1928
*Nov. 5, 6.
1929
*Feb. 5.

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALT SPRINGS AND OTHERS (DEFENDANTS) } APPELLANTS;

AND

ALEXANDER CAMERON AND OTHERS (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Religious societies—United Church of Canada—Congregational meetings—Authority to call—Session—Whether meeting regularly called—Validity of proceedings—The United Church of Canada Act, (D) 14-15 Geo. V, c. 100; (N.S.) (1924) c. 122.

The St. Luke's Presbyterian Congregation of Salt Springs in the County of Pictou, was a congregation in connection with the Presbyterian Church in Canada. Under the provisions of "The United Church of

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

(1) (1859) Johnson's Chy. Rep. 174.

(2) (1879) 10 Ch. D. 436.

Canada Act" (Can.) it voted on December 22, 1924, not to concur in union. The minister, Rev. S. C. Walls, who was in the minority, resigned. On May 5, 1925, the Presbytery of Pictou (the appellant congregation being within its bounds), appointed one Rev. Robert Johnston of New Glasgow, N.S., interim (*pro tempore*) moderator of its session, and until after July 27, 1925, no minister was inducted to the charge. In that month, requisitions were signed by a large number of the members of the congregation asking the elders to convene a congregational meeting for the purpose of taking a second vote under the provisions of "The United Church of Canada Act" (N.S.). Some of the elders called a meeting for the 27th of July. One hundred of those who attended voted to become part of the United Church; none opposing. Members opposed to union then brought this action for a declaration *inter alia* that the meeting and proceedings so taken were null and void; that the congregation is a Presbyterian congregation and not a congregation of or in connection with the United Church of Canada.

Held, Duff J. dissenting, that, under the circumstances of this case and in view of the enactments of the federal and provincial Acts respecting the United Church of Canada, the vote given at the meeting of the 27th of July, 1925, was ineffective to carry either the congregation or its property into the Union.

Per Newcombe, Rinfret and Smith JJ.—The power of non-concurrence which the appellant congregation duly exercised under the Dominion Act, having been invoked with affirmative consequences, was exhausted and could not be reviewed by the congregation. Moreover, a meeting of non-concurrence is held under the authority of "The United Church of Canada Act," and should be held before the union comes into force. It is, for the purposes of this case, a meeting of a congregation of the Presbyterian Church in Canada, and, in the absence of any express statutory provision, the regulations of that church applicable to holding a congregational meeting in like circumstances were apt to regulate the meeting for which the statute provides. Rule 19 of the Rules and Forms of Procedure of the Presbyterian Church in Canada requires that meetings of the congregation shall be called by the authority of the Session, which may act of its own motion or on requisition in writing of the Deacons' Court or Board of Managers, or of a number of persons in full communion, or by mandate of a superior court, and rule 50 reiterates that it is the duty of the Session "to call congregational meetings." These rules were not followed as to the meeting of 27th July, and there was no antecedent meeting of the Session, but, moreover, by s. 10 (*d*), the United Church of Canada Act specially provides that a meeting of the congregation for the purposes of expressing non-concurrence may be called by authority of the Session of its own motion, and shall be called by the Session on requisition to it in writing of twenty-five members entitled to vote, in congregations, such as this, having over 100, and not more than 500 members. There was no compliance with these provisions, and in consequence the meeting of 27th July was not regularly called or held, and consequently, if for no other reason, it failed of its purpose.

Per Anglin C.J.C. and Smith J.—The meeting of the 27th of July, 1925, was professedly called under the last sentence of clause (*a*) of s. 8 of the Nova Scotia Act. There is no corresponding provision in the Dominion Act. The resolution for concurrence passed at that meet-

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

ing could not bring about the entry of the congregation into the incorporated body known as "The United Church of Canada," since that body is a Dominion corporation. While the property of the congregation might possibly be affected, the congregation did not thereby become part of The United Church of Canada. Under the constating Act of that body corporate (s. 10) the congregation of Saltsprings had definitely, and apparently irrevocably, voted itself out of the Union on the 22nd of December, 1924. But assuming that, by virtue of the Nova Scotia Act of 1925, the vote for non-concurrence taken in December, 1924, should be deemed for all purposes of the Nova Scotia Act of 1924 to be a vote taken under and in conformity with the earlier provisions of s. 8 (*a*) of the latter Act, nevertheless the resolution voted on the 27th of July, 1925, being ineffective to bring the Saltsprings Congregation into the Union, *its only avowed purpose,* it could not operate indirectly to affect the property held by the defendant trustees for such congregation. If it did, that property would thereafter be held by the trustees for a body legally non-existent, i.e., The Presbyterian Congregation of Saltsprings in connection or communion with the United Church of Canada. That the legislature contemplated or intended any such anomalous result is inconceivable. Moreover, the only decision at which the last sentence of clause (*a*) of s. 8 purports to authorize the meeting, for which it provides, to arrive is "to enter the Union and become part of the United Church." The application of the Act "to the congregation and all the property thereof" is manifestly dependent on such "decision" being effectively made. Inefficacious to cause the congregation to become part of the United Church, the resolution for concurrence could not bring about the application of the Nova Scotia Act either to the congregation or to its property.

Judgment of the Supreme Court of Nova Scotia en banc, (59 N.S. Rep. 272) aff., Duff J. dissenting.

APPEAL from the decision of the Supreme Court of Nova Scotia, en banc, (1), reversing the judgment of Harris C.J., and maintaining the respondent's action claiming a declaration that a meeting of the Congregation of Saltsprings, held on or about July 27, 1925, to consider entering the United Church of Canada, was null and void and of no effect.

The material facts of the case are fully stated in the judgments now reported.

H. McInnes K.C. and *G. W. Mason K.C* for the appellants.

H. P. MacKeen for the respondents.

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Newcombe. While I concur in his disposition of this appeal, its dismissal can, in my opinion, be rested on a short and simple ground, not taken at bar, but so obvious from a consideration of the

(1) (1927) 59 N.S. Rep. 272.

statutes that to direct re-argument upon it would seem unnecessary.

The Dominion statute, 1924, (14-15 Geo. V, c. 100), alone provides for the incorporation of the United Church of Canada, a Dominion-wide body. The provincial statute of Nova Scotia (c. 122 of the year 1924) of course makes no provision for incorporation and deals chiefly with matters affecting property.

The Dominion Act, by section 10, provides for a meeting of " any congregation in connection or communion with any of the negotiating churches " being held " at any time within six months *before* the coming into force of the Act," at which a majority of the persons present and entitled to vote may decide " not to enter the said Union of the said Churches." While s. 2 of the Dominion Act, which was assented to on the 19th of July, 1924, provides that the Act as a whole is not to come into force until the 10th of June, 1925, it also expressly provides that s. 10 thereof shall come into force on the 10th of December, 1924.

Section 29 of the Nova Scotia Act reads as follows:

29. This Act shall come into force on the day upon which the United Church shall be incorporated by Act of the Parliament of Canada, provided that the said date in respect of the whole of this Act or any section or sections thereof may be altered to such date or dates as shall be fixed by proclamation of the Lieutenant-Governor in Council to be made upon the request of the sub-committee on Law and Legislation of the joint committee on Church Union to be evidenced by the hands of its chairman and secretary.

No proclamation bringing into force the whole or any section or sections of this Act was referred to in argument, nor have I been able to find any such proclamation in the *Royal Gazette* of Nova Scotia. It would seem, therefore, that the Nova Scotia Act came into force only on the 10th of June, 1925.

