

1934
* May 11.
* Oct. 24.

IN THE MATTER OF THE BEQUESTS OF THE WILL OF JESSIE GRAY, DECEASED.

THE UNITED CHURCH OF CANADA . . . APPELLANT;

AND

THE PRESBYTERIAN CHURCH IN CANADA } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA
EN BANC

Will—Identity of object of gift—Gift to certain funds “of the Presbyterian Church in Canada”—Will made before, but testatrix dying after, the passing and coming into force of The United Church of Canada Act (Dom., 1924, c. 100).

By her will, made in 1921, G. gave a sum to “the Home Mission Fund of the Presbyterian Church in Canada” and a sum to “the Foreign Mission Fund of the Presbyterian Church in Canada.” When she made her will she was a member of a congregation of the Presbyterian Church in Canada, at Hopewell, Nova Scotia. That congregation entered the United Church of Canada in 1925, when *The United Church of Canada Act* (Dom., 1924, c. 100) came into force. G. remained a member of the congregation until her death in 1929. The Supreme Court of Nova Scotia *en banc* held (6 M.P.R. 465, affirming judgment of Graham J., *ibid*) that the gifts should be paid to the Home and Foreign Mission Funds respectively, of the Presbyterian Church in Canada (that is, the continuing Presbyterian Church in Canada, so called, not merged in nor associated with the United Church of Canada) (hereinafter called the “Continuing Presbyterian Church”). The United Church of Canada (but no other parties interested) appealed to this Court. It claimed that the Presbyterian Church in Canada, as it existed before the said Act, became a constituent part of the United Church of Canada without the loss of its identity, and that the gifts in question should pass to the United Church of Canada.

* PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

Held: The United Church of Canada was not entitled to the gifts (*Fraser v. McLellan*, [1930] Can. S.C.R. 344); and its appeal failed.

This Court expressed no opinion on the question of the right of the Continuing Presbyterian Church to the gifts as against other parties interested, as residuary legatees or as next of kin; that question (which the appellant church had no status to raise) not being before it.

Therefore the said decision of the Supreme Court of Nova Scotia *en banc*, in the result remained undisturbed.

APPEAL (by leave of the Supreme Court of Nova Scotia *en banc*) by The United Church of Canada from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming (Hall J. dissenting) the judgment of Graham J. (2), holding that certain bequests in the will of Jessie Gray, deceased, should be paid to the Home Mission Fund and the Foreign Mission Fund, respectively, of the Presbyterian Church in Canada (that is, the Continuing Presbyterian Church in Canada, so called, not merged in nor associated with the United Church of Canada).

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

W. N. Tilley K.C. and *G. W. Mason K.C.* for the appellant.

Glyn Osler K.C. and *E. M. Macdonald* for the respondent.

The judgment of Duff C.J. and Lamont J. was delivered by

LAMONT, J.—On July 7, 1921, Jessie Gray, a resident of Hopewell, in the County of Pictou and Province of Nova Scotia, made her last will and testament. By that will she left bequests as follows:—

| | |
|--|----------|
| “ To the Home Mission Fund of the Presbyterian Church in Canada ” | \$500 00 |
| “ To the Foreign Mission Fund of the Presbyterian Church in Canada ” | 500 00 |

She died on the 12th day of September, 1929.

(1) 6 M.P.R. 465; [1933] 2 D.L.R. 400. (2) 6 M.P.R. 465, at 466-470; [1932] 3 D.L.R. 250.

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At the date of the will and for many years previous thereto Jessie Gray was a member of the St. Colomba congregation of the Presbyterian Church in Canada, at Hopewell. That congregation voted to enter the United Church of Canada, and entered that church on June 10, 1925, when *The United Church of Canada Act* (Statutes of Canada, 1924, chapter 100) came into force. Jessie Gray remained a member of the said congregation up to the date of her death.

