this application a permit was duly granted. It has not been produced, but it will be presumed to have accorded with the application. The people immediately proceeded to cut the timber and to erect the church, and it was completed some time in the following year. Now, pausing here, what is the effect of what has been done? They have asked the Crown for a site for the purpose of building thereon a church of a specified character and denomination. They have also asked for a gift of timber for the same purpose. The gift both of the land and the timber is made and the church is built. The object and the purpose of the gifts are in writing. I think it plain that the church when built became and was under those circumstances impressed with the trust stated in the permit, namely, a trust for the Greek Orthodox Church, and for no other, and that if there were nothing else in the case, the appellants would be entitled to succeed.

But that is not all. The congregation appointed the three lay defendants trustees to receive and hold the title to the property—in pursuance of the ordin-

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ance, N.W.T. Cons. Ord. 1898, ch. 28, and after the church was completed, or about completed, those defendants applied to the land agent for a patent. The agent then on the 25th May, 1898, wrote to the Department of the Interior, at Ottawa, in effect asking for the issue of the patent to those trustees. The agent refers to the fact that an application had been previously made by or in the name of the Roman Catholic bishop Grandin for the land, but that he had assigned or relinquished all claim, and that

this land is not intended to go to the Catholic Church, but to the members of the Greek Catholic Little Russian denomination who are settled in this vicinity.

It is not disputed that these words correctly describe the Greek Orthodox Church, described in the permit for land and timber above mentioned.

The patent was issued in pursuance of this request. It does not appear what its date was nor what were its precise contents. All that has been proved is that a certificate of title was obtained by the trustees under the Land Titles Act for the forty acres in question, expressed to be

in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake.

The words Greek Catholic Church are ambiguous. There is much testimony that such words might mean either the Roman catholic or the orthodox church. We must gather which is meant by evidence, and the letter of the agent applying for the grant would be sufficient to shew that it was the orthodox church which meant. But if that were not sufficient, the fact that the Crown had previously, by its permit to build an orthodox church on this very land, with logs also granted for the same purpose, to my mind make it



clear to a demonstration that the land and church in question have from the beginning been held, as was expressly intended by the donor, the Crown, as a Greek Orthodox Church.

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For these reasons, as well as for the reasons much more fully expressed in the opinions of my brothers Davies and Idington, which I have had the opportunity of perusing, and also for the reasons expressed in the dissenting judgment of the Chief Justice of the Supreme Court of the Territories, I am of opinion that the appeal should be allowed, and that the action should be dismissed with costs both here and below.

MacLennan J

*Appeal allowed with costs.*

Solicitors for the appellants: *Short, Cross, Biggar & Ewing.*

Solicitor for the respondents: *C. DeW. MacDonald.*