The Congregation of St. Luke's Presbyterian Church at Saltsprings held a meeting, now admittedly regularly called, on the 22nd of December, 1924, at which a majority of those present and qualified to vote decided " not to enter the said Union of the said churches." Obviously, this meeting was held under s. 10 of the Dominion Act, as s. 8 of the provincial Act did not come into force until the 10th of June, 1925.

Clause (*a*) of section 8 of the Nova Scotia Act reads as follows:

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Anglin C.J.C.

8. (*a*) Provided always, that if any congregation in connection or communion with any of the negotiating churches shall, at a meeting of the congregation regularly called and held within six months *after* the coming into force of this section, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat, not to concur in the said union of the said churches, then and in such case the property, real and personal, belonging to or held in trust for or to the use of such non-concurring congregation shall be held by the existing trustees, or other trustees elected by the congregation for the sole benefit of said congregation. Should such congregation decide in the manner aforesaid at any later time to enter the union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

In 1925 the Legislature of Nova Scotia, by c. 167, amended its Act of 1924 and enacted this declaratory section:

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

The manifest purpose of this provision was to make "any vote on the question of entering the said union" taken under the authority of s. 10 of the Dominion Act of 1924 of the same efficacy for the purposes of the Nova Scotia Act, as if such vote had been taken under and in conformity with the earlier provisions of s. 8 (*a*) above quoted.

Subsequently, on the 27th of July, 1925, another meeting was held, the regularity of which the respondents challenge, but at which a majority of those present decided to enter the Union and become part of the United Church. This meeting was professedly called under the last sentence of clause (*a*) of s. 8 of the Nova Scotia Act. There is no corresponding provision in the Dominion Act. Obviously, if effective for any purpose, the resolution for concurrence passed at that meeting could not bring about the entry of the congregation into the incorporated body known as "The United Church of Canada," since that body is a Dominion corporation. It would follow, if there were no other objection to the validity of the transactions of the meeting, that, while the property of the congregation might possibly be affected in some way by such resolution, the congregation itself did not thereby become part of The United Church of Canada. Under the constating Act of that body corporate (s. 10) the congregation of Saltsprings had definitely, and under the provisions of the Dominion Act apparently irrevocably, voted itself out of the Union on the 22nd of December, 1924.

But for the amending Act of 1925, there would have been a deeper objection to the efficacy of what was done at the meeting of the 27th of July, 1925. The last sentence of clause (*a*) of s. 8 of the Nova Scotia Act deals with "such congregation," i.e., a congregation which had already held a meeting under the earlier provision of clause (*a*) of s. 8, and thereat voted non-concurrence. But no such meeting was ever held because s. 8 only came into force on the 10th of June, 1925, and the only meeting at which non-concurrence was voted had been held on the 22nd of December, 1924, exclusively under the authority of the Dominion Act. To the congregation of St. Luke's Presbyterian Church at Saltsprings, the last sentence of clause (*a*) of s. 8, therefore, could not apply, unless by virtue of the legislation of 1925. Consequently the meeting of the 27th of July, 1925, could not have been validly held under that provision. Nor can any meeting under the earlier part of clause (*a*) of s. 8 be now held, since that clause prescribes that such a meeting must be held within six months after the coming into force of the statute, i.e., before the 10th of December, 1925.

But, assuming that, by virtue of the Nova Scotia Act of 1925, the vote for non-concurrence taken in December, 1924, should be deemed for all purposes of the Nova Scotia Act of 1924 to be a vote taken under and in conformity with the earlier provisions of s. 8 (*a*) of the latter Act, nevertheless the resolution voted on the 27th of July, 1925, being ineffective to bring the Saltsprings Congregation into the Union, and to make it a constituent part of the Dominion Corporation, "The United Church of Canada," *its only avowed purpose,* it cannot operate indirectly to affect the property held by the defendant trustees for such congregation. If it had any such operation that property would thereafter be held by the trustees for a body legally non-existent, i.e., The Presbyterian Congregation of Saltsprings in connection or communion with the United Church of Canada. That the legislature contemplated or intended any such anomalous result is inconceivable. Moreover, the only decision at which the last sentence of clause (*a*) of s. 8 purports to authorize the meeting, for which it provides, to arrive is "to enter the Union and become part of the United Church." The application of the Act "to the congregation and all the property thereof" is manifestly dependent on such "decision" being effectively made.

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Anglin C.J.C.

Wholly inefficacious to cause the congregation "to enter the Union and become part of the United Church," the resolution for concurrence, which the meeting purported to pass, cannot bring about the application of the Nova Scotia Act either to the congregation or to its property.

On this ground, therefore, I would affirm the judgment of the Supreme Court of Nova Scotia en banc in favour of the respondents with the variation in its terms indicated by my brother Newcombe.

DUFF J. (dissenting).—There was no disagreement—and apparently no doubt—in the court below, upon the capacity of a majority of St. Luke's congregation to take the necessary proceedings to make the congregation a part of the United Church; and to bring the congregation property under the trusts of the model trust deed adopted by the Basis of Union and the Act of Incorporation. Neither was there any doubt as to the power of the United Church to receive St. Luke's, at the critical date (27th July, 1925), as one of its constituent congregations.

As these subjects were not discussed or even touched upon in the argument before us, I should not have adverted to them but for the views in respect of them which form the principal ground of the judgment of the majority of the court.

For that reason only, I review briefly the statutory enactments bearing upon these points, before proceeding to the discussion of what I conceive to be the substantial question in controversy. The United Church Act (The Act of Incorporation) (c. 11, 14-15 Geo. V), after reciting that the Presbyterian, Methodist and Congregational Churches had agreed to unite and form one body or denomination of Christians under the name of the "United Church of Canada," declared that the union of these churches should be effective on the day on which the statute should come into force (10th June, 1925). The "Churches" so united included all congregations in communion or in connection with them, except such as should declare their non-concurrence within six months before "the coming into force of this Act" or within any time limited by the local legislature having jurisdiction over the property of the congregation.

On this appeal we are immediately concerned with the effect of this statute (the Act of Incorporation) upon the status and the rights of the non-concurring congregations. Some of its provisions touching upon this subject could only become completely operative under the sanction of provincial legislation, and the Nova Scotia Act of 1924, c. 122, which came into effect on the same date as the Dominion Act (10th of June, 1925) gives in express terms "with respect to property and civil rights" in Nova Scotia, the force of law to these provisions (s. 27).

The effect of the Act of Incorporation in point of law—and this of course is the only aspect of the legislation with which we are concerned—is not obscure. Such a congregation was, so far as legislative enactment could bring it about, the moment the statute came into operation, segregated from the organized ecclesiastical body or connection to which it belonged, that body having now become absorbed in the United Church; and its congregational property freed from all denominational interest and control and the congregation itself from denominational jurisdiction.

The Act of Incorporation contains no explicit provision purporting to enable a non-concurring congregation to reverse its decision and to enter the United Church after the consummation of the Union. But power to receive congregations is given unmistakably to the United Church by s. 18 (*j*)

(To do all such lawful Acts or things as may be requisite to carry out the terms, provisions and objects of the Basis of Union and this Act);

and that power is explicitly recognized by s. 8 of the Act and by article 8 of the Basis of Union.