On the 31st day of December, 1931, the executors named in the will took out an originating summons calling upon The United Church of Canada; The Presbyterian Church in Canada, not merging in nor associated with The United Church of Canada (hereinafter called "The Continuing Presbyterian Church"); and a number of others who were beneficiaries under the will, to cause an appearance to be entered for them, respectively, to the summons, which was an application for an order to determine whether the bequests above mentioned should be paid to The United Church of Canada or The Continuing Presbyterian Church, or, if to neither, how otherwise.

The matter came on for hearing before Mr. Justice Graham, of the Supreme Court of Nova Scotia, who held that the bequests should be paid to The Continuing Presbyterian Church. On appeal to the Supreme Court, *en banc*, that court affirmed the decision of Mr. Justice Graham (Hall J. dissenting). The United Church, by leave, now appeals to this Court.

The United Church bases its claim to the bequests upon *The United Church of Canada Act*, which was assented to on July 19, 1924, but did not come into force generally until June 10, 1925.

The various sections of the Act received consideration from this court in the case of *In re Estate of Eliza Patriquin, deceased—Fraser v. McLellan* (1). In that case Eliza Patriquin bequeathed \$100 to the Trustees of the Tatamagouche Presbyterian Church, and the residue to the Tata-magouche Presbyterian Church. The will was made January 5, 1924, and Eliza Patriquin died May 2, 1926. The will was, therefore, made before the Union, and she died subsequent thereto. On June 10, 1925, the Tatamagouche

Presbyterian Church became part of The United Church of Canada, and an application was made to this court for an order declaring that The United Church was entitled to both bequests. It was held by this court that, as both the bequest and the residue were to benefit the Tatamagouche Presbyterian Church, and that, as that congregation had been divided, the congregation of The United Church was no longer identical with the congregation which it had been Eliza Patriquin's intention to benefit, and, therefore, The United Church was not entitled to receive the bequests.

I agree with my brother Crocket, whose judgment I have had an opportunity of reading, that, in view of the principle laid down in the *Tatamagouche* case (1), The United Church, in the case before us, is not entitled to receive the bequests. Although in the *Tatamagouche* case (1) the bequests were to a congregation and in the present case are to "Funds," yet the funds which the testatrix intended to augment were funds controlled and administered by the Presbyterian Church in Canada. Both funds were then managed by boards or committees which were appointed by the General Assembly and which acted under such regulations as the Assembly from time to time adopted. Can it be said that funds which, although intended for missionary purposes, are controlled and administered by the General Council of The United Church, are the funds which the testatrix desired to augment by her bounty? In view of the decision in the *Tatamagouche* case (1), it seems to me the answer must be in the negative.

As to the claim of the Continuing Presbyterian Church. As the case was framed and as the parties went to trial there were three parties before the court: there were the two churches and one of the next of kin, and the court was called upon to decide whether or not either church or the next of kin was entitled. Both of the Nova Scotia courts decided in favour of the Presbyterian Church. From the judgment of the Supreme Court of Nova Scotia *en banc*, neither the Trustees who took out the originating summons, nor the next of kin, has appealed. The only party disputing the claim of the Continuing Presbyterian Church is The United Church of Canada. Under the pro-

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ceedings taken here, all we have to do is to determine the right of The United Church to the bequests. That claim failing, the Continuing Presbyterian Church is entitled to maintain its judgment. It is entitled to maintain it, not on the ground that it has been established that it is the same entity as the Presbyterian Church in Canada prior to the Union—on that question I express no opinion—but because The United Church, which is the only one in a position to dispute its right to the bequests, has no claim whatever thereto. Whether under the Act the Continuing Presbyterian Church would be entitled as against the next of kin is a question which is not before us. As Lord Herschell said in *Cox v. Hakes* (1),—

The function of a Court of Appeal is to deal with the judgment before it for review, and not to pronounce opinions on a point of law which may remove a difficulty from the path of a litigant in future proceedings.

The appeal should, therefore, be dismissed with costs.

