

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Zacklynski and others v. Polushie and
others, from the Supreme Court of Canada;
delivered the 3rd December 1907.*

Present at the Hearing :

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

In this case, by a majority of three judges to two, the Supreme Court of Canada reversed the judgment of the Supreme Court of the North-West Territories. That Court, sitting in banco (Sifton C.J. dissenting), had affirmed a decision pronounced by the trial judge in favour of the Plaintiffs. The Plaintiffs are now the Appellants.

The case is remarkable in more ways than one. In the course of the trial the leading Counsel for the Plaintiffs intimated to the Court that he elected to abandon the whole of the claim originally put forward on behalf of his clients, and announced that he had determined to take his stand on an alternative claim set up by amendment at the beginning of the trial. He explained that he did so "in order to shorten the trial." A sacrifice so unsparing and complete for an end so desirable seemed full of promise and hope. But the result can hardly be called satisfactory. The proceedings, lightened by throwing overboard the original cause of action, drifted on in an aimless and desultory way for more than a year. The trial itself occupied no less than

33 days. The hearing began on the 16th of May 1902. The evidence closed on the 4th of September 1903. In the beginning of January 1904 the learned Judge filed his written judgment, which was afterwards embodied in a formal decree dated the 25th of March 1904.

The questions raised by the amendment, as well as those raised by the original statement of claim, concern a congregation of Galician peasants recently settled in a district situated in the North-West Territories about 50 miles from Edmonton. The place is sometimes called Limestone Lake, sometimes Edna, but now more commonly Star. The congregation worships, or did worship until the services were stopped by the intervention of the police, in a church built of logs on a plot of land 40 acres in extent, being Legal Subdivision 1 of Section 27 in Township 56, Range 19, West of the 4th Meridian, Alberta.

This plot of land or legal subdivision is vested in fee simple in the three Respondents on trust. There is a burial ground attached to the church. The rest of the land was intended to be used as a residence and homestead by the priest in charge.

The case made by the statement of claim was that the Respondents had been removed from office, and that, although they were no longer trustees, they refused to hand over the trust property to the Plaintiffs, who had been (it was alleged) duly appointed trustees in their place. Relief was asked on that footing, and on that footing only. No other claim was set up until just before the trial, when the Plaintiffs obtained an order giving them leave to amend and to sue not only as trustees claiming a transfer of the trust property, but also as individuals "on behalf of themselves and " all other members and adherents of the said " congregation " in order to enforce their view of the trust both by declaration and injunction. Their

Lordships think it is to be regretted that leave to make such a sweeping amendment should have been granted at that stage of the proceedings. The result has been an enormous waste of time and money, and an inquiry, or rather a series of rambling inquiries, on which the parties embarked apparently without much consideration, and certainly without any method. Even in their factum on Appeal the Plaintiffs, who were then Respondents, propounded no less than eight issues, most of which seem to be wholly irrelevant. It is hardly surprising to find that after a trial so protracted, and with issues so confused, the learned Judge of first instance should have failed to appreciate the real point of the case and the relative importance of the evidence before the Court. But it is somewhat remarkable that all the learned Judges who supported his decision did so on the ground that the evidence was very conflicting, and that a judge who had seen the witnesses and heard what they said through the medium of an interpreter, was more likely to be right than one who had not had the advantage or misfortune of such an experience.

Although there is a good deal of contradiction about irrelevant facts and immaterial details there is absolutely no conflict on any material point. The difficulty, if there be a difficulty, is to determine the proper inferences to be drawn from facts which are either admitted or undisputed.

In order to succeed the Appellants must show that the trustees have committed or are about to commit some breach of trust. The questions, therefore, that lie on the threshold are, What was this trust? or in simpler language, What was the purpose for which the land was vested in the trustees? and When was the trust constituted?

There is no written declaration of trust. There are no formularies or articles subscribed

by the persons who may be regarded as founders of this religious charity. Everything depends on oral testimony and on the meaning and effect of two documents issued by the Land Registry at the time when the Government made over the land as a free gift for religious purposes.

In Galicia, the province from which the settlers came, the great bulk of the population is divided pretty equally between Poles, or Polaks, as they are sometimes called, and Ruthenians, or Little Russians. Held together by the strong hand of the Austrian Government, these two sections of the community have never become united or even assimilated. Strangers in race and in religion, they keep separate and aloof, each regarding the other with jealousy and dislike. "For many generations," says the Reverend Father Philas, a witness for the Plaintiffs, who was a travelling missionary in Galicia and knows "the whole of it," "there has been a struggle between the Polish and the Little Russians, and the latter have been kept down." The Poles to a man are Roman Catholics. The Little Russians are, as Father Philas tells us, "devoted to the religion, rites, and ceremonies of the Greek Church." The Orthodox Greek religion is proscribed in Galicia. For fear of Russian intrigues it is not tolerated there. Adherents of the Orthodox Church, as the Ruthenians or Little Russians originally were, are liable to be arrested and punished if they are suspected of an intention to revert to that faith. As a condition of being allowed to use their own liturgy and rites and to have their services conducted in the old Slavonic language, the Little Russians in Galicia are compelled to acknowledge the supremacy of the Pope and so to accept those points of doctrine which the Roman Church holds and the Greek Church rejects. In other countries and other provinces which, in course of time,

have been detached from the Greek Empire and have fallen under the sway of devout Roman Catholic sovereigns, something of the same sort has happened. The result has been the creation of a composite church, half Roman and half Greek—Roman to the educated priesthood, but Greek to the ignorant peasantry. Its proper style is the “Uniate Church,” a title derived from its enforced union with Rome.

The writer of an article on “The Greek Church” in “Chambers’ Encyclopædia” sums up the position fairly enough. “It is difficult,” he observes, “to state exactly to what degree union has been attained. The primary and, in most cases, the only condition was submission to Papal supremacy, all else, clerical matrimony, communion in both kinds, church discipline, rites and liturgy, being allowed to remain Greek.”

The points of doctrine in which the Roman Catholic Church differs from the Greek Church appear, by a formal admission made in the action, to be :—

- (1) The infallibility and supremacy of the Pope ;
- (2) The immaculate conception of the Virgin Mary ;
- (3) Purgatory ; and
- (4) The procession of the Holy Ghost from the Father and from the Son.

With these matters, other than Papal supremacy, the settlers at Star, being uneducated peasants, unable, for the most part, to read or write or even to sign their own names, were not, it may be supposed, much troubled in their old country. Probably they never heard a word about any of them there. Galicia was no place for religious controversy or proselytism. Naturally they cared for none of these things. But there

was one thing about which they did care, and that was subjection to the Pope. They were a frugal people and miserably poor. Some of them who came forward as witnesses for the defence complain of having had to pay a "big tax" to the Pope and of the exaction of money which was to be sent to Rome.

When these settlers came to Canada they found the conditions of life very different. They were free. They seem to have been intoxicated with their freedom. They had come to a land, says one of them, where there was "no must." They had escaped from their oppressors. But the past was not forgotten. At one of the services held in the early days in a schoolhouse before the church was built, they were reminded by the officiating priest of the heavy yoke laid on them in their old country, and then the whole congregation burst into tears. They were an impressionable people, and not unlikely to be influenced in the choice of a religion, when free to choose for themselves, by sentiments of patriotism and the memory of past oppression.

Emigrants from Galicia began to settle in the North-West Territories about the year 1892. They were few in number at first. For some time they had no church—no priest to bury their dead, or perform the marriage service, or keep them in the straight path and guard adherents of the true faith against the dangerous and deadly errors of Christians of another denomination. By degrees the settlement increased. In 1896 there were about 30 Galician families in the neighbourhood of Star, P.O., scattered about in the surrounding country. Then some of the leading men among them resolved to take steps with the view of providing a place for religious worship and securing the services of a priest. Prominent among the leaders of the movement

were the Respondents and two or three others, who are witnesses in the case. The trial judge records an admission by the learned Counsel for the Plaintiffs to the effect that the three Respondents were "among the most active members and liberal supporters of the church," and that "they and Fedor Melnyk and Wasyl Feniak," who were called for the defence, "were among the first active workers in the congregation." Their object, and the object of all the early settlers at that time, appears to have been to provide religious services in their new home identical in language and in form with those to which they had been accustomed in the old country, and at the same time to make themselves independent of the Pope and to break off from the Church of Rome, which seems to have been always associated in their minds with their enemies the Polaks or Poles. There was no idea then or at any other time of founding an independent sect. The choice lay between the Orthodox Church to which their forefathers belonged, and the Uniate Church such as it was in Canada, where there is no Uniate Bishop, and Roman Catholic Prelates claim to be its rulers and masters under the Pope as supreme head. At one of the earliest meetings it was resolved to write a letter to the Bishop of the Orthodox Greek Church in America, whose seat was in San Francisco. The letter was written and sent. An answer came back. Then there was another letter to the Bishop, and another reply from him. The letters to the Bishop are, unfortunately, not in evidence; we have, however, the replies of the Bishop, who signs himself "Nicholas, Bishop of Alutzk and Alaska." They are dated January 8th and February 5th, 1897. In his first letter the Bishop thanks God that his correspondents "remember that" they "are

Russians," and expresses an earnest desire to include them in "that blessed faith from which," he says, "Popes and Jesuits seek to separate you by force and falsehood." The Bishop was evidently more than content with the reply he received. "I have much satisfaction," he writes, "in your return to your grandfathers' religion." He calls it "Pravoslavny," or orthodoxy. Then he promises to visit them, and speaks of the church which, he understood, they intended to erect. These letters were made public. They were read more than once at big meetings, at which, it is said, all the settlers in the neighbourhood were present. The arrival of letters from San Francisco, under the hand of His Eminence the Bishop himself, must have been a great event. The news must have been carried to every homestead in the district telling of the affectionate interest the Bishop took in the settlers and his intention to come and minister to them himself.

At Easter, 1897, the settlement was visited by a Uniate priest, Father Dymytrow. How it was that he came there nobody seems to know. He consecrated the Easter bread, and held services just as they were held in the old country. His visit lasted only a week, but he returned in the following September, and remained there then for about a fortnight.

In June 1897, two orthodox priests, sent by the orthodox Bishop in San Francisco, arrived at the settlement. They were Father Kamneff and Father Alexandroff. Father Alexandroff was apparently not in full orders at the time. But he always went about with Father Kamneff and acted as his assistant and interpreter. He was familiar with the language or dialect of the Little Russians. Father Kamneff and he held services, which were

largely attended. When the services were over business was discussed; and the people crowded round them asking what they should do about a church. They assured their hearers to their great relief that the Government would give land without price for church purposes and a permit to cut logs for church building. Then the question of site was considered. The settlers near Star wanted the church built there. Those who lived further east wanted to have it at a place now called Wostock, where some leading settlers named Nymyrski lived. It was about five or six miles from Star. Father Kamneff declared in favour of the Wostock site, and promised support to a church built there. He said they were too poor to build more than one church at that time, but they were not to quarrel about it; other churches could be built as the means of the settlers increased, and they would all be cared for by the missionaries of the orthodox church. The settlers about Star thought Wostock too far for them, and being comparatively well off, they determined to have a church of their own. They set about the work at once. They communicated with Mr. Oliver, M.P., and with the Land Department.

At a full meeting of the whole congregation, which had been, it is said, "well advertised," acting on an assurance or intimation received from headquarters, they selected the land which is in question in this action, and proceeded to cut logs for building.

It is important to observe that there was no difference of any sort between the settlers except on the question of site. So entirely were they at one that the Nymyrskis and those who meant to belong to the Wostock congregation (which was beyond question intended to be orthodox and was orthodox from the first), came to the meeting

held to select the site at Star. They did not subscribe for the church at Star because they were going to build a church of their own, but until that was built they meant to attend the church at Star, and so they all subscribed towards the expenses of getting the land. "They each," says Wasyl Feniak, "gave 30c. for that purpose at the time the meeting was called to select the land."

So far, everything was going smoothly. There was no symptom of dissent: no murmur of dissatisfaction. The movement had originated with the people themselves. It was spontaneous and genuine. It was not started or worked by any priest or minister of religion.

When matters were in this position, the Right Reverend Emile J. Legal, Coadjutor Bishop of the Roman Catholic Diocese of St. Albert, within which the Star Settlement was locally situated, appeared on the scene. Father Dymytrow was there at the time, on his second visit. It was in September 1897, or, perhaps, somewhat earlier, if the Bishop's recollection is right.

Bishop Legal, who is spoken of generally as the "French Bishop," held services in the settlement. One was conducted in Latin, and in accordance with the Latin rites; at another, Father Dymytrow officiated, and the Bishop gave the episcopal blessing, dressed, it is said, in full canonicals. He, too, was well received, and his services were well attended. He came to the settlement knowing that two orthodox priests had been there before him. He was, of course, anxious that the people should not leave "his church," as he calls it. He asked them why they were leaving their own church. He told them that he wanted to do all he could for them. He told them he would try to secure the

land "for them." He promised them "assistance towards building their church." He promised to supply nails, shingles, doors and windows—everything, in fact, that was required, except the logs, which they were to haul—if only they would stay in their own church. Father Dymytrow, who was with the Bishop and interpreted for him, advised the people to take everything they could get from the French Bishop, but not to commit themselves by signing anything.

Bishop Legal's appeal seems to have produced but little impression. There were no visible signs of repentance. There was nothing to show that the wandering flock had any thought of returning to the fold. Some of the people at Star bespoke the Bishop's good offices with the Government; and there can be no doubt that the Bishop was well received and listened to with respect. But that goes for very little. As Sifton, C.J., says in a judgment, which is concise and to the point, "Settlers in a remote district anywhere in this country, with no settled pastor of their own, will attend occasional religious services, and give the most serious attention thereto, without in any way believing that they are prejudicing their own religious views."

Bishop Legal left shortly after Father Dymytrow. Then the Bishop, who had assured the people that he would do his best to secure the land "for them," applies to the Land Office, and gets the land vested in Bishop Grandin, the Roman Catholic Bishop of the Diocese, "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake." It is not suggested that he had authority from the congregation or any member of the congregation to take this step. It is not suggested that he told

the congregation or any member of the congregation what he was doing, or that he told the congregation or any member of the congregation what he had done when the matter was completed. He left the country for Europe some months afterwards without making any communication to the parties who were thus deprived of their land. The patent granted to Bishop Grandin is unfortunately not in evidence. But from what took place afterwards it is clear that it must have contained the declaration of trust which now appears on the Register. Its date is not given anywhere. It must have been issued on or shortly after the 26th of January 1898, the date when Bishop Legal appears to have paid the patent fees for the land. How the Bishop managed to carry the matter through does not appear. The practice of the Land Office requires that before a patent fee is accepted on an application for a patent for a church, a declaration must be made by the trustees or some one on their behalf "setting out the correct name of the church and the purposes of the trust." In the present case no such declaration was made or asked for in connection with the patent to Bishop Grandin. This omission is all the more remarkable because at the very time there was in the office a document declaring the names of the trustees for the Star congregation and the purposes of the trust reposed in them. While Bishop Legal's application was pending in the Land Office, the trustees were pressing the office for a regular permit to cut logs for their church. They had been supplied with an office form which the proper officer had headed thus: "I must know where the church is to be built, on what quarter section; and this Requisition must be signed by the trustees for the church or by the priest in charge." The Requisition was filled up accordingly. The

position of the church on the land already selected by the congregation was defined. The Requisition was signed and returned to the office. The date of return seems to have been the 7th of December 1897. As filled up by the trustees, the Requisition contains the following declaration: "This timber is required and will be used in the erection of a church building for the mission of the Greek Orthodox Church, and for no other purpose." It seems to their Lordships that sufficient weight has scarcely been given to this document, or rather to the permit which followed. The permit itself is not in evidence, but it was not disputed that a permit was issued in accordance with the Requisition, declaring in the same words the purpose for which the timber was to be used. In form the permit was an authority to cut timber on Government land. But at the same time it was an invitation to the trustees to build a church on a specified plot of Government land, to be used for a specified purpose. When the permit was acted upon, the land in the hands of the Government became impressed with a trust for the purpose specified in the permit. It would be contrary to the elementary principles of equity to allow a private landowner who encourages another person to erect a building on his land to be used for a special purpose to make over the land to anybody else or to sanction the use of the building for a different purpose. A public department would no doubt act in accordance with the same principle, whether legally compellable to do so or not. It must not be forgotten that the Government was the author of the trust. The land was dedicated by the Government to the use of the mission of the Greek Orthodox Church. No doubt this was done at the instance of the trustees, and no doubt the

Government would have dedicated the land just as readily to the use of the Roman Catholic Church if they had been asked to do so. But in point of fact, by the permit they did dedicate it to the purposes of the Orthodox Church.

Some time after the issue of the patent to Bishop Grandin the congregation at Star discovered that the land which they had selected for themselves had been vested in the Roman Catholic Bishop. They were naturally indignant. Father Tymkiewicz, a Uniate priest who came to Star in April 1898, and was then in charge, disapproved of the action of Bishop Legal as much as any lay member of the congregation. "The congregation as such," says Spaczinski, one of the principal witnesses for the Plaintiffs, "became unfriendly to Bishop Legal because he tried to take away the church land from them and have it in his name." The trustees were directed to take steps to recover their property. They went to Mr. Oliver, they went to the Land Department, they went to see the Bishop. The Bishop was absent, but they saw the Bishop's representative, an elderly Roman Catholic priest. Father Tymkiewicz, as Spaczinski says, had told them "not to be under the control of the French Bishop." Bishop Grandin's representative told them that they "had to be under the Bishop." "The tail," he "said, cannot wag the cat, the head must be there to wag the tail." They answered him bluntly, "You are not our head and we are not your tail." They added that if the Bishop would not give the land back, they would go to a lawyer. The Bishop made no more difficulty. He executed an assignment of the land to the trustees. The Land Department acted on the assignment. The land was transferred to the

trustees, but the trust was left to stand as declared in words chosen apparently by Bishop Legal. That was another mistake. If the patent to Bishop Grandin had been revoked, as it ought to have been, the trust would no doubt have been expressed in the same words as those used in the permit. The trustees were probably satisfied with their success in recovering the land, and paid little or no attention to the wording of the declaration of trust. No one certainly could have foreseen the vast extent of controversy to which those words have led. Ecclesiastics of all denominations—Uniate, Orthodox, Roman Catholic, Church of England, and Presbyterian—were called as witnesses to enlighten or perplex the Court. After all the result is that the words are acknowledged to be ambiguous and applicable to the Greek Orthodox Church as well as to the Uniate Church. Historically, at any rate, they are more properly applicable to the Orthodox Church. Father Zoldac, a witness for the Plaintiffs, says: "From the time of the great schism in 1044 the Western Church was known as the Roman Catholic, and that of the East as the Greek Catholic."

So far their Lordships have been compelled to deal somewhat fully with the materials before them. Up to this point there is really no conflict in the evidence. There are only two witnesses on the side of the Plaintiffs who were in the settlement about the time when the church was founded. One (Spaczinski), who did not come till March 1907, contributed neither money nor labour, and admits that he was paid or promised payment for collecting the names of the adherents of the Orthodox Church after Father Kamnef's visit. He says that he got 60 names and then lost the list. The other (Petro Melnyk) professes never to have heard of the petition to the Orthodox Bishop at San Francisco. The other witnesses on

behalf of the Plaintiffs are concerned about the meaning of the words "Greek Catholic," or speak of occurrences of a much later date which can have no bearing on the real question at issue. What is wanting in the meagre evidence offered by the Appellants on the only material question in the case is supplied by the Respondents, and it was neither challenged by cross-examination nor contradicted directly or indirectly.

The trust was now constituted. It was constituted when the permit was issued, or at latest when the Government parted with the land for the use and behoof of the congregation at Star. Is it possible to hold, as the trial Judge has held, that a trust so constituted is a trust for a church "which is united with the Roman Catholic Church?"

The events which took place afterwards, though they occupy much space in the printed evidence, are of little or no importance. It is a matter of indifference what were the relative numbers of the opposing forces when the congregation became divided against itself in December 1900, or what expressions were used in a letter written on behalf of the congregation in July of that year to a Uniate priest who was advertising for employment.

Father Tymkiewicz remained with the congregation at Star for about five or six months. He conducted the services just as the services had been conducted in Galicia, and the congregation seems to have been perfectly satisfied with his ministrations. He was not more loyal to Bishop Legal than Father Dymytrow had been. But he was certainly more open and straightforward. He told the people to take nothing from the French Bishop. If they did, he said, they would belong to the French Bishop. The warning was not needed. Bishop

Legal neither gave nor offered to give any contribution in money or in kind towards the completion of the church, though he seems to have kept in touch with some of the congregation and to have visited the settlement more than once after the trust property was recovered by the trustees. This conduct on the part of the Bishop seems to show that he, at least, was conscious that the congregation did not belong to him or to his church or to the Uniate Church of which he assumed to be the pastor and head in the Diocese of Alberta or St. Albert. His promises of support, large and liberal as they were, were conditional on the congregation keeping to what he called his church or their own church. It is impossible to suppose that a person in the position occupied by the Bishop would have failed to perform his promises if he had thought that the condition attached to them had been fulfilled by the congregation.

After Father Tymkiewicz left, the congregation was without a priest until Father Zacklynski came in July 1900. The dissensions began in his time. It is not clear whether they arose out of money disputes or in consequence of a suspicion that he wanted to carry the congregation over to Rome. The congregation was divided. Then the trustees intervened and procured the services of Father Korchinsky, an orthodox priest who had been connected with the Wostock congregation. Unfortunately they did so without consulting the congregation at Star; more unfortunately still, Korchinsky insisted on public renunciation of Romish doctrines; the quarrel broke out afresh, and the police were compelled to interfere and close the church.

Although the trustees would no doubt have done better if they had taken the congregation into their confidence, it is impossible to say that

they have committed a breach of trust. The Plaintiffs have wholly failed to prove their case. The decree of the trial judge was, in their Lordships' view, properly reversed.

The Appellants laid much stress on the undoubted fact that the congregation gladly accepted the ministrations of Uniate priests. But then it must be remembered that there were no orthodox priests in Galicia, and that the Uniate priests who ministered to the congregation at Star were, or claimed to be, fellow countrymen, and professed to regard with little favour the pretensions of the Roman Catholic Bishop and his Coadjutor. Besides, there was no difference between the services of the Orthodox Church and those of the Uniate Church intelligible to persons in the position of the parties to this lamentable quarrel, or, indeed, noticeable by them until they were armed and instructed on the point for the purpose of the conflict or for the purpose of the trial.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed.

The Appellants will pay the cost of the Appeal.