I am unable to discern any ground for a contention that after the Union, the United Church was destitute of power to receive the St. Luke's Congregation as a congregation of that body. The Act of Incorporation does not deal with the subject from the point of view of the non-concurring congregation. In virtue of the Act of Incorporation and the supplementary provincial legislation, such a congregation having, by voting non-concurrence, severed its former denominational connections, its civil rights and property became, as subjects of legislation, merely provincial matters, within the exclusive jurisdiction of the provincial legislature; and accordingly it is to the law of the province of Nova Scotia that we must return to ascertain the scope of

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Duff J.

the congregation's rights and the conditions controlling their exercise.

The governing enactment is sec. 8 (*a*) of the Nova Scotia Act of 1924, (C. 122), as amended and interpreted by sec. 1 of the Act of 1925 (C. 167). These enactments are in these words:

8. (*a*) Provided always, that if any congregation in connection or communion with any of the negotiating churches shall, at a meeting of the congregation regularly called and held within six months after the coming into force of this section, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat, not to concur in the said union of the said churches, then and in such case the property, real and personal, belonging to or held in trust for or to the use of such non-concurring congregation shall be held by the existing trustees, or other trustees elected by the congregation, for the sole benefit of said congregation. Should such congregation decide in the manner aforesaid at any later time to enter the union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

Sec. 1. Chapter 122 of the Acts of 1924 is amended by the addition of the following subsection to Section 8:

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

The Nova Scotia courts as I have observed have had no doubt about the effectiveness of this legislation to empower St. Luke's Congregation by appropriate proceedings to enter the United Church. "The purposes of this Act" mainly contemplated by the clause introduced into s. 8 of the Act of 1924 by the amendment of 1925, are manifestly the "purposes" of the first clause of the same section—clause (*a*)—which specifically declares the consequences of a vote of non-concurrence. A vote of non-concurrence therefore pursuant to and in accordance with the provisions of the Act of Incorporation is, in virtue of this amendment, a vote within the meaning of sec. 8 (*a*). It is, in short, in the words of the statute of 1925, a vote of non-concurrence for "the purposes of" clause (*a*), and for all the purposes of that clause—for the purposes of that part of the clause which enables a non-concurring congregation to enter the United Church, as well as of that part of it which declares the effects of non-concurrence.

St. Luke's Congregation is therefore a congregation within the operation of the second sentence of s. 8 (*a*):

should such congregation decide in manner aforesaid at any later time to enter the Union and become part of the United Church, then this Act shall

apply to the congregation and all the property thereof from the date of such decision.

Section 8 (*a*) and the statute of 1925 were not intended to take effect *in vacuo*. They must be read with the Act of Incorporation, which empowers the United Church to receive congregations after the Union. The capacities of the United Church, in so far as they affect the exercise of rights in relation to property or other civil rights within the province, are recognized by the provincial statute (s. 27). The enactments of that statute (as is evidenced by sec. 27) are intended to operate in harmony with the Act of Incorporation; and must be read in light of this legislation as a whole. Section (*a*), by necessary implication, empowers a non-concurring congregation to which it applies, to take, as a congregation, the steps prescribed, in order to "enter the Union and become part of the United Church"; and again, by necessary implication, to take these steps in co-operation with the United Church, acting under the powers derived from the Act of Incorporation and in pursuance of its provisions. It is, perhaps, not out of place to observe that, the main purpose of the enactment being clear, it ought not to be reduced to a nullity, in consequence of infelicities of draughtsmanship. *Salmon* v. *Duncombe* (1).

As to the property of the congregation, the Nova Scotia Statute is to apply to it. It matters little, it seems to me, whether that property comes under s. 4 or s. 6. If under s. 6, that section sanctions (as do s. 8. of the Act of Incorporation and article 8 of the Basis of Union) the use by a congregation of the United Church of congregational property in which, as property, the United Church has no interest and over which it has no control. The congregation, as a congregation of the United Church, has control over the congregational property (affected by s. 6) for congregational purposes; and after proper proceedings under s. 8 (*a*), the congregation is pursuing its legitimate congregational objects in exercising its ecclesiastical and religious functions as a congregation of the United Church. The trustees hold the property for the benefit of the congregation, that is to say, to enable the congregation to make use of it for such legitimate congregational purposes. In either view, the plaintiffs must fail if the proper steps have been taken under s. 8 (*a*).

(1) (1886) 11 App. Cas. 627.

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Duff J.

Turning now to the question of procedure. The enactment of the Act of Incorporation and the decision of the congregation to become a non-concurring congregation, necessarily affected the congregational procedure. The Book of Rules envisages a congregation under the Presbyterian polity; under a denominational system of church government in the Presbyterian form and in full vigour.

By section 8 (*a*), the property of a non-concurring congregation "shall be held * * * for the sole benefit of the congregation." This necessarily implies capacity in the congregation to act as a congregation; and the last sentence of the clause, authorizing such a congregation "to enter the Union" if "such congregation decide, in the manner aforesaid" to do so, implies the existence of capacity on the part of the congregation to reach a decision, "in the manner aforesaid," that is to say, in the words of the earlier part of the clause, "at a meeting of the congregation regularly called and held" to "decide by a majority."

A non-concurring congregation, so long as it remains unconnected with a denominational system acknowledging the Presbyterian form of government, is outside the sphere of Presbyteries and other superior church courts; and on the separation taking effect, all rules involving the exercise of authority by such superior courts were necessarily *ipso facto* suspended or modified in their practical operation. The retention of all such rules in their entirety may be put out of question, because that would have the effect, the obvious effect, in contingencies likely to occur in the ordinary course, contingencies which must have been foreseen, of paralysing the congregation as an ecclesiastical body. The participation of the Presbytery, for example, in the selection and induction of a minister became impossible; and the appointment of a minister, therefore, also impossible, unless plenary authority in relation to such matters vested in the congregation in consequence of the severance. So also, if the minister died or resigned or became incapable of acting, a session could not be properly constituted, according to the strict prescriptions of the Book of Rules; because according to the rules the appointment of an interim moderator rests exclusively with the Presbytery. There could, under the rules, be no properly constituted session and therefore, if the view advanced by the re-

spondents be accepted, no properly constituted meeting of the congregation—no such meeting "regularly called and held."

It cannot be supposed that the legislature intended that the enactments of clause (*a*) should become nugatory in circumstances and conjunctures so probable that they must be taken to be contemplated; in such easily foreseeable contingencies, for example, as the resignation of the minister after a vote of non-concurrence. The Act of Incorporation for the Trustees of St. Luke's (C. 217 of Nova Scotia statutes of 1906) provides for an annual meeting of the congregation on a specified date, and prescribes the notice to be given. It enacts also that no property of the congregation shall be disposed of, and no action or suit brought by the trustees without the authority of the congregation, given at a regular meeting, called for the purpose of granting such authority. There is nothing in this Act requiring meetings of the congregation to be called by the session or requiring notice of the annual meeting, which the statute itself enjoins, to be given under the authority of the session.

But, assuming the proceedings directed and authorized by the St. Luke's Act to be governed by the rules in the Book of Rules, the Nova Scotia legislature, in enacting s. 8 (*a*) and in giving its sanction to the Dominion enactments in the Act of Incorporation, can hardly have intended to deprive a congregation situated as St. Luke's was, of the power of functioning as a congregation in relation to its property or in holding an annual meeting. A decision of such a congregation "in the manner aforesaid" which, by the second limb of s. 8 (*a*) is the condition upon the performance of which such a congregation enters the Union, does not require for its validity a meeting "regularly called and held" within the strict prescriptions of the Book of Rules—a condition impossible of performance in such cases as those alluded to. What is required is a meeting fairly called in a manner conforming to the customary procedure in such a degree as is reasonably practicable, and, having regard to the disruption, fairly demanded in the circumstances of the particular case.

I now turn to a brief consideration of the circumstances in which the impeached decision of the congregation was

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Duff J.

arrived at. First of all, it is well to correct an impression which one might gather from the judgments in the full court, that there was in fact no meeting of the elders who signed the notice calling the meeting of the congregation. There is evidence that the session, that is to say, the elders who were members of the session, in the absence, of course, of Mr. Johnston, decided to call a meeting of the congregation for the purpose of having a second vote. This evidence is uncontradicted and there was no cross-examination upon it. For the purposes of this appeal, it must be taken that the elders professed to meet, without Mr. Johnston, as a session, and that, as such, they decided upon calling the congregational meeting. In the circumstances, it would appear that the elders did everything that could reasonably be required of them. Mr. Johnston had, at a meeting of the Presbytery of Pictou on the 5th of May, been appointed interim moderator. On the 10th of June, the legislation constituting the United Church took effect and the vote of non-concurrence by St. Luke's Congregation in December became operative. Mr. Johnston, himself a non-concurrent, together with the Pictou Presbytery constituted by the non-concurring Presbyterian congregations, of which he was a member, assumed that St. Luke's came under the jurisdiction of this Presbytery—a not unnatural supposition perhaps in view of the vote in the December preceding. In fact, St. Luke's had not adhered, and never did adhere to the church formed by the continuing Presbyterians, and the Presbytery never acquired any jurisdiction over that congregation. At a meeting of the session on the 10th of July, at which Mr. Johnston was present, there was a good deal of acrimonious discussion, and Mr. Johnston reported to the Presbytery that the elders had resigned; the Presbytery accordingly, acting no doubt under the belief that it possessed the authority to do so, appointed assessors, who with Mr. Johnston were to act as the Session (R. 59). In this action, the respondents took the position that these proceedings by the Presbytery were effective, that the elders had resigned as Mr. Johnston had reported, and that the assessors so appointed had been regularly constituted assessors, under the constitution by which the congregation was governed.

The learned trial judge, the Chief Justice of Nova Scotia, held that, although Mr. Johnston had acted under a belief that the elders had resigned, there never was any intention on their part to do so, and that they had not in fact done so. The learned trial judge evidently accepted the evidence of the elders, and was convinced that there was a quarrel and a misunderstanding as to what had occurred. The learned judge also finds that Mr. Johnston was notoriously opposed to Union and opposed to the holding of a meeting for the purpose of taking a second vote.

I cannot in these circumstances doubt that the elders, who unanimously desired a meeting of the congregation for that purpose, were entitled to proceed as they did. They and they alone represented the congregation as members of the Session. There was no minister. The presence of an interim moderator could not, for the reasons I have given, be essential to the proper constitution of a meeting of the Session.

It is argued that the present case differs from those suggested because there was an interim moderator who had been duly appointed; and it is contended that it was necessary to observe the rules in so far as it was possible to do so, in the circumstances. There are, I think, weighty reasons for doubting that Mr. Johnston's authority as interim moderator survived the separation of the congregation from the church which, by force of legislative enactment, had become incorporated in the United Church of Canada. Up to that time, he was interim moderator and possessed of such authority as pertained to that office under the constitution of the Presbyterian Church of Canada. But it was not an authority attaching to him personally in the sense that he was entitled to wield it according to his uncontrolled discretion. He was the appointee of the Presbytery; he was subject to the direction of the Presbytery as to calling meetings of the Session and in respect of other things; against him complaints could be addressed to the Presbytery, which had full powers to deal with such matters as well as a general superintendency over the Session. The records of the Session were subject to review by the Presbytery, to which an appeal lay from the Session. The Presbytery in its turn was subject to the jurisdiction of superior courts, the general assembly and the Synod. It would be superfluous

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Duff J.

to pursue these matters into their details. What is now contended is that Mr. Johnston, having been appointed interim moderator of this Session under a polity which conferred upon him certain very important powers touching matters pertaining to the spiritual and temporal affairs of the congregation, but subject, in the exercise of them, to the control and discipline of the superior courts of the church, still retained those powers in their full vigour, but free from any such discipline and control. I am disposed to think that the authority of the interim moderator lapsed when the disruption occurred which deprived the congregation of the protection provided in the Presbyterian polity against ill-judged or arbitrary acts by a moderator in whose appointment the congregation itself had no voice. That is the view upon which I am disposed to think this branch of the appeal ought to be decided; but, beyond that, I am wholly unable to assent to the proposition that an interim moderator in Mr. Johnston's position, assuming the attitude he assumed, asserting an authority derived from a Presbytery which had no jurisdiction over the congregation, could insist upon being recognized as the official solely entitled to initiate the proceedings necessary to call the congregation together for the transaction of business of vital moment to the congregation itself.

If the elders were strictly bound by the letter of the rules, they were in the circumstances powerless. By those rules it is the moderator who convenes the Session. It is true that he is bound to do so when enjoined by a superior court or when requested to do so by one-third of the elders. There was no longer a superior court possessed of jurisdiction. It is improbable that he would have recognized any of the elders (who, he believed, had resigned), if they had requested him to call a meeting. It is equally improbable that he would have called a meeting for such a purpose of his own motion. And if he had called one, there can be little doubt that he would have recognized only the assessors appointed by the Presbytery as entitled to take part with himself in the business of the Session. Under the rules, in their integrity, the elders would have had their remedy by way of complaint or appeal. In the circumstances, if the view advanced by the respondents be accepted, the elders of the congregation were subjected to the arbitrary dictates of the interim moderator.

The appeal should be allowed with costs.

NEWCOMBE J. (concurred in by Rinfret J.).—This action relates to a division which has unfortunately taken place in the congregation known to the law as "St. Luke's Presbyterian Congregation of Saltsprings in connection with Presbyterian Church in Canada," as to the position which that congregation occupies with regard to the recent legislative union of the churches. It is maintained by the plaintiffs, on the one hand, that the congregation is non-concurrent, while it is contended by the defendants, on the other hand, that the congregation belongs to the union.

The plaintiffs, whose contention has been upheld by the majority of the Supreme Court *en banc,* were, at the time of the union (10th June, 1925), members of the congregation in full communion, and the Rev. Robert Johnston, who was the *pro tempore* or *interim* Moderator of the Session. It is claimed, on behalf of the plaintiffs, that Mr. Cameron and Mr. Halliday were also assessors to the Session, and a question was suggested in the court below as to the validity of their appointment, but that is a question which, in my view, it will not be necessary to consider. The defendants are the trustees of the congregation under the statute of Nova Scotia, c. 217 of 1906, entitled *An Act to Incorporate the Trustees of St. Luke's Presbyterian Congregation of Saltsprings in connection with the Presbyterian Church in Canada;* also two reverend gentlemen, Mr. Frame and Mr. Matheson, who were in some wise thought to be concerned in the controversy, and against whom the action was dismissed.

The question depends upon the meaning of the legislation, to which I shall now refer, in its application to the material facts.