The judgment of Rinfret, Cannon, Crocket and Hughes JJ. was delivered by

CROCKET, J.—The claim of the appellant, The United Church of Canada, to these bequests rests entirely on its submission that the Presbyterian Church in Canada, as it existed before the coming into force on June 10, 1925, of *The United Church of Canada Act*, Statutes of Canada, 1924, c. 100, became a constituent part of the ecclesiastical corporation constituted by that statute under the name of The United Church of Canada without the loss of its identity and that it therefore still existed as before within the new corporation.

In *Fraser v. McLellan* (2), *in re* the Estate of Eliza Patriquin, deceased, who had made a will before *The United Church of Canada Act* came into effect, leaving a bequest to the Tatamagouche Presbyterian Church at Tatamagouche, N.S., this Court unanimously decided that that congregation, having become a part of The United Church of Canada under the provisions of *The United Church of Canada Act*, which purported to merge the Presbyterian Church in Canada, The Methodist Church and The Congregational Churches of Canada, in the new corporation constituted by that statute, was not the same entity to

(1) (1890) 15 App. Cas. 506, at 533-4. (2) [1930] Can. S.C.R. 344.

which the testatrix made her bequest and therefore could not take it. In delivering the judgment of the court Smith, J., said:—

The sole question for determination is whether or not that congregation, under the circumstances that have since arisen, comes now within the description in the will or has become something so different that it does not now answer to the description.

And, after pointing out that The United Church of Canada was incorporated by *The United Church of Canada Act* as “an entirely new and distinct legal entity”:

It cannot be said that a congregation of The United Church of Canada at Tatamagouche is the same religious organization as was within the contemplation of the testatrix in making this bequest to the Tatamagouche Presbyterian Church.

This decision is conclusive, so far as this Court is concerned, as to the appellant The United Church of Canada's claim that it is entitled to the bequests now in question on the ground that “the Presbyterian Church in Canada is a constituent part of such Church without loss of identity,” which must mean that the Presbyterian Church in Canada still exists as the same entity as formerly within the fold of the United Church. Upon no other ground could it possibly be contended that the Home and Foreign Missions Funds of the United Church of Canada are the Home and Foreign Mission Funds of the Presbyterian Church in Canada as the last named church existed before *The United Church of Canada Act* came into force. To hold that the several church organizations described in that Act as the negotiating churches, viz., the Presbyterian Church in Canada, The Methodist Church, The Congregational Union of Canada and The Congregational Union of Nova Scotia and New Brunswick, were all constituted a single church under the new name of The United Church of Canada without loss of their identity, would necessarily imply, not only that each continued to exist within the new church corporation as a distinct and separate body as formerly, but that each retained the right to control its own internal affairs within The United Church without reference to the others, which was clearly never intended by the incorporating Act.

The appellant, The United Church of Canada, having no right or interest itself in these bequests, it follows, in my opinion, that it has no status on this appeal to chal-

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lunge the right of the respondent, The Presbyterian Church in Canada, to receive them as against any other party or persons. The executors of the will, upon whose application the originating summons was issued for the determination of the questions therein framed, have not appealed from the judgment of the Supreme Court of Nova Scotia *en banc*. Neither have any of the residuary legatees or next of kin, the only parties, other than the Presbyterian Church in Canada and The United Church of Canada, who could in any possible contingency be entitled to receive the moneys bequeathed to the Home Mission Fund and the Foreign Mission Fund of the Presbyterian Church in Canada, and all of whom, as it seems, were duly cited to appear in the action and thus afforded an opportunity of being heard upon the question of the possible lapsing of the bequests because of there being no Home Mission Fund or Foreign Mission Fund of the Presbyterian Church in Canada, as contemplated by the testatrix,—which is obviously the only ground upon which they or any of them could become entitled to share in the bequeathed moneys. Both the trial court and the Supreme Court of Nova Scotia *en banc* decided that the bequests should be paid to the Home Mission Fund and the Foreign Mission Fund respectively of the Presbyterian Church in Canada, as designated in the two questions, viz., “the Presbyterian Church in Canada (that is, the continuing Presbyterian Church in Canada, so called, not merged in nor associated with the United Church of Canada)”, or in other words to the two designated funds of the Presbyterian Church in Canada as it now exists and functions. The decision of the Supreme Court of Nova Scotia must be taken, so far as that court is concerned, to have been conclusive of the whole action and the questions for the determination of which it was brought, not only as between the Presbyterian Church in Canada and The United Church of Canada, but as between either of these churches and the residuary legatees and next of kin. It excludes the residuary legatees and next of kin of the testatrix, so far as these bequests are concerned, just as conclusively as it excludes The United Church—precisely as it would have excluded both the Presbyterian Church in Canada and the residuary legatees and next of kin had the decision been

in favour of The United Church. Leave to appeal from this judgment to this Court was granted only to The United Church of Canada, which is the only appellant here represented, though Isabella Munro, one of more than twenty nieces and nephews, named as residuary legatees in the will, appealed in her own behalf from the judgment of Graham, J., to the Supreme Court of Nova Scotia, as well as The United Church, and was heard by separate counsel before that Court. The sole question, therefore, for determination before this Court on the present appeal is as to whether the appellant, The United Church of Canada, is itself entitled to the bequests, which the testatrix made to the Home and Foreign Mission Funds of the Presbyterian Church in Canada. This question having been decided against the appellant in accordance with the decision in the Tatamagouche case (1), and no appeal having been taken from the judgment of the Supreme Court of Nova Scotia *en banc* by either the executors of the will or any of the residuary legatees or next of kin, who were content to accept that judgment, it cannot now, in my opinion, be disturbed on this appeal at the instance of a body which could have no possible concern with any controversy, if there were any, between the Presbyterian Church in Canada and the executors of the will or any of the residuary legatees or next of kin.

The fact that *The United Church of Canada Act* carried or purported to carry into the new church corporation thereby constituted the "Board of the Presbyterian College, Halifax," or any other holding corporation, which had previously been charged with the administration of the property and moneys given or bequeathed to the Home and Foreign Mission Funds of the Presbyterian Church in Canada, as the latter church formerly existed and functioned, and that this particular Board or any other holding corporation still existed at the time of the death of the testatrix in September, 1929, for the purpose of administering, not the Home and Foreign Mission Funds of the Presbyterian Church in Canada as formerly, but the Home and Foreign Mission Funds of the newly constituted United Church of Canada, manifestly could not bring the latter

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funds within the description of the former, as used in the will, unless the Presbyterian Church in Canada itself continued to exist within the new church corporation as formerly without loss of its identity. It comes back to the question of identity precisely as in case of a congregation of The United Church and a Presbyterian congregation in communion with the Presbyterian Church in Canada, as Smith, J., pointed out in delivering the judgment already referred to in *Fraser v. McLellan* (1), in considering the \$100 bequest to "The Trustees of the Tatamagouche Presbyterian Church." He said:

The bequest of \$100, therefore, is to a corporation which, perhaps, continues to exist, but it is nevertheless necessary to consider, even if that be so, whether or not it is a corporation for carrying into effect the object that the testatrix had in view, namely, to hold or expend the bequest for the benefit of the "Presbyterian Church at Tatamagouche." It would seem that the same principle should be applied as in the case of the other bequest.

The church or congregation there described had become a church or congregation of The United Church of Canada. The clear ground of the decision was that The United Church of Canada did not answer the description of the Presbyterian Church in Canada as the latter church existed before *The United Church of Canada Act* came into effect.

We are not called upon to consider and consequently express no opinion as to whether the judgment of the Supreme Court of Nova Scotia is right or wrong as between the Presbyterian Church in Canada and the residuary legatees or next of kin.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *E. M. Macdonald, Jr.*