

# Motions Hearing

November 19, 2018

The Protestant Episcopal Church in the Diocese of South Carolina,  
et. al. v. The Episcopal Church, et. al.

Case No. 2013-CP-18-00013

Case No. 2017-CP-18-1909

# Motions

CASE	Date Filed	Filed By	Description
2013-CP-18-00013	3/22/2018	Plaintiffs	Jurisdiction and Other Relief
2013-CP-18-00013	5/8/2018 (5/16/2018)	Defendants	Petition for Execution
2013-CP-18-00013	7/10/2018	Defendants	Petition for Accounting
2017-CP-18-1909	12/15/2017	Defendants	Dismiss Complaint
2017-CP-18-1909	12/27/2018	Plaintiffs	Complex Case Designation

“We have given little to no coherent guidance in this case.”

“[T]he Court’s collective opinions give rise to great uncertainty” in “this matter of great importance.”

“...I have no doubt the Court will see more litigation involving these issues....”

**–Justice Kittredge and Acting Justice Toal  
November 17, 2017**

Opinions below are “fractured not only in rationale but even on facts”.

Opinions below are based on “an incomplete record” which “contains significant ambiguities”.

**–Defendants’ Response in Opposition to Petition for Writ of Certiorari, United States Supreme Court at 2, 23, May 7, 2018.**

“The mandate of the Supreme Court is clear and unambiguous.”

**–Defendants’ Brief in Opposition to Plaintiffs’ Motion for Clarification and Further Relief at 5, October 5 2018.**

# Collective Opinions

- First time in history there are 5 separate opinions.
- There is no mandate telling this court what to do.
  - Half the Court agrees: “little to no coherent guidance”; “great uncertainty.”

# Collective Opinions

- There was no merits review of the issues raised in the Petition for Rehearing.
  - Half the Court agrees: “merits review” was “blocked” by 2-2 refusal to hear the merits.
  - “Nothing is settled” by an equally divided court. *Ohio ex. rel. Eaton, 364 U.S. 263, 264 (1960)*.
- Not an enforceable judgment because too uncertain.
  - Intent to be determined from all parts of an opinion, not an isolated part. *City of North Myrtle Beach, 725 S.E. 2d 676, 679. (2012)*.

# Scope of this Court's Jurisdiction

- Have jurisdiction to decide anything that is not inconsistent with what was actually decided.
  - “Remittal” vs “remand”: a distinction without a difference. *Martin v. Paradise Cove Marina*
  - “cannot reconsider questions...laid at rest” but that “does not tell us what issues were laid at rest.” *FCC v. Pottsville, 309 US 134, 140-41(1940)*. “A lower court is free as to other issues.” *Id.*
  - Defendants’ arguments that cannot “unravel” or “appeal” what has been decided begs the question.
  - What was “laid at rest”?
- Even if “laid at rest”, one cannot be deprived of property, “whether acting through its judiciary or through its legislature...unless there is, or was, afforded to him some real opportunity to protect it.” *Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)*.

# Issues that were joined

- Who had the right to control the Diocese/Parishes under *All Saints*?
- Is Parish property subject to a trust under *All Saints*?
- Have the Diocese's marks been infringed upon and should there be a permanent injunction?

# Issues that were **not** joined

- TEC made no counterclaims against the Plaintiffs on any theory **including declaratory judgment concerning its alleged trust interest in Parish property.**
  - TEC cannot seek to enforce a judgment it could not have been given since it did not plead it.
- TEC/TECSC did not make Federal trademark counterclaims (infringement, dilution), UTPA and unfair competition re TEC trademarks against any plaintiff.
  - brought against individuals not made parties.