The Act incorporating the United Church of Canada, c. 100 of the Dominion, received assent on 19th July, 1924, and may be cited as *The United Church of Canada Act;* it recites that the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches of Canada, believing the promotion of Christian unity to be in accordance with the Divine Will, recognize the obligation to seek and promote union with other churches adhering to the same fundamental principles of the Christian faith, and, having the right to unite with one another without loss of

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Newcombe J.

their identity, upon terms which they find to be consistent with such principles, have adopted a basis of union, which is set forth in schedule A to the Act, and have agreed to unite and form one body or denomination of Christians under the name of "The United Church of Canada"; and it is declared that the Act shall come into force on 10th June, 1925,

except the provisions required to permit the vote provided for in section ten being taken, which section shall come into force on the tenth day of December, 1924.

Some definitions follow, including these:

(*c*) "Congregation" means any local church, charge, circuit, congregation, preaching station, or other local unit for purposes of worship in connection or in communion with any of the negotiating churches or of The United Church of Canada.

(*e*) "The Presbyterian Church in Canada" shall include * * * the Presbyterian congregations separately incorporated under any statute of the Dominion of Canada or of any province thereof, and all congregations heretofore and now connected or in communion with The Presbyterian Church in Canada, whether the same shall have been organized under the provisions of any statute or deed of trust or as union or as joint stock churches or otherwise howsoever.

* * * * *

(*k*) "Non-concurring congregations" shall mean those congregations which decide, as hereinafter provided, not to enter the union hereinafter mentioned.

By section 4, the union of the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches becomes effective when the Act comes into force, namely, on 10th June, 1925,

and the said churches, also united, are hereby constituted a body corporate and politic, under the name of "The United Church of Canada."

The several corporations, described as the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches, are merged in the United Church, and the congregations of these churches which are known as the "negotiating churches," are admitted to, and declared to be congregations of, the United Church; but it is provided, notwithstanding anything in the Act contained, that members of any non-concurring congregation

shall be deemed not to have become, by virtue of the said union or of this Act, members of the United Church;

and provisions follow to the effect that any minister or member of the negotiating churches may, within six months from the coming into force of the Act, notify in writing to the prescribed authority his intention not to become a minister or member, as the case may be, of the United Church,

and that, in such event, he shall be deemed not to have become, by virtue of the union or of the Act, such minister or member.

Sections 5 to 9 inclusive relate to church or congregational property, and need not, for the present, be considered. Section 10 is the important section. It provides in part that if any congregation in connection or communion with any of the negotiating churches, shall,

at a meeting of the congregation regularly called and held at any time within six months before the coming into force of this Act (10th June, 1925) or within the time limited by any statute respecting the United Church of Canada passed by the legislature of the province in which the property of the congregation is situate, before such coming into force, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat not to enter the said union of the said churches, then, and in such case, the property, real and personal, belonging to such non-concurring congregation shall remain unaffected by this Act, except that any church formed by non-concurring congregations of the respective negotiating churches into which such congregation enters shall stand in the place of the respective negotiating churches in respect of any trusts relating to such property, and except that, in respect of any such congregation which does not enter any church so formed, such property shall be held by the existing trustees or other trustees elected by the congregation free from any trust or reversion in favour of the respective negotiating churches and free from any control thereof or connection therewith..

It is further enacted by s. 10 that the persons entitled to vote shall be only those who are in full membership and whose names are on the roll of the church "at the time of the passing of the Act" (19th July, 1924); but it is nevertheless provided that

In any province where by an Act of the Legislature respecting the United Church of Canada passed prior to the passing of this Act, a different qualification for voting has been prescribed, the qualification for voting under this section shall be as provided in such Act.

Then it is provided by paragraph (*c*) that

The non-concurring congregations in connection, or in communion with, any or all of the negotiating churches may use, to designate the said congregations, any names other than the names of the negotiating churches, as set forth in the preamble of this Act, and nothing in this Act contained shall prevent such congregations from constituting themselves a Presbyterian Church, a Methodist Church, or a Congregational Church, as the case may be, under the respective names so used.

It will have been observed by the foregoing that the meeting of the congregation at which the power of non-concurrence may be exercised is, by the express direction of the statute, to be regularly called and held. Paragraph (*d*) of s. 10 proceeds to define more closely the method by which the meeting may be called. It may be called by the author-

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Newcombe J.

ity of the Session of its own motion, and shall be called by the Session on requisition to that body in writing of a number of members entitled to vote, depending upon the total membership of the congregation; and it is further provided that such meeting shall be called by public notice read before the congregation at each diet of worship on two successive Lord's Days on which public service is held, and that such notice shall specify the object of the meeting.

These directions follow very nearly, although with variations, the method described by the *Rules and Forms of Procedure of the Presbyterian Church in Canada,* to be found in rule 19 thereof. That rule is as follows:

> 19. Meetings of the congregation are called by the authority of the Session of its own motion or on requisition in writing of the Deacons' Court or Board of Managers, or of a number of persons in full communion, or by mandate of a superior court. Meetings are called by public notice, read before the congregation on the Lord's Day; such notice specifies the object of the meeting and is given on at least one Sabbath before the time of meeting, unless otherwise and specially provided for. Congregational meetings are opened and closed with prayer.

Before passing on to consider the provincial legislation, attention should, perhaps, be directed to s. 22 of the Dominion Act, by which it is provided that all synods and presbyteries of the Presbyterian Church in Canada, and all other courts or governing bodies of any of the negotiating churches shall,

> save as to the non-concurring congregations, continue to have, exercise and enjoy all or any of their respective powers, rights, authorities and privileges, in the same manner and to the same extent as if this Act had not been passed, until such time or times as the United Church, by its general council, shall declare that the said powers, rights, authorities and privileges, or any of them, shall cease and determine.

There is no evidence of any such declaration, and I refer to this section because the appellants endeavour to justify an inference from it that, once a congregation becomes non-concurring, it ceases to be subject to any of the church courts or governing bodies. The section, however, did not come into effect until 10th June, 1925, when the non-concurrence became operative, and then it did not, in my view, operate to displace the regulations for the holding of meetings contemplated by the previous clauses to which I have referred, and which, I think, must have their application, notwithstanding any inference which may be admissible under s. 22.

The promoters of the union, in order to obtain adequate legislative sanction, and for the avoidance of doubts, sought legislation, not only by the Dominion, but also by the provinces, and, in Nova Scotia, the local provisions are to be found in ch. 122 of 1924, entitled *An Act Respecting the Union of Certain Churches Therein Named,* enacted on 9th May, as amended by c. 167, enacted on 7th May of the next following year. We were told that the common intent was, in one way or another, to have each legislative provision sanctioned by both the Parliament and the provincial legislature, and no question of legislative power was in terms raised or suggested at the hearing, although the point is specifically made in the statement of claim that the proceedings upon which the defendants rely are "null and void and of no effect." So far as the intention of Parliament and of the legislature appear to be the same, it is, perhaps, unnecessary to define their respective limits of authority, but, as I shall presently shew, the Assembly has, in some material particulars, purported to enact provisions which form no part of the incorporating Act. The local statute is however largely in conformity with and anticipates the enactments of the *United Church of Canada Act.* It is provided by s. 29, the concluding section, that

> This Act shall come into force on the date upon which the United Church shall be incorporated by Act of Parliament of Canada, provided that the said date, in respect of the whole of this Act or any section or sections thereof, may be altered to such date or dates as shall be fixed by proclamation of the Lieutenant-Governor in Council, to be made upon the request in writing of the said Committee on Law and Legislation and the joint committee of Church Union to be evidenced by the hand of its chairman and secretary.

Our attention was not directed to any such proclamation, and none appears to have been published in the *Nova Scotia Gazette.* The local provisions affecting non-concurrence are to be found in s. 8 of the Nova Scotia Act, and they correspond, in some measure, with s. 10 of the Dominion Act, but it will be useful, I think, to reproduce s. 8. It reads as follows:

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

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Newcombe J.

other trustees elected by the congregation, for the sole benefit of said congregation. Should such congregation decide in the manner aforesaid at any later time to enter the union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

(*aa*) notwithstanding the provisions of this subsection (*a*) no congregation of the negotiating churches within the province of Nova Scotia excepting such congregation as have prior to the passing of this Act joined with any one or more congregations of any of the other negotiating churches for purposes of worship shall be deemed to have entered the Union or become part of the United Church, nor shall all the property, real or personal, belonging to or held in trust for or to the use of such congregation be affected by the provisions of this Act, if within six months from the day upon which this Act comes into force such congregation at a meeting of the congregation regularly called shall decide by a majority of votes of the persons present at such meeting and entitled to vote thereat not to concur in the said Union of said churches.

(*b*) the persons entitled to vote under the provisions of the first clause of this section shall be those who by the constitution of the congregation, if so provided, or by the practice of the Church with which they are connected, are entitled to vote at a meeting of the congregation.

(*c*) "Congregation" in this section means a local church as mentioned in the Basis of Union.

Paragraph (*b*) of this section should be read in connection with rule 14 of the *Rules and Forms of Procedure of the Presbyterian Church in Canada,* by which it is prescribed that

All members in full communion, male and female, have the right to vote at all congregational meetings, and to them exclusively belongs the right of choosing ministers, elders and deacons. At any meeting of the congregation when matters relating to the temporal affairs of the congregation, and not affecting the order of worship, the discipline of the Church, or the disposal of property, are under consideration, adherents who contribute regularly for the support of the Church and its ordinances may vote.

It will have been perceived that the Nova Scotia Act came into force as a whole on 10th June, 1925, and there is no such exception, as there is in s. 2 of the Dominion Act, with respect to the

provisions required to permit the vote provided for in section ten being taken,

and that, by the provincial requirement, the time for a meeting of the congregation to authorize non-concurrence in the union is within six months after the coming into force of s. 8; and, moreover, there is introduced into s. 8 the concluding sentence of paragraph (*a*), which provides that

Should such congregation decide in the manner aforesaid at any later time to enter the Union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

There is no corresponding enactment in the Dominion Act, nor does that Act contain any express provision whereby a non-concurring congregation may enter the union; and, moreover, according to the meaning of s. 8 (*a*), the intention seems to be that this concluding sentence applies only to a congregation which, at a meeting within six months after 10th June, 1925, has decided, by a majority of votes, not to concur in the union. What happened may now be stated in the order of the events.

On 22nd December, 1924, the congregation of Saltsprings, then under the ministry of the Rev. S. C. Walls, voted not to concur in the union. There is, notwithstanding a suggestion to the contrary by the learned Chief Justice who tried the cause, no dispute as to the regularity and effect of this meeting. The vote was for non-concurrence, and the congregation admittedly then became non-concurrent. The minister, who was in the minority, resigned. The congregation was within the bounds of the Presbytery of Pictou, and that body, following the prescribed practice in like cases, at a meeting on 5th May, 1925, appointed a *pro tempore* Moderator of the Session. The Rev. Robert Johnston was selected, and, by the minute, his appointment was to take effect from 10th May. His powers and duties as Moderator are regulated by Rules 53, 54, 58 and 59 of the *Forms and Rules of Procedure,* as follows:

53. The duty of the moderator is to preside; to preserve order; to take the vote; to announce the decisions of the court and to pronounce censures. The moderator may introduce any competent business, and may express his views upon any matter under consideration. He has only a casting vote.

54. In the absence of the moderator, or when, for prudential reasons, he deems it better not to preside, another minister of the Church, having authority from him, may act as moderator *pro tempore*. When the minister has been removed by death or otherwise, or is under suspension, a moderator *pro tempore* is appointed by the Presbytery.

58. The moderator has power to convene the Session when he sees fit; and he is bound to do so when enjoined by a superior court or requested by one-third of the elders. Meetings are called on the authority of the moderator, either by notice from the pulpit or by personal notice to the members.

59. The moderator and two other members constitute a quorum. When from any cause, the number of elders is not sufficient to form a quorum, application is made to the Presbytery for assessors to act with the other members until new elders have been elected.

At the December meeting, there had been a substantial minority of the congregation voting against non-concur-

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

NewcombeJ.

rence, and subsequently a question of reconsideration arose. There were, nominally, nine elders. On 10th July, Mr. Johnston met the Session, when he ascertained that three of the five elders who attended were unwilling to continue in office. There was talk about resignations, and the minister apparently understood that the way was open for the election or re-election of seven elders. Notice was to be given on the two next following Sabbaths, 12th and 19th July, and the ballots were to be taken on the third Sabbath, 26th July. Whether or not this was done does not appear by the evidence, but I infer that the election did not take place. Some of the elders caused to be read at the church on 19th and 26th July the following notice:

> Notice is hereby given that a meeting of the congregation shall be held at the Church on the 27th day of July, 1925, at 2 o'clock p.m. for the purpose of considering and voting upon a resolution that St. Luke's Presbyterian Church, Saltsprings, concur in the Union of the Churches provided for by Chapter 122 of the Acts of Nova Scotia for 1924, and that the said St. Luke's Presbyterian Church at Saltsprings shall become part of The United Church of Canada. The meeting and the voting thereat shall take place under the provisions of said section 8 of said Chapter 122 of the Acts of Nova Scotia, 1924.
>
> Dated at Saltsprings, N.S., this 18th day of July, 1925.

This notice was preceded by a requisition, signed by some of the members of the congregation, which reads as follows:

> The undersigned members in full communion of St. Luke's Presbyterian Congregation at Saltsprings hereby request the elders to call a meeting of the congregation to be held at the earliest time possible under the constitution of the Church for the purpose of considering and voting whether or not the said cogregation shall concur in the union of St. Luke's Church with The United Church of Canada, and become part of the said The United Church of Canada.
>
> The said meeting is to be called under Section 8 of Chapter 122, of the statutes of Nova Scotia, for the year 1924.
>
> Dated at Saltsprings, N.S., this 15th day of July, 1925.

The pulpit was supplied, on 19th July, by Mr. Harrison, a student for the ministry, who had for some time been conducting services for the congregation under authority of the Presbytery; and, on the 26th, Mr. Johnston preached, but each of them declined to read the notice.

Pursuant to the notice thus advertised, a meeting was held at the time and place thereby appointed, when, according to the notes of the meeting, Mr. W. H. McKay, one of the elders, was appointed Chairman of the meeting, and Mr. C. H. McKay, Secretary. The notice was read,

and the following resolution, moved and seconded by two of the elders, was put to the meeting and carried by a standing vote:

Resolved, that St. Luke's Presbyterian Church, Saltsprings, concur in the Union of Churches, provided for by Chapter 122 of the Acts of Nova Scotia for 1924, and that St. Luke's Presbyterian Church, Saltsprings, shall become part of the United Church of Canada.

The votes having been counted by scrutineers, who were then appointed, the Chairman declared 100 for, and none opposing, and he then proceeded to declare.

That St. Luke's Presbyterian Church, Saltsprings, is now a part of the United Church of Canada.

Then a letter was prepared by the Rev. Mr. Farquhar, "the minister in New Glasgow," who had been invited to attend the meeting, and signed by Mr. A. C. MacDonald, the clerk of the Session. The letter is addressed to Mr. Harrison, the student who had been supplying the congregation at Saltsprings, and reads as follows:

ST. LUKE'S CHURCH, SALTSPRINGS

July 27, 1925.

Mr. E. HARRISON,
Saltsprings.

Dear Sir,—You will recall that some time ago a resolution was passed and communicated to you that we held ourselves responsible for your services for two Sundays only, your services to terminate on June 10. You have since continued to give services in the congregation of St. Luke's while it remained an independent congregation and neither at the request of nor with the acquiescence of the elders of the congregation, in whose hands all arrangements for pulpit supply, for the time being, lay.

To avoid difficulty we have till now taken no action. To-day the congregation of St. Luke's has decided to enter the United Church of Canada.

This is to inform you that from to-day any further attempt on your part to supply St. Luke's will be in opposition to the wishes of the elders and the congregation and contravene the authority of the Presbytery of Pictou of the United Church of Canada, under whose jurisdiction this congregation now lies.

We write you thus because we are persuaded that you are not aware of the gravity of the situation, and the very serious matter of contravening constituted authority.

We would also inform you that the Presbytery of Pictou of the United Church of Canada is asked to send supply to the pulpit of St. Luke's on Sunday next.

Yours very truly,
(Sgd.) ALEX. C. MCDONALD,
Session Clerk.

The writ was issued on 1st September, 1925.

The trial was had before the learned Chief Justice. He had some doubts as to the validity of the meeting of De-

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Newcombe J.

cember 24, 1924, when the congregation voted non-concurrence. He concluded that the elders had not resigned. He thought that if the *pro tempore* moderator had not been properly appointed, he would not be a constituent of the Session, and that the signing of the notice for the congregational meeting of 27th July "would seem to do away with the necessity of any meeting" of the Session; but, upon the assumption that Mr. Johnston had been properly appointed, he expressed the following view:

> The situation was, as everybody knew, that the Reverend Robert Johnston would oppose in every way the taking of a second vote on the question of Union by this congregation. His attitude throughout shews this. If a meeting of the Session had been asked for there is no reason to suppose that he would have called it; and if he had called it he would have had no vote at the Session meeting, because all the elders were unanimously for the holding of a meeting, and the minister only had a casting vote in case of an equal division. Under the circumstances the holding of a meeting of the Session would have been a mere formality and the question is whether the notice given by all the elders was not under the circumstances a good notice for the purpose. I think it was.

He held that the notice of the congregational meeting complied with the rules; that s. 7 of ch. 217 has reference only to the Annual Meeting of the congregation, and does not apply to the meeting of 27th July, and he held that, although it had been argued that there was no provision for a second vote upon the question of union, and that once the congregation had voted against union, no further vote was permissible, the latter part of s. 8 (*a*) of the provincial Act specifically states that after the congregation has decided not to concur, it may, at a later date, decide to enter the union. Accordingly, he dismissed the action.

The plaintiffs appealed, and the judges en banc were Rogers, Mellish, Graham and Carroll JJ. The majority (Rogers, Graham and Carroll JJ.) were of the view that the congregational meeting of 27th July, 1925, was ineffective because no meeting of the Session was held authorizing the calling of the congregational meeting, and that, in the absence of such authorization, a valid meeting could not be held, seeing that, by the requirements of s. 8 (*a*) of the provincial Act, non-concurrence of a congregation could not be authorized, unless "at a meeting of the congregation regularly called and held." The learned judges referred to the *Rules and Forms of Procedure,* adopted by the General Assembly, as setting forth the law and practice of the

Church, and they considered that the regularity of the procedure was to be judged by these rules, and that, if the elders believed that the congregation had changed its view, and desired to enter the union, their proper course would have been to request another meeting of the Session, under Rule 38, for the purpose of passing a resolution for the calling of another meeting. Mellish J., on the other hand, was of the opinion that it was the paramount intention and purpose of Parliament and the Legislature "to obliterate each of the negotiating churches as such, and their ministry and membership," and he says that after the union, the Session of the Saltsprings congregation had no right to function, that it no longer remained a court of a negotiating church, and that the elders and congregation were no longer under any obligation to respect or conform to the previously existing rules with respect to meetings. Mellish J., seems therefore to have been of the opinion, if I do not misjudge his reasoning, that the July meeting was regularly called and held within the meaning of s. 8 (*a*) of the provincial Act.

Beyond this, he held that the trustees of the Saltsprings congregation are not entitled to hold the congregational property in trust for the benefit of the congregation as part of the United Church, unless the congregation consent thereto; that the individual members of the congregation have the right to select their own church, but not to alter the proprietary rights of each other, unless so authorized by statute, and that

the consent contemplated is not the consent of the congregation as a part of the United Church, but in this case I think the *quondam* congregation of the Presbyterian Church in Canada known as St. Luke's. And their property can, I think, be dealt with under the Act incorporating the trustees to reasonably meet any situation, whether the congregation enters the union in a body or not.

This point, it is said, was not raised before the learned Chief Justice at the trial, and it is rejected by Rogers and Graham JJ., who are in agreement throughout, although Carroll J., concurs with Mellish J.

as to the conditions or terms under which this particular property is held.

In the result, upon the latter point, the Court en banc is equally divided, but in the view which I take of the case, it is not necessary for me to consider it.

One must desiderate, in these judgments, an explanation or statement of the reasons which led the judges in

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

NewcombeJ.

Nova Scotia to permit the provincial Act to operate in a manner to affect the constitution of the United Church as incorporated and established by Act of Parliament. It is remarkable that no attention was paid to that subject, but it is none the less obvious that, by the *United Church of Canada Act*, every congregation of the Presbyterian Church in Canada was a negotiating church, and, subject to the provisions or exceptions of s. 10 of that Act, became embodied in the union, on 10th June, 1925, when the union of the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches, became operative, and the churches, as so united, were constituted a body corporate and politic under the name of The United Church of Canada. The legislative description is that the several corporations embraced within the definitions of s. 3 are merged in the United Church, and the congregations are admitted, and declared to be, congregations of the United Church; and, moreover, the congregations which, in the manner and within the time prescribed, decided not to enter the union, were excepted from the union as non-concurrent. These remain, as to their property, unaffected by the Act of Union, except in respect of trusts and reversions, as to which there are special provisions, intended no doubt, for the protection of the non-concurring congregations, and to produce equity.

Now the time for non-concurrence was within six months before 10th June, 1925, " or within the time limited by any statute respecting the United Church of Canada passed by the legislature of the province in which the property of the congregation is situate, before such coming into force," and the meeting of non-concurrence was held on 22nd December, 1924, before the provincial Act, or any of its provisions, came into force, and not otherwise than under the Church Union Act of Canada. This proceeding seems definitely to have placed Saltsprings in the category of a non-concurring congregation. Certainly the Nova Scotia Act, including s. 8, was passed before the Dominion Act, if that be a relevant circumstance, but neither s. 8, nor any other provision of the local Act, was meant to come into force until 10th June, 1925, nor had it anything to do with bringing about the condition of non-concurrence in which Saltsprings has stood since the meeting of 22nd December,

1924, by the effect of the Dominion Act; and, the power of non-concurrence which the congregation duly exercised under that Act, having been invoked with affirmative consequences, is, in my opinion, exhausted, and cannot be reviewed by the congregation. Under the authority of the Dominion Act there is no sanction for re-trial of the vote upon a future occasion; and by the amending Act of Nova Scotia, ch. 167 of 1925, it is enacted in terms that

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

2. Notwithstanding any informality in the taking of any vote or defect in the proceedings relating thereto, and notwithstanding that persons not entitled to vote have voted or that persons entitled to vote have been deprived of the vote, all votes taken or purporting to have been taken in pursuance of the Act of incorporation shall be valid and binding upon the congregations respectively in which such votes have been taken unless on or before the 10th day of June, 1925, a proceeding is taken in the Supreme Court of Nova Scotia for the purpose of having such vote set aside or declared of no effect.

The concluding sentence of s. 8 (*a*) of the provincial Act does not help; first, because the premises or conditions in which it is intended to operate never did, in fact, exist; and secondly, because that clause, relying, as it does, solely upon provincial authority, is incompetent to the legislature of the province, according to principles which are very plainly established by such cases as *Dobie* v. *The Temporalities Board* (1); *Colonial Building and Investment Association* v. *Attorney General of Quebec* (2), and the more recent authorities.

Moreover, the formula of the vote, by which a congregation of the negotiating churches may escape union, as prescribed by the Dominion Act and by s. 8 (*a*) of the Nova Scotia Act, differs from that which has been adopted in this case under the authority said to be derived from s. 8 (*a*). What is required, in order to disqualify and exclude a congregation from the operation of the Act of Union, is a majority of qualified votes "not to enter such union of the said churches," and in fact the vote of 22nd December, 1924, is the only vote which complies with that requirement. No effect is given by Parliament to a resolution, expressing concurrence in the union of the churches,

(1) (1881) 7 App. Cas. 136. (2) (1883) 9 App. Cas. 157.

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Newcombe J.

or that a congregation "shall become part of the United Church of Canada," nor is any authority given for the holding of a meeting for such a purpose.

As to the invalidity of the meeting of 27th July, I agree with the reasons of the majority of the Supreme Court *en banc*. A meeting of non-concurrence is held under the authority of the *United Church of Canada Act*, and should, as I interpret the statute, be held before the union comes into force. It is, for the purposes of this case, a meeting of a congregation of the Presbyterian Church in Canada, and I should have thought that, in the absence of any express statutory provision, the regulations of that church applicable to holding a congregational meeting in like circumstances were apt to regulate the meeting for which the statute provides.

Now I have already shewn that Rule 19 requires that meetings of the congregation shall be called by the authority of the Session, which may act of its own motion or on requisition in writing of the Deacons' Court or Board of Managers, or of a number of persons in full communion, or by mandate of a superior court, and rule 50 reiterates that it is the duty of the Session "to call congregational meetings." These rules were not followed as to the meeting of 27th July, and there was no antecedent meeting of the Session, but, moreover, by s. 10 (*d*), the statute itself specially provides that a meeting of the congregation for the purposes of expressing non-concurrence may be called by authority of the Session of its own motion, and shall be called by the Session on requisition to it in writing of twenty-five members entitled to vote, in congregations, such as this, having over 100, and not more than 500 members. There was no compliance with these provisions, and in consequence it seems to me to be very plain that the meeting of 27th July was not regularly called or held, and that consequently, if for no other reason, it failed of its purpose. I do not think the Court is entitled to infer that, although the regulations were disregarded, the meeting, such as it was, would have been held, or would have reached the identical result, if the prescribed preliminaries had been observed, and it is, I should think, very unlikely that Parliament or the legislature intended to leave congregations who were in doubt about their future affiliation, without adequate directions for the determination of that vital question.

The suggestion that the defect in the meeting of 27th July is, at most, an irregularity, which does not affect the reality of the thing accomplished, ought therefore to be rejected. The prescribed regulations must, I should think, rather be regarded as essential requirements of procedure in the polity or administration of the Church. And besides, there is a two-fold answer: In the first place, the statute in this particular case, which involves the whole status of the congregation, expressly insists that the meeting shall be regularly called and held, and therefore it would seem that irregularity is not to be tolerated; and, secondly even assuming regularity in the calling of the meeting, its object and business, in so far as it could effectively serve any purpose, was, in substance, the reversal of a statutory election or option, which having been already competently exercised, could not be revoked by the congregation: *quod semel placuit in electionibus amplius displicere non potest.* The case is not within the principle enunciated in the cases of which the well known judgment of Mellish L.J., in *McDougall* v. *Gardiner* (1), is a leading example.

For these reasons, I would dismiss the appeal, but I think the judgment of the Supreme Court of Nova Scotia *en banc* should be varied by striking out the fourth paragraph, which begins with a statement of opinion

> that the congregation, at a meeting regularly called and held, may, pursuant to the latter part of s. 8 (*a*), of ch. 122 of the Acts of the Province of Nova Scotia, 1924, enter the union and become part of the United Church,

because I am not satisfied that this congregation may, pursuant to that authority, exercise such a power, and certainly cannot do so in the present circumstances with the consequence of uniting or merging the congregation with the united body.

The costs of the appeal should follow the event.

SMITH J.—I agree with the Chief Justice and my brother Newcombe that the provincial Act could not introduce into the Dominion Corporation a congregation that the latter Act, in pursuance of the vote of non-concurrence under it, expressly excluded. This ground, however, was not taken, either in the court below or here, and my brother Newcombe has therefore deemed it advisable to discuss the

(1) 1 Ch. D., 25.

1929

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS. v. CAMERON.

Smith J.

merits of the appeal upon the grounds presented to the Court.

If this be advisable, I would concur in his conclusions, as I agree with him that the meeting of 27th July, 1925, was not strictly regular. It seems to me that the rules of procedure of the Presbyterian Church in Canada continued to apply to this congregation after the union, so far as applicable, and that the officers of the congregation continued in office. I think there was a method by which a meeting of the Session could have been had, in accordance with these rules, notwithstanding any efforts by the temporary moderator to prevent it.

The object of the meeting was to enable the members of the congregation who wished to go into the union to carry with them into the union the property of the congregation. If that could be done at all, under authority of the provincial statute, it could only be done by the vote of a meeting regularly called. It is argued that what was done by the individual members of the Session in calling a meeting is precisely what would have been done had a meeting of the Session been regularly called, and that therefore there is no substantial difference, and that the contention that the meeting was not regular is a mere technicality, without substantial merit. There is, of course, weight in this argument, and it was pressed with great force. The answer to it would be that if the statute authorizes the transfer of the property of the congregation from the congregation to another body, upon a vote taken at a meeting regularly called, this condition must be strictly fulfilled, and here it was not fulfilled, because the meeting was not regular. The point is, of course, a debatable one, as is indicated by the difference that has arisen in judicial opinion concerning it in this case. I have, however, intimated that in my opinion, for the reasons set out by the Chief Justice and also by my brother Newcombe, the vote of 27th July, 1925, even if the meeting had been regular, was ineffective to carry either the congregation or its property into the union.

I concur in disposing of the appeal as proposed by my brother Newcombe.

Appeal dismissed with costs.

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

Solicitor for the respondents: *C. B. Smith.*