

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
McSwaine and others v. Lascelles and Adair,
from the Supreme Court of Queensland;
delivered 10th July 1895.*

Present :

LORD HOBHOUSE.

LORD MORRIS.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

The question on this Appeal is whether a charitable gift contained in the will of one Robert Adair is invalid, by reason of the will not having been attested in the manner prescribed by the Religious Educational and Charitable Institutions Act of 1861 or registered as required by that Act. The testator directed the sale and conversion of his real and personal estate, and the gift in question is of the residue thereof, in these words:—"To the Presbyterian Church at
" Spring Hill Brisbane aforesaid called St. Paul's
" now under the Pastorate of the Reverend
" J. F. McSwaine and I direct my said executor
" and trustee to pay and apply the same to and
" for the use and benefit of the said church as in
" his sole discretion shall seem fit or to pay the
" same to the churchwardens for the time being
" of such church and whose receipt shall be
" good and sufficient discharges to my said
" executor and trustee for any moneys he may

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“ pay them to be applied for the use and benefit
“ of the said church as aforesaid.”

Prior to and in the year 1863 a Congregation of Presbyterians, calling themselves the Congregation of United Presbyterians owned a church and lands situate in Creek Street Brisbane, which were vested in trustees, in trust only for the use and behoof of the said Congregation of the United Presbyterian Church at Brisbane, then under the pastoral charge of the Rev. Mathew McGavin, and under the inspection of the United Presbyterian Synod Scotland.

On the 25th November 1863 Articles of Union were adopted at an assembly or conference of delegates from Presbyterian Congregations (not including the Creek Street Congregation) held at Brisbane for the purpose of associating the Presbyterians of Queensland together by voluntary compact as an ecclesiastical body under the name of the Presbyterian Church of Queensland.

In or shortly after the year 1864 the Creek Street Congregation voluntarily joined the said ecclesiastical body, and the members for the time being of the Congregation thereupon became and have since continued to be a Congregation of the Presbyterian Church of Queensland.

In the month of May 1874 the General Assembly of the Presbyterian Church of Queensland adopted certain “ Rules and forms of procedure,” which appear to their Lordships to have provided a regular ecclesiastical constitution for the Church according to the Presbyterian polity. Some of these rules and forms of procedure require to be referred to. The first Article re-states the Articles of Union adopted by the Presbyterian Church of Queensland at its formation on the 25th Nov. 1863, of which the 4th is in these words :—

“ That the Church asserts to itself a separate

“ and independent character and position,
 “ possesses supreme jurisdiction over its sub-
 “ ordinate judicatories, congregations, and
 “ people; and will receive all ministers and
 “ preachers from other Presbyterian Churches
 “ applying for admission, on an equal footing,
 “ who shall thereupon become subject to its
 “ authority alone.” The general rules provide
 as follows (4):—“ Every member of the church
 “ has a right of access personally or by petition
 “ or complaint to the session of his own con-
 “ gregation, and through the session, by petition
 “ or appeal to the presbytery, and thence
 “ to the general assembly; and every inferior
 “ court, or member of any inferior court, has the
 “ right of access, in the same manner, to the
 “ next superior court, and upwards to the general
 “ assembly, on all matters concerning discipline,
 “ worship, doctrine, or government”; (20):—
 “ All members are held as subscribing to, and
 “ are bound by the articles of union and the
 “ formula of the church, and have equal rights
 “ and privileges”; (25):—“ The temporal affairs
 “ of the congregation shall be managed by a
 “ deacons’ court or committee of management”;
 and by rule 29 (2) one of the duties of the
 deacons’ court is:—“ The management and
 “ charge of the whole property of the congre-
 “ gation”; (41):—“ The real property of the
 “ congregation shall be vested in trustees, who
 “ must be members of the congregation, and
 “ whose duties are defined in the schedule of
 “ trusts and the bond,” forms of which are
 annexed; by rule (13) the presbytery are to
 select and appoint the trustees out of persons
 nominated by the congregation; rule (45)
 provides that “ the real property of the con-
 “ gregation cannot be sold nor transferred without
 “ the consent of at least three-fourths of the
 “ members of the congregation, and also the

“ consent of the presbytery of the bounds and
 “ of the general assembly.” Provisions are also
 contained defining the constitution and func-
 tions of the Session, the Presbytery, and the
 General Assembly.

The schedule of trusts and bond provide that
 the property affected thereby is to be held in
 trust for the particular congregation in con-
 nection with the Presbyterian Church of
 Queensland, and for the use of the congregation
 “subject to the authority and jurisdiction of the
 “ Presbyterian Church of Queensland.” And
 the trustees bind themselves faithfully to obey
 the decisions and orders of the courts of the
 said Church.

In the year 1885 the church and lands in
 Creek Street were sold, and partly out of the
 proceeds and partly out of other funds lands in
 Spring Hill were purchased, on which was erected
 the church now known as St. Paul's. There is
 no dispute that this church, and the congregation
 worshipping at this church, are the objects of
 the charitable bequest in question. The site of
 St. Paul's Church was vested in trustees, upon
 trust for the majority in number of the persons
 for the time being representing the congregation
 of St. Paul's Presbyterian Church, and upon
 certain further trusts mentioned in the deed.

Their Lordships will now refer to the Act of
 1861 under which the present question arises.
 It is intituled “ An Act to facilitate the incor-
 “ poration of religious educational and charitable
 “ Institutions.” After a preamble that “ it is
 “ desirable to provide facilities for the trans-
 “ mission and management of estates properties
 “ and effects granted or dedicated to religious
 “ educational or charitable uses,” by section 1
 the Governor is empowered to incorporate any
 person or persons, and their successors for
 ever, holding any religious or secular office or

preferment, or exercising any religious or secular functions to which he or they shall have been duly called or appointed, in accordance with the rights laws rules or usages of the community or institution to which such person or persons should belong, and such person or persons by their corporate name are empowered to hold to them and their successors to and for the uses and purposes of the corporation, and of the religious or secular institution by which such person or persons are called or appointed, real and personal estate. The 3rd section is in the following words:—

“ Every deed of grant gift benefaction or testamentary disposition to or in favour of any such corporation shall be made in the presence of and attested by three credible witnesses and shall be executed and registered one month previous to the decease of the person making such deed of grant gift benefaction or testamentary disposition.”

The office bearers of the charitable community or institution are no doubt the corporators. But their Lordships think that they must consider them as incorporated only on behalf of the institution of which they are the officers or (in other words) that the community or institution is incorporated through its officers. They also think that in construing the 3rd section they must hold every gift made for or in trust for all or any of the charitable and other objects or purposes of the institution as made to or in favour of the Corporation within the meaning of that section, notwithstanding that the donor may have selected other trustees for the purpose of his bounty and that the disposition is not directly or in terms to or in favour of the Corporation. It appears to their Lordships that the section was so construed and rightly construed by the Supreme Court of Queensland in the case of *Swan's will*, to which they have been referred. To hold otherwise would unduly narrow and indeed render almost nugatory the enactment in the 3rd

Section of the Act. The effect of the Act therefore, in their Lordships' opinion, is to invalidate any disposition not attested or registered in accordance with the Act in favour of the community the office bearers of which are incorporated.

But it was contended before their Lordships that the congregation of St. Paul's was not incorporated under and had not taken the benefit of the Act, and that the gift to that body was not in any sense a gift to or in favour of the Corporation called the Presbyterian Church of Queensland and was therefore not within the Act. Their Lordships think that this ground cannot be maintained consistently with the Constitution established in May 1874. In their opinion the persons forming the church or congregation of St. Paul's became and were at the date of the bequest constituent members of the Presbyterian Church of Queensland, and as such were entitled to the benefit of the incorporation granted by the Letters Patent to that Church, and the facilities thereby acquired for the transmission of their property. It was argued that the members of the congregation might secede from the Church, but it is another question whether property given to or held in trust for the congregation, being members of the organized ecclesiastical body called the Presbyterian Church of Queensland, could be diverted by the seceders to uses unconnected with that institution. It is unnecessary however to express any opinion upon this, because at the date of the bequest the congregation were still members of the Church, and held their property subject to the provisions and conditions contained in the rules of that Church. The property clauses of the "Rules and Forms of Procedure" of 1874 are such as to create common interests in property between the Church and the Con-

gregation. Rule 29 (2) must clearly be taken with much qualification. As regards real property, the presbytery select its trustees. It cannot be sold without the assent of the presbytery of the bounds and of the general assembly. And the trustees are bound to hold it in trust for the Congregation in connection with the Church, and subject to the authority of the Church Courts.

Such provisions show that the union is not one of faith sympathy and co-operation alone, but of property also. As regards the most important and permanent class of property, viz. real property, the union is express and direct; a gift of land to the Congregation is by virtue of their contract, a gift in favour of the Church; the Act makes no distinction between the two kinds of property; it applies to every gift to or in favour of the incorporated body. In the view of their Lordships every gift to the Congregation tends to increase the resources of the Church, and is in furtherance of the objects uses or purposes for which the office bearers of the Church were incorporated. Their Lordships are of opinion that the gift in question is one in favour of the incorporated body within the meaning of the Act.

Their Lordships therefore agree with the judgment of the Supreme Court, and will humbly advise Her Majesty that the same be affirmed. They were informed at the Bar that an arrangement was made in the Colony that the costs of all parties of this appeal as between solicitor and client should in any event be paid out of the estate. Their Lordships will direct accordingly.