# Issues that were tried

- Corporate control of the Diocese and the Parish Churches under *All Saints*.
- The existence of an express or constructive trust over parish church property under *All Saints*.
- Whether TEC or the Diocese is the statutory beneficiary of the Trustees assets.
- The infringement of the names, marks of the Diocese and parishes by TEC/TECSC under 2 statutes: §39-15-1105 *et. seq.* (service mark infringement) and §16-17-310, 320 (improper use of names)
  - TECSC defense of invalidity: whether Diocese/Parish marks were derived from TEC.
  - The right to permanent injunctive relief against improper use/ infringement of Diocese/Parish names and marks.

# Issues that were decided

- Diocese and parishes followed proper corporate procedures under neutral principles of state law (*All Saints*) to sever any relationship with TEC.
  - Statutory beneficiary of Trustees statute is Diocese not TEC.
- Parish agreement to TEC constitution and canons that included the Dennis Canon did not create an express or constructive trust.
- Diocese and certain parishes own their marks; the marks were not derived from TEC marks; defendants intentionally used the marks after the Diocese withdrew.
- Diocese and certain parishes entitled to permanent injunction under state registration statutes and improper use of names statutes preventing TEC and TECSC from using the names and marks.

# Issues that were **not** tried

- Who is the “true” diocese.
- If a trust existed, its revocability.
- The “minimal burden” issue: Whether a trust could constitutionally be created for a religious organization with less burdensome requirements than a similar trust for a secular organization.
- Any issue involving TEC’s federal marks except whether Plaintiffs’ marks derived from TEC’s.

# Issues that Defendants appealed

- Deference to TEC is correct standard to resolve the property disputes.
- “Promises of allegiance” by parishes to TEC rules created trusts, which were irrevocable.[Revocability not decided by trial court.]
- Plaintiffs’ state registered marks created confusion with TEC federal marks. [Issue was not joined or tried.]
- Trustees’ statute references TEC not Diocese as beneficiary.
- Amendments of articles of incorporation were ultra vires.

	Pleicones	Hearn	Kittredge	Toal	Beatty
Standard of Review for Facts	de novo	de novo	defer to trial court	defer to trial court	
Legal Rationale	Deference to TEC	Deference to TEC	Neutral principles	Neutral principles	Neutral principles
Parish property	TEC gets	TEC gets	Parishes keep	Parishes keep	<b>disputed</b>
Trustees' beneficiary	TEC	TEC	Diocese	Diocese	<b>disputed</b>
Service Marks	Reverse	Reverse	Affirm	Affirm	"I express no opinion"

- Bound by the trial court's factual findings (2-2)
- *All Saints* (neutral principles) and its application to the facts is the law of the case. (3-2)
- Service marks (§39-15-1105) of Diocese and parishes were infringed upon by TEC/TECSC and a permanent injunction continues. (2-2)
- Improper Use of Names (§ 16-17-310) permanent injunction in place because not appealed.
  - An unappealed ground becomes the law of the case. *Anderson v. Short*, 476 S.E. 2d 475, 477 (1996).

# Law of the Case

- The (1) actual decision by an appellate court (2) of a legal issue (3) is binding in subsequent stages of the case (4) unless there is substantially different evidence or the ruling is clearly erroneous and would work a manifest injustice.
- Does not apply to issues of fact: “a **decision on an issue of law**” is “to be followed in subsequent stages of the same litigation.” *Flexon v. PHC-Jasper, Inc*, 776 S.E. 2d 397 (Ct. App. 2015).

# Dicta

- Law of the case does not apply to dicta. *White v. Colony, Inc.*, 609 S.E. 2d 811 (Ct. App. 2005).
  - Footnotes of Toal, Hearn and Beatty contain dicta.
- Appellate court statements about an unpreserved issue are dicta. ***Berberich v. Jack, 709 S.E. 2d 607, 613 (SC 2011).***
  - minimal burden
  - revocability (not decided)
- Judicial conclusions drawn from facts not in the record are dicta.
  - Parish accession “facts” were not in the record.

# C.J. Beatty Opinion

- “I disagree with the analysis and much of the result” of Pleicones and Hearn opinions. 806 S.E. 2d at 102.
- *All Saints* and *Jones v. Wolf* control this dispute. *Id.*
  - *All Saints* continues to be the controlling law. ***Jenkins v. Refuge Temple of God in Christ, Inc.*, 424 S.C. 320, 328, 818 S.E. 2d 13, 17 (Ct. App. 2018).**
- Dennis Canon does not create a “legally cognizable” trust under SC law.
  - “It does not **unequivocally** convey an intention to transfer ownership of property to the national church or to create an express or constructive trust.” *Id.* at 103. (emphasis added).

# C.J. Beatty Opinion

- Each parish must individually agree in a signed writing to the Dennis Canon evidencing an unequivocal intent to create a trust.
  - “those **parishes that did not expressly agree** to the Dennis Canon should **retain ownership** of disputed real and personal property” Id. at 102.
  - “TEC argues that the parishes accession to the Dennis Canon created the trust. **Assuming that each parish acceded in writing**, I would agree.” Id. at 103.
  - **“the Dennis Canon had no effect until acceded to in writing by the individual parishes.”** Id.
  - “the parishes that did not accede to the Dennis Canon cannot be divested of their property.” Id.
- So far, standard SC neutral principles of trust law strictly applied.

# Defendants' appellate argument on accession

- Express trust is created by agreement to TEC rules.
- “written promises to obey National Church rules”
- “voluntary accession to the National Church’s rules
- “express promises in their governing documents to comply with the National Church’s rules”

# C.J. Beatty Opinion

- Parish agreement to the rules of TEC (constitution and canons) or any other document that is not the Dennis Canon does not create an express trust.
  - ***All Saints*** controls and **similar agreement there did not create a trust**: All Saints Parish promised to conduct its affairs “according to the canons and rules of [TEC]”. 685 S.E. 2d at 169, n. 5.
  - “Promises to obey rules”, “accession to rules”, “promises of allegiance” appear prominently in both the argument of Defendants and in Pleicones and Hearn opinions.
- Consistent theme: express written agreement to the Dennis Canon.

# Defendants, Pleicones and Hearn: “Promises of allegiance” create a trust

- Appellants’ Brief, p. 34:
- The trial court's holding tells the National Church that the **promises of allegiance** that it required of its subordinate parts as well as of its ordained persons **have no effect**, and that local churches and their leaders are **free to disregard the Canons of the National Church** at will.
- Pleicones, A.J.:
- *All Saints Parish* agreed to be bound by the Dennis Canon through its “**promises of allegiance**”. 806 S.E. 2d at 88. (emphasis added)
- Hearn, J.:
- “**documentation reaffirming [Parish] allegiance** to the National Church” created an express trust. Id at 99. (emphasis added).

Beatty: “Promises of allegiance”  
do not create a trust.

- “...I would find that **parishes that did not expressly accede to the Dennis Canon** cannot be divested of their property. ...**these parishes merely promised allegiance....** Without more, this promise cannot deprive them of their ownership rights in their property.”

# C.J. Beatty Opinion

- “remaining parishes...express accession to the Dennis Canon was sufficient....”
- No accession facts before the Court. If intent is that accession made based on case facts, then is dicta. If dicta, no holding.
- If assumed to mean agreement to rules (despite previous statements) is enough, would be “laughable” under SC trust law unless a minimal burden but that was not preserved for review and statement would be dicta. Again, no holding.

# C.J. Beatty Opinion

- This sentence is ambiguous because it is completely at odds with the record and the rest of the opinion.
  - Must discern intent from all parts of opinion, not an isolated part.
  - Unambiguous requirement that must **directly** agree to the Dennis Canon, not simply to rules as in *All Saints*.
    - No trust on St. Matthias property, even though agreed to be subject to the Canons of the Diocese, because did not “directly” accede “to the local or national version of the Dennis Canon”. See n. 49.

# C.J. Beatty Opinion

- The facts were not before the court, only the argument of defendants' counsel.
  - Pleicones and Hearn: "Dearth of evidence" on the issue of accession.
- No parish is named nor does Beatty consider "accession" facts as to each parish.
  - "**Assuming** that each parish acceded in writing, I would agree."

# 5 Page Summary of Counsel

- Statements of counsel are not record facts.
  - Can provide the factual basis for **those who did not agree** because by omitting them from the summary of “express trust” parishes it is an admission by defendants.
  - Cannot provide evidence of accession because not record facts.
- Even if the summary were record facts, it does not support the facts Beatty requires as these examples will show.
  - written, signed agreement by each parish to the Dennis Canon.

# St. Philips Church

- 1680 founded.
- 1785 incorporated by legislature with vested rights in its property.
- Summary: 1987 Articles of Restatement: corporate purpose to operate “in accord with the Articles of Religion” of TEC.
  - Religious doctrine only. No canons or rules. No Dennis Canon.

# St. Michaels Church

- 1761 founded.
- 1785 incorporated by the legislature with vested property rights.
- Summary: 1989 Bylaws “acknowledges the authority” of the Diocese and TEC.
- No mention or or reference to the TEC Canons or to Dennis Canon.

# Good Shepherd

- Summary: 2001 articles, “organized pursuant to the Canons” of the Diocese.
- No mention of the Dennis Canon
  - With St. Matthias, organization pursuant to the Canons of the Diocese did not create an express trust because St. Matthias did not “directly” agree “to the local or national version of the Dennis Canon.” 806 S.E. 2d at 111, n. 49.

# Old St. Andrews

- 1706 founded
- 1785 incorporated by the legislature with vested property rights.
- Like the 7 parishes found not to have agreed to the Dennis Canon, OSA was omitted from counsel's summary.
- A.J. Toal mistakenly called it "the Parish of St. Andrew, Mt. Pleasant" when listed those parishes in n. 49.
- Summary does not list OSA with other "express trust" parishes, but defendants contend it was inaccurate as to OSA.

# Diocese Property

- Ownership by Diocese of its property was uncontested; control of Diocese was contested.
  - Defendants admitted Diocese owned its names and marks. Fin. Or. at 39.
  - Permanent injunction protects these names and marks against use by TEC/TECSC.
- Trial court decided the statutory beneficiary was the Diocese, not TEC.
- Trustees only hold title to what is given to them.
  - No record of any Diocese property being transferred to Trustees.
- Diocese owned property is not an issue.

# Diocese as Beneficiary

- Beatty's footnote discussed CSC's intended beneficiary based on deed language and then says Diocese cannot be the successor.
  - Issue of CSC intended beneficiary based on the deed was not an issue and was not appealed.
  - No other legal basis stated. Does not mention the statutory beneficiary issue that was before the trial court.
- Beatty's statement is dicta if broader than CSC because it is contrary to *All Saints* and if just CSC that issue was not decided at trial which also makes it dicta.
- *All Saints* clearly holds that the Diocese property issue is about corporate control. All Justices agree the Diocese withdrew with its corporate control intact. There is no Dennis Canon for Diocese or Trustees property. Whoever controls the Diocese controls its property, and is the beneficiary of the Trustees.

# Summary

- The law of the case is that a signed written agreement by each parish to the Dennis Canon which expresses the unequivocal intent to create a trust does so.
  - The accession facts were not before the Court. Statements construing them are dicta.
  - This Court can determine on the existing record whether each parish agreed to the Dennis Canon in a signed written agreement.
- C.J. Beatty considered the issue of the beneficiary of the CSC deed but that issue was not tried. No other legal rationale was stated, *All Saints* controls. Right to control the Diocese determines the Trustees beneficiary.
- An injunction is in place that prohibits the use of names and marks by anyone other than the Diocese.