

## REPORT OF THE AD-INTERIM COMMITTEE OF THE SYNOD OF MISSISSIPPI IN THE SOUTHWESTERN CASE

The Synod of Mississippi committed to its directors on the Southwestern Board the handling of its case against the majority of the Board of Southwestern and the Synods of Alabama, Louisiana and Tennessee in the litigation growing out of the refusal of the majority of the Southwestern Board and said Synods to receive the fourth director from the Synod of Mississippi, Dr. W. H. McIntosh, as a member of the Board.

The case was first heard in the Chancery Court of Shelby County, Tennessee, the Synod of Mississippi taking an appeal against the decision of the Chancery Court to the Supreme Court of Tennessee. The Supreme Court of Tennessee rendered its decision and made its decree in the case of the Synod of Mississippi v. Southwestern at its December term, 1938.

The majority of the Southwestern Board, through its attorney, petitioned the Court for a re-hearing in the case, to which the Supreme Court made answer on the 18th of February, 1939, and denied Southwestern's petition for a re-hearing.

Your committee submits herewith the full decision made at the December term of the Court, together with the decree and also the full answer made February 18, 1939 to Southwestern's petition for a re-hearing.

Inasmuch as the handling of this case was committed to the Mississippi directors by the Synod of Mississippi, and inasmuch as the decision in the case completes an important phase in the business of the Synod in its efforts to preserve its charter rights over an institution founded and maintained at a great sacrifice to all the associated Synods' and inasmuch as the questions involved are of permanent interest and importance to the Synod, your directors desire to present, together with the text of the decision of the Court, a statement of the issues of the case which was placed in their hands, and a history of the controversy which has been settled by the decision.

This statement your committee feels is necessary in order that the issue as decided by the Court might be understood, especially by those who have come into the Synod since the Concurrent Resolution was passed by the Synod in 1924 and the repeal of the same by the Synod in 1931, and by future generations in our Church.

### HISTORY

Commissioners from the Synods of Nashville, Memphis, Arkansas, Mississippi (at this time the state of Louisiana was in the Synod of Mississippi) and Alabama held a conference on May 8, 9, 10, 1873 for the purpose of establishing a Presbyterian School for these respective Synods. They unanimously resolved to present to the respective Synods the following plan for their consideration and adoption, which is known as the plan of Union: (See Charter and By-Laws of Southwestern, p. 3.)

### PLAN OF UNION

**Resolved 1.** That the proposed union of Synods for the furtherance of our educational interests is in every way desirable, and that it is practicable to unite in the founding, endowment, support and government of an institution common to them all.

**Resolved 2.** The subject and scope of the institution shall be not only to train our youth to enter upon one of the learned professions, but also to fit them for the ordinary vocations of life.

"To this end it shall be a University in two senses. 1st. It shall offer the largest facilities for thorough culture and for a high standard of graduation; and 2nd. The organization shall be made on the plan or separate and co-ordinate schools, and elective courses.

"In connection with every course there shall be a faithful and comprehensive Biblical training, so as to make an intelligent, Scriptural faith the controlling principle in the Institution.

"Resolved 3. In realizing the proposed object and scope of the Institution, the order of development shall be: **First**, the various liberal studies usually embraced in a college curriculum, and **then** the special scientific and polytechnic schools necessary.

"Resolved 4. The sole government of the Institution shall be in the hands of a Directory, consisting of two members from each Synod, one elected each year after the first, of whom one-half shall constitute a quorum.

"With a view to securing the necessary confidential relations between the Directory and the Faculty, the presiding officer of the Institution shall be ex-officio, the presiding officer of the Board of Directors.

"Resolved 5. This Directory shall, with other duties, have power to elect all members of the Faculty or remove for cause, and shall have in charge the raising, preservation and administration of all monies, either directly or by such executive agency as may seem to them best, and shall be incorporated in the State in which the school may be located.

"Resolved 6. The Board shall proceed at once to secure subscriptions to the amount of \$500,000, payable one-fifth down when subscribed, and the remainder in four annual installments; and shall locate, organize and develop the Institution as soon as in their judgment it can be done with safety, and to such extent as the means in hand will justify without incurring debt.

"Resolved 7. The Synods agreeing to this plan shall at once elect Directors as herein provided, who shall hold their first meeting in the city of Memphis, on the second Tuesday of January, 1874, at 7 o'clock p. m., and take in hand the matters committed to their charge."

This Plan of Union was adopted by all of the Synods and also by the Synod of Texas. Representatives of these Synods met again on May 14, 1874 to consider the question of the location of the proposed University. At this meeting they selected Clarksville, Tennessee as the location for the University. There was then at Clarksville a school known as Stewart College, which school had been formerly owned by the Masonic Fraternity of Montgomery County and in 1855 became a Presbyterian College.

Under the General Law of Corporations found in the Acts of Tennessee 1875, Chapter 142, and in pursuance of the provisions of this act, the Board of Directors, in session at St. Louis, Missouri, May 18, 1875, took steps to secure a charter. The application for a charter was adopted at an adjourned meeting of the Board in Clarksville, June 1, 1875.

## CHARTER

"Be it known, that Thomas R. Welch, B. M. Palmer, John N. Waddell, Donald MacGregor, Evander McNair, John B. Shearer, D. N. Kennedy, W. K. Marshall, C. A. Stillman, Thomas A. Hamilton, James A. Lyon, and B. M. Estes are hereby constituted a body politic and corporate, by the name and style of the Southwestern Presbyterian University, for the purpose of establishing and maintaining in the city of Clarksville, County of Montgomery, State of Tennessee, a University with power to confer degrees. The object and scope of the institution proposed shall be to found a school of instruction in the various liberal and professional studies, and in such special and polytechnic arts and studies as may be deemed necessary, and to be under the patronage of the Presbyterian Church in the United States.

"This corporation is organized under and pursuant to an act of the General Assembly of the State of Tennessee, enacted March 23, 1875, Chapter 142; and in compliance with the terms of said act, which is as follows: "The support of any literary or scientific institution, as a College or University with power to confer degrees, an academy, debating society, lyceum, the

establishment of a library, the support of a historical society, the promotion of painting, music or the fine arts, the support of Boards of Trade, or Chambers of Commerce, or other objects of like nature."

"We, the undersigned, apply to the State of Tennessee, by virtue of the laws of the land, for a charter of incorporation for the purpose and with the powers declared in the foregoing instrument.

—C. A. STILLMAN, Chairman."

This Charter was filed in the office of the Secretary of State of Tennessee, Nashville, Tennessee on the 31st day of May, 1875. The Board continued to act under this Charter until it was amended on March 25, 1924.

Extracts of the amended Charter will be cited later in this report.

In 1903, an overture came to the Synod of Mississippi, meeting in Laurel, Mississippi, from the "Board of Trustees of the Synod of Georgia for establishing a college," touching the consolidation of Southwestern Presbyterian University and Columbia Seminary as a university to be located at Atlanta, Georgia, in answer to which overture the Synod of Mississippi appointed two ministers and one Ruling Elder as its representatives to meet in the Central Church, Atlanta, December 8, 1903 "in an educational conference of the Synod in order that a conclusion may be reached, 1. As to the feasibility of the combination of the two institutions, and 2. As to the plan by which such combination may be arrived at, if found feasible." The Synod appointed Revs. J. J. Chisolm and W. D. Heddleston and Ruling Elder W. C. Wells as principals.

The Board of Directors of Southwestern Presbyterian University were opposed to the removal of the University to Atlanta and its consolidation with Columbia Seminary, and on the second day of June, 1904, filed a bill in the Chancery Court of Montgomery County, Tennessee asking for an injunction against the Synods of Alabama, Tennessee, Mississippi and Louisiana forbidding the removal of Southwestern and the consolidation of these schools. The allegations of the Board in this injunction proceeding are cited in the resolution of the Synod of Mississippi (See printed Minutes of Synod, 1904, p. 173), which is as follows:

"WHEREAS, The Board of Directors of the Southwestern Presbyterian University did, on the second day of June, 1904, file a bill in the Chancery Court of Montgomery County, Tennessee, against the Synods of Alabama, Tennessee, Mississippi and Louisiana alleging therein, among others things that 'the defendant Synods have no right, title, claim or ownership in the property, equipment and endowment of the said University,' and alleging further 'that its Board of Directors are the sole governing power of the institution, that they must, and do, get their authority to act, in every particular, from the charter and under the general laws of the state of Tennessee, that the defendant Synods have no property rights therein, and have, if any right, the mere right of visitation,' and

"WHEREAS, It is furthermore alleged in the bill of the Board against the Synods that the directors 'are advised that they have the right, under the charter to repeal such by-laws (providing for the election of directors by the Synods) and that then the Board of Directors would have the right under the charter to elect directors themselves without reference to the Synods,' and

"WHEREAS, The Board of Directors did subsequently repeal the by-law which provided that the directors should be elected by the Synods, and enacted in its stead a by-law providing for the election of directors by the Board, and

"WHEREAS, In accordance with the by-law as amended, the Board elected Mr. B. H. Owen to membership in the Directorate of the University to succeed Mr. D. N. Kennedy, deceased. Therefore be it

**"Resolved,** By the Synod of Mississippi, the Synods of Alabama, Tennessee and Louisiana concurring:

"1. That the Synod deny the allegations of the Board in its bill touching the ownership of the University, and affirm the institution to be the property of the Presbyterian Church in the United States as represented by the associated Synods of Tennessee, Alabama, Mississippi and Louisiana.

"2. That the Synod deny the allegations of the Board in regard to the control of the University, and affirm the control of the institution to be a right of the associated Synods of Tennessee, Alabama, Mississippi and Louisiana, given them by the plan of union and by the charter of the University, and to be exercised by them in accordance with the provisions of the Plan of Union and the laws of Tennessee, through the Board of Directors."

The Synod of Mississippi adopted the following resolution:  
(See Printed Minutes of Synod, 1904, p. 189.)

"First, We recommend that the Synods controlling the Southwestern Presbyterian University and the Columbia Theological Seminary agree to the plans for the consolidation of the two institutions in a university to be located at or near Atlanta.

"Second. We recommend that each Synod elect at once two directors to meet in the Central Presbyterian Church, Atlanta, Georgia, Nov. 23, 1904, for the purpose of perfecting this consolidation and the location of said university,

"Third. We recommend that this Board of Directors be authorized:

"1. To receive all properties coming to the university in the proposed consolidation, and also all other monies for the support of the same.

"2. To adopt a plan of union and to secure a charter for the new university.

"3. To act as directors, until succeeded by such directors as may be provided for by the plan of union, to be elected by the several Synods at their next meeting.

"4. We recommend that this Board of Directors be authorized to release to such persons, and under such trusts, as may be designated by the present Board of Directors of the Southwestern Presbyterian University the \$50,000 received from the city of Clarksville under certain conditions; the \$35,000 given by Stewart College; the lands of about 5 acres and the buildings thereon transferred by the Stewart College to the Southwestern Presbyterian University, by deed dated April 29, 1876, with all their appurtenances; this property, thus released, to be used for such educational purposes under Presbyterian control as the proper authorities may elect.

W. G. Neville  
W. F. Stevenson  
T. H. Rice  
J. W. Walden  
S. M. Inman  
J. G. Anderson  
L. R. Walker

A. A. Little  
G. W. Patterson  
J. H. Miller  
J. J. Chisolm  
J. S. Hillhouse  
W. Calvin Wells  
Edward Mack

"Rev. J. J. Chisolm and Ruling Elder W. C. Wells, with Rev. J. S. Hillhouse as alternate to either, were elected the directors to meet in Atlanta, Ga. November 23, 1904."

Dr. S. C. Caldwell and Dr. T. W. Raymond being members of the Board of Southwestern Presbyterian University that had instituted the litigation against the Synods, and not approving the action of the Synod, offered their resignation as members; and Charlton Alexander and Dr. W. D. Heddlston were elected as their successors on the Board.

The Supreme Court of Tennessee rendered a decision prohibiting the removal of Southwestern Presbyterian University from Clarksville, Tennessee, and declared that Synod had the right to elect its own directors, the germane parts of which decision are as follows:

"The said university is under the patronage of the Presbyterian Church in the United States, and in this relation of patronage, the said Synods of Tennessee, Mississippi, Louisiana, and Alabama, act for said Church, and for it and in such capacity, have the right to elect each two directors of the said University corporation, according to the Plan of Union adopted by the Synods originally cooperating in the establishment of the said Southwestern Presbyterian University, which provided in substance that the government of the university shall be in the hands of a directorate consisting of two members from each Synod, one elected each year after the first; and, Sixth, that therefore the Trustees or Directors of said University have no power or authority to select their successors and perpetuate the said Board regardless of the will and desire of the said Synods as hereinbefore stated, and that the Trustees and Directors are rightfully to be selected or chosen in accordance with the custom and by-laws of said university adopted in pursuance of the said Plan of Union and in practice before the 21st of June, 1904, when this bill was filed."

The Charter of Southwestern Presbyterian University recites that it is issued under Chapter 142 of the Laws of 1875 of the State of Tennessee. Chapter 142 of the Laws of 1875 was amended by Chapter 6, Section 2 Laws of 1895 as follows:

"The representative governing body of such society or denomination shall have the power and authority, at its option, to elect its own Board of Directors or trustees or fill vacancies."

The Supreme Court of Tennessee in the Vanderbilt Case, 164 S. W. 1151, stated that the Southwestern decision of 1904 might well be supported by the foregoing Act of 1895, amending the Act of 1875. Thus the statute of incorporation which is a part of the Charter (Spring Hill Cemetery v. Lindsey, Supreme Court of Tennessee, 32 S. W. (2nd) 111; Anderson-Duling-Varnell Company v. Williams, Supreme Court of Tennessee, 255 S. W. 597), gave the Synods the power to elect the Directors; the Plan of Union was in the nature of a by-law, and simply implemented the organic Act; and the present decision of 1939 recognizes and adjudicates this point.

In 1924, as before stated, the Charter of Southwestern was amended. We give below extracts from the amended Charter which are germane to this case: (See Printed Charter, p. 9.)

From Article 2: "The said College shall be located in or near Memphis, Shelby County, Tennessee, but with power and authority to conduct, maintain or operate the educational institution now being conducted, operated or maintained by it at its present location in Clarksville, temporarily, or so long as it be deemed advisable by its Board of Directors so to do in order to effectuate and carry out the plans and purposes of this corporation."

From Article 3: "The Board of this corporation may be increased to any number, not to exceed fifty, to be determined by the Synods of Tennessee, Louisiana, Mississippi, and Alabama of the Presbyterian Church in the United States, or, as it is called sometimes, the Southern Presbyterian Church, which Synods of such church or denomination shall have the power to elect and to prescribe the terms of office of the corporate Directors and to elect the successor or successors of a member or members of the said Board of Directors as their terms may expire, and to provide by resolution, motion or By-Laws for the filling of vacancy or vacancies in the interim, provided, however, that the administration of the affairs of this institution shall be supremely and solely in the hands of its said Board of Directors, except that no mortgage may be placed upon the property by said Board without the consent of the majority of the controlling Synods.

"And provided, further, that said Synods of Tennessee, Louisiana, Mississippi and Alabama shall have equal representation, numerically, upon said Board of Directors, and shall each have the right to elect its own representatives upon said Board and to fill vacancies as may be created in the membership of those whom it has elected."

From Article 4: "The general powers of the corporation shall be . . . to make, amend, alter or repeal by and through its Directors all By-Laws and regulations necessary and deemed expedient for the management of its corporate affairs, and not inconsistent with the laws of the United States and the State of Tennessee, and not contrary to the constitution, rules and regulations of the Presbyterian Church in the United States, or the Synods of Tennessee, Louisiana, Mississippi and Alabama." (Blackface added)

The question of the right of Southwestern Presbyterian University Board to remove from Clarksville, Tennessee to Memphis, Tennessee resulted in litigation. The Board of Southwestern carried the matter to the Supreme Court of Tennessee at a cost of \$30,000 for attorneys' fees and other costs. The Supreme Court of Tennessee granted the Board the right to remove to Memphis.

Acting under the amended Charter, Section 3, the following resolution was sent to the respective Synods by the Board of Southwestern: (Printed Minutes of Synod, 1925, page 7.)

"WHEREAS, at the request of the Board of Directors of Southwestern, the Synod of Mississippi took the following action:

"That the Board of Directors of Southwestern be authorized to increase its number by the election of three Directors resident of Memphis and members of the Presbyterian Church, whose tenure of office shall be on the same basis as that of the Directors chosen by Synod."

"AND WHEREAS, under our amended charter the only way by which any men can legally become members of the Board of Directors of Southwestern is by the election of the Synods.

"THEREFORE, BE IT RESOLVED, That the Board overture the Synod of Mississippi to substitute for its previous action the adoption of the following resolutions, amplifying the Plan of Union with regard to the election of directors.

"RESOLUTION 1. That the representation of each Synod upon the Board be raised from three to four members, and that the additional Director chosen be a resident of Memphis, Tennessee, and a member of the Presbyterian Church, and that at least one of the four representatives of each Synod be thereafter a resident of Memphis.

"And, further, that this action be effective when concurrently adopted by the Synods of Alabama, Louisiana, Mississippi and Tennessee.

"RESOLUTION 2. That this Synod, in electing such fourth member and his successors, being a resident of Memphis and a member of the Presbyterian Church, be guided by and act upon the recommendation of the Directors of Southwestern.

"RESOLUTION 3. That such fourth member be elected to serve a term to expire in the fall of 1927, and that hereafter each member chosen be elected for a term of four years, thus making such adjustment as will preserve a four-year rotation in office and the election of one member each year.

"RESOLUTION 4. That this Synod go into the election of such fourth member, to be named now, but to take office as such director only when a fourth member has been chosen by the Synods of Alabama, Louisiana and Tennessee.

"RESOLUTION 5. That the Board of Directors of Southwestern rec-

ommend the election of Mr. George G. Tayloe, officer in the Idlewild Presbyterian church, as the fourth member from Mississippi."

In 1931 a controversy began in the city of Memphis in the Synod of Tennessee in which eleven Presbyterian ministers of Memphis preferred charges against the President of Southwestern, alleging that he was extravagant in the administration of Southwestern, and was the exponent of doctrines which are not held by the Southern Presbyterian Church. The discussion of these charges would have been opened on the floor of the Synod of Mississippi, but for the fact that this was referred to a Committee of the Synod of Mississippi in order to avoid a public discussion of the matters; and, adopting the suggestion of a member of the Southwestern Board, the committee made report as follows:

(See Printed Minutes of Synod, 1931, page 45.)

"1. That Synod reaffirm its statement made in 1904 as a concurrent resolution which is found in the minutes of Synod of 1904, page 174, with reference to Southwestern Presbyterian University.

"a. That the institution is the property of the Presbyterian Church of the United States, as represented by the Associated Synods of Tennessee, Alabama, Mississippi, and Louisiana.

"b. That the control of the institution is the right of the associated Synods of these States, granted them by the plan of union and by the charter of Southwestern, and to be exercised by them in accordance with the provisions of the plan of union and the laws of Tennessee, through the Board of Directors.

"c. That the associated Synods are the incorporators of Southwestern, and that amendments of the charter and by-laws cannot be made without the concurrent affirmative action of said Synods.

"2. That Synod affirm that it has the sole right of the election of all of its trustees in accord with the charter of Southwestern which affirms, 'The Synod shall have the power to elect and to prescribe the terms of office of the corporate directors and to elect their successors.'; and in accord with the decree of the Supreme Court of Tennessee in the case of Southwestern Presbyterian University, versus the Synods, March 31, 1905.

"That the said university is under the patronage of the Presbyterian Church in the United States, and that in this relation of patronage, the said Synods of Tennessee, Mississippi, Louisiana, Alabama, act for said Church, and for it and in such capacity, have the right to elect each two Directors of the said University corporation, according to the plan of Union adopted by the Synods originally cooperating in the establishing of the said Southwestern Presbyterian University, which provided in substance, that the government of the University shall be in the hands of a directorate consisting of two members from each Synod, one elected each year after the first."

"4. That inasmuch as there is wide difference of opinion among the members of Synod as to the interpretation of the action of Synod at Starkville in 1925 relating to the election of a Memphis member of the Board of Directors of Southwestern, your Committee recommends that Synod repeal the section of the concurrent resolution of Synod with reference to a member of its board of directors, being a resident of the city of Memphis and in the manner of his election, (this resolution is found on page 7 of the Minutes of 1925). This action to become effective September, 1932. That the associated Synods of Alabama, Louisiana, and Tennessee be advised of this action. That Mr. Watkins Overton be asked to continue to serve as director for the year ending September, 1932. That after September, 1932, all the members of Synod's Directors be elected from within the bounds of Synod.

"5. That the matter of the acceptability or non-acceptability of the President of Southwestern and other matters touching Southwestern be referred to a Committee of Conference of five members, to be appointed by this Synod to confer with like Committees from the Associated Synods, if appointed. This Committee of Conference to report to the next meeting of Synod.

"This committee to consist of one member from each Presbytery to be nominated to the Synod by members of the Presbytery present at this meeting of Synod."

This report of the Committee was unanimously adopted by the Synod of Mississippi. The Synod sang, "Praise God From Whom All Blessings Flow", and was led in a Prayer of Thanksgiving.

The Board of Southwestern passed the following resolution with reference to the action of Synod, on October 27, 1931. (See Printed Minutes of Synod, 1932, page 130).

"WHEREAS, this Board has been advised of certain action regarding Southwestern taken by the Synod of Mississippi at its meeting held September 17, 1931; and

"WHEREAS, it is further advised that included in such action was the appointment of a Committee of five members to confer with a like committee from the associated Synods, if appointed, regarding the matter of the acceptability or non-acceptability of the President of Southwestern and other matters touching Southwestern; and

WHEREAS, this Board believes that the Synod of Mississippi in its action taken at said meeting, of September 17 has exceeded its power and authority in several matters pertaining to Southwestern, including its consideration of the acceptability or non-acceptability of the President of Southwestern and its appointment of a Committee to confer and report upon the question and other matters; and

"WHEREAS, this Board does not believe that the authority of said Committee, if legally appointed, extends to an investigation of the College and its administration, but, nevertheless, the Board deems it proper that its conduct of Southwestern be at all times open to investigation and examination;

"NOW, THEREFORE, BE IT RESOLVED, That any member of said Committee of the Synod of Mississippi, or a like Committee of any of the associated Synods, be given free access to the Minutes of the Board and of the Executive Committee and be allowed full liberty in conducting such investigation of the college as he may desire, provided such investigation does not involve the college in expense nor interfere with its orderly administration.

Signed: MOORE MOORE, Secretary."

The Ad-Interim Committee appointed to confer with other Synods reported that the Stated Clerk of the Synod of Alabama had said that the Synod of Alabama had held its meeting in July, 1931, and it would be impossible to appoint the Committee on Southwestern as suggested in the communication from the Synod of Mississippi. The Ad-Interim Committee also reported that they had corresponded with the Chairman of the Committee, Mr. R. B. Clinton, from the Synod of Tennessee, and that it was the judgment of Mr. Clinton that it was unwise for the Committee to go to the expense of meeting with the Synod of Mississippi, inasmuch as the Synods of Louisiana and Alabama had failed to appoint committees on conference. (Printed Minutes of Synod, 1932, p. 131).

#### Election of Dr. W. H. McIntosh as Fourth Director

The following action was taken by the Synod of Mississippi:

(See Printed Minutes of Synod, 1932, page 135).

"In accordance with the action taken by the Synod of Mississippi, 1931, pages 45 and 46, we nominate Rev. W. H. McIntosh, D. D. as a member of the Board of Southwestern to succeed Mr. Watkins Overton, his term of office to expire September, 1935. We also would nominate the Rev. Fred R. Graves, D. D., to succeed himself as a member of the Board.

"Synod would record its hearty appreciation for the valuable services rendered by Mr. Watkins Overton during his term of office as a representative of the Synod of Mississippi on the Board of Southwestern."

Dr. W. H. McIntosh attended the annual meeting of the Southwestern Board at Memphis, Tennessee, January 31, 1933, to the membership of which he had been elected by the Synod of Mississippi. The Board of Directors of Southwestern refused to receive Dr. W. H. McIntosh as a member of the Board of Southwestern, and sent to the Synod of Mississippi the following resolution:

(See Printed Minutes of Synod, March 18, 1933, page 189).

#### Board of Southwestern Declines to Receive Dr. McIntosh at Its Annual Meeting Held on January 31, 1933

"The sole question before the Board of Directors of Southwestern is the legality of the election of the fourth director by the Synod of Mississippi. Did that Synod comply with the LAW 'amplifying the Plan of Union' which had been concurrently adopted by the four controlling Synods in 1924, or did that Synod violate that LAW?

"The law reads as follows:

"**Resolution 1.** That the representation of each Synod upon the Board be raised from three to four members, and that the additional director chosen be a resident of Memphis, Tennessee, and a member of the Presbyterian Church, and that at least one of the four representatives of each Synod be hereafter a resident of Memphis.

"And further that this action be effective when concurrently adopted by the Synods of Alabama, Louisiana, Mississippi and Tennessee.

"**Resolution 2.** That this Synod in electing such fourth member and his successors, being a resident of Memphis and a member of the Presbyterian Church, be guided by and act upon the recommendation of the Directors of Southwestern."

"This law is binding on each Synod and on the Board of Directors of Southwestern.

"Now, when, in 1932, the Synod of Mississippi elected as its fourth director Dr. W. H. McIntosh, that Synod violated both sections of the above law. Dr. McIntosh is not a resident of Memphis, Tennessee, and he was not recommended by the Board of Directors. The Board of Directors is under obligation to keep the above law:

THEREFORE, BE IT RESOLVED That the Board of Directors of Southwestern hereby declines to seat Dr. W. H. McIntosh on this Board, only because of his illegal election, and hereby declares the position of fourth director from Mississippi vacant.

"We are confirmed in the correctness of the above resolution by the fact that the other three Synods controlling Southwestern have refused to annul the law, and have declared that no one Synod acting alone can change any part of the contractual agreement.

"The Board regrets that the Synod of Mississippi has seen fit to take the action it took in this matter, and trusts that, in the interest of the college and of the Presbyterian Church, renewed and prayerful consideration will lead the Synod of Mississippi to elect its fourth member to this Board according to the concurrent agreement of the four controlling Synods adopted in 1924."

This action of the Board very much aroused the Synod of Mississippi and thirty-six ministers and forty-five elders of the Synod signed a petition asking for a called meeting of the Synod on March 21, 1933, as follows: (See printed Minutes of Synod, March 18, 1933, p. 188.)

"The following petition having been duly signed and presented to me, namely, Whereas, the Board of Directors of Southwestern, at its annual meeting held in the City of Memphis, Tenn., January 31st, 1933 passed a resolution, declining to allow Dr. W. H. McIntosh to sit as a member of the Board of Southwestern; And Whereas, Dr. W. H. McIntosh had been duly elected to membership on Southwestern Board by the Synod of Miss., acting under the right guaranteed the Synod by the Charter of Southwestern, and this fact having been certified to the Board by the Clerk and the Moderator of the Synod.

"And whereas, this action of the Board of Southwestern infringes upon Synod's right to joint ownership and control of Southwestern.

"Therefore, we the undersigned request that you, under Paragraph 82, Form of Government, call a meeting of Synod, to convene in the First Presbyterian Church of Jackson, Mississippi, 11 A. M. Tuesday, March 21st, 1933.

"First—To consider and act upon the resolution of Southwestern Board above mentioned which was sent by the Board to the Synod.

"Second—To hear the Report of Dr. W. H. McIntosh, as a member of Southwestern Board.

"Third—To take from the docket, the Report of the Synod's Ad-Interim Committee on Conference as to Southwestern, and to give this Committee further instructions.

"Fourth—To consider and act upon all matters pertaining to Synod's relation to Southwestern, and Synod's Directors of Southwestern.

"Therefore, the constitutional requirements having been met, I, as Moderator of Synod, do hereby call the Synod to meet as requested above, in the First Presbyterian Church, Jackson, Mississippi, Tuesday, March 21st, 1933, at 11 A. M. for the purposes herein mentioned.

A. A. LITTLE, Moderator."

Signed by:

Ministers: W. H. Hill  
 J. C. Watson  
 E. W. Ford  
 J. C. Stewart  
 J. R. Tackett  
 W. L. Downing  
 F. L. McFadden  
 G. M. Smiley  
 W. A. Hall  
 R. E. Hough  
 G. T. Gillespie  
 R. D. Bedinger  
 J. B. Hutton  
 W. B. Hooker  
 W. A. Gamble  
 J. F. Naylor  
 T. M. Lemly  
 C. P. Colmery  
 R. W. Hardy  
 P. S. Rhodes  
 O. G. Jones  
 W. H. McIntosh  
 J. V. Currie  
 L. A. Beckman, Jr.  
 C. F. Monk  
 B. A. Meeks  
 W. I. McInnis  
 L. N. Blackwelder

Elders: A. J. Coleman  
 John R. Heggie  
 J. D. Eades  
 J. H. Hunter  
 C. G. Cox  
 J. S. Rimmer  
 M. L. Neill  
 S. E. Stafford  
 V. H. Andrews  
 Joe Alexander  
 L. J. Hand  
 U. M. Springfield  
 H. H. Campbell  
 H. V. Cain  
 R. C. Thompson  
 Pat Sharkey  
 A. P. Caruthers  
 Wm. Gibbon  
 W. P. Morgan  
 Horace Weir  
 W. A. Hall, Jr.  
 Jno. C. Batte  
 J. T. Caldwell  
 Chas. L. Long  
 J. J. Liddell  
 Chalmers Alexander  
 R. H. Spencer  
 M. F. Higgs

E. L. Storey  
 S. P. DuBois  
 J. T. Sharman  
 J. M. Williams  
 F. L. McCue  
 A. W. Duck  
 O. M. Anderson  
 I. O. Alexander

E. C. Hearon  
 E. J. Word  
 Sam Seaton  
 R. C. Hauenstein  
 V. L. Currie  
 F. O. Smith  
 F. D. Ethridge  
 C. C. Alexander  
 W. B. Ludlam  
 J. A. Smylie  
 W. J. Stockett  
 M. S. Hassell  
 W. O. Caulfield  
 J. C. McGehee  
 Jos. Redhead  
 J. S. Rea  
 R. F. Kimmons  
 V. S. Broyles

Synod met pursuant to the above call, heard the statement of Dr. W. H. McIntosh, its fourth Director of Southwestern, and adopted the following paper:

**Reply of the Synod of Mississippi to a Resolution Adopted by the Board of Directors of Southwestern, January 31, 1933**

(See Printed Minutes of Synod, March 1933, page 190)

"The Synod of Mississippi, Presbyterian Church, U. S., in called session Jackson, Mississippi, March 21, 1933, would acknowledge the receipt of a resolution adopted by the Board of Directors of Southwestern held at its annual meeting January 31, 1933, which resolution declares that the Synod of Mississippi violated the law governing Southwestern in the election of Dr. W. H. McIntosh as Director of Southwestern, and because of this alleged illegal action of the Synod of Mississippi the Board of Directors declined to seat Dr. McIntosh on the Board of Southwestern.

"The Board accompanies this with a request that the Synod of Mississippi give renewed and prayerful consideration to its action in electing Dr. W. H. McIntosh to the end that this action may be rescinded and a fourth director be elected from the Synod of Mississippi, whom the Board of Southwestern shall direct the Synod of Mississippi to elect, the said Director to be a resident of Memphis, Tenn., and a member of the Presbyterian Church.

"The Board admonishes that this matter affects the interests of Southwestern and the Presbyterian Church.

"In acknowledging this communication from the Southwestern Board the Synod of Mississippi would fully concur in the statement of the Board of Southwestern that the interests of the College and of our Church are involved in the question before us. The Synod has been deeply conscious of this for many years. The Synod, as early as 1904, asserted that it had the sole right to elect all of its directors, and this right, that was then contested by the Board of Southwestern, usurping authority and trying to elect their successors, was confirmed by the decree of the Supreme Court of Tennessee.

"The resolution passed by the Synod of 1904 asserting Synod's ownership and control of Southwestern jointly with the Synods of Alabama, Louisiana and Tennessee was unanimously reaffirmed by the Synod of 1931.

"Synod would further advise the Board of Southwestern that the action of Synod in 1931 in which it decided to elect all of its directors from the Synod was adopted by a unanimous vote of the Synod, and that when the Moderator announced this action, the Synod led by Dr. Geo. D. Booth sang "Praise God

from whom all Blessings Flow." And this was followed by a prayer of thanks to God.

"In answer to the communication from Southwestern Board with reference to Synod's violating the law in electing Dr. W. H. McIntosh as director of Southwestern, Synod affirms that the sole and only law to govern in the election of a director is the Charter of Southwestern. This charter gives to each Synod equal representation on the Board and the right to elect its directors.

"The concurrent resolution to which the Board refers is not, never has been, and was not proposed to be a part of the Charter of Southwestern but is in conflict with the plain provision of the Charter, if its language means, as the Board of Southwestern construe it to mean, that the Synod has only the right of veto in electing its fourth director. The said resolution is not and cannot constitute rule, law or ordinance, but on the contrary is rescindable, has been rescinded by this Synod with fair, ample and complete notice to all other Synods.

"Synod further affirms that the Board of Directors of Southwestern has no power or rights with reference to determining the membership of the Board or the qualifications of the members of the Board, nor has the Board the right or any semblance of right to deny membership in the Board to any member elected by Synod.

"Synod's right to elect directors is derived from the Charter and when Synod elects a director and this election is officially certified, as was done in the case of Dr. W. H. McIntosh, by the moderator and Clerk of Synod, the one elected is a member of the Board, and clothed with all the rights which that office confers, and no other member of the Board or collection of members, have any more authority to question his right to sit on the Board than he has to question their right to sit on the Board.

"The Synod regards the action of the Board with reference to Dr. W. H. McIntosh as wholly unwarranted, a gross usurpation of power on the part of the Board, an offense to Dr. McIntosh and to the Synod of Mississippi. Synod would indulge the hope that this action was taken by the Board without due consideration and that at its next meeting it will rescind the action as an apology to Dr. McIntosh and the Synod, but this Synod here and now reaffirms its right to elect all of its members of the Southwestern Board without nomination or dictation from the Board and here and now declares that Dr. W. H. McIntosh was duly and legally elected a member of said Board and demands that he be permitted to attend the meetings of the Board; to participate in its deliberations and to vote upon every matter considered by it and in every respect to be treated as a member of the said Board with every right and privilege of such member of said Board."

The Synod adopted the following form of acceptance for its Directors of Southwestern: (See Printed Minutes of Synod, March, 1933, p. 193)

#### **Provision for the Election of Directors of Southwestern**

"1. Synod shall elect its director or directors of the Board of Directors of Southwestern by ballot, and shall define in a form of acceptance the duties of a director as agent of Synod, his election being conditioned on his acceptance of this form.

"2. When anyone shall receive a majority of the votes cast, the Stated Clerk of the Synod shall present to him the form given herein for his immediate acceptance; and if, as, and when he shall sign the same he shall be declared elected to membership on the Board of Directors of Southwestern.

"3. Form of Acceptance. I accept the office of Director of Southwestern to which the Synod has elected me; and obligate myself to respect and obey the provisions of the Charter of Southwestern as these have been interpreted

or in future may be interpreted by the resolution of the Synod of Mississippi; I recognize that Southwestern is owned and controlled by the several Synods; and that said Synods have the right to determine the policy of the school; and that only the affairs of administration have been committed to the Board of Directors. In accepting membership on the Board of Directors I agree that the tenure of my office shall be at the will of the Synod of Mississippi. As the charter provides that nothing shall be done contrary to the Constitution, Rules, and Regulations of the Presbyterian Church, U. S. or of the Controlling Synods, I stand ready to answer affirmatively the questions prescribed for officers in the Presbyterian Church U. S. found on page 78, paragraph 148, Book of Church Order. I obligate myself to keep Southwestern in full accord with the doctrines and teachings of the church to which it belongs.

"4. The foregoing election and acceptance, officially certified by the Moderator and by the Clerk of Synod, shall constitute an election to membership on the Board of Directors of Southwestern without any action from the Board of Southwestern or any other body."

At the called meeting, Dr. Fred R. Graves presented his resignation as a member of the board of Directors of Southwestern. His resignation was accepted and Dr. J. B. Hutton was elected to fill his unexpired term on the Board.

The Ad-Interim Committee of the Synod of Mississippi on Southwestern reported to Synod at its meeting on September 12, 1933, in Belhaven College, Jackson, Mississippi, that Synod's Committee had conferred with the Committee on Conference from the Synod of Tennessee, of which Mr. R. B. Clinton was chairman, on August 31, 1933, there being present from the Synod of Mississippi Dr. J. B. Hutton, Dr. R. L. Campbell, Dr. F. L. McCue, Dr. R. A. Bolling, and from the Synod of Tennessee Mr. R. B. Clinton, Dr. T. K. Young, Dr. W. L. Caldwell, and Rev. H. S. Henderson. The following action was taken: (See Printed Minutes of Synod, 1933, p. 228)

"Careful and earnest consideration was given to the subject of the Synods' ownership and control of Southwestern. The discussion of this question was with fine spirit and there was a manifest desire on the part of the joint-committee to find the best way to promote the best interests of Southwestern and of conserving her ideals.

"After mature deliberation it was the feeling of the joint committee that there is practical unanimity in the Synods of Tennessee and Mississippi, the only Synods represented in this Conference, with respect to the Synods' ownership and control of Southwestern, and the right of the respective Synods to elect their own Directors.

"The joint-committee on Conference feels that there is a like unanimity in these two Synods as to the administrative matters of Southwestern, being placed by the Charter in the hands of the Board of Directors.

"Inasmuch as the Synod of Mississippi has withdrawn from the agreement to elect one member of the Board from the city of Memphis, it is the judgment of this Conference that the action of the Synod of Mississippi in electing the fourth member of the Board from within the bounds of the Synod of Mississippi, should stand. Thus the concurrent resolution of the four Synods with reference to the election of the fourth member of the Board is rescinded in so far as this resolution affects the Synod of Mississippi.

"Dr. Young asked to be excused from voting upon the last paragraph above.

"After reading and approving the minutes, the joint-committee adjourned.

H. S. Henderson, Secretary."

Synod reaffirmed its action as to its right to elect its fourth Director, in the report of the Bills and Overtures Committee, of which Dr. A. A. Little was chairman, as follows: (See printed minutes of Synod, 1933, p. 226).

"With regard to the overtures from the Presbyteries of North Mississippi, and East Mississippi.

"Inasmuch as the Synod of Mississippi in regular session in 1931, considering these matters in a special committee, and adopting the report of the committee by a unanimous vote, which report notified the Synod of Alabama, Tennessee and Louisiana, that one year hence, it would withdraw from its agreement to elect the fourth member of the Board of Directors from the city of Memphis, and appointed a committee of conference with similar committees of these aforesaid Synods, and,

"Second, Inasmuch as Synod in 1932, in regular session, after some hours of discussion did by vote of at least three to one, adopt a report wherein they withdrew from the agreement made in 1924-25, and did elect Rev. W. H. McIntosh, a fourth member of the Board of Directors in lieu of a member from the city of Memphis, and

"Inasmuch, as the Synod at a well attended called meeting in the First Presbyterian Church of Jackson, in March 1933, and after some hours of discussion, did adopt an answer to the action of the Board of Directors of Southwestern, and did reaffirm its right to elect all members of the Board of Directors from within the bounds of the Synod, and did lay down an obligation which was to be signed by all the members of the Board of Directors of Southwestern by a vote of at least three to one, and,

"Third, inasmuch, as a protest was submitted to the called meeting of Synod by some ministers and elders, mainly of the Presbyteries of North Mississippi and East Mississippi, wherein they deprecated the further consideration, and discussion of this matter as detrimental to the peace of the Synod of Mississippi.

"Therefore, your Committee would recommend that the Overtures be answered in the negative."

On January 24, 1934, Dr. W. H. McIntosh attended the annual meeting of the Southwestern Board and asked in writing that his name be called as a member of the Board and that his vote be recorded in all matters voted upon by the Board. The Board of Directors again refused to receive Dr. McIntosh as a member of the Board. (See printed minutes of Synod, 1934, p. 321).

At the meeting of Synod at Belhaven College on September 11, 1934, Synod directed the members of the Board of Directors of Southwestern from the Synod of Mississippi to present to the Board of Directors of Southwestern and to the other controlling Synods the actions of Synod with the reasons therefor and the legality of the same.

At its meeting in September, 1935, Synod re-elected Dr. W. H. McIntosh as its fourth Director on the Southwestern Board for a four-year term, to expire at the regular meeting of the Synod in 1939.

At this meeting the Synod's Ad-Interim Committee on Southwestern made a report to Synod giving a full account of all matters touching on the fourth Director. This report set forth the position of Synod and the fact that Revs. E. L. Storey, J. B. Hutton, of Synod's Ad-Interim Committee had communicated in person with the Synod of Alabama, visiting that Synod in its session at Talladega, Ala.; and that Revs. W. H. McIntosh, E. L. Storey, and J. B. Hutton had communicated with the Synod of Louisiana in person in its meeting at Monroe, La. The Committee of the Synod of Mississippi asked the Synods of Alabama, and Louisiana to recognize the Charter right of the Synod of Mississippi to elect its own directors on the Southwestern Board. The report stated that both Synods

gave the Committee of the Synod of Mississippi a courteous hearing, but that both Synods rejected and denied the right of the Synod of Mississippi to elect its own directors. When the Synod of Mississippi had heard this report, the Synod passed the following resolution and referred the whole question of securing church ownership and control of Southwestern, especially as respecting the election of the fourth Director from Mississippi, to the Directors from the Synod of Mississippi, and empowered them to secure the Charter rights of the Synod of Mississippi by taking whatever legal action they deemed necessary. (See printed minutes of Synod 1935, Page 405).

#### RESOLUTION

"WHEREAS the Synod of Mississippi has given careful and prayerful consideration to her relation to Southwestern, and that it is now as it has ever been said Synod's conviction that, if Southwestern is to fulfill her mission as a Christian Institution, church ownership and control are essential; and

"WHEREAS the Synod of Mississippi has made appeals for this purpose to the Board of Directors of Southwestern and the other controlling Synods only to have them refused; now

"THEREFORE BE IT RESOLVED that the Synod of Mississippi of the Presbyterian Church in the United States now refers this whole question to the members of the Board of Directors of Southwestern from the Synod of Mississippi, and clothes them with full power and authority to secure the rights of the Synod of Mississippi under the charter of Southwestern; and

"BE IT FURTHER RESOLVED that the directors of Southwestern from the Synod of Mississippi, namely, R. W. Hardy, J. B. Hutton, W. H. McIntosh and E. L. Storey, and their successors from the Synod of Mississippi, be and they are hereby authorized in person or by attorney to begin and prosecute to conclusion and completion an action or actions as law or in equity in any of the civil courts of the State of Tennessee or other state or states, or of the United States of America, which in their discretion may be deemed appropriate to assert and enforce the right of the Synod of Mississippi to elect any and all of its directors or their successors, without regard for any command, nomination or recommendation of the Board of Directors of Southwestern, whether or not the director or directors elected be a resident or residents of Memphis, Tennessee, and regardless of any other requirement not contained in the Charter of Incorporation of Southwestern as amended in accord with the laws of the State of Tennessee. A majority of the said Directors from Mississippi or their successors elected by the Synod of Mississippi are authorized to exercise all the power and authority hereby given.

"BE IT FURTHER RESOLVED that the Synod of Mississippi again expresses its hope that the Directors of Southwestern will recognize the right of the Synod of Mississippi to elect freely the persons the Synod desires to elect without dictation from the Board of Directors of Southwestern." (See printed minutes Report of Ad-Interim Com. 1936).

Dr. W. H. McIntosh attended the annual meeting of the Board of Directors of Southwestern on January 28, 1936, and asked the Board in writing that his name be called and that he be allowed to take part in all the matters of the Board. Dr. McF. Alexander, a Director of the said Board from the Synod of Louisiana said that the Board understood the facts, and that the Board had declined to recognize the election of Dr. McIntosh, and that he moved that Dr. W. H. McIntosh be not seated. Dr. J. B. Hutton, a Director on the said Board from the Synod of Mississippi offered a substitute motion, which was seconded by Rev. E. L. Storey, and which is as follows:

"Whereas the Commission from the Synod of Mississippi of the Presby-

terian Church in the United States to Dr. W. H. McIntosh as a member of the Board of Directors of Southwestern, duly authenticated by the Clerk of the Synod of Mississippi aforesaid is now presented by him in person to the Board of Directors of Southwestern on this the 28th day of January 1936, I move,

"1st. That the aforesaid original Commission be filed with the Minutes of the Board of Directors of Southwestern, and be incorporated in the said Minutes as a part of the permanent record of the transactions of this meeting of the said Board of Directors, and of the matters and affairs coming before the said Board of Directors for official consideration and action;

"2nd. That the aforesaid W. H. McIntosh be enrolled by the said Board of Directors of Southwestern as a member of the said board of Directors as a member from the aforesaid Synod of Mississippi."

This substitute motion was voted down, all the members of the Board except Rev. E. L. Storey, Rev. R. W. Hardy, and Rev. J. B. Hutton voting against the substitute. The substitute motion being typewritten, Dr. J. B. Hutton asked that the Commission of Dr. W. H. McIntosh from the Synod of Mississippi be filed with and made a part of the minutes of the Board. The Chairman of the Board, Mr. E. B. Lemaster, ruled that this should be done. An appeal was made from the decision of the Chairman, and the Board declined to make the aforesaid Commission a part of its Minutes.

Dr. W. H. McIntosh, having voted on a motion that the Board take recess, asked that his vote be counted. This was declined by a vote of the Board. Dr. J. B. Hutton made a motion that inasmuch as he had been elected by the Synod of Mississippi, and held a Commission from the Synod, that he was a member of the Board and that his vote should be counted. This motion was duly seconded. "The Chairman then ruled that Dr. W. H. McIntosh was not a member of the Board, had no right to vote, and that he should retire. By vote the ruling of the Chairman as to this matter, just mentioned in this paragraph, was sustained, J. B. Hutton, E. L. Storey, R. W. Hardy voted against the ruling of the chairman.

"After the refusal of the Board to permit Dr. McIntosh to represent the Synod of Mississippi the Directors of Southwestern from the Synod of Mississippi conferred among themselves in accordance with the direction of the Synod of Mississippi, and also consulted those ministers and leaders of the church who were accessible. The opinion of the Directors and of their advisers was and is that the case should be tried and the issue settled in a state court. Accordingly a bill was filed for a declaratory judgment setting forth the true construction of the charter and of the concurrent resolution authorizing the election of the fourth director and determining the right of Dr. McIntosh to represent the Synod of Mississippi as its Director on the Board of Directors of Southwestern." This bill was filed under the Declaratory Judgment Act which is in force in Tennessee. (See Printed Minutes of Synod of Mississippi, for 1936, page 485.)

The Directors secured the services of Hon. Stokes V. Robertson and J. B. Hutton, Jr., as the attorneys to represent the Synod of Mississippi in this case. They advised your Committee that to take care of the pleadings under the Tennessee law it was necessary to secure the services of an attorney in Memphis. Your Committee secured the services of Mr. Hillsman Taylor, of Memphis, Tennessee, at an agreed fee of \$250.00.

The Southwestern Board at its meeting September 8, 1936 passed a motion to employ counsel to represent the Board. Your Directors maintained that since Southwestern is owned in common by the four Synods the Directors from the Synod of Mississippi considered it unjust for the common funds to be taken to pay an attorney to represent one faction in the Board of Southwestern and three Synods. A verbal protest was made to the Board substantially as contained in the following resolution:

## RESOLUTION

(Printed Minutes of Synod 1936, Page 486)

"Inasmuch as the Charter of Southwestern gives each Synod the right 'each to have the right to elect its own representatives upon the said Board,' (Section 3, Charter 1924), and inasmuch as the Charter is the document controlling the election of Directors, and inasmuch as it is an ultra vires act on the part of the Board of Directors of Southwestern to ride roughshod over the Charter of Southwestern, to obstruct Charter Rights, or to take any measures to impair and abrogate and annul the Synod of Mississippi's charter right to elect her own directors, and inasmuch as the obstruction of the right of the Synod of Mississippi to elect her own directors is ultra vires when done by the individuals who sit on the Board of Southwestern, and is in defiance of the Charter which grants and limits the powers and functions of the said individuals when acting on the said Board of Directors and therefore is a manifest departure from the charter and an act without any authority to support it, is an act wholly beyond the administrative functions of the said Directors, and inconsistent with the very instrument which creates the office of director and defines its functions, and inasmuch as such acts violative of the Charter of Southwestern are revolutionary in the internal management of the institution, and constitute an abuse of and an impairment of the charter rights of the owning Synods, and inasmuch as such gross abuses are no part of the administrative duties of the directors or their agents and should not be committed at the expense of the institution THEREFORE BE IT RESOLVED, that no money be paid out of the treasury of the said institution, Southwestern, for litigation over any such unwarranted attempt to destroy charter rights, that no attorney be employed by the said board of directors acting as a board at the expense of the said Board, and that no persons or committee shall have any authority to expend money or employ counsel in the litigation of the matter, and that any officer who shall presume to spend the money of the church school, Southwestern, in an effort to deprive the branches of the church of their charter right to elect the directors shall be deemed to act in contempt of the Board of Directors, and in defiance of the Presbyterian Church in the United States, and of the Synods of Mississippi, and the associated Synods, clothed with their vested charter rights in the said institution, and also to act in derogation of the right and of the policies of the Presbyterian Church in the United States in fostering and maintaining schools responsive to the will of the church designed to furnish a liberal education grounded on belief in God and faith in Christ; and resolved further that this resolution be published in the public press in order to give notice to the practioners in courts of law that services rendered in aid of the violation of charter rights and in gross and complete denial of the rights given under the charter cannot receive compensation out of the funds of Southwestern, and that administrative officers are not competent to spend church money or school money in resisting the church in asserting its charter rights."

### Issues of the Case and Decision of the Court

We set forth below in opposite columns the positions of Southwestern Board and of the Synod of Mississippi and a digest of the decision of the Court upon these issues.

**Position of the Southwestern Board.**  
(Resolution of Southwestern, Jan. 31, 1933. See Printed Minutes of Synod, 1933, p. 189).

**Position of Synod of Mississippi**  
(p. 45, Synod's Minutes, 1931).

1. Synod maintains that Southwestern is governed by the Charter ALONE.

1. The law controlling the election of directors of Southwestern is the Charter, the Plan of Union, and Concurrent Resolution.

### Supreme Court Decision As To The Above

The Amended Charter of Southwestern applied for under Chapter 98, Acts of 1923, and approved and accepted by all of the Synods associated in the affairs of Southwestern, namely the Synods of Tennessee, Mississippi, Alabama, and Louisiana, of the Presbyterian Church U. S., superseded all contrary and antagonistic laws and customs of the original charter, the plan of union, and by-laws. The rights of the litigants must be determined solely by reference to the said Amended Charter, as amended, and by those subsequent acts exercising power under the said Charter validly in accordance with the principles of the opinion of this Court in this case.

2. Southwestern Board maintained that a concurrent resolution gave Southwestern Board the right to direct the Synod of Mississippi, whom to elect as its fourth director, and that a concurrent resolution would have to be passed in order to take from the Board the right to direct the election of the fourth director.

2. The Synod of Mississippi maintained that the Charter of Southwestern gave the Synod the right to elect its own directors, and that concurrent resolution of the Synod owning the school under the Charter cannot take that power away, that a concurrent resolution is void that abrogates the very Charter rights under which such concurrent resolution is passed.

### Supreme Court Decision As To Above

Chapter 98, Acts of 1923 is read into the Amended Charter of Southwestern, and expressly and with emphasis declares that the Synods shall have equal representation numerically upon the Board of Directors and shall each have the right to elect its own representatives on the Board of Directors of Southwestern. The Synods are separate entities. The several Synods, separately, and not jointly, have the exclusive power to appoint the Directors of Southwestern. The power of electing or appointing the Directors of Southwestern can not legally be assumed by the Board of Directors of Southwestern, as to any or all of the Directors of Southwestern to be elected or appointed, nor can the said power of electing or appointing the Directors of Southwestern lawfully be delegated or surrendered in whole or in part by the said Synods to the Board of Directors of Southwestern; and the illegal delegation or surrender of the power by the Synods jointly cannot be enforced against the will of the Synod of Mississippi; and neither can the illegal delegation or surrender of the said power to elect Directors be enforced against the will of any of the other associated Synods which may wish severally, and independently to exercise the said Charter power of electing or appointing its Directors.

### Supreme Court Decision of Other Questions

The Supreme Court ruled further that the power to fix the number of directors shall be exercised by joint or concurrent, unanimous action on the part of the Synods associated under the said Amended Charter in the affairs of Southwestern.

The fourth director from each of the said associated Synods must be a resident of Memphis, Tennessee, and a member of the Presbyterian Church U. S., Dr. W. H. McIntosh is ineligible at present to membership on the Board of Directors of Southwestern because he is not a resident of Memphis. The ruling of the trial court to the effect that Dr. W. H. McIntosh is ineligible as a Director because not a nominee of the Board of Directors is erroneous in its reasoning.

The provision of the Concurrent Resolution, that in making the appointment of the fourth director, the Synods shall be guided by and act upon the recommendation of the Board of Directors of Southwestern contravenes the

provisions of the statute and charter which provide that the Synods shall have equal representation numerically upon the Board of Directors, and shall each have the right to elect its own representatives upon the Board of Directors of Southwestern; and the said provision of the Concurrent Resolution, and also the Corporate By-Law which re-states and summarizes the said provisions of the said Concurrent Resolution, are null and void.

The term of office of the Directors of Southwestern shall be for the length of time fixed by concurrent, unanimous action of the said associated Synods.

The several associated Synods cannot control the exercise of the discretion of the Directors in matters of administration, and cannot shorten the term fixed by action of the Synods. The said Synods cannot lawfully control the exercise of the discretion and judgment of the Directors of Southwestern in matters of administration by resort to the form of acceptance which is set out in the opinion of this Court in this case, nor limit the tenure of a director, nor make his election dependent upon a contingency.

The costs will be taxed equally upon the complainants and defendants.

After the rendering of the decision the majority of the Board of Southwestern petitioned the Supreme Court of Tennessee for a rehearing:

### Issues of Southwestern Petition for Rehearing and Decision of Court

#### I

#### Contention of Southwestern

The petition alleged:

"The Plan of Union, which is the original agreement of the Synods setting up the charitable trust (original brief, p. 8) contains certain important provisions outlining the policy of the institution. It is unthinkable that these fundamental declarations of trust have been swept away by the charter amendment by necessary implication. Under substantially similar circumstances the Articles of Foundation in the Vanderbilt case were held to continue in effect notwithstanding the corporate structure erected thereon. See our original brief p. 54 et seq.

"It has come to the attention of appellees, however, that some in the Synod of Mississippi have already published in The Mississippi Visitor, a church paper of general denominational circulation, that the Plan of Union, the original charter and the corporate by-laws have been entirely abrogated by the decision of the Court and that henceforth the rights of the Synods and of Southwestern are governed solely and exclusively by the charter as amended under Chapter 98, Acts 1923, and by subsequent by-laws and acts of the parties.

#### Decision of Supreme Court of Tennessee

The court ruled:

"For reasons stated in the opinion filed for publication, antecedent agreements and the Plan of Union under which Southwestern Presbyterian University operated before the act of incorporation are not controlling. The charter and the Act of 1923 are the controlling law of the corporation and provide that each Synod shall have the right to elect its own representatives on the Board of Directors. In the opinion filed, the Court observed the clear meaning of this provision of the act. Without more, it is sufficient response to the petition for rehearing to say that the petition (presents) no new question, and that the Court is content with the conclusions reached upon the questions presented and disposed of upon the hearing."

(Opinion filed February 18, 1939)

"If this petition for rehearing is denied, appellees with great deference suggest that the Court nevertheless make it abundantly clear, so that he who runs may read, that the Plan of Union, the original charter and the corporate by-laws are superseded by chapter 98, Acts 1923, and the charter as amended thereunder only to the extent, if at all, that provisions of the former are antagonistic to the provisions of the latter. (p. 23).

"Appellees advise the Court that the foregoing expressions have proven susceptible of being twisted by some so inclined to mean that the original trust agreement of the Synods, i. e., the Plan of Union, and the original charter and corporate by-laws in effect prior to the amendment of the charter under chapter 98, Acts 1923, have ceased to have any validity or effect and are entirely abrogated, notwithstanding elsewhere in the opinion it is made crystal clear that they are superseded only to the extent that they are inconsistent with or antagonistic to chapter 98, Acts of 1923. (p. 22).

"If this petition for rehearing should be sustained and the relief prayed for granted, it follows that the unwarranted construction placed upon the decision of the Court by certain elements of the Synod of Mississippi must be abandoned. (p. 24).

"Upon acceptance of the charter as amended under that Act, the relation of the corporation to the Synods rested no longer upon uncertain reliance upon collateral agreements, custom, or the right of the patron to control the institution."

(Opinion of Supreme Court of Tennessee, December term, 1938.)

## II

The petition alleged:

"1. That properly understood, with the history of Southwestern and the relations of the Synod to each other and to Southwestern in mind, the provisions of the Concurrent Resolutions obligating the Synods in electing the fourth director to be guided by and act upon the recommendation of the Directors of Southwestern, is not antagonistic to and does not contravene the charter provisions or the identical provisions of chapter 98, Acts 1923. That act provides in Section 3 that the subordinate body of the Church (when only one) controlling such an institution 'shall have the power to elect \* \* \* the corporate Direc-

The Court ruled:

"This cause is here upon petition for rehearing by the defendant. It is complained that the Court erred in holding the concurrent resolutions of the Synods delegating power to the Board of Directors to nominate directors antagonistic to the charter. The conclusion of the Court rested upon provisions of the charter and the act under which Southwestern was incorporated. It was declared that so much of the resolution of the Synods as surrendered power to the Board of Directors was void because antagonistic to the charter and the charter act, Chapter 98, Acts of 1923. The act

tors' and further that if the institution is affiliated with or controlled by (in this case) 'two or more Synods \* \* \* said Synods \* \* \* shall each have the right to elect its own representatives upon said Board,' etc."

"2. That the right to 'elect' is not delegated to the Board in any event by the agreement of the Synods to be guided by and act upon the 'recommendation' of the Board of Directors.

"The error in the opinion and decree of the court, we submit with great respect, is attributable to two underlying errors: (1) the decision of the Court that the statute and charter 'plainly' give the Synods 'exclusive power to appoint the directors'; and (2) the failure of the Court to distinguish between the right to 'elect' which is to be exercised by the Synods under the Concurrent Resolutions, and the duty to 'recommend' for election which is imposed by the Resolutions upon the Board.

"If the statutory grant to the Synods of the right to elect is not plainly exclusive, then the delegation by the Synods to the Board of the duty to recommend for election obviously is not antagonistic to and does not contravene the provisions of the statute and charter." (p. 11).

"In other words, in the case at bar, in the absence of limitations in the charter or charter act, the power of the Synods to impose the further qualification that the additional director must be a person recommended by the Board is so consistent with the purposes and objects of the charter and charter act that the power to enter into such an agreement may be implied. \* \* \*

"Again, that the Synods may without surrendering the power to 'elect' delegate to the Board the duty to 'recommend' for election and in the practical operation of the agreement reject one recommendation and call for another, if with reason not satisfied with the first, and so on, until a suitable person is recommended, is equally settled by the Vanderbilt case." (p. 19).

expressly declares that the Synods shall have equal representation numerically upon the Board of Directors, and shall each have the right to elect their own representatives on the Board."

(Opinion of February 18, 1939)

"The charter and the Act of 1923 are the controlling law of the corporation and provide that each Synod shall have the right to elect its own representatives on the Board of Directors. In the opinion filed, the Court observed the clear meaning of this provision of the act. Without more, it is a sufficient response to the petition for rehearing to say that the petition (presents) no new question, and that the Court is content with the conclusions reached upon the questions presented and disposed of upon the hearing."

(Opinion of February 18, 1939)

"So much of said resolution as surrendered the power to the Board of Directors of Southwestern to nominate the additional member provided for therein is void because unauthorized by and contrary to the charter and the charter act, Chapter 98, Acts of 1923, which must be read into the charter and which expressly declares that the Synods shall have equal representation numerically upon the Board of Directors and shall each have the right to elect their own representatives on the Board.

"The Synods are clothed with exclusive power to appoint members of the Board of Directors for reasons stated in the opinion of the Court, \* \* \*"

(Opinion of Supreme Court of Tennessee, December term, 1938).

"As we have said in the beginning, if the Court is in error in treating the words 'shall have the right to elect' as mandatory and exclusive, then there is no limitation in the statute or charter upon the subject. Hence, by mutual agreement the Synods were free to impose a further qualification of the fourth director from each Synod that he shall be a person recommended by the Board." (p. 17).

### III

Since the December, 1938 opinion of the Supreme Court of Tennessee was rendered, the attorney for Southwestern has written a letter circularized by Dr. Diehl among various ministers and directors of all the Synods and has stated:

"The Court has nowhere, either in the opinion or in the decree, said that Board may not lawfully make recommendations to the Synods with respect to the election of the fourth Director from each Synod or that the making of such recommendation by the Board would be unlawful." "It is true, under the decision as it now stands, that the Synods are not bound to be 'guided by and act upon' the recommendations of the Board, but there is no possible objection to the Board submitting its recommendations, which the Synods may accept or reject at their pleasure. The Synods simply may not be forced against their will to accept the recommendation of the Board and if the Synods reject the recommendation and elect a fourth director otherwise qualified for that office, the Board may not lawfully refuse to seat him as a member of the Board."

Similarly, the attorney for Southwestern argued in his petition for rehearing:—

"Likewise the Court has said in its opinion and decree that the agreement of the Synods to be guided by and act upon the recommendation of the Board in electing the fourth director 'cannot be enforced against the will of the Synod of Mississippi. From this the same persons in the Synod of Mississippi have published and circulated in the same church paper and in the same article a state-

The answer of the Court in response to the petition for rehearing is:

"... So much of the Resolution of the Synods as surrendered power to the Board of Directors was VOID because ANTAGONISTIC TO THE CHARTER AND THE CHARTER ACT, CHAPTER 98, ACTS OF 1923."

Likewise, the decree of December, 1938 provides that Resolution II, to the effect that the Board should make recommendations for the action of Synod in electing the fourth Director, is "VOID."

(Opinion of February 18, 1939)

ment to the effect that the Court has decided that it is unlawful for the Board to make any recommendations to the Synods whatever and, **inferentially at least**, (Black face added), that the Court has also decided that the other Synods, appellees here, may not lawfully act upon the recommendations of the Board. These statements we submit, go beyond the actual decision of the Court." (Pp. 23-24.)

This decision of the Supreme Court refuses to grant the President and Board of Southwestern a rehearing of this case; and declares again that Resolution 2, which authorizes recommendation by the Board of Southwestern, is "VOID." Now that the full and free exercise of Synod's charter right of election has been established in law over the opposition of the Board, all efforts by the Board to limit or impair or confuse this right by further recommendation will be unwise, improper, and of had effect, and in the nature of gratuitous intermeddling. The charter provision is wise which leaves the right of election of directors to the free exercise of each Synod. As a permanent policy, it would be wrong for the President and Board to be placed in a position to influence directly or indirectly the Synodical election of directors. Every school has its patronage, in scholarships, in degrees to be conferred, in influence to be exerted in securing positions. These things must be regarded as a sacred trust and can never be used to reward or to punish, without bringing into the Church the corrupting influences of the Spoils System. Therefore, the policy which leaves Synod, perfectly free in the election of its directors is the policy which the best interest of the cause of Christian Education demands shall be maintained. Your Ad Interim Committee in thankful that this charter policy has been left by the decision of the Court as a right of the several Synods.

At the meeting of the Board of Southwestern in the city of Memphis, Tenn., September 5, 1939, Dr. Chas. E. Diehl, in making a report as to the decision of the Southwestern case, said: (See President's Report, Sept. 5, 1939, p. 23.)

"The Synods need not, in the election of the fourth director, be governed by and act upon the recommendation of the Board of Directors of Southwestern. Nevertheless we are assured by our attorneys that it is not illegal or improper for the Board to continue to make recommendations to the Synods of the man for fourth director who in its judgment is best qualified or would be most useful in that position, nor is it illegal or improper for all the Synods, or any of them, to accept the recommendation of the Board. The majority of the Synods will doubtless welcome and appreciate the continuance of such recommendations by the Board.

"In the matter of this controversy about the fourth director it should be recognized that there was never any desire 'to put something over' on the Synods, nor was there any effort to make the Board of Directors of Southwestern self-perpetuating. As a matter of fact, the wisest arrangement that could probably be made would be to have the Board nominate and the Synods confirm the election of all the directors. Because of the very nature of the enterprises, no church court can directly operate a hospital, an orphanage, or a college. It can, by exercising wisdom and care, elect ideal men to the Board, putting into their hands the sole government of the institution. This is the method which the late Dr. B. M. Palmer outlined for Southwestern, upon the basis of which it has been operated through all these years. It often occurs, as was pointed out at the last meeting of the Presbyterian Edu-

ational Association of the South at Montreat, that church courts elect men as directors of our institutions in much the same way as they elect commissioners to the General Assembly, electing men who will 'put something across,' or as a compliment to them."

#### Nominating To Synod's Fourth Director

Later, when the question came up as to nominating the fourth director to the respective Synods, recommendations or nominations were proposed for the Synods of Alabama, Louisiana, and Tennessee. The Directors from the Synod of Mississippi called the attention of the Board to the fact that the Supreme Court of Tennessee had decided that the resolution delegating to the Board the right to nominate was null and void, and urged the Board to abide by the decision of the Court. Your Directors stated to the Board that they believed it would be to the best interest of Southwestern and of the Synods for all parties to abide by the decision of the court. Since the Court declared that the resolution was void and that the full and free exercise of Synod's charter right of election was established in law over the opposition of the Board, all efforts by the Board to limit or impair or confuse that right by further recommendation would be unwise, improper, and of bad effect. By following the decision of the Court and leaving to the Synods the right to elect their members on the Board, free from all pressure or influence or patronage, the Board would leave the Synods unhampered in selecting those whom the Synods desired to represent them in the responsible position of administering the affairs of their school. Your Directors think that such a course would have been a wise one.

The action of the Board of Directors, however, was that they would make no nominations to the Synod of Mississippi as to its fourth director, but would make nominations to the Synods of Tennessee, Alabama, and Louisiana, but would state to these Synods that they would not be required to be guided by or act upon the recommendation of the Directors. All the members of the Board present voted for this action except the Directors from the Synod of Mississippi, who recorded their votes against the Board's making nominations, and assigned the following reasons therefor:

Inasmuch as the Supreme Court of Tennessee has declared in its decree in the case of the Synod of Mississippi v. Southwestern that, "So much of said resolution as surrendered the power to the Board of Directors of Southwestern to nominate the additional member provided for therein is void because unauthorized by and contrary to the charter and the charter act;" Decree of Supreme Court of Tennessee, December, 1938.

And inasmuch as the Board of Southwestern asked for a rehearing in this case, and the Supreme Court of Tennessee in declining to grant the rehearing said, "It is complained that the Court erred in holding the Concurrent Resolution of the Synods delegating power to the Board of Directors to nominate directors antagonistic to the Charter. The conclusion of the Court rested upon provisions of the Charter and the Act under which Southwestern was incorporated. It was declared that so much of the Resolution of the Synods as surrendered power to the Board of Directors was void because antagonistic to the Charter and the Charter Act, Chapter 98, Acts of 1923. The Act expressly declares that the Synods shall have equal representation numerically upon the Board of Directors, and shall each have the right to elect their own representatives on the Board.

"For reasons stated in the opinion filed for publication, antecedent agreements and the Plan of Union under which Southwestern Presbyterian University operated before the Act of incorporation are not controlling. The Charter and the Act of 1923 are the controlling law of the corporation and provide that each Synod shall have the right to elect its own representatives on the Board of Directors. In the opinion filed, the Court observed the clear meaning of the provision of the Act. Without more, it is a sufficient response to the petition for rehearing to say that the petition (presents) no new ques-

ion, and that the Court is content with the conclusions reached upon the questions presented and disposed of upon the hearing."

And inasmuch as the Synod of Mississippi has thus successfully resisted the assumed right of the Board to nominate the fourth or any of its directors, we therefore, deny the authority of the Board to make any nomination of any directors.

September 9, 1939

Warren Potts  
J. B. Hutton  
G. M. Smiley

The Board was asked to approve the fees to be paid the attorneys of the majority of the Board in this case. It was stated that the fees to be paid the attorneys amounted to \$2,500.00. Your Directors are informed that in addition to the attorneys' fees, there was \$600.00 to \$800.00 in costs which was paid by the Board out of the funds of Southwestern. Your Directors, in accord with the action of Synod taken in 1936, and printed above in this report (p. 486, Printed Minutes of 1936), stated to the Board that, inasmuch as the Synod of Mississippi was one of the joint owners of the school, and inasmuch as the Board had contested the right of the Synod to elect its fourth Director, and inasmuch as the Supreme Court had declared that the Synod had such a right, that it was improper for the majority of the Board to take any of the funds of Southwestern with which to pay its attorneys' fees or the costs of this case.

Your Directors stated to the Board that they did not care to discuss at all the amount of the fees paid, or the expenditures that the Board made, but they did question the right of the Board to pay any of said fees or expenses out of the funds of the institution.

#### The Form of Acceptance

The form of acceptance passed in 1933 is set out above.

In regard to this form of acceptance, the Supreme Court of Tennessee ruled as follows:

"We concur in so much of the chancellor's decree as declares that the Synod of Mississippi cannot legally control, by resort to the Form of Acceptance heretofore quoted, the exercise of discretion or judgment of its appointees on the Board of Directors, and cannot by such method limit the tenure of a Director or make his election dependent upon a contingency."

The decree of the Court, entered in pursuance of the foregoing opinion regarding the Form of Acceptance, is as follows:

"The Synods are clothed with exclusive power to appoint members of the Board of Directors for reasons stated in the opinion of the court, but the Synods cannot, by resort to the Form of Acceptance copied into the opinion, control the exercise of discretion or judgment of members of the Board after their election by resort to resolution providing for termination of their tenure of office, or make the election of Directors dependent upon a contingency, as attempted by the resolution of the Synod of Mississippi passed in March, 1933, which is copied into the opinion, and said resolution is void."

In presenting this part of the question of the relation of the Synod to the institution, counsel for the Synod stated that the Form of Acceptance was not intended to infringe the administrative discretion of the directors, inasmuch as it expressly recites that "said Synods have the right to determine the policy of the school, and that only the affairs of administration have been committed to the Board of Directors." Counsel for the Synod also stated that if this was not perfectly clear he felt there would not be any difficulty in revising the Form of Acceptance in order that the directors' administrative discretion might be clearly recognized, and in order that the charter provisions might be recognized by directors to the effect that directors are representatives of the Synods set to operate a school which is expressly forbidden by charter to do anything contrary to the Constitution and laws of the church.

As stated, the Court ruled that the Synod cannot control the exercise of discretion or judgment of the directors, and cannot limit the tenure of office or make the election contingent upon a condition. It will be observed that the Form of Acceptance provided that the tenure of office should be at the will of Synod, and that no person should be declared elected until he signed the Form of Acceptance.

As a result of the decision of the Court, the provision of the Form of Acceptance providing a tenure of office at the will of Synod is invalid; and the Form of Acceptance not being severable or separable is accordingly held to be void, because a part is void.

It is not clear whether the Court construed the Form of Acceptance to infringe administrative discretion, or to attach any contingency to an election; and since the instrument expressly recognized and respects the administrative discretion of directors, it is to be assumed that the short sentence of the Court merely announces a general principle in passing, although no such facts were before them. Likewise the phrase referring to elections on a contingency is obiter dictum, for there is nothing in the Form providing for elections subject to a contingency.

By the charter the Synod still has a right to seek out persons who will be in spirit and in truth representatives of the Synod in operating a school in harmony with the laws and Constitution of the Church. For, the Charter uses the word "representatives" and expressly provides the school must conform in its acts to the Constitution and laws of the Church.

Hence, the result of this Court opinion as to the Form of Acceptance and the relation of the Church to directors of this important institution is merely that the term of office shall be fixed by all the Synods, at present being fixed at four years, that administrative discretion be respected and that elections shall not be subject to contingencies.

Wherefore, the Committee is advised that the Form of Acceptance may be revised in conformity with the law and the Charter to make these points clear and to put the representatives of Synod in Christian Education upon the same footing as other Church officers and ministers, and your Committee is advised that the following revised form is in conformity with the deliverance of the civil court and in conformity with the established policy of the Church in selecting its officers:

**Revised Form for Ascertaining Principles of Persons Considered as Candidates for Office of Director of Southwestern From the Synod of Mississippi**

WHEREAS, by Section 3 of the amended Charter of Southwestern it is provided that the Synods shall each have the right to elect their own representatives upon the Board; and that the administration of the affairs of the institution shall be supremely and solely in the hands of the Board of Directors, but the institution through its Board of Directors shall not pass any by-law or regulation contrary to the Constitution, Rules and Regulations of the Presbyterian Church in the United States or the Synods of Tennessee, Louisiana, Mississippi, and Alabama,

And WHEREAS, the Statute of Incorporation of Southwestern (C. 98, Act of 1923) expressly recognizes the principle of affiliation and control of schools by churches and provides: "And where the institution is **affiliated** with or **controlled** by two or more conventions, or associations, then each by and represent the several Synods and who may not by regulation convention or association with which said institutin is **affiliated**, or by which it is **controlled**, shall have such **representation**, in number, as is expressed in the Charter, and **each** such convention or association shall have the right to elect its own **representatives** upon the said Board and to fill vacancies as may occur in the membership of those whom it has selected." (Blackface added)

And WHEREAS, these provisions of law establish an institution affiliated with a church and controlled through directors who are elected exclusively by and represent the Several Synods and who may not by regulation or by-law violate the rules and laws of the said Synods and to whom is given, by way of exception, exclusive administrative discretion;

And WHEREAS, the civil court has recently ruled that the Charter and the Charter Act control the government of the institution, and not antecedent agreements and not the Plan of Union; and that by the Charter and Charter Act each Synod has the exclusive right to elect its own representatives on the Board of Directors, and that so much of the Concurrent Resolution as surrendered power to the Board of Directors is void because antagonistic to the Charter and the Charter Act; and further that the provision of the Concurrent Resolution that the Synods in electing directors be guided by and act upon the recommendation of the Board of Directors contravenes the Charter power of the several Synods exclusively to elect their own directors; and that the power to elect directors is non-delegable;

Therefore, in answer to inquiries that have been made of me by persons who consider voting for me as a director, I make the following statement of my beliefs and principles in regard to the proper and legal government of Southwestern:

1. I accept and am completely in accord with the foregoing principles and rulings, which result from the Charter and the said judicial investigation and decision; and I believe that the Charter should control the government of the School, and that the Charter provision requiring the regulations of the school to be in harmony with the law of the Church is wise and most necessary, under modern conditions especially. If elected to the office I shall do all in my power to represent the best interests of the Synod of Mississippi with due fidelity to the laws and regulations of the said Synod and of the Southern Presbyterian Church and to see to it that no regulations or by-laws of the school are contrary to the Constitution and rules and regulations of the said Synod and Church.

2. Since I am considered for a position as a legal representative of the said Synod which acts by law as affiliated with and in control of the said institution under the Charter, I am glad to inform you that I do answer affirmatively those questions prescribed for officers in the Presbyterian Church U. S., found on page 78, paragraph 148, Book of Church Order.

3. I understand that administrative discretion in school affairs is exclusively in the hands of the Directors.

Signed \_\_\_\_\_  
Candidate

**Text of Court Decision**  
**The Synod of Mississippi, et al**  
**v.**  
**Southwestern, A Corporation, et al—Shelby Equity**  
**O P I N I O N**

The complainants are the Synod, the governing body of the Presbyterian Church in Mississippi, and W. H. McIntosh, J. B. Hutton, and R. W. Hardy, the Synod's appointees on the Board of Directors of Southwestern University. The defendants are Southwestern, a corporation organized under the laws of Tennessee as an educational institution, the officers and directors of the corporation, and the Synods of Tennessee, Alabama, and Louisiana.

The prayer of the bill is for a declaratory judgment that the Synod of Mississippi has a right to appoint four persons of its own choice as members of the Board of Directors, and that the action of the Board of Directors in refusing to recognize the appointment of Dr. W. H. McIntosh as a member

of the Board was illegal, and that by decree Dr. McIntosh be declared a member of the Board. Upon the answer filed as a cross bill defendants seek a declaratory judgment that the form of acceptance exacted by the Synod of Mississippi of its appointees on the Board is void.

Southwestern Presbyterian University was incorporated under chapter 142, Acts of 1875, as the result of a plan formulated by a synodical conference in 1873. By a provision of the statute which was omitted from the charter, the incorporators became the first Board of Directors. This provision of the charter was waived. The plan of union was adopted as a by-law and by arrangement the patronizing Synods were authorized to control the corporation through appointment of directors of their own choice. The plan then adopted continued even after the enactment of chapter 6, Acts of 1895, which expressly empowered the patronizing Synods to elect the Board of Directors.

In 1905 in a litigation between the corporation and the Synods involving removal of the University from Clarksville, Tennessee, to Atlanta, Georgia, this court decreed that the University was under the patronage of the Presbyterian Church in the United States, and that in this relation of patronage the Synods acted for the Church and could each elect two directors according to the plan of union originally adopted. Whether the conclusion of the court rested upon the fact that the original plan of union was a by-law of the corporation or that the corporation and all laws under which it was created was subordinate to the plan of union because of the right of the Synods as patrons to exercise the power of control is not determinable from the decree, which was entered ten years after passage of chapter 6, Acts of 1895. That Act expressly empowered the Synods to elect the directors.

Such was the uncertain legal status of the governing boards of the institution when, preliminary to the removal of the University from Clarksville to Memphis, the charter was amended under chapter 98, Acts of 1923. Upon acceptance of the charter as amended under that Act, the relation of the corporation to the Synods rested no longer upon uncertain reliance upon collateral agreements, custom, or the right of the patron to control the institution.

The charter applied for under chapter 98, Acts of 1923, and approved and accepted by the Synods and by Southwestern, superseded all contrary and antagonistic laws and customs. Under the charter as amended, power was expressly given the Synod to elect the directors and fix their number. Under the plan of union and the first charter, each Synod elected two directors. Under the amended charter, which was approved and accepted by the Synods and by the corporation, membership of the board was fixed by the Synods at three from each Synod. But in 1924, upon overture by the Board of Directors, the Synods, by separate but concurrent resolutions, increased the directors from three to four for each Synod, one of which should be a resident of Memphis, a Presbyterian, and a person recommended by the Board of Directors.

In 1931 the Synod of Mississippi repudiated that part of the concurrent resolution providing that the fourth member should be a resident of Memphis and that in his selection the Synod should be guided by and act upon the recommendation of the Board of Directors. The Synod declared that all its appointees on the board should come from within the bounds of the Synod, and appointed Dr. W. H. McIntosh, a resident of Hattiesburg, Mississippi. He accepted the appointment by subscribing to the Synod's form of acceptance, embodied in a resolution of March, 1933, headed "Provision for the Election of Directors of Southwestern," and which reads:

"1. Synod shall elect its director or directors of the Board of Directors of Southwestern by ballot, and shall define in a form of acceptance the duties of a director as agent of Synod, his election being conditioned upon his acceptance of this form.

"2. When anyone shall receive a majority of the votes cast, the Stated Clerk of the Synod shall present to him the form given herein for his im-

mediate acceptance; and if, as and when he shall sign the same he shall be declared elected to membership on the Board of Directors of Southwestern.

"3. Form of Acceptance. I accept the office of Director of Southwestern to which the Synod has elected me; and obligate myself to respect and obey the provisions of the Charter of Southwestern as these have been interpreted or in future may be interpreted by the resolution of the Synod of Mississippi; I recognize that Southwestern is owned and controlled by the several Synods; and that said Synods have the right to determine the policy of the school; and that only the affairs of administration have been committed to the Board of Directors. In accepting membership on the Board of Directors I agree that the tenure of my office shall be at the will of the Synod of Mississippi. As the charter provides that nothing shall be done contrary to the Constitution, Rules, and Regulations of the Presbyterian Church U. S. or of the Controlling Synods, I stand ready to answer affirmatively the questions prescribed for officers in the Presbyterian Church U. S. found on page 78, paragraph 148, Book of Church Order, I obligate myself to keep Southwestern in full accord with the doctrines and teachings of the church to which it belongs.

"4 The foregoing election and acceptance, officially certified by the Moderator and by the Clerk of Synod, shall constitute an election to membership on the Board of Directors of Southwestern without any action from the Board of Directors of Southwestern or any other body."

The Board of Directors refused to receive Dr. McIntosh as a member because he had not been recommended for appointment by the board and was not a resident of Memphis. The legality of the McIntosh appointment and the proceedings of the Synod of Mississippi repudiating the resolution increasing the number of directors of each Synod from three to four raised the questions upon which the parties by their pleadings sought a declaratory judgment.

The chancellor decreed under the prayer of the bill (1) that the concurrent resolutions of the Synods of 1924 amplifying the plan of union was binding upon all the Synods until modified or abrogated by their mutual consent. (2) That the by-laws of Southwestern embodying the substance of the concurrent resolutions of 1924 were valid and binding upon all members of the corporation until amended or repealed in the manner provided by organic law of the corporation. (3) That Dr. W. H. McIntosh being a resident of Hattiesburg, Mississippi, and not a person recommended by the Board of Directors of Southwestern for election as the fourth director of Southwestern from the Synod of Mississippi is not qualified to hold the office and as such could not participate in proceedings of the Board of Directors. (4) Upon the cross bill the chancellor decreed that the form of acceptance above quoted was contrary to public policy and void.

Complainants appealed and insist that the decree of the chancellor is erroneous and contrary to powers conferred by the statute and by the charter upon each of the patronizing Synods.

As before stated, all antagonistic provisions of the original charter, the plan of union, and by-laws were superseded by the charter as amended under chapter 98, Acts of 1923, and so the rights of the litigants must be determined by reference to the charter as amended and by subsequent acts of those exercising power under the charter.

In addition to conferring upon the Synods the power to fix the number of directors, prescribe the terms of their office, elect their successors and fill vacancies, chapter 98, Acts of 1923, which is read into the charter, expressly, and apparently with emphasis, declares that the Synods shall have equal representation numerically upon the Board of Directors and shall each have the right to elect its own representatives on the board. The Synods are separate entities. Therefore it must be implied that the power given them by statute to fix the number of directors means that they shall do this by joint or concurrent unanimous action, subject to change only by similar concurrence. By concurrent resolutions the Synods increase the number of directors from three

to four from each Synod and provided in the resolution that one of the four directors should be a resident of Memphis and a nominee of the Board of Directors.

There is no limitation in the charter upon the power of the Synods, by concurrent and unanimous action to prescribe the qualification of directors, by reference to residence or church affiliation.

The Synod of Mississippi, after joining in the concurrent resolution to add the additional director and prescribe his qualifications by reference to residence and church affiliation, could not assert the right to appoint this additional member and at the same time repudiate or reject so much of the resolution as prescribed the qualification of such member. We therefore concur in so much of the chancellor's decree as declared Dr. W. H. McIntosh ineligible to membership on the Board of Directors because he was not a resident of Memphis. But we do not concur in the declaration contained in the decree that Dr. McIntosh was ineligible because not a nominee of the Board of Directors.

When the charter and the statute under which it was granted are considered together, and in connection with the objects designed by enactment of the charter act, it is plainly apparent that the Synods are given exclusive power to appoint the directors who, after appointment, become directors of the corporation clothed with exclusive power over all matter of administration for the term fixed by concurrent action of the Synods.

The provision in the concurrent resolution, increasing the directors from three to four by each Synod, that in making the appointment the Synod shall be guided by and act upon the recommendation of the Board of Directors of Southwestern contravenes the provision of the statute which provides that the Synods shall have equal representation numerically upon the Board of Directors, and shall each have the right to elect its own representative upon the board. The power thus conferred upon each Synod could not be legally assumed by the Board of Directors nor could it be delegated by the Synods, and the illegal delegation or surrender of the power by the Synods jointly cannot be enforced against the will of the Synod of Mississippi. But the Synod of Mississippi can only appoint directors. It cannot control their tenure of office of their exercise of discretion.

We concur in so much of the chancellor's decree as declares that the Synod of Mississippi cannot legally control, by resort to the form of acceptance heretofore quoted, the exercise of discretion or judgment of its appointees on the Board of Directors and cannot by such method limit the tenure of a director or make his election dependent upon a contingency. A declaratory judgment will be accordingly entered.

The costs will be taxed equally against the complainants and the defendants.

**The Decree of the Court is as follows:—**

This cause was heard upon the transcript of the record from the Chancery Court of Shelby County and upon the assignments of error, briefs and arguments of counsel, to determine questions presented by the pleadings. By its bill, the complainant sought a declaratory decree that the Synod of Mississippi has a right to appoint four persons of its own choice as members of the Board of Directors of Southwestern, and that the action of the board of directors in refusing to recognize the appointment of Dr. W. H. McIntosh as a member of the board was illegal. By the cross bill the defendants ask for a decree declaring void the form of acceptance to appointment on the board of directors exacted by the Synod of Mississippi of its appointees on the board:

And thereupon the Court decreed:

(1) That so much of concurrent Resolution Number II, passed by the synods in 1924, as increased the directors from three to four to be elected

from each synod, and so much of said resolution as prescribed their qualifications by reference to residence and church affiliation, is valid; but so much of said resolution as surrendered the power to the board of directors of Southwestern to nominate the additional member provided for therein is void because unauthorized by and contrary to the charter and the charter act, Chapter 98, Acts of 1923, which must be read into the charter and which expressly declares that the synods shall have equal representation numerically upon the board of directors and shall each have the right to elect their own representatives on the board.

(2) The synods are clothed with exclusive power to appoint members of the board of directors for reasons stated in the opinion of the Court, but the synods cannot, by resort to the form of acceptance copied into the opinion, control the exercise of discretion or judgment of members of the board after their election by resort to resolution providing for termination of their tenure of office, or make the election of directors dependent upon a contingency, as attempted by the resolution of the Synod of Mississippi passed in March, 1933, which is copied into the opinion, and said resolution is void.

(3) Dr. W. H. McIntosh is not entitled to a seat upon the board as a fourth member from the Mississippi Synod because not a resident of the City of Memphis, residence there being a qualification prescribed by the concurrent resolution of the Synods which provide for the election of the fourth member of the board of directors from each synod.

It is adjudged that the costs be taxed equally against appellants and appellees, for which execution may issue.

The majority of the Southwestern Board has given notice that they will ask the Supreme Court of Tennessee to give them a rehearing of this case as they are apparently dissatisfied with the decision.

SIGNED—Warren Potts, G. M. Smiley, W. H. McIntosh, J. B. Hutton, Ad-Interim Committee to conduct Southwestern Litigation.

“Filed Feb. 18th, 1939  
David S. Lansden, Clerk.  
“THE SYNOD OF MISSISSIPPI, ET AL  
VS.  
SHELBY EQUITY  
“SOUTHWESTERN, A CORPORATION, ET AL

**RESPONSE TO PETITION FOR REHEARING**

“This cause is here upon petition for rehearing by the defendant. It is complained that the court erred in holding the concurrent resolutions of the Synods delegating power to the Board of Directors to nominate directors antagonistic to the charter. The conclusion of the court rested upon provisions of the charter and the act under which Southwestern was incorporated. It was declared that so much of the resolution of the Synods as surrendered power to the Board of Directors was void because antagonistic to the charter and the charter act, Chapter 98, Acts of 1923. The act expressly declares that the Synods shall have equal representation numerically upon the Board of Directors, and shall have the right to elect their own representatives on the Board.

“For reasons stated in the opinion filed for publication, antecedent agreements and the Plan of Union under which Southwestern Presbyterian University operated before the act of incorporation are not controlling. The charter and the Act of 1923 are the controlling law of the corporation and provide that each Synod shall have the right to elect its own representatives on the Board of Directors. In the opinion filed, the Court observed the clear meaning of

the provisions of the act. Without more, it is a sufficient response to the petition for rehearing to say that the petition (presents) no new question, and that the Court is content with the conclusions reached upon the questions presented and disposed of upon the hearing.

Cook, J."

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WARREN POTTS  
G. M. SMILEY  
W. H. McINTOSH  
J. B. HUTTON