

Control, secede, vested rights and ecclesiastical property

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Abstract

In this article I argue that the Church has a strategic responsibility for property and finance. Three modes of ecclesiastical property exist, for example movables, offerings and funded property. Parallel to the possession of property, although distinguishable from it, is the right of the Church to receive offerings from the faithful for its own maintenance. In this article I will reflect on the fact that the law in apartheid South Africa required different procedures for the Dutch Reformed Mission Church and the Dutch Reformed Church in Africa regarding property and finances. Attention will be given to the principles in ecclesiastical law and common law with regard to ecclesiastical property. Secondly, attention will be given to who has the right to control ecclesiastical property, as well as to the quest of vested rights in the case of schism, unification and dissolution. Lastly, I propose that ecclesiastical property and financial matters require basic knowledge of ecclesiastical law and common law.

Introduction

In this article I will reflect on the fact that the law in apartheid South Africa required different procedures for the Dutch Reformed Mission Church (DRMC) and the Dutch Reformed Church in Africa (DRCA) regarding property and finances. Attention will be given to principles in the ecclesiastical law and common law with regard to ecclesiastical property. Consequently, the lack of adequate provisions in the church orders of the said churches pertaining to financial and property matters has had a hampering effect on church unification. Secondly, attention will be given to who has the right to control ecclesiastical property, as well as to the quest of vested rights in the case of schisms, unification and dissolution. Lastly, I propose that ecclesiastical property and financial matters require basic knowledge of ecclesiastical and common law. Amendments to the church orders of the Reformed churches in the South African context will therefore be suggested at the end of the article.

Possession and administration of the ecclesiastical property

Churches in South Africa at large are organised so as to be capable of holding property in any form. Ecclesiastical property is held by minor or major assemblies in trust, explicit or implied, for ecclesiastical uses. According to Lacey (1903:245), three modes of ecclesiastical property, namely, movables, offerings and funded property, can be distinguished. Movables are, in this connection, all things used directly or indirectly in connection with divine worship, technically called ornaments (Lacey 1903:249). According to Lacey, ecclesiastical property is legally vested in the church councils, presbyteries and synods of the respective churches, who have the power to assign them, to bring a suit for their recovery if lost and to prosecute in case of theft. Parallel to the possession of property, although distinguishable from it, is the right of the Church to receive offerings from the faithful for its own maintenance. Offerings are normally at the free disposal of those to whom they are given. The offerings of the Church have a three-fold purpose: use at the Eucharistic feast; distribution to the poor; and support of the teaching office. In all three cases ecclesiastical property is spent for God (Lowrie 1904:327). According to Lacey (1903:243), funded property may be held either by trustees or by ecclesiastical corporations, explicit or implied, for ecclesiastical uses, whether in trust or for their own use and include, among others, buildings and land.

With regard to the possession and administration of ecclesiastical property, Sohm (in Lowrie 1904:314) states that it is extremely important to inquire as to the way in which church property might be received and administered, and for what purposes it is disbursed. Sohm's investigation has cast the whole subject in a new light. In the case of pagan societies or clubs, a member on leaving the society might require his share. Sohm (in Lowrie 1904:322) justifiably observes that Tertullian actually disclaims any comparison between the Church and the pagan associations, when he says in effect: "We have only religious and moral aims none that are secular or commercial." The church is not a corporate property held for the benefit of the members who subscribe, or for the expense of their common cult. Tertullian defends Christian society from the point of view that it is merely a community of faith, without a guild-like organisation, with purely spiritual aims (*coimus orantes*) and a purely spiritual discipline (*censura divina*); and he therefore designates the Church not as a *collegium*. Tertullian disclaims any comparison between the Church and the *collegia tenuiorum*. The State, however, recognised Christian society as a legal corporation capable of holding property, and hence felt itself bound to protect its corporate rights of possession.

During the first centuries the Church amassed no earthly possessions. In principle the Church was without property. Collections were made for

immediate necessities and straightaway expended. According to Lowrie (1904:316) in his *The church and its organization in primitive and catholic times an interpretation of Rudolph Sohm's¹ kirchenrecht*, ecclesiastical property was intended solely for distribution. In the early Church in Jerusalem certain members brought the price of their possessions and laid them at the Apostles feet. These offerings, like all others, became God's property, which is equivalent to ecclesiastical property. From the primitive point of view the property of Christendom is not the property of the congregation, but rather God's property and hence the house of worship was known more properly by the name "the house of God". The gifts which constituted the *pecunia ecclesiae* (money of the church) were regarded as offerings, presented to God, not to men, or even to the Church. The reception and administration of ecclesiastical property is, according to Sohm in his *Kirchenrecht* (Lowrie 1904:320), a priestly act, which can be performed only by God's representative.

It was not until the fourth century, when the legal organisation was already penetrating all spheres of Church life, that a juristic conception was applied to ecclesiastical property (Lowrie 1904:320). On reception of gifts, the prophet, as a representative of God, also had to administer (distribute) them. In the first Christian ages, especially in the more thoroughly Romanised provinces of the Empire, ecclesiastical property, both funded and movable, seems to have been generally held in common by *collegia temiiorum*, voluntary associations, which the law freely allowed to be formed for charitable purposes. From the fourth century we find the bishops holding *ex officio* considerable estates and transmitting them to their successor. The property of dissolved corporations, for lack of heirs, belonged in England to the Crown. In this way vast numbers of ecclesiastical corporations were dissolved in the sixteenth century and their property seized (Lacey 1903:247).

Until the time of Constantine ecclesiastical property *de jure* did not exist; it was merely *de facto* in existence (Lowrie 1904:324). Under Constantine the Church acquired legal possession of its property. The common law had only one category under which such tenure could be classed, namely, that of the juristic person. Only one sort of juristic person was recognised, the corporation (*corpus, collegium*), as the concept of an institution or charitable foundation (later known in common law as *pia opera* or *universitas bonorum*) capable of holding property in trust for an object defined by the

¹ Dr. Rudolph Sohm was a professor in the Juristic Faculty of the University of Leipzig. He is best known as a writer on Roman law. His work, *Institutes of Roman Law*, has been translated into English from the Fourth German Edition, first ed. Oxford, 1892, second ed. 1901. His work in church history is not altogether unknown; a concise, popular book, entitled *Kirchengeschichte im Grundriss*, has been translated into English under the title, *Outlines of Church History*, Macmillan & Co., 1895 (1901), from the Eighth Revised German Edition of 1893.

donor or founder had not yet arisen. For this reason ecclesiastical property was at first defined as the property of a *corpus*, that is, of the Church as a corporation which bestows the right of inheritance upon the *concilium catholicae (ecclesiae)* (Lowrie 1904:325).

In the imperial constitutions of the fifth and sixth centuries ecclesiastical property already appears as institutional property. It is only rarely and in retrospect that the *corpus, consortium*, etc. are named as the subject of possession. As a general rule the subject expressly named is a particular church (i.e. the building, regarded as the visible manifestation of the ecclesiastical institution) (Lowrie 1904:325–326, Stephens 1907:7).

Hence even from a legal point of view ecclesiastical property still remained God's possession, and throughout the whole of the Middle Ages the law of ecclesiastical property was governed by the idea that it is virtually the property of God or of the saints (Lowrie 1904:321). The conception that the congregation itself is the possessor of ecclesiastical property was utterly unknown in ancient times. Therefore, in the administration or stewardship of such property, there was no attempt to apply the congregational principle and no effort to express the corporate will of the congregation according to a democratic or a representative principle of government (Lowrie 1904:321). Out of above arrangements grew the system of vesting ecclesiastical property in corporations, sole or aggregate, with perpetual succession. A corporation is a legal personality. During the eighteenth century English law took over corporations already established by ecclesiastical custom, gave them legal status and made provision that any corporation could be dissolved in proper form of law (Lachey 1903:247).

In the present day, any church corporation may be dissolved in accordance with the respective church order stipulations. Our scope in this article would require us to deal only with the ecclesiastical jurisdiction, but it will be convenient to pay some regard to purely secular legislation as well.

Three case studies in the South African context

I want to draw attention to three cases in the South African context with regard to ecclesiastical property. In the first instance I want to refer to the issue of property rights in the church unification between the DRCA and the Uniting Reformed Church in Southern Africa (URCSA). In the case of the DRCA, the ownership and actual possession of ecclesiastical property was determined by the following apartheid laws: the Group Areas Act, Act No 41 of 1950, the Prevention of Illegal Squatting Act, Act No 52 of 1951, the Bantu Authorities Act, Act No 68 of 1951, the Native Laws Amendment Act of 1952, the Promotion of Bantu Self-government Act, Act No 46 of 1959, the Urban Bantu Councils Act, Act No 79 of 1961 and the Bantu Homelands

Citizens Act of 1970.² Various segregation laws were passed before the Nationalist Party took complete power in 1948.

Probably the most significant Acts were the Natives Land Act, No 27 of 1913 and the Natives (Urban Areas) Act of 1923. The former made it illegal for blacks to purchase or lease land from whites except in reserves; this restricted black occupancy to less than eight per cent of South Africa's land. The latter laid the foundations for residential segregation in urban areas. The Group Areas Act No 41 of 1950 forced physical separation between races by creating different residential areas for different races. It also led to forced removals of people. The Prevention of Illegal Squatting Act No 52 of 1951 gave the Minister of Native Affairs the power to remove blacks from public or privately owned land and to establish resettlement camps to house these displaced people. The Bantu Authorities Act No 68 of 1951 provided for the establishment of black homelands and regional authorities with the aim of creating greater self-government in the homelands. In these homelands the DRCA could acquire land for church purposes.

The Natives Laws Amendment Act of 1952 narrowed the definition of the category of blacks who had the right of permanent residence in towns. The Group Areas Act of 1950 divided the land in which blacks and whites resided into distinct residential zones. This act established distinct areas of South Africa in which members of each race could live and work. Blacks were restricted from renting or even occupying property in the areas deemed as "white-zones", unless they had received permission from the state to do so. The Group Areas Act also prevented blacks from owning land for church purposes in the white-zoned areas. The only ownership or occupational rights a black African possessed were restricted to the Bantustans or the black townships.

The laws mentioned above restricted the DRCA in purchasing land for church purposes. The actual control of the ecclesiastical property of the DRCA belonged essentially either to the Dutch Reformed Church (DRC), the local government in the Bantustans or the so-called urban Bantu councils. Ecclesiastical property of the DRCA was held under a lease for ninety-nine years and was renewable forever. Land was also conveyed to the trustees of the missionary commission of the DRC and their successors with the proviso that the land was to be used for church purposes by the DRCA. The funded properties of congregations of the DRCA had to be transferred as follows:

- (a) In the name of the local white church council;
- (b) In the name of the General mission commission of the DRC;

² <http://africanhistory.about.com/library/bl/blsalaws.htm> (1 May 2011).

- (c) In the name of other bodies approved by the General mission commission of the DRC (*Kerkorde Wette en Verordeninge van die NGSK OVS 1934 Art v 1934:6*).

The DRCA was restricted in the acquisition, management and disposal of ecclesiastical property. The general mission commission of the DRC had the right to obtain immovable property in any part of the mission field and register it in the name of the DRC. The commission could also with the consent of the Commission of Control and Supervision of the DRC exchange or sell property (s 381(7) *Wette en Bepalinge NGK in SA 1953:78*). Where a congregation, presbytery or synod of the DRCA purchased immovable property on their own account it could be transferred with the consent of the mission commission of the DRC in the name of the above-mentioned assemblies of the DRCA. Where the transfer under the apartheid laws was not permitted, the DRCA and the mission commission of the DRC were appointed as trustees for such properties. The properties of the DRCA could not be alienated, sold or seceded without prior consent of the DRC. All ecclesiastical property held by the mission commission of the DRC for a DRCA was held in trust for the use and benefit of the DRCA.

The Urban Bantu Councils Act, Act No 79 of 1961 created black councils in urban areas that were supposed to be tied to the authorities running the related ethnic homeland. The Bantu Homelands Citizens Act of 1970 compelled all blacks to become citizens of the homeland that corresponded to their ethnic group, regardless of whether they had ever lived there or not, and removed their South African citizenship. The above legislation contributed to the fact that the DRCA could not hold ecclesiastical property in its own name. The regional synod of Phororo (1972) accepted a regulation for the control of ecclesiastical property. In accordance with the laws of the country the regional synod, presbytery or church council could purchase and sell movable property, donate, invest funds, rent property and act as a plaintiff or defendant in legal proceedings (*Skema NGKA Streeksinode Phororo 1972:43*). The congregations, presbytery or ecclesiastical commissions of the DRCA were not able to register property in their name. The regional synod, however, was bestowed with power to act as trustees on behalf of such assemblies. The registration of immovable property took place according to the laws of the country (*Skema NGKA Streeksinode Phororo 1972:43*). According to state policy, properties in the so-called Bantustans could not be transferred under the title of bodies that could not be considered as “pure Bantu” (*Acta NGKA 1971:34*). The mission commission of the DRC could, however, obtain occupancy of the property (*Acta NGKA 1991:393*). In 1994 all these apartheid laws were abolished. Since then the DRCA as a legal entity can hold ecclesiastical property in its name.

On the other hand, the Dutch Reformed Mission Church (DRMC), which was established in 1881, was seen from conception as a legal entity which brought with it the possibility of holding ecclesiastical property in its own name. The ecclesiastical property had been transferred in either the name of the DRC or on the congregations of Dutch Reformed Mission Church (*Acta NGK* 1880:8, *Acta NGSK* 1892:18). Without the permission of the Mission of the DRC, the DRMC could not sell, alienate or objection, mortgaged immovable property which they held in trust (*Wette en Bepalinge NGK in Suid Afrika* 1953: 95, art 340). With the signing of the Draft *Memorandum of Agreement* in 1974 and the acceptance of the Constitution of the DRMC in 1978, the DRMC took full legal responsibility for its ecclesiastical property (*NGSK Acta* 1974:452, *Kerkorde NGSK 1978*). Hence, on the legal title to property of the minor and major assemblies of the DRMC vested in the respective assemblies who have power to assign them, to bring a suit for their recovery if lost, and to prosecute in case of theft. The church councils held the property subject to denominational uses. The minor and major assemblies of the DRMC have a voice in the acquisition, management and disposal of ecclesiastical property.

On 14 April 1994 and the ensuing foundation synod, the DRMC and the DRCA dissolved and the two churches consolidated to form one church organisation with full corporate power named the Uniting Reformed Church in Southern Africa (URCSA). Decisions were taken on ecclesiastical property at the DRCA Synod 1991 and the foundation synod. At the foundation synod it was decided that the DRMC and the DRCA had ceased to exist and *inter alia* that all the Regional Synods, presbyteries and congregations of the DRCA and the DRMC with the implementation of the Church order of the URCSA ceded all its assets, liabilities, privileges, properties, rights and obligations, nothing excluded, to the Regional Synods, presbyteries and congregations of the URCSA (*Skema VGKSA Algemene Sinode* 1994:39, *NGKA Acta* 1991:393). The established URCSA stepped in as the successor in right and title of the dissolved Regional Synods, presbyteries and congregations of the DRCA and the DRMC and took control of all the ecclesiastical property of both churches. The Synod decided that the management of the ecclesiastical property should be vested in the respective General Synod, Regional Synods, presbyteries and congregations of the URCSA. The URCSA was granted authority to take any legal action to give effect to the cession and transfer of property (*Acta VGKSA Algemene Sinode* 1994:42, 131, 3340, 341, 313).

However, these decisions led ultimately to church schism and court cases between the DRCA and the URCSA. These court cases subsequently had a horrendous impact on URCSA's cash-strapped budget. In 1998, the Supreme Court adjudged the ecclesiastical property of the DRCA as belonging to the members, however few in number, who adhere to the form

of church government and acknowledge the church connection for which the property was acquired (*Nederduitse Gereformeerde Kerk (OVS), Nederduitse Gereformeerde Kerk in Afrika (Phororo) en die Verenigende Gereformeerde Kerk in Suider-Afrika* 536/96:11).

It is a general rule that a church should dissolve properly by taking the steps required by their respective church orders or constitution. No provision was made in the constitutions of the two churches for the proper dissolution of their constituencies and the transfer of assets to the new church organisation. According to Appeal Judge Vivier, no dissolution decisions were made by the regional synods of the DRC in the Orange Free State or by the DRCA Phororo or by any other of the 102 congregations (*supra* 536/96:11). The verdict of the Supreme Court in 1998 indicated that all decisions regarding church property were *ultra vires* and that the DRCA as a legal corporate entity remains. The court ruled furthermore that the General Synod could not merely by a majority vote dissolve the local congregations and synods of the DRCA and the DRMC. The DRMC and the DRCA did not ensure carefully prior to the chartering of the new church that its administrative and fiscal structure would deal effectively with property matters. A constitution of a church may be amended in harmony with the principles, discipline and objects of the church, but not otherwise. The fact that a church confers certain rights and privileges under the constitution, such constitution being accepted, does not give the church any vested rights. The church order of the URCSA makes provision in the *Reglement van Eenwording* for two or more churches to unify in order to form one church (*Kerkorde VGKSA* 2006:86). According to this regulation the minor assemblies will legally dissolve and all rights, obligations, assets and liabilities whatsoever shall pass and vest in the new denomination. Taking the Supreme Court decision into account this regulation is deemed to be ruled also as *ultra vires* if tested in a court of law.

Secondly, I want to refer to the right to ecclesiastical property in the case of schisms. Cases are emerging in the URCSA where members of a congregation unilaterally resolve to sever the connection with the URCSA and organise a new church of a different denomination. For example, a large constituency of the URCSA, Wellington Bergrivier, still claims its right to ecclesiastical property, for example movables (chairs, ornaments, podiums, sound systems, computers, files and vehicles) after it severed its connection to the URCSA during 2011 and constituted a new church, namely, Timura Transforming Ministries (Report of the Church Council of the Bergrivier URCSA to the Synodical Commission 2011:1–130).

In the URCSA Alice case, claim was made by the seceders to offerings and funded property (buildings). The seceders refused to surrender the buildings and other ecclesiastical property until they were compelled to do so by legal action. These cases bring to the fore the fact that the church order of the URCSA does not make ample provision for cases of schism;

those members who do not continue to act in accordance with the ecclesiastical connection and church order forfeit their right to ecclesiastical property. In addition, no provision is made in the church order that a congregation might, by a majority vote, dissolve or cede from the central body and divide the property (Report of the Church Council of the Bergrivier URCSA to the Synodical Commission 2011:1–130).

Thirdly, problems are surfacing in the URCSA regarding the extinction of congregations as a result of the dispersal of members (Report on ministry challenges and opportunities in the Eastern Cape 2010:6–7). In apartheid SA and even before, the DRC constituted small congregations, consisting of only 100 members, in the rural areas, paid the stipends of the missionaries and sponsored the administration of the mission (Report on ministry challenges and opportunities in the Eastern Cape 2010:6–7). After unification most of these congregations ceased to exist and, in most cases, the DRC withdrew financial contributions to these congregations. Although the URCSA approves tent making as an option for congregations that are not financial viable, it does not address the problem of ecclesiastical property in the case where the congregation has become extinct by reason of the dispersal of its members. For instance in the Eastern Cape, in the the URCSA presbytery of Rietvlei, there is a congregation, namely Bizana, where there is only one member, an eighty-year old female (Report on ministry challenges and opportunities in the Eastern Cape 2010:6–7). Most of the other members have moved to nearby towns. On 16 April 2011, at a meeting between the moderamen of the Cape Regional Synod and twenty-two representatives of the ten Eastern Cape presbyteries, it was reported that the Bizana URCSA had become extinct by reason of the dispersal of its members. The church order of the URCSA does not, however, make provision for a situation where a particular congregation is formally dissolved by a major assembly, or has become extinct by reason of the dispersal of its members. In such cases, the ecclesiastical property should be held, used and applied for such uses, purposes and trusts as the major assembly may direct. The Presbytery in which resort the afflicted congregation is located therefore has no judicial power to control the ecclesiastical property of the said congregation.

Common law and the control and vested rights of minor and major assemblies

I believe that the church requires a basic knowledge of ecclesiastical law and common law in order to manage ecclesiastical property more appropriately. Notions of exponents in church law and common law abroad, for example Blackstone, Scanlan, Lincoln, Strong, Humphrey, Stephens, Gray & Tucker and Sohm and, in South Africa for example Geldenhuys, should be taken account of in our deliberations on ecclesiastical property.

South Africa traces its legal heritage back to Roman Dutch law, with influences from English law. The English common law includes the general customs and usages, the *lex non scripta*, the immemorial law as laid down by the expositions (treatises) of the old law writers, the judicial decisions, and the amendments and modifications introduced by acts of parliament. Common law is also known as “case law”, and is that body of law that has developed over many centuries and forms the basis of our legal system. It can best be thought of as a set of legal principles that is used by the courts to regulate how people interact with one other.

On the other hand, statutory law is created by the legislative branch (national, provincial, municipal) through a formal law-making process, whereas common law is created by the judicial branch by means of decisions on cases in the courts. Statutory law consists therefore of official codified text (such as the acts) and common laws are rules that are found in the decisions made regarding actual cases. Statutory law is very broad, and is subject only to constitutional limitations, while common law is very narrow and is limited to actual cases. It is only when there is no statutory law about something that the common law will apply. In the court case between the DRCA and the URCSA common law was applied.

Churches are voluntary associations with a legal personality (*universitas*). In order for a voluntary association to have body corporate status, the founding document must provide that it, *firstly*, has perpetual succession; *secondly*, has the capacity to acquire certain rights apart from the rights of the members forming it and no member has any rights by reason of his or her membership to the property of the association, and *thirdly*, has the right to hold property in its own name.³ The DRCA, the DRMC and the URCSA generally meet the three requirements in order to be deemed as a *universitas*:

1. It is structured to continue as an entity notwithstanding a change in membership.
2. It is able to hold property distinct from its members.
3. No member can have any rights, based on membership, to the property of the association (Geldenhuis 1951:340–368).

Once a church has been established it is presumed to continue as an entity notwithstanding a change in membership. The Church is perpetual. For the Roman Catholics the perpetuity of the Church includes the continued existence of an organised society, professing the true faith; the continued legitimate administration of the sacraments; and the uninterrupted succession of prelates and popes. Perpetuity for the Anglicans must include perpetual

³ http://www.icnl.org/knowledge/ijnl/vol12iss2/special_7.htm (11 May 2011).

adherence to the truth, the due administration of the sacraments, and the uninterrupted succession of bishops. The perpetuity of the Church, according to the Protestant theory, involves the continued existence on earth of sincere believers who profess the true religion. According to Scanlan (1909:51), when a new religious society is formed and incorporated, consisting of individuals from existing parishes, the members of the new society from the time of its incorporation cease to be members of the respective parishes to which they had belonged.

The church order should therefore make provision that changes on the control of ecclesiastical property can be made consistently with the particular and general laws of the church and not in violation of them. All the proceedings of a church should therefore be in accordance with the constitution and by-laws and no business transacted contrary thereto is legal. Cognisance should be taken that in church organisations those who adhere to the regular order of the church, legal and general, albeit a minority, constitute the true congregation (Scanlan 1909:52).

Where a congregation has been organised and holds its property as a constituent part of any particular religious denomination it cannot, without just cause, sever itself from such connection or government. The congregations cannot by a majority vote of the church councils dissolve or secede from the central body. If they do, it necessarily forfeits its rights and ecclesiastical property to those of the church organisation who maintain the original status. A minority has the right to insist upon carrying out the proposition for which the church or society was organised (Lincoln 1916:525). Properties can therefore not be dispossessed without the consent of all the minor and major assemblies of a church. The title to the ecclesiastical property of a divided congregation is in that part of it which is acting in harmony with its own constitution. The actual control of the ecclesiastical property belongs essentially to the local congregations. The ecclesiastical laws, usages, customs and main principles, which were accepted among them before the dispute began, are the standard for determining which party is right (Lincoln 1916:527).

The church council as the governing body of a particular congregation or church is charged with maintaining the spiritual government of a congregation as well as managing its temporal affairs. The church council is not a corporation and has no standing as a body in any civil court. It cannot maintain an action in a civil court, nor can its members maintain such an action. A congregation and not the church council per se is, in terms of the common law, a legal entity. The officers of a church also have control of the business management of the church. However, these by-laws must not contravene the laws of the State. All the proceedings of the minor and major assemblies must be in accordance with the constitution and bylaws, and no business transacted contrary thereto is legal. The church is bound to manage

the property in the most upright and careful manner according to the church order of the respective churches (Scanlan 1909:50). The congregation or its governing body holds title to the ecclesiastical property and also accepts certain restrictions on the rights of ownership (Gray & Tucker 1994:139). The church council also has the power to remove the church edifice from one lot to another or from one village to another, but they cannot sell the real estate of the local congregation without the permission of the congregants. It is also required that all property that the church shall in any way acquire shall be taken, held and tenured subject to the control and disposition of the respective ecclesiastical assemblies. Where property is held by the minor or major assemblies it may be disposed of, retained, or occupied and managed as they please, admitting that they adhere to the church order. The fact that Reformed churches confer certain rights and privileges under the church order does not give the major assemblies any vested rights. A synod has the power to erect a presbytery, but no power to dissolve one without the latter's consent (Lincoln 1916:513).

A minority has the right to insist upon carrying out the proposition for which the church or society was organised. According to Strong (1875:47), it may safely be asserted as a general proposition, in a case where controversies arise within the church in respect of the ownership or control of property, and a division takes place, courts of law will inquire which party, or which division, adheres to the form of church government, or acknowledges the church connection designated in the conveyance, and adjudge the right to that party. Where a majority of a religious society has withdrawn therefrom and organised a new church of a different denomination, the minority, adhering to the original society, are entitled to the use and occupation of the church building held in trust for said society, and the new church and its trustees may be restrained from interfering with such use. Neither seceding members, though a majority, nor any majority of a religious society, has a right to divert its property from the uses defined and limited by the grant of such property to it, or the purpose of its organisation as regards the particular religious faith it was organised to promote (Lincoln 1916:526; Scanlan 1909:5).

In the Presbyterian Church United States of America (PCUSA), the presbytery has the responsibility to decide which fraction (if either) is entitled to the property (Gray & Tucker 1994:139). An organised church cannot be divested of its property by even a majority of its members who enter into a new organisation, although they adopt the same name, provided the other organisation still exists; and when secedes from an organised church entered into such new organisation they forfeit all claim to any interest in the former church and lose all identity with it (Lincoln 1916:541).

If a majority of its members resolve to sever the connection of the church with that synod, courts of law will decree that it has forfeited its right to the property, and will adjudge it to the minority that adheres to the synod

(Strong 1875:48). It may then be said generally, that the law will not recognise any right in a church endowed in connection with a larger ecclesiastical organisation and in subordination to it, or endowed with reference to any form of church order, or government, to unite with any other organisation, or to become independent, or to abandon its order and adopt another (Strong 1875:48). The civil courts will adjudge the property to those members, however few in number they may be, who continue to act in accordance with the ecclesiastical connection and church order which were accepted at inception when the endowment was made. Those who adhere and submit to that established order and connection are recognised as the church endowed, and the title to the property remains in them (Strong 1875:50). In church organisations those who adhere to the regular order of the church, legal and general, though a minority, are seen to be the true congregation.

When property is held, charged with a trust for the use of a church, it occasionally happens that its members depart from the faith, and embrace other and contrary doctrines, while still claiming to hold the property. It is subsequently the duty of a civil court to decide in favour of those, whether a minority or a majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, and also to the form of church government in operation in the church, with which the congregation was connected, at the time the trust was declared (Strong 1875:53). Civil courts which have the supervision and control over churches and religious societies, in matters of property do not guarantee the privilege of dissenters. It rather secures to individuals the right of withdrawing from a church and forming a new society (Strong 1875:59). Courts of law will not interfere with any church organisation's ownership of ecclesiastical property, except to enforce its being held in strict subordination to the uses to which it was devoted when it was acquired (Strong 1875:62; Humphrey 1898:23).

Building on the principles of ecclesiastical law and common law, provisions are being made more adequately in the church orders of the Christian Reformed Church, the Presbyterian Church in America, the Reformed Church in America as well as the Protestant Church in the Netherland (Christian Reformed church order and its supplements, The constitution of the Presbyterian Church (U.S.A.) Part 11 Book of , PCUSA church order companion) concerning the ecclesiastical property and financial matters than in above-mentioned Reformed Churches in South Africa.

Conclusion

Ecclesiastical property and financial matters require a basic knowledge of ecclesiastical law and common law, as well as a clear understanding of the relations between the church council, the congregation, and the presbytery and the synod. Provisions should be made in the church orders or

constitutions in the South African reformed context in order to prescribe the manner in which decisions are made, reviewed and corrected which are applicable to all matters pertaining to ecclesiastical property. Taking legislation in the South African situation and the above common law principles into account, I suggest, if needs be, the following amendments to the church order or constitutions of the respective churches:

- (a) In the event of the disbanding of a church and the dissolution of the church as corporation, the church's remaining assets, if any, after the payment of its debts and expenses, shall be conveyed as the respective major and minor assemblies may propose and as the affirmative vote of a majority of the members shall determine, subject to each of the following:
 - (i) The church councils must approve the disbanding of this church and the dissolution of the church as corporation.
 - (ii) The church council shall receive the advice of the major assemblies in formulating its proposal for property distribution.
 - (iii) The vote of the members shall be in accordance with the provisions of the constitution of the respective church.
- (b) In the event that a majority of the members of a congregation consensually agree to divide a congregation, with the consent of the Presbytery, into two (2) or more member churches, all ecclesiastical property of this congregation shall be distributed as a majority vote of the church council determines.
- (c) In the event that the major assembly determines that an irreconcilable division (schism) has occurred within a local congregation, the major assembly shall determine if one of the factions is entitled to the ecclesiastical property. This determination does not depend on which faction received the majority vote within the particular congregation at the time of the schism. The confessing members of the local congregation who remain true to the purposes of the respective church and the principles of doctrine and ecclesiastical government outlined in the constitution of the church shall be declared as the lawful congregation of the church and shall have the exclusive right to hold and enjoy the ecclesiastical property of the local congregation.
- (d) All property held by or for a particular local congregation, presbytery, synod or general assembly should be held in trust for the use and benefit of the respective church.
- (e) Whenever property of, or held for, a particular local congregation ceases to be used by that local congregation in accordance with its constitution such property shall be held, used, applied, transferred or sold as provided by the presbytery. Whenever a particular local con-

gregation is formally dissolved by the presbytery, or has become extinct by reason of the dispersal of its members, the abandonment of its work, or other cause, such property as it may have shall be held, used and applied for such uses, purposes and trusts as the presbytery may direct, limit and appoint, or such property may be sold or disposed of as the presbytery may direct, in conformity with the respective local congregation.

- (f) The relationship to the major assembly of a particular local congregation can be severed only by constitutional action on the part of the synod. A local congregation may be dissolved by a two-thirds majority, subject to the concurrence of the synod involved. All the property, real and personal, of the congregation shall be divided between the denominations in the resort of the presbytery.
- (g) A particular local congregation shall not sell, mortgage, or otherwise encumber any of its property and it shall not acquire *property* subject to an encumbrance or condition without the permission of the congregants.

